

THE HIGH COURT

[2014 No. 423 MCA]

BETWEEN

DAMHNAIT NIC BHRÁDAIG
AND
THE EMPLOYMENT APPEALS TRIBUNAL

APPELLANT

RESPONDENT

AND
MOUNT ANVILLE SECONDARY SCHOOL,
THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM AND
THE MINISTER FOR EDUCATION AND SKILLS

NOTICE PARTIES

JUDGMENT of Ms. Justice Baker delivered on the 20th day of May, 2015

1. This is a statutory appeal on a point of law brought under s. 7(4)(b) of the Payment of Wages Act 1991 (the "Act of 1991") in respect of a decision made by the Employment Appeals Tribunal (the "EAT"), the respondent, with regard to the applicability of the Financial Emergency Measures in the Public Interest (No. 2) Act 2009 (hereinafter "FEMPI (No. 2)") to the appellant.

2. The appellant is an employee of Mount Anville School, the first notice party, a fee paying private school where she is employed as a secretary. Her salary is wholly paid by the school and she asserts that the reduction in her salary imposed by her employer under FEMPI (No. 2), is unlawful and in breach of the Act of 1991, as she did not consent to the reduction as is mandated by s. 5(1)(c) of that Act. The appellant contends as she is not a public servant within the meaning of the legislation and that reductions under FEMPI (No. 2) may lawfully be made against the salary of a public servant only.

3. The appellant was unsuccessful in her application to the Rights Commissioner who gave a determination on the 20th March, 2012 that she was a public servant for the purposes of the legislation, a decision affirmed by a majority decision of the EAT on 29th July, 2014.

4. The High Court is empowered to hear an appeal on a point of law under s. 7(4)(b) of the Act of 1991 in respect of an EAT decision. The determination of the High Court on the point of law is final and conclusive.

Facts

5. The facts may briefly be stated. The plaintiff has been employed as school secretary in Mount Anville Secondary School since the 8th July, 1991. Her salary is funded entirely by private funds raised through the fee structure in operation in the school, a fee paying private school. The school itself is owned by the Society of the Sacred Heart and Mount Anville Educational Trust Company which operates as patron of that school. The school was founded in or around the year 1853, and it seems that the Trust was established some time thereafter, the precise date whereof is not relevant to the question I am asked.

6. The appellant has no pension rights arising from her employment and her pension is wholly privately funded.

7. The question before me is whether the appellant is a public servant governed by the provisions of the FEMPI (No. 2) Act.

The financial emergency legislation

8. FEMPI (No. 2) was one of a series of emergency statutes enacted in the context of the financial crisis which occurred in the State after the financial and banking crash in 2008. The FEMPI (No. 1) Act came into force on the 27th February, 2009 and made provision for the compulsory payment of a pension contribution by certain persons employed in the public service. The Act recited the purpose and need for the legislation as arising from the fact that the value of public service pensions was significantly and markedly more favourable than those generally available in other employment. That Act has no direct application to the matters raised by the appellant in this case.

9. The FEMPI (No. 2) Act came into operation on the 20th December, 2009 and had more far reaching effects and provided for the general reduction in the remuneration of certain persons in the public service. The recited purpose of that legislation was to facilitate the making by the State of "significant" savings in its direct and indirect expenditure on public service remuneration.

10. Section 2 provides for the reduction in the remuneration of public servants as defined in that Act, and in accordance with a sliding scale set out in s. 2(2), the relevant rate being that found in table 3 of the subsection.

11. The applicant claims that she is not a "public servant" within the meaning of this legislation and that accordingly the reductions made to her salary were not lawfully made.

12. As with many matters governing the relationship between the State and the school sector the Minister makes directions by means of Circulars. Circular 0070/2010, sent to all principals or chief executive officers of primary, secondary, community and comprehensive schools and VECs, contained the following directions with regard to the FEMPI (No. 2) Act:

"As you are aware the Act has determined the criteria for reducing the pay of public servants with effect from 1 January 2010. The definition of a public servant for the purposes of this Act is different to that used in the Act which introduced the Pension Levy in 2009. This led to a question as to whether some staff employed in recognised schools or VECs, who are not subject to the pension levy may be subject to the reductions in pay detailed in this Act."

Following receipt of legal advice it has now been determined that all staff employed by a recognised school or VEC come within the definition of "public servant" solely for the purposes of the Act.

This applies, regardless of the source of the money used to fund their salary, notwithstanding the fact that the Minister does not determine their terms and conditions of employment, and irrespective of whether or not they are eligible for, or members of, a public service pension scheme,

It has now been determined that, in accordance with the Act, you should ensure that the pay reductions provided for therein are applied, with effect from 1 January 2011, to all relevant staff in your employment who have not already

been affected by these pay reductions. In view of the uncertainty that existed the Minister of Finance has granted an exemption from the provisions of the Act for the staff in question up until 31 December 2010."

13. The Circular set out a list of the categories of staff who would be affected by the FEMPI (No. 2) reductions in pay, and these included school secretaries and other non-teaching staff. There was an express comment to the effect that the making of the reductions, and the fact that these members of school staff were deemed to be public servants for the purposes of FEMPI (No. 2), "does not alter their employment status in any other respect."

14. The first notice party applied the relevant reduction to the salary of Ms Nic Bhrádaig and correspondence with her from the school has been exhibited in these proceedings. From this it can be ascertained that the Board of this school has unsuccessfully with other, presumably private, schools lobbied the Minister for Education and Skills to grant an exemption from the Act for all privately paid members of staff. The school Board is sympathetic to Ms Ni Bhraiadgh

15. The applicant applied to the Rights Commissioner who gave a decision on the 20th March, 2012 that the reduction in pay was a lawful deduction within the meaning of s. 5(1) of the Payment of Wages Act 1991. The applicant appealed to the EAT, which by majority decision, affirmed the decision of the Rights Commissioner on the 29th July, 2014. While the majority does not give a reason there is a two page detailed dissenting opinion.

16. It is against that determination that this appeal is brought.

The law

17. The question in this case involves a net legal question, namely what is meant by the category of persons defined as "public servants" within the meaning of the legislation. It is accepted by Ms Nic Bhrádaig that if she is a public servant that the reductions provided in FEMPI (No. 2) apply to her, but she contends that she is not a public servant within the meaning of that definition.

The scheme of the FEMPI (No. 2) Act

18. Section 1 of the Act defines a public servant as "*a person who is employed by, or who holds any office or other position in, a public service body*" and includes an office holder.

19. Public service body in turn is defined in s. 1 and the relevant part of the definition is as follows:-

"a body (other than a body specified or referred to in the Schedule) that is wholly or partly funded directly or indirectly out of money provided by the Oireachtas or from the Central Fund or the growing produce of that Fund and in respect of which a public service pension scheme exists or applies or may be made."

20. The definition of a public service body then includes two elements: the body must be in whole or in part funded whether directly or indirectly from Exchequer funds, and a public service pension scheme must exist or apply or be one that may be made in respect of that body.

21. The second and third notice parties argue that FEMPI (No. 2) applies to all public service bodies, and to the staff employed by those bodies even if the salary of that staff is not paid by the Exchequer. There was put in evidence before me a list of regulatory bodies, many of them in the medical and health sector, including Fáilte Ireland, the Broadcasting Commission of Ireland, the Turf Club, Waterways Ireland, the Medical Council, the Private Residential Tenancies Board to take just a few by way of example, and it is stated on affidavit that the salaries of the persons employed by those bodies are paid in some cases out of income generated by the public service body itself, and in some cases directly by the Exchequer or from funds paid to the public service body by the Exchequer for that purpose. In the education sector specifically there is identified certain employees who are paid a salary directly by the Department of Education and Skills, such as teachers, special needs assistants, and in some schools, secretaries and caretakers, and other staff employed directly by the school who are not paid directly by the Exchequer such as some secretaries and caretakers, cleaners and administrative staff, school transport bus escorts, non teaching staff in Youth Encounter Projects. It is estimated that there are approximately 15,600 persons so employed, including approximately 8,000 school secretaries, caretakers, cleaners and administrative staff.

Direct or indirect funding?

22. Most of the facts are not controverted. The Exchequer does not pay the salary of the applicant but the school does receive Exchequer funding in two ways, both direct and indirect. As is evident from the affidavit of Philip Crosby, principal officer in the Department of Education and Skills, the Exchequer pays the salaries of the teachers in the school in accordance with the pupil/teacher ratio for fee charging schools, and also pays the salaries of special needs assistants allocated to the school. 34 such teachers are at present so funded. The school also has had the benefit of ICT infrastructure grants and some funding for capital projects. Mr Crosby in his affidavit avers that the total Exchequer funding to Mount Anville over the past eight school years was approximately €19,000,000, but he does not break this down between direct funding for infrastructure or capital projects, and indirect funding by means of paying the salaries of the teachers.

23. Mr Crosby's evidence is that fee charging schools pose less of a burden on the Exchequer than those within the State free schools system, but that the estimated average cost per pupil of a teaching post in a fee charging school at a ratio of 21:1 is €3,048 per year. There are 51 fee charging schools remaining in the State and since the commencement of the recession five fee charging schools have applied and been admitted to the free education scheme. With regard to Circular 0070/2010 Mr Crosby says that the decision to apply the reduction across the board to all employees and public service bodies was made with a view to avoiding preferential or different treatment for staff in fee charging schools, and one purpose was to avoid a difference in treatment in the legislation between two groups carrying out the same or similar roles in the school sector, and in that context to avoid industrial relations issues. The applicant is not paid from State resources, she has no State funded pension, and any savings that are made by virtue of the reduction in her salary do not consequentially result in a saving to the Exchequer, and the savings are not refunded to Central Funds.

Conclusion on funding

24. The evidence overwhelmingly points to the fact that Mount Anville Secondary School receives State funding. The amount of direct State subvention received by the school is small, but it receives very substantial indirect funding through the payment of the salaries of its teaching staff. The teachers provide the service to the students, and the direct payment by the Exchequer of the salaries of teachers enables the school to offer the service of teaching that it does to its pupils.

25. The language of the statute is clear and the ordinary and plain meaning of the expression "*wholly or partly funded directly or indirectly*" from Central Funds, does not require me to engage in any complex analysis of the clear intention of the Oireachtas to

include indirect funding of the payment of salaries of staff as a means by which the first part of the test is satisfied. Accordingly, I hold that the first part of the legislative test is satisfied.

Does the public service pension scheme exist in the school?

26. The second part of the conjunctive test in the definition of a "public service body" is that a public service pension scheme "exists or applies or may be made in respect of the relevant body".

27. I turn now to consider whether Ms Nic Bhrádaig is correct in her argument that the second part of the definition of a "public service body" does not apply to her.

28. Ms Nic Bhrádaig does not have an entitlement to an occupational State pension arising from her employment. She argues that a public service pension is not available to staff employed by and paid by the school itself, and that such a pension scheme is available or applies to teachers at the school whom she argues are employed by the Department of Education and Skills. She correctly points to the fact that there are in some schools secretaries whose salaries are paid by the Department and who have the benefit of a public service pension, and that those persons "enjoy better terms and conditions of employment than I have and ever will", have differential and preferential terms and conditions of employment and public service pensions. She argues in that case that no public service pension exists in her favour, applies to her, or may be made to her.

29. The teacher's pension scheme was created by S.I. 435 of 2009, the Secondary Community and Comprehensive School Teacher's Pension Scheme 2009. Under part 2 of the S.I. certain persons are automatically deemed to be members of the scheme, Section 4(1) (a) makes any person appointed after the 5th September, 2001 as a teacher in a secondary school, community school or comprehensive school automatically a member. A "secondary school" is defined as:-

"a school providing post-primary education to its students and which—

(a) is in receipt of funds provided by the Oireachtas in respect of the education activities for students of that school or the remuneration of teachers in that school, and

(b) in the case of a school operating on or after 22 December 2000, is recognised under section 10 of the Education Act 1998".

30. The school which employs the appellant is one which falls into the definition of "secondary school" in the S.I., it being a school in which Exchequer funds pay for the remuneration of the teachers. Ms Nic Bhrádaig accepts that certain staff members at her school do have such a pension

31. Furthermore, Section 24(3) of the Education Act 1998 provides:

"A board shall appoint teachers and other staff, who are to be paid from monies provided by the Oireachtas, and may suspend or dismiss such teachers and staff, in accordance with procedures agreed from time to time between the Minister, the patron, recognised school management organisations and any recognised trade union and staff association representing teachers or other staff as appropriate".

32. Funding of such schools is provided under Part II of that Act. The "tripartite" nature of the relationship was reviewed in the judgment of O'Malley J. in *Kelly v. Board of Management of St. Josephs National School* [2013] IEHC 392, and from the case law and the provisions of s. 24(3) it is clear that while the State pays the salaries of teachers, they are employed by the individual school in which they work. Ms Nic Bhrádaig is incorrect to characterise the State as the employer of the teachers in the school, and to argue from that premises that only she, and other persons whose salaries are paid from school funds are employed by the school.

33. Counsel for the second and third notice parties argues that this part of the test is clear and admits of no ambiguity. It is pointed out that a body cannot have a pension and that a public service pension scheme exists in the school, applies to certain members of staff in the school or may be made available to certain of those staff members, albeit it is accepted that no such scheme is available to the appellant herself. It is argued that the definition is wide and that the bodies in respect of which a pension scheme exists, apply or may be made includes bodies where no actual member of staff currently has a public service pension scheme, provided such body could in the future have employees to whom such a pension scheme might be available.

34. I accept the argument made on behalf of the second and third notice parties that there exists in Mount Anville School a public service pension scheme, and that new teachers who take on a teaching role in the school may seek to become a member of that scheme. The scheme exists in the school, albeit Ms Nic Bhrádaig is not a member. The legislation is sufficiently widely drafted to include within this part of the test a body where a public pension scheme is available to some but not all members of staff. Unfortunately for Ms Nic Bhrádaig that is the position in the school which employs her.

Arguments from the purpose of the legislation

35. Ms Nic Bhrádaig argues that the purpose of the legislation is not served by any reduction in her salary, and that I ought to take note of the fact that a saving by the school of the percentage by which her salary has been reduced by virtue of the direction in the Circular does not have the effect that the amount saved is returned to the Exchequer. She points me to the obvious fact that the recited purpose of the legislation is to improve public finances, and that, as there is no improvement in public finances by virtue of any reduction in her individual salary, that the purpose of the legislation is not properly achieved by the reduction. Accordingly, she argues that the reduction is unlawful in that it is made other than for the purpose of the legislation. She specifically points to the fact that the purpose of the legislation is not achieved by any reduction, and that the reduction is particularly invidious in those circumstances.

36. Unfortunately for Ms Nic Bhrádaig I cannot accept her submission.

37. I accept that there are circumstances where the Court might need to look to the purpose of legislation in order to construe the legislative provisions. I do not accept that any such examination is necessary in this case. The legislation is clear and while the recitals in the preamble may offer an interpretative tool, they cannot be used to displace the actual language in the operative part of a statute. Keane C.J. in *Bridgeman v. Limerick Corporation* [2001] 2 I.R. 517, dealing with the Limerick Markets Act 1852, stated that:-

"One is entitled to have regard to the preamble as being a guide to the legislative intention. No doubt, as was urged on behalf of the applicant, they cannot be called in aid to override the plain language of the enactment."

38. The Supreme Court took a similar approach in the *State (O'Connor) v O'Caomhanaigh (Governor of Mountjoy Prison)* [1963] IR112, dealing with the preamble to the Tumultuous Rising Act 1831, and stated:

"It is, I think, well established that when the express provisions of a statute are clear and unambiguous one does not resort to the preamble to the statute to restrict the scope of the statute."

39. The preamble to the FEMPI (No 2) legislation quite clearly, as Ms Nic Bhrádaig states, recites the purpose of the legislation as being the improvement in State finances, and the necessity of reducing State expenditure, or achieving significant savings in both direct and indirect expenditure. If Ms Nic Bhrádaig is correct, and no evidence has been adduced by the respondent or by any of the notice parties that would suggest otherwise, the savings on her salary are not savings from which the State gains. It could be argued, but in fact was not argued, that the school by virtue of the savings that it makes in the payment of the salary of Ms Nic Bhrádaig improves its financial position, and that this gives it less requirement to call on Exchequer funds. No evidence has been adduced before me that would suggest that this is how the amount saved has been applied, or that there is even a possible saving to the school and indirectly to the Exchequer by virtue of the reduction in Ms Nic Bhrádaig's pay. However, because the legislation in my view admits of no ambiguity, I may not as a matter of law call in aid the recitals to add to or to take from the clear statutory provisions.

40. Thus it seems to me that while Ms Nic Bhrádaig may be correct as a matter of fact that the school does not benefit from the reduction in her salary, the legislation defines her as a person to whom the statutory reduction must be applied, and she is for the purpose of this Act, and no other purpose a "public servant", and employed by a "public service body" as defined in FEMPI (No. 2). Accordingly, I reject the appeal and affirm the order of the EAT.