Neutral Citation: [2013] IEHC 352

THE HIGH COURT

[2012 No. 250 MCA]

IN THE MATTER OF THE PENSIONS ACT 1990 AND IN THE MATTER OF AN APPEAL PURSUANT TO THE PROVISIONS OF SECTION 140 OF THE PENSIONS ACT 1990 (AS AMENDED)

BETWEEN

JOE WILLIS, PAUL KELLY, JOHN WALSH, GERRY O'DWYER, NESSAN RICKARD AND JOE CAMPBELL AS THE TRUSTEES FOR THE TIME BEING OF THE IRISH BLOOD TRANSFUSION SERVICE SUPERANNUATION FUND

APPELLANTS

AND

THE PENSIONS OMBUDSMAN

RESPONDENT

AND

EMER LAWLOR

NOTICE PARTY

JUDGMENT of Kearns P. delivered on the 22nd day of July, 2013

This is an appeal brought by the appellants from a determination made by the respondent on a complaint made by Dr. Emer Lawlor, the notice party, concerning the calculation of her pension entitlements under the Irish Blood Transfusion Service (IBTS) pension scheme.

The appellants are the trustees of the pension fund and the notice party herein was employed by the IBTS from 1st December, 1988 until her retirement on 7th October, 2011.

On or about 1st January, 2010, the remuneration of the notice party was reduced by 15% in line with the Financial Emergency Measures in the Public Interest (No. 2) Act 2009 FEMPI (No.2). The relevant section (s. 2) provided, *inter alia*, that a "relevant provision", in this case a contractual provision, setting the remuneration of a "public servant" would be amended with effect from 1st January, 2010.

However, s. 3 of the Act provided that pay cuts applied pursuant to s. 2 of the Act were to be disregarded in certain circumstances for persons retiring before a particular date for the purposes of calculating the pension entitlements of a person to whom s. 2 applied. The notice party, who retired after the Act came into operation but before the relevant date, claims she has been deprived of the benefit of that provision as a result of an adjudication made by the appellants. Her complaint was upheld by the respondent. The appellants, the trustees of the Irish Blood Transfusion Services Superannuation Fund, have appealed that determination to this Court on a net point of legal interpretation but have also sought to annul the decision of the respondent on the basis of a number of subsidiary matters arising from the manner in which he investigated and determined the matter.

LEGISLATIVE FRAMEWORK

Section 1 of FEMPI (No. 2) defines a "public servant" as:-

> *"(a) a person who is employed by, or who holds any office or other position in a public service body"*

Section 1 further defines what constitutes a public service body for the purpose of the Act as:-

> *"(a) the Civil Service,*
>
> *(b) the Garda Síochána,*
>
> *(c) the Permanent Defence Force,*
>
> *(d) a local authority for the purposes of the Local Government Act, 2001,*
>
> *(e) the Health Service Executive,*
>
> *(f) a vocational education committee established under section 7 of the Vocational Education Act 1930,*
>
> *(g) a body (other than a body specified or referred to in the Schedule) established –*
>
> *(i) by or under an enactment (other than the Companies Acts),*
>
> *or*
>
> *(ii) under the Companies Acts in pursuance of powers conferred by or under another enactment, and financed wholly or partly by means of money provided, or loans made or guaranteed, by a Minister of the Government or the issue of shares held by or on behalf of a Minister of the Government, in respect of which a public service pension scheme exists or applies or may be made"*

The IBTS was established pursuant to the Blood Transfusion Service Board (Establishment) Order 1965 (S.I. 78 of 1965) and thus meets the definition of a public service body within the context of (g) above. The IBTS is not listed in the schedule to the Act.

Section 2 of FEMPI (No 2) provides:-

> *"(1) A relevant provision that fixes the remuneration, or any part of the remuneration, of a public servant shall be taken to have been amended, with effect on and from 1 January 2010, in accordance with this section.*
>
> *(2) Where the remuneration of a public servant is fixed by a relevant provision, then, subject to subsections (3) and (4), the relevant provision shall be taken to have been amended so that the remuneration is—*
>
> > *(a) in the case of persons to whom Table 1 to this section relates, reduced in accordance with that Table, and*
> >
> > *(b) in any other case, subject to subsection (7), reduced in accordance with Table 2 or Table 3 (as the case requires) to this section.*
>
> *(3) Where the remuneration of a public servant, other than a person to whom Table 1 to this section relates, is fixed by a relevant provision and that remuneration includes a fixed periodic allowance which is not a reimbursement of any expense actually incurred, then the relevant provision that fixes each such allowance shall be taken to have been amended so that the allowance is, subject to subsection (7), reduced in accordance with Table 4 to this section.*
>
> *(4) Subject to subsection (7), where a public servant is entitled as part of his or her remuneration to the payment of an allowance and the allowance—*
>
> > *(a) is not reimbursement of any expense actually incurred,*
>
> *and*
>
> > *(b) is expressed as a specified percentage or specified proportion of another part of the remuneration (referred to in this section, including the Tables, as "basic salary") of a public servant to whom the relevant provision applies,*
>
> *then the public servant's basic salary, for the purposes of calculating the amount payable as the allowance, is his or her basic salary reduced in accordance with subsection (2) and Table 2 or Table 3 (as the case requires) to this section.*
>
> *(5) Nothing in this section affects any allowance or payment which is a reimbursement of an expense actually incurred.*
>
> *(6) This section has effect notwithstanding—*
>
> > *(a) any provision by or under—*
> > > *(i) any other Act,*
> > >
> > > *(ii) any statute or other document to like effect of a university or other third level institution,*
> > >
> > > *(iii) any circular or instrument or other document,*
> > >
> > > *(iv) any written agreement or contractual arrangement,*
> >
> > *or*
> >
> > *(b) any verbal agreement, arrangement or understanding or any expectation."*

Section 3 of the Act then provides:-

> *"(1) This section applies to—*
>
> > *(a) a person who was at some time before 31 December 2009 a public servant but is on 1 January 2010 in receipt of a pension or has a preserved benefit in a public service pension scheme, and*
> >
> > *(b) a person who was a public servant on 1 January 2010, but ceases to be a public servant on or before—*
> > >
> > > *(i) 31 December 2010, or*
> > >
> > > *(ii) a later date specified by the Minister by order in accordance with subsection (3).*
>
> *(2) The amendments taken to have been made by section 2 shall be disregarded for the purpose of calculating any pension entitlement (including an entitlement to a lump sum and an entitlement to periodic payments of pension) of a person to whom this section applies.*
>
> *(3) For the purpose of making an order pursuant to subsection (1)(b)(ii), the Minister shall take into account such legal, superannuation and personnel management issues affecting public service bodies as he or she considers appropriate, and shall consult with any person or body that he or she considers appropriate."*

The later date specified by Ministerial Order was 29th February, 2012. Upon her retirement in October 2011, the notice party's pension entitlements were calculated by reference to her reduced salary and thus the notice party contends that she was not afforded the protections provided for in section 3 (2) of the Act.

The notice party raised the issue with the appellants, arguing that same had been miscalculated in that the trustees had not taken into account s. 3 (2) of FEMPI (No.2) which ought to have been applied to her benefit. This complaint was addressed by the trustees through the Superannuation Scheme Internal Dispute Resolution Procedure and it was determined on 30th November, 2011 that the trustees had no authority under the rules of the superannuation fund to disregard the salary cut that had been imposed upon the notice party's salary in that the provisions of s. 3 (2) of the Act did not apply to her because she was not a person with a preserved benefit in a public service pension scheme.

The definition of a 'public service pension scheme' is contained at s. 1 of the Financial Emergency Measures in the Public Interest Act 2009 FEMPI (No.1) as:-

"*an occupational pension scheme or pension arrangement, by whatever name called for any part of the public service which –*

(a) is provided for under –

(i) the Superannuation Acts 1834 to 1963, or

(ii) any other enactment or administrative measure for the like purpose and to the like effect as those Acts, or

(b) is made by a relevant Minister or has been approved or requires the approval or consent, however expressed, of either or both a relevant Minister and the Minister, but does not include such a scheme or arrangement in respect of a body specified or referred to in the Schedule."

PROGRESS OF THE COMPLAINT

In her submission of complaint which she furnished to the trustees in September, 2011 the notice party stated:-

"It is not possible for the IBTS to apply section 2 of the No. 2 Act but not to apply Section 3 on preserving certain pension rights. The two sections go together. Anyone who is a public servant for the purpose of the salary cuts under section 2 is automatically also a public servant for the purposes of section 3 and it is then a question of whether the public servant retires before the deadline of 29 February 2012."

On 19th January, 2012 the notice party referred her complaint to the Pensions Ombudsman, the respondent in these proceedings, stating in her Complaint Form:-

"My complaint is that the trustees have calculated my pension and lump sum by reference to the reduced remuneration which I was receiving at the date of my retirement on 7 October, 2011 and have refused to comply with section 3(2) of the Financial Emergency Measures in the Public Interest (No 2) Act 2009. This provides that, as I retired before 29 February 2012, the 15% reduction in my remuneration 'shall be disregarded for the purpose of establishing any pension entitlement'."

The case made to the Ombudsman on behalf of the appellants appears from an appendix attached to a letter sent to the Ombudsman on 15th February, 2012. It appears in the following terms:-

"Section 3(2) of Financial Emergency Measures in the Public Interest (No. 2) Act 2009 (the "2009 Act") provides that the salary cuts imposed on public servants under section 2 of that Act shall be disregarded in calculating the pension entitlements of persons to whom section 3 applies. Broadly, section 3 of the 2009 Act applies to:

(a) A person who was, prior to 31 December 2009, a public servant and was in receipt of a pension under a public service pension scheme on 1 January 2010.

(b) A person who was a public servant on 1 January 2010 but ceased to be a public servant on or before 29 February 2012 and is entitled to payment of a pension under a public service pension scheme, including former public servants who will become entitled to receive a benefit under a public service pension scheme before 29 February 2012.

(c) A person who becomes entitled to payment of a public service pension as a spouse, civil partner or child of a former public servant to whom paragraphs (a) or (b) above applied.

The main pre-condition which must be satisfied in order for Dr. Lawlor to get the protection of section 3(2) is that she must be a 'public servant' as defined by the 2009 Act.

The 2009 Act defines a 'public servant' as a person who is employed by, or holds any office or other position in a public service body. It also includes judges, members of the Houses of the Oireachtas, local authorities, European Parliament and the holders of certain Ministerial and other official offices which are not relevant for the purposes of this analysis.

A public service body is defined in the 2009 Act as including the Civil Service, Gardaí, defence forces, local authorities, the HSE, VECs, a body established under an enactment in respect of which a public service pension scheme exists, applies or may be made and a body wholly or partly funded directly or indirectly out of money provided by the Oireachtas in respect of which a public service pension scheme exists, applies or may be made.

The Irish Blood Transfusion Service (the 'IBTS') is a body established under a statutory instrument made pursuant to powers conferred on the Minister for Health by the Health (Corporate Bodies) Act 1961. As a result, in order for the IBTS to be considered a public service body under the 2009 Act, it must be a body in respect of which 'a public service pension scheme exists or applies or may be made'.

The 2009 Act defines 'public service pension scheme' by reference to the definition of that term as contained in the Financial Emergency Measures in the Public Interest Act, 2009. It is defined within that Act as an occupational pension scheme or a pension arrangement for any part of the public service which is:

• provided for under the Superannuation Acts 1834-1963 or any other enactment or administrative measure for the like purpose and to the like effect as those Acts, or

• made by a relevant Minister or has been approved or requires the approval or consent of either or both a relevant Minister and the Minister for Finance.

The pension schemes of certain commercial semi-State bodies, such as Bord Gáis, RTE and others, are excluded from the scope of this definition by a separate schedule within the Act. The IBTS is not one of the excluded bodies referred to in that schedule.

Based on the recitals within the current trust deed and rules governing the Scheme, we understand that it was established under an interim deed dated 18 May 1963 by the IBTS under its then name, the Blood Transfusion Service Board. There is no reference in the recitals to the current deed governing the Scheme of it having been established or approved by a Minister.

Under the terms of the Scheme's amendment power, Ministerial approval is not required to amend the Scheme. Similarly, the Minister has no role in determining how the employer contribution rate is set. From that perspective, the Scheme operates as a normal self-financed private sector pension fund and cannot be said to be 'made by a relevant Minister or has been approved or requires the approval or consent … of either or both a relevant Minister' and the Minister for Finance for the purposes of the definition of 'public service pension scheme'.

We have reviewed the statutory instrument under which the IBTS was established (S.I. No. 78/1965) and other relevant statutory instruments relating to the IBTS. Those instruments do not 'provide for' a superannuation scheme. The only provision within S.I. No. 78/1965 which comments on the terms and conditions of IBTS staff states that:

> *'The Board shall determine the remuneration and conditions of service of each officer and each servant of the Board and may, from time to time, alter the remuneration or conditions of service of any officer or servant.'*

For the purposes of the definition of 'public service pension scheme' we do not see how this provision could be interpreted as meaning that the Scheme is 'provided for under … any other enactment or administrative measure'.

We have also reviewed the Superannuation Acts 1834-1963 and they do not 'provide for' the Scheme.

The Superannuation Acts 1834-1963 govern pension arrangements for established civil servants and other officials. The Superannuation Acts also contain provisions relating to the basis upon which civil servants' pension benefits are calculated.

There is no enactment or administrative measure that provides for the Scheme which is for the 'like purpose and to the like effect as' the Superannuation Acts. We have identified no statute which either establishes or makes provision for the Scheme in the same way as the Superannuation Acts do for civil servants.

Based on this analysis, the Scheme is not a 'public service pension scheme' under the 2009 Act. We understand that the IBTS does not operate any other pension arrangement which could be categorised as a 'public service pension scheme'.

As a result, the IBTS is not a public service body and Dr. Lawlor cannot therefore be categorised as a public servant given that she does not work for a public service body as defined in the 2009 Act. Accordingly, Dr. Lawlor is not in our view entitled to the protection provided to certain public servants pension entitlements under section 3(2) of that Act."

The respondent took the advices of counsel before he issued his determination on 22nd June, 2012, upholding the complaint of the notice party and in which he concluded as follows:-

"6.1 The decision reached by the trustees in this case has the effect of defeating the purposes of ss. 2 and 3 of the FEMPI (No.2) Act and is thus both incorrect and unfair. This is because the fact that the complainant in this case has already been penalised under s. 2 means that the trustees should not go behind this, but rather should give effect to the purposes of the Act by affording her the protection contained in s. 3 in the manner in which the Oireachtas intended.

6.2 I therefore determine that the trustees must restore Dr. Lawlor's pension to a level calculated by reference to the salary which she enjoyed prior to the application of the cut in pay mandated by s. 2 of the Act and I direct the trustees forthwith to pay her the appropriate arrears of pension and lump sum payable with effect from the date of her retirement."

The determination of the Ombudsman runs to some 17 pages, but for present purposes the Court will confine itself to setting out the reasoning applied by the Ombudsman in reaching his determination, which appears at s. 5 thereof as follows:-

"5.1 For Dr. Lawlor to receive the protection of s.3 of the Financial Emergency Measures in the Public Interest (No. 2) Act 2009 (hereinafter called 'the Act') she must fall within either of the two protected categories named in that section. She must be '(a) a person who was at some time before 31st December 2009 a public servant but is on 1st January 2010 in receipt of a pension or has a preserved benefit in a public service pension scheme, and (b) a person who was a public servant on 1st January 2010, but ceases to be a public servant on or before –

(i) 31st December 2010, or

(ii) A later date specified by the Minister by order in accordance with subsection (3).

5.2 The Public Service Pensions Rights Order 2011 (S.I. No. 80/2011) fixed the later date mentioned in subsection (1)(b)(ii) as 29th February 2012. As she was due to retire and did so retire in October 2011, she falls under paragraph (b) – if she was a public servant.

5.3 It appears that Dr. Lawlor was considered a public servant for the purpose of reducing her remuneration under s. 2 of the Act. The term 'public servant' has the same meaning throughout the Act and it does not appear possible that a person can be a public servant for the purposes of one section, and not for another. Section 3 does not stand alone, as it is clearly aimed at providing protection for certain persons in terms of their pension entitlements, from the effects of section 2, the reduction in remuneration.

5.4 Counsel was of the view that Dr. Lawlor's argument that she either comes within s. 3, or is due a refund of amounts deducted from her salary pursuant to s. 2, has a lot of merit. Reimbursement would, of course, present difficulties and this would not fall within the remit of this Office in any event; but it was not the question that was referred to me.

5.5 The trustees would not have been the body which decided that Dr. Lawlor's remuneration was to be reduced under the terms of s. 2 of the Act and it could be argued that the interpretation of the term 'public servant' by either a government department or by the employer itself did not bind them as trustees, and that they were required to satisfy themselves as to the meaning of the term as defined by the Oireachtas.

5.6 However it is arguable that the trustees, in coming to the decision that Dr. Lawlor was not a public servant, should have had regard to the fact that others had already considered her a public servant for the purposes of s. 2 of the Act. If a party competent to do so had already determined that Dr. Lawlor was a public servant and had applied s. 2 of the Act against her, it does not appear reasonable that the trustees could then purport to deprive her of the protection that s. 3 was intended to give her in those circumstances. Such an approach would defeat the legislative purpose of the Act and it would appear highly unlikely that the Oireachtas envisaged a situation in which a person could be a public servant for the purpose of one section of the Act, and not for another.

5.7 The trustees stated that they did not have any discretion in the matter of the pension payable to Dr. Lawlor, since the scheme rules provided that her pension is based on a final salary at the point of retirement. This, of course, raises the question as to what 'final salary' means in this context. The Act is an emergency measure, to bring about a temporary reduction in a person's normal salary. It was not intended to be permanent and under s. 7 of the Act the Minister is obliged to undertake an annual review of the ongoing necessity of the Act. The point of s. 3 was to ensure that, regardless of any reduction in salary made under the terms of s. 2, pension rights would be preserved for persons who satisfied either of the definitions contained in section 3.

5.8 In one sense, the question is whether the trustees can refuse to apply the law of the land if they think it conflicts with the rules of their scheme. This has not been tested in the courts as yet but I do not believe that trustees could ignore the law of the land or take measures that would frustrate the clear purpose of that law.

5.9 The trustees determined that Dr. Lawlor did not fall under the definition of 'public servant' because the scheme of which she was a member was not a 'public service pension scheme'. This calls into question the definition of a public servant, which appears to depend upon the definition of 'public service pension scheme'. In section 1 of a different enactment, the Financial Emergency Measures in the Public Interest Act 2009 (which was passed earlier in that year and to which I shall refer to as the 'No. 1 Act') provides that a 'public service pension scheme' means an occupational pension scheme or pension arrangement, by whatever name called, for any part of the public service which

> *(a) is provided for under*
> *(i) The Superannuation Acts 1834-1963, or*
>
> *(ii) Any other enactment or administrative measure for the like purpose and to the like effect as those Acts, or*
>
> *(b) is made by a relevant Minister or has been approved or requires the approval or consent, however expressed, of either or both a relevant Minister and the Minister [for Finance],*
>
> *but does not include such a scheme or arrangement in respect of a body specified or referred to in the Schedule [Commercial State Bodies].*

5.10 The IBTS Scheme was not made by any Minister, does not require the approval of any Minister and is certainly not provided for under the Superannuation Acts 1834-1963, so the question is whether it falls under the latter part of the definition – 'any other enactment or administrative measure for the like purpose and to the like effect'. The term 'enactment' includes a statutory instrument (s. 2, Interpretation Act 2005).

5.11 Dr. Lawlor's contract of employment and any reference to it in the scheme, were provided for by "any other enactment", viz., the Blood Transfusion Service Board (Establishment) Order, 1965 (S.I. No. 78/1965), already referred to at 4.5 above.

5.12 Regulation 22 (4) of that statutory instrument states that 'The Board shall determine the remuneration and conditions of service of each officer and may, from time to time, alter the remuneration or conditions of service of any officer or servant'. There is no doubt that a person's pension entitlements form part of his/her remuneration and Dr. Lawlor's remuneration is therefore granted pursuant, not to a private law contract, but to an enactment.

5.13 That is not to say that the scheme itself was provided for under an enactment or administrative measure as it appears to have been constituted by a deed of May 1963, which predates the statutory instrument already named and the interim deed appears to have been made by a predecessor body, the National Blood Transfusion Association, which made a resolution for its own winding up on 9th April, 1965, as recited in S.I. No. 78 of 1965. …

5.14 The scheme was originally established under an interim deed and, in accordance with the practice then prevalent for securing the approval of the Revenue Commissioners under the terms of the Finance Acts 1921 and 1958, that would be followed at some temporal distance by a definitive deed and rules. It is not clear when the definitive deed and rules of the scheme were made. It would normally be provided for within a standard interim deed of that period that a definitive deed should be made within two years. In practice, however, the interval between interim and definitive deeds was usually much longer than that. It is therefore likely that the definitive deed which contained details of the full powers and duties of the trustees, together with the detailed rules of the scheme, was adopted after the establishment of the Blood Transfusion Service Board in 1965. Moreover, these instruments would have had to be amended in considerable detail following the passing of the 1972 Finance Act, which laid down a deadline of 5th April 1980 for such amendment, in order for the scheme to enjoy continuing approval of the Revenue Commissioners.

5.15 I therefore determined that the administrative measure establishing the scheme was an act of the Blood

Transfusion Service Board itself and the scheme in its present form is undoubtedly the product of one or more administrative measures taken by IBTS or its predecessor over the years. And I have no doubt whatever that IBTS, as it is now known, is a public body.

5.16 It then falls to be determined whether the administrative measure was 'to the like purpose and effect' as the Superannuation Acts.

5.17 The experience of this Office in dealing with complaints brought by members of superannuation schemes in the wider public service confirms that it was indeed the intention of the Oireachtas to capture as many pension schemes as could conceivably be achieved, for the purpose of applying the pension levy imposed by the No. 1 Act of 2009. Not only that, but that pension levy is actually being applied to the employees of IBTS. It is not tenable that the scheme should be a public service pension scheme for the purpose of one financial emergency measure and cease to be a public service pension scheme for the purpose of another financial emergency measure passed in the same year.

5.18 The purpose of the Superannuation Acts 1834-1963 is to set the terms and conditions of the superannuation of established civil servants and certain other officials. The 1834 Act established the principle of awarding pensions in respect of service given, by promising a pension at retirement based on years of service completed. I have absolutely no doubt that the pension scheme established by IBTS and its predecessors is 'to the like purpose and effect'."

An appeal to this Court from the determination of the Ombudsman was then brought pursuant to s. 140 of the Pensions Act 1990 as inserted by s. 5 of the Pensions (Amendment) Act 2002 which provides as follows:-

"(1) A party to an investigation before the Pensions Ombudsman under this part may appeal to the High Court from a determination of the Pensions Ombudsman within 21 days from the date of the determination.

(2) The High Court, on the hearing of an appeal under this section, may, as it thinks fit, annul the determination concerned, confirm the determination or confirm the determination subject to such modifications as it considers appropriate."

DISCUSSION

The IBTS was established as the Blood Transfusion Service Board by the Blood Transfusion Service Board (Establishment) Order 1965. It is a non-profit self-financing public service body which is not in receipt of funding from the Exchequer. On its establishment, the IBTS took over the property and assumed the responsibilities of the National Blood Transfusion Association which was a company incorporated under the Companies Acts 1908 – 1959. The IBTS Pension Scheme was originally established under an interim deed of 18th May, 1963 made by the National Blood Transfusion Association. Since the making of that interim deed there have been 28 subsequent deeds dealing with variations to the rules of the IBTS Pension Fund and with the appointment of new trustees. The most recent deed is the fifth definitive trust deed which was made on 24th May, 2010.

As one might expect, the purpose of the IBTS Pension Scheme is to provide members with the relevant benefits as defined in s. 770 of the Taxes Consolidation Act. Thus members of the IBTS Pension Scheme contribute to it during their working lives and as a consequence of membership are entitled to a pension on retirement. The pension that each member is entitled to is calculated by reference to their final salary at the date of retirement.

Given that the IBTS Pension Scheme was established pursuant to the first deed in 1963, it pre-dated the establishment of the IBTS under the 1965 order. Pursuant to the terms of the 1965 order, the power to determine the remuneration and conditions of service of officers and servants of the IBTS does not require the consent of the Minister. This is in contrast with other bodies established by order, for example, the interim Health Executive, the National Treatment Purchase Fund Board, the National Haemophilia Council, and the National Breast Screening Board, all of which were established by their respective orders which contained provisions such as:-

> "The Board shall, subject to the approval of the Minister with the consent of the Minister for Finance, determine the remuneration and conditions of service (including superannuation) of the members of staff."

In the instant case the Ombudsman determined that the IBTS Pension Scheme is one which falls within the second category of the definition of Public Service Pension Scheme as defined in FEMPI (No. 1) on the grounds that the administrative measure establishing the scheme was an act of the BTSB itself and the scheme in its present form, in the view of the Ombudsman, was the product of one or more administrative measures taken by IBTS or its predecessor over the years.

However, the statutory definition requires in addition that the measure be "to the like effect of those Acts" (being the Superannuation Acts).

The Superannuation Acts provide for the payment of pensions out of public funds and such pensions are funded on an ongoing basis from the Public Exchequer. The appellants argue that the same could not be said of the IBTS Pension Scheme which is analogous to a private pension fund which is funded by contributions from employees with the assistance of the employer. This private pension fund requires and is subject to the approval of the Revenue Commissioners. It is subject to the pension levy applied under the Finance Act (No. 2) 2011 and is also subject to the provisions of the Pensions Act 1990 (as amended). It is subject to the minimum funding standards prescribed by Part IV of the Pensions Act and can be wound up if necessary.

The trustees argue that it is therefore difficult to categorise the IBTS Pension Scheme as a Public Service Pension Scheme within the meaning of FEMPI (No. 1), and it is this fact which drove the trustees to extrapolate further that the IBTS was not, in consequence, a public body within the meaning of that Act (although it is for every other purpose) and that Dr. Lawlor is not a public servant within the meaning of that Act (although she is for every other purpose) and to conclude that the trustees could not in consequence apply the provisions of s. 3 (2) of FEMPI (No. 2) Act in calculating her pension entitlements.

However, the Ombudsman determined that, since other parties (namely, the IBTS, Dr. Lawlor's employer) had applied s. 2 of the FEMPI (No. 2) Act in reducing the remuneration of the notice party, and had applied to her also the pension levy under the FEMPI (No.1) Act, the trustees were in consequence compelled to have regard to this fact and to apply for her benefit the provisions of section 3. This was undoubtedly a fair and equitable approach to take, but one which, with considerable vehemence in this appeal, the trustees contend was not open to the respondent to take on the law and on the facts.

The trustees' position, putting it simply, is that the IBTS did not apply the 15% salary reduction to the notice party in reliance on s. 2 of the FEMPI (No. 2) Act. On the contrary, they did so in pursuance and on the basis of a circular emanating from the Department of Health on 24th December, 2009. However, the terms of the circular state explicitly that the cut is being imposed as a direct consequence of the provisions of FEMPI (No.2). It states from the outset:-

> *"I am directed by the Minister for Health and Children to convey the following instructions to all public sector employers in relation to the application of pay reductions with effect from 1 January 2010 in accordance with the Financial Emergency Measures in the Public Interest (No. 2) Act 2009……"*

The reality is therefore that the pay cut of 15% suffered by the notice party was identical to the provision which, pursuant to FEMPI (No.2) 2009, was applied across the board to the public service generally. It was applied to the notice party by her employers in exactly the same way as the pension levy had been applied under FEMPI (No.1). The Department of Health is an emanation of the State and it would have been surprising if the IBTS had not complied with the "instructions" received from the Department in this regard to apply the cuts by reference to the FEMPI Acts. In fact, deductions have been made to the notice party's remuneration by her employers under both Acts and the proceeds are being held in escrow because the IBTS, although complying with the instructions, took issue with their applicability to their employees as early as February, 2009.

Even more surprising is the fact – if fact it be – that the trustees were unaware of the "instructions" from the Department of Health or failed in any event before adjudicating on the notice party's complaint to ascertain the position for IBTS members of the pension scheme in the aftermath of the two FEMPI Acts. Was there no liaison between the IBTS and the trustees? If not, that would indicate a very strange state of affairs indeed. I feel compelled to ask the question because the appellants have suggested that the failure to uncover or utilise this vital information during the complaint process is in some way a failure on the part of the respondent. The respondent for his part says the trustees should have addressed this issue during the course of the proceedings before him and I agree with him. Rounding off the unsatisfactory nature of the inter-departmental communications on this topic is the reference contained in a letter dated 11th July, 2012 from the IBTS Chief Executive to the trustees which states:-

> "The current advice available to IBTS continues to be that neither the FEMPI Act 2009 nor the FEMPI (No.2) Act 2009 apply to its employees. However this is not accepted by the Department of Health and the Department of Finance and IBTS is actively engaged in discussions with both Departments to seek a resolution of the current impasse."

DECISION

At the outset the Court should clarify that it is adjudicating only on the present case where particular considerations arise in the context of an adjudication by an ombudsman on the complaint of a citizen who feels aggrieved by a decision of a pension provider. In other words, has the notice party brought forward a legitimate complaint of unfair treatment in respect of which she can and should, subject to the limitations of the Pensions Act, be provided with a remedy? The Court's function is not to provide a definitive road map for the resolution of ongoing differences of interpretation as between various State bodies and the IBTS.

A high threshold must be crossed by any appellant from a decision of a financial/pensions ombudsman. The Court has no difficulty in accepting that the relevant test for a statutory appeal against a decision of the Pensions Ombudsman should be the same as that provided for in respect of the Financial Services Ombudsman as laid down by Finnegan P. in *Ulster Bank v. Financial Services Ombudsman* [2006] I.E.H.C. 323 where it was stated at p. 9:-

> *"To succeed on this appeal the plaintiff must establish as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In applying the test the court will have regard to the degree of expertise and specialist knowledge of the defendant. The deferential standard is that applied by Keane C.J. in Orange v. The Director of Telecommunications Regulation & Anor. and not that in The State (Keegan) v. Stardust Compensation Tribunal."*

The appeal is a limited one and not a full *de novo* hearing. This approach was described by MacMenamin J. in *Hayes v. Financial Services Ombudsman & Ors.*, (Unreported, High Court, 3rd November, 2008), as "a well established and accepted test". At p. 13 of that judgment he continued:-

> *"While a statutory appeal (such as this) is not a judicial review, and where the decision maker is acting within his own area of professional expertise, the test set out by Finnegan P. suggests it bears many of the features of a judicial review. In particular, it is clear that there may be a permissible error if it is within jurisdiction, albeit only in so far as that error falls short of being one which is serious and significant. … What has been established, therefore, is an informal, expeditious and independent mechanism for the resolution of complaints. The respondent seeks to resolve issues affecting consumers. He is not engaged in resolving a contract law dispute in the manner in which a court would engage with the issue.*
>
> *The function performed by the respondent is, therefore, different to that performed by the courts. He is enjoined not to have regard to technicality or legal form. He resolves disputes using criteria that would not usually be used by the courts, such as whether the conduct complained of was unreasonable simpliciter; or whether an explanation for the conduct was not given when it should have been; or whether, although the conduct was in accordance with a law, it is unreasonable, or is otherwise improper. He can also make orders of a type that a court would not normally be able to make, such as directing a financial services provider to change its practices in the future. Thus, he possesses a type of supervisory jurisdiction not normally vested in a court. These observations are to be borne in mind when considering whether the decision made by the respondent was validly made within jurisdiction."*

The appellants for their part rest their case squarely within the parameters of the Supreme Court decision in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34, in which Hamilton C.J. noted, at pp 36-37, that the courts:-

> *"… should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or on unsustainable finding of fact by a tribunal, such conclusions must be corrected. Otherwise it should be recognised that where tribunals which have been given statutory tasks to perform and who exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them, it should not be necessary for the courts to review their decisions by way of appeal or judicial review."*

Reliance is placed upon this judgment to argue that in all cases where the appeal consists of a pure issue of law, whether substantive

or procedural, the court has greater expertise than a tribunal and no need or obligation for curial deference arises.

The Office of the Pensions Ombudsman was established by the Pensions Act 1990 (as amended) and reference has already been made to the statutory provisions contained in that Act whereby appeals from any decision of the Pensions Ombudsman can be brought to the High Court.

Section 131 of the Act deals with the functions of the Pensions Ombudsman and provides:-

> *"(1) The Pensions Ombudsman shall be independent in the performance of his functions.*
>
> *(2) The Pensions Ombudsman may investigate and determine the following complaints and disputes-*
>
> > *(a) a complaint made to him by or on behalf of an actual or potential beneficiary of an occupational pension scheme, trust RAC or PRSA who alleges that he has sustained financial loss occasioned by an act of maladministration done by or on behalf of a person responsible for the management of that scheme, trust RAC or PRSA;*
> >
> > *(b) any dispute of fact or law that arises in relation to an act done by or on behalf of a person responsible for the management of the scheme or PRSA and that is referred to him by or on behalf of the actual or potential beneficiary."*

Section 139 of the Act provides, *inter alia*:-

> *"(1) On the investigation of a complaint or reference under this Part, the Pensions Ombudsman shall make a determination in relation to the complaint or dispute, and may in the determination give to the parties concerned such directions as the Pensions Ombudsman considers necessary or expedient for the satisfaction of the complaint or the resolution of the dispute.*
>
> *(2) A direction under subsection (1) shall not require either-*
>
> > *(a) an amendment of the rules of a scheme, trust RAC or the conditions of a PRSA contract, or*
> >
> > *(b) the substitution of the decision of the Pensions Ombudsman for that of the trustees of a scheme, trust RAC in relation to the exercise by the trustees of a discretionary power under the rules of the scheme, trust RAC.*
>
> *(3) Subject to subsection (4), the Pensions Ombudsman may under subsection (1) order such redress, including financial redress, for the party concerned as he considers appropriate having regard to all the circumstances and to the provisions of this Part.*
>
> *(4) Any financial redress under subsection (3) shall be of such amount as the Pensions Ombudsman deems just and equitable having regard to all the circumstances but shall not exceed any loss of benefit under the scheme or PRSA."*

It seems to me that the critical provision is that which imposes upon the Pensions Ombudsman the obligation to give "such directions as the Pensions Ombudsman considers necessary or expedient for the satisfaction of the complaint or the resolution of the dispute".

I accept, as I must, that in this context the Pensions Ombudsman could not, regardless of the merits of the case, legitimately make a decision which the law did not permit. But subject only to that consideration he enjoys a significant discretion to allow and achieve a fair outcome in relation to a complaint.

The reasoning for his decision appears at paras. 5.12 – 5.18 of his determination which I have set out in full at an earlier part of this judgment. Far from setting out to ignore the law he set out comprehensive reasons why the IBTS Pension Scheme was a public service pension scheme and how that inference can be derived from the words "administrative measure for the like purpose and to the like effect of those Acts (i.e. the Superannuation Acts 1831 – 1963)". It is unnecessary to repeat the reasons here and I am satisfied that this Court should only step in to set aside his conclusions (being those of an expert in this area) where a clear and serious legal error may be demonstrated. No such error has been demonstrated and there can be no doubt but that his decision achieved a fair result insofar as this particular complainant was concerned.

I am also of the view that he would have been entitled to reach the same conclusion under and by virtue of s. 5 of the Interpretation Act, 2005 when the same is applied to the provisions of the FEMPI Acts, 2009.

Counsel for the notice party referred the Court to s. 5 of the Interpretation Act 2005 which provides:-

> *"(1)-In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) –*
>
> > *(a) that is obscure or ambiguous, or*
> >
> > *(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of-*
> >
> > > *(i) in the case of an Act to which paragraph (a) of the definition of 'Act' in section 2 (1) relates, the Oireachtas, or*
> > >
> > > *(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,*
>
> *the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."*

The first of the FEMPI Acts 2009 refers in its recitals to the serious disturbance in the economy which in consequence has brought about a serious deterioration in the revenues of the State and significant and increasing Exchequer commitments in respect of public service pensions. The recitals further recite the necessity to cut current Exchequer spending and note that the burden of job losses and salary reductions in the private sector has been very substantial, in consequence whereof "it is equitable that the public sector should share that burden".

The Act then proceeded to authorise a deduction to be made from the remuneration of public servants to provide for the payment of a contribution by persons in the public service who are members of an occupational pension scheme (*i.e.*, "the pension levy").

Notwithstanding the definition of "public service pensions scheme" contained in the Act, it has not been in issue in these proceedings but that the notice party was a person to whom such a reduction was applied. She was a public servant as far as the State and its emanations were concerned.

FEMPI (No. 2) Act 2009 was expressed to be "an Act, in the public interest, to provide for the reduction of the remuneration of certain persons in the public service (including members of the Houses of the Oireachtas and certain office holders), and to provide for related matters".

The recitals to this Act recorded that it was necessary to reduce State expenditure to maintain international confidence and to protect the State's credit ratings and in that regard to take urgent steps to help restore the State's competitiveness, resulting in the necessity for the State to achieve significant savings in its expenditure, both directly and indirectly from remuneration of persons in the public service.

Notwithstanding the non reference to employees of the IBTS, those reductions were applied to them also. The FEMPI (No. 2) Act, 2009 came into effect on 20th December, 2009, a few days before the circular issued by the Department of Health which explicitly demanded and required the imposition of the pay cut on Dr. Lawlor and other employees of the IBTS under FEMPI (No.2). The notice party and her colleagues were again identified as public servants working in a public service body and treated accordingly.

I ask rhetorically: can it really have been the intention of the legislature that employees of the IBTS were to be singled out uniquely for cuts in remuneration which were not to be contextualised and mitigated by reference to s. 3 of FEMPI (No. 2)? I find it impossible to believe that such a radical departure from all considerations of fairness and justice was in contemplation, or should be allowed to prevail in the absence of express statutory authorisation. There is a complete absence of any evidence of intent or official statement from any branch of government stating that either or both the FEMPI Acts were intended to have such an effect, an effect which might be seen as offending the principles of equality and very possibly entering the realms of unconstitutionality.

I would be unsurprised to discover that the historic anomaly whereby the IBTS Pension Fund was first established by trust deed was something not taken into account by the legislators in defining 'public servant', 'public service body' and 'public service pension scheme', perhaps because of the very emergency circumstances in which these particular pieces of legislation were enacted. The fact that inter-Departmental exchanges indicate that the issue remains unresolved even up to the present day tends to support such a suspicion.

While there is no obscure or ambiguous wording in the definition of "public servant", "public service body" or "public service pension scheme", I am satisfied that any interpretation of all three definitions which would deprive the notice party of the benefit of s. 3 of the FEMPI (No. 2) Act 2009 would be absurd and furthermore would, taking both Acts as a whole, fail to reflect the plain intention of the Oireachtas to take all public service employees into the ambit of pay reduction with the concomitant saver for those encouraged to retire or who did retire before a particular date.

This is not the first case in which an anomaly of the same sort has arisen. In *Unite the Union & Anor v. The Minister for Finance & Ors*. 2010 [IEHC] 354 (Unreported, High Court, 8th October, 2010), the decision under challenge before this Court was that of the Minister for Finance not to exempt certain employees of the Central Bank and Financial Services Authority of Ireland (the CBFSAI) from deductions authorised by s.2 of FEMPI (No.1). The applicant was Unite, a trade union representing 75% of the staff of the CBFSAI, whose members contributed to their own pension scheme and it was argued that they were entitled to be treated differently from other public service employees, notwithstanding that the legislation expressly included the Central Bank. In rejecting that proposition I stated:-

> *"It is clear that the purpose of the legislation is more than just reducing the level of current Government spending. Therefore the fact that the CBFSAI pension is a self-funded pension and does not make any demands on the Central Funds does not preclude employees from CBFSAI being brought within the scope of the Act. There are other considerations which may justify a requirement that CBFSAI employees pay a contribution as required by s.2 of the Act, chief of which is the fact that the CBFSAI pension scheme is clearly and undeniably modelled on the public service type pension scheme which is 'significantly and markedly more favourable' than the pension schemes operating in the private sector."*

I am also attracted by the further submission advanced on behalf of the notice party that if remuneration was not reduced by reference to s. 2 of FEMPI (No. 2) Act 2009, then it necessarily follows that alterations to her contractual entitlements, including remuneration and superannuation entitlements, were implemented without her consent and were unlawful. A unilateral alteration of a contract, be it a contract of employment or otherwise, is impermissible in the absence of agreement on both sides. The notice party in this case never agreed to any reduction in her remuneration. If it was "unlawful" then surely the trustees should not have had regard to an "unlawful reduction" when calculating her remuneration for the purpose of establishing her pension entitlements? It would in my view have been open to the ombudsman to devise some other remedy or solution to the notice party's difficulty by taking this route had he chosen to do so.

Having reached my conclusions for the particular reasons which I have, I do not find it necessary to address in any detail the subsidiary matters adumbrated by counsel on behalf of the appellants during the course of the hearing. They were admitted by counsel on behalf of the appellants to be subsidiary to the main issue but for the sake of completeness I will deal briefly with them.

The first of these is the suggestion that the respondent based his findings on an erroneous basis of fact, namely, that he believed the IBTS applied the 15% cut relying on s. 2 of FEMPI (No. 2). This submission relies for its substance on a letter dated 11th July, 2012 to the trustees from the IBTS in which the IBTS stated:-

> *"IBTS assumed that the Department were correct in their determination that the cut applied to all IBTS staff and implemented the Circular according to IBTS's standard processes for implementing such Circulars without reference to*

the underlying legislation."

In asking this Court to have regard now to this letter is effectively asking the Court to receive fresh evidence not before the respondent. Except in exceptional circumstances this is not permissible. Besides, I do not believe the letter in question accurately reflects what was outlined in the Circular from the Department of Health in December, 2009 which is quite explicit in its reliance on FEMPI (No.2).

The appellants then complain that this supposed "factual error" should have been uncovered if the ombudsman had carried out his investigation more thoroughly. It seems to me however that this supposed "factual error" could and should have been well known to the trustees themselves. The issue had arisen for the IBTS as far back as February 2009 in the context of FEMPI (No. 1). The trustees during the investigation did not challenge the assumption that the notice party was subjected to s.2 of FEMPI (No.2) and based their defence instead on the "public pension scheme" argument.

A further complaint is made that certain e-mails relating to standardised annual leave arrangements across the public service which came to the attention of the respondent were not disclosed to the trustees. However these did not relate to the central theme of the trustees' defence and were in my view of peripheral importance. Similarly, the trustees' complaint about not obtaining sight of the counsel's opinion obtained by the respondent in circumstances where, although they were aware it was being sought, they never asked for sight of it is singularly unimpressive. In fact the trustees made no complaints of any procedural unfairness during the investigation even after 19th June, 2012 when they were advised that the respondent was now proceeding to a final determination. Even less impressive is the allegation that the respondent pre-judged the matter. This submission stems from a passage in a letter written by the respondent to the notice party on 14th March, 2012 in which he states:-

> *"…I confirm that I have received from the Trustees the detail of the legal advice on which they rejected your complaint under the internal disputes resolution process.*
>
> *I disagree with a number of the detailed points raised in the course of that advice.*
>
> *I have therefore decided to ask Counsel's opinion from Dr. Paul Anthony McDermott in this matter… and my conviction that the IBTS is wrong is strengthened by the confirmation that you gave me that the Public Service Pensions Levy has in fact been deducted from members of the IBTS Superannuation Scheme."*

In the informal context in which the respondent conducts his work, and in addition the bizarre situation into which the notice party was cast, I do not believe the contents of this letter mean anything more than that the respondent felt the appellants had a case to answer. It is a communication furnished at a very early stage of the process and the appellants were in no way hindered or precluded from advancing every conceivable argument or point which they wished to raise as matters progressed towards the final determination of this matter in June. His comprehensive ruling and determination evinces no sign of bias or pre-judgment of any sort.

Further, none of these subsidiary points now raised by the appellants had any bearing of relevance on the reasoning which led to the decision arrived at by the respondent. It was in my view open to him to reach the same conclusion in the other ways addressed in this judgment.

I will therefore dismiss the appeal.