Neutral Citation Number: [2010] IEHC 354

THE HIGH COURT

2009 1061 JR

BETWEEN

UNITE THE UNION AND PAUL GALLAGHER

APPLICANTS

AND

THE MINISTER FOR FINANCE, IRELAND AND

THE ATTORNEY GENERAL

RESPONDENT

JUDGMENT of Kearns P. delivered the 8th day of October, 2010

INTRODUCTION

This is an application for judicial review arising out of the decision of the Minister for Finance of 28th August, 2009, not to exempt certain employees of the Central Bank and Financial Services Authority of Ireland ("the CBFSAI") from deductions authorised by the provisions of s. 2 of the Financial Emergency Measures in the Public Interest Act 2009, commonly referred to as "the pension levy".

The applicant is Unite, a trade union representing approximately 75% of the staff of the CBFSAI. Mr Paul Gallagher is the senior executive officer of Unite and is the second named applicant. The first named respondent is the Minister for Finance.

RELIEFS SOUGHT

On 19th October, 2009, the applicants were granted leave by this Court (Peart J.) to bring an application for judicial review seeking a number of reliefs including:

> 1. An Order of *certiorari* quashing the decision of the Minister for Finance of 28th August, 2009, refusing to grant the applicant's members exemptions from deductions under s. 2 of the Financial Services Measures in the Public Interest Act 2009.
>
> 2. A Declaration that ss. 1 and 2 of the Act of 2009 are invalid having regard to the provisions of Article 40.1 of the Constitution (equality before the law.).
>
> 3. A Declaration that ss. 1 and 2 of the Act of 2009 are invalid having regard to the provisions of Articles 40.3.1, 40.3.2 and Article 43 of the Constitution (personal and property rights).
>
> 4. A Declaration that the application of the provisions of the Act of 2009 to employees of the CBFSAI contravenes Article 101 and/or Article 103(1) of the Treaty on European Union by consisting of or constituting a form of monetary financing by the Central Bank of public sector obligations *vis-á-vis* third parties.

THE ACT OF 2009

As is well known the Act of 2009 was passed to meet the unprecedented economic crisis affecting the State.

Section 2 of the Act provides for a system of deductions from the remuneration paid to (a) "public servants" who (b) are members or beneficiaries of a "public service pension scheme". The long title to the Act, describes these deductions as a "contribution".

The Act is preceded by a number of recitals, which outline the background and necessity of the legislation. As can be seen from these recitals there are several reasons why the legislation has been introduced. One of the reasons is the need to address the "significant and increasing Exchequer commitments in respect of public service pensions". There is a recognition that there have been very significant job losses and salary reductions in the private sector and "it is equitable that the public sector should share that burden". Finally, the recitals state that "the value of public service pensions is significantly and markedly more favourable than those generally available in other employment."

Section 2 provides, *inter alia* as follows:

> "2.— (1) This section applies to a person—
>
> (a) who—
>
> (i) is a public servant on 1 March 2009, or
>
> (ii) is not a public servant on that date but after that date is appointed or otherwise becomes a public servant, and
>
> (b) who, on 1 March 2009 or at any time afterwards—
> (i) is a member of a public service pension scheme,
>
> (ii) is entitled to a benefit under such a scheme,

or

(iii) receives a payment in lieu of membership in such a scheme.

(2) In this section, a person to whom this section applies is referred to as a 'relevant person'.

(3) The person who is responsible for, or authorises, the payment of remuneration to a relevant person shall deduct or cause to be deducted an amount at the applicable rate or rates specified in the Table in this subsection … from the remuneration from time to time payable to the relevant person during that period or any such year.

(4) The deduction which this section requires shall be made in accordance with any regulations made by the Minister under section 3.

(5) This section has effect notwithstanding—

(a) any other enactment,

(b) any pension scheme or arrangement,

(c) any other agreement or contractual arrangement, or

(d) any understanding, expectation, circular or instrument or other document."

Section 1 defines "public servant" as including "a person who is employed by, or who holds any office or other position in, a public service body".

Section 1 defines "public service body" to include the Civil Service, as well as bodies such as the Garda Síochána, the Permanent Defence Force, local authorities, the Health Service Executive and the Central Bank and Financial Services Authority of Ireland, among others.

Section 1 defines "public service pension scheme" to mean:

> "an occupational pension scheme or pension arrangement, by whatever name called, for any part of the public service which—
>
> (a) is provided for under—
>
> (i) the Superannuation Acts 1834 to 1963, or
>
> (ii) any other enactment or administrative measure for the like purpose and to the like effect as those Acts, or
>
> (b) is made by a relevant Minister or has been approved or requires the approval or consent, however expressed, of either or both a relevant Minister and the Minister, but does not include such a scheme or arrangement in respect of a body specified or referred to in the Schedule"

The Schedule to the Act lists a number of commercial semi-state bodies which are not subject to the deductions provided for in s. 2, such as the E.S.B., Bord Gáis and R.T.É.

Section 8 provides the Minister for Finance may exempt "a particular class or group of public servants" from the deductions provided for in s. 2 or modify their obligations under s. 2 of the Act of 2009. Section 8 provides:

> "8.— Where the Minister is satisfied that there is a particular class or group of public servants who, by reason of exceptional circumstances (because of some particular aspect or condition of their employment, office or position) which, in the Minister's opinion, are materially distinguished from other classes or groups of public servants to which section 2 applies, then the Minister, if he or she considers it to be just and equitable in all the circumstances to do so, may by direction—
>
> (a) exempt that class or group from deductions under section 2 , either entirely or to such extent as the Minister considers appropriate, or
>
> (b) modify the obligation under section 2 to make deductions from their remuneration in such manner as the Minister thinks fit, having regard to the nature and degree of the financial burden that would otherwise be borne by that class or group,
>
> and the provisions of this Act relating to deductions, and of any regulations made under any of those provisions, shall be read subject to any such direction."

THE CENTRAL BANK AND FINANCIAL SERVICES AUTHORITY OF IRELAND

The Central Bank and Financial Services Authority of Ireland ("the CBFSAI") is a body established by the Central Bank Act 1942 as amended by the Central Bank and Financial Services Act 2003 to provide a public service. The main form of income of the CBFSAI is the investment of the assets which are the counterpart of Ireland's share of Euro banknote issue. Within the structure of the CBFSAI, is the Financial Regulator which is partly funded by levies raised from the financial services industry in accordance with the legislation. The CBFSAI provides the balance necessary to supplement industry funding.

THE CBFSAI PENSION SCHEME

The CBFSAI's pension scheme was formally established on 1st October, 2008, and the rules of the scheme were exhibited in the affidavit of Mr. Gallagher grounding the application for judicial review. On 8th April, 2008, by means of S.I. No. 99 of 2008 the Minister for Finance formally approved the superannuation scheme in accordance with the provisions of the Central Bank Act 1942 as amended

by the Central Bank and Financial Services Act 2003. Under that statutory instrument, the CBFSAI scheme is subject to the "Civil Service Rules" as defined.

Up to 30th September, 2008, the CBFSAI operated a pay-as-you-go system, in that assets were not separately identified to provide for the CBFSAI's pension liabilities and benefits were paid as they fell due from the current revenues. On 1st October, 2008, a funded pension scheme was established, as provided for under the Act of 2003, and an amount of €400 million was transferred from the CBFSAI's resources to the pension fund to purchase pension fund assets. All future benefits are to be paid out of this fund.

The scheme is operated on a non-contributory basis for staff employed before 6th April, 1995, apart from certain exceptions. Persons employed by the CBFSAI after 6th April, 1995, make compulsory contributions to their pension scheme, in addition to contributions made on their behalf by the CBFSAI.

The CBFSAI alone is liable for the payment of the pensions due under the scheme. It is claimed on behalf of the applicant and its members that the deductions made under the Act have no relevance to or connection with the pensions of the employees of the CBFSAI. The deductions have not been and will not be paid into the CBFSAI's pension fund or be received by the CBFSAI which is liable for the pension payments. Further it is claimed there is no call on the Central Fund for the payment of salaries or pensions of employees of the CBFSAI.

On behalf of the Minister it is argued that the benefits provided under the CBFSAI scheme are materially identical to the benefits provided pursuant to the normal civil service pension scheme. Under the scheme the CBFSAI's employees receive the same entitlement as established civil servants and employee contributions are identical to those applying to comparable employees in the civil service. Benefits and contributions are paid in accordance with and subject to the provisions of the rules of the scheme and the Civil Service Rules.

This is described as the key point on behalf of the respondents. The fact that contributions for employees of the CBFSAI and other public servants are identical means there is no unequal treatment between the applicant's members and other public servants required to pay the deduction provided for in section 2. On the other hand, it is suggested if employees of the CBFSAI were required to pay greater contributions to fund their pension scheme, this would be a materially distinguishing factor which the Minister could take into account under s. 8, however, that is not the case.

Furthermore, it is argued that the CBFSAI's capacity to fund the scheme derives from its particular statutory status, functions and powers.

There is no dispute the CBFSAI's pension scheme is self-funded, however, on behalf of the Minister it is argued that this is not unique and that other regulatory bodies such as the Commission for Communications Regulation also operates a self-funded pension scheme, and employees of those bodies are also required to pay the pension levy.

Finally, counsel on behalf of the Minister drew attention to the relevant recitals to the Act which provide:

> *"AND WHEREAS as a consequence a serious deterioration in the revenues of the State has occurred and there are significant and increasing Exchequer commitments in respect of public service pensions …*
>
> *AND WHEREAS the value of public service pensions is significantly and markedly more favourable than those generally available in other employment."*

This indicates the purpose of the legislation, which is to ensure the continued funding of public sector pensions, which are generally believed to be more favourable than pensions available in the private sector. Although the CBFSAI pension scheme is self-funded, it is argued that the scheme is modeled on the pension schemes or arrangements that apply across the civil and public service. It is argued that persons obtaining the benefit of civil service or public service pension schemes should make a contribution to ensure the continued availability of such pension arrangements across the public sector and to "share the burden" of the current demands placed on the Exchequer, and indeed the economy generally.

THE APPLICANT'S CASE

The applicant maintains that its members are a particular class or group of public servants which by reason of exceptional circumstances because of particular aspects or conditions of their employment are materially distinguished from other classes or groups of public servants to which s. 2 of the Act of 2009 applies. The applicant's members are members of the CBFSAI's own superannuation scheme which is described as a "self-standing and fully funded Pension Scheme outside of the Civil Service Superannuation Scheme structure." The applicant's members claim they will not get any benefit out of the deductions made pursuant to s. 2 and claim they are being unfairly penalised and/or inequitably affected by the full application of the deductions to their remuneration.

On 4th August, 2009, the applicant, on behalf of its members, made a formal request in writing to the Minister for Finance pursuant to s. 8 for exemption from the application of the full level of deductions provided for in section 2. The relevant part of the letter reads:

> *"The CBFSAI is included in the definition of a public service body [in the Act], and consequently the pensions levy has been deducted from the salaries of CBFSAI staff. It is out contention that to have included the CBFSAI in the definition of a public service body was incorrect and inappropriate, and that instead the CBFSAI should have been listed in the Schedule to the Act, where one finds similar semi-State bodies."*

Reference is made to the decision of the Supreme Court in *Central Bank of Ireland v. Gildea* [1997] 2 I.L.R.M. 391 where it was held an employee of the Central Bank was not a civil servant and was not a person employed by or under the State for the purposes of the Unfair Dismissals Act 1977. At p. of the judgment Keane J. (as he then was) said:

> *"He is employed by a body which has been created by statute, the powers of which, however essential they may be to the functioning of the State, can be removed from them at any stage by the Oireachtas. He is thus in no different position from those employed in a vast range of what have come to be called 'semi-state bodies', the employees of which may, by specific legislative provision, be deemed to be civil servants but who, in the absence of any such provision, are not to be so regarded."*

In reliance on this judgment, it was argued in the letter of the 4th August, 2008, that "the CBFSAI should have been included in the Schedule of the Act, where one finds all similar semi-state bodies".

The letter then refers to Article 40.1 of the Constitution and the guarantee of equality before the law. Further reference is made to the provisions of Article 101 of the Treaty on European Union which prohibits the provision of "overdraft facilities or other type of credit facility" by the ECB or national central banks in favour of central governments. Reference is also made to Council Regulation No. 3603/93 which defines the term "other type of credit facility" as meaning any financing of the public sector's obligations *vis-à-vis* third parties.

Towards the end of the letter the arguments on behalf of the applicant's members in support of their application for the Minister to grant an exemption under s. 8 are summarised as follows:

> i. Staff are not paid out of the Central Fund and therefore the funds deducted from their salaries are not being applied for the purpose intended by the Act
>
> ii. Their pensions will not be paid out of the Central Fund, but will be paid from a funded scheme. The CBFSAI has acknowledged in writing that it is fully liable for their pension;
>
> iii. As confirmed by the Supreme Court, CBFSAI staff are employees of a semi-State body, and as such they should, as will the employees of all similar semi-State bodies, have been exempted from the pensions levy;
>
> iv. Applying the pensions levy to their salary created a new and unique income tax, and this is incompatible with their constitutional right to be held equal before the law. We have been advised that this amounts to a disproportionate interference with their property rights and is a violation of the equality clause in Article 40 Section 1 of the Constitution;
>
> v. The payment to the Exchequer of the deductions from the salaries of CBFSAI staff made pursuant to the Act constitutes monetary financing, and as such it is in violation of Article 101 and 103 of the Maastricht Treaty,

On 28th August, 2009, the Minister for Finance issued his decision rejecting the application for exemption under section 8. In the letter of 28th August, 2009, the Minister wrote:

> *"CBFSAI staff are public servants and their pension scheme is a 'public service pension scheme' within the meaning of the Financial Emergency Measures in the Public Interest Act 2009. It is not considered that the CBFSAI pension scheme is exceptional. It is a fact that the scheme rules mirror those applying in the civil service (and a large part of the public service). The CBFSAI pension scheme funding situation is not exceptional either; other regulatory bodies must meet any portion of the cost of their scheme which is not funded through employee contributions".*

According to the affidavit of John O'Connell, Assistant Secretary in the Department of Finance, the Minister made his decision following the recommendations of Mr O'Connell and those recommendations were exhibited in his affidavit.

A number of reasons for refusing the exemption sought on behalf of the staff of the CBFSAI were advanced in the recommendations of Mr O'Connell as follows:

> *"1. The pension-related deduction is currently applied in a consistent manner in the public service. To exempt these staff, who enjoy standard public service pension benefits, would be unjust and unfair to other groups in the public service who similarly argue for an exemption. ….*
>
> *4. The first argument put forward is that CBFSAI staff are not paid out of the central fund with the result that the funds deducted are not being applied for the purposes intended by the Act. This issue was referred to the Office of the Attorney General. The advice we have received is that the above is not a requirement under the Act and the argument made on behalf of CBFSAI staff is thus misconceived.*
>
> *5. The next argument put forward to exempt the members of the CBFSAI pension scheme is that there is no call on the Central Fund for the purposes of providing the pensions of these staff. The CBFSAI scheme mirrors the pension terms and conditions of civil servants and requires the approval of the Minister for Finance in relation to any changes to it. The CBFSAI alone is responsible for meeting the costs of the scheme over and above any contributions made by the employees. The argument is made that the CBFSAI liability amounts to a materially distinguishing feature such that the employees should be exempted from this deduction.*
>
> *6. You recently considered similar arguments to the above in the case of COMREG and the National Building Agency. In those cases you decided to reject the application on the grounds that there are other pension schemes which do not have an Exchequer underpin and whose members are subject to the deduction and therefore not materially distinguished.*
>
> *7. …*
>
> *8. … the Central Bank is more akin to Regulatory state bodies who are covered by the provisions of the Act.*
>
> *9. Moreover, the fact that the CBFSAI staff are not 'civil servants' is not relevant to the determination of whether or not they should be subject to the Pensions Levy. The real question is whether or not they are 'public servants' within the meaning of the Act of 2009. The Central Bank and Financial Services Authority is expressly included in the definition of public service body. It follows therefore that the CBFSAI employees are 'public servants' within the meaning of the Act.*
>
> *10. ….*
>
> *11. We consider that the CBFSAI superannuation scheme is not unique. As already noted the scheme rules mirror those applying in the civil service (and a large part of the public service). Nor is the funding situation unique; other regulatory bodies must meet any portion of the cost of their scheme which is not funded through employee contributions. The imposition of the levy cannot therefore be regarded as a form of taxation on CBFSAI employees." [Emphasis added].*

According to the applicant, the Minister's decision is unlawful, irrational and *ultra vires* for the following reasons:

> 1. The reasons advanced by the Minister fail to address the test provided for in section 8.

2. The reasons advanced by the Minister are irrational as the CBFSAI is the only regulatory body with a self-standing fully funded Superannuation Scheme which is contained within the definition of 'public service body' in s. 1 of the Act of 2009 and/or is covered by the provisions of the Act.

3. The Minister's decision does not constitute a reasoned decision demonstrating that the test in s. 8 was applied by the Minister and the decision does not demonstrate any lawful, legitimate basis on which the Minister determined that the aspects and conditions of employment of the applicant's members were not materially distinguishable from other groups or classes of public servants covered by the provisions of the Act of 2009.

THE MINISTER'S CASE

On behalf of the Minister for Finance, it was argued that the Minister took a decision not to exempt the employees of the CBFSAI from the requirements of s. 2 and that this decision was reasonably and properly open to the Minister in the exercise of the powers conferred on him by s. 8 of the Act of 2009.

In particular, it is argued that

1. Employees of the CBFSAI are "public servants".

2. The CBFSAI's Pension Scheme is a "public service pension scheme" within the meaning of the Act of 2009.

3. The CBFSAI's Pension Scheme Rules mirror those applying to the civil service and a large part of the public service.

4. The CBFSAI's Pension Scheme funding situation is not exceptional and other regulatory bodies must meet any portion of the cost of their pension scheme which is not funded through employee contributions.

5. The pension related deductions have been introduced at a time of great pressure on public finances and take account of the value of pension benefits available to public servants.

6. The pension related deductions are currently applied in a consistent measure in the public service and it is fair and appropriate that CBFSAI employees are subject to the deductions.

THE LAWFULNESS OF THE DEDUCTIONS AS APPLIED TO EMPLOYEES OF THE CBFSAI

Although issue is taken on behalf of the applicant's members, that the CBFSAI should properly have been taken outside the scope of the Act by being included within the Schedule to the Act along with commercial semi-state bodies, it is not disputed, nor can it be disputed, that the deductions applied to the employees of the CBFSAI in this case pursuant to s. 2 are lawful (subject to the arguments advanced on constitutional grounds considered below).

The CBFSAI is expressly included within the definition of "public service body" in s. 1 and consequently the CBFSAI's employees are "public servants" within the meaning of s. 1 and for the purposes of the Act of 2009 and, accordingly, are lawfully subject to the deductions provided for in section 2. Furthermore, the CBFSAI pension scheme comes within the definition of "public service pension scheme" in section 1. The fact that the CBFSAI's superannuation scheme is a self-funded pension scheme, is not relevant to the determination of whether or not this scheme is a "public service pension scheme" within the meaning of s. 1 of the Act of 2009.

The issue in this case is solely the lawfulness of the Minister's decision under s. 8 not to exempt the applicant's members from the requirements of section 2.

PRELIMINARY OBJECTION TO REVIEW OF THE EXERCISE OF THE MINISTER'S DISCRETION UNDER SECTION 8

A preliminary objection is taken on behalf of the Minister to these proceedings. It is argued that s. 8 provides for "exceptional circumstances" where the Minister may, in his discretion, decide to exempt a class or group of public servants from the requirements of s. 2 or to modify those requirements where the Minister considers it "just and equitable" in those circumstances. In other words, it is argued that in order for s. 8 to apply there must be both "exceptional circumstances" and "significant injustice or inequity". Section 8 envisages an exception or modification only being permitted in rare circumstances. However, even where s. 8 applies, there is no right to an exemption or modification and the matter is still within the discretion of the Minister.

In enacting s. 8, it is argued, the Oireachtas clearly intended the Minister would have a broad discretion and would have regard to a wide range of matters and circumstances in deciding whether or not to permit an exemption or modification. As such the Minister is entitled to have regard to the great pressure on the State finances and the underlying policy and objectives of the Act of 2009.

In this context it was argued on behalf of the Minister that a decision taken under s. 8 of the Act is in a number of significant respects materially different to the categories of decisions which are normally the subject of judicial review. These differences are as follows:

1. The Act does not establish any form of statutory regime for applications for exemption and decisions on such applications.

2. The nature of the decision under s. 8 does not involve a judicial or quasi-judicial determination of some issue or dispute or a determination of legal rights and the Minister is not engaged in any form of adjudication.

3. No class or group of public servants has any entitlement to an exemption or modification under section 8.

This is not to suggest that the decision of the Minister cannot be the subject of judicial review (an argument that was raised in Garda Representative Association v. Minister for Finance [2010] I.E.H.C. 78 but ultimately not pursued and, according to Charleton J. in that case correctly so). The argument is made, however, that as a result of these characteristics the Minister's decision under s. 8 is entitled to a significant degree of deference and the Court should not interfere with the decision unless some manifest error is established.

In this regard counsel on behalf of the Minister relies on the judgment of Charleton J. in *Garda Representative Association v. Minister for Finance* [2010] I.E.H.C. 78. There are several similarities between that case and this case. In that case the GRA on behalf of its

members also applied to the Minister for an exemption under s. 8, which was refused. The application for an exemption was based on the unique features of the terms and conditions of employment of members of the Garda Síochána. Like the CBFSAI, the Garda Síochána is expressly included in the definition of "public service body" in s. 1 of the Act. This was significant, as Charleton J. explained at para. 6 of his judgment that "it is clear on reading the Act that a considered choice has been made as to those from whom the levy will be taken and those who are excluded from the operation of the Act". Later in his judgment Charleton J. explained:

> *"24. Turning to the precise provisions in question in the Financial Emergency Measures in the Public Interest Act 2009, the relevant express inclusion of all public servants, save for those excluded, for the purposes of deductions by way of the pension levy is made by section 2. In that regard, the specific inclusion in s. 1 of the Act of both the Civil Service and An Garda Síochána makes it clear that the Oireachtas always envisaged that those who exercise the vital and difficult function of garda within our community should be subject to the levy. On that basis alone, it becomes very difficult indeed to argue, as against a decision by the Oireachtas leaving gardaí within the scope of the levy, that the Minister acted improperly in failing to exempt them under s. 8 of the Act. Further, it is clear that the exemption under s. 8, or a modification of the relevant obligation, can only arise where the Minister is satisfied that there are exceptional circumstances arising out of some particular and special feature of their employment. The Oireachtas must be taken to have known that which is general public knowledge: that the gardaí cannot strike, that they are constricted as to what they may do by way of employment in their spare time and perhaps also that their overtime rate is set at a particular level because of the historical obligations of police officers in relation to their public duties.*
>
> *25. The discretion being faced by the respondent is not to include the Garda Síochána in the pension levy, in his discretion, but rather to find exceptional circumstances before he would even be entitled in law to consider excluding them. That being so, the burden faced by the respondent in making his decision in favour of the Garda Representative Association representations would be to, firstly, clearly identify some exceptional circumstance for removing or ameliorating the pension levy in respect of a body expressly included within the terms of the Act by vote of the Oireachtas. Further, the discretion to be exercised by the Minister is not capable of being lawfully used to confer an exemption or amelioration on any class or group of public servants merely because they are able to show exceptional circumstances by reference to some aspect or condition of their employment. It must, secondly, be just and equitable in the circumstances for the Minister to exercise that discretion. Even, thirdly, if it is just and equitable to confer a decision in favour of a group applying for an exemption or amelioration, the amplitude of the discretion conferred by this legislative wording makes it clear that the Minister is unfettered in the decision which he is then empowered to make. By referring, in s. 8 of the Act, to an entitlement in the Minister to make a decision of exemption or modification in favour of some class or group of public servants where it is, on the consideration of the Minister both 'just and equitable', the amplitude of the discretionary power is declared by the legislative context to be at the extreme end of the spectrum. This amounts, in my view, to an unfettered discretion since the wording clearly excludes by express terms any entitlement by reason of qualification.*
>
> *26. That being so, I would find it impossible to hold in favour of the applicant either on the basis of the argument so eloquently advanced or to imagine any situation, absent a Minister declining to consider a submission at all, where the court could declare such a decision unlawful by reason of the improper exercise of a discretion. I am therefore compelled to hold that the submission to the respondent was fully and adequately considered by him in accordance with the law as I understand it." [Emphasis added].*

In my view exactly the same considerations apply in this case. The fact that the Oireachtas expressly included the CBFSAI in the definition of "public service body" in s. 1 makes it very unlikely that the Minister would subsequently grant an exemption in respect of that body under section 8, unless, of course, there was some feature of the terms and conditions of employees of the CBFSAI, not capable of *a priori* identification which materially distinguished them from other public servants also subject to the requirements of section 2. The Oireachtas must be taken to have been aware of the nature of the CBFSAI pension scheme, how it was funded *etc*. and there must have been some reason for distinguishing between the CBFSAI and commercial semi-state bodies of the type listed in the Schedule to the Act.

ADEQUACY OF REASONS

In the first place counsel on behalf of the Minister relies on the decision of Charleton J. in *Garda Representative Association v. Minister for Finance* [2010] I.E.H.C. 78 where he said that the decision of the Minister under s. 8:

> *"29. … was not a decision which required the expression of reasons. Since the discretion of the Minister was unfettered, beyond a requirement to consider the application, which he did, it was unnecessary, beyond courtesy to state anything beyond an acceptance or rejection of the submission of the applicant. I do not believe that this was a case where natural justice required the expression of reasons. Even so, there were reasons given by the respondent and they were fulsome ones."*

Counsel on behalf of the Minister in this case does not seek to argue that the Minister was not obliged to give reasons for his decision, as clearly the letter of the 28th August, 2009, outlines some reasons. However, the argument is made that the reasons offered were adequate.

In *Garda Representative Association v. Minister for Finance* [2010] I.E.H.C. 78 Charleton J. summarised the legal principles on the duty to give reasons and referred to the decision of the High Court in *Mulholland v. An Bord Pleanála (No. 2)* [2006] 1 I.R. 453, where Kelly J. reviewed the case law in this area said that where reasons are given for a decision they must be sufficient to:-

> *"1. give to the applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision;*
>
> *2. arm himself for such a hearing or review;*
>
> *3. know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider; and*
>
> *4. enable the courts to review the decision."*

It was submitted that the reasons given by the Minister conveyed the "broad gist" of the decision and were more than adequate to enable the applicant to form a view as to whether there were grounds on which the decision could be quashed.

Further, it is argued that the letter of the 28th August, 2009, is not and does not purport to be an exhaustive statement of the Minister's consideration of the issue or of the material considered by him which led to the decision not to permit the exemption sought. The basis of the decision is set out in the material before the Minister, including the recommendations of the Assistant Secretary General in the Department of Finance.

In particular it is argued that the Minister did consider the substantive submission, *i.e.* that the position of the applicant's members was unique, and expressed the conclusion that the CBFSAI's pension scheme was not exceptional by reference to other public service bodies. The Minister also referred to the great pressure on the public finances and the need to apply the deductions in a consistent manner across the public service.

Furthermore, it is argued that if the applicants did not understand the reasons given, it was open to them to seek clarification, which it did not do. It is also suggested the applicants could have had recourse to the Freedom of Information Act to seek disclosure of material considered by the Minister in the exercise of his discretion.

THE STATUTORY TEST IN SECTION 8
On behalf of the applicants it is argued that the decision of the 28th August, 2009, does not demonstrate any legitimate basis on which the Minister determined that the aspects and conditions of employment of CBFSAI employees were not materially distinguishable from other groups or classes of public servants. It is argued the Minister has therefore erred in law in failing to apply the statutory test set out in section 8.

The applicants argue that the Minister sought to justify his refusal to grant the exemption sought on a number of grounds, including that "the Scheme rules mirror those applying in the Civil Service". However, it is argued that whether or not there are similarities in the rules is irrelevant to the basis of the application for exemption.

On behalf of the Minister it is argued that the Minister had full and careful regard to the various issues which had been raised by the applicant and it cannot be said that the Minister failed to have regard to relevant considerations or that the decision was otherwise irrational.

On behalf of the Minister it is argued that the applicant's members do not have aspects or conditions of employment which clearly materially distinguish them from other classes or groups of public servants to whom s. 2 applies. For example, it is suggested that if employees of the CBFSAI were required to pay greater contributions to fund their pension scheme, this would be a materially distinguishing factor which the Minister could take into account under s. 8, however, that is not the case.

It is also denied that the CBFSAI is the only regulatory body with a "self-standing fully funded Superannuation Scheme" which is contained within the definition of "public service body" in s. 1 and covered by the provisions of the Act of 2009. In particular it is claimed that other regulatory bodies such as the Commission for Aviation Regulation, the Commission for Communications Regulation and the Commission for Energy Regulation all have self-standing fully-funded superannuation schemes, but that the terms and conditions of those schemes are identical as those operating in the public service generally and employees of those bodies are also subject to the requirements of section 2.

In my view it is clear from the letter of the 28th August, 2009, as well as from the recommendations of Mr O'Connell, Assistant Secretary in the Department of Finance, that the Minister had particular regard to the provisions of s. 8 of the Act and did consider whether there were any circumstances which materially distinguished employees of the CBFSAI from other class or groups of public servants to which s. 2 applies. It was open to the Minister to find that because the pension scheme for employees of the CBFSAI was modelled on the pension schemes or arrangements operating in other areas of the public service, and that because employees of the CBFSAI made identical contributions for identical benefits as other public servants, that there were no circumstances which materially distinguished employees of the CBFSAI from other public servants. Furthermore, it is clear the Minister did consider the alleged similarities between the pension scheme for CBFSAI employees and other regulatory public sector bodies with similar self-funded pension schemes such as COMREG. Indeed the Minister had previously been requested to grant an exemption to employees of COMREG and refused to do so. It was open to the Minister to decide that the similarities between employees of CBFSAI and other public servants were such that they should not be exempted from the requirements of section 2.

Therefore I find that the Minister properly considered the statutory test in s. 8 of the Act and applied it to the facts of the case before him. The conclusions the Minister reached were reasonably open to him based on the recommendation of the Assistant Secretary in the Department of Finance. Therefore, the Minister's exercise of his discretion cannot be reviewed on this ground. Furthermore, the Minister gave adequate reasons for his decision in the letter of 28th August, 2009. I am satisfied that the applicants have not demonstrated that the Minister's decision was in any sense irrational.

CONSTITUTIONAL ARGUMENTS
A number of arguments are also advanced by the applicants to attack the constitutionality of the Act of 2009, and in particular s. 2 thereof:

> (1) The deductions from the salaries of the applicant's members are not being applied for the purposes intended by the Act, *i.e*. the employees of the CBFSAI are not paid out of monies provided by the Oireachtas or out of the Central Fund and do not provide services to or on behalf of the State and the deductions made from the employees of the CBFSAI cannot have the effect of reducing the amount payable out of money provided by the Oireachtas or out of the Central Fund as the salaries and pensions of the staff of the CBFSAI are paid for out of the resources of the CBFSAI and there is no call on the Central Fund for the purposes of providing those salaries or pensions.
>
> (2) The CBFSAI should have been excluded from the definition of "public service body" in s. 1 of the Act of 2009 or, alternatively, should have been included in the Schedule to the Act of 2009 which contains a list of bodies which, by virtue of the provisions of s. 1, are not considered to be 'public service bodies' for the purposes of the Act and as such employees of such bodies are not subject to the deductions provided for in section 2.
>
> (3) The deductions provided for in s. 2 as applied to the applicant's members constitute an additional and unique special tax on their incomes.
>
> (4) The application of the provisions of the Act to the applicant's members constitutes a breach of Article 40.1 of the Constitution (equality before the law).
>
> (5) The provisions of the Act fail to defend and vindicate the personal rights of the applicant's members in breach of

Article 40.3.1 of the Constitution.

(6) The provisions of the Act fail to protect from unjust attack and to vindicate the property rights of the applicant's members in breach of Article 40.3.2 of the Constitution and fail to regulate the said property rights in accordance with the principles of social justice in breach of Article 43 of the Constitution.

The main grounds for constitutional attack are (a) the legislation is an interference with property rights and (b) the legislation unlawfully discriminates against employees of the CBFSAI and does not treat them equal before the law.

The compatibility of the Act of 2009 with the constitutional guarantees of equality before the law and property rights has already been extensively considered by this Court in *Haire & Co. Ltd. v. Minister for Health and Children* [2009] I.E.H.C. 562, albeit on the factual matrix of that case. Therefore, not only do the applicants in this case bear the burden of displacing the presumption of constitutionality to which the Act of 2009 is entitled, they must also overcome the hurdle of a recent decision of this Court, based on similar arguments, that the legislation is constitutional.

It is necessary to briefly deal with some of the other arguments made on behalf of the applicants.

PURPOSE OF THE LEGISLATION
Counsel on behalf of the Minister argued that the purpose of the legislation was not solely to "cut current Exchequer spending substantially" as specified in the recitals to the Act. Other purposes include the need to require persons getting the benefit of a public service type pension to make a contribution, or a further contribution. The necessity for this contribution includes the consequences of the "serious disturbance in the economy and the decline in the economic circumstances of the State" as well as the "increasing Exchequer commitments in respect of public service pensions". There is also the legitimate objective of ensuring the public sector shares the burden of job losses and salary reductions which has affected the private sector and this is so in light of the fact that "the value of public sector pensions is significantly and markedly more favourable than those generally available in other employment".

It is clear that the purpose of the legislation is more than just reducing the level of current Government spending. Therefore the fact that the CBFSAI pension is a self-funded pension and does not make any demands on the Central Funds does not preclude employees of the CBFSAI being brought within the scope of the Act. There are other considerations which may justify a requirement that CBFSAI employees pay a contribution as required by section 2 of the Act. Chief of which is that fact that the CBFSAI pension scheme is clearly, and undeniably, modeled on the public service type pension scheme which is "significantly and markedly more favourable" than the pensions schemes operating in the private sector.

INCLUSION OF THE CBFSAI WITHIN THE DEFINITION OF "PUBLIC SECTOR BODY"
In my view it was open to the Oireachtas to include the CBFSAI within the definition of "public sector body" in s. 1 of the Act and there is a rational basis for doing so having regard to the definition of "public service pension scheme" in section 1. the CBFSAI pension scheme required the approval of the Minister for Finance in 2008 in accordance with the relevant legislation and the Minister's consent is required for any modification to the scheme. This is sufficient to bring the CBFSAI's pension scheme within the definition of "public service pension scheme". Furthermore the CBFSAI pension scheme is modeled on the public service / civil service type pension scheme or arrangement and employees of the CBFSAI are required to pay identical contributions as other public servants.

DOUBLE TAXATION
The applicant relies heavily on the decision of the High Court in *Daly v. Revenue Commissioners* [1995] 3 I.R. 1. In that case the Finance Act 1987 introduced a system of withholding tax and this system was amended by the Finance Act 1990. Section 14 of the Act of 1990 provided tax became chargeable on the profits and gains of the year of assessment, instead of the year proceeding the year of assessment as had been the case. Section 26 of the Finance Act 1990 contained provisions to avoid a windfall tax gain as a result of the amendments to the withholding tax system introduced by the Act.

The applicant was a medical doctor who was subject to the withholding tax regime and he alleged he had suffered considerable financial hardship as a result of amendments to the withholding tax regime introduced by the Finance Act 1990 including having to borrow money from the bank to pay his tax liabilities. He argued s. 26 of the Finance Act 1990 amounted to an "unjust attack" on his property rights.

At p. 4 of the judgment Costello J. outlined the nature of the constitutional challenge in this case:

> *"Like everyone else I am sure that Dr. Daly does not like paying income tax. It is, however, important to remember that his challenge in this case is not to the payment of the tax referred to in the Act, nor to the principle of collecting tax at source, nor does he raise any constitutional challenge to the method of collection as introduced originally in the Act of 1987. His challenge is to an amendment to the method of collection effected by the Finance Act, 1990, which he says has caused him very great hardship and has resulted in an infringement of his constitutionally protected rights." [Emphasis in the original].*

At p. 11 of his judgment Costello J. noted that it was common case that the system of tax collection was an attack on the applicant's property rights, but that "legislative interference with property rights occurs every day of the week and no constitutional impropriety is involved". In determining whether legislative interference amounts to an "unjust attack" on property rights, the courts apply a proportionality test. However, as Costello J. noted at p. 12 in applying a proportionality test in these circumstances "the court must take into account the context in which the amendment was made as the effect of the means employed to obtain the section's objective will be influenced by the other provisions of the regime in which the amendment is made."

Ultimately, Costello J. held s. 26 of the Finance Act 1990 was unconstitutional because it failed to pass the proportionality test. He held that the effect of s. 26 of the Act of 1990 was to alter the credit arrangements contained in s. 18 of the Act of 1987 so that the withholding tax deducted was not available as a credit against liability for the income tax payable in the year of assessment in which it was deducted. This was designed to avoid a windfall for some tax payers but it also had the effect of producing results which were manifestly unfair to established taxpayers. The provision had caused hardship for the applicant by (a) reducing his ability to pay income tax in respect of which withholding tax had been collected to discharge and (b) it required the double payment of tax, because of the inability to set-off withholding tax against income tax due for the year 1992/93. Furthermore, Costello J. found that s. 26 operated in a particularly onerous manner:

> *"The section was designed to deal with a transitional situation (namely a windfall gain arising in one year from the change in the basis on which the self-employed were taxed) but in doing so it has imposed a permanent measure which*

involves a permanently unfair method of collecting tax. And this effect is borne not only by established taxpayers who might have enjoyed the windfall gain if the amendment was not enacted but also by new entrants to the regime who would have obtained on benefits in 1991.

The respondents accept that the problem posed by the creation of a windfall gain could have been dealt with differently but urge that this was a matter for the Oireachtas and not for the courts to decide. I agree. This court has neither the jurisdiction nor the competence to say whether or not the taxpayers should have been allowed to enjoy a windfall gain in 1991 or how the objective envisaged by s. 26 could best be achieved. But it can examine the measure actually adopted and decide whether or not the interference with property rights has been brought about by means which are unfair to individual taxpayers or affect property rights in a manner out of proportion to the objective which the measure is designed to achieve. As I have reached a conclusion on these matters unfavourable to the amendment I must declare s. 26, sub-s. 1 of the Act of 1990 to be invalid having regard to the provisions of the Constitution." [Emphasis in the original].

In my view the facts of *Daly* are quite unique and far removed from the facts of this case.

Even if the Court accepts that the deductions requried by s. 2 of the Act of 2009 amount to an interference with property rights, I do not think that it can be said to be disproportionate having regard to the dire financial circumstances in which the Act of 2009 was passed by the Oireachtas. There is clearly a public interest in the the deductions required by s. 2 of the Act, principally to ease the pressure on the State's finances. The need for a contribution by employees obtaining the beneit of a public service type pension is justified in the public interest.

The rates of deductions are set out in s. 2 of the Act are as follows:

Amount of Remuneration	Rate of deduction
Up to €15,000	3 per cent
Any excess over €15,000 but not over €20,000	6 per cent
Any amount over €20,000	10 per cent

Therefore a person earning €15,000 is required to pay €450 a year in respect of the "pension levy". A person on the average industrial wage of €32,000 is required to pay approximate €1950. While this is a considerable amount of money in the current economic climate for a person earing the average industrial wage, I do not think it amounts to a disproportionate additional contribution to require a person with the benefit of a public sector type pension to pay in light of the current economic circumstances affecting the public finances.

In *Daly* s. 26 of the Finance Act 1990 was to avoid a windfall gain for some tax payers, but it had the disproportionate effect of causing hardship to established tax payers. In this case, however, the deductions provided for in s. 2 of the Act of 2009 apply consistently and uniformly to employees across the public service, with the exception of employees of commercial semi-state bodies listed in the Schedule to the Act. In this case there can be no question that the provisions of s. 2 of the 2009 Act operate in a discriminatory manner on some public servants over others. In fact, the legislation would appear to treat all public servants equally.

PROPERTY RIGHTS

On behalf of the applicants, it is argued that if the pensions levy is not a general tax then it amounts to a legislative interference with existing contractual entitlements. The applicants claim that the entitlement to a statutory pension is a property right and a pension entitlement arising from an existing contract of employment is also a property right.

Article 40.3.2 of the Constitution provides the State shall protect from "unjust attack" the property rights of every citizen. In *Haire & Co. Ltd. v. Minister for Health and Children* [2009] I.E.H.C. 562 McMahon J. said:

"'Unjust', in this sense, refers, to matters such as retrospectivity, lack of fair procedures, unreasonableness and irrationality, discrimination, lack of proportionality and, in some cases, lack of compensation (see Hogan and Whyte, J.M. Kelly: The Irish Constitution, (4th ed., pp. 1994 – 2004)."

The issue in this case is what are the property rights of the applicant's members and are they being subject to unjust attack, for example, because the legislation is unreasonable or irrational or the employees of the CBFSAI are being discriminated against or the measures being taken in the public interest are disproportionate to the aims to be achieved.

In this case it is argued on behalf of the Minister that employees of the CBFSAI, in accordance with s. 6D(5) of the Central Bank Act 1942 as amended by the Act of 2006, "are to be employed on such conditions (including conditions as to remuneration and allowances) as the Board fixes from time to time". The Board being the Board of Directors of the Bank. It is argued that it appears that the terms and conditions of employment are liable to unilateral variations without the assent of the employees and that the Central Bank in this case agreed to the pension levy being imposed on its employees (letter of 31st March, 2009). Consequently, it is argued that the employees of the CBFSAI have no contractual entitlement not to be required to pay the deductions provided for in s. 2 of the Act of 2009.

Even if the property rights of CBFSAI employees are being interfered with, I am not satisfied that the interference is such as to amount to an "unjust attack". In this respect I agree with what McMahon J. said in *Haire & Co. Ltd. v. Minister for Health and Children* [2009] I.E.H.C. 562:

"Article 40.3.2 is not absolute in its terms and obliges the State only to protect the citizen's property rights 'as best it may'. In Moynihan v. Greensmith [1977] I.R. 55 O'Higgins C.J., giving the judgment of the Supreme Court, said in this connection at p. 71:

> *'It is noted that the guarantee of protection given by Article 40, s. 3, sub-s. 2, of the Constitution is qualified by the words 'as best it may'. This implies circumstances in which the State may have to balance its protection of the right as against other obligations arising from regard for the common good.'*

This phrase, and indeed the word 'unjust' in 'unjust attack', must be read in the light of the unusual economic crisis that necessitated the introduction of the 2009 Act. All the evidence before the court was to the effect that the State is facing an unprecedented economic crisis, whereby the State is forced to introduce drastic economies and cuts across the board. These economic realities must inform the interpretation of the constitutional phrases in assessing what the State can do and what distributive measures it must take to ensure not only the stability of the economy, but the

stability of the State itself. It is also relevant to mention in this context that whatever the State's duty is in relation to property rights under the Constitution, these have always to be balanced against "other constitutional duties" that the State may have to uphold. (See Henchy J. in Hamilton v. Hamilton [1982] I.R. 466, 487.)

Given the exceptional threat to the economic well being of the State and to the people, I have no difficulty in accepting that the 2009 Act is exceptional. Clearly it is capable of affecting persons adversely and that was one of the objectives of the legislation. I am not satisfied, however, that it could properly be described as draconian in the circumstances where it is clearly a measured, proportionate and carefully drawn piece of legislation with a number of significant safeguards inbuilt."

EQUALITY ARGUMENT

On behalf of the applicants, it is argued that s. 2 discriminates against the applicant's members because employees in a like position, i.e. in commercial semi-state bodies, are not subject to the pensions levy. Furthermore, it is argued that the pensions levy is a special tax on employees of the CBFSAI which is not borne by other classes of public service employees who have unfunded pensions for which they have not made any contribution. This, is it argued, amounts to a form of "double taxation" of the type that was found to be unconstitutional in *Daly v. Revenue Commissioners* [1995] 3 I.R. 1

In response, on behalf of the Minister, the following arguments are made.

First, that the first named applicant, as a trade union, cannot rely on Article 40.1 which only applies to "citizens as human persons" (*Quinn's Supermarket Ltd. v. Attorney General* [1971] I.R. 1).

Second, that Article 40.1 does not apply in this case. Article 40.1 only guarantees equality before the law for citizens as "human persons". In *Murtagh Properties v. Cleary* [1972] I.R. 330, Kenny J. in the High Court held that Article 40.1 did not apply in a case where a female employee was dismissed because Article 40.1 "relates to [the] essential attributes of citizens as persons" and has "nothing to do with their trading activities or with the conditions on which they are employed".

More fundamentally, however, it is argued that the employees of the CBFSAI are in fact being treated equally with other public service workers and to exempt them from the requirements of s. 2 would be to impose unequal treatment. While the applicants contend that commercial semi-state bodies with self-funded pension schemes are excluded from the scope of the Act, on behalf of the Minister it is argued that no evidence has been adduced in respect of the pension schemes of such bodies. The burden is on the applicants to establish unequal treatment and the applicants have not adduced sufficient evidence to that effect, apart from mere generalised assertion.

Counsel on behalf of the Minister again relies on the judgment of McMahon J. in *Haire & Co. Ltd. v. Minister for Health and Children* [2009] I.E.H.C. 562. In that case pharmacists were subject to cuts of 24% under the Act of 2009 compared with other health care professionals who were only subject to cuts of on average 8%. McMahon J. held the burden was on the applicant to establish the unequal treatment of which it complained:

"Insofar as this argument is based on unequal treatment, it would require, as the plaintiffs admit, evidence of disparate treatment. No such evidence was, however, produced which means that the court is not in a position to make any finding or judgment on that issue. Furthermore, as the plaintiffs submit, it is only if evidence is brought forward by them, that the onus shifts to the defendants in this regard. As it stands, therefore, following the plaintiffs' own argument, the defendants have no obligation to disprove or justify something which the plaintiffs have not established by evidence."

Later in his judgment McMahon J. considered the argument that once unequal treatment is established by the applicant the burden is on the State to justify the unequal treatment.

"In relation to the fall back argument the plaintiffs then make that, if they establish discrimination or unequal treatment in the legislation, the onus shifts to the State to justify this, it seems to me that, in effect, counsel for the plaintiffs wishes to argue that the normal presumption of constitutionality extended to legislation, does not apply here. I cannot agree with this proposition. The normal rule is well established that Acts passed by the Oireachtas are entitled to the presumption of constitutionality until the contrary is proved. There are many authorities to that effect and I will content myself to quoting one dictum from a recent Supreme Court decision. In J.D. v. Residential Institutions Redress Board [2009] IESC 59, where the issue was whether fixing the upper age limit at 18 years for claims brought under the Residential Institution Redress Board Act, amounted to discrimination, Murray C.J., delivering the judgment of the Supreme Court in upholding the constitutionality of the Act, on the issue of concern, said:-

'Any person wishing to challenge the compatibility of a provision of an Act of the Oireachtas with the Constitution must overcome and rebut the fundamental principle of the presumption of constitutionality which operates in favour of the impugned provision.'"

Reference was also made to the judgment of Keane C.J., in giving the judgment of the Supreme Court in *Re Article 26 and the Planning and Development Bill*, 1999 [2000] 2 I.R. 321 at p. 357 stated that:-

"the presumption that every Act of the Oireachtas is constitutional until the contrary is clearly established applies with particular force to legislation dealing with controversial, social and economic matters".

McMahon J. also referred to the following passage from the judgment of Barrington J. in *Brennan v. Attorney General* [1983] I.L.R.M. 449 at p. 480 where he stated:-

"There is a sense in which to legislate is to discriminate. The legislature in its efforts to redress the inequalities of life or for other legitimate purposes may have to classify the citizens into adults and children, employers and workers, teachers and pupils and so on. Pringle J. stated in O'Brien v. Manufacturing Engineering Company Limited [1973] I.R. 334 that such division of the citizens into different classes was envisaged by the second sentence of Article 40.1. He then added:

'Therefore, it would appear that there is no unfair discrimination provided that every person in the same class is

treated in the same way.'

No doubt this is true, but it might be prudent to express, what is perhaps implied in it, that the classification must be for a legitimate legislative purpose, that it must be relevant to that purpose, and that each class must be treated fairly."

These same dicta were repeated by Barrington J. in the Supreme Court judgment in *An Blaoscaod Mór Teo. v. Commissioner of Public Works (No. 3)* [2000] 1 I.R. 6 at pp. 18 – 19.

However, as McMahon J. explained in Haire:

"To get the benefit of these dicta, the unfairness of which the plaintiffs complain is an unfairness 'when compared with other healthcare professionals and the public sector generally'. I have, however, as already noted, no comparative evidence of the circumstances or contracts of other health professionals or of the public sector generally, to make such a determination in this case."

In this case I am satisfied the burden is on the applicant to establish that its members are victims of unequal treatment when compared with other public servants who are subject to s. 2 of the Act or those employees of commercial semi-state bodies not subject to the requirements of s. 2 because such bodies are listed in the Schedule to the Act. This would necessitate expert evidence on the manner in which pensions are paid across the public service and evidence of how pension schemes operate in the commercial semi-state sector in comparison. No such evidence was advanced in these proceedings. Accordingly, the applicant has failed to establish unequal treatment.

I am satisfied there is a rational basis for including the CBFSAI within the scope of the Act of 2009 and within the definition of "public service body" in section 1. This is because of the definition of "public service pension scheme " which includes "an occupational pension scheme or pension arrangement, by whatever name called, for any part of the public service which … has been approved or requires the approval or consent, however expressed, of either or both a relevant Minister and the Minister."

The pension scheme of the CBFSAI requires the approval of the Minister for Finance and the Minister's consent is required in relation to any modifications of the scheme. While the CBFSAI pension scheme may be self-funded, the scheme is modelled on the civil service pension schemes or arrangements which apply across the public service and which are generally believed to be significantly more generous than private sector pension arrangements, both in relation to the levels of contributions and benefits.

On that basis, I am satisfied the Oireachtas purported to treat employees of the CBFSAI in the same manner as employees of other public sector bodies which have pension schemes modelled on the civil service pension schemes or arrangements. In so far as it is stated that other regulatory bodies with self-funded pension schemes are also included within the scope of the Act, this further indicates that the Oireachtas intended to treat employees of the CBFSAI equally.

I am not satisfied that the applicants have established that employees of the CBFSAI are in fact in a different category from other public servants and in a similar position to employees of commercial semi-state bodies as was claimed on behalf of the applicants. I find the applicants have not established employees of the CBFSAI are being subjected to unequal treatment.

EU ARGUMENT

Finally, the argument is made on behalf of the applicants that the application of the s. 2 of the Act of 2009 to employees of the CBFSAI contravenes Articles 101 and/or 103 of the Treaty on European Union by consisting of or constituting a form of monetary financing by the Central Bank of public sector obligations *vis-á-vis* third parties.

Article 101 provides:

"Overdraft facilities or any other type of credit facility within the European Central Bank or with the central banks of the Member States.. in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited…"

The term "other type of credit facility" is defined in Article 1 of Council Regulation 3603/93 as:

"(1) Any claim against the public sector existing at 1 January, 1994, except for fixed-maturity claims acquired before that date;

(2) Any financing of the public sector's obligations vis-à-vis third parties;

(3) Without prejudice to Article 101(2) of the Treaty, any transaction with the public sector resulting or likely to result in a claim against that Sector"

Article 103(1) of the EC Treaty provides:

"The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project"

Reliance is placed by the applicant on the opinion dated 24 February 2009 of the President of the European Central Bank, Mr Trichet, which is in part to the effect that the deductions in s. 2 may amount to a form of taxation on employees of the CBFSAI.

This argument may be dealt with on a number of grounds. First, the principal focus of that opinion is not Articles 101 or 103 but instead is on a concern that, in order to protect the CBFSAI's autonomy in staff matters, it should be consulted on the application of the pension levy to its officers and employees. However, it is the fact that the Minister did consult with the Governor and Board of the CBFSAI and the Board confirmed it had no objection to its being included within the scope of the Act of 2009. Second, the deductions under s. 2 are not paid by the Central Bank, but rather paid out of the remuneration paid to public servants, including employees of the CBFSAI. Third, the deduction is a measure of general application that applies to all public servants as defined in section 1. Finally, I am of the view that Articles 101 and 103 of the Treaty do not prohibit measures of general application, such as

the deductions provided for in s. 2 of the Act of 2009, which have been taken to improve the financial position of the State in a case of grave economic emergency, irrespective of the fact that it has been applied to employees of the CBFSAI in the same manner as other public servants.

In my view, because the deductions provided for in s. 2 apply to all public servants generally, the arguments based on Articles 101 and 103 of the Treaty are misconceived and can have no application.

CONCLUSION
In light of these findings, I am satisfied that applicants have not rebutted the presumption that the Act of 2009 is constitutional and therefore the applicants are not entitled to the declarations sought.