

IRLANDA

SOBRE LA NATURALEZA JURÍDICA DE LA RELACIÓN QUE VINCULA A UN CAPELLÁN/ PROFESOR DE RELIGIÓN CON EL CENTRO DOCENTE EN QUE PRESTA SERVICIOS¹: Caso Conroy —v— Board of Management of Gorey Community School²

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La cuestión objeto de controversia en esta resolución judicial gira en torno a la vinculación que existe entre el capellán de un colegio católico que, tras ser objeto de un expediente disciplinario, es destituido en el desempeño de sus funciones y readmitido en el centro como profesor de religión, circunstancia que representa una modificación sustancial en

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² Sentencia de La Corte Suprema de Irlanda del Norte de 23 de enero de 2015, Número de Citación [2015] IEHC 103. URL: <http://www.bailii.org/ie/cases/IEHC/2015/H103.html>.

la situación jurídica del profesor y que da lugar a la interposición de un recurso de revisión de la inicial decisión judicial.

1. RÉGIMEN ESTATUTARIO DE LOS COLEGIOS RELIGIOSOS EN IRLANDA

El demandante, sacerdote ordenado en la Iglesia Católica Romana, fue propuesto por el Obispo de Ferns para realizar funciones de capellán en el Gorey Community School. Las funciones que ha desempeñado en tal concepto han ido evolucionando con el tiempo, de manera que, aunque el demandante se involucró en tareas de pastoral y de enseñanza en la escuela, contractualmente se trataba de un auténtico capellán. El régimen jurídico vigente en Irlanda en esta materia, no exige que la persona que desempeñe las funciones de capellán tenga que ser necesariamente un sacerdote ordenado.

La reclamación se plantea contra el Consejo de Dirección del centro docente privado concertado que, como ocurre en la mayoría de los casos en Irlanda, adopta la forma de fideicomiso constituido entre el Ministerio de Educación y las personas que actúan en nombre de la Junta del centro. En el marco de este modelo de concierto, el objetivo último declarado por este centro católico es proporcionar un sistema integral de educación post-primaria, abierta a todos los niños de la comunidad, de manera que, en la escritura del fideicomiso se recoge la organización de este tipo de educación que obliga a la Dirección del centro a llevar a cabo y a ejecutar las obligaciones previamente convenidas, conforme a una programación cuya observancia es vigilada a través de unos instrumentos de control internos.

El Consejo de Dirección se encarga de la gestión y dirección del centro, funciones que comparte con la Junta de centro, órgano que asume la competencia de seleccionar y nombrar al personal docente. La Junta también puede contratar a profesores a tiempo parcial y a personal no docente. El contrato suscrito con el personal docente se ajusta a un formulario aprobado por el Ministerio, pero corresponde a los Estatutos del centro especificar la instrucción religiosa que se va a impartir en él, pudiendo destinar a un profesor a tiempo parcial a cumplir este cometido, sin perjuicio de que también un capellán pueda ser nombrado a propuesta de la autoridad religiosa competente.

2. CIRCUNSTANCIAS CONCURRENTES EN EL CASO

I.– En virtud de un auto dictado en enero de 2014, se admite a trámite el recurso presentado por el demandante contra la decisión tomada por la Junta del centro en octubre de 2013, en cuya virtud se acuerda retirar al solicitante de su cargo de capellán, así como prohibir que tenga contacto con los estudiantes de la escuela fuera del horario escolar, sin el consentimiento del director del centro. Por el presente recurso, el demandante solicita la revisión de esta decisión y la restitución en su condición de capellán de la escuela.

II.– La adopción de esta decisión por parte de la Junta del centro obedece a la demanda presentada por una ex-alumna que, en el año 2013, a través de sus padres, denunció haber mantenido relaciones íntimas con el demandado en los años 2006 y 2007. Debido a la gravedad de los hechos que se le imputan, el centro abre una investigación que determina la imposición de una sanción disciplinaria al ahora demandante, considerando que “ciertos aspectos de su conducta fueron inapropiados”. El informe elaborado por un psicólogo cualificado recomienda que el demandante no desempeñe funciones de asesoramiento o de atención pastoral a los alumnos en la escuela.

III.– Tras la conclusión del proceso de evaluación de riesgos, el demandante solicitó ser readmitido en el centro. Sin embargo, al haber sido cesado en sus funciones de capellán, esta readmisión sólo podía tener lugar en condición de profesor de religión, lo cual exigía un registro previo en el Consejo de Enseñanza. A raíz de esta inscripción, la Junta del centro le comunica su readmisión como profesor de educación religiosa, si bien, sujeto a las condiciones y recomendaciones contenidas en el informe de evaluación emitido por el psicólogo.

IV.– El demandante recurre la decisión de la Junta de centro por la que se acuerda el cese de sus funciones como capellán y su readmisión como profesor de religión, teniendo en cuenta, además, que las condiciones que se le imponen son consideradas por éste como arbitrarias, irrazonables y desproporcionadas. Lo que se ventila en este proceso, con carácter previo, es si la decisión de esta Junta del centro es susceptible de revisión jurisdiccional.

3.POSIBLE REVISIÓN JUDICIAL DE LA DECISIÓN DE LA JUNTA DE CENTRO

I.– La relación jurídica que vincula al centro docente con su personal es compleja debido al hecho de que históricamente algunas de estos centros han estado gestionados por congregaciones religiosas, junto al protagonismo que asumen determinadas Iglesias, particularmente la Iglesia de Irlanda y de Iglesia Católica Romana en el nombramiento de algunos miembros del personal que prestan servicios para estos centros. Complejidad que se agrava en el caso de las personas que desempeñan las funciones de capellanes, teniendo en cuenta que su nombramiento para desempeñar este puesto ha sido realizado por el Obispo competente y, en consecuencia, se rige por el derecho canónico, pues las actividades que éste realiza tienen un carácter estrictamente pastoral.

II.– Hay dos factores que influyen en la naturaleza contractual de la relación que vincula al capellán con el centro. En primer lugar, en virtud de la escritura de fideicomiso, el capellán ha sido designado como personal del centro, a pesar de que la propuesta inicial de su nombramiento ha sido efectuada por las autoridades religiosas. Es decir, el capellán ha sido nombrado por la Junta Directiva y se le emplea en el centro como personal trabajador a tiempo completo, por lo que se puede decir que es contratado por la escuela. En segundo término hay que estar a lo dispuesto en la Ley de Educación de 1998, cuyo art. 24 reconoce a la Junta de centro la potestad para designar tanto al personal docente del centro como a “otro personal”. En ambos casos, se trata de personas que deben ser retribuidas con fondos públicos del Estado, que pueden ser suspendidas de sus funciones o cesadas en sus puestos, sólo de acuerdo con lo dispuesto en el art. 24, nº 3, es decir, de conformidad con los procedimientos convenidos entre el Ministerio de Educación, el titular del centro y los representantes sindicales del personal docente y no docente que preste servicios en el centro.

III.– Desde este punto de vista, el capellán que presta servicios en un centro docente debe ser considerado como miembro del personal de la escuela y su despido o destitución deben ajustarse al procedimiento establecido por el Ministerio. En este mismo sentido se han pronunciado, entre otras, la Sentencia *O’Malley J. in Kelly v. Board of Management of St. Joseph’s National School [2013] IEHC 392*. T. Ese caso se refería al Director de una escuela al que se le aplican determinadas disposiciones obliga-

torias relativas a la destitución o al régimen disciplinario de un Director, ajustándose a los procedimientos legalmente establecidos, por entender que la decisión de despedir, degradar o nombrar a un Director son decisiones que manifiestamente tienen un componente de carácter público. En otras palabras, todos los trámites procedimentales que deben observarse derivan de la ley y no del contrato.

4. INCIDENCIA DE LA PARTICIPACIÓN DEL MINISTERIO EDUCACIÓN EN LA CELEBRACIÓN DEL CONCIERTO EDUCATIVO CON EL CENTRO PRIVADO

I.– El Ministerio de Educación suscribe un concierto con la escuela con el objeto de proporcionar un sistema integral de educación post-primaria abierta a todos los niños de la comunidad, que combina la instrucción y los aspectos académicos y prácticos junto a la educación de las personas que integran la comunidad escolar y en general, con el propósito de contribuir al desarrollo espiritual, moral, así como al bienestar físico y mental de las mismas.

II.– En consecuencia, la intervención del Ministerio en la organización del centro se extiende a los siguientes aspectos:

- a) Aprobar anualmente los presupuestos del centro
- b) Destinar un fondo anual para el mantenimiento del centro
- c) Retribuir al profesorado
- d) Asumir la responsabilidad en relación con la construcción de los edificios y el normal funcionamiento de las instalaciones escolares
- e) Abastecer al centro de equipamiento, muebles y libros
- f) En materia de profesorado, el número y la clasificación del personal docente está sujeto a la aprobación previa del Ministerio y, lo más importante, la estipulación de los requisitos para el nombramiento del personal es competencia suya. Decide, en última instancia, si el candidato reúne los requisitos para acceder al puesto de trabajo. Además, el Ministerio juega un papel decisivo a través del servicio de Inspección educativa, en el nombramiento de los profesores para la provisión de una plaza vacante.

- g) La organización y la planificación de los estudios también implican al Ministerio, sin perjuicio del poder de dirección que tiene el Consejo escolar, siempre subordinado a las disposiciones normativas dictadas por el Ministerio en aras a garantizar la enseñanza en general, así como el carácter de la escuela.

III.– Precisamente, la cláusula 10.4 del concierto celebrado con este centro docente establece que “el reconocimiento a tiempo completo o de carácter temporal a media jornada de los profesores de religión se concederá a los sacerdotes o a cualquier otra persona cualificada”. De manera que la Junta del centro está facultada para designar a los profesores de religión con la aprobación formal del Ministerio a partir de la propuesta de nombramiento de la autoridad religiosa respectiva. No obstante, la Junta es competente para dar por terminado este nombramiento, siempre y cuando esté debidamente justificado el cese, de acuerdo con la autoridad religiosa y el Ministerio de Educación, que desempeña un papel protector de los intereses públicos.

5. INCOMPETENCIA DEL MINISTERIO EN RELACIÓN CON LAS FUNCIONES DEL CAPELLÁN

I.– El nombramiento de un capellán es diferente. Es el Consejo del centro el que designa al capellán nombrado por la autoridad religiosa competente. Se trata de un miembro de la comunidad escolar empleado a tiempo completo que recibe una retribución equivalente a la del resto de profesorado, pero realmente no estamos en presencia de un profesor vinculado del centro. No existe ninguna disposición específica que atribuya al Ministerio función alguna en relación al nombramiento de un capellán. Tampoco juega ningún papel respecto a su selección o destitución. Ejerce sus funciones a tiempo completo como un miembro más del centro, pero sin aprobación o supervisión alguna del Ministerio, aunque sea éste quien le retribuye como al resto del personal docente.

II.– La propuesta del capellán es realizada por la autoridad religiosa competente y el nombramiento es efectuado por el centro. El papel del capellán en la escuela, a diferencia del profesor de religión, es muy residual. No interviene en el plan de estudios ni forma parte de la Junta de centro. Desempeña meramente funciones religiosas, así como de atención espiritual, pero en ningún caso se identifican con la función edu-

cativa de la institución. No se puede considerar que intervenga ningún elemento de derecho público en el nombramiento o en la destitución del capellán. El hecho de que el Estado le retribuya, no es por sí mismo elemento suficiente para considerarlo integrado dentro del sistema público, dependiente del Ministerio de Educación.

III.– Reiterada jurisprudencia en este sentido aprecia que la vinculación del capellán con la escuela es privada, de carácter contractual, y no deriva de la ley (Vid., Sentencia Peart J in *Becker v The Board of Management St. Dominick's Secondary School Cabra [2005] 4 JIC 140*). Por eso se desestima la pretensión del demandante de interponer recurso de revisión judicial de su despido, debido a que la rescisión de la relación que le vincula al centro donde prestaba servicios como capellán deriva de un contrato de carácter privado entre las partes.

6. PROPUESTA DE READMISIÓN COMO PROFESOR DE RELIGIÓN DEL CAPELLÁN DESPEDIDO

I.– El centro propone al religioso volver a prestar allí sus servicios, pero en este caso como profesor de educación religiosa en lugar de capellán. Éste solicita la revocación de las condiciones que le impone el centro para integrarse en él, por considerar que se extralimitan de las atribuciones que tiene el Consejo. De manera que, como consecuencia de una sanción disciplinaria, se le propone al religioso reingresar en el centro como profesor de religión *ex novo*, para la cual sería imprescindible ajustarse a los procedimientos de contratación previstos en la legislación educativa y en los Estatutos del centro.

II.– En definitiva, mientras que la naturaleza de la relación estrictamente contractual que vincula al capellán con el centro docente donde presta sus servicios no es susceptible de control jurisdiccional por las razones expuestas, sí que lo es, en cambio, la decisión de readmitir al demandante como profesor de religión en la escuela, pues intervienen en este caso elementos de derecho público en la vinculación jurídica entre el centro y el profesorado de religión que hace posible la revisión de la decisión impugnada.

ANEXO

THE HIGH COURT JUDICIAL REVIEW BETWEEN TOMMY CONROY APPLICANT AND BOARD OF MANAGEMENT OF GOREY COMMUNITY SCHOOL

Title:	Conroy -v- Board of Management of Gorey Community School
Neutral Citation:	[2015] IEHC 103
High Court Record Number:	2014 40 JR
Date of Delivery:	23/01/2015
Court:	High Court

JUDGMENT of Ms. Justice Baker delivered on the 23rd day of January, 2015

1. The applicant is a priest ordained in the Roman Catholic Church and some 21 years ago he was nominated by the then Bishop of Ferns to act as chaplain to Gorey Community School. His role evolved over time and although it did involve the applicant in both pastoral and teaching duties in the school, he was contractually a chaplain *simpliciter*. A chaplain in a Roman Catholic school is not required to be an ordained priest, or to have any other ministry of religion.

2. The respondents are the Board of Management of the school established, as are most community schools, under the model deed of trust for community schools made between the Minister for Education and identified persons who act as the Board and others who are trustees of the school. The school buildings themselves are held by the trustees under lease from the Minister, and the State pays some or all of the building costs of the school buildings themselves.

3. Under the model trust the trustees hold the property on trust for the purposes of the school with the declared object of providing a comprehensive system of post primary education open to all children of the community. The model trust deed incorporates a scheme for such education and the trustees covenant to perform and execute the obligations contained in the scheme set out in the two schedules to the deed, the first such schedule being the Instrument of Management and the second schedule being the Articles of Management.

4. Under the Instrument of Management there is established a Board of Management which is responsible for the governance and direction of the school subject to the provisions of the two schedules. The members of the

Board are those nominated by the patron, usually a religious body, two parents of children who are pupils in the school, two members who are serving teachers in the school, and the Board in total comprises 10 members as well as the principal of the school.

5. Under the Articles of Management the Board has a power to select and appoint teaching staff, the number of such staff to be subject to the prior approval of the Minister. The Board may also employ part-time teachers and non teaching staff. The contract of employment with teaching staff is to be in the official form supplied by the Minister. The Articles specifically provide for religious instruction to be given at the school and for the attendance of pupils thereat. A whole time or part-time teacher of religion may be appointed for that purpose. A chaplain may be appointed on the nomination of the relevant religious authority.

6. By order made on the 20th January, 2014 the applicant was granted leave to seek by way of judicial review an order of *certiorari* quashing a decision made by the Board on the 22nd October, 2013 insofar as the decision purports to:-

- 1) Remove the applicant from his position as chaplain of the school.
- 2) Assert that the applicant is not chaplain of the school.
- 3) Forbid the applicant from having contact with students of the school outside school hours without the consent of the school's principal.
- 4) Forbid the applicant from having a lead role in any school group activity and from participating in any trips with pupils.
- 5) Require the applicant to see his personal counsellor on a regular basis.

The applicant also obtained leave to seek by way of judicial review a declaration that the applicant is and remains chaplain of the school and ancillary injunctive relief prohibiting the respondent from removing the applicant as chaplain.

7. Sometime in 2011 a former pupil of the school made an allegation against the applicant through her parents that the applicant had had a sexual relationship with her in 2006 and 2007. The applicant was placed on administrative leave while this allegation was investigated by the respondent and, following the mandatory reporting to the HSE, by the HSE. The applicant has always denied and continues to deny all allegations of sexual impropriety, and ultimately the HSE determined that the complainant in question was not one within its remit, as the complainant was not under the relevant age of consent. The HSE, however, did advise the principal of the school that the allegations made by the former pupil were "very serious in nature" and in that context the Board conducted its investigation and inquiry.

8. The Board having determined to conduct its own investigation communicated its disciplinary complaint against the applicant by a letter of the 5th september, 2012 the relevant extract from which states the following (...).A disciplinary hearing was then convened on the 11th October, 2012 at which the applicant was legally represented. The complainant did not attend. The decision of the disciplinary hearing was communicated to the applicant's solicitor by a letter of the 5th December, 2012 which contained a finding that "on balance the Board believes that there was no sexual impropriety on the part of your client with the Complainant".

9. The letter however stated that the Board did believe "that certain aspects of your client's conduct were inappropriate", although it did not set out details of those matters or how it was suggested they were inappropriate.

10. Following this finding the applicant was requested and did in fact undergo a risk assessment through an assessor, a qualified psychologist, one Kieran McGrath. The process took a number of months and involved an independent consultation process with the applicant following which a report was prepared by Mr McGrath at the end of February 2013. He was asked in particular to assess whether the applicant posed any risk to students at the school and his finding in his written report was that the applicant posed a "low risk", the possibility of there being a "no risk" classification not being open to the assessor as the applicant was not in a sexual relationship because of his vow of celibacy. The assessor went on to recommend that the applicant not engage in counselling pupils in the school, that he refer students seeking pastoral care to the "school chaplain", that he not have any lead role in group activities, and that he not participate in any trips with students.

11. I accept the argument made on his behalf, and this flows indeed from the report of Mr McGrath himself, that in truth the applicant did not pose any risk to students, but having regard to the fact that he had taken a vow of celibacy and was not in a sexual relationship the finding that he was at low risk was the only one open to Mr McGrath, who explained that the vow of celibacy could itself in certain circumstances create a risk.

12. Following the conclusion of the risk assessment process the applicant sought through his solicitors to be restored to his duties at the school. To take up a role as teacher one is required to be registered with the Teaching Council, a statutory body established pursuant to the Teaching Council Acts 1996 to 2001, and the applicant applied and ultimately came to be registered in september 2013, following an appeal. The conditional registration of the applicant as a teacher by the Teaching Council is the subject of other judicial review proceedings not yet determined.

13. Following communication by the applicant to the Board that he had secured registration with the Teaching Council, the Board wrote to him by a

letter of the 22nd October, 2013 informing him that he could “return” to the school as a religious education teacher subject to certain conditions and the recommendations contained in Mr McGrath’s risk assessment report.

14. The applicant asserts that by this letter the respondent has in effect removed him as chaplain at the school and the first ground of judicial review is that the applicant acted *ultra vires* and in breach of fair procedures in so doing. The second ground of judicial review is that the conditions imposed by the respondent were also not within the competence of the respondent and are harsh, arbitrary, unreasonable and disproportionate.

15. The respondent makes a preliminary objection that the issues arising in the proceedings are not matters of public law. It denies that there was any breach of fair procedure or natural justice and that the imposition of conditions was in excess of jurisdiction. By way of a separate argument the respondent asserts that what the applicant is in truth seeking to do is quash by way of judicial review the decision of the Board made on the 25th October, 2012, and that the applicant is well out of time for seeking such relief. I deal first with this question.

16. The applicant asserts that the true import of the decision made on the 22nd October, 2013 is to remove him as chaplain and seeks a declaration that such removal is unlawful, for the reasons outlined above. The respondent says that if a decision was made to remove the applicant as chaplain it was done some 11 months earlier following the disciplinary hearing on the 11th October, 2012 and the decision made by the Board following that hearing was communicated on the 5th December, 2012.

17. It has to be said that neither the letter of the 5th December, 2012 nor that of the 22nd October, 2013 expressly removes the applicant as chaplain of the school, but by implication the letter of 22nd October, 2013 which offers the “reinstatement” of the applicant as teacher of religious education has the practical effect that the applicant was offered a return to the school as a teacher but not as chaplain, albeit that he was to be a teacher of religious education.

18. The letter of 22nd October, 2013, was written by the secretary of the Board of Management of the school. The procedures that had occurred leading up to this letter were lengthy and conducted in a formal or relatively formal matter and the applicant had the benefit of legal advice and legal assistance throughout some or all of those procedures. The letter of the 22nd October, 2013 must be seen as a letter written by a lay person albeit, a person with an important role in the school, as a follow up from previous correspondence and events that occurred, and specifically it reports the decision of the Board following a meeting which took place to “consider the risk assessment report prepared by Kieran McGrath” and the fact that the applicant had by

then been registered as a teacher by the Teaching Council on the 10th October, 2013 (...).

20. In addition the letter required the applicant to accept and adhere to the recommendations made by Mr McGrath in his report.

21. Nowhere in the letter is the applicant's role as chaplain mentioned, but the letter undoubtedly expresses an offer by the school to "allow" the applicant to return to the school as a teacher of religious education. The use of the expression "return as a teacher of religious education" imports some degree of substitution of roles, and I accept that the letter by implication identifies a decision by the Board that the applicant would not be permitted to return as a chaplain (...).

24. I consider that on any reasonable interpretation the letter of the 5th December 2012, itself also contained an implicit dismissal of the applicant from his role as chaplain of the school. Indeed while it can be fairly said that there is no express removal of the applicant from that role, it is clear that the purpose of the risk assessment was not to restore the applicant as chaplain, but rather to consider whether he might "possibly" return to the school in a different capacity, namely as religious education teacher. It was with that possible return to the school on that basis and with that exact role in mind that the risk assessment was conducted.

25. Thus it seems to me that the applicant was dismissed as chaplain by the letter of 5th December 2012, and he is out of time to seek review of that decision. No reason has been advanced to support an extension of time and indeed as the applicant engaged fully with the process commenced after the letter of the 2nd December 2012, I regard that he has approved the process to the extent that would disentitle him to seek an extension of time.

26. If I am incorrect in this conclusion, I also consider that the decision to remove the applicant is not amenable to judicial review for the reasons I now set out.

27. A relationship between a school and its staff members is complicated by the fact that some schools have historically been run by or through religious congregations, and by the direct role in the appointment of certain school staff that is taken by the churches, primarily the Church of Ireland and the Roman Catholic Church. The relationship is particularly complex in the case of a person employed as chaplain to a school and it might appear, having regard to the fact that the initial appointment of the applicant to the school as chaplain was made by the Bishop of Ferns, that the relationship was one governed by private law, or perhaps even by canon law, and that the role was entirely pastoral.

28. However matters are not so simple and two primary factors are relevant to understand the contractual nature of the relationship between the school and the applicant. The first arises from the deed of trust contained in the demise of the school lands by which the school chaplain is designated as a member of staff of the school notwithstanding that the initial nomination of him as chaplain may have come through the religious authorities. It may be doubted whether the Board of Management of the school has a power to appoint as chaplain someone other than the person nominated by the competent religious authority, but it cannot be doubted that the chaplain is appointed by the Board and is employed following his appointment as a full-time member of staff, by which must be meant that he is employed by the school. Some assistance is also to be gleaned from an analysis of s. 24 (1) of the Education Act 1998 which provides that a board of a school may appoint persons both as teachers and “other staff”, and that such teachers and “other staff” so appointed are to be paid from monies provided by the Oireachtas but may be suspended or dismissed only in accordance with the provisions of s.24 (3) which I recite in full (...).

29. A chaplain must in that context be seen as a member of staff, properly characterised as “other staff of a school” and under s. 24 (3) suspension and dismissal of him by the Board must be done in accordance with the procedures set out or agreed from time to time by the Minister, if such have been agreed.

30. That this can in certain circumstances import a statutory and public law element to the relationship is clear from the very comprehensive analysis of the law in this area contained in the judgment of O’Malley J. in *Kelly v. Board of Management of St. Joseph’s National School* [2013] IEHC 392. That case involved a principal of a school and certain mandated provisions relating to the removal or disciplining of a principal, but her judgment is of wider application. She identified in particular what she described as the “statutory source for procedures within the sector”, and held that the decision to dismiss or demote a principal as well as the decision to appoint a principal are “decisions which manifestly have a public element”.

31. I adopt the analysis of O’Malley J. in *Kelly v. Board of Management of St. Joseph’s National School* and in particular note that the combination of the provisions in the trust deed and the statutory provision has the effect, as she described it, of incorporating the procedures from the Act into any disciplinary process engaged in by the school (...).

“With the object of providing a comprehensive system of post primary education open to all the children of the community, combining instruction and academic and practical subjects and ongoing education for persons living at or near aforesaid and generally for the purpose of contributing a spi-

ritual, moral, mental and physical well-being and development of the said community".

37. There is a provision that should it come to be considered at any time that it is impracticable to continue the school as a community school that the lease will be surrendered.

38. The Articles of Management bind the Board to these objects which are repeated in clause 2 and the provisions of the lease are recited almost in identical form, save that the establishment of the school is recited as being for the education of persons living in or near an identified town land in the relevant county, making the recitals in the Articles location specific. The Minister's involvement with the school is quite extensive: estimates for expenditure must be submitted to her every year; she maintains and establishes a school fund; she pays the salaries of teachers; she is responsible for the erection of the buildings and development of school premises and the provision of equipment, furniture, books etc. The number and classification of the teaching staff is subject to the prior approval of the Minister, and more importantly the qualifications for appointment of staff are stipulated from time to time by the Minister, who has a residual discretion to determine whether the validity of the qualifications of a candidate for appointment are within her requirements. She plays a role in the appointment of individual teachers, as the selection committee for the filling of a vacant post must at all times include an inspector of the Department nominated by the Minister. The organisation and curriculum also involve the Minister, and although the Board has what is described as the "general direction" of the conduct and curriculum of the school, this power is subject to the "provisions" of the Minister as protector of the general educational character of the school and its place in the educational system, as provided in clause 10(i). (...).

40. Clause 10(ix) provides that recognition as temporary full-time or part-time teachers of religion may be accorded to priests or to any other suitably qualified person and the Board is authorised to appoint such teachers of religion with the formal approval of the Minister on the nomination of the appropriate religious authority. While the Board is also authorised to terminate this appointment if and when necessary and in accordance with the wishes of that religious authority, the Minister plays a role as protector of the public interest.

41. The appointment of a chaplain is different however, and clause 10(x) provides that the Board will appoint a chaplain nominated by the competent religious authority who is to be employed outside the normal quota of the school. The chaplain is a full time member of staff and is paid a salary equivalent to that of a teacher in the school, but is not characterised as a teacher.

42. There is a specific provision with regard to teachers of religious instruction, and the appointment of such a teacher is subject to the formal approval of the Minister. There is however no such provision with regard to the appointment of the chaplain, and the Board of Management has power to appoint a chaplain subject only to the fact that the chaplain must be nominated by the relevant competent religious authority. The Minister has no role in the selection criteria, appointment or dismissal. The appointment of a chaplain is one which the Board can exercise without the approval of the Minister, albeit the chaplain is a full-time member of staff and is to be paid by the Minister a salary equivalent to that of the teacher in the school.

43. The Minister thus has no role in the appointment of the chaplain nor does the Board covenant with the Minister to, for example, seek the Minister's approval for the appointment of a chaplain, such as is found in regard to the appointment of a teacher, and in particular the chaplain is not appointed following a decision by a selection committee which I have noted includes an inspector of the Department nominated by the Minister. The appointment of the chaplain is outside that framework and the nomination of the chaplain is done by the relevant religious authority. The qualifications for the role of chaplain are not fixed by the Minister, unlike in the case of the qualifications for appointment of the teacher.

44. I note also that the Minister has a general role to oversee the general organisation and curriculum of the school and that the advisory committee which assists the Board in the running of the school consists of the principal, the vice principal and not more than five representatives of the teaching staff. The chaplain plays no role in this.

45. The Board, in clause 11, covenants with the Minister to ensure that there is religious worship and religious instruction for pupils, save where the parents of those pupils request that the pupils be withdrawn from religious worship or religious instruction and the Minister has a role in the provision of teachers of religious instruction who are appointed by a selection committee and whose appointment is subject to formal approval by the Minister. That role can be seen in the context of the recital of the spiritual purpose and trust to which one of the recited purposes for which the school is established and of which the Minister is protector.

46. No such provisions are contained with regard to the appointment of a chaplain and the chaplain is not for the purposes of his or her role as chaplain, deemed to be a teacher of religious education. The appointment of the chaplain, the role of the chaplain in the school, the selection of the chaplain, the position of the chaplain in the curriculum while they each have Board involvement, do not have any Ministerial involvement. The role of chaplain, then, is not subject to any covenant with the Minister and is not identified in

the context of the community and education purpose. The role of chaplain can to that extent be seen as residual and religious rather than a community role. There is accordingly no public law element in the appointment and dismissal of a chaplain.

47. I do not consider that the fact that the State pays the salary of a chaplain as importing a sufficient public law element and this is clear from the judgements noted above where the schools were wholly private, and from the judgment of Peart J in *Becker v The Board of Management St. Dominick's Secondary School Cabra* [2005] 4 JIC 1405 where he held that the grievance procedures were wholly contractual and did not arise from statute or mandatory regulation.

48. I have already held that the decision of the respondent to remove the applicant as chaplain occurred in October 2012 and that the applicant is out of time to bring an application for judicial review. Even if I am wrong in that I also hold that the applicant may not avail of the remedy of judicial review with regard to the removal of him as chaplain as that removal arose from the wholly private contract between the parties and does not arise from any covenant of the Board with the Minister, nor from any statutory provisions or public law purpose by which the Minister performed a role of protector of the community or public interests.

49. The letter of the 22nd October 2013 proposes a return by the applicant to the school as a teacher of religious education subject to his written acceptance of and adherence to the conditions which I have outlined above. The applicant also seeks an order of *certiorari* quashing the decision to impose these conditions, as having been imposed in breach of fair procedures, or outside the powers of the Board.

50. On one reading of the letter, and looking at it purely from the point of view of contract, what the Board did was offer the applicant the position of teacher of religion in lieu of his role as chaplain and the offer contained these conditions. I have already noted that the Board's communications are not, nor could one expect them to be, couched in legal language, and while to some extent the letter has the appearance of being an offer I cannot read it as being such in substance. This is primarily because what the letter does is identify a decision of the Board to "allow" the applicant to return to the school as a religious education teacher. It was a substitution of role, not the offer to the applicant of a new position, but permitting the applicant to continue to be employed at the school. (...).

52. I consider that the agreed procedures in the "Towards 2016" document apply. That document provides a very extensive mandatory scheme and provides a formula for procedures to deal with various types of disciplinary issues and in particular for the purpose of the argument of the applicant iden-

tifies a range of penalties that can be imposed and the penalty identified includes the deferral of an increment, withdrawal of an increment, demotion, suspension with or without pay or "other disciplinary action short of suspension or dismissal". There is a specific provision that:- *"The nature of the disciplinary action should be proportionate to the nature of the issue of work or conduct issue that is resulted in the sanction being imposed"*. (...).

61. I reject then the argument that the applicant was not fully informed before the disciplinary hearing of the matters in issue at that hearing, and that the finding that there had been a degree of inappropriate behaviour was not one in respect of which he had an opportunity to respond. Thus the offer to him of the new role as teacher of religious was not a decision made without giving him an opportunity to respond and was made within acceptable procedures. (...).

69. The decision to remove the applicant as chaplain is not one amenable to judicial review, but the decision to employ the applicant as teacher of religion in the school is one with a sufficient public law element to attract review. I reject the argument that the applicant was denied fair procedure in the way in which certain conditions were imposed upon him. He was well aware of the possible inclusion of these conditions either as a result of Mr McGrath's findings or as a result of the recommendations made by the Board. He cooperated with the risk assessment. There was no denial of his rights to fair procedure or constitutional justice in the process. I also find that the conditions imposed upon him were not harsh, arbitrary, disproportionate or irrational and are not *ultra vires* the Board.