Neutral Citation Number: [2013] IEHC 226

THE HIGH COURT

[2012 No. 790 J.R.]

BETWEEN

SEOSAMH MACDONNCHA AND KATIE SWEENEY

APPLICANTS

AND

MINISTER FOR EDUCATION AND SKILLS, IRELAND

AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on 29th May, 2013

1. We live in hard and stirring times. Since September, 2008 the State has been grappling with an economic, fiscal and banking crisis of almost unparalleled severity. It is perhaps idle to endeavour to identify the root causes of this crisis, still less to hazard any prediction as to when these acute challenges to the public finances will dissipate. One thing has, however, become painfully clear, namely, that the State has felt itself obliged during this period to examine the continued utility and desirability of almost all items of public expenditure with a view to ensuring that the public finances quickly return to equilibrium.

2. There are, naturally, many views on these wider questions. Some question the desirability of this general exercise and insist that it is economically counter-productive, while others express opposition to the fairness and wisdom of particular public expenditure reductions, stressing that any revenue deficits should be addressed by means of higher taxation. Yet others insist that such retrenchment, however painful, is necessary to restore the economy to health and that the economy has reached the limits of its taxation capacity. No one living in this State or, for that matter, elsewhere in the European Union, can be but aware of these intense debates which have informed and moulded public opinion on these matters both here and elsewhere.

3. These general debates form the backdrop to the present proceedings which, as we shall presently see, concern the re-organisation by the Oireachtas of the vocational educational sector, culminating in the enactment of the Education and Training Boards Act 2013, on 8th May, 2013 ("the 2013 Act"). Yet it is perhaps necessary to stress at the outset that the general wisdom of the policy of fiscal consolidation which the executive and legislative branches have pursued over the last five years or so is not a matter which the courts can question or review. For even if the judicial branch possessed – which it does not - the skill and understanding of a Keynes or a von Hayek or a Friedman or a Krugman in matters of general macroeconomic theory, this would not alter matters in the slightest. This is because questions of the wisdom, efficacy and general fairness of these policies are committed exclusively to the democratic process. Article 5 of the Constitution proclaims the State to be a democracy and this means that questions of general economic policy of this nature are committed to the two branches of government which are ultimately answerable to the People in the electoral process.

4. It is perhaps necessary to re-state these propositions against the background of the present case, because at times arguments were addressed to this Court in the course of argument which seemed more appositely to belong either to the realm of political debate on the one hand or that of the industrial relations process on the other. At the same time, the responsibility and duty of the judicial branch in such matters is clear, namely, to ensure that the Constitution is upheld and the law is applied. Not least when confronted with a plain illegality, the court must not allow itself to be deflected from discharging its judicial duty for reasons of convenience or the acute nature of the fiscal crisis or the siren call of emergency: *cf.* here the comments of Hardiman J. in *Dellway Investments Ltd. v. National Asset Management Agency* [2011] IESC 14, [2011] 4 I.R. 1. In cases of such kind, the court must neutrally apply the law, without fear or favour and still less must it dilute or even compromise legal principle by a jurisprudence which itself was distorted by a judicial desire to bring about a result deemed to be convenient or expedient in the public interest.

5. None of this is to suggest that the courts should remain oblivious to economic reality and proceed as if the economic climate were benign. Quite the contrary: the courts can quite properly take account of these unpleasant contemporary realities in assessing, for example, the extent to which an otherwise legitimate expectation has been defeated by an abrupt worsening in the public finances (cf. the judgment of Dunne J. in Curran v. Minister for Education [2009] 4 I.R. 300) or the proportionality of a measure reducing the remuneration of professionals supplying services to the public on behalf of the Government (*cf.* the judgment of McMahon J. in *J.J. Haire & Co. Ltd. v. Minister for Health and Children* [2009] IEHC 562, [2010] 2 I.R. 615). But what the courts cannot do is to turn a blind eye to *ultra vires* executive and administrative action.

6. As I have just indicated, the re-organisation of the vocational educational sector forms the backdrop to the present proceedings. Both of the applicants have been appointed as Chief Executive Officers of Vocational Educational Committees. Mr. MacDonncha was appointed as CEO of Co. Galway VEC on 16th January 2006 and Dr. Sweeney was appointed CEO of Co. Mayo VEC on 1st September 2006. They are both statutory officers whose offices and entitlements are governed by the terms of the Vocational Educational Acts 1931—2001.

7. There are at present some 33 VECs and reform and restructuring has been in contemplation in official circles for quite some time. The present litigation commenced by the grant of leave of this Court (Ryan J.) on 18th September, 2012 and during this period the Educational and Training Boards Bill 2012, was proceedings through the Oireachtas. Indeed, the Bill was signed by the President and became law on 8th May, 2013, the last day of the hearing in these proceedings.

8. The actual coming into force of the new law, Educational and Training Board Act 2013 ("the 2013 Act"), is made dependent on the making of ministerial orders appointing commencement dates for some or all of the provisions of the Act. When commenced, the 2013 Act will effect a repeal of the Vocational Education Acts 1930-2001 (with the exception of s. 36 of the Vocational Education Act 2001) and the various statutory instruments made thereunder. Critically, the commencement of the 2013 Act will lead to the abolition

of the existing 33 VECs and their replacement by 16 new Educational and Training Boards ("ETB").

9. With this in mind, the Minister for Education and Skills promulgated a Circular No. 24/2012 on 19th June, 2012 ("the 2012 Circular") which set out the categorisation of the new ETBs "for the purposes of the pay scales applicable to CEOs of these Boards." The new ETB for the City of Galway, Co. Galway and Co. Roscommon fell into Category II, as did the new ETB for Co. Mayo, Co. Sligo and Co. Leitrim. Paragraph 3 of the Circular stated that this categorisation "will apply from the commencement date of the legislation bringing into force the new Education and Training Boards".

The Industrial Relations Aspect of the Dispute

10. The Croke Park Agreement (2009)("CPA") provided for the re-organisation of the wider public service. In return for assurances regarding the employment security, public sector trade unions agreed to a series of pay cuts and organisational efficiencies. It is only fair to record that these applicants – like so many others in the public service – have already stoically and patriotically accepted the not inconsiderable reductions in their pay in the national interest. It is also appropriate to note that the integrity, diligence and capability of these two applicants is not in any way in doubt. Indeed, counsel for the Minister, Ms. Butler S.C., was at pain to stress this point and with commendable fairness she paid a handsome tribute in open court to the dedication and ability of these two applicants.

11. At a latter point in this judgment I shall revisit the issue of the justiciability of the CPA, but for the moment it suffices to describe the industrial relations aspect of the case. The CPA expressly envisaged that there would be special sectoral agreements in particular areas of the public service. To this end the Department of Education concluded an agreement with SIPTU (the trade union representing the CEOs of the VECs) which provided for a redeployment agreement for the VEC sector: "Arrangements for the Redeployment of those appointed (other than in a temporary acting capacity) in the Grade of Chief Executive Officer of a Vocational Education Committee" ("Arrangements Agreement").

12. Under the Arrangements Agreement, appointment to the position of the newly created position of CEO of the ETBs was to be determined by seniority and preference. No other criteria were employed. The Arrangements Agreement provided for an elaborate system whereby all existing CEOs were asked to state their first and second preferences and selections was made accordingly.

13. Mr. MacDonncha was assigned his second preference, namely, the CEO for the newly created ETB for Mayo, Sligo and Leitrim. He was not assigned his first preference – namely, Galway – because that has been given to a person deemed to be more senior than him. This assignment is not regarded by Mr. MacDonncha – who lives in Bearna, Co.Galway - as satisfactory because it will enormously increase his travelling and commuting times and he participated in the process only with very considerable reluctance.

14. The position of the second, Dr. Sweeney, is somewhat different. She again participated with some reluctance in this process and gave the position of the CEO for the Mayo, Sligo and Leitrim ETB as her only preference. She did not actually obtain this position – which went to Mr. MacDonncha by reason of his seniority – but she remains in a queue for this purpose, given that she remains automatically in line for designation as a CEO of one of the ETBs should a vacancy arise between now and 2014. Under the terms of the Arrangements Agreement, she remains eligible for other redeployment – perhaps even on a compulsory basis – to another position, although the Minister has stressed that he wishes to respect the individual preferences of each CEO insofar as this can be achieved.

The Transport Liason Officers Allowance

15. An allowance was paid to CEOs known as the Transport Liason Officers Allowance ("TLOA"). While the amount of this allowance varied annually and differed somewhat as between different VECs areas, in recent times the annual amount averaged somewhere between €11,000 and €12,000 in the case of Dr. Sweeney and slightly more than €12,000 in the case of Mr. MacDonncha.

16. It seems clear that the original rationale for the allowance was in recognition of the extra administrative burdens which were placed on the CEOs as a result of the operation of the school transport system. The rationale for the payment of this allowance was probably undermined over time in that, for example, the actual organisation and administration of the scheme – such as dealing with correspondence with parents and schools - seems to have been largely carried out by support staff.

17. At all events, following a review of the TLOA by the Department of Finance (which recommended that the payment would cease for new entrants), the Government decided in 2010 that the role of the TLO would cease and that the responsibility for the administration of the scheme would be transferred to the actual transport providers. The CEOs were informed by the Department of Education that their role as actual Transport Liason Officer would cease as of the end of December, 2011. By way of concession, however, the TLOA payments continued to be paid until June 2012. At that point the payments ceased for all CEOs of VECs.

18. These issues were first referred to the Labour Relations Commission which issued certain proposals both in relation to ETBs and the payment of the TLOA on 28th May, 2012. (While these issues are strictly separate, they were nonetheless heard in tandem for reasons of convenience by the Commission). On 15th August, 2012, the matter of the payment of TLOA was ultimately referred by SIPTU to the Labour Court which, following a hearing in November 2012, ultimately ruled on the matter on 15th January, 2013 (Labour Court Recommendation No. 20448). On this point the Labour Court noted as follows:-

> "The Court notes that this is an allowance in the nature of pay and is reckonable in the same way as basic pay for pension purposes. It is further noted that the allowance relates to specific additional duties and the requirement for those in receipt of the allowance to continue performing these duties has ceased. In these circumstances the Court accepts that its elimination is justified. In this case the Department have offered to pay the established compensation formula of 1.5 times the annual loss in the case of each individual affected. The Court recommends that this offer be accepted."

19. The court went on to state that the abolition of the allowance had implications for pensions purposes and it recommended further that:-

> "The parties should enter into central negotiations with a view to reaching a generally applicable agreement on measures by which loss arising from the elimination of pensionable allowances can be ameliorated"

20. The applicants originally sought a variety of reliefs, but in the end the matter reduced itself to three fundamental issues. First, was the purported categorisation contained in the 2012 Circular which was to apply to the new ETBs as and from the commencement of the new legislation lawful? Second, had the Department complied with the terms of the Croke Park Agreement in the manner in which it organised the re-deployment of CEOs and, in any event, did the CPA give rise to enforceable legal rights, whether in contract or legitimate expectations? Third, was the termination of the TLOA allowance lawful? I propose now to consider these issues in turn.

The validity of the 2012 Circular
21. One theme which runs through the affidavits and grounding statement of the applicants is the concern that the Minister might in practice endeavour to establish some form parallel system for the governance of vocational education pending the enactment and entry into force of any new legislation by the Oireachtas and that their existing entitlements qua CEOs of the existing VEC structures might be compromised as a result. A variation of this was a concern that an interim "super CEO" might be created prior to the enactment of such legislation and that such a person would get preferential treatment in the new structures as a result. The legal position is, however, perfectly clear.

22. The applicants hold statutory offices pursuant to legislation already enacted by the Oireachtas. These statutory offices cannot be dismantled or the statutory entitlements of those office holders compromised merely by executive action or by directions given by or behalf of the executive: this can be achieved through legislation alone. Article 28.2 of the Constitution provides:

> "The executive power of the State shall, *subject to the provisions of this Constitution*, be exercised by or on the authority of the Government." (Italics supplied)

23. The exclusive right to legislate is, of course, assigned to the Oireachtas by Article 15.2.1 and is one of those other provisions of the Constitution to which the exercise of the executive power is subject. It follows that it is the right of the Oireachtas alone both to make and to unmake law. One aspect of the executive power is that it is duty of the Government to ensure that these laws are carried into effect and enforced. But the Government enjoys no right to suspend or to disapply the law, for if such a power were to be allowed, it would be tantamount to saying that the Government could in effect secure a repeal of the law without the necessity for legislation. This would plainly violate Article 15.2.1 and, moreover, this Court had already said as much in *Duggan v. An Taoiseach* [1989] I.L.R.M. 720. In that case Hamilton P. held that a Government instruction to suspend the operation of the Farm Tax Act 1985 was unlawful.

24. None of this means, of course, that the Government cannot plan for or initiate legislative change. Formulating new policy and planning for change (whether legislative or otherwise) is a core business of government and is a central feature of the executive power. Ministers and civil servants have sought to anticipate and plan for legislative change since the formation of the State in 1922 and it would be remarkable to suggest that this could not be done. The process of actually initiating and processing legislation through both Houses is, of course, committed to the two Houses of the Oireachtas by Article 20 of the Constitution and as Maguire C.J. said in *Wireless Dealers Association v. Fair Trade Commission*, Supreme Court, 14th March, 1956, the courts have no power "to prevent or stay the operation of Article 20." He added:

> "The Constitution…entrusts to the two Houses of the Oireachtas the power and duty of considering and passing Bills which become law on being signed by the President. The consideration of proposed legislation is a matter which it entrusts to the Oireachtas alone, and in which the courts have no part."

25. All of this means that the courts have no role at all in the lead up to or in the planning of new legislation or in respect of its passage through the Oireachtas. In the present case this meant that, provided, of course, that the Government continued to operate the Vocational Education Acts pending their repeal by the Oireachtas, it was entirely free to plan for the new contingencies which would or might arise following the enactment of new legislation which repealed the old provisions and replaced them with a new structure.

26. Is this what has happened? While the applicants had understandable concerns regarding the new structures and the manner in which the new vacancies might be filled, in the end no steps have actually been taken to compromise their position. Pending the enactment and commencement of the 2013 Act, the applicants remain undisturbed in their posts and the only steps which have been actually taken are in the nature of forward planning. Here again it may be recalled that paragraph 3 of the 2012 Circular - to which the Circular the applicants took exception - nonetheless critically stated that the categorisation of the ETBs and the new salary scales applicable to them "will apply from the commencement date of the legislation bringing into force the new Education and Training Boards."

27. In these circumstances, I find myself unpersuaded by the contention that the respondents have taken any actual steps to compromise the legal entitlements of the applicants as statutory officeholders prior to the enactment of the new legislation or that the 2012 Circular is unlawful in any way.

Whether the Department had complied with the terms of the Croke Park Agreement in the manner in which it organised the re-deployment of the VEC CEOs and the termination of the TLOA?
28. Both applicants object strenuously to the manner in which the redeployment scheme has been organised by the Minister and they contend that the respondents have breached specific terms of the Croke Park Agreement ("CPA") in the manner in which the re-deployment of the CEOs has been organised.

29. The Minister contends in turn that the Arrangements Agreement (which, let us recall, is but a sectoral agreement within the CPA process) binds the applicants, in that Clause 7.4.1 provides that:

> "The Arrangements shall commence on the date on which agreement is reached with SIPTU or on the date where a determination is provided by the Labour Court on any matters of dispute in relation to it."

30. The Minister submits that this clause is intended to ensure that the Labour Court decision is binding. Indeed, this is one of the reasons why it is said the applicants cannot litigate the validity of the TLOA allowances in these proceedings, given that – or so the argument runs - the matter is effectively *res judicata* in the light of the Labour Court's decision. To this one might add that paragraph 1.24 of CPA expressly states that the outcome of any industrial relations process – involving, for example, the Labour Relations Commission or the Labour Court – "will be final."

31. Finally, it may be noted that in its recommendation the Labour Court noted that the matter had come before it pursuant to the CPA and that "the parties have agreed to be bound by the Court's recommendation."

32. For my part, however, I see no reason to alter the views which I expounded at greater length in *Holland v. Athlone Institute of Technology* [2011] IEHC 414, [2012] ELR 1 regarding the legal status of the CPA. In that judgment I stressed that the whole tenor of CPA was that it was an agreement designed to operate in the political and industrial relations spheres. Everything therein suggested that it was not intended to create legal relations, not least through its use of imprecise and aspirational language and the creation of particular dispute resolutions mechanisms (paragraphs 1.18 to 1.22 of the CPA) which plainly operate outside the conventional legal sphere.

33. As I said in *Holland*:

> "For my part, I do not consider that the Agreement can be taken to have created enforceable legal rights which are justiciable in law at the hands of an individual public sector employee. The commitment given by the Government with regard to public sector redundancies in paragraph 1.6 thus applies in the sphere of political and industrial relations sphere, but not the legal sphere. The proviso to that commitment ("This commitment is subject to compliance with the terms of this Agreement and, in particular, to the agreed flexibility on redeployment being delivered…") would seem to be at odds with the idea of an enforceable legal right, since it would be extremely difficult for a court to apply legal standards to determine whether, for example, the public sector unions had been sufficiently flexible on redeployment issues. This would seem to be a matter of judgment for either politicians or industrial relations specialists. This in itself demonstrates that the parties never intended thereby to create legal rights, or, at least, that the Agreement was not intended to be enforceable at the hands of third parties such as the plaintiff."

34. Accordingly, the reference to "finality" of the industrial relations process – which, in the present case, culminated in the Labour Court recommendation of January 15th, 2013 – is to "finality" in the industrial relations sense of that term. It means no more than that the Government and the public sector have agreed a mechanism *inter se* whereby disputes arising from the CPA can be resolved. Accordingly, the CPA does not seek to vest the Labour Court recommendation with a legal status it would not otherwise enjoy.

35. Here it may also be noted that the Labour Court assumed jurisdiction under s. 26(1) of the Industrial Relations Act 1990 (albeit in the context of the dispute resolution procedures envisaged by the CPA) and that it merely issued a recommendation. The whole purpose of the Labour Court's functions in matters of this nature is to advance a solution to industrial relations disputes. Although the Court's functions are sometimes clothed in the language of law (*e.g.*, the very use of the term "Court") and while it employs legal principles when adjudicating on matters relating to legal rights (such as, for example, cases involving the rights of part-time workers or employees on fixed term contracts), in the present context it is really acting as a form of industrial relations mediator. When adjudicating on matters relating to the CPA, therefore, the Labour Court is accordingly not deciding legal rights or employing exclusively legal concepts to resolve such disputes. On the contrary, when issuing recommendations in this context the Court will often – perfectly properly – adopt a purely pragmatic and practical approach to such questions. Its role in such cases is to resolve disputes and to maintain industrial peace and the criteria which underpin its recommendations are not strictly legal ones.

36. In summary, therefore, the recommendation of the Labour Court at most amounts to a binding resolution of any such dispute for industrial relations purposes. While the decision to terminate the TLOA was one which was (probably) taken outside of the strict confines of the CPA, it cannot be said that the use of the CPA dispute resolution procedures (such as, in this instance, the reference to the Labour Court) rendered the outcome binding or final for legal purposes. This is not only because the Court's jurisdiction under s. 21 of the Industrial Relations Act 1990 is not invested with that quality of legal finality, but also because for all the reasons set out in *Holland* the CPA itself does not create – and was not intended to create – legally justiciable rights.

37. It follows, therefore, that the Labour Court recommendation does not create *res judicata* nor does it preclude the applicants from applying to this Court for declarations as to the legality of the withdrawal of the TLOA allowance. Before considering this latter issue, we must, however, next address the issue of legitimate expectations and the CPA.

Legitimate expectations and the CPA

38. Both the applicants stress that the new arrangements transgress specific commitments contained in CPA with regard to redeployment and that in that respect the Department has violated legitimate expectations which they had acquired as a result of the terms of the CPA. One may give a number of examples of specific provisions of CPA on which the applicants relied.

39. Paragraph 1.6 of CPA provides:

> "The Government gives a commitment that compulsory redundancy will not apply within the public service, save where existing exit provisions apply. This commitment is subject to compliance with the terms of this Agreement and, in particular, to the agreed flexibility on redeployment being delivered."

40. The applicants maintain that the Minister violated Paragraph 1.6 by stating that the role of the TLO is redundant. In this regard, I rather think that the applicants have sought to read too much into this commitment. It was not a commitment that no post would be abolished, but it was instead rather a commitment that *no person* would be made redundant from the wider public sector. This construction of Paragraph 1.6 is underscored by the redeployment provisions contained in Paragraph 6.2.1 *et seq*., because these obviously involve the abolition of certain positions and duties. Why else would the CPA make such elaborate provision for redeployment?

41. Nor do I think that other specific commitments have been violated. Thus, for example, Paragraph 6.2.1 provides:

> "These procedures [regarding redeployment in the education sector] will be implemented in an open and transparent manner with full regard to the need for consultation with individuals and the representative Trade Unions."

42. It is quite clear that there has indeed been consultation with relevant trade unions, since the Arrangements Agreement was conducted with SIPTU in October 2011. The Arrangements Agreement further endeavours – admittedly subject to seniority - to respect individual preference. All CEOs were, after all, invited to give their preferences for the new ETB assignments. Furthermore, Paragraphs 5.2.1 of the Arrangements Agreement provides for elective deployment in the education sector at an analogous grade for which the individual has the necessary skills, qualifications and competence. In these circumstances, I find it difficult to say that provision is not made for at least some consultation before an individual is redeployed.

43. So far as Paragraph 6.2.8.iii is concerned, I cannot see that the Arrangements Agreement does not faithfully reflect it:

> "Where there are no or insufficient volunteers, management will be able to require staff to redeploy. Selection will be made in accordance with the 'last in, first out' principle (LIFO). Seniority in the context of LIFO is defined as the most senior in terms of pensionable service within the grade, save where different arrangements exist for the determination of seniority."

44. While it is true that Paragraph 6.2.8.iii refers to "volunteers", this simply corresponds to the exercise of choice of those wishing to redeploy. Under the Arrangements Agreement, all existing CEOs were effectively asked to volunteer to transfer to the new positions (described by Paragraph 3.2.1 of the Arrangements Agreement as "elective assignment") from which selection would then be made on

a seniority basis. (The seniority list had itself been assembled in advance on a transparent basis under the terms of the Arrangements Agreement). In effect, therefore, Arrangements Agreement assigned the new positions in accordance with volunteered preferences which were then governed by seniority.

45. Objection is also taken that the respondents failed to comply with the assurances promised by Paragraphs 6.2.13 and 6.2.14 to the effect that:

> "Where staff are being redeployed to another organisation in accordance with these principles, they will be assigned to a post within a 45km radius of their current work location or home address, whichever is the shorter commute. Regard will also be had to reasonable daily commute time. Given that Public Service organisations and posts are fewer in number and more dispersed in some parts of the country than in others, redeployment options may of necessity be beyond these guidelines times and distances in some instances. In these circumstances, consultations will take place with the relevant employee(s) and union(s) in relation to the assignment(s) on offer."

46. It is clear that Mr. MacDonncha has been redeployed far beyond the 45km radius (in that he now has responsibility for Mayo, Sligo and Leitrim, instead of the county of Galway), but here it is envisaged by Paragraph 6.2.14 that this may occur. There has, moreover, been some consultation with both individuals and unions in relation to the redeployment options in that the former were consulted regarding their preferences and the latter were involved in the Arrangements Agreement, even if it must also be accepted that none of these deployment options can be regarded as very appealing from the Mr. MacDonncha's point of view.

47. There is, in any event, a more fundamental objection to all of the applicants' arguments based on legitimate expectations, whether by reference to Paragraph 1.6 or any of the other specific commitments contained in the CPA on which the applicants have relied.. Paragraph 1.6 is admittedly at the heart of the CPA with its commitment regarding compulsory redundancies. But that commitment is immediately qualified by the statement that this is subject "to compliance with the terms of this Agreement and, in particular, to the agreed flexibility being delivered."

48. These very qualifications are inconsistent with the existence of any legitimate expectation, because as I pointed out in *Holland*, the language used "is too imprecise, conditional and aspirational to permit of this." Critically, however, the rest of the commitments in the CPA are predicated on the delivery of such change and flexibility One might add that the nature of the commitment does not lend itself to judicial evaluation by reference to cognisable legal standards. As I pointed out in *Holland*, in the context of whether the CPA created legally enforceable rights (which passage I have already quoted above), how could a court determine, for examine, whether the public sector unions had been "sufficiently flexible" in respect of redeployment issues? Yet as the entire CPA is premised on this and must be read subject to these basic qualifications, it follows that none of the CPA's provisions can give rise to a legitimate expectation.

The validity of the termination of the TLOA

49. If I may re-echo the sentiments I expressed at the commencement of this judgment, the validity of the termination of the TLOA so far as these proceedings must be governed entirely by legal considerations only. To that extent, considerations which would be very much to the fore in industrial relations bargaining or in any conciliation process before the Labour Relations Commission have no direct bearing on any of the legal issues which come before me. Thus, counsel for the applicants, Mr. Stewart S.C., emphasised that the Department of Finance review had originally recommended that these allowances be abolished for new entrants only. Ms. Butler S.C. countered by noting that as the applicants were no longer performing the duties of TLOs, they should not receive any supplementary pay for this purpose.

50. It was further emphasised that this matter was considered by the Labour Court and in its determination in January 2013 it had recommended a formula – which was accepted by the Department – that the CEOs receive a once-off compensation payment for the abolition of the allowances and, furthermore, that some protection for the associated pension entitlements would also be given. Under this formula, Mr. MacDonncha's pension entitlement would be almost completely unaffected by the new regime, albeit that this was not quite so in the case of Dr. Sweeney, save in the event that she were to retire within the next seven years. I should pause to explain that the reason for this apparent discrepancy is that Mr. MacDonncha is closer to retirement age than Dr. Sweeney. It should also be recalled that the Labout Court recommendation called for further negotiations between the parties regarding the pensionability of the allowance in respect of persons such as Dr. Sweeney whose pension entitlements are affected by the abolition of the TLOA.

51. Yet the answer in legal terms is absolutely straightforward. Section 15(6) of the Vocational Education Committee (Amendment) Act 2001 ("the 2001 Act") provides:

> "A chief executive officer shall hold office upon and subject to such terms and conditions (including terms and conditions relating to remuneration and allowances) as may be determined by the vocational education committee for which he or she is chief executive officer with the consent of the Minister."

52. The allowances to which the CEO is entitled are determined by the local vocational education committee. It is, of course, true that the Minister must *consent* to the relevant employment terms, including such remuneration and allowances. But the sub-section unambiguously assigns the role of determining the terms and conditions of the CEOs to the local VECs. This inevitably includes all decisions regarding any variations concerning the conditions of employment, including the termination of allowances.

53. Yet no evidence has been supplied to show that any decision to terminate the allowance was taken by the relevant VECs (namely, Co. Galway and Co. Mayo respectively). Quite the contrary: it is instead clear that the decision was taken by the Minister for Education. But as is clear from the express terms of s. 15(6) of the 2001 Act, the Minister has absolutely no role in terminating the allowances or otherwise varying the terms and conditions of employment of the CEOs. It is thus plain that the purported termination of the allowances by the Minister was unlawful.

Conclusions

54. It remain only to sum up my principal conclusions:

> A. The applicants hold statutory offices whose operation cannot be terminated or suspended by executive action alone. But while the Government cannot suspend the operation of law, it can plan for future legislative changes.
>
> B. Pending the enactment and commencement of the 2013 Act, the applicants remain undisturbed in their posts and the only steps which have been actually taken are in the nature of forward planning. Paragraph 3 of the 2012 Circular critically stated that the categorisation of the ETBs and the new salary scales applicable to them "will apply from the commencement date of the legislation bringing into force the new Education and Training Boards." In these

circumstances, the 2012 Circular cannot be held to be unlawful as a form of executive attempt to circumvent the legislative regime which obtained immediately before the coming into force of the 2013 Act.

C. The Minister has not violated the terms of the CPA in the manner in which the redeployment of VEC CEOs has been organised. In any event, for the reasons set out more fully above, the terms of the CPA itself cannot give rise to a legitimate expectation because the entire agreement is predicated on the existence of sufficient flexibility and a commitment to change on the part of the employee side and these are criteria which are beyond the capacity of the judicial branch usefully to evaluate.

D. By virtue of s. 15(6) of the 2001 Act the payment of allowances is to be determined by the Vocational Education Committee themselves and the Minister's role is simply to consent to such payment. The Minister is, however, given no power to terminate such payments in the manner in which he purported to do so and the revocation of such payments in June 2012 by the Minister must accordingly be judged to be unlawful.

55. For completeness, I should stress that this judgment addresses the situation *only* with regard to the situation which obtains immediately prior to the coming into force of the 2013 Act. Any arguments which might conceivably arise with regard to the operation of the 2013 Act would, of course, have to be addressed in separate proceedings.