

Suspension of pupil – duty of procedural unfairness – whether principal followed fair procedure – whether pupil’s parents should have been consulted – whether suspension imposed as a punishment – whether principal’s decision was merely provisional – Education and Libraries (Northern Ireland) Order 1986 – Schools (Suspension and Expulsion of Pupils) Regulations (Northern Ireland) 1995

Neutral Citation no. [2004] NIQB 6

Ref: **GIRC4100**

Judgment: approved by the Court for handing down

Delivered: **04/02/2004**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN’S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY M, A MINOR BY AM
HIS MOTHER AND NEXT FRIEND FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF THE EDUCATION AND LIBRARIES
(NORTHERN IRELAND) ORDER 1986 AS AMENDED**

**AND IN THE MATTER OF A DECISION DATED 15 APRIL 2003
BY THE PRINCIPAL AND BOARD OF GOVERNORS OF
GOOD SHEPHERD PRIMARY SCHOOL**

GIRVAN J

SYNOPSIS

The principal of the primary school decided to suspend the applicant from school for 5 days following an investigation of an incident when a number of pupils handled a packet of cannabis resin brought into the school by a pupil other than the applicant. In his letter informing the parents, the relevant board and other prescribed organisations the principal stated that the applicant was suspended on grounds of knowingly handling and promoting cannabis resin. The decision to suspend was made on the day following the incident. The principal did not inform or consult the parents before the suspension of his proposed action or in relation to the investigation or its outcome and the applicant and his parents were not given an opportunity to challenge any of the material which the principal purported to take into account in arriving at his decision. All four pupils involved in the investigation were suspended for 5 days without differentiation although one

of the pupils had actually brought the cannabis into the school. The school now accepted that the applicant had not knowingly “promoted the drug”. The applicant challenged the decision on the grounds that the procedure followed was unfair. The principal contended that the suspension was not punitive but instead it was made to facilitate further investigation and consideration of expulsion. In the event it was decided not to expel the pupil who returned to school after the suspension. It was contended that the application was academic because the pupil had now moved to secondary education and that in any event the proper applicants were the parents and not the applicant.

Held

1. The applicant was the proper applicant being the party having a legal grievance. The application was not merely academic since the decision of the principal to suspend him on the grounds of knowingly handling and promoting drugs stood on the applicant’s record.
2. The principal’s argument that the suspension should not be viewed as punitive and that it was of a provisional nature was fallacious. Suspension is a severe sanction and the decision to suspend must be made in that light. Moreover looking at the matter objectively the principal had purported to make a definitive finding that the pupil had knowingly handled and promoted cannabis resin and he had informed the applicant his parents and the relevant authorities of that decision. The decision could not be viewed as merely provisional.
3. The procedure followed was unfair. In the circumstances there was time available to involve and consult the parents of the applicant who was too young to protect his own interests or to know how to consider or challenge the evidence against him.

JUDGMENT

INTRODUCTION

[1] The applicant a minor (“M”) brings his application by his mother and next friend. M was born on 25 January 1992 and was formerly a pupil at Good Shepherd Primary School, Dunmurry (“the school”). He seeks judicial review of a decision made by the principal of the school to suspend for 5 school days on 15 April 2003. The grounds for the suspension were that the minor “knowingly handled and promoted whilst in school premises an illegal substance namely cannabis resin”. The applicant was permitted to return to school on 29 April 2003. A request directed to the Board of Governors to delete any reference to the suspension from the disciplinary record of the applicant was rejected. M challenges the decision to suspend him.

[2] According to the affidavit of M's mother M told her about an incident at the school on 14 April 2003. His version of events was that a pupil called P had brought a drug into the school in his schoolbag. The child P went to his special needs class and a pupil other than M went to P's bag and showed everyone in the class the drug in the bag. When P returned to the class he asked another pupil to hide the drug and the pupil threw the drug into the bushes as the class left for swimming. While the class was at swimming another pupil told a teacher about the drug. The pupil who had hidden the drug was unwilling to state where he had put it but M persuaded him to reveal its whereabouts and he alleged that the teacher had praised him for doing so. M told his mother that the principal had accused him of having the drug up his sleeve and of asking a number of other pupils to sniff it but he denies that.

FACTUAL BACKGROUND

[3] The principal made a decision to suspend M and three other pupils from the school for a period of 5 days from 15 - 29 April 2003. Part of this period was during the Easter vacation. M was in fact off school for 3 days before the Easter holiday as part of his suspension. The principal sent a letter to M's parents. The contents of the letter were significant in the application and so far as material it reads as follows:

"I am very sorry to have to inform you that I am suspending your son M from the school for a period of five school days from 15 - 29 April 2003 inclusive for the following reason:

1. Knowingly handling and promoting yesterday 14 April while on school property, an illegal substance, suspected to be cannabis resin.

I would like you to understand that M will remain in your care while suspended and the school accepts no responsibility for him during this time. School work can be collected for him from Mrs McGuinness before or after school each day. It is your responsibility to collect this work and return it to the teacher for marking. During this period of suspension M should not be on the school premises at any time.

Following the period of suspension, I would like to meet you and M in my office on Wednesday morning 30 April at 9.00am when we will discuss arrangements for allowing M back into school.

I am required by regulation to notify the Chairman of the Board of Governors, the Senior Management Officer of Down and Connor Diocese of CCMS and the designated officer of the South Eastern Education and Library Board and I am confirming by copy of this letter that I have done so.

I regret very much having to take this action but you will understand that a serious incident such as this cannot be overlooked. It is my earnest hope that M will make a positive contribution to his education upon his return."

[4] The principal states that he was informed of the possible existence of an illegal substance suspected to be cannabis resin on the school on 14 April 2003. According to the school's drug education policy a suspected drug related incident is described as including:

- "Suspect drugs found on the school premises
- A pupil suspected of being in possession of drugs
- A pupil found to be under the influence of drugs."

In its disciplinary procedure documents sanctions are provided for cases related to illegal drugs. Should any pupil be found knowingly in possession of illegal drugs while in school immediate disciplinary action would be taken. Parents would be informed and summoned to the school. Police authorities according to law would be notified and the pupil would be recommended for expulsion. It is not apparent from the principal's affidavit whether parents and pupils were informed of the terms of the school's policy in this regard.

[5] The principal stated that having conducted preliminary investigations he concluded that M and another three pupils had breached the school's drug education policy and he was therefore obliged to deal with the matter in accordance with the disciplinary procedure which included the provision recommending expulsion.

THE SCHEME AND REGULATIONS

[6] Being a Catholic maintained school the school follows the Catholic Maintained Schools Scheme ("the Scheme"). This Scheme prepared pursuant to article 146 of the Education Reform (Northern Ireland) Order 1984 follows the requirements for such schemes prescribed by the Schools (Suspension and Expulsion of Pupils) Regulations (Northern Ireland) 1995 ("the Regulations"). The Scheme sets out the procedures to be applied in the suspension and expulsion of pupils. In the context of suspension paragraph 3.2 points out

that suspension of a pupil from school is a “severe sanction” which can only be proposed where the pupil’s behaviour is presenting serious difficulties to the school and where suspension is considered to be in the best interests of the school-pupil. Paragraph 4.00 of the Scheme sets out regulations governing suspension which may only be effected by the principal. Under paragraph 4.5 notification of suspension must be given to the parent of the pupil. Under paragraph 5.00 dealing with the procedures governing all suspensions paragraph 5.1 requires the principal to give written notification of the reasons for and duration of the suspension to the parent of the pupil, the chairperson of the Board of Governors, the local Senior Management Officer of CCMS and the relevant designated officer of the Education and Library Board. 5.4 goes on to require the principal to inform the parent that his child shall be regarded by the school as being in his care from the end of the school day in which supervision takes effect and for the duration of the period of suspension and of any renewal thereof. A letter informing the parent is to be delivered by first-class post to the parent as soon as is practically possible prior to the commencement of the suspension and at the latest on the same day as the suspension imposed. In addition the school may wish to send a copy of the letter along with the suspended pupil as well as contacting the parent by telephone to advise them of the suspension. Under paragraph 6.1 principals must give reasons for suspending a pupil and satisfy themselves that the suspension is appropriate. A short fixed term of suspension should be imposed while they decide whether more serious action is necessary or appropriate. Paragraph 6.3 states that schools which do not follow the procedure in the scheme are acting illegally. Paragraph 6.2 also states that decisions relating to suspension and expulsion are subject to an appeal procedure which may be initiated by the parent of an expelled pupil. There does not appear accordingly to be an appeals procedure for suspensions and none is required by the Regulations. The letter sent to the parent must include reasons for the suspension, the period of the suspension, a request to the parent to contact the school immediately to attend a meeting with the principal to discuss the pupil’s behaviour. In exceptional circumstances and because of the grave nature or gross extent of any misbehaviour a principal may suspend a pupil immediately. In paragraph 8.3 under the rubric of consideration before suspending or expelling a pupil it is stated to be good practice (inter alia) to consider fully the circumstances which led to the behaviour and whether any effective alternative approach to suspension is possible, apply the minimal period of suspension that is appropriate in the circumstances and consider fully the circumstances which led to the behaviour. Factors to be taken into account include the age of the pupil the degree of severity of the behaviour and whether the incident was perpetrated by the pupil on his own or as part of a group.

[7] According to paragraph 8 of his affidavit the principal took the decision on 15 April 2003 to suspend M “to facilitate the required consultation referred to”. That was a reference to consultation in relation to possible

expulsion. As it transpired on 29 April 2003 the Board of Governors and the principal decided that none of the pupils should be expelled but instead representatives of the Governors would meet with the parents in order to agree a pastoral approach to change the children's behaviour which would include drug counselling. Paragraph 11 of the principal's affidavit featured strongly in the course of the application. In it the principal stated:

"The purpose of the suspension was not punitive but instead was intended to facilitate the further investigation and consideration necessary before a definitive view could be taken on M's future in the school. No such definitive view would have been taken without permitting M and his parents to make full representations to the Board of Governors. For the sake of completeness I should say that while M and his parents would have been permitted to make representations to the Board of Governors and would have had access to the materials (including statements) adverse to M these would have been redacted to prevent intimidation of other students.

[8] In the event however as appears from paragraphs 9 and 10 above the pastoral disposition rendered unnecessary a contentious hearing and definitive finding. As required the principal did notify the Chairman of the Board of Governors, the Senior Management Officer of the Down and Conor Diocese of CCMS and a designated officer of the relevant board.

[9] Following the incident on 16 April 2003 M's father went to the school but the meeting with the principal was apparently acrimonious. On 16 April the Children's Law Centre wrote to the Chairman of the Board of Governors of the school asking for the circumstances surrounding the decision to suspend M from the school be independently investigated by the Board. Following a brief letter of 28 April 2003 the Board of Governors on 30 April stated that they had decided to have a meeting between the Governors and principal and the parents to agree a pastoral approach to change the children's behaviour in regard to illicit substances.

THE DEPARTMENTAL PAPER

[10] It is necessary to refer to one other document exhibited to the affidavits namely the Department of Education's paper "Pastoral Care in Schools - Promoting Positive Behaviour". This document is not a statutory document but purports to set out sensible advice to schools in relation to the promotion of positive behaviour and touches upon the proper approach to questions of suspension and expulsion. In relation to suspensions the paper indicates that

suspension should only take place after all the relevant facts and the evidence to support the allegations have been examined and after the pupil concerned has had an opportunity to put his or her side of the case and others involved have had an opportunity to give their version of the events. Paragraph 160 points out the school should attempt to liaise effectively with parents of any pupil suspended prior to, during or after the suspension as their cooperation will help to ensure that work set during the suspension is completed but that the pupil reintegrates into the school successfully and that his or her attitude is more positive in the future. At paragraph 175 it is pointed out that group suspensions should not be meted out unless the school is completely satisfied that all members of the group were equally at fault. At paragraph 159 it is pointed out that the length of the suspension should accord with the offence and take individual circumstances into account it should be as short as possible since the longer pupils are out of school the more difficult it is for them to reintegrate. The legal status of the Departmental paper and whether the principal had a duty to take it into account was a matter of debate but bur reasons which became apparent later it is not necessary to come to a conclusion now on those arguments.

[11] It is clear from the relevant statutory provisions, from the Scheme and from the Departmental paper that decisions relating to the use of suspension and expulsion by a school should be made with great care and in a way which is procedurally fair and proportionate to the exigencies of the particular circumstance of an individual case. It is clearly right that this should be so since both suspension and expulsion if effected unfairly or disproportionately can cause major deleterious and at times devastating impact on the pupil concerned and his family and can have long-term effects on the pupil's education and emotional development.

PARTIES' CONTENTIONS

[12] It is the thrust of the applicant's case that in the circumstances the suspension of the applicant was unfairly carried out. It is contended that M was never afforded a fair hearing in respect of the decision to suspend the decision to suspend was clearly punitive and the principal was quite wrong in paragraph 11 of his affidavit in suggesting that he did not regard it as punitive. Mrs Loughran on behalf of the plaintiff argued that either the principal misconceived the proper function and effect of a suspension (if he really believed it was not punitive) or that his suggestion that they believed it was not punitive was simply wrong. Paragraph 11 was inconsistent with paragraph 6 in which the principal stated that he concluded that M had breached the school's drug policy and that he had had to deal with the matter in accordance with disciplinary procedure. The conclusion referred to in paragraph 6 was arrived at as the result of an unfair procedure because M and his parents were not given an opportunity to know or challenge what others were asserting in relation to M's alleged involvement in the incident.

In relation to the principal's case that the suspension was to facilitate an investigation to be undertaken was undermined by the fact that there was nothing to suggest any further investigation of the facts and the parents were not involved in relation to the factual situation. There was no indication to M or his parents that the finding was anything other than definitive.

[13] Mr Larkin QC contended that, in the context of the case, the supervision was essentially interim in nature. Although in some cases supervision may be punitive normally, as here, it is of an interim provisional character and is imposed to facilitate further reflection and investigation. He raised two preliminary points which he contended showed that the application should be dismissed. Firstly, he raised a standing issue. Relying on *Re Anderson* [2001] NI 454, a school's admissions criteria case, the proper applicant should have been the parents not the minor. Secondly, the plaintiff is no longer at Good Shepherd Primary School, having transferred to secondary education in September 2003. His school record and the suspension had not affected his further education. Mr Larkin contended that the impugned suspension decision could have no educational impact on him and it was fanciful to suggest that his reputation was damaged by the record retained by the Education and Library Board.

[14] On the first preliminary objection I reject Mr Larkin's argument. The school's admissions criteria cases arise out of parental grievances because parental choice is being affected. In the present case the grievance is that of M who suffered the suspension. His argument is that his suspension was legally flawed. On the second preliminary ground of objection the impugned decision was a decision made by the principal to suspend the plaintiff on the basis of a recorded finding by the principal that M was knowingly handling and promoting cannabis resin on 14 April 2003. If that decision was unfair on the basis that it was made on foot of an unfair procedure it is not in my view of merely academic interest. I see no reason why M should not be entitled to establish the irregularity of a decision which resulted in his suspension on potentially seriously damaging findings of misconduct of a serious nature.

DECISION

[15] In *Re Kean* [1997] NITB 109 Coghlin J accepted that an application for judicial review could be made to challenge a school decision to suspend a pupil on the grounds of procedural irregularity. While he was sceptical of any suggestion that the day to day exercise of disciplinary powers by a teacher should be subject to unwieldy and time consuming supervision by the law he concluded in that case which involved a suspension of a pupil there was a breach of basic fairness and that relief should be granted. Basic fairness in that case would have required that the applicant should have been given an opportunity to consider the case being made against her by other parties and the headmaster. In *Re Kean* Coghlin J considered and analysed the

expulsion cases such as *R v Fernhill Manor School* [1993] 1 FLR 620 and *R v Dunraven School ex B* [2000] FLR 156.

[16] The question whether a decision-maker has made a decision in a manner which is so unfair that in the circumstances it should be set aside or declared unlawful requires a careful consideration of all the circumstances. The question of whether there has been procedural unfairness involves a consideration of all the circumstances of the individual case. Lord Mustill in *Doody v The Secretary of State for the Home Department* [1993] 3 All ER 92 at 106(e) expressed it thus:

“The standards of fairness are not immutable. They may change with the passage of time both in general and in their application to decisions of a particular type the principles of fairness are not to be applied by xxx identically in every situation. What fairness demands is dependent on the context of the decision and this is to be taken into account in all its aspects.”

[17] Key circumstances in the present case were the following:

(i) M was being accused of involvement in a very serious breach of school discipline involving illegal drugs in the school.

(ii) The principal was minded to conclude that the minor not merely touched drugs which M had not brought into the school but that he knowingly handled them as drugs and that he was by his actions intentionally promoting drugs within the school.

(iii) The plaintiff was at the time 11 years of age.

(iv) The principal conducted some kind of investigation including speaking to M which led him to conclude that M and another three pupils were so seriously in breach of the school's drug policy that the circumstances prima facie justified expulsion.

(v) The principal did not call in M's parents or consult them or give them an opportunity to express any views or raise any questions relevant to the investigation before he reached his conclusion to suspend M.

(vi) M being aged 11 could not be expected to understand or appreciate all the implications of the situation once the principal began to conclude that the situation called for suspension and probably expulsion. The principal should have understood that. Nor would M be alive to what should be done to ensure that there was a fair and proper investigation. The parents would

have been the appropriate responsible adults in relation to M who could have more adequately ensured that M's interests were protected. There does not appear to be any reason why between 14 and 15 April he would not have had the opportunity to involve the parents, explain the situation to them and seek their views and comments in relation to the material evidence and in relation to the allegations being made against M. There may be cases of urgency where fairness would not be breached by immediate expulsion.

(vii) The principal did not apparently consider the case as one that called for an exceptional immediate suspension since the incident occurred on 14 April and the decision to suspend was not made until 15 April.

(viii) The Scheme made it clear that suspension is a severe sanction and that it must be regarded as punitive in nature.

(ix) Suspension should be for the minimum period appropriate in the circumstances and the decision-maker must accordingly consider what is the shortest period appropriate in all the circumstances. Alternatives need to be explored before a decision to suspend is made.

(x) When a number of pupils are allegedly involved the decision-maker must consider what is appropriate in each case. It would not necessarily be logical to conclude that each of the pupils must be treated in the same way (a self evident fact reinforced by paragraph 157 of the Departmental paper).

(xi) In this case the term was nearly over and the Easter holidays were about to start. This meant that there was time available for reflection and detailed investigation of the circumstances and consultation with interested parties.

[17] The decision by the principal to suspend the pupils on the grounds of knowingly handling and promoting cannabis resin did two things. Firstly the principal purported to make a definitive finding of fact that the pupil knowingly did these things. Secondly the principal decided to suspend the pupil for a period of 5 days. As a necessary result of suspending the pupil the decision, including the express finding of fact, had to be notified to the various bodies specified in the scheme. It is argued that the decision-maker was not definitively deciding the facts and that the conclusion reached was only provisional but whatever the principal's internal thinking might have been he expressed his conclusions in positive and definitive terms and not on a provisional basis. So far as anybody else was concerned including the pupil, his parents and the third parties notified, a conclusion had been reached by the principal. The expressed decision was procedurally flawed in that the investigation carried out to establish the facts was unfair in the circumstances of this case in that the principal failed to take reasonable steps to involve M's parents before purporting to come to the serious conclusion

that M was “knowingly involved in the handling and promotion” of the banned drug, a conclusion which the school does not now purport to stand over or support for the school now states that it accepts that M was not knowingly promoting drugs. I reach this conclusion without needing to resort to the Departmental paper the advice in which represents sound common sense in any event.

[18] The imposition of suspension is a severe sanction in the words of the Scheme and is thus a form of punishment. It should not be used as merely a mechanism to give time for further reflection on the ultimate penalty to be imposed. If the situation is such that one cannot reach a concluded view on the facts then to impose to suspension is unfair since it results in a suspension that may later be revealed to be unjustified. If as the result of a fair procedure the principal is able to arrive at a conclusion on the facts suspension may be an appropriate sanction to impose for a period of time provided that it is considered to be the least sanction to be imposed in the circumstances. In paragraph 6 of his affidavit the principal makes the case that he did reach a conclusion on the facts (which is not consistent with what he states in paragraph 11). The procedure which he followed to reach those factual conclusions was unfair.

[19] Had the principal put before the court all the evidence that he had in relation to the incident and its investigation he might have been in a position to make the case that whatever the procedural shortcomings the ultimate result would have been the same. He has not however put such evidence before the court and as counsel put it the affidavit particularly in paragraph 11 is expressed in a way which is “deliberately scanty”. As a result it is an inevitable conclusion that because the procedural shortcomings were such as to render the conclusion unfair the investigation may have resulted in a flawed factual conclusion by the principal. Counsel’s reference to the “deliberately scanty” nature of the principal’s affidavit, and paragraph 11 in particular, highlights a tendency in judicial review application for draftsmen at times to draft affidavits as a form of sworn argument. This is a tendency which should be resisted and affidavits should concentrate on the facts.

[20] Although the decision was flawed on the procedural grounds of an unfair procedure there are other features of the decision which could call into question the correctness of the decision to suspend for 5 days. The principal in his determination to suspend treated all four pupils in the same way although it was clear that one of them was more culpable in actually bringing the drugs into the school. Moreover, the principal appears to have opted for a five day suspension when the term was about to end and there was adequate time to investigate the matter over the Easter vacation. I do not, however, need to form my decision on those possible shortcomings and do not do so.

[21] In the circumstances the appropriate to grant is a declaration that the decision by the principal as stated in the letter of 15 April to suspend M for knowingly handling and promoting cannabis resin on 14 April was wrong in law in that the decision was arrived at on the basis of an unfair procedure. The school should inform the recipients of the information as to the suspension and reason for suspension of the effect of this decision.