Neutral Citation Number: [2012] IEHC 414

THE HIGH COURT

[2001 No. 18362P]

BETWEEN

PATRICK QUIGLEY, MICHAEL WALSH, NOEL COLLINS, JULIAN CAMPBELL, MARIANNE GALLAGHER, PATRICK MOYNIHAN, GEORGE BLACK, NOEL McMORRAN, CATHERINA HEARNE, MICHAEL MURPHY, JOHN J. O'CONNOR, WILMA O'FLYNN, GERARD FORDE, ARTHUR TOBIN AND DAVID O'BRIEN

PLAINTIFFS

AND

CITY OF CORK VOCATIONAL EDUCATIONAL COMMITTEE, MINISTER FOR EDUCATION AND SCIENCE, IRELAND AND THE ATTORNEY GENERAL, DUBLIN INSTITUTE OF TECHNOLOGY AND CORK INSTITUTE OF TECHNOLOGY

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 14th day of February, 2012.

1. Procedural and factual background to the application

1.1 These proceedings were initiated by a plenary summons which issued on 14th December, 2001. An amended statement of claim, in which the status of, and the role engaged by, the various parties to the proceedings were explained, was delivered on 29th October, 2003.

1.2 As pleaded in the amended statement of claim, the plaintiffs have brought these proceedings as being at the material times "eligible part-time teachers on the staff as officers" of the first named defendant (the VEC). The VEC is a statutory body corporate established under the Vocational Education Act 1930 (the Act of 1930). The second named defendant (the Minister) is sued as the Minister with responsibility for education, including the higher education sector. It is important to emphasise that neither the Minister nor the third nor fourth named defendants (the State Parties) are parties to the application to which this judgment relates. Cork Regional Technical College was established as a body corporate by s. 3 of the Regional Technical Colleges Act 1992 (the Act of 1992). It is now Cork Institute of Technology (CIT), which is currently the fifth named defendant. By virtue of the application of s. 18 of the Act of 1992 all liabilities incurred before "the establishment date", as defined therein, by the VEC for the purposes of or in connection with Cork Regional Technical College (the College) were on establishment date transferred to the relevant body corporate established by the Act of 1992, now CIT. Both the VEC and CIT are sued in these proceedings in relation to events which straddled the period before and after the establishment date. They are represented by the same legal team in these proceedings and for present purposes they will be collectively referred to as "these defendants". The body corporate which, in reality, became responsible for the College under the Act of 1992 will be referred to as CIT, which was treated by counsel for the plaintiffs as the relevant defendant for the purposes of this application.

1.3 Given the Court's function, as explained later, it is necessary to accurately outline the factual basis, as well as the legal basis, on which the thirteen plaintiffs who remain in these proceedings have pleaded their case in the amended statement of claim. It is pleaded that at all material times they were employed as "Eligible Part-Time Teachers" by the VEC at the College situate at Bishopstown, Cork. At all material times the plaintiffs performed and were contractually required to perform "like work and like hours as permanent whole-time teachers employed [by the VEC], yet their conditions of employment and remuneration were markedly different", in that they –

> (a) "were on a lower salary scale vis-à-vis their permanent whole-time comparators", and,
>
> (b) "as compared to their permanent whole-time comparators and as compared to their fellow eligible part-time comparators, had lower incremental status and eligibility and were thus discriminated against in an invidious fashion".

Since 1987 the plaintiffs, while so employed, have been "remunerated in a fashion invidiously discriminatory vis-à-vis their whole-time colleagues notwithstanding that they performed like work and worked like hours". Each was employed on a yearly contract which provided for automatic renewal, subject to satisfactory service.

1.4 It is further pleaded that, although the VEC, presumably, meaning its successor, was entitled, pursuant to s. 11(4) of the Act of 1992 to make appointments on a temporary part-time or contract basis, it was never envisaged by the Oireachtas that the statutory power in question would be employed in a manner so that persons such as the plaintiffs would be employed "more or less as *de facto* permanent whole-time employees", but without the protections and remuneration offered to permanent whole-time employees. On that basis, it is pleaded that their treatment was ultra vires the provisions of the Act of 1992 and that the exercise of the relevant statutory powers was unreasonable in law, and the failure to treat them in a manner equivalent to that of permanent whole-time employees in respect of remuneration, tenure and superannuation was unreasonable in law. It is also pleaded that they were wrongly precluded from admission to the VEC's superannuation scheme. Further, it is pleaded that, having regard to the provisions of Article 40.1 of the Constitution, these defendants are not entitled to discriminate between the plaintiffs, on the one hand, and their identified comparators (whole-time employees and part-time employees), on the other hand, in terms of tenure, remuneration and superannuation. Finally, it is pleaded that the plaintiffs have suffered loss as a result of the discriminatory, unreasonable and *ultra vires* actions alleged, such loss having been caused by reason of unreasonable, unconstitutional and unlawful activities of the defendants.

1.5 Arising out of the foregoing pleas, in the substantive proceedings the plaintiffs seek certain declaratory relief, primarily declarations that the manner in which they were treated by these defendants amounted to invidious discrimination and was contrary to their rights under Article 40.1 of the Constitution and was ultra vires the powers of the defendants under the Act of 1992. Further, they seek orders directing the defendants to make good the monetary loss they allege they have sustained since taking up employment with the VEC, damages for breaches of their constitutional right to equality, and the taking of an account of all monies due to them and an order for the payment of all such monies as are found to be due.

1.6 Although not pleaded in the statement of claim, as I understand the position, the plaintiffs' situation changed in 1999, because in that year they were awarded whole-time permanent contracts as teachers in the College. Therefore, their complaints are historical. The losses in respect of which they claim reparation are historical, in the sense that they are related to the failure to pay them the level of salary applicable to permanent whole time teachers during the material period, that is to say, the period of their employment with these defendants prior to 1999, and to accord them appropriate incremental increases in their salary during that period and to provide for the appropriate level of superannuation cover for that period.

1.7 These defendants have delivered a full defence in which they have raised a number of preliminary objections (for example, that any liability of the VEC lies with CIT and that the VEC should be released from the proceedings; and that the plaintiffs' claim is statute-barred). What is relevant for present purposes is that they have asserted that the amended statement of claim does not disclose any cause of action against these defendants or either of them, or, in the alternative, no claim cognisable by the Court, in circumstances where the substance of their claims is based on discrimination, these defendants asserting that claims so founded may only be made in accordance with the provisions of applicable equality or equal pay legislation. Further, they have contended that Article 40.1 of the Constitution does not confer any right of action on the plaintiffs against these defendants.

1.8 In the reply delivered by the plaintiffs on 10th February, 2005 they have joined issue on the objections and matters pleaded by these defendants.

1.9 The application to which this judgment relates arose out of a motion brought by these defendants on foot of a notice of motion dated 1st December, 2005, in which, in broad terms, they sought to have the proceedings struck out on the basis that the plaintiffs' claim does not disclose any reasonable cause of action against these defendants, or, alternatively, to have the issue as to whether they have any reasonable or sustainable cause of action or any claim cognisable or justiciable by the Court determined as a preliminary issue under the Rules of the Superior Courts 1986.

1.10 By order of the Court made on 13th March, 2006 it was ordered that, without further pleadings, a preliminary issue be tried in relation to two questions set out in the order, the wording of which had been agreed by the plaintiffs and these defendants. Although the perfected order suggests that the Court directed that these defendants be the moving parties, on the hearing of the preliminary issue it was agreed by the parties that the Court did not so direct. Therefore, on the hearing of the preliminary issue, the plaintiffs were the moving parties.

2. The issue questions and invoked Constitutional and statutory provisions

2.1 The first question for determination by the Court was formulated as follows in the order of 13th March, 2006:

> "Assuming for the purposes of the determination of this issue (and for that purpose only) that the facts pleaded in the Plaintiffs' amended Statement of Claim are true are the plaintiffs entitled to rely on Article 40.1 of the Constitution so as to maintain the claims against [these] Defendants set out in the amended Statement of Claim?"

In relation to that question (the constitutional issue), Article 40.1 of the Constitution provides as follows:

> "All citizens shall, as human persons, be held equal before the law.
>
> This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

2.2 The second question for determination by the Court was formulated as follows in the order of 13th March, 2006:

> "Assuming for the purposes of the determination of this issue (and for that purpose only) that the facts pleaded in the Plaintiffs' amended Statement of Claim are true was the issue of successive part-time temporary contracts to the Plaintiffs *intra vires* the powers of [these] Defendants under Section 11(4) of the [Act of] 1992?"

2.3 Because the basis on which the Court is required to address the questions posed is on the assumption that the facts pleaded in the amended statement of claim are true, I have endeavoured to set out those facts as accurately as possible at paras. 1.3 and 1.4 above. The facts pleaded have been elaborated on in extensive replies to particulars sought by these defendants, which have been put before the Court. I propose referring only to one aspect of those replies in the interests of clarity. The plaintiffs have stated in their replies that the word "eligible" is used in the statement of claim for the purpose of advancing a plea that the plaintiffs were eligible for appointment by reason of their qualifications and/or experience to positions as whole-time permanent lecturers at the College. It is stated that the term "eligible part-time teacher" is a term of art which has derived a particular meaning in the context of employment with the VEC, reference being made to an agreement between the VEC and the Teachers' Union of Ireland, the terms of which, including a term outlined in the replies as "that 'eligible' teachers working the threshold or above hours would be offered a fixed-term annual renewable contract of employment", were incorporated into contracts entered into by individual "eligible" teachers with the VEC. What that suggests is that the terms of employment of the relevant class of employees, namely, "eligible part-time teachers", within which the plaintiffs in these proceedings consider they belong, were of considerable complexity (as the booklet of circulars and agreements which was put before the Court indicates) and also to some extent had been subject to collective bargaining and industrial relations processes. However, it is important to emphasise that the Court is concerned only with the facts, which are assumed to be true, which have been pleaded in the amended statement of claim in very general terms and must determine the preliminary issues by reference to those facts only.

2.4 In relation to the second question (the *ultra vires* issue) and also, to some extent, the Article 40.1 issue, the provisions of the Act of 1992 which were cited as being relevant may be summarised as follows:

> (a) Section 12 contained provisions in relation to existing staff. Sub-section (1) provided that on the establishment day an existing employee of the VEC as an officer or servant thereof would become an officer or servant (as appropriate) of the relevant college to which the Act of 1992 applied (i.e. in this case, the College). While s. 12 provided for continuity of employment on and from the establishment day, it is clear that, by virtue of subs. (1)(d) and (e), the affected employees would not receive less remuneration or be subject to less beneficial conditions of service than hitherto and the conditions of service, restrictions, requirements and obligations to which each such employee was subject would continue unless varied by agreement. In the circumstances, it seems to me that s. 12 is only of peripheral, if any, relevance to the preliminary issue questions.
>
> (b) Section 11 contained general provisions in relation to the appointment and the terms of employment of staff. Sub-section (1) conferred the power of appointing "such and so many persons to be officers . . . and servants" as the

governing body [of the College] should think proper, subject, however, to the approval of the Minister given with the concurrence of the Minister for Finance. Sub-section (2), which was expressed to be subject to s. 12, empowered the College to fix the terms and conditions of employment of an officer or servant, subject to a similar qualification in relation to approval. Sub-section (4), which as I understand the plaintiffs' case, is the provision under which they contend CIT continued to employ them under new contracts after the Act of 1992 became operative, provided as follows:

> "A college, subject to the provisions of section 13 of this Act, may appoint suitable persons to research fellowships, research assistantships and other support posts in relation to the offering of services, on a temporary, part-time or contract basis, subject to such conditions as may be laid down by the Minister with the concurrence of the Minister for Finance."

Sub-section (6) made remuneration of and payment of allowances to staff subject to similar approval.

(c) For completeness, s. 13, to which s. 11(4) was subject, dealt with the College obtaining approval from the Minister for operational programmes (including proposed staffing structures) and budgetary matters.

2.5 No specific provision of the Act of 1930 or of the amending Vocational Education Act 2001 was cited.

3. The constitutional issue: the plaintiffs' submissions and the authorities relied on

3.1 Counsel for the plaintiffs summarised the gravamen of the plaintiffs' case in relation to both issues as being that the plaintiffs were required to perform the same type of work in terms of teaching hours, administrative duties and suchlike as were performed by whole-time employees. Despite this they were offered only part-time, fixed term contracts renewable annually over a significant period of time. As a consequence, they were not remunerated, or afforded the same terms and conditions of employment, as their full-time counterparts, particularly in terms of salary, full increments and suchlike. That discriminatory treatment was unlawful as being in breach of Article 40.1 and as being *ultra vires* these defendants' powers under the Act of 1992, it was submitted.

3.2 It was acknowledged by counsel for the plaintiffs that the authority which is probably closest having regard to the factual context to this case, *Murtagh Properties v. Cleary* [1972] I.R. 330, if it represents the law today, does not support the plaintiffs' claim by reference to Article 40.1. However, it was argued that the judgment of Kenny J. in that case no longer represents correct law. Counsel for the plaintiffs traced the evolution of the modern approach to Article 40.1 through later authorities, which it is necessary to consider in some detail.

3.3 The *Murtagh Properties* case concerned an application for an interlocutory injunction by the plaintiff public house proprietor against the secretary of a trade union to restrain picketing of the public house. The position of the trade union was that the employment by the plaintiff proprietor of part-time women employees, who were not members of the trade union, was in breach of an agreement between an employer's association and the trade union. The plaintiff argued, *inter alia*, that the objection of the trade union to the employment of the women by the plaintiff was based solely on the ground that the employees in question were female, which was contrary to their constitutional right of equality before the law under Article 40.1, so that the picket was designed to compel the plaintiff to infringe the constitutional right of the women employees. Having quoted Article 40.1, Kenny J. found that the provisions of Article 40.1 were not applicable to the circumstances, stating (at p. 334):

> "This article is not a guarantee that all citizens shall be treated by the law as equal for all purposes but it means that they shall, as human persons, be held equal before the law. It relates to their essential attributes as persons, those features which make them human beings. It has, in my opinion, nothing to do with their trading activities or with the conditions on which they are employed: see *The State (Nicolaou) v. An Bord Uchtála*; and *Quinn's Supermarket v. The Attorney General*."

At the heart of the reliance of the plaintiff in that case on Article 40.1 was the suggestion that the article has what is now referred to as horizontal effect, in other words, that it is capable of creating private law causes of action or otherwise affecting legal relations of individuals and corporations. Counsel for the plaintiffs acknowledged that, on the facts of that case, a classically horizontal situation existed in which one private entity, the plaintiff proprietor, was seeking equitable relief against another private entity, a trade union. However, it was emphasised by counsel for the plaintiffs that this case is different, the critical difference being, it was submitted, that here the plaintiffs were employed, to use EU law parlance, by emanation of the State. Their employer at all material times was a creature of statute and was acting in pursuance of statutory powers. It was emphasised that this is not a case where the employer was a private body subject to the general law.

3.4 It is convenient at this juncture to consider the decision of the Supreme Court in *Quinn's Supermarket Ltd. v. Attorney General* [1972] I.R. 1 referred to by Kenny J. in the *Murtagh Properties* case. In that case the plaintiffs had sought a declaration that a statutory instrument dating from 1947, which exempted shops which sold only Kosher meat from the restrictions on the opening hours of meat shops, was invalid having regard to certain provisions of the Constitution, including Article 40.1. In a passage from the majority judgment of the Supreme Court, which was relied on by counsel for these defendants, Walsh J. stated (at p. 13):

> "The provisions of Article 40, s. 1, of the Constitution were discussed in the decision of this Court in *The State (Nicolaou) v. An Bórd Uchtála*. As was there decided, this provision is not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and (as the Irish text of the Constitution makes quite clear) is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community. This list does not pretend to be complete; but it is merely intended to illustrate the view that this guarantee refers to human persons for what they are in themselves rather than to any lawful activities, trades or pursuits which they may engage in or follow."

Walsh J. stated that Article 40.1 had no bearing whatsoever upon the point to be considered in the case before the Court, as no question of human equality or inequality arose.

3.5 The passage from the judgment of Walsh J. in the *Quinn's Supermarket* case, which I have quoted above, was approved of, and followed by, the Supreme Court in *Brennan v. A.G.* [1984] ILRM 355. At issue in that case was a claim that certain statutory provisions dating back to 1852, by reference to which the rateable valuation of agricultural land was determined, were invalid having regard to the provisions of the Constitution. As regards the invocation of Article 40.1 by the plaintiffs, O'Higgins C.J. stated (at p. 364):

> "The plaintiffs' arguments in relation to Article 40.1 have already been noted as have the submissions of the Attorney

> General. In the view of the court a complaint that a system of taxation imposed on occupiers of land which has proved to be unfair, even arbitrary or unjust, is not cognisable under the provisions of Article 40.1. This section deals, and deals only with the citizen as a human person and requires for each citizen as a human person, equality before the law."

O'Higgins C.J. stated that the inequality of which the plaintiffs complained in that case did not concern their treatment as human persons. It concerned the manner in which occupiers and owners of land were rated and taxed. Each owner and occupier would be treated in exactly the same way because the tax related not to the person but to the land occupied.

3.6 Counsel for the plaintiffs pointed to the decision of the Supreme Court on a reference under Article 26 of the Constitution in The Employment Equality Bill 1996 [1997] 2 I.R. 321 as representing the beginning of the modern attitude to the application of Article 40.1. However, he pointed to the earlier decision of the High Court (Barr J.) in *Cox v. Ireland* [1992] 2 I.R. 503 as being irreconcilable with the *Murtagh Properties* case.

3.7 In the *Cox* case the plaintiff challenged the constitutionality of the provisions of s. 34 of the Offences against the State Act 1939, which provided that a person who was convicted by the Special Criminal Court of a scheduled offence and who at the time of the conviction was the holder of an office or employment remunerated out of public sources would upon conviction forfeit the office or employment and be disqualified from holding any like office for a period of seven years subsequent to the date of the conviction and would also be disqualified from receiving a publicly funded pension, subject to the proviso that the government might, in its absolute discretion, remit in whole or in part any such forfeiture. The plaintiff invoked various provisions of the Constitution, including Article 40.1 and Article 40.3. Barr J., having analysed s. 34 and its impact, concluded that the penalties thereby imposed on those within its compass were patently unfair and capricious in nature and amounted to an unreasonable and unjustified interference with the personal rights which are guaranteed by Article 40.3. He continued (at p. 513):

> "The provisions of the section also amount to unfair discrimination under Article 40, s. 1, which guarantees equality before the law. See judgment of Supreme Court in *The People (Director of Public Prosecutions) v. Quilligan (No. 2)* [1989] I.R. 46 (Henchy J. at final paragraph of page 56)."

3.8 That broad proposition must be seen in the light of what Barr J. considered his task to be. He considered that it was to determine whether s. 34, in imposing certain penalties on those within its ambit, was fair and even handed. His analysis of the impact of s. 34 highlighted various differences of treatment of persons convicted under the Act of 1939 by the application of s. 34, for example, that it was limited to persons in receipt of, or entitled to, remuneration or benefit from public funds. It is to be inferred that Barr J. regarded the difference of treatment exemplified by that difference coupled with the other differences of treatment which he outlined (for instance, that s. 34 did not apply when the Director of Public Prosecutions directed the accused to be tried in an ordinary court as distinct from the Special Criminal Court), as being on a par with the inequality referred to in the paragraph from the judgment of Henchy J. in the *Quilligan* case to which he referred. In that paragraph, Henchy J. stated that, if the Supreme Court were to assume inherent jurisdiction, as had been suggested by the DPP, to order a retrial following an acquittal by direction of a judge in the Central Criminal Court –

> ". . . the purported exercise of the suggested jurisdiction would be open to question on other constitutional grounds, such as in treating persons acquitted by direction in the Central Criminal Court, as compared with persons similarly acquitted in the Circuit Court or the Special Criminal Court, with a degree of inequality and unfair discrimination beyond that necessarily resulting from the decision in *The People (DPP) v. O'Shea* [1982] I.R 384"

Indeed, it would be difficult to argue that Barr J. was incorrect in regarding the position of the plaintiff in the Cox case, on whom an additional penalty was being imposed in the context of the administration of justice to which other persons found guilty of similar criminal offences would not be subjected, as being similar to that of an acquitted person of whom Henchy J. spoke, who in the context of the administration of justice would be subjected to a retrial to which persons acquitted under other criminal jurisdictions would not be subjected.

3.9 While the Supreme Court dismissed the appeal in the *Cox* case, holding that, for the reasons outlined, s. 34 failed as far as practicable to protect the constitutional rights of the citizen and, accordingly, was impermissibly wide and indiscriminate, it did so without explicitly referring to either Article 40.1 or Article 40.3. The decision of the Supreme Court, in my view, cannot be regarded as having been based solely, or even primarily, on the application of Article 40.1 to the employment context which was part only of the factual matrix, and, in particular, it should not be viewed as having applied Article 40.1 *simpliciter* in the context of employment law to unequal treatment in relation to an employee's entitlements. Rather, it concerned the imposition of a penalty in the context of the administration of justice, being a penalty which potentially affected a person's unenumerated person right to earn a livelihood. As is pointed out in J.M. Kelly: *The Irish Constitution* (4th Ed.) at para. 7.2.47, the restrictive "human personality" approach to the application of Article 40.1 has never been applied in cases touching on the administration of justice nor to cases on the operation of the democratic process (as the authorities referred to at 3.14 below illustrate).

3.10 Returning to the *Employment Equality Bill 1996* reference, one aspect of the Bill which led to the consideration by the Supreme Court of Article 40.1 was what was described as "the age ground". Section 6(3) of the Bill expressly provided that treating a person aged 65 or over or a person under 18 more favourably or less favourably than another (whatever the other person's age) in an employment context should not be regarded as discrimination on the age ground. In dealing with the submissions made by counsel assigned by the Court that that provision and the other age related provisions would discriminate against employees or potential employees on the ground of age in violation of their rights under Article 40.1, Hamilton C.J., delivering the judgment of the Court, commenced his analysis of the authorities by stating (at p. 342) that the nature of the guarantee provided in Article 40.1 had been explained in the passage from the judgment of Walsh J. in the *Quinn's Supermarket* case quoted at para. 3.4 above. However, he omitted the last sentence as quoted above, in which Walsh J. had stated that the guarantee in Article 40.1 refers to human persons for what they are in themselves, rather than to "any lawful activities, trades or pursuits which they may engage in". That sentence was clearly reflected in the observations of Kenny J. in the *Murtagh Properties* case, in which he stated that Article 40.1 had nothing to do with persons' trading activities or their conditions of employment. Later (at p. 346), Hamilton C.J. analysed the application of Article 40.1 to the difference of treatment on the ground of age, stating:

> "Article 40, s. 1 as has been frequently pointed out, does not require the State to treat all citizens equally in all circumstances. Even in the absence of the qualification contained in the second sentence, to interpret the Article in that manner would defeat its objectives. In the present context, it would mean that the State could not legislate so as to prevent the exploitation of young people in the workplace or, at the other end of the spectrum, to make special provision in the social welfare code for the elderly. The wide ranging nature of the qualification which follows the general guarantee of equality before the law puts beyond doubt the legitimacy of measures which place individuals in different categories for the purposes of the relevant legislation. In particular, classifications based on age cannot be regarded as, of themselves,

constitutionally invalid. They must, however, be capable of justification on the grounds set out by Barrington J. in *Brennan & ors. v. Attorney General* [1983] ILRM 449 at p. 480 as follows:

> 'The classification must be for a legitimate legislative purpose … it must be relevant to that purpose, and that each class must be treated fairly'."

3.11 On the reference, it had been submitted on behalf of the Attorney General that the requirement in Article 40.1 that all citizens be held "equal before the law" was essentially a prohibition against unjustifiable discrimination in legislation. That argument was dealt with as follows in the judgment of the Court (at p. 346):

> "The Court is satisfied that this submission goes too far. The guarantee of 'equality before the law' is in its terms not confined to the State in its legislative role. It is unnecessary, in the context of the present case, to consider to what extent, if any, the provisions of the Article may be applicable in the area of private law. It is sufficient to say that the Article, in common with the other Articles of the Constitution which are concerned with fundamental rights, does not confer a right on any person which, in the absence of the Constitution he would not in any event enjoy as a human being. As Walsh J. said, speaking for this court in *The State (Nicolaou) v. An Bórd Uchtála* [1966] I.R. 567 at p. 639, Article 40, s. 1 is: –
>
> > 'an acknowledgement of the human equality of all citizens and that such equality will be recognised in the laws of the State'."

Understandably, as it was not necessary to do so, the Supreme Court gave no guidance on the application of Article 40.1 in the area of private law. Nor did it give any specific guidance as to the extent, or the implications, of the guarantee of "equality before the law" on the exercise of statutory powers by a statutory body which creates private law rights in favour of individuals, for example, contractual rights in favour of employees.

3.12 In addressing the age ground, Hamilton C.J. considered the forms of discrimination proscribed by Article 40.1 stating (at p. 347):

> "The forms of discrimination which are, presumptively at least, prescribed *(sic)* by Article 40, s. 1 are not particularised: manifestly, they would extend to classifications based on sex, race, language, religious or political opinions."

As regards discrimination based on age, while he stated that it would not seem, at first sight, so clearly within the ambit of Article 40.1, he made it clear later that the aged are entitled as human beings to protection against laws which discriminate against them, unless the differentiation is related to a legitimate objective and is not arbitrary or irrational, which echoes the test laid down by Barrington J. at first instance in the Brennan case. In relation to the age ground, the Supreme Court found that s. 6 of the Bill, in seeking to eliminate discrimination from the workplace so far as practicable, was designed to meet an important objective which is enshrined in the Constitution itself. It held that, since the age limits chosen, of 18 and 65 respectively, reflected the threshholds at which a significant number of the population enter or leave the working place, their choice could not plausibly be characterised in the view of the Court as irrational or arbitrary.

3.13 Counsel for the plaintiffs also relied on the more recent decision of the Supreme Court in *An Blascaod Mór Teo v. Commissioner for Public Works (No. 3)* [2000] 1 I.R. 6, in which the Supreme Court upheld a decision of the High Court declaring that a section of An Blascaod Mór National Park Act 1989, which excluded from the compulsory acquisition powers conferred by the Act in connection with the establishment of a national historic park on the Great Blasket Island certain land, that is to say, land owned or occupied by a person who had owned or occupied it since 17th November, 1953 and was ordinarily resident on the Island before that date, and land owned and occupied by a relative of such person. Applying the test he had formulated in the *Brennan* case, Barrington J., delivering the judgment of the Supreme Court, stated (at p. 19):

> "In the present case the classification appears to be at once too narrow and too wide. It is hard to see what legitimate legislative purpose it fulfils. It is based on a principle - that of pedigree - which appears to have no place (outside the law of succession) in a democratic society committed to the principle of equality. This fact alone makes the classification suspect. The court agrees with the learned trial judge that a constitution should be pedigree blind just as it should be colour blind or gender blind except when those issues are relevant to a legitimate legislative purpose. This Court can see no such legitimate legislative purpose in the present case and has no doubt but that the plaintiffs are being treated unfairly as compared with persons who owned or occupied and resided on lands on the island prior to November, 1953, and their descendants."

On that basis, the Supreme Court held that the Act was invalid having regard to the provisions of the Constitution.

3.14 In support of his contention that Article 40.1 has, for over a decade, been given a more expansive application by the Superior Courts than was envisaged in the *Murtagh Properties* case, where the concept of equality before the law was connected to human persons' "essential attributes as persons", counsel for the plaintiffs referred the Court to a number of cases in the area of electoral law. In particular, he relied on the decision of the High Court (McKechnie J.) in *Kelly v. Minister for the Environment* [2002] 4 I.R. 191, which was upheld by the Supreme Court. The issue in that case was the constitutionality of a provision in the Electoral Act 1997 which excluded payments and services provided to a person out of public funds, by virtue of the person being a member of the Oireachtas, from the definition of election expenses in respect of which there were statutory limits imposed in relation to national and European elections. Having referred to the decision of the Supreme Court in the *Quinn's Supermarket* case and having stated that the "human attributes" test as to the scope of Article 40.1 was originally thought to have placed an immovable restriction on its availability to support a constitutional challenge to a piece of legislation such as an Electoral Act, McKechnie J. stated that that historical perspective could no longer prevail in view of a number of decisions (*McKenna v. An Taoiseach (No. 2)* [1995] 2 I.R. 10; *Coughlan v. Broadcasting Complaints Commission* [2000] 3 I.R. 1; and *Redmond v. Minister for the Environment* [2001] 4 I.R. 61). He stated (at p. 218):

> "It appears from the foregoing and now seems clear that the State must in its electoral law have regard to the concept of equality and must ensure that with any provisions passed into law the guarantee of equality as contained in Article 40.1 of the Constitution will be respected. It cannot therefore by any provision of a statute, or by the manner and way in which it might implement such a provision, cause unjustified advantage to accrue to one person, class or classes of the community as against, or over and above, another person or class of that same community. Equals must be treated equally."

3.15 Arising out of the analysis of the relevant authorities, the case made by counsel for the plaintiffs is that in *The Employment*

Equality Bill 1996 reference the Supreme Court appears to have implicitly abandoned the restrictive version of the "human personality" doctrine and substituted for it an inquiry under which it is necessary to establish that a classification or a differentiation of individuals for the purposes of legislation is for a legitimate legislative purpose and is relevant to that purpose and is neither irrational or unfair. The core question here, it was submitted, is whether, having regard to the difference of treatment of the plaintiffs, on the one hand, and of whole-time employees of these defendants, on the other hand, Article 40.1 is engaged. If it is, the position of the plaintiffs is that it must confer a right of action on them because the Court must have jurisdiction to adjudicate on a claim of alleged discrimination contrary to Article 40.1.

3.16 In suggesting how that core question should be answered, it was submitted that Article 40.1 is engaged here, because these defendants, as emanations of the State, had engaged in what was objectively a discriminatory work practice. It was a work practice which gave effect to differences of treatment which were not *de minimis* and which were not the by-product of circumstances. There was no objective justification for the work practice, which involved differences of treatment going to the heart of the plaintiffs' employment. As I have recorded earlier, counsel for the plaintiffs emphasised that the critical point in this case is that the employment of the plaintiffs was by emanation of the State acting pursuant to statutory powers. Difference of treatment of similarly situated employees by such a body without objective justification constitutes a breach of Article 40.1, it was submitted.

3.17 As counsel for the plaintiffs pointed out, and as is recorded in the judgment of the Supreme Court in *The Employment Equality Bill 1996* (at p. 342), it had been held in several cases in the Superior Courts that, among the unenumerated personal rights guaranteed by Article 40.3 of the Constitution, is the right to work and the right to earn a livelihood (the Supreme Court citing the decision in the *Murtagh Properties* case) and that certain rights associated with those rights, such as the right to a pension, gratuity or other emolument already earned, or the right to the advantages of a subsisting contract of employment, are recognised as property rights which under the Constitution the State is obliged to protect, so far as practicable, from unjust attack (the Supreme Court citing the decision in the *Cox* case). It was submitted on behalf of the plaintiffs that regarding the right to earn a livelihood as an unenumerated right under Article 40 must be based on the fact that it is a right which inheres in the person by nature of his human personality. Further, it was submitted that employment is an integral part of the human condition and that discriminatory treatment in the workplace engages the individual so treated as a human being.

3.18 Counsel for the plaintiffs referred the Court to a decision of the Supreme Court of Canada (*Andrews v. Law Society of British Columbia* (1989) 1 SCR 143) on the application of the guarantee of equality before and under the law which is contained in s. 15 of the Canadian Charter of Rights. Having considered the commentary contained in Hogg on the *Constitutional Law of Canada* (5th Ed. Supplemented) at chapter 55 and, in particular, pp. 55 – 18 to 55 – 22, to which the Court was referred by counsel for these defendants, it would appear that currently Canadian authority does not support the plaintiffs' position on the application of Article 40.1, on its own, to the factual circumstances of the plaintiffs as represented by them in the amended statement of claim. Hogg has pointed out that the restrictive application of s. 15 to the grounds listed in s. 15 (discrimination based on race, nationality or ethnic origin, colour, religion, sex, age or mental or physical disability) and to analogous grounds is a permanent feature of Canadian jurisprudence on s. 15.

4. Constitutional issue: these defendants' submissions and the authorities relied on

4.1 It was submitted on behalf of these defendants that Article 40.1 has no application to the facts of this case, having regard to the traditional approach to the application of Article 40.1, as exemplified by the decision in the *Murtagh Properties* case, which, it was submitted, has been followed by the courts. In particular, it was submitted that the restricted application of Article 40.1 applied by the Supreme Court in the *Brennan* case has never been overturned. It was followed by the Supreme Court in *Madigan v. A.G. & Ors*. [1986] ILRM 136, where the constitutionality of a provision of the Finance Act 1983, which imposed a residential property tax, was unsuccessfully challenged. More recently, in *District Judge McMenamin v. Ireland* [1996] 3 I.R. 100, the High Court (Geoghegan J.) applied the decision of the Supreme Court in *Quinn's Supermarket*, holding that the differentiation which he had found in qualification for full pension as between judges of the District Court, who qualified for a full pension after twenty years service, and judges of the Circuit Court, who qualified for a full pension after fifteen years service, even if unfair, could not of itself contravene Article 40.1, because that provision requires only equality as human persons and the inequality in qualification for full pensions was not an inequality between the judges as human persons.

4.2 Counsel for these defendants did not accept that the decision of the Supreme Court in *The Employment Equality Bill 1996* reference, or the subsequent authorities relied on by counsel for the plaintiffs, reflected a departure from the earlier jurisprudence that only "human attributes" based forms of discrimination are outlawed by Article 40.1. It was submitted that the aspects of that decision in respect of which reliance was placed on Article 40.1 were concerned with age discrimination, which is presumptively outlawed by Article 40.1, although the provisions under consideration in that case were held not to be discriminatory in a manner which infringed Article 40.1. Similarly, it was submitted that the impugned legislative provision in the *An Blascaod Mór* case had ethnic overtones, reflecting the observations of Barrington J. in relation to the principle of pedigree quoted at para. 3.13 above. As regards the authorities, such as the *Kelly* case, which addressed issues arising under electoral law, it was submitted that, as they were concerned with the application of Article 40.1 in the particular context of participation in the political process, where other provisions of the Constitution, for example, Article 16, came into play, different considerations arose there to the considerations which arise in the factual context of this case. Similarly, it was submitted that different factors and considerations underpin the judgments relied on by the plaintiffs concerning consistency of treatment to be afforded to persons charged on criminal offences, including *Byrne v. Government of Ireland* (Unreported, Supreme Court, 11th March, 1999), and *Corbett v. DPP* (Unreported, High Court, 7th December, 1999). In short, it was submitted that neither the electoral law based authorities nor any of the other authorities relied on by the plaintiffs provide support for the contention that the plaintiffs may invoke Article 40.1 on the basis pleaded in the amended statement of claim for the purpose of pursuing what, it was submitted, is in substance a claim for damages.

4.3 Indeed, counsel for these defendants went further, in that it was contended that what the Court is, in effect, being asked to do in this case is to conjure up out of thin air a parallel equality jurisdiction of uncertain, sweeping ambit, enforceable by action without any limitations or protections found in the statutory regimes which are in place governing employment law. It was in this context that it was submitted by counsel for these defendants that Article 40.1 does not affect relations between private citizens, that is to say, that it does not have horizontal effect. In this connection, counsel quoted from the decision of this Court (O'Higgins J.) in *Equality Authority v. Portmarnock Golf Club* [2005] IEHC 235, which was under appeal, to the following effect:

> "I accept the plaintiffs' submission that as interpreted by the courts Article 40.1 of the Constitution guarantees process equality and does not impose obligations on citizens in their private relations."

Since this application was heard, the Supreme Court has given judgment on the appeal against the decision of O'Higgins J., which is reported at [2010] 1 ILRM 237. The Supreme Court determined the matter on the basis of the proper interpretation of the relevant sections of the Equal Status Act 2000 and did not address the issue on the constitutionality of the relevant provisions. However, it is worth recording that, on the basis that the statement by O'Higgins J. represents the law and that Article 40.1 does not impose

obligations on private employers, counsel for these defendants posed the rhetorical question. What authority is there, he asked, for public sector employers being subject to a different regime to private employers, or put another way, how can Article 40.1 preclude a public sector employer from doing what a private sector employer is entitled to do?

4.4 Counsel for the defendants referred to the elaborate statutory provisions which currently exist in this jurisdiction to deal with equality and non-discrimination in the workplace, starting with the provisions of the Anti-Discrimination (Pay) Act 1974 and including the provisions of the Protection of Employees (Part-Time Work) Act 2001 (the Act of 2001), which the plaintiffs were not able to avail of because it post-dated their complaints. The strictures embodied in the legislation in relation to enforcing the rights and obligations created by such legislation were emphasised by counsel for these defendants, for example, that enforcement generally is by complaint to a specialist tribunal created by the relevant legislation, not by action in court, and that specific time limits, usually short time limits, are laid down for the initiation of a complaint. Counsel for these defendants made specific reference to the judgment of Charleton J. in *Doherty v. South Dublin County Council (No. 2)* [2007] 2 I.R. 696 (at p. 707), where it was pointed out that, where a specific legal obligation is created for the first time by statute (the Equal Status Acts 2000 – 2004 being in issue in that case), and a mode of enforcement is set up through an agency which was thereby created and limited rights of access to the courts are created, it amounts to the creation of a separate legislative and administrative scheme which does not create a series of rights which are either enforceable in damages, or outside the context of that scheme. Charleton J. cited the observations of Fennelly J. in *Maha Lingam v. Health Service Executive* [2006] ELR 137, who made similar observations in relation to the protection afforded by the Protection of Employees (Fixed-Term Work) Act 2003 (the Act of 2003), stating that it contained its own statutory scheme of enforcement and that it did not appear to be envisaged that it was intended to confer independent rights at common law.

4.5 As it happened, the plaintiffs in this case did not have to invoke the provisions of the Act of 2003, because their situation had been ameliorated four years before it came into operation, when they were given permanent contracts. However, as counsel for these defendants pointed out, the reality of this case is that the plaintiffs' principal complaint against these defendants – that they were employed by these defendants on a temporary basis on yearly fixed-term contracts for long periods and in some cases for as long as fifteen years – was not at the material time covered by any equality or employee protection legislation of the type which is now in force. Notwithstanding that, it was submitted that Article 40.1 cannot be resorted to by the plaintiffs to provide the remedies that they seek. The response of counsel for the plaintiffs was that these defendants' argument "begs the question", in that it assumes that, in the absence of legislation regulating equality in the workplace, a plaintiff in State employment would never be entitled to invoke Article 40.1, irrespective of how egregious the discrimination might be, the so-called "marriage bar", which applied to female public servants before it was abolished in the early 1970s, being cited as being historically a manifestly egregious discriminatory work practice.

4.6 In summary, counsel for these defendants characterised the submissions made on behalf of the plaintiffs as "extravagant" on a number of bases: that there is no authority to support the plaintiffs' reliance on Article 40.1 to maintain their claims; none of the authorities indicates that Article 40.1 is capable of governing the employment relationship of these defendants and the plaintiffs; there is nothing to show that the part-time/whole-time dichotomy in the context of employment is a form of difference of treatment which comes within the ambit of Article 40.1; and there is nothing by way of authority to support the contention that the plaintiffs can pursue a private law claim for damages in relation to employment practices against a State agency by invoking Article 40.1 without challenging the constitutionality of some legislation or secondary legislation or challenging the validity of some executive action.

5. The *ultra vires* issue: submissions and authorities cited

5.1 To recapitulate, although the plaintiffs' complaints temporally extend further back in time than the coming into operation of the Act of 1992, the provision under which it was contended by the plaintiffs that these defendants acted in excess of their powers is s. 11(4) of the Act of 1992, which empowered CIT to make appointments to "support posts in relation to the offering of services, on a temporary, part-time or contract basis". In a nutshell, the plaintiffs' position was that an appointment made under that provision by CIT would only be intra vires the powers conferred by s. 11(4) if it was genuinely temporary and/or genuinely part-time. Appointments on the basis of repeated annual temporary contracts (in some cases over a span of fifteen years), could not be regarded as being intra vires the powers conferred by s. 11(4), it was submitted. Two authorities were cited in support of that proposition.

5.2 The first was the decision of the Supreme Court in *O'Neill v. Minister for Agriculture* [1998] 1 I.R. 539, in which the Supreme Court was concerned with the scope of s. 3 of the Livestock (Artificial Insemination) Act 1947, which empowered the Minister for Agriculture to "make regulations for controlling the practice of artificial insemination of animals . . . and, in particular, for prohibiting the distribution and sale of semen of animals . . . except under and in accordance with a licence". What had happened was that the Minister had adopted a licensing scheme based on the division of the State into nine areas and on the granting of only one licence in respect of each area, such exclusivity scheme having been carried into effect by way of administrative decisions. The applicant sought judicial review of a refusal by the Minister to grant him a licence on the basis that there were licences already in existence covering all of the nine areas and the issue of further licences would not be justified. The first issue which was considered by Keane J., as he then was, in his judgment was whether the Minister was entitled under the Act of 1947 to impose the constraint which the exclusivity scheme involved on the exercise of his discretion or whether it was an unlawful abdication of powers vested in him. Having referred to the evidence of an official of the Minister's Department as to the reasons for the adoption of the exclusivity scheme, Keane J., in the passage relied on by counsel for the plaintiffs, stated (at p. 546):

> "There is no indication in the Act of 1947 that these undoubtedly laudable objectives constituted the underlying policy of the Act, with two qualifications. The evidence in the High Court established, and common sense would have in any event suggested that it was the case, that the major reason for introducing statutory controls over artificial insemination in 1947, was because of the desirability of controlling disease and improving the general quality of the national herd. The system of control spelled out is negative rather than positive: the practice of artificial insemination may only be carried on where a licence is granted. There is nothing in the Act to suggest that the Oireachtas intended that, for the reasons . . . already cited, the first respondent should divide the country into a number of regions, in respect of each of which only one licence was to be granted. I am satisfied that in adopting the exclusivity scheme the first respondent acted *ultra vires* the Act of 1947 and, on that ground alone, the appeal should be allowed."

5.3 In the other authority relied on by the plaintiffs, *Humphrey v. Minister for Environment* [2001] 1 ILRM 241, the issue before the High Court was whether a Statutory Instrument, which was purported to be made under s. 82 of the Road Traffic Act 1961, as amended, which empowered the Minister to make regulations in relation to the control of public service vehicles, including providing for the licensing of such vehicles, was *ultra vires*. In addressing that issue, Murphy J. considered, inter alia, the decision of the Supreme Court in the O'Neill case. In summarising his conclusions on the issue of the validity of the Statutory Instrument (at p. 280), having stated that the relevance of the decision in the O'Neill case was that "it unambiguously rejects the possibility of the minister fettering his discretion in purporting to exercise quantitative control under the Act" in question, Murphy J. stated:

> "The minister, in restricting the number of licences in the manner under consideration, has fettered the discretion conferred upon him by s. 82 of the Act of 1961. The scheme ostensibly put in place by S.I. No. 3 of 2000, represents an exercise of quantitative control and there can be little objection to that per se. However, it is also a blanket restriction which renders nugatory applications from parties other than current taxi licence holders. It represents a fettering of the Minister's discretion which affects the rights of citizens to work in an industry for which they may be qualified and, further, which affects public access to taxis and restricts the development of the taxi industry."

5.4 Counsel for the plaintiffs also submitted that the repeated issue of temporary part-time contracts to persons employed in a de facto whole-time position was *ultra vires* s. 11(4), because it infringed the accepted principle of administrative law that an authority exercising a statutory power must act in a reasonable manner, citing the decision of Lord Wrenbury in *Roberts v. Hopwood* [1925] AC 578, where it was stated (at p. 613):

> "A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so – he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs."

5.5 In responding to those submissions, counsel for these defendants submitted that, in substance, the contended for *ultra vires* foundation of the plaintiffs' claim is a reiteration of the claim based on Article 40.1, in that the alleged excess of jurisdiction identified is that the Oireachtas could never have intended that, in exercising its power under s. 11(4) of the Act of 1992, CIT would do so in a manner which effected invidious discrimination against a class of employees, including the plaintiffs. It follows, counsel for these defendants submitted, that if the plaintiffs have not established that there was "invidious discrimination" their claim based on the *ultra vires* ground must fail.

5.6 It was the position of counsel for these defendants that, as a matter of statutory construction, applying the principles laid down by the Supreme Court in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101, these defendants clearly had power under s. 11(4) to grant part-time temporary contracts to the plaintiffs. It was submitted that the decisions in the *O'Neill* case and the *Humphrey* case are of no relevance. In contrast to the manner in which the statutory powers were purported to be exercised in those cases, it was submitted that the employment of the plaintiffs by these defendants fell full square within the plain words of s. 11(4).

5.7 Further, counsel for these defendants posed a question which, while strictly not before the Court, must give food for thought. That question is what benefit would accrue to the plaintiffs in the event that their contracts of employment were found to be have been *ultra vires* the power of these defendants? Counsel for these defendants characterised the plaintiffs' claim for an order "to make good the monetary loss" as being no more and no less than a disguised claim for damages and submitted that, having regard to the decisions of the Supreme Court in *Pine Valley Developments v. Minister for the Environment* [1987] I.R. 23, *Glencar Exploration Plc v. Mayo County Council (No. 2)* [2002] 1 I.R. 84 and *Beatty v. The Rent Tribunal* [2006] 1 ILRM 164, no claim for damages lies at the suit of the plaintiffs against these defendants.

6. Conclusions: general observations

6.1 The purpose behind the procedure which was followed in this case, the trial of a preliminary issue on the basis of assumed facts, is to save time and costs, which is a laudable purpose. However, with the benefit of much hindsight, which is the result of having had to consider the very limited facts pleaded in the amended statement of claim, which, having regard to the observations made at para. 2.3 above, I believe do not give a complete picture of the context or the factual reality of the plaintiffs' employment with these defendants, and having to apply to them the principles which have been established in the authorities relied on by the parties and, in particular, by the decisions of the Supreme Court by which this Court is bound, the caveat issued by Kenny J. in relation to the appropriateness of trying preliminary issues in *Tara Exploration and Development Co. Ltd. v. Minister for Industry and Commerce* [1975] I.R. 242 resounds. Kenny J. said (at p. 249):

> "When this procedure is adopted, the answers to the questions of law usually have to be qualified in so many ways that they do not lead to expedition or, indeed, to clarity. Answering the questions may be an interesting academic exercise but the questions of law which have to be decided are usually conditioned by the facts."

Aside from such handicap, the absence of full facts raises the concern that justice may not be done to one or other of the proponents.

6.2 The difficulty inherent in the preliminary issue process is magnified in this case by reason of a number of factors. The most obvious is that the constitutional issue, arising, as it does, not in the context of the constitutional challenge to legislation, but on the basis of the exercise by a statutory body of its statutory powers in relation to the creation of contracts of employment, traverses virgin territory. Further, both the constitutional issue and the *ultra vires* issue are required to be determined at the suit of these defendants in the absence of the State parties, notwithstanding that the retainer of employees and the terms on which they have been employed by CIT since the Act of 1992 came into operation, were and are subject to control by the Minister, with the concurrence of the Minister for Finance, under the Act of 1992. I assume that the VEC was subject to similar controls under the Act of 1930. Indeed, that these defendants were at all times subject to the direction and approval of the Minister and that they at all times complied with circulars issued by the Minister in relation to retainer of teachers is specifically pleaded by them in their defence, although, of course, this is also a factor on which the plaintiffs relied in making their case under Article 40.1.

6.3 Although, as I have stated, the plaintiffs' complaints straddle the period before and after the coming into operation of the Act of 1992, the plaintiffs' claim as formulated is based on the statutory power conferred on these defendants to employ temporary part-time teachers conferred by the Act of 1992 and not on the basis of the Act of 1930, which governed the activities of the VEC at the material time. Accordingly, it is to be determined by reference to the Act of 1992.

6.4 When the plaintiffs' claim is analysed, it seems to me that the real remedy which is being pursued by them is financial reparation for being deprived, wrongfully they say, of inclusion in the incremental salary scale of remuneration and the superannuation scheme which were applicable to permanent whole-time teachers from the time each of the plaintiffs took up his or her employment with these defendants until each was made permanent in 1999. While the various declarations which the plaintiffs seek on the amended statement of claim, if granted, would record the basis on which these defendants have acted wrongfully against the plaintiffs, that outcome is obviously not regarded by them as sufficient to redress the wrongs they allege they have suffered, given the other reliefs they claim.

6.5 To reiterate the position of the plaintiffs, it is that the factual basis of their complaint is that they were employed by these

defendants as, and on the terms applicable to, temporary part-time teachers rather than as, and on the terms applicable to, permanent whole-time teachers. The legal basis on which they contend that that factual outcome was wrong in law is that these defendants, as their employer, being a statutory body exercising statutory powers, acted: –

(a) in excess of the statutory powers conferred by s. 11(4) of the Act of 1992, and

(b) contrary to Article 40.1 of the Constitution.

At the material time each of the plaintiffs had a private law relationship, that is to say, a contractual relationship under an employment contract, with these defendants. Although, in pursuing the claim for a declaration that these defendants acted ultra vires, the plaintiffs are challenging the manner in which a statutory power was exercised by these defendants as statutory bodies, I consider that what the plaintiffs are pursuing are their private law rights and private law remedies in the substantive proceedings. Further, having regard to the decisions of the Supreme Court in *Hanrahan v. Merck Sharpe & Dohme (Ireland) Ltd*. [1988] ILRM 629 and in *McDonnell v. Ireland* [1998] 1 I.R. 134, the claim for financial reparation must be regarded as being in the nature of an action in tort for alleged breach of constitutional rights.

6.6 Following the order in which the questions are posed, I propose considering the constitutional issue first.

7. Constitutional issue: conclusions

7.1 In considering whether the plaintiffs are entitled to rely on Article 40.1 to maintain their claims for declaratory relief and financial reparation against these defendants, of all of the authorities relied on by the parties I have found the decision of the Supreme Court in *The Employment Equality Bill 1996* reference to be the most relevant. It is of paramount significance in the context of the constitutional issue in this case for a number of reasons. First, it was made clear by the Supreme Court that the guarantee of equality before the law contained in Article 40.1 is not confined to the State in its legislative role. Although, as I have commented at paragraph 3.11 above, the Supreme Court gave no guidance as to its application in the area of private law, it certainly did not rule out the possibility that an exercise by a statutory body of a statutory power in a manner which infringed Article 40.1, which is the basis on which the plaintiffs invoke Article 40.1 to provide a private law remedy for them, would give rise to a cause of action on the part of the persons whose rights were infringed. Secondly, the limitations discernible in the *Quinn's Supermarket* and the *Murtagh Properties* decisions as to the factual context to which the guarantee applies seem to have been abandoned by the Supreme Court, so that it is no longer the case that there is a blanket exclusion of "any lawful activities, trades or pursuits" in which people engage, or of persons' "trading activities or the conditions on which they are employed" from the ambit of the application of Article 40.1.

7.2 However, the Supreme Court did not ignore the fact that what Article 40.1 guarantees is equality before the law to persons "as human persons". While the intended meaning of the statement by the Supreme Court that Article 40.1 "does not confer a right on any person which, in the absence of the Constitution he would not in any event enjoy as a human being" is somewhat unclear, it would appear that the quotation from the judgment of Walsh J. in the *Nicolaou* case which immediately follows it, which defines Article 40.1 as an acknowledgment "of the human equality of all citizens and that such equality would be recognised in the laws of the State", is intended to explain it. Accordingly, having regard to the long line of decisions of the Supreme Court, starting with the *Nicolaou* case, the law as laid down by the Supreme Court is that Article 40.1, standing on its own, in guaranteeing equality before the law to all citizens "as human persons", but subject to the qualification spelt out in the second sentence thereof, prohibits the making of laws, or the implementation of laws, which treat a person or a category of persons unequally as against other persons or categories of persons by reference to their particular attributes or characteristics as human beings, such as gender, race and the like, as recognised in the authorities. In other words, where, as here, Article 40.1 is invoked on its own for the purpose of having what is contended to be unequal treatment by an employer of an employee vis-à-vis other employees condemned as being unlawful for repugnancy to the Constitution, I do not think it is open to this Court to merely assess the difference of treatment *simpliciter* without considering whether such difference is based on the forms of discrimination which have been identified by the Supreme Court as being proscribed by Article 40.1. On the contrary, I consider that such consideration is the first test which the Court has to apply. Additionally, in the assessment of the ambit and application of what was described by the Supreme Court in *The Employment Equality Bill* 1996 decision as the "wide ranging nature of the qualification" in the second sentence of Article 40.1, a second test, namely, the test laid down by Barrington J. at first instance in *Brennan v. Attorney General*, has to be applied in determining the legitimacy of differences of treatment of persons in legislation by reference to the factors to which the State is entitled to have regard, namely, physical and moral capacity and social function.

7.3 In this case the plaintiffs have based their claim that there has been a breach of their constitutional rights solely on the alleged breach of Article 40.1 by reason of their less favourable treatment, while they were employed as temporary part-time teachers, as against the comparators they have identified as having been employed by these defendants at the material time, that is to say, permanent whole-time teachers. Even assuming, as the Court must, that, notwithstanding that they performed precisely the same work as their comparators, the plaintiffs were treated less favourably than them, the question which must be asked is whether the plaintiffs have demonstrated that they have been treated unequally or discriminated against as human persons within the meaning of Article 40.l. In my view, they have not.

7.4 There is no doubt that laws, or the implementation of laws, which regulate the employment sphere may infringe Article 40.1. This can be illustrated by the example suggested by counsel for the plaintiffs – the so-called marriage bar which up to the early 1970s required a female public servant to retire on marriage. That rule treated the persons affected by it less favourably than other public servants on the grounds of gender. If that employment practice still existed, it is difficult to envisage that it would survive a challenge that it infringes Article 40.1. On the other hand, to illustrate what in the employment sphere does not amount to discrimination within Article 40.1, it is easy to point to unequal treatment of employees in the public sector, which has been necessitated by what the Oireachtas has described in recent legislation as the serious disturbance of the economy and the decline in the economic circumstances of the State, which it would be difficult to argue infringes Article 40.1. For example, in the case of a new recruit to a particular grade in the public service, whose salary has been fixed by law or contract at a lower rate than a person in the same grade who was recruited, say, two months previously before the reduction in salary was implemented, but is doing precisely the same work as his colleague, it is difficult to see how the new recruit could claim that his right to equality under Article 40.1 is infringed. What distinguishes that latter example from the marriage bar example is that the difference of treatment necessitated by economic conditions, applies to all new recruits, irrespective of gender or race and such like.

7.5 Similarly, in my view, the basis on which the plaintiffs, as regards their terms and conditions of employment, were treated differently and less favourably than the comparators they have identified before 1999, by reference to the facts as pleaded by the plaintiffs, was not an attack on the plaintiffs' human equality as acknowledged in Article 40.1, as there is nothing to suggest, and I assume it was not the case, that it was in any way connected with, or applied by reference to, gender, colour, creed, political leaning, or any other human characteristic.

7.6 There is no doubt, as counsel for the defendants pointed out, that currently there is in force in this jurisdiction a comprehensive body of law governing employment equality. It is to be found in the Employment Equality Act 1998 and the Equality Act 2004. Broadly speaking, in my view, the submission made on behalf of these defendants, by reference to the authorities referred to at paragraph 4.4 above, that the rights and remedies conferred on employees by the legislation must be enforced in accordance with the legislation and does not give rise to a parallel right which may be enforced at common law, is correct. Having said that, I do not accept that what the plaintiffs are endeavouring to do in these proceedings is to invoke an equality jurisdiction at common law parallel to the statutory jurisdiction, which currently exists. On the contrary, the only rights which the plaintiffs invoked were their rights under Article 40.1.

7.7 It may be that some employers still engage in workplace practices which are not expressly rendered unlawful by the equality legislation referred to in the preceding paragraph or by the Acts of 2001 and 2003, which, like the marriage bar if it still existed, constitute an infringement of the workers' entitlement to equality as human persons under Article 40.1. If there are such workplace practices, in my view, a worker affected is entitled to seek a remedy from the Court to redress the wrong. However, this is not such a case.

7.8 If the conclusion I have reached that the first test to be applied in determining whether the plaintiffs' complaint constitutes an infringement of Article 40.1 is whether the difference of treatment of which they complain is based on a form of discrimination which has been identified by the Supreme Court as being proscribed by Article 40.1 is incorrect, and, if the only test to be applied is whether, in the exercise of their statutory powers in the manner of employment of the plaintiffs, these defendants acted for a legitimate purpose and not in an arbitrary or an irrational manner or unfairly, then for the reasons set out at para. 8.5 later, I consider it is not possible to apply that test to the circumstances of this case because of the dearth of relevant evidence.

8. *Ultra vires* issue: conclusions

8.1 Whether or not these defendants, in employing the plaintiffs in the manner in which they did on what were effectively fixed-term contracts renewable annually on the terms applicable to temporary part-time teachers, exceeded the powers conferred on them by the Act of 1992 is a matter of construction of the relevant provisions of that Act.

8.2 In appointing persons to fulfil teaching and lecturing duties in the College, these defendants had two options. The first was to appoint a suitable person as an officer or servant under s. 11(1) of the Act of 1992. The nature of the distinction between an officer and a servant has not been addressed and it is not relevant for present purposes, although I would comment that I assume that, irrespective of what is pleaded in the amended statement of claim, the plaintiffs do not contend that they were officers of these defendants prior to being made permanent in 1999. The second option available to these defendants was to make an appointment under s. 11(4) of the Act of 1992 and, having regard to the formulation of the *ultra vires* issue, as I understand it, the position of the plaintiffs is that the appointment of each at the relevant time was made under s. 11(4). In addition to providing for the appointment of research fellowships and research assistantships, s. 11(4) conferred on these defendants the power to appoint "other support posts in relation to the offering of services". That is clearly wide enough to include support teachers and lecturers, because the principal function of the College, as set out in s. 5 of the Act, was to provide vocational and technical education and training for the economic, technological and such like development of the State and the first of the specific functions outlined in s. 5 was to provide courses of study in the College. Section 11(4) gave these defendants a range of options as to the basis on which an appointment to a support post might be made. It could be temporary, as distinct from permanent. It could be part-time as distinct from whole-time. It could be on some other contractual basis.

8.3 As regards the proper approach to the construction of s. 11(4), I think one needs go no further than to apply the approach advocated by Blayney J. (at p. 151) in *Howard v. Commissioners of Public Works*, by reference to the following passage from *Craies on Statute Law* (1971) (7th Ed.) at p. 65:

> "The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver."

The words used in s. 11(4) are precise and unambiguous, in that they expressly empowered these defendants after 1992 to make appointments to support posts on a temporary part-time basis and there is nothing in the sub-section which precluded the creation of a fixed-term contract and its renewal on an annual basis over the period until the plaintiffs became permanent in 1999.

8.4 Of course, the law changed after 1999 with the adoption of the Act of 2003, which implemented Directive 99/70/EC by virtue of which, after the Directive had direct effect (10th July, 2001), these defendants would have been prevented from creating any further fixed-term contracts in favour of the plaintiffs. However, as the law stood between 1992 and 1999, there was no statutory restriction on renewing fixed-term contracts of employment irrespective of the duration of employment of the employee on renewed fixed-term contracts.

8.5 There is no evidence as to the reason which motivated the defendants to employ the plaintiffs in the manner in which they did prior to 1999. It is reasonable to infer that, from the perspective of the defendants, there were advantages and disadvantages in the policy adopted in relation to the employment of the plaintiffs as teachers at the material time. It must be assumed, on the basis of the plaintiffs' case as pleaded, that these defendants saved money by appointing the plaintiffs to their teaching posts on a temporary part-time basis, rather than appointing them on a permanent whole-time basis with an incremental salary and superannuation rights. On the other hand, it must be assumed that they ran the risk of losing the service of experienced teachers, having regard to the temporary nature of their appointment. However, even assuming the facts pleaded by the plaintiffs in the amended statement of claim to be true, it is not possible to form a view as to why these defendants chose to retain the plaintiffs on temporary part-time contracts over a long period. It may have been that, because of budgetary constraints, they were adopting the cheaper of the two options open to them. However, it may be that there were other considerations. The following possible considerations spring to mind: absence of approval from the Minister for permanent positions; approved permanent positions being temporarily vacant by reason of the incumbent being on sick leave, or on secondment, or on a career break; or likely demographic changes leading to uncertainty as to requirements in future years. The problem confronting the Court is that the relevant facts by reference to which a finding could be made as to the purpose for the employment practice complained of by the plaintiffs and, in particular, whether it was for a legitimate purpose and not arbitrary, irrational or unfair, or otherwise, are not before the Court, either on an assumed or an established basis, so that the Court does not have the factual material to determine that crucial question. One cannot rule out the possibility that the employment practice in question was for a legitimate purpose and was reasonable. It is perhaps worth noting that, even if the provisions contained in the Act of 2003 had been in force at the material time, there may have been objective grounds justifying renewal of the plaintiffs' fixed-term contracts which would have taken them out of the ambit of a provision such as s. 9 of the Act of 2003.

8.6 I agree with the submission made by counsel for these defendants that the decisions in the *O'Neill* case (referred to at para. 5.2 above) and the *Humphrey* case (referred to at para. 5.3 above) are of no particular relevance to the proper construction of s. 11(4). The basis on which those cases were decided was that the relevant Minister had a broad discretion to regulate activity in the commercial sectors in issue by granting licences to suitably qualified operators to operate in each sector, the artificial insemination sector and the taxi trade, but in each case he had exercised the discretion in an exclusionary manner which the Court held the Oireachtas could not have intended. As regards the teaching and lecturing posts in the College, as I have stated, the factual considerations which motivated (and may, or may not, have objectively justified) these defendants in opting for the appointment of the plaintiffs as temporary part-time teachers, rather than permanent whole-time teachers, not having been pleaded in the amended statement of claim, there is no basis on which one can conclude that the Oireachtas could not have intended that practice. Further, no fact is pleaded on the basis of which one can form a view as to the preponderance of temporary whole-time teaching appointments relative to permanent whole-time teaching appointments in the College, which might justify a conclusion that the practice of these defendants in appointing temporary part-time teachers in the material years was based on a policy designed to exclude applicants for teaching posts from appointment to whole-time permanent posts by utilising s. 11(4) in a manner which could not have been in contemplation by the Oireachtas.

8.7 While, at this point in time, it is reasonable to conclude that the obvious legislative policy underlying the Act of 2003, and of the Directive which it transposed, is to eradicate what was seen as the unfair and abusive use of successive fixed-term contracts, which, when considered by reference to the position of the plaintiffs' employment by these defendants prior to 1999, certainly raises a suspicion as to the manner in which these defendants relied on the power conferred by s. 11(4) to make teaching appointments in the College, I consider that it would not be proper for the Court in this process to reach a conclusion, on the basis of the facts as pleaded by the plaintiffs in the amended statement of claim, that these defendants were acting *ultra vires* their powers in the appointments of the plaintiffs as temporary part-time teachers prior to 1999.

8.8 Even assuming that, as pleaded in the amended statement of claim, the plaintiffs under their contracts performed "like work and like hours as permanent whole-time teachers" in the College, it is not possible to conclude on that assumption alone that the employment of the plaintiffs was neither genuinely temporary nor genuinely part-time. However, on the assumption that the basis on which the plaintiffs were employed involved a fixed-term contract which provided for automatic renewal, subject to satisfactory service, and the explanation of the use of the epithet "eligible" given on behalf of the plaintiffs in the replies to notice for particulars (as set out at para. 2.3 above), the suspicion pointed to in the next preceding paragraph is magnified. Notwithstanding that, I do not think it would be proper to conclude in this process, on the basis of the facts as pleaded, which the Court is required to assume are true, that these defendants were acting *ultra vires* the power conferred by s. 11(4) in employing the plaintiffs as they did prior to 1999. It is clear that the terms on which the plaintiffs were employed, which had been the subject of negotiations and agreements between their union and the employer, were complex. The contracts which were offered to the plaintiffs were accepted by them and worked out, presumably on the basis that they were genuine contracts, which these defendants had power to grant. It is noteworthy that the challenge to their validity was not initiated until in the region of two years after the plaintiffs had become permanent whole-time employees of these defendants under new contracts.

8.9 That leads to the question posed on behalf of these defendants as to what benefit would accrue to the plaintiffs in the event that their contracts of employment prior to 1999 were found to have been *ultra vires* the power of these defendants under s. 11(4). However, I do not consider it appropriate to attempt to answer that question. Whether the submission made on behalf of these defendants that, as a matter of law, on the basis of the authorities referred to at para. 5.7 above, the plaintiffs would not be entitled to financial reparation is correct or not cannot be answered in this process, but may be a matter for another day. It would be particularly inappropriate to comment on that question in the absence of the State parties, given that the making of appointments to teaching posts in the College and the terms of such appointments were subject to the approval of the Minister with the concurrence with the Minister of Finance, and the State parties are not before the Court on this application.

8.10 Although the focus of the *ultra vires* issue, as formulated, appears to be very narrow, in that the question posed is whether "the issue of successive part-time temporary contracts" was *intra vires* the powers of these defendants under s. 11(4), notwithstanding the suspicions which the facts as pleaded raise, which have been alluded to in the previous paragraphs, in my view, because of the dearth of agreed, established or assumed facts surrounding the grant of the contracts of employment to the plaintiffs prior to 1999, it is not possible to find conclusively that the issue of successive part-time temporary contracts to the plaintiffs was *intra vires* or, alternatively, was *ultra vires* the powers conferred on these defendants by s. 11(4) of the Act of 1992.

8.11 Finally, for completeness, I would observe that I do not accept the interpretation by counsel for the defendants of the basis on which the plaintiffs' *ultra vires* claim was pursued, as outlined at paragraph 5.5 above, as being correct. While it was made clear in the submissions on behalf of the plaintiffs that the kernel of the plaintiffs' claim is that their discriminatory treatment was unlawful by reason of being *ultra vires*, in the context of the *ultra vires* issue the alleged discrimination was not linked to Article 40.1. I would also observe that there was no debate on this application as to the application of what is known as the "double construction" rule laid down by the Supreme Court in *East Donegal Co-Operative Livestock Mart v. The Attorney General* [1970] I.R. 317, nor, as is clear, is there any claim before the Court as to the validity of s. 11(4) having regard to the provisions of the Constitution. My understanding of the plaintiffs' case is that the *ultra vires* issue is whether, as a matter of construction of s. 11(4), CIT had power thereunder to grant successive part-time temporary contracts to the plaintiffs.

9. Summary of conclusions

9.1 The answer to the constitutional issue is that, assuming that the facts pleaded in the amended statement of claim are true, the plaintiffs are not entitled to rely on Article 40.1 of the Constitution so as to maintain the claims against the defendants set out in the amended statement of claim.

9.2 The answer to the *ultra vires* issue, is that, even assuming them to be true, the facts pleaded in the amended statement of claim are insufficient to allow the Court to determine conclusively whether the issue of successive part-time temporary contracts to the plaintiffs was *intra vires* the powers of these defendants under s. 11(4) of the Act of 1992 or not.