

THE HIGH COURT

[Record No. 2016/225 J.R.]

BETWEEN

TONYA MARTIN

APPLICANT

AND

THE MINISTER FOR SOCIAL PROTECTION

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 31st day of May , 2017.

Background:

1. The applicant is a 28 year old woman, who prior to the matters giving rise to the proceedings had been in receipt of Jobseeker's Allowance. She received a letter dated 30th April 2015, which stated that as someone who had been unemployed for 12 months or more and who is in receipt of Jobseeker's Allowance, she had been randomly selected by the Department of Social Protection ("DSP") to take part in an activation programme entitled "the Tús Community Work Placement Initiative ("the Scheme")." The letter stated:- "As Tús is a government programme failure to attend the above appointment may affect your D.S.P. (Social Welfare) payment." The letter was sent by Tolka Area Partnership ("the Partnership"), which was operating the Scheme pursuant to an agreement with the DSP of 31st March 2011.

2. This led to the employment of the applicant by the Partnership by way of written contract dated 31st August 2015. Her contract of employment required the applicant to work in a garden allotment assisting elderly people, for a period of approximately eight months. On 25th February 2016, a disagreement occurred between the applicant and a co-worker; and it is alleged that the applicant threw an item in the direction of the co-worker and as a result was suspended from employment for one week on full pay, pending an investigation. The applicant accepts this event occurred but in the proceedings pleads that she felt intimidated by her co-worker and that this explained her actions.

3. A disciplinary hearing was held on 29th February 2016, at which the applicant was present, but was adjourned until 7th March 2016 at 4p.m. ("the second hearing"), to allow the applicant to submit a written account of the incident. The applicant claims that she arrived for the second hearing at approximately 4.05p.m., i.e. five minutes late, and informed a representative of the respondent that she was present. The applicant was refused admission to the second hearing and it was conducted and concluded in her absence. On 11th March 2016, the applicant received, from the Programme Manager of the Scheme, Ms. Anne Fitzgerald, a letter dated 8th March 2016, setting out the outcome of the disciplinary proceedings which stated:-

"I am writing to inform you that as a result of the disciplinary hearing on 07/03/2016 which was in Rosehill House, Dublin North West Area Partnership, Finglas Road, Dublin 11 in which you failed to attend following on from the disciplinary hearing on 29/02/2016. The outcome of his hearing was your dismissal from the Tús Programme due to an incident which occurred in the Greenview community Garden on 25/02/2016 concerning acts of misconduct in accordance with the Company's Disciplinary Procedure.

Reasons for dismissal are as follows:

- *Violent or threatening behaviour*
- *Malicious mischief resulting in danger to fellow employees or other persons or danger to or destruction of the organisation's property or equipment*

Your case file will now be returned to the Department of Social Protection for review.

You are entitled, if you wish to appeal this decision. An appeal should be made within three working days of the decision by notifying the Chair of the Appeals Panel in writing..."

4. It is the applicant's case, inter alia, that she received this letter too late to appeal the decision within the stipulated period and that she telephoned her supervisor on the Scheme and informed her of this, but the supervisor would not facilitate the lodgement of a late appeal. By letter dated 15th March 2016, Ms. Fitzgerald wrote to the applicant, informing her that as no appeal had been lodged on her behalf against her dismissal, the decision to return her file to the DSP for review was upheld. The letter further stated that her contract with the Scheme would cease on 18th March 2016. On the same date, 15th March 2016, a Deciding Officer, Ms. Aileen Clare Brennan, of the DSP wrote to the applicant to inform her that she was disqualified from receiving Jobseeker's Allowance for nine weeks on the grounds that:-

"You are not entitled to Jobseeker's Allowance if you lost your job through your own misconduct.

The reason for my decision is: You have deprived yourself of an income due to losing you (sic) position on the Tús Programme. Additionally, you failed to engage fully with the disciplinary procedures in place which resulted in your dismissal.

The legislation covering this decision is: Section 147(4)(a) of the Social Welfare Consolidation Act 2005, as amended."

The letter went on to state that if the applicant was dissatisfied with the decision, she could send any facts or evidence to the DSP and a deciding officer would review the decision. The letter also gave the applicant the option to appeal the decision within a period of 21 days of the date of the letter.

5. The applicant lodged an appeal against the decision of the DSP. While she had twenty-one days to appeal this decision, she did not do so for a period of twenty-eight days. Nonetheless, the appeal was accepted by the Social Welfare Appeals Office. However, it was rejected by letter to the applicant on 6th July 2016, on the grounds that the applicant had lost her employment in the Scheme due to her own misconduct.

The Proceedings:

6. The applicant was granted leave to apply for judicial review on 11th April 2016. By way of notice of motion dated 12th April 2016, the applicant seeks an order of *certiorari* quashing the decision of the Minister for Social Protection ("the respondent") of 8th March 2016. In this regard, it is the applicant's contention that the respondent is responsible for the decision of the Partnership to dismiss the applicant. The applicant also seeks, if necessary, an injunction pending the determination of the proceedings, restraining the respondent from implementing the disqualification of social welfare payments to the applicant. The applicant also seeks damages.

The Statement of Grounds

7. The applicant's case is that the disciplinary procedure to which she was subject lacked fair procedures and that this was the responsibility of the respondent. In particular, it is claimed that the respondent, her servants or agents, failed to provide a fair or appropriate process leading to the impugned decision. It is claimed that the respondent, her servants or agents has determined that the applicant has deprived herself of an entitlement to the payment in question, due to her own misconduct and has done so:

- i) without providing for a fair hearing on the issue;
- ii) without ascertaining how or why that conclusion had been arrived at;
- iii) without adhering to the principle of audi alteram partem;
- iv) in circumstances where the applicant was refused entry to her own disciplinary hearing, having arrived five minutes late and where her own written account of matters was not considered.

8. In relation to the second hearing, the applicant claims that upon arriving at the meeting, she informed the programme manager that she was late due to family commitments, including her partner being in hospital. She claims that the manager refused to take her written account of the incident, or to listen to her explanation. It is pleaded that the applicant was denied basic fair procedures by being refused entry to the meeting on 7th March 2016, because she arrived five minutes late.

9. It is also the applicant's case that the respondent failed to provide a fair appeal procedure for the applicant. In respect of the three day period available to the applicant to appeal the decision to dismiss her from the Scheme, as set out in the letter of Ms. Fitzgerald to the applicant 8th March 2016, it is claimed that by the time the said letter arrived, the three day period for the lodgement of an appeal had already expired. The applicant pleads that her supervisor would or could not facilitate her with the lodgement of a late appeal. The applicant, in her statement of grounds also highlights the fact that she was afforded 21 days within which to appeal the decision disentitling her to the social welfare payments, as notified to her in the second letter of the respondent of 15th March 2016, but she was afforded only three days to appeal the decision of 8th March 2016, to dismiss her from her employment with the Partnership. The applicant pleads that she is totally financially reliant on her mother as a result of the abovementioned decisions.

10. The applicant claims that she has a legitimate expectation that she would be afforded a reasonable length of time to lodge an appeal against her dismissal and that the respondent adopted an arbitrary and inflexible policy which fettered the proper exercise of discretion. As a result, she claims the decision is unreasonable, irrational and lacking in proportionality.

11. It is claimed by the applicant that even though she was employed by the Partnership, implementation of the Scheme, the supervision of the participants and the general operation of the Scheme rests under the aegis of the respondent and it is pleaded that the applicant was informed that the Scheme is a government programme; that failure to attend may affect her entitlement to social welfare payments.

12. The applicant relies on s. 259A of the Social Welfare and Pensions Act 2010, which governs the functions of the respondent in relation to employment and related Schemes.

Statement of Opposition

13. The respondent's case is that the reliefs sought by the applicant are misconceived and/or moot. The respondent pleads that the decision of 8th March 2016, was a decision not taken by the respondent, but taken by the then Tolka Area Partnership (now Dublin North West Area Partnership), which is a limited partnership not a party to these proceedings; the respondent claims that it was a stranger to that decision and that the appropriate person to seek relief from is the Partnership.

14. The respondent also claims that the injunction sought by the applicant is now moot in circumstances where the nine week disqualification from entitlement to jobseekers allowance has expired since 10th May 2016. The respondent also pleads that the applicant lodged an appeal against the nine week disqualification from receiving social welfare benefits, and by doing so pursued an alternative remedy.

15. In her statement of opposition, the respondent relies upon s. 359(A) of the Social Welfare Consolidation Act 2005 ("the Act of 2005") which sets out the functions of the Minister in relation to employment and other schemes and other schemes including the Scheme. At subsection (4) thereof it is stated that:-

"The Minister shall not be, or be deemed to be, an employer, within the meaning of the Terms of Employment (Information) Acts 1994 and 2001 by reason only of the provision of funding by him or her to a person pursuant to a scheme or programme provided under this section."

16. It is denied by the respondent that the implementation of the Scheme, the supervision of the participants and the general operation of the programme rests under the aegis of the respondent. It is claimed that the respondent entered into a memorandum of agreement ("the agreement") with the Partnership (therein called "the implementing body") on 31st March 2011. Specifically, the respondent pleads that the agreement states that:-

- (i) the implementing body agrees to carry out its obligations to implement the Scheme in accordance with the agreement;
- (ii) the implementing body is an independent contractor for all persons recruited by them and that no person, or employee of the implementing body shall be considered to be an employee of the DSP;
- (iii) the DSP is indemnified against any liability as a result of any action or injury to any person whether as a result of any work done or action take in connection with the Scheme.

17. The respondent further pleads that the agreement sets out the responsibilities of the implementing body which includes: entering into contracts with all parties involved in the Scheme; monitoring the performance of persons engaged and to proactively manage performance, behavioural or disciplinary issues; and identify and approve eligible organisations and work placement opportunities. In addition, the duties of the implementing body consist of those set out in the agreement and in the Tus Community Work Placement Initiative Conditions and Rules ("the conditions and rules") published by the respondent, which state that the implementing body:

- (i) is responsible for the delivery of the Scheme;
- (ii) enters into a contract with each participant of the Scheme;
- (iii) may discontinue a participant's participation in the Scheme.

The respondent claims that the applicant entered into a one year contract with the Partnership, as implementing body, which contained the terms and conditions of the applicant's employment in the Scheme and that the respondent is a stranger to that contract, and further the respondent was not responsible for, or involved in, any disciplinary process involving the applicant. The respondent does not hold copies of the contracts entered into between the implementing body and the Scheme participants. It is specifically pleaded that the Scheme is a non-statutory initiative approved by the Government. It is also claimed that the decision to dismiss the applicant from the Scheme was contained in a letter dated 8th March 2016, from the Partnership.

18. In respect of the letter dated 8th March 2016, it is pleaded that the applicant was informed of her right to appeal the decision dismissing her from the Scheme, to what is an internal appeal process of the Partnership. The respondent claims it is a stranger as to the precise date upon which the applicant received the letter of 8th March 2016, and as to whether the applicant had time to lodge an appeal within the three day time frame.

19. In relation to the letter dated 15th March 2016, sent by the Partnership, the respondent pleads that this letter stated that the applicant's contract with Tús (i.e. the Partnership) would terminate and that this refers to the contract entered into between the applicant and the Partnership, as the implementing body.

20. The respondent admits that it informed the applicant, by letter dated 15th March 2016, of its decision pursuant to its statutory power under s.147(4)(a) of the Act of 2005 to disqualify the applicant from receiving Jobseekers Allowance for nine weeks on the ground that the applicant lost her job due to misconduct. The respondent claims that in these proceedings the applicant sought relief by way of an injunction in relation to the nine week disqualification, while at the same time she was entitled to lodge an appeal against the disqualification before 5th April 2016. In the event, the applicant lodged an appeal against same on 12th April 2016, and therefore failed to lodge an appeal within the required time frame. (Nonetheless the appeal was accepted by the Social Welfare Office).

21. The respondent pleads that the decision of 8th March 2016, which gave the applicant three days to appeal the decision to dismiss her from the Scheme, was a decision taken by the Partnership. The respondent denies that the applicant will be destitute by the time the appeal is heard and pleads that the applicant received a Basic Income Payment (BASI) of €186.00 per week from 19th April to 25th May 2016. In addition, the nine weeks' disqualification ended on 10th May 2016, and the applicant received Jobseeker's Allowance since that date at a rate of €188.00 per week.

22. It is denied by the respondent that their servants or agents failed to provide for a fair or appropriate process leading to the decision of 8th March 2016; the decision was taken by the Partnership and the respondent was not a party to that decision. The respondent also denies that it failed to provide a fair appeal for the applicant or that the principles of fair procedures and natural justice were not adhered to.

Submissions

Submissions on behalf of the Applicant

23. Counsel on behalf of the applicant contends that her participation in the Scheme was governed by the relevant conditions and rules. It is submitted that any arrangement between the respondent and any third party, servant or agent was not a matter within the knowledge of the applicant. The applicant relies on a number of rules contained in the conditions and rules as being relevant, in particular:

"2.2.6 Each implementing Body is responsible for its own employment policies and compliance with statutory requirements in respect of its employees. Accordingly, the Department has no function in respect of any employment matters other than to require that all practices meet general good practice norms..."

5.12.2 Where a participant begins work with a placement provider and their behaviour poses difficulties or they are un-cooperative, the implementing body may discontinue their participation on Tús. Before taking such action, the implementing body should take reasonable steps to deal with the unacceptable behaviour, including engaging with the participant and offering support, issuing verbal and/or written or referral to other support services..."

5.12.3 The DSP Local Office that referred the participant should receive a formal notification of the termination of a participant's contract with the implementing Body..."

5.12.4 Where a decision of this nature is being taken, reasonable notice should be given to the participant and a right of review should be provided..."

8.4.1 The Department shall establish and convene ... a coordinating committee to support the consistent implementation and delivery of Tús..."

24. Counsel for the applicant submits that the conditions and rules specify the action which the DSP's servant or agent may take in implementing the Scheme when "unacceptable behaviour" is alleged. It is submitted that the procedures in place did not conform to the requirements of the DSP's Scheme. The applicant attended for the hearing on 7th March 2016, five minutes late, was refused entry and the hearing was conducted and concluded in her absence. Her written account and oral explanation were ignored. It is submitted on behalf of the applicant that these actions clearly constitute a breach of the terms and conditions of the Scheme, put in place by the DSP; the DSP cannot distance itself from the obligation to ensure its servants or agents complied with the terms of the Scheme. As the applicant was not a party to any implementation agreement arrived at between the DSP and its servants and agents, accordingly she must look to the DSP, in circumstances when she was subjected to a process which has resulted in her being

deprived of her Jobseeker's Allowance.

25. The applicant also claims that a manifest unfairness attaches to the fact that on 11th March 2016, she received the letter dated 8th March 2016, affording her three days to appeal the decision dismissing her from the Scheme. The applicant relies on paragraph 5.12.4 of the conditions and rules as set out above in that regard. It is submitted on behalf of the applicant that the DSP failed to provide to her reasonable access to a right of review and that that failing is one for which the DSP is responsible for, as it was the DSP's conditions and rules that were breached. Counsel for the applicant contends that the respondent is seeking to rely on the private law Implementation Agreement to avoid liability. While the Minister may be entitled to an indemnity from the Partnership, that does not speak to the primary liability of the Minister. On behalf of the applicant, it is highlighted that the applicant was selected by the Minister for participation on the Scheme and she was informed in writing that her failure to attend the Scheme might affect her social welfare payments.

26. It is submitted on behalf of the applicant that the nexus between the respondent and the Scheme is evident by the sanction imposed on the applicant, and by whom. When the applicant was excluded from the Scheme, this was interpreted by the DSP as coming within s. 147(4)(a) of the Act of 2005 and she was deprived of her Jobseeker's Allowance for a period of nine weeks. On this basis, the applicant submits that the breach of fair procedures, dismissal and penalty are inextricably linked.

27. The applicant contends that in circumstances where the applicant was denied entry to her own disciplinary hearing and was afforded three days to submit an appeal, she was unable to seek legal advice; any argument suggestive of an alternative remedy is illusory. In respect of the appeal against the nine week disqualification from social welfare payments, the applicant submits that that appeal process was lacking in any practical effect since it was based upon the original decision to dismiss taken under the Scheme, which the applicant has been unable to appeal, i.e. the outcome of her appeal to the social welfare appeals office was pre-determined by her dismissal from the scheme.

28. In so far as the respondent argues that the matters at issue are now moot, because the applicant's entitlement to Jobseekers Allowance was restored on 10th May 2016, the applicant argues that in circumstances where the prejudicial finding of misconduct against the applicant is permanently on the applicant's social welfare record, the decision could not be described as moot. The applicant relies on *Shui Jie Liu v. Governor of the Dóchas Centre* (Unreported, Supreme Court, 27th June 2013) and argues that the Court should conduct a two pronged process: first the Court must determine whether the case is moot and secondly, if the Court finds the case to be moot, the Court must then determine whether there are exceptional circumstances which would justify the Court determining the case, notwithstanding the fact that there is no longer a live controversy. It is submitted the Court must have a discretion to hear the case where there are compelling reasons to do so, even upon a finding that the issues are moot. The applicant relies on *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] 4 I.R. 274, *Condon v. Minister for Labour* [1981] I.R. 62 and *McDonagh v. Governor of Mountjoy Prison* [2015] IECA 71 in support of the argument that the doctrine of mootness is not absolute. The exception to the doctrine is said to arise in a number of cases for example *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342 and *Farrell v. Governor of St. Patrick's Institution* [2014] IESC 30.

29. Counsel for the applicant argued that one such instance where a moot issue will be determined by the courts is where the issue raised is capable of repetition yet evading review. In that regard, counsel relies on the American case of *Southern Pacific Terminal Co. v. Interstate Commerce Co.* 8 (1911) 219 US 498 and *P.V. (a minor) v. Courts Service* [2009] 4 I.R. 264. Counsel also relies on the Supreme Court case of *Condon v. Minister for Labour* [1981] 1 I.R. 62.

30. It is submitted on behalf of the applicant that the record of the applicant is tainted by an unlawful determination and that as a matter of principle she is entitled to have the record corrected.

Submissions of the respondent

31. Counsel for the respondent submits that the applicant has no basis upon which to apply for a judicial review and that the application should be struck out on the basis that the reliefs are misconceived or moot.

32. Specifically, it is submitted that Minister is not responsible for the impugned decision of 8th March 2016, of the Partnership, to dismiss the applicant. The respondent argues that the legislation does not define the extent of the role or responsibilities of the Minister in respect of the Scheme other than the Minister "*may provide or arrange for and coordinate the provision of...*". It is submitted on behalf of the respondent that the Court is not tasked with determining if the Minister is an employer of the applicant. Rather, the issue is whether the functions of the Minister, in relation to the Scheme, confers a responsibility on the Minister for the decision of the Partnership as the implementing body to dismiss the applicant and terminate her contract under the Scheme. The respondent relies on a number of paragraphs contained in the agreement which state *inter alia*:-

"7.The implementing body shall at all times be an independent contractor for all purposes and all persons recruited by the implementing body shall be their sole responsibility. It is agreed and understood that in no way shall any person or employee of the implementing body, in any capacity whatsoever, in relation to Tús, be considered to be an employee of the department or its agents.

8.The implementing body must ensure that valid contracts are in place with all parties involved in Tús, including those persons on work placements, supervisor's/team leader and any other applicable parties. It is the responsibility of the implementing body to ensure that all contracts are enforceable, properly signed, dated, recorded and filed securely and are in line with the guidance issued by the Department.

10.The implementing body undertakes to monitor the performance of persons engaged and shall proactively manage on an ongoing basis where there are performance, attendance, behavioural or disciplinary issues."

It is submitted on behalf of the respondent that the agreement and conditions and rules specifically identify the role and responsibilities of the implementing body and the DSP in relation to the delivery, implementation and management of the Scheme. Counsel submits that the responsibility of the DSP in relation to the implementation of the Scheme is limited to the provision of funding to the implementation bodies. The role of the DSP in relation to the participants is limited to identifying the potential participants and the provision of funds to cover the cost of the participants' wages and PRSI contributions. Disciplinary and grievance procedures and processes adopted by the implementing body are controlled exclusively by the implementing body; the DSP has no control of, nor exercises any involvement in disciplinary or dismissal processes.

33. The respondent relies on *O'Keeffe v. Hickey, The Minister for Education and Science, Ireland and the Attorney General* [2008] IESC 72, in which case the plaintiff sought to hold the State defendants vicariously liable for the actions of the first defendant, a teacher, but the Supreme Court held that the State defendants were not liable for the actionable wrongs committed by the first

defendant as there was no direct employment relationship between the first defendant and the State. It is submitted that although the issue in this case is not one of vicarious liability, nonetheless, by analogy, control is a determinative factor in the present case. When the Court considers the issue of responsibility, the extent of control of the DSP in relation to any disciplinary or dismissal process should be considered in determining if the Minister can be held responsible for the applicant's dismissal. The respondent also relies on a number of employment law decisions including: *Minister for Education v. The Labour Court* [2015] IEHC 429, *Catholic University v. Colm Dooley* [2010] IEHC 496 and *Karen Coakley v. Department of Social Protection* [DEC – E2014-011]. In each of these cases, the role of the employer was split. In *The Minister for Education v. The Labour Court* the tripartite arrangement between the school, the Department of Education and the teacher was discussed and in *Dooley* the splitting of the role of employer again arose in the context of the payment of school teachers. *Coakley* (a decision of the Equality Tribunal) however, concerns the splitting of the role of employer in the context of a Tús Scheme as between the Minister for Social Protection and an implementing body for the purpose of the Safety Health and Welfare at Work Act 2005. The respondent contends that all of these decisions support the proposition that where a process is controlled by a body such as the partnership in this case, that body has full responsibility for all decisions taken by it in connection with that process even though it may be funded by a State Department.

34. Counsel on behalf of the respondent submits that the implementing body has complete control over the disciplinary and dismissal process. The dispute, it is submitted is not a dispute in relation to pay which the Department controls, but an alleged failure to provide fair procedures within its the disciplinary process leading to the applicant's subsequent dismissal, in none of which it is argued, the Department exercises any control or has any role. On that basis, it is submitted that the Minister cannot be held responsible for the decision taken on 8th March 2016, to dismiss the applicant.

35. Furthermore, it is submitted that the impugned decision is the subject of a private law dispute, which is not amenable to judicial review; the Minister cannot be held responsible for a decision that is governed by a private contractual agreement between the applicant and the implementing body.

36. It is submitted on behalf of the respondent that the applicant had available to her an alternative remedy, namely, an appeal against her disqualification from receiving Jobseekers Allowance for a period of nine weeks, and that the applicant exercised her right of appeal. The appeals officer upheld the decision of the deciding officer to disqualify the applicant from receiving her social welfare payment for nine weeks. The respondent submits that the Act of 2005 provides for a comprehensive independent statutory appeals mechanism.

37. The respondent further submits that, in any event the applicant's right to fair procedures was not breached. It is submitted that the applicant was afforded two disciplinary hearings by the implementing body: the first on 29th February 2016 when she was asked to submit a written account of the incident, and then on 7th March 2016 (the adjourned hearing), as well as being afforded a right to appeal. The respondent relies on *O'Donnell v. Tipperary (South Riding) County Council, Dellaway Investments Limited & Ors v. The National Asset Management Agency & Ors* [2011] 4 I.R. 1 and *International Fishing Vessels Ltd. v. The Minister for the Marine* (No.2) [1991] 2 I.R. and argues that the applicant had the opportunity to be heard at the first disciplinary hearing. It is also submitted that the procedures followed enabled the applicant to ascertain how and why the conclusion had been arrived at. The respondent also refutes the claim made by the applicant that the decision to dismiss her was irrational or unreasonable.

Decision

38. There cannot be the slightest doubt but that the decision that was taken to dismiss the applicant from her employment by the Partnership, was a decision taken by the Partnership itself, and not the respondent. The mere fact that the respondent has a significant oversight role in relation to the administration of the Scheme, and provides funding for the Scheme, does not and could not serve so as to treat a decision of the Partnership as though it were as a matter of law, a decision of the respondent.

39. The fact that the applicant was required to take up employment with the Partnership in order to remain eligible for Jobseeker's Allowance is not relevant for the purposes of these proceedings; nor is the fact that her dismissal by the Partnership gave rise to the loss of her entitlement to Jobseeker's Allowance (for the limited period of nine weeks, for much of which she received another social welfare benefit that was just €2.00 less per week than Jobseeker's Allowance). It is a matter for the Oireachtas to set the criteria for eligibility for social welfare benefits.

40. The applicant has undoubtedly made out a case that her dismissal from her employment by the Partnership was effected in a manner that is contrary to fair procedures, although because the Partnership is not a party to these proceedings (and nor could it be, it being a private body) the Court does not have the benefit of knowing what the Partnership would have to say in response to the allegations of the applicant. But in any case, those are matters between the applicant and the Partnership, and not between the applicant and the respondent. It is abundantly clear that all matters relating to the employment of the applicant by the Partnership were matters of private law as between those parties, and that the decision to dismiss the applicant from her employment was one taken by the Partnership, and not by the respondent. As such, no matter how unfair that decision may be (and I make no finding in this regard) any complaint that the applicant has arising out of her dismissal is a complaint that should be directed to the Partnership, and not the respondent. As a matter of law, it is not possible to deem the decision of the Partnership to be a decision of the respondent, and for this simple reason it is not possible to grant the applicant the relief which she seeks by these proceedings.

41. My conclusion in this regard finds support in the decision of the Supreme Court in the case of *Patrick O'Donnell v. Tipperary (South Riding) County Council* [2005] IESC 18, a decision of the Supreme Court upon which the respondent relies.

In that case the Supreme Court stated:-

"In Geoghegan v. Institute of Chartered Accountants in Ireland [1995] 3 I.R. 86, factors relevant to the issue as to whether or not the decision was amenable to judicial review were analysed. A number of those factors are relevant to this case and I apply those principles. First, this case relates to the fire service and to a station officer of that service, a service of importance in the community for fighting fires and flooding, amongst other matters. Such a service is necessary within a State, either to be provided by the State or delegated by the State. Secondly, the sources of the general powers of the County Council are to be found in legislation. Thirdly, the functions of the County Council, the fire service, and the station officer come within the public domain of that State. Fourthly, the consequences of the County Council's decision may be very serious for the applicant. Amongst these factors, I lay emphasis on the functions of the County Council, the fire service, and the station officer as functions manifestly in the public domain of the State.

In conclusion on this issue, I am satisfied that the employment of the station officer of a fire station is a matter within the public domain and amenable to judicial review. While there was a contract between the applicant and the County Council, it has a significant public element and the decision to terminate was amenable to judicial review."

42. The respondent submits that the applicant in this case was carrying out a work placement in a community garden, pursuant to her contract with the Implementing Body. The applicant was not in a position of seniority or authority. The powers of the Implementing Body are not derived from legislation. It is submitted therefore that the functions of the Partnership and in particular the function of the applicant do not come within the public domain. I agree with this submission.

43. I am satisfied beyond any doubt that the decision that the applicant impugns in these proceedings is a decision taken by the Partnership and not by the respondent, and it is not a decision for which the respondent is in any way liable. While the respondent established and funded the Scheme, the responsibility for the administration of the Scheme, insofar as it concerns matters relating to the employment of the applicant, rested entirely with the Partnership and not with the respondent. That is clear both from the terms of the Tús implementation agreement, and the Tús community workplace initiative, conditions and rules. The applicant's employment was governed by the contract of employment which she entered into with the Partnership and not the respondent. While it is true that she was obliged to enter into this contract of employment in order to maintain her entitlement to Jobseeker's Allowance, that does not in any way alter the fact that her contract was with the Partnership. The respondent had no role in the day to day management of employees and indeed it would be utterly unrealistic to expect that it could do so. Furthermore, I am quite satisfied that the dispute is indeed a private law dispute and is not amenable to judicial review. I fully agree with the arguments advanced on behalf of the respondent in this regard.

44. It follows therefore that these proceedings should be dismissed.