Neutral Citation [2015] IEHC 429

THE HIGH COURT

[Record No. 2012/685 JR]

JUDICIAL REVIEW

BETWEEN/

THE MINISTER FOR EDUCATION AND SCIENCE

APPLICANT

-and-

THE LABOUR COURT

RESPONDENT

-and-

ANNE BOYLE AND THE COMMITTEE OF MANAGEMENT OF HILLSIDE PARK PRE-SCHOOL

NOTICE PARTIES

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 3rd day of July, 2015

Introduction

1. This case concerns the employment status of a part-time preschool teacher for the purposes of the Protection of Employees (Part Time Work) Act, 2001 ("the Act"). The applicant ("the Minister") seeks to quash a determination of the respondent ("the Labour Court") by which that body decided that the first named notice party ("Ms Boyle") was an employee of the Minister within the meaning of that Act, and that she had been treated less favourably than a full-time comparator in relation to pension rights. It directed accordingly that the Minister should admit her to the National Teachers Superannuation Scheme with effect from six months before the initiation of her claim and pay her a sum of €10,000 by way of compensation for discriminating against her.

2. The Minister claims that the Labour Court exceeded its jurisdiction and erred in law, in that, according to the Minister,

> 1. the Minister had no contractual relationship with Ms Boyle and was not her employer within the meaning of the Act;
>
> 2. the Labour Court erred in following a High Court judgment – that of Dunne J. in *Catholic University School v Dooley* [2010] IEHC 496 - while failing to follow the authority of the Supreme Court decision in *O'Keeffe v Hickey & Ors* [2008] IESC 72; and
>
> 3. the Labour Court acted unreasonably, disproportionately and *ultra vires* in directing the Minister to admit Ms Boyle to a statutory pension scheme, the requirements of which she did not fulfil.

3. Ms. Boyle has sought to uphold the conclusions of the Labour Court. She has also maintained that judicial review is not a proper avenue, in that the Minister has also lodged an appeal on points of law, as provided for by the Act, but has not progressed that appeal pending the outcome of the judicial review. The Minister has stated that judicial review, rather than the statutory process, has been pursued because the decision of the High Court on a point of law would be final whereas judicial review leaves open the possibility of an appeal from this court.

4. In the course of the hearing an issue also arose as to whether the Labour Court had in its ruling been conscious of the terms of the EU Directive transposed by the Act, and, if so, whether it had jurisdiction to construe the Act in accordance with the Directive if that entailed reading the Act *contra legem*. However, for the reasons set out in this judgment, I do not find it necessary to deal with that argument.

Background facts

5. It is common case that Ms. Boyle was recruited and employed as a teacher in a grant-aided preschool for the children of travellers for over 20 years, until it closed in 2011. A grant amounting to 98% of the salary payable to a primary school teacher was paid to the management committee of the preschool in respect of her salary. She was the only teacher in the preschool and worked 15 hours per week.

6. On the 16th March, 2009, Ms. Boyle made a complaint to the Rights Commissioner service pursuant to the provisions of the Protection of Employees (Part-Time Work) Act, 2001, claiming that she was treated less favourably than full-time workers by not being admitted to the National Teachers Superannuation Scheme. The complaint named both the Chair of the management committee and the Department of Education and Science ("the Department") as her employer. In making her case, she chose as her comparator a National School teacher who worked in an Early Start unit in a primary school.

7. It is relevant to note that the preschool closed before the complaint was dealt with and that Ms. Boyle was paid redundancy by the Minister.

8. Ms. Boyle was represented before the Rights Commissioner by the Irish National Teachers Organisation. The Department was represented by two officials, while the chairperson of the management committee, Mr. Joe Neylon, appeared in person.

9. After a hearing in January, 2011 the Rights Commissioner upheld the arguments made on behalf of the Department of Education and Science, concluding that it was neither the employer of Ms. Boyle within the meaning of s.3(1) of the Act nor an associate employer within the meaning of s.7(5). No finding was made in respect of the management committee and it is not clear what position was taken by that body in relation to the claim.

10. Ms. Boyle appealed this decision to the Labour Court.

Statutory context - The Protection of Employees (Part Time Work) Act, 2001
11. The long title of the Act states that it is to provide for, *inter alia*, the implementation of Directive 97/81/EC of 15 December, 1997.

12. Section 9 of the Act lays down the general principle that a part-time employee shall not, in respect of his or her conditions of employment, be treated in a less favourable manner than a comparable full-time employee. This general principle does not apply where such treatment can be justified on objective grounds.

13. A part-time employee is an employee whose normal hours of work are less than the normal hours of work of an employee who is a comparable employee in relation to him or her. A full-time employee is an employee who is not a part-time employee.

14. "Contract of employment" is defined in s. 3(1) as meaning

> *"(a) a contract of service or apprenticeship, and*
>
> *(b) any other contract whereby an individual agrees with another person, who is carrying on the business of an employment agency within the meaning of the Employment Agency Act, 1971, and is acting in the course of that business, to do or perform personally any work or service for a third person (whether or not the third person is a party to the contract),*
>
> *whether the contract is express or implied and, if express, whether it is oral or in writing."*

15. "Employee" means

> *"…a person of any age who has entered into or works under (or, where the employment has ceased, entered into or worked under) a contract of employment and references, in relation to an employer, to an employee shall be construed as references to an employee employed by that employer; and for the purposes of this Act, a person holding office under, or in the service of, the State (including a civil servant within the meaning of the Civil Service Regulation Act, 1956) shall be deemed to be an employee employed by the State or Government, as the case may be, and an officer or servant of a local authority for the purposes of the Local Government Act, 1941, or of a harbour authority, health board or vocational education committee shall be deemed to be an employee employed by the authority, board or committee, as the case may be."*

16. The definition of "employer" provides that

> *" 'employer' means, in relation to an employee, the person with whom the employee has entered into or for whom the employee works under (or, where the employment has ceased, entered into or worked under) a contract of employment, subject to the qualification that the person who under a contract of employment referred to in paragraph (b) of the definition of 'contract of employment' is liable to pay the wages of the individual concerned in respect of the work or service concerned shall be deemed to be the individual's employer."*

17. Section 7 creates the framework for comparisons between part-time and full-time employees. Section 7(2) and (3) provides as follows:

> *(2) For the purposes of this Part, an employee is a comparable employee in relation to the employee firstly mentioned in the definition of "part-time employee" in this section (the "relevant part-time employee") if –*
>
> > *(a) the employee and the relevant part-time employee are employed by the same employer or associated employers and one of the conditions referred to in subsection (3) is satisfied in respect of those employees,*
> >
> > *(b) in case paragraph (a) does not apply (including a case where the relevant part-time employee is the sole employee of the employer), the employee is specified in a collective agreement, being an agreement that for the time being has effect in relation to the relevant part-time employee, to be a type of employee who is to be regarded for the purposes of this Part as a comparable employee in relation to the relevant part-time employee, or*
> >
> > *(c) in case neither paragraph (a) nor (b) applies, the employee is employed in the same industry or sector of employment as the relevant part-time employee is employed in and one of the conditions referred to in subsection (3) is satisfied in respect of those employees,*
>
> *and references in this Part to a comparable full-time employee in relation to a part-time employee shall be construed accordingly.*
>
> *(3) The following are the conditions mentioned in subsection (2) –*
>
> > *(a) both of the employees concerned perform the same work under the same or similar conditions or each is interchangeable with the other in relation to the work,*
> >
> > *(b) the work performed by one of the employees concerned is of the same or a similar nature to that performed by the other and any differences between the work performed or the conditions under which it is performed by each, either are of small importance in relation to the work as a whole or occur with such irregularity as not to be significant, and*
> >
> > *(c) the work performed by the relevant part-time employee is equal or greater in value to the work performed by the other employee concerned, having regard to such matters as skill, physical or mental requirements, responsibility and working conditions.*

18. Pursuant to s. 16(2) of the Act, a rights commissioner (and, on appeal, the Labour Court) may require an employer who is found to be in breach of the Act to comply with the relevant provision (in this case s.9), and/or to pay

> *"compensation of such amount (if any) as is just and equitable having regard to all the circumstances"*
>
> not exceeding 2 years remuneration. Claims must be initiated within six months of the date of the alleged contravention, or of the termination of employment, whichever is the earlier.

19. It is also relevant to note that s. 24(5) of the Education Act, 1998 provides that the terms and conditions of teachers and other staff of a school appointed by a board of management, who are to be paid from monies provided by the Oireachtas, shall be determined by the Minister for Education with the concurrence of the Minister for Finance.

The evidence and submissions before the Labour Court

20. The hearing took place over the course of several dates in 2011 and 2012. Ms. Boyle was represented by the INTO while the Minister was represented by Senior and Junior Counsel. Each side filed several sets of written submissions.

21. By this time the preschool had closed. Educational policy in relation to traveller children had changed, with the emphasis now being on inclusivity, and the Department of Education did not intend to fund preschools for such children (although it might have been open to the committee to seek funding from other State sources). The management committee did not participate in the appeal. It appears that Mr. Neylon had passed away and the committee had disbanded.

22. The following summary of the evidence and submissions deals only with the aspects relevant to the issues before this court, and not, for example, with the details of the work done by Ms. Boyle and her chosen comparator.

History of employment

23. The Labour Court was informed that the preschool had been established in 1981 and Ms. Boyle had been employed there since 1989. Originally it was based in two rooms in the local community centre. When that was demolished it relocated to a different premises. It is noteworthy that all correspondence between the Department and the management committee was sent care of Ms. Boyle's home address.

24. It appears from submissions filed by the Department that it was policy to grant aid to traveller preschools to a maximum of 98% of a national school teacher's salary for a maximum of three hours per day, five days per week for the duration of a normal school year. It also funded 98% of the cost of school transport where that was provided.

25. Ms. Boyle was a qualified secondary teacher, rather than a primary teacher. It was stated that she was employed by the board of management. The Department paid 98% of her salary by way of grant to the board. The grant, which was paid into a bank account in the name of the management committee, included the amount payable by way of employer's PRSI. It was accompanied by details of the calculations relevant to Ms. Boyle's pay.

26. It was noted that all part-time teachers (learning support and resource teachers) in primary schools had been paid by the grant system until 2009, and that part-time teachers in special schools had been paid under the same system until January, 2011. The change in relation to these categories came about on foot of a circular (Primary Circular 0088/2008) issued by the Department, which stated that the grant system was to be altered, on a phased basis, to direct payment to the teacher. The circular made it clear that the intention of the change was to reduce the administrative burden on schools and also help to

> *"ensure that the terms of the Protection of Employees (Part-Time Work) Act, 2001 are fully implemented for part-time teachers."*

27. Teachers in these positions were thus brought "onto the payroll" as the phased changes were implemented. As part of the process the Department required records of service in relation to individual teachers so that it could ensure that they were paid the appropriate salary and to calculate any arrears that might be due. Thereafter, part-time teachers were paid directly by the Department.

28. The terms and conditions of Ms. Boyle's employment, including her salary, were set by the Department in relation to issues such as sick leave, holidays, maternity leave, compassionate leave and entitlement to a qualification allowance.

29. Until 1992, Ms. Boyle was paid a part-time hourly rate. In that year the Department introduced a scheme establishing "Pro-Rata Pay and Conditions for Eligible Part-Time Teachers in Special Schools and other Institutions." This scheme was open only to part-time teachers who were wholly or mainly dependent for their livelihood on their earnings from part-time teaching, and whose employment history met certain criteria. The "pro-rata" aspect was by reference to the earnings of full-time primary school teachers.

30. "Eligible part-time teachers" were those who were either fully qualified teachers, or part-time teachers who, though not fully qualified, had been sanctioned in their posts by the Department and who had at least one year's service prior to the 1st September, 1990.

31. Of note, the terms of the scheme specifically stated that it did not provide for any amendments to the current regulations in relation to superannuation. It was also stated that

> *"The employment or re-employment of a teacher under the scheme is a matter for the employer i.e. the Management Authorities of Special Schools or other Institutions."*

32. Ms. Boyle applied for inclusion in the scheme. The response from the Department, in a letter dated the 30th September, 1992, set out the difference in her entitlements under the existing part-time teacher rate and the new scheme. If she became an Eligible Part-time Teacher she would be entitled to an annual salary, paid over 12 months, of £8,478.86, which would be higher than her earnings on the part-time rate. She would not be entitled to claim Unemployment Benefit during school holidays. If she remained on the part-time teacher rate she would be covered by the Worker Protection (Regular Part-Time Employees) Act, 1991 and would be entitled to holiday and public holiday pay under the terms of that legislation. She could also be entitled to claim unemployment benefit during holidays. The writer stated

> *"The main advantage of the EPT Scheme is the fact that you will be on a fixed annual salary which will continue to be*

paid during periods of Sick Leave or Maternity Leave."

33. Ms. Boyle opted to join the EPT scheme. Her salary was set at the first point of the scale with an allowance for her degree and her H. Dip., and she was informed that she would remain on that point because she was not a fully qualified national school teacher.

34. In 1995, Ms. Boyle was conferred with a Master's degree in education. She applied to the Department for an additional qualification allowance in her salary on foot of this. It was explained to her that she already had two qualification allowances and it was not possible to have three – however, the Master's was substituted for one of the existing two. This entitled her to an increase in pay which was paid to her with effect from the date of conferral of the degree.

35. In 2000, the Department issued a circular (24/00) concerned with the shortage of qualified primary school teachers. The effect of the circular was to allow secondary teachers teaching in primary schools, in a temporary or substitute capacity, to be paid at the rate applicable to qualified national teachers. Ms. Boyle applied to the Department to be put on the scale and was placed on the second point. Thereafter the incremental scale was applied to her. It remained the case, however, that the Department's grant to the preschool was capped at 98% of what would have been payable to her had she been employed in a primary school.

36. It appears to be common case that the rates paid to teachers, including those in Ms. Boyle's position, were fixed pursuant to a collective agreement entered into under the auspices of the Teaching Council (a statutory body). With the introduction of benchmarking, the value of pension entitlements paid to national school teachers were taken into consideration in fixing discounted rates of remuneration for them.

37. After the coming into force of the Financial Emergency Measures in the Public Interest (No.2) Act, 2009, Ms. Boyle's salary was reduced on the same basis as that of national school teachers.

38. In November 2010, the Department sent a circular (0070/2010) to the management of all primary, secondary, community and comprehensive schools and to VECs. This dealt with the question whether certain staff, who had not been subject to the pension levy introduced in earlier legislation, were subject to the pay reductions under FEMPI. The issue arose because the legislation in question defined "public servant" in different ways. The circular explained that

> *"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."*

39. Under the heading "Categories of staff who will now be affected", the circular reads as follows:

> *"Any staff employed in a recognised school or VEC and falling into the following categories* ***who have not already been affected by the pay reductions introduced under the Act;***
>
> *…*
>
> *Teachers employed in Traveller pre-schools*
>
> *….*
>
> *It is important to point out that the fact that affected staff employed by recognised schools and VECs come within the definition of "public servant" solely for the purposes of the Act does not alter their employment status in any other respect."*

40. Evidence was given at the hearing by Ms. Boyle's chosen comparator, a qualified primary school teacher working in an Early Start unit of a primary school. This witness did not claim that she had entered into a contract of employment with the Minister. According to the Minister's affidavits she accepted that she was employed by the board of management of the primary school. Ms. Boyle denies this. She and her representative say that the witnesses evidence was confined to the issue of like work.

Submissions to the Labour Court

41. The submissions on behalf of Ms. Boyle argued that her appointment by the management committee had been subject to sanction by the Department; that the pre-school was subject to inspection and indeed had been evaluated by the Department Inspectorate in 2000/2001; that the Department's Visiting Teacher for Travellers traditionally sat on the management committee; that a capitation fee was paid in respect of children enrolled in the school; that the Department determined the number of days and hours in the school year, and that it provided in-house training for Ms. Boyle in the same manner as for national school teachers. The management committee had no control over her remuneration, since that was fixed by reference to the collective agreement entered into by the Department under the tripartite structure of the Teaching Council. The additional allowances paid to Ms. Boyle in respect of her qualifications were also within the control of the Department.

42. The appointment of Ms. Boyle is said to have been "sanctioned" by the Minister in that her eligibility for the EPT scheme depended on her being either a qualified primary teacher (which she was not), or sanctioned by the Department.

43. It was pointed out that Ms. Boyle's salary and allowances had been reduced in accordance with the provisions of the Financial Emergency Measures in the Public Interest (No.2) Act, 2009.

44. It was also pointed out that, when the preschool was closing, the Department had stated that it would pay statutory redundancy to Ms. Boyle.

45. In legal submissions, it was argued that the Minister must be deemed, under the provisions of the Act, to be the employer because he was the person liable to pay Ms. Boyle's wages. Reliance was placed upon the High Court decision in *Catholic University School v. Dooley* and on the Employment Appeals Tribunal decision, cited in Dooley, in *Sullivan v. Department of Education* [1998] E.L.R. 217. The judgment of the Supreme Court in *O'Keeffe v Hickey* was distinguished, on the argument that it dealt only with the issue of vicarious liability.

46. In *Dooley*, which is considered in detail below, Dunne J. held that a part-time teacher whose salary was privately funded could not choose, when nominating a comparator under the Act, a full-time teacher whose salary was funded by the State. She said for the purposes of the Act a State funded teacher must be deemed to be an employee of the Minister.

47. The comparator chosen by Ms. Boyle was a full-time primary school teacher working in an Early Start project, or unit, in a primary school. Such projects were designed to assist disadvantaged children at preschool level. Teachers working in pre-schools in this programme were eligible for the superannuation scheme.

48. On the issue of redress, it was submitted that the Department had been in breach of the Act since the date of its enactment. It was argued that the cap on compensation available under the Act was insufficient to amount to an effective deterrent and as such was a breach of the Directive. It should therefore be disregarded. Ms. Boyle also sought an order deeming her to have been a member of the superannuation scheme with effect from the date of commencement in 1992 of her employment as an eligible part-time teacher.

Submissions on behalf of the Minister

49. The Minister submitted as a preliminary point that Ms. Boyle's complaint was not well founded, because neither she nor her chosen comparator were his employees within the meaning of the Act. She had entered into a contract with, or worked under a contract of employment for, the management committee. There was no contract of employment between herself and the Minister.

50. It was submitted that the only exception to this principle was for the purposes of the Payment of Wages Act, 1991, in relation to teachers "on the payroll". Under this Act, "contract of employment" is defined in s. 1(1) as follows:

> *"(a) a contract of service or apprenticeship, and*
>
> *(b) any other contract whereby an individual agrees with another person to do or perform personally any work or service for a third person (whether or not the third person is a party to the contract) whose status be virtue of the contract is not that of a client or customer of any profession or business undertaking carried on by the individual, and the person who is liable to pay the wages of the individual in respect of the work or service shall be deemed for the purposes of this Act to be the employer,*
>
> *whether the contract is express or implied and if express, whether it is oral or in writing."*

51. However, it is argued that Ms. Boyle cannot avail of this exception since she was not "on the payroll".

52. With regard to the extended part of the statutory definition dealing with employment agencies, it was submitted that this was an exceptional example of the Oireachtas adopting an artificial interpretation. Having specifically provided for this unusual circumstance, it was to be presumed that no other special circumstance was contemplated.

53. Reliance was placed upon the judgments in *Tobin v Cashell* (Unrep., Kearns J., 21st March 2000), *O'Keeffe v Hickey* [2009] 2 IR 302, and *Crowley v Minister for Education & Ors*. [1980] IR 102.

54. While it was accepted that the specific issue at stake in *O'Keeffe* was vicarious liability, it was submitted that the judgments of the Supreme Court contained a broader statement of principle and that in large measure the decision rested on a finding that the Minister was not the employer of the teacher in question. It was submitted that:

> *"The question as to whether a person has entered into or works under a contract of employment with another is a question of fact and it was clear in all of the judgments in O'Keeffe, including the dissenting judgment of Geoghegan J., that a teacher in a national school is in a contractual relationship with the manager of the school [or, now, Board of Management] and not with the Minister or the State."*

55. The parts of the submissions dealing with *Dooley* implicitly suggested that the finding by Dunne J. as to the status of the Department-funded teachers was incorrect. Noting that the Minister had not been a party to the case, it was further argued that the judgment was *in personam* rather than *in rem*.

56. It was asserted that the pre-school was controlled and operated by the management committee and that the Minister had no involvement whatsoever with either the running of the school or Ms. Boyle's employment. A grant was paid to the committee, a private, non-State entity which engaged staff and dealt with "all employment matters" affecting those staff. In the circumstances it was said that the department had "substantially" less control over the management committee than it would over the board of management of a recognised school.

57. Further, it was submitted that there was no discrimination as between full-time and part-time teachers in the operation of the superannuation scheme, since the scheme was available to both full-time and part-time national school teachers, including substitute teachers and job-sharers. Ms. Boyle's ineligibility for access to the scheme arose from the fact that she was not a national school teacher.

58. Reference was made to the legislation governing the scheme. Section 2 of the Teachers Superannuation Act, 1928 permits the Minister, with the consent of the Minister for Finance, to prepare a pension scheme "in relation to any particular class or classes of teachers". In relation to primary school teachers the principal scheme is provided for in the National School Teachers' Superannuation Scheme, 1934 (S.I. 23/1934), which defines "salary" as

> *"the remuneration received by a teacher from the Minister out of moneys provided by the Oireachtas for duty in a National School…"*

59. Since Ms. Boyle did not teach in a national school she did not have pensionable service. There is no pension scheme for preschool teachers, whether part-time or full-time.

Determination of the Labour Court

60. The Labour Court gave its determination on the 4th July, 2012.

61. The Court identified the issues arising as being, firstly, whether the Minister was Ms. Boyle's employer for the purposes of the Act

and, secondly, whether the nominated comparator was a comparable full-time employee within the meaning of the Act. The second question turned on whether or not the chosen comparator was an appropriate comparator for the purposes of the Act, and whether she and Ms. Boyle were engaged in the same work or work of equal value.

62. The facts of the case were summarised much as set out in paragraphs 5-9 above. The Labour Court found that the management of the school was vested in the management committee and that Ms Boyle was under the day-to-day control of that body in the discharge of her duties. However, it also found that it was clear that the committee exercised no control over the remuneration and other conditions attaching to her employment, and that these matters were "exclusively controlled" by the Minister.

63. The Labour Court then went on to note the statutory definitions of the terms "employer" and "employee" already referred to, before considering the applicable law as found by the Superior Courts in *Tobin v Cashell* (Unrep., Kearns J. 21st March, 2000), *Crowley v Minister for Education, O'Keeffe v Hickey and Catholic University School v Dooley*.

64. In rejecting the argument advanced by the Minister that *Dooley* should not be applied to the case, the Labour Court found, firstly, that the factual differences urged upon it – that in this case, the Minister paid only 98% of the salary, and that it was it was in the first instance paid to the committee – did not undermine the application of the general principle enunciated by Dunne J. The Court went on:

> *"In so far as it may have been implicit in submissions made in the course of argument that Catholic University School v Dooley was wrongly decided, or that it should not be followed in light of earlier Supreme Court authorities, it is not open to this Court to consider such a proposition. While that decision may appear to be at variance with the earlier authorities it is directly in point as it deals with the same issue as that arising in this part of the instant case. It is also clear that the earlier authorities were opened to and considered by Ms Justice Dunne. It goes without saying that this Court is absolutely bound, by the Doctrine of Precedent, to follow and apply the rationale of a decision (or the ratio decidendi as it is technically called) of the High Court in any case in which that decision is relevant…*
>
> *…It seems to the Court that the ratio decidendi in Dooley is discernible from the passages of the judgment quoted above. It appears to be that in a tripartite employment relationship, where the worker is engaged by and works under the direction and control of one party, and his or her terms and conditions of employment are determined solely by another party and funded by that party, the party who determines and funds the wages is to be regarded as the employer for the purposes of the Act of 2001.*
>
> *As in Dooley, [the Minister] determined the terms and conditions of [Ms. Boyle's employment and [the committee] had no hand, act or part in determining her pay or her conditions of employment. [Ms. Boyle's] salary was set, adjusted and reduced on the directions of [the Minister] without any input by [the committee]. Moreover, as in the case of Sullivan v Department of Education [1998] ELR 217, which was quoted with approval by Ms Justice Dunne, the relief that [Ms. Boyle] seeks, namely inclusion in the superannuation scheme, could only be obtained against [the Minister] and there could be no reality in seeking to pursue that claim against [the committee]."*

65. The Labour Court concluded on this issue:

> *"The decision in Catholic University School v Dooley is a decision of the High Court exercising a final appellate jurisdiction. That case concerned the interpretation of the same provisions of the Act as are in issue in the instant case. The Court believes that it is bound to follow and apply the ratio decidendi of that decision in this case. For these reasons the Court must hold that [the Minister] is to be regarded as [Ms. Boyle's employer for the purposes of the within claim."*

66. The Court then went on to find that the comparator and Ms. Boyle were both employed by the Minister, and that while they were not engaged in the same work they were engaged in work of equal value.

67. Under the heading "*Redress*" it is noted by the Labour Court that one of the hearing dates was specifically convened for the purpose of taking submissions on this topic. Ms. Boyle sought an order directing the Minister to enter her into the National School Teachers Superannuation Scheme with effect from 1992, the year in which she became an "eligible part-time teacher". The Court considered that this was not possible, for two reasons. The first was that the Act under which the claim was brought was not enacted until 2001, and plainly Ms. Boyle could not have accrued any entitlement under the legislation prior to its enactment. Secondly, no complaint could be entertained unless made within six months from the date of the alleged contravention of the Act.

68. The Labour Court therefore took the view that it was limited to making an order directing the Minister to enter Ms. Boyle into the National Teachers Superannuation Scheme with effect from the 21st September, 2008, being six months before the date upon which she initiated her claim. The Court said that it also believed that it was appropriate to make an award of compensation "for the general effects of the discrimination suffered by the Claimant". It considered the sum of €10,000 to be just and equitable.

The judicial review proceedings

69. The Minister seeks an order of *certiorari* in respect of the determination by the Labour Court. The statement of grounds, in summary, pleads that the Labour Court acted unfairly and *ultra vires* the Act, and erred in law in

> a. determining that Ms. Boyle and her chosen comparator were employees of the Minister for the purpose of the Act without any or any sufficient regard for the express terms of the Act, in the absence of any contract of employment between the parties and despite the fact that they were employed by a separate, identified third party;
>
> b. directing the Minister to enter Ms. Boyle in the National Teachers' Superannuation Scheme, when she did not satisfy the statutory requirements for it; and
>
> c. making a finding as to general unspecified effects of discrimination suffered by Ms. Boyle, in the absence of any claim or any evidence of loss, and awarding compensation.

70. It is pleaded that the Labour Court failed to correctly apply the doctrines of precedent in considering who the appellant's employer was, and considered itself bound by a High Court *dictum* instead of applying Supreme Court authority; that it acted arbitrarily and unreasonably and that there was a fundamental error of law on the face of the record.

71. The statement of opposition, in summary, denies that the Labour Court fell into the errors alleged, or that its determination is amenable to judicial review. The proceedings are asserted to be an abuse of the process because of the existence of the statutory

appeal on a point of law.

72. It is admitted that the principal claim made by Ms. Boyle in the Labour Court was that both she and her chosen comparator were both employees of the Minister. However, it was open to that Court to find in her favour on alternative bases under s. 7(2)(a), (b) or (c) of the Act.

The position of the Management Committee
73. The management committee was a party to and represented at the hearings before the Rights Commissioner. It did not involve itself in the hearing of Ms. Boyle's appeal.

74. Ms. Boyle has averred that by the time the matter reached the Labour Court there was no functioning management committee. However, she says that at the Rights Commissioner hearing Mr. Neylon had confirmed that the committee had no say or discretion in relation to her terms and conditions.

75. For the purpose of service of the papers relating to this judicial review application on the committee, it appears that a member of An Garda Síochána was instructed to go to a particular address. This address was in fact the home address of Ms. Boyle. The garda did not find anyone present. This method of service appears to have been adopted because the Minister did not know, and said that he had no way of finding out, the identities of the members of the Committee.

Propriety of judicial review proceedings
76. The Minister says that he is entitled to invoke the judicial review jurisdiction to correct an error of law which formed the basis for the impugned decision, relying in this regard on the authorities of *Farrell v Attorney General* [1998] 1 I.R. 203 and *O'Donnell v Tipperary (South Riding) county Council* [2005] 2 I.R. 483.

77. The decision to pursue this avenue, as well as lodging an appeal on a point of law under the Act, is explained in the grounding affidavit sworn on behalf of the Minister by Mr. Dalton Tattan, a Principal Officer, as follows:

> *"The decision impugned herein, now the subject of appeal to the High Court, is of major importance I believe having regard for the very large number of other teachers who might seek to suggest that they are similarly positioned, not merely to Ms. Boyle but also and importantly to her chosen comparator. As I have sought to highlight above, the position which has long been accepted is that even in the context of a recognised school such as a primary school, the Minister is not the employer of an individual teacher. Inherent in the determination impugned herein is the finding that not merely was Ms. Boyle an employee of the Minister, but her chosen comparator was an employee of the Minister. Accordingly the decision has wide ramifications not just in respect of the Act of 2001, but also in respect of other legislation wherein the status of an employee is similarly defined and indeed possibly on an even broader basis still.*
>
> *Since the appeal to the High Court on a point of law may not be taken further to the Supreme Court, I say and believe and am advised by counsel that there is a risk that such an important issue will fall to be determined before the High Court without any recourse being had (by either party) to a determination by the Supreme Court. In particular in this case, there is a risk that if the matter comes before the High Court, the High Court without addressing the substance of the issue, may adopt a similar approach to that of the Labour Court and hold that a recent High Court decision has in fact determined the issue, rightly or wrongly, and accordingly the substance of the matter may not be revisited."*

78. The last sentence seems to refer to the principle set out in *In Re Worldport Ireland Ltd (in Liquidation)* [2008] IESC 68, *Kadri v Governor of Wheatfield Prison* [2012] IESC 27 and *Irish Trust Bank v. Central Bank of Ireland* [1976-7] I.L.R.M. 50, whereby one High Court judge should in general follow a decision by another.

79. It is argued on behalf of Ms. Boyle that the Minister is engaged in an abuse of the court's process and attempting to bypass the statutory scheme established by the Act.

80. Guidance on this issue is to be found in the judgment of Clarke J. in *EMI Records (Ireland) Limited v The Data Protection Commissioner* [2013] IESC 34. One of the issues in the case was whether the applicant record companies were entitled to take judicial review proceedings in circumstances where they had already applied to be joined in a statutory appeal by the notice party. Clarke J., having referred to the well-known passage in *The State (Abenglen Properties Ltd) v. Dublin Corporation* [1981] ILRM 54 regarding alternative remedies, noted that the availability of an adequate alternative meant that the court was likely to exercise its discretion against the applicant. He also quoted with approval from the judgment of Hogan J. in *Koczan v Financial Services Ombudsman* [2010] IEHC 407, and concluded as follows:

> *"Thus the overall approach is clear. The default position is that a party should pursue a statutory appeal rather than initiate judicial review proceedings. The reason for this approach is, as pointed out by Hogan J. in Koczan, that it must be presumed that the Oireachtas, in establishing a form of statutory appeal, intended that such an appeal was to be the means by which, ordinarily, those dissatisfied with an initial decision might be entitled to have the initial decision questioned.*
>
> *However, there will be cases, exceptional to the general rule, where the justice of the case will not be met by confining a person to the statutory appeal and excluding judicial review."*

81. This approach was followed by Hedigan J. in *Blackrock College v. Browne* [2013] IEHC 607, a case concerning the same issue as the instant case, in which it was held that the appellant school was correct to appeal on a point of law rather than seeking judicial review.

82. It is clear that if the general rule were to be applied, the court should confine the Minister to the statutory appeal process.

83. I propose, in this instance, to deal with the substantive merits of the judicial review proceedings notwithstanding the fact that there is in being an appeal under the statute.

84. I accept the legitimacy of the rationale for taking the judicial review proceedings as averred to by Mr. Tattan. The issue in the case goes beyond a technical dispute as to the interpretation of the Act. It is a serious matter, affecting a large number of people, with its roots in the unique Constitutional arrangements for education in this State. It seems to me that it is not necessarily an abuse of process in these circumstances to wish to leave open to both parties the possibility of appeal. This is particularly so when the matter was properly dealt with in the grounding affidavit and brought to the attention of the leave judge.

Submissions in the judicial review proceedings
85. The case was opened by Mr. McDonagh SC on the basis that any discrimination suffered by Ms. Boyle was not because she worked part-time, but because she did not work in a National School. However, the fundamental issue was identified as being the contention that she did not have a contract of employment with the Minister. The latter simply provided funding and it was open to the school to top up her pay, change her hours or make provision for a pension. Her contract of service was with the committee.

86. The Minister relies on *O'Keeffe v. Hickey* and the line of authority supporting the proposition that a teacher is employed, not by the Minister, but by the management of the school.

87. It is submitted that the correct *ratio* of *Dooley* is that the appellants in that case, being privately-funded teachers, could not use State-funded teachers as comparators. This was because they did not have the same relationship with the school. The observations about the Minister being the employer of the State funded teachers are said to be *obiter*, and/or wrong, and, in any event, applicable only in respect of secondary teachers in a school which is recognised within the meaning of the Act. The pre-school in question was never a recognised school within the meaning of the Education Act, 1998. The Labour Court fell into legal error in applying those observations, instead of applying the terms of the Act and following the established authorities.

88. It is submitted that the statutory definitions of "employer" and "employee" are the only ones cognisable by the Court and that the Directive and Framework Agreement cannot be used for the purpose of interpreting the Act *contra legem*.

89. The Minister also submits that the Labour Court should not have awarded compensation in the absence of proof of damage. It was up to the claimant to present evidence if she felt that loss had accrued to her. This argument is put in terms of fair procedures – not that the Minister was not given an opportunity to make submissions on redress, but that there had been no evidence or submissions relevant to compensation.

90. It is also argued that the order requiring the Minister to admit Ms. Boyle to the pension scheme is contrary to law, in that she does not meet the statutory qualifications for it.

91. Mr. McDonagh submits that the Education Act preserves the employment status of teachers.

92. In answer to a query from the court as to what redress a part-time teacher would have if the Minister set different pay rates for full-time and part-time teachers. Mr. McDonagh said that the remedy would be against the board of management of the school.

93. However, he maintains that any detriment suffered by Ms. Boyle was not because she was part-time, but because she was not a national school teacher. It is suggested that she is attempting to get a benefit "never intended for her" but intended for national school teachers. She worked in a preschool, which is not primary education and which the Minister has no obligation to provide. She was paid out of a grant given to that establishment.

94. Mr. McDonagh referred to the fact that there are early learning centres run by organisations such as Barnardo's, whose staff are provided with pension schemes. He says that it would not be of concern to the Minister if the management committee had paid Ms. Boyle more than a national school teacher's salary.

95. On behalf of Ms. Boyle, Mr. Ward SC says that there is nothing in the statement of grounds about any differentiation between recognised schools and the preschool where Ms. Boyle taught, or about the method by which it was funded, and that these are in any event side-issues. The device by which the money was paid as a grant was just a means to provide her salary, which was that of an eligible part-time teacher. She had the same relationship with the Minister as a national school teacher.

96. It is submitted that the decision of the Labour Court was correct in law. Ms. Boyle had sought redress from the person who controlled her pay and conditions, the degree of control being illustrated by the facts of the case and the documentation put before the Labour Court on all pay-related issues up to the point where the Department accepted responsibility for the payment of redundancy entitlements. It is noted that the Minister does not suggest that she should not have the protection of the Act, arguing rather that in attempting to invoke its provisions against him she is aiming at the wrong target. However, even when the management committee was functioning, there was nothing it could have done about a pension for her.

97. On the authorities, it is submitted that *O'Keeffe v Hickey* is concerned with the question of vicarious liability. This arose in the historical context of the tripartite system of education in Ireland, and the conclusions of the Supreme Court in relation to the issue before it cannot be directly applied to pay-related issues. In relation to those matters, the State regulates every aspect. In any other employment area these issues are decided by an employer.

98. It is submitted that, when looking at any particular piece of legislation, the question to be asked is – who has control over this issue? In *Dooley*, Dunne J. concluded that for the purposes of this particular Act, State funded teachers were employees of the Minister. This could not be described as obiter, and the Labour Court was bound to apply it.

The authorities
99. Article 44(4) of the Constitution reads as follows:

> *The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate education initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, to the rights of parents, especially in matters of religious and moral formation.*

100. The historical background, and the reasons why the provision is worded in this manner, were most recently examined by the Supreme Court in *O'Keeffe v Hickey*. In that case the plaintiff had attended a national school as a child. She sued the State and the principal of that school in respect of sexual assaults perpetrated upon her by the latter. The trial of the action in the High Court involved rulings on a number of issues, but the only one left in the case when it came before the Supreme Court was the question whether the State could be held to be vicariously liable in negligence for the principal's actions.

101. All of the judgments in the Supreme Court, including the dissent of Geoghegan J., accepted the contention of the State that the principal was employed by the manager of the school and not by the State. The majority held that in those circumstances, since the Minister had no direct control over the principal, the principle of vicarious liability could not avail the plaintiff.

102. On the issue of the employment contract Geoghegan J. said that it was not in dispute that a teacher in a national school was in a contractual relationship with the manager of the school.

> *"In other words the manager is the employer…What is certainly beyond argument is that the State is not in a contractual relationship of any kind with the teacher including the principal."*

103. Hardiman J. said

> *"[The principal] was not an employee of the Minister and neither was he in any form of relationship with him which corresponds to any of the ordinary legal triggers for vicarious liability. Their relationship –a triangular one with the Church – is entirely sui generis, a product of Ireland's unique historical experience."*

104. Fennelly J. observed that

> *"It is the manager and not the Minister who decides on which teacher to employ and the contract of employment is between the manager and the teacher. The manager may dismiss a teacher without the sanction of the Minister."*

105. The above are passages that are, of course, relied upon by the Minister in the instant proceedings. However, the analysis in each of the judgments in *O'Keeffe* of the historical and Constitutional position of the State vis-à-vis schools and school management in the Irish system is also of relevance.

106. It was noted that in the 19th century the "managerial system" became established in Ireland, mainly through the efforts of the Roman Catholic and Dissenting churches. The State agreed to pay for a national education system, and promulgated rules for it, but ceded the role of management and administration at the point of delivery to the Patron and the Manager of the school - in practice, to the churches. This system was already long established by 1937.

107. The judgments refer to the expert evidence of a Professor Coolahan, who described as "the key concern that had been fought for and won over the years" the right of the school manager to appoint and dismiss teachers.

108. Looking at 20th century judgments dealing with the structure of the education system, Hardiman J. cited *Fox v. Higgins* (1912) 46 I.L.T.R. 222 as being the first to refer to a "triangular pact" involving the National Board of Education, the school manager and the teacher. In that case, dating from 1912, a teacher who had been absent through illness was refused permission to return to work by a new manager appointed during his absence. The rules in force at the time stipulated that a new manager was obliged to reappoint teachers appointed by his predecessor. The teacher was held entitled to damages on the basis that the rules, although made by the Board, created a contract between him and the manager.

109. The judgments in *O'Keeffe* also refer to the following passages from *McEneaney v. The Minister for Education* [1941] I.R. 430, in which the managerial system was described by the then Supreme Court.

> *"The selection of the teacher, who should, however, have the prescribed qualifications, was left to the manager, but the salary of the teacher was in general provided by the Board [of National Education]…*
>
> *By the Rules of the Board upon a change of manager the succeeding manager was under an obligation to reappoint the existing teachers under an agreement in writing in the same terms as the agreement by which they had previously been appointed. Further, whilst under the Rules the provision of salary for the teacher was made in the form of a grant to the manager and was paid to him unless he signed a request to have it paid direct to the teacher, the entire conditions as to remuneration usually depended upon the action of the Board…*

110. Reference was also made to *Crowley v. Ireland* [1980] I.R. 102. In that case, a number of members of the Irish National Teachers Organisation had been held to have entered into an unlawful conspiracy to deprive children of their constitutional right to education in furtherance of industrial action. The High Court had also found the Minister for Education liable in damages on foot of his failure to take adequate action to ensure that education was provided to the children during the strike. The Minister's appeal was allowed by the Supreme Court.

111. Kenny J. referred to this State's historical experience as being

> *"one of the State providing financial assistance and prescribing courses to be followed at schools; but the teachers, though paid by the State, were not employed by and could not be removed by it. This was the function of the manager of the school who was almost always a clergyman. So s.4 of Article 44 prescribes that the State should provide for free primary education. The effect of this is that the State is to provide the buildings, to pay the teachers who are under no contractual duty to it but to the manager or trustees, to provide means of transport to the school if this is necessary to avoid hardship and to prescribe minimum standards."*

112. There appear to be two High Court judgments dealing with the position of teachers under the Act with which the instant case is concerned.

113. *Catholic University School v Dooley* involved a claim under the Act brought by part-time teachers employed in CUS. That school is a fee-paying establishment and the part-time teachers involved in the claim were paid out of privately raised funds. They sought to compare themselves to full-time teachers in the same school whose salaries were paid by the Department, for the purpose of seeking to be paid at the same rate. There was no dispute as to the fact that they were treated less favourably. The Labour Court upheld their claim and an appeal on a point of law was taken to the High Court.

114. The school relied upon paragraph (b) of the definition of an employer and argued that the claimants did not have the same employer as their chosen comparators since the school had "no hand, act or part" in the negotiations between the teachers, their union and the Department. Various distinctions between state and privately funded teachers were set out. It relied upon a decision of the Employment Appeals Tribunal in *Sullivan v. The Department of Education* [1998] E.L.R. 217, where the tribunal had found the Department to be a teacher's employer for the purposes of the Payment of Wages Act, 1991.

115. The claimants relied upon the analysis of the Supreme Court in *O'Keeffe* in making the argument that the board of management, or the school, had to be seen as their employer for all purposes.

116. Having considered *O'Keeffe*, Dunne J said:

> *"There is no doubt that the school is the employer of the claimants. Bearing in mind the decision in O'Keeffe v. Hickey, it*

appears that the school is also the employer of the chosen comparators for the purposes of issues of vicarious liability. That decision highlights the unusual tripartite relationship between the Department funded teacher, the Department and the school. However, the provisions of s.24 of the Education Act 1998 are also of importance. S.24 (3) makes it clear that the task of appointing teachers funded by the State falls on the board of management of a school. S.24 (5) of the Act makes it clear that the terms and conditions of teachers funded by the State shall be determined by the Minister, with the concurrence of the Minister for Finance.

In a private school there will be a cohort of Department funded teachers and usually there will also be a cohort of privately paid teachers. The paymaster for each cohort is different. In the case of O'Keeffe v Hickey to which I have referred above, the unusual nature of the tripartite agreement was described; the Board of Management was found to be the employer of the teacher concerned in that case which involved the question of vicarious liability although the teacher was paid by the Department. There is no tripartite arrangement in the case of the claimants."

117. Dunne J. went on to refer to the EAT decision in *Sullivan*, which concerned a dispute about the entitlement of a teacher to a particular qualification allowance. One of the arguments made by the Department was that it was not the applicant's employer but merely the "paying agent". Dunne J. quoted the following passage from the EAT's determination:

"The tribunal does not accept that the Department is not the employer. The board of management or other managing authority of a school may well have a role in the day-to-day running of the school and indeed in engaging teachers, interviewing etc. The reality is that such boards of management or other managing authority in relation to state schools have little or no role when it comes to the question of remuneration of teachers, which is a most important element and aspect of the relationship between teachers and their employers. The tribunal considers that the role of the Department of Education goes beyond that of "paying agent". The Department is empowered to negotiate teachers' salaries and qualification allowances and makes policy decisions in relation to the type of degree which Ms. Sullivan and other teachers have studied for in relation to the status of such degree as regards qualification allowances. The Department has a role in the whole area of maintaining appropriate pupil/teacher ratio indirectly and regulates the number of teachers in any particular school as in the scheme of redeployment. If ultimately redeployment in the case of any particular teacher cannot be settled by agreement, the Minister is empowered to withhold the grant of the sum of money which would go towards paying that particular teacher's salary and effectively has the power to deprive a particular teacher of his or her salary.

In all of those circumstances the Tribunal does not accept that the Department is simply a 'paying agent' which simply pays out the money at the request of the state school concerned. In relation to the question of the hours worked for which a teacher qualifies for his or her monthly salary, the school principal has a role in certifying the hours worked. However in respect of all teachers, when it comes to the question of qualification allowances, these aspects of a teacher's salary involve no role for the school and are something which go to the teacher's particular qualification and are a constant."

118. The tribunal considered that the fact that the school principal described him or herself as the "employer" on the monthly certification form was not conclusive.

119. Dunne J. observed that the case of *Sullivan* highlighted the different and complicated employment arrangements as between Department funded teachers and privately funded teachers. She continued:

"One wonders what relief, if any, could have been obtained by the claimant in the case of Sullivan v Department of Education had she pursued her case against the school as opposed to the Department. It is hard to see how the Tribunal in that case could have come to any other conclusion. The recognition of qualifications and the payment of a qualification allowance was always a matter to be dealt with by the Department of Education, because it set the criteria for the payment of that allowance. The case provides one small example of the different contractual arrangements that exist between Department funded teachers and the school in which they are employed and privately funded teachers and the school in which they are employed.'

120. She noted that on the facts in *Dooley* the school had no input into the contract of a State funded teacher and no control over significant terms in such a contract. In contrast, the school did have control over those aspects of the claimants' contracts. She went on to find that, if the school had had control over the fixing of the terms and conditions of all the teachers in the school, including the determination of remuneration and superannuation, there could be no objection to the chosen comparators but that was not the case.

"The school has no hand, act or part in determining the salary and other terms and conditions of the Department funded teacher. In determining the employer for the purpose of the legislation in relation to agency workers, the legislation expressly provides that the party paying the worker is, for the purposes of the legislation, the employer. I think the school is in an analogous position. I do not accept that the chosen comparators have the same type of employment contract or relationship as the claimants with the school. To that extent, it seems to me that the Department has to be viewed as the employer of the chosen comparators for the purpose of the legislation."

121. *Dooley* was followed by Hedigan J. in *Blackrock v. Browne* . In that case, the claimant was, again, a privately paid part-time teacher who sought to compare herself to a full-time Department funded teacher in relation to pay, pension and other conditions of employment. The Labour Court found in her favour and the school appealed to the High Court.

122. Hedigan J. rejected a submission on behalf of the claimant that the passage from *Dooley* quoted immediately above should no longer be regarded as good law, because of the intervening change in the relationship between the claimant and the Department brought about by FEMPI. He noted that her salary had been reduced, and her hours increased, by direction of the Department but held that the key rationale of Dunne J.'s decision was contained in these sentences:

"In determining the employer for the purpose of the legislation in relation to agency workers, the legislation expressly provides that the party paying the worker is, for the purposes of the legislation, the employer. I think the school is in an analogous position."

123. Hedigan J. went on:

"Thus, although the school has imposed upon the respondent new terms and conditions, it still remains the party that

pays the worker i.e. the respondent. Thus, the relationship of employer and employee continues to be, in essence, as Dunne J. found it and upon which she determined that the Departmental teacher was an incorrect comparator."

124. I now turn to a closer examination of *McEneaney v. Minister for Education*, already referred to in the discussion of *O'Keeffe*. The plaintiff, a teacher, claimed to be entitled to a particular increment. He was so entitled under the Department's rules as they stood at his appointment, but the relevant rules had been altered. The Supreme Court held that he was legally entitled to the salary and increments set out in the rules when he was appointed, subject to the power of the Minister to reduce pay in certain circumstances.

125. Giving the judgment of the majority, Murnaghan J. commenced by stating that it had been recognised for more than a century that the provision of primary education was "a national obligation". For many years this duty had been entrusted to a body corporate, created by charter, called the Commissioners of National Education in Ireland. In administering the funds granted to it by Parliament, the Board of this body devised the managerial system.

126. After the passages referred to above, (as quoted in *O'Keeffe*), Murnaghan J. said:

"As between the manager and the teacher legal rights and obligations depended upon the contract to which the Board was not a party, and it has been sought on behalf of the Department of Education to treat this contract as one in which, as to its legal effects, the Department was in no way concerned. I use the word "Board" and "Department" interchangeably as the Department of Education has now succeeded to all the powers of the National Board of Education.

But the contract between the manager and the teacher does not comprise the entire relationship. Fox v. Higgins was an action in which a teacher sued a new manager for failure to re-appoint him in accordance with the Rule made by the Board, and Gibson J. held "that the National Board, the manager and the teacher are put together in a kind of triangular pact" and he awarded damages against the new manager who had entered into no new contract with the teacher. So far as the present case is concerned, as the manager did not own the school and was not carrying it on for his personal benefit, he is in the position of a trustee of an educational trust; but at the same time the Board, acting as an independent authority, has made published Rules by which it has made representations to both the manager and the teachers as to the way in which it would apply the funds entrusted to it by Parliament. In so far as Parliament has left to the Board a free discretion as to the application of these funds, the Board was legally bound by the representations which it had made."

127. Further on he continued:

"I have mentioned already one argument put forward by the Department to the effect that the salary was a mere matter of bounty given to the manager, and that the contract between the manager and the teacher was a matter in which the Department had no concern. Even if this were a tenable proposition in law it would be quite at variance with reality, but it is not so. I have already stated my reasons for saying that a private corporation administering trust funds could not in the face of its own representations take up such a position to the detriment of those persons who acted upon its representations, and such a course of conduct is not open to a public Department of State.

I am equally, for the reasons I have given, unable to accept the argument that the parties by their contract meant, not a salary upon definite terms and conditions, but only such salary as the Board should decide to grant from time to time."

128. It may be noted that the views of the Court as to the "national obligation" to provide education should perhaps be regarded as overly broad in the light of the decision in *Crowley v. Ireland*. However, *Crowley* does not cast doubt on the status of the findings in *McEneany* relating to the Department's obligations to pay teachers in accordance with the applicable rules.

Discussion and conclusions

129. I do not propose to discuss the issue that arose between the parties as to the applicability of the Directive in this particular case because it seems to me that the matter can be determined as a matter of Irish law, by reference to the authorities cited above.

130. It is in the nature of a tripartite relationship that each of the three parties has a separate role to play. Much of the focus in the authorities cited has been on the relationship between the school management and the teacher, and it is clear beyond argument that the former holds responsibility for hiring, discipline and dismissal. These aspects are the ones that are likely to give rise to issues of vicarious liability, since that is a concept that is related to control of an employee's behaviour. Questions as to the responsibility of the State for the actions of teachers have been answered in the light of this aspect of the triangular relationship.

131. It is equally clear that since long before this State came into existence, the State's role in this country has been concerned with the funding of that very large part of the education system that is not privately financed. However, it does not, and did not in the past, simply hand over funds to schools to do with as they wish. It sets the rules according to which it pays the salaries of teachers, where they are not paid out of privately sourced funds. Salaries will not be paid by the Department unless the teachers chosen by the management have the qualifications required by the Department, and unless the allocation of posts by the Department to the school in question permits appointments to be made. The rates of pay, including allowances for qualifications, posts of responsibility and so on, are negotiated by the Department in a collective bargaining process under the auspices of a statutory body (the Teaching Council) rather than being set by the individual school management bodies negotiating with individual teachers. In other words, the Department carries out, in respect of State funded teachers, the role normally carried out by an employer with regard to payment of employees.

132. Further, the State now concedes (in contrast to the stance taken by it in the EAT in *Sullivan*) that, in respect of State funded teachers, it is to be considered the employer for the purposes of the Payment of Wages Act, 1991. It is of course the case that the definitions in that Act are different to those under consideration, but the definition from the Payment of Wages Act (set out at paragraph 50 above), is premised on the concept of a person who is "liable to pay the wages". The Minister is, therefore, accepting that he is that person. This position is now confirmed by the provisions of the Education Act, 1998 as amended, s. 24 of which provides for the powers of the Minister in relation to teachers' pay.

133. This, in my view, is one of the results of the unique tripartite arrangement in relation to education in this State. In relation to teachers whose salaries are paid by the State the role of employer is, uniquely, split. Part of it is played by the management of an individual school and part by the Department of Education. The former has the right to hire, discipline, dismiss and generally direct a teacher in the day-to-day running of the school. The Department, on the other hand, sets the rules about, and pays, the salaries.

Since it thereby takes on what would normally be the rights of an employer in relation to pay, it follows, in my view, that it carries the legal duties of an employer associated with pay. It has been clear since, at least, the 1940 decision of the Supreme Court in *McEneany* that compliance with its own Departmental rules is one such legal obligation, and is a matter of contractual right on the part of teachers. I cannot see that compliance with rules imposed on employers by legislation in respect of pay and pay-related matters should be treated any differently. To hold otherwise would be to impose on school management bodies legal responsibility where they have no legal power. The argument that it is open to individual schools to give better salaries or pension provisions if they wish does not deal with the primary liability to pay what is lawfully due.

134. The decisions in *Dooley* and *Browne* are therefore entirely consistent with both the authorities and the factual situation of State funded teachers.

135. It has been argued that the statement by Dunne J. that the Minister must be deemed to be the employer of Department funded teachers should be regarded as *obiter*, and that the *ratio* of her decision was that those teachers had a different relationship with the school. I think that this submission is misconceived. If all the teachers in the school were to be deemed to have the same employer then, under the Act, the claimants would have had a cast-iron case. They were part-time teachers being treated less favourably than full-time teachers. The case was not contested on the basis that the school could show objective justification for the difference.

136. As a matter of fact, it seems that over the years the Department has administered its functions with a consciousness of these responsibilities. The circular issued in 2008 is a good example. It states clearly that the Department was to phase in direct payment of salaries to part-time teachers in order to ensure compliance with the very Act under consideration in this case.

137. If the Department did not act in this manner, it is difficult to imagine how the school system could function. It is not just the sheer impracticality of making individual members of boards of management legally responsible for teachers' payment issues in State funded schools – if that were the law, and it was known to be such by members of school boards, it would seem unlikely that they would be willing to act. The situation in this regard is as the Supreme Court saw it in 1940s Ireland, when it described the proposition put forward by the Minister as "*quite at variance with reality*". There is also the fact that the school boards, unlike other employers, do not have control over the salary rates paid to their employees. It is therefore difficult to see how they could be responsible for paying them. As Dunne J. said of the EAT decision in *Sullivan*, that case could hardly have been decided any other way, given the unlikelihood that a claim could be made against the school in relation to a matter controlled by the Department.

138. Similarly, if the Department decided for some reason to set rates of pay for part-time teachers in a manner which, without justification, treated them less favourably than full-time teachers, how could it be said that a part-time teacher's only remedy would be against the school?

139. The decision of the Supreme Court in *McEneaney* seems to me to be dispositive of the issue. In fulfilment of its Constitutional functions, the Department of Education provides for free primary education by *inter alia* paying teachers salaries. It has set rules, by virtue of which it makes representations to managers and to teachers as to how it will pay salaries, and it is bound by those representations. It has thereby made itself responsible for ensuring the lawful payment of those salaries. It would clearly not be acting in compliance with either its Constitutional duties or the implicit representations made by it if it adopted rules which contravene the provisions of enactments of the Oireachtas.

140. It is true that Ms. Boyle was not employed in a school "recognised" under the Education Act, 1998. However there is no legislation, or other rule of law, to prevent the Minister from entering into the kind of arrangement under which Ms. Boyle was employed for over twenty years. During that time, she was paid at a rate determined by the Minister. In accordance with rules promulgated from time to time by the Minister, she was paid qualification allowances by the Department, put on a twelve-month salary with provision for sick leave and maternity leave, put on an incremental scale, and, ultimately, paid redundancy. While she was still in employment the Department adopted a policy of phasing in direct payment to teachers in her position, rather than via the management committee. All of this is consistent with the legal responsibility of an employer for pay-related issues.

141. The Minister argues that Ms. Boyle has no entitlement to a pension because she was not a national school teacher, and the pension scheme is limited to national school teachers. It seems to me that this is a matter that goes to the appropriateness of he remedy rather than Ms. Boyle's substantive rights under the Act. If one accepts, as I do, that for *the purposes of the Act* she must be deemed to be employed by the Minister, then what she has to do is demonstrate that she has been treated less favourably than full-time employees who are doing comparable work within the definition of the Act. The Labour Court found in her favour on this aspect, and that finding is not challenged in these judicial review proceedings. The mere fact that she worked in a different type of establishment cannot in itself be a bar to redress, and the Minister would bear the burden of showing that there was objective justification for the different treatment.

142. However, I consider that the Minister's complaint about the redress ordered by the Labour Court is to some extent made out.

143. The powers of the Labour Court under s. 16 are to direct the employer to comply with s.9 (that is, to cease treating the part-time employee less favourably than the comparable full-time employee) and/or to direct the payment of compensation.

144. The parties made submissions in this context as to the effects of Directive 97/81, and whether it required the Labour Court to hold that the limitations imposed on it by the Act were such as to amount to a breach of the Directive. Ms. Boyle's representatives argued that she should be retrospectively admitted to the superannuation scheme with effect from the date upon which she became an eligible part-time teacher in 1992. The Labour Court considered that it could not do that because the Act was not enacted until 2001, and because of the six-month limitation period for the making of complaints. It did not, therefore, attempt to interpret the Directive in the manner contended for but applied the terms of the Act as it understood them to be.

145. However, I do not think that the jurisdiction to direct compliance with the terms of the Act can encompass ordering the Minister to admit the claimant to a particular statutory scheme, the terms of which set out qualifying conditions including what appear to be a requirement to pay contributions. This goes beyond ordering an employer to cease discriminating and comply with the Act, and I consider it to be ultra vires the powers of the Labour Court. It seems to me that the loss suffered by the claimant in these circumstances is more appropriately dealt with by way of compensation.

146. The power to award compensation is not limited by the terms of the Act to established special damage and I do not consider that the Labour Court acted irrationally or unlawfully in awarding €10,000 for the "general effects" of the discrimination suffered by Ms. Boyle. However, I propose to remit the matter to the Labour Court for reconsideration of the question of compensation, to take account of the findings of this court as to the invalidity of the direction to admit the claimant to the superannuation scheme.

Summary
147. School teachers whose salaries are publicly funded must be deemed, for the purposes of the Protection of Employees (Part-time Work) Act, 2001, to be employed by the Minister for Education. The Labour Court correctly found that the claimant in this case, although not a national school teacher, or a teacher in a recognised school, was employed on the same basis as such teachers. She was found to have been treated less favourably than full-time teachers doing comparable work. She is therefore entitled to redress under the Act. The Labour Court is not, however, empowered to order that she be admitted to the national teachers superannuation scheme. The matter will be remitted to the Labour Court for further consideration of the question of compensation.