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**THE HIGH COURT**

**2009 92 MCA**

**IN THE MATTER OF AN APPEAL PURSUANT TO S. 17(6) OF THE PROTECTION OF EMPLOYEES (PART TIME WORK) ACT 2001,**

**BETWEEN**

**CATHOLIC UNIVERSITY SCHOOL**

**APPELLANT**

**-v-**

**COLM DOOLEY**

**RESPONDENT**

**AND**

**THE HIGH COURT**

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**IN THE MATTER OF AN APPEAL PURSUANT TO S. 17(6) OF THE PROTECTION OF EMPLOYEES (FIXED TERM WORK) ACT 2001,**

**BETWEEN**

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**APPELLANT**

**-v-**

**AOIFE SCANNELL**

**RESPONDENT**

**JUDGMENT of Ms. Justice Dunne delivered the 20th day of July 2010**

The appellant herein has sought an order pursuant to the provisions of O. 84C of the Rules of the Superior Courts and pursuant to s. 17(6) of the Protection of Employees (Part Time Work) Act 2001, setting aside the determination of the Labour Court No. PTD092 dated the 22nd April 2009, and pursuant to O. 84C of the Rules of the Superior Courts and pursuant to s. 15(6) of the Protection of Employees (Fixed Term Work) Act 2003, setting aside the determination of the Labour Court No. FTD094 dated the 21st April, 2009 and finally in respect of an order pursuant to the provisions of O. 84C of the Rules of the Superior Courts and pursuant to s. 17(6) of the Protection of Employees (Part Time Work) Act 2001 setting aside the determination of the labour Court No. PTD093 dated the 22nd April, 2009. For ease of reference I will refer to the appellant as "the school" and to the respondents as "the claimants".

It will be seen that Mr. Dooley, one of the claimants, has brought a claim in respect of two Acts referred to in the title of these proceedings and Ms. Scannell, the second claimant, has brought a claim under one of those Acts. The same issues arise in respect of the appeals and all the appeals were heard at the same time and it is appropriate therefore to deal with the matter by way of one judgment.

The school is a private school which employs a number of full time and part time teachers. The majority of the teachers are paid

salary and other benefits by the Department of Education and Science and a small number (including the claimants) are privately paid by the school. There is no dispute that that the claimants are treated less favourably than their incremental, Department paid colleagues. Without going into all of the details at this point, it is that difference in treatment which prompted the claimants to bring their dispute with the school to a Rights Commissioner in the first place and ultimately before the Labour Court. The claimants make the point that they are entitled to be paid at the same rate as their State paid colleagues. It is contended on behalf of the school that the pay differential is independent of the claimants part time and/or fixed term status and in those circumstances that it is not open to the claimants to rely on the rights and entitlement to which a State paid teacher is entitled and accordingly, the legislation relied on together with the European Directives to which reference will be made later does not avail the claimants.

I propose now to refer to the Directives and to the relevant legislation. The Part Time Workers Directive (Directive 97/81/EC) provides as follows:-

> "Article 1 The purpose of the Directive is to implement the framework agreement on part-time work concluded on 6 June 1997 by the general cross-industry organisations . . . annexed hereto.
>
> Article 2(1) Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 20th January 2000, or shall ensure that, by that date at the latest, the social partners have introduced the necessary measures by agreement, the Member States being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.
>
> Clause 1. Purpose
>
> The purpose of this Framework Agreement is:
>
> (a) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work;
>
> (b) to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organization of working time in a manner which takes into account the needs of employers and workers.
>
> Clause 3. Definitions
>
> For the purpose of this agreement:
>
> 1. The term 'part-time worker' refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.
>
> 2. The term 'comparable full-time worker' means a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills.
>
> Where there is no comparable full-time worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.
>
> Clause 4. Principle of non-discrimination
>
> 1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely (*my emphasis*) because they work part time unless different treatment is justified on objective grounds.
>
> Clause 6. Provisions on implementation
>
> 1. Member States and/or social partners may maintain or introduce more favourable provisions than set out in this agreement.
>
> 2. Implementation of the provisions of this Agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of this agreement. This does not prejudice the right of Member States and/or social partners to develop different legislative, regulatory or contractual provisions, in the light of changing circumstances, and does not prejudice the application of Clause 5.1 as long as the principle of non-discrimination as expressed in Clause 4.1 is complied with."

There is also a Fixed Term Workers Directive (Directive 99/70/EC). The definitions set out in that Directive in relation to Fixed Term Worker and Comparable Permanent Worker are similar to those in the previous Directive and I do not think it is necessary to set out the details thereof. The principle of non discrimination contained in Clause 4.1 is in similar terms to that contained in the previous Directive.

I now want to set out the relevant terms of the Protection of Employees (Part Time Work) Act 2001. Section 31 provides:-

> "In this Act, unless the context otherwise requires . . .
>
> 'employee' means a person of any age who has entered into or works under (or, where the employment has ceased,

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

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

I also propose to refer to s. 7(1) which contains a number of definitions which may be of relevance:-

"Comparable Employee" shall be construed in accordance with subs. (2);

'full-time employee' means an employee who is not a part-time employee;

'normal hours of work' means, in relation to an employee, the average number of hours worked by the employee each day during a reference period;

'part-time employee' means an employee whose normal hours of work are less than the normal hours of work of an employee who is a comparable employee in relation to him or her. . . .

'relevant part-time employee' shall be construed in accordance with subsection (2).

(2) For the purposes of this Part, an employee is a comparable employee in relation to the employee first mentioned in the definition of 'part-time employee' in this section (the 'relevant part-time employee') if –

(a) the employee and the relevant part-time employee are employed by the same employer or associated employers and one of the conditions referred to in subsection (3) is satisfied in respect of those employees,

(b) in case paragraph (a) does not apply (including a case where the relevant part-time employee is the sole employee of the employer), the employee is specified in a collective agreement, being an agreement that for the time being has effect in relation to the relevant part-time employee, to be a type of employee who is to be regarded for the purposes of this Part as a comparable employee in relation to the relevant part-time employee, or

(c) in case neither paragraph (a) nor (b) applies, the employee is employed in the same industry or sector of employment as the relevant part-time employee is employed in and one of the conditions referred to in subsection (3) is satisfied in respect of those employees,

and references in this Part to a comparable full-time employee in relation to a part-time employee shall be construed accordingly.

(3) The following are the conditions mentioned in subsection (2) -

(a) both of the employees concerned perform the same work under the same or similar conditions or each is interchangeable with the other in relation to the work,

(b) the work performed by one of the employees concerned is of the same or a similar nature to that performed by the other and any differences between the work performed or the conditions under which it is performed by each, either are of small importance in relation to the work as a whole or occur with such irregularity as not to be significant, and

(c) the work performed by the relevant part-time employee is equal or greater in value to the work performed by the other employee concerned, having regard to such matters as skill, physical or mental requirements, responsibility and working conditions."

The key issue to be determined in these proceedings is whether the determination of the Labour Court made in April of 2009, in respect of the claimants respective claims to the effect that the claimants are entitled to a contract on terms and conditions pro rata with that of his comparator is correct. The Rights Commissioner in her decision on the claimants claim under the Part Time Work legislation, found that the claimant, Mr. Dooley, as a part time worker was treated less favourably than a comparable full time worker. She found that the respondent employer was in breach of s. 9 of the Part Time Work Act, and required the respondent to ensure that the claimant's pay (i.e. salary scale and incremental progression, payment of qualification allowances and all other conditions of employment) were no less favourable (on a pro rata basis where appropriate) than those of the whole time comparator from that date. She found that in relation to the incremental salary scale the respondent was required to operate the same type of salary scale for the claimant as that for the comparator including incremental progression. In relation to the claimant's access to the Department of Education's superannuation scheme, she found that the respondent was to ensure that the claimant was to become a member of the scheme and to make the same employee contributions as the comparator. It is that decision that was subject to minor variations affirmed by the Labour Court. There was also a claim under the Fixed Term Work Act, but for the purpose to these proceedings I do not think it is necessary to deal with that aspect of the matter to any extent.

Three principal issues arose before the Labour Court and indeed on appeal to this Court. The first issue is whether or not the claimants have chosen the appropriate comparator. The second issue relates to whether or not the Directive 97/81/EC has been properly transposed into national law. The final issue relates to the defence of objective justification. I now propose to deal with these issues.

**The Appropriate Comparator**

There is no dispute between the parties that a claimant is entitled to choose their own comparator. The question is whether the

comparators chosen by the claimants are appropriate. The claimants have sought to compare themselves with a permanent teacher on an incremental scale whose salary is paid by the Department of Education. It is contended on behalf of the school that this is not a correct or appropriate comparator. The school contends that the appropriate comparator is a privately paid teacher employed by the respondent directly. There are a number of such teachers employed by the school. The first point made on behalf of the school is that the chosen comparator has to be in the same type of employment contract or employment relationship. There was no issue as to the teaching ability of either of the claimants and that in that regard each of the claimants presents identically by comparison to their chosen comparators. However, the principal point made on behalf of the school is that there is a difference between the contractual arrangements of the claimants and their chosen comparators and that this is a relevant feature. The school contends that the appropriate comparator should be a full time privately paid teacher. Reference was made in that regard to two members of staff employed by the school who are permanent full time privately paid teachers. It was submitted that the claimants had been treated equally and no less favourable than those employees or any other privately paid teacher paid by the school.

Although it was accepted by the school that the claimants are entitled to choose their comparator, it was submitted that they could not be disingenuous in their choice of comparator. The context in which the comparator was employed had to be considered. Indeed it was suggested that it might be appropriate to consider other teachers in a similar employment relationship i.e. someone from within the private sector not the State sector. Reference was made to the decision of the Supreme Court in the case of *National University of Ireland v. Ahearn* [2005] 2 I.R. 577. That was a case that considered the provisions of s. 2(3) of the Anti-Discrimination (Equal Pay) Act 1974. An employee under the provisions of that legislation was entitled to compare themselves to another employee in seeking to establish that they were being paid unequal pay for like work. McCracken J. at p. 583 of the judgment in that case commented:-

> "The question at issue here is whether the differing rates of remuneration are based on the grounds of sex or whether there are other reasons for the differential. This involves a different approach to the position of the comparators, and in particular of the context in which they were employed. I accept the arguments on behalf of the applicant that for this purpose the Labour Court ought to have looked at the position of the comparators, not only in isolation, but also in the context of the other persons in the same grade who had not been chosen as comparators, namely the remaining switchboard operators."

Therefore it was submitted that one had to consider the context in which the chosen comparator was employed not in isolation but also in the context of other teachers on the staff who where not chosen as comparators namely, the other privately paid teachers. In this context, particular emphasis was placed by the school on the definition of employer within the meaning of the Protection of Employees (Part Time Work) Act 2001, which is set out above and in particular that part of the definition which states "the person who under a contract from his employment referred to in para. (b) of the definition of contract of employment" is liable to pay the wages of the individual concerned in respect of the work or service concerned shall be deemed to be the individual's employer". It was suggested therefore that having regard to the definition of employer in the 2001 Act as set out above that the chosen comparator was not even employed by the same employer as the claimants. In emphasising this particular point, it was noted that the school has no hand, act or part in the negotiations between the teachers or their union and the Department. Criticism of the decision of the Labour Court was based on the fact that the Labour Court allowed the claimants to compare their contract with the school with the contract agreed between two separate parties, namely, the chosen comparators and the Department of Education and Science. Reference in this context was made to a decision of the Employment Appeals Tribunal (*Sullivan v Department of Education* 1998 E.L.R. 217) in relation to a claim in respect of an alleged unlawful deduction within the meaning of the Payment of Wages Act 1991. It was found in the particular case that there were sufficiently close ties and control exercised by the Department of Education in relation to individual teachers and that therefore the Department was the employer for the purpose of the Payment of Wages Act 1991. On that basis it was argued that the Department could be deemed to be the employer in this context. It was pointed out that the Department can determine the conditions applicable to State paid teachers without any input from the school.

Reference was also made to the decision of the High Court in the case of *Wilton v. Irish Steel* [1999] E.L.R. 1. That was an equal pay claim. The plaintiff in that case took over the duties of her chosen comparator at a salary of £11,000. Her chosen comparator, Mr. Clarke, had been earning £14,000 when he was in the defendant's employ. The plaintiff claimed that she was entitled to the same pay on the grounds that she was doing like work and that the only distinction between them was one of sex. An equality officer recommended that the plaintiff was not entitled to the same rate of pay as her comparator because the different rates paid could be justified on grounds other than sex. That recommendation was affirmed by the Labour Court. The equality officer had in the course of reaching a decision made detailed comparison with another individual who had taken on responsibilities similar to those of the plaintiff at the same time and was also paid less than the comparator. It was held by O'Sullivan J. in dismissing the appeal that the Labour Court had relied on the recommendations of the equality officer and had found that there were grounds other than sex which justified the difference in pay which could be "adequately identified". It was also held that the plaintiff was entitled to choose her comparator and having done so, the equality officer was obliged to make a comparison with that person. Accordingly, if the recommendation showed that the equality officer had not compared the plaintiff with her comparator but with another, then an error of law would have occurred and the matter would have to be sent back to the equality officer. It is clear from that decision, as both parties accept, that a claimant is entitled to choose their own comparator but it is also possible in appropriate cases to conduct an analysis not only of the chosen comparator but also of others not chosen by a claimant as the comparator.

A further authority opened in relation to this particular issue was the case of *Minister for Finance v. Una McArdle* [2007] 18 E.L.R. 165 a decision of the High Court (Laffoy J.). That case related to a person employed as a lab technician with the State Laboratory on a fixed term contract of one year. It was found by Laffoy J. in refusing the reliefs sought by the Minister for Finance that "the defendant was treated less favourably than her chosen comparator in relation to eligibility for the vacancy and that the difference in treatment was not objectively justified. The defendant was entitled to rely on an established civil servant as a comparator as well as the same conditions of employment as the comparator including pension entitlements and access to a career break but excluding tenure as an established Civil servant."

In the course of her judgment in that case, Laffoy J. at p. 8 of 14 stated:-

> "The Labour Court summarised the combined effect of sub-ss. (1) and (2) of s. 5 as being that a comparable permanent employee for the purposes of the Act the permanent employee employed by the same employer as the complainant, who is engaged in like work with the complainant. The Labour Court followed the decision of this Court (O'Sullivan J.) in *Wilton v. Steel Company of Ireland* [1999] E.L.R. 1, where it was held that, for the purposes of the Anti Discrimination (Pay) Act, 1974, an employee is entitled to choose his or her comparator. Apropos of the position of the defendant, the Labour Court stated that it was accepted that she was engaged at all material times in doing the same job as permanent civil servants who were designated as established, and it was also accepted that there were no other civil servants employed by the plaintiff engaged in like work with her, who were designated unestablished. The Labour Court found that the defendant and a number of established civil servants performed the same work under the same or similar conditions and each was

> interchangeable with the other in relation to work. Therefore, the Labour Court found that the established civil servants were comparable permanent employees in relation to the defendant within the meaning of s. 5. On that basis, the Labour Court concluded that the defendant, as a fixed-term employee, was entitled to the same conditions of employment as her nominated comparators who were established civil servants (except, of course, in relation to the duration of her contract).
>
> In this Court, counsel for the plaintiff did not dispute that the defendant was entitled to choose her comparator, but it was submitted that she had to choose a comparator for the purposes of the Act. He submitted that the difference in treatment between the defendant and her chosen comparator of which she complained was not due to her fixed-term status, but to her status as an unestablished civil servant. It was submitted that the discrimination of which she complained was not within the ambit of the Act. . . .
>
> Counsel for the defendant submitted that the Labour Court was correct in holding that she was entitled to select as a comparator an established civil servant working in the State Laboratory. In relation to the application of s. 5 to her, para. (1)(a) was complied with, in that she and her comparator had a common employer and the Labour Court had found as a fact, and there was no appeal against the finding, that she complied with para. (a) of subs. (2). It was submitted that in the Act comparability is defined not by reference to status but by reference to having the same employer and being engaged in like work. Therefore, it was submitted that the plaintiff's contention that the Labour Court fell into error was misconceived.
>
> I can see no error of law in the conclusion of the Labour Court that an established civil servant in the State Laboratory, who was engaged in like work with the defendant was a 'comparable permanent employee' for the purposes of s. 6 because, on the basis of the unchallenged findings of fact made by the Labour Court, such person fulfilled the criteria set out in s. 5 for a comparable permanent employee vis-à-vis the defendant as a fixed-term employee."

Thus it was argued on behalf of the school relying on the above decision that the chosen comparator does not have the same employer. Indeed it was added that in the case of *Sullivan v. The Department of Education* referred to above, it is of significance that it was the department and not the relevant board of management that was the defendant in those proceedings. Thus a significant part of the school's arguments are based on the contention that the appropriate employer in this case is the Department and not the school. In support of these arguments reference was also made to two decisions of Rights Commissioners in the cases of *Mannion and Jacques and Keating v. Scoil Áine* and the case of *Noone v. St. Mary's Holy Faith Secondary School Killester*. In the first of those cases the Rights Commissioner found that there were two separate contracts in existence, one between the school and the claimant funded by the Department and the other which was privately funded between the school and each of the claimants outside the control of the funding of the Department. In other words the Rights Commissioner had regard to the different funding arrangements and contractual arrangements between the claimants and the school. In the second of those cases, that of Imelda Noone, the Rights Commissioner rejected a claim for pro rata pay and conditions in respect of the claimant's Department paid incremental colleagues and therefore found that the claimant was not comparable to the Departmental paid incremental teachers on the respondent staff.

In support of their arguments on this point, reference was made on behalf of the school to a number of factual matters which it was contended showed significant differences between the claimants and their chosen comparators.

I think it is necessary to set out some of the details referred to on behalf of the school in relation to the differences between the claimants and their chosen comparators. The first point to note is that incremental teachers have salary paid according to the Department's "rules for the payment of incremental salary to secondary teachers". There are two categories of teachers entitled to receive incremental salary, a registered teacher and a recognised teacher. To be employed or paid by a private school a teacher does not have to come within those categories. The terms and conditions of a recognised and registered teacher's employment are determined by the Department. Negotiations in relation to terms and conditions take place within the teachers conciliation council, a forum not open to privately paid teachers. A Department paid teacher is subject to redeployment, whereas a privately paid teacher such as the claimant is not. The qualifications are determined by the Teaching Council pursuant to the Teaching Council Act 2001. If not acceptable to the Teaching Council a teacher is not eligible for payment of salary from the Department. Such qualifications are not necessary for privately funded teachers. A State employed teacher is obliged to undergo a period of probation. This does not apply to a privately funded teacher. A privately paid teacher is not entitled to be appointed to a post of responsibility funded by the Department. The career break scheme is not open to privately paid teachers. The job sharing scheme is not open to privately paid teachers. Finally there are some differences in relation to the pension scheme provided by the Department of Education and Science.

**The Claimants Response in Relation to the Appropriate Comparator**

As I have mentioned previously, there is no issue between the parties as to the fact that a claimant is entitled to choose its comparator. Further it was accepted by counsel on behalf of the claimants that, as has been contended on behalf of the school, not only must the position of the comparator be considered, but the context in which they are employed must be considered and taken into account. In other words the claimants do not disagree with the findings of the Supreme Court in the case of *National University of Ireland v. Ahearn* and the High Court in the case of *Wilton v. Irish Steel* referred to above.

A principal part of the argument on behalf of the claimants was based on what was described as the tripartite relationship as identified in the decision in *O'Keefe v. Hickey and Ors* [2008] I.E.S.C. 72. That case concerned a plaintiff who brought an action for damages for personal injuries arising from a series of sexual assaults committed by the first defendant on her in 1973, in her national school where the first defendant was the principal. The school was owned, managed and run by a private religious group but recognised by the State as a national school. The plaintiff claimed that the second, third and fourth defendants ("the State") were vicariously liable for the tortuous acts of the first defendant. The plaintiff appealed to the Supreme Court against the decision of the High Court dismissing her claim against the State while holding that the state was not vicariously liable for the acts of sexual abuse of the first defendant. The Supreme Court held in dismissing the appeal that the State defendants were not liable to the plaintiff for the actionable wrongs committed against her by the first defendant as there was no direct employment relationship between the first defendant and the State. It was further held that the State could not be liable for the first defendant's tortuous and criminal acts on the ordinary and established principles of vicarious liability. The first defendant was not the State's employee: he was employed by the patron of the school and directed and controlled by the school's manager. Accordingly, there was no question of the State defendant as having put the first defendant in his position as a national school teacher to do the class of acts in respect of which the action was brought. The Minister laid down rules for national schools that were general in nature and did not allow him to govern the detailed activities of any individual teacher. As a result of the system historically in place, the Minister was deprived of direct control of the schools. In the course of the submissions, counsel on behalf of the claimants referred in particular to a passage from the judgment of Hardiman J. at para. 125, where he stated:-

> "But, in the end, my views on the Canadian and antipodean decisions are not central since I consider that even if they were to be followed here, except perhaps in their most extreme form, the Minister's absence of direct control over the first-named defendant, (because such control had long since been ceded to the Manager and the Patron), prevents a finding against him. The first defendant was not an employee of the Minister and neither was he in any form of relationship with him which corresponds to any of the ordinary legal triggers for vicarious liability. Their relationship - a triangular one with the Church - is entirely *sui generis*, a product of Ireland's unique historical experience."

Thus in that case concerning the issue of vicarious liability, it was found that the first defendant in that case, the principal of a catholic national school was not an employee of the Minister.

The historical relationship between the State schools and teachers is considered at length in the course of the judgments in that case. I was also referred to the provisions of s. 24 of the Education Act 1998, which contains provisions relating to staff. It provides at s. 24(1) as follows:-

> "(1) Subject to this section, a board may appoint such and so many persons as teachers and other staff of a school as the board from time to time thinks necessary for the performance of its powers and functions under this Act.
>
> (2) The numbers and qualifications of teachers and other staff of a school, who are to be paid from monies provided by the Oireachtas, shall be subject to the approval of the Minister, with the concurrence of the Minister for Finance.
>
> (3) A board shall appoint teachers and other staff, who are to be paid from monies provided by the Oireachtas, and may suspend or dismiss such teachers and staff, in accordance with procedures agreed from time to time between the Minister, the patron, recognised school management organisations and any recognised trade union and staff association representing teachers or other staff as appropriate. . . ."

Relying on the decision of the Supreme Court in the case of *O'Keeffe* and *Hickey* and the provisions of s. 24 of the Education Act 1998, it was contended on behalf of the claimants that it is clear that teachers are appointed by the Board of Management of a school and that the Board is the employer of the teachers. Accordingly, it was submitted that in law the school or the Board of Management is the employer for all purposes.

**Transposition of the European Directive**
I now wish to deal briefly with the issues raised in regard to the transposition of the Directive. As noted previously Clause 4 of the Fixed Term Workers Directive states:-

> "In respect of employment conditions, fixed term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed term contract or relation unless different treatment is justified on objective grounds."

The Part Time Workers Directive is in similar terms as it provides:-

> "In respect of employment conditions, part time workers shall not be treated in a less favourable manner than comparable full time workers solely because they work part time unless different treatment is justified on objective grounds."

It was argued on behalf of the school that it is clear from the Directives that in order to be actionable the less favourable treatment must be solely because of the part-time or fixed term nature of the work. It is contended that neither the 2003 Act nor the 2001 Act fully implement those provisions of the Directive. If one looks, for example, at s. 9(1) of the Protection of Employees (Part Time Work) Act 2001, it provides:-

> "Subject to *subsection* (2) and (4) and *section* 11(2) a part-time employee shall not, in respect of his or her conditions of employment, be treated in a less favourable manner than a comparable full-time employee."

Section 6(1) of the Protection of Employees (Fixed Term Work) Act 2003, is in similar terms. It will be noted that the word "solely" is omitted from the provisions of the Act. it is the omission of that word that has led to the argument on behalf of the school that the State has failed to properly transpose the Directive in to Irish law.

Counsel on behalf of the claimants noted that the purpose of the Directive was to provide protections to part-time workers and fixed term workers by ensuring the application of the principle of non-discrimination and to establish the general framework for eliminating discrimination against part-time and fixed term workers. It was pointed out on behalf of the claimants that Clause 6(1)(i) of the Part-Time Workers Framework Agreement provides:-

> "Member States and/or the Social Partners can maintain or introduce more favourable provisions for worker set out in this Agreement."

On that basis it was argued that the Directive rights are a floor not a ceiling. In other words, the Directive provides the minimum rights that may be provided and the State legislature can expand on that.

Counsel on behalf of the school had pointed out that any less favourable treatment in this case is not on the grounds of the fixed term or part-time status of the employee and that the less favourable treatment was due to the different contractual arrangements between the claimants and their chosen comparators who are paid by a third party, namely the Department.

The Labour Court in its conclusion on this particular matter stated as follows:-

> "If the court were minded to consider the relevance or meaning of the word "solely" as used in Clause 4 of the Fixed Term Work Framework Agreement, it could not reasonably be ascribed the meaning or effect canvassed by the respondent. If the word were to be interpreted literally, it would mean that any factor, no matter how trivial, which influenced an employer in not applying the principle of equal treatment, could operate as a full defence to a claim made under the Acts or the Directives. In that event the protection afforded by both Acts would be rendered nugatory and the objects pursued by the Directives would be subverted. This arises because there would rarely be a case in which an employer could not point to some status neutral consideration, which influenced an impugned decision, to avoid liability for what would otherwise be unlawful discrimination. Such a result could not have been intended."

The claimants have argued in this respect that the determination of the Labour Court is correct. They argued that the Directive provided that different treatment of workers based solely in their status as part-time or fixed term workers is prohibited and that Irish legislation goes further and that it is permissible for the Irish legislation to provide greater rights than those provided by community law. This is not a violation of community law, but is a permissible extension of that law.

I should add in parenthesis in dealing with this issue that both sides are agreed that in one respect the determination of the Labour Court was in error on the law insofar as it dealt with the issue of the doctrine of direct effect in respect of a Directive. This related to the argument on behalf of the school to the effect that the Directive had been improperly transposed. As was noted in the determination of the Labour Court, the case advanced by the respondent was that the claimant was treated differently because he was paid for out of private rather than public funds as opposed to his status as a part-time or fixed term worker. This argument was supported by the fact that other teachers, also privately funded and full-time and permanent, are treated in the same manner as the claimant. The argument in this regard was based on the view that the Acts allow for a defence equivalent to that provided by s. 19(5) of the Employment Equality Acts 1998 and 2004, that is, grounds other than sex.

In the course of the determination the Labour Court stated:-

> "In any event, these points are of academic interest in relation to the instant case. Neither the Part Time Work Act nor the Fixed Term Work Act provide for the defence on which the respondent seeks to rely. The only defence available under both Acts is to show that the impugned differences are objectively justified on grounds unrelated to the status of the claimants as either fixed term or part-time employees. In effect, the respondent is inviting the court to import into the legislation a provision which is simply not there. It is settle law that a court cannot interpret a statute by adding to or taking from the plain language in the text which was enacted by the Oireachtas. To do so would be for this Court to trespass into the legislative domain."
>
> In order to overcome this obvious difficulty the respondent seeks to rely on the Doctrine of Direct Effect of community law. The substance of the submissions made on the that point are that the Directive has been improperly transposed in Irish law and that in these circumstances the respondent is entitled to rely on the Directive in defending the instant claim. This line of argument is misconceived.
>
> The Doctrine of Direct Effect describes a role of community law which, subject to certain requirements, allows an individual to assert a right before a national court by reliance on a provision of community law. In the case of a Directive the Doctrine operates where a member state has either failed to transpose the Directive altogether or had done so inadequately. In the case of Directives, the Doctrine can only operate against the State or an emanation of the State. It appears to be accepted that the respondent herein is such a body."

The latter statement that it appears to be accepted that the respondent school is such a body is accepted by the claimants and the school to be an error of law. In other words, it is agreed that the school is not an emanation of the State. However, having conceded that that is an error of law, it appears to be the view of both sides that the error does not affect the decision of the Labour Court overall.

I now wish to look at the issue of objective justification. The submission of the school in relation to objective justification is that the different contractual and/or employment status of the chosen comparators compared to the complainants constitute objective justification for the less favourable treatment which has occurred. The Labour Court in its determination referred to the defence available under s. 7 of the Protection of Employees (Fixed Term Work) Act 2003, and s. 12 of the Protection of Employees (Part-Time Work) Act 2001, which deal with that defence. Section 12(1) provides as follows:-

> "A ground shall not be regarded as an objective ground the purposes of any provision of this part unless it is based on considerations other than the status of the employee concerned as a part-time employee and the less favourable treatment which it involves for that employee is for the purpose of achieving a legitimate objective of the employer and such treatment is appropriate and necessary for that purpose."

The Labour Court in its determination made the point that:-

"In this instance the objective justification relied upon appears to be that the school cannot afford to pay the cost associated with affording the claimant equal treatment. That could not be accepted as a defence since in every case in which it is necessary to implement principles of equality there is a cost to the employer. The ECJ said in case No. C-243/95 *Hill & Stapleton v. Revenue Commissioners & Department of Finance* [1999] I.R.L.R. 466, that:-

> "So far as the justification on economic grounds is concerned, it should be noted that an employer cannot justify discrimination…solely on the ground that avoidance of such discrimination would involve increased costs.
>
> Moreover, there are clearly alternative means available to the employer in order to reflect the true economic cost of paying teachers in accordance with the statutes. It is a matter of choice for the respondent school as to whether or not it wishes to adopt such a course."

Accordingly, the Labour Court in its determination rejected the defence of objective justification. The claimants in their submissions on this issue pointed out that it is well settled in community law that costs cannot objectively justify discrimination. The Labour Court referred to a number of authorities including *Jorgensenv Forenigen Af Speciallaeger* Case No. C-226/98 [2000] E.C.R.I. – 2447, and *Schonheit v. Stadt Frankfurt Ammain* Case No. C-4/02 and C-5/02 [2003] E.C.R.I. 12575. Finally, I should refer briefly to the decision in *Del Cerro Alonso v. Osakidetza-Servicio Vasco De Salud* Case C-307/05. That case considered the interpretation of the concept of objective grounds. In the course of its decision the court stated:-

> "The court held that that concept of "objective reasons" must be understood as referring to precise and concrete circumstances characterising a given activity, which are therefore capable, in that particular context, of justifying the use of successive fixed term employment contracts. Those circumstances may result in particular, from the specific nature of the tasks for the performance of which such contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from pursuit of a legitimate social policy objective of a member state….
>
> The same interpretation is necessary, by analogy, regarding the identical concept of "objective grounds" within the meaning of Clause 4(1) of the Framework Agreement.

> In those circumstances, that concept must be understood as not permitting a difference in treatment between fixed term workers and permanent workers to be justified on the basis that the differences provided for by a general, abstract national norm, such as a law or collective agreement.
>
> On the contrary, that concept requires the unequal treatment at issue to be justified by the existence of precise and concrete factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria in order to ensure that that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose."

Relying on that authority, counsel on behalf of the claimants has strongly submitted and urged upon the court that the school has failed to establish that the unequal treatment in this case responds to genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose.

**Decision**

**The Appropriate Comparator**
The arguments on this point centred on the decision in the case of *O'Keeffe v. Hickey*, the provisions of s. 24 of the Education Act 1998 and the provisions of s. 3(1) of the Protection of Employees (Part Time Work) Act 2001 and s. 2(1) of the Protection of Employees (Fixed Term Work) Act 2003, which define employers respectively as follows:-

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

It can be seen that there is a difference between the definitions of employer contained in the two Acts. Essentially however, an employer is the person with whom the employee has entered into or for whom the employee works under a contract of employment.

The provisions of s. 24 of the Act apply to schools which are fully State funded and schools which are private schools and partly funded by the State. Section 24(1) provides for the appointment of teachers and staff of a school by the Board of Management. The provisions of s. 24 go on to deal with the number and qualifications of teachers and staff of a school to be paid from monies provided by the Oireachtas and sets out various matters in that regard. It is clear from the terms of the statute that the terms and conditions of employment and other staff of a school appointed by a Board and who are to be paid from monies provided by the Oireachtas, shall be determined by the Minister with the concurrence of the Minister for Finance. Section 24(6) provides as follows:-

> "Where all or part of the remuneration and superannuation of teachers and other staff of a school is paid or is to be paid from monies provided by the Oireachtas, such remuneration or superannuation shall be determined from time to time by the Minister, with the concurrence of the Minister for Finance."

There are some observations which I think it is necessary to make in relation to those provisions. The first point to note as I have already said is that they apply to all schools, private and State schools. It is implicit, for example, in s. 24(6) that not all of the teachers in a school may be paid from monies provided by the Oireachtas. It is also clear that the terms and conditions of employment and the remuneration and superannuation of teachers paid from monies provided by the Oireachtas are matters which will be determined by the Minister. In other words, the Minister determines the terms and conditions of employment of State paid teachers and the Minister determines the remuneration and superannuation of the State paid teachers. I think it is also clear from the provisions of s. 24 that the employer of teachers is the Board of Management. It is the Board of Management of the school that appoints teachers. It is also clear from the provisions of the Act, and in particular s. 24(2), that the numbers and qualifications of teachers paid from monies provided by the Oireachtas is subject to the approval of the Minister. Nevertheless, all teachers are appointed by the Board of Management.

Counsel on behalf of the claimants in this case laid particular emphasis on the decision in the case of *O'Keeffe v. Hickey* as referred to previously. I have already referred to a number of passages from that judgment which deal with the issue of vicarious liability and which outlined and described in some detail the nature of the relationship between the Minister, teachers and a school. It is undeniably a feature of this case that the contractual arrangements between the claimants and the school, and the chosen comparators and the school are different. The State through the provisions of s. 24 controls key aspects of the contract of employment, namely terms and conditions and remuneration and superannuation of State funded teachers. The school has no input into the contract of employment of a State funded teacher and has no control over the significant terms of such contract of employment. On the other hand, the school does have control over those aspects of the contract of employment as between the claimants and the school. If the school in this case had control over the fixing of the terms and conditions of employment of all the teachers in the school, including the determination of the remuneration and superannuation, there could be no objection to the chosen comparators.

I have considered the authorities that were opened to me in the course of this hearing. It is interesting to note in the case of Sullivan v. Department of Education, a case before the Employment Appeals Tribunal, that there the respondent in those proceedings was the Department of Education although the claimant was employed by a school. The issue in that case related to the recognition of a degree allowance and she was a Department paid teacher. None of the cases opened to me in the course of the hearing involve a situation where the contract of employment between the employer and the employee is one in which the employer in respect of the chosen comparators has no hand, act or part in fixing important terms of the contract i.e. terms and conditions, including remuneration and superannuation.

In reaching its conclusions on this issue, the Labour Court found:-

> "In the instant case, there is no dispute as to like work as between the claimant and his chosen comparator. On the above criteria as set out by Laffoy J., in the *McArdle* case, although there are some full-time privately funded teachers in the school, the claimant is entitled to choose a full-time department funded teacher as a comparator."

As can be seen from that particular passage, the Labour Court referred to the decision in the case of *Minister for Finance v. McArdle*

[2007] 18 E.L.R. 165. I now want to look at that decision in more detail. The facts of that case were that the defendant commenced employment in the State laboratory in her capacity as a laboratory technician in March, 2000 on a fixed contract for one year. The purpose of her employment was to assist in the analysis of samples of drivers suspected to have been under the influence of drugs. Her contract was renewed on an annual basis thereafter until 21st March, 2004. at that point, as was accepted before a Rights Commissioner, her contract was not managed appropriately. It was not until May 31st, 2005, that she was furnished with the renewed contract which, in the language of the Labour Court, purported to be in respect of the period from March 22, 2004 until March, 21, 2005. As was recorded in the determination of the Labour Court the plaintiff (the Minister for Finance) accepted that the contract furnished on 21st May, 2004, did not comply with the requirements of s. 8 of the Act and that the defendant became entitled to a contract of indefinite duration with effect from 22nd March, 2004. It appears from the decision that the defendant was governed by the same terms of employment as other permanent employees in respect of "annual leave, sick leave, pay, hours of attendance, etc". The matters at issue, and which were the subject of complaint related to pension, access to career breaks and tenure.

Having set out the various submissions in relation to the entitlement of the employee to choose his or her comparator, it was noted in the course of the judgment as follows:-

> "The Labour Court stated that it was accepted that she was engaged at all material times in doing the same job as permanent civil servants who were designated as established, and it was also accepted that there were no other civil servants employed by the plaintiff engaged in like work with her, who were designated unestablished. The Labour Court found that the defendant and a number of established civil servants performed the same work under the same or similar conditions and each was interchangeable with the other in relation to work. Therefore, the Labour Court found that the established civil servants were comparable, permanent employees in relation to the defendant within the meaning of section 5. On that basis, the Labour Court concluded that the defendant, as a fixed term employee was entitled to the same conditions of employment as her nominated comparators who were established civil servants (except, of course, in relation to the duration of her contract).
>
> In this Court counsel for the plaintiff did not dispute that the defendant was entitled to choose her comparator, but it was submitted that she had to choose a comparator for the purposes of the Act. He submitted that the difference in treatment between the defendant and her chosen comparator of which she complained was not due to her fixed term status, but to her status as an unestablished civil servant. It was submitted that the discrimination of which she complained was not within the ambit of the Act.
>
> Counsel for the defendant submitted that the Labour Court was correct in holding that she was entitled to select as a comparator an established civil servant working the State Laboratory. In relation to the application of s. 5 to her, para. 1(a) was complied with, in that she and her comparator had a common employer and the Labour Court had found as a fact, and there was no appeal against the finding, that she complied with para. (a) of subs. (2). It was submitted that in the Act comparability is defined not by reference to status but by reference to having the same employer and being engaged in like work. Therefore, it was submitted that the plaintiff's contention that the Labour Court fell into error was misconceived."

In relation to those submissions, Laffoy J. went on to state:-

> "I can see no error of law in the conclusion of the Labour Court that an established civil servant in the State Laboratory, who was engaged in like work with the defendant was a "comparable, permanent employee" for the purposes of s. 6 because, on the basis of the unchallenged findings of fact made by the Labour Court, such person fulfilled the criteria set out in s. 5 for a comparable permanent employee *vis-a-vis* the defendant as a fixed term employee."

The provisions in s. 7 of the Protection of Employees (Part Time Work) Act 2001, mirror the provisions of s. 5 of the Protection of Employees (Fixed Term Work) Act 2003. Accordingly, an employee is a comparable permanent employee if the employee and the relevant part-time employee are employed by the same employer and one of the conditions referred to in subs (3) of s. 7 is satisfied in respect of those employees namely,

> "(a) Both of the employees concerned perform the same work under the same or similar conditions or each is interchangeable with the other in relation to the work,
>
> (b) The work performed by one of the employees concerned is of the same or a similar nature to that performed by the other and any differences between the work performed and/or the conditions under which it is performed by each, either are of small importance in relation to the work of whole or occur with such irregularity as not to be significant, and
>
> (c) The work performed by the relevant part-time employee is equal or greater in value or the work performed by the other employee concerned, having regard to such matters as skill, physical or mental requirements, responsibility and working conditions."

There is no doubt that the school is the employer of the claimants. Bearing in mind the decision in *O'Keeffe v Hickey*, it appears that the school is also the employer of the chosen comparators for the purpose of issues of vicarious liability. That decision highlights the unusual tripartite relationship between the Department funded teacher, the Department and the school. However, the provisions of s. 24 of the Education Act 1998 are also of importance. S. 24 (3) makes it clear that the task of appointing teachers funded by the State falls on the board of management of a school. S. 24 (5) of the Act makes it clear that the terms and conditions of teachers funded by the State shall be determined by the Minister, with the concurrence of the Minister for Finance.

In a private school there will be a cohort of Department funded teachers and usually there will also be a cohort of privately paid teachers. The paymaster for each cohort is different. In the case of *O'Keeffe v Hickey* to which I have referred above, the unusual nature of the tri-partite agreement was described; the Board of management was found to be the employer of the teacher concerned in that case which involved the question of vicarious liability although the teacher was paid by the Department. There is no tri-partite arrangement in the case of the claimants. I have already referred to the case of *Sullivan v Department of Education,* a decision of the Employment Appeals Tribunal. It was observed in the course of argument in that case which involved a teacher, that the Department, as the paymaster of the teacher, was the respondent. It was argued by the Department in that case that the Department was not the employer but the "paying agent". The tribunal in that case stated in relation to that argument:

> "The tribunal does not accept that the Department is not the employer. The board of management or other managing authority of a school may well have a role in the day-to-day running of the school and indeed in engaging teachers,

> interviewing etc. The reality is that such boards of management or other managing authority in relation to state schools have little or no role when it comes to the question of remuneration of teachers, which is a most important element and aspect of the relationship between teachers and their employers. The tribunal considers that the role of the Department of education goes beyond that of "paying agent". The Department is empowered to negotiate teachers salaries and qualification allowances and makes policy decisions in relation to the type of degree to which Ms Sullivan and other teachers have studied for in relation to the starters of such degree. As regards qualification allowances. The Department has a role in the whole area of maintaining appropriate pupil/teacher ratio in directly and regulates the number of teachers in any particular school as in the scheme of redeployment. If ultimately redeployment in the case of any particular teacher it cannot be settled by agreement, the Minister is empowered to withhold the grant of a sum of money which would go towards paying that particular teacher's salary and effectively has the power to deprive a particular teacher of his or her salary.
>
> In all of those circumstances, the tribunal does not accept that the Department is simply a "paying agent", which simply pays out the money at the request of the State School concerned. In relation to the question of the hours worked for which a teacher qualifies for his or her monthly salary, the school principal has a role in terms of certifying the hours worked. However in respect of all teachers, when it comes to the question of qualification allowances, these aspects of the teacher's salary involve no role for the school and are something which go to the teachers particular qualification and are a constant. In fact the school principal describes him or herself as "employer" on the monthly certification form at the form is not conclusive."

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

Although the chosen comparators appear to come within the definition of comparable full-time employees as defined in the legislation, I have come to the conclusion that because of the fact that the Minister determines the terms and conditions of the Department funded teacher and the school determines the terms and conditions of the privately paid teachers, the Labour Court has fallen into error in finding that the claimants were entitled to choose a full time Department funded teacher as a comparator. The school has no hand, act or part in determining the salary and other terms and conditions of the Department funded teacher. In determining the employer for the purpose of the legislation in relation to agency workers, the legislation expressly provides that the party paying the worker is, for the purposes of the legislation, the employer. I think the school is in an analogous position. I do not accept that the chosen comparators have the same type of employment contract or relationship as the claimants with the school. To that extent, it seems to me that the Department has to be viewed as the employer of the chosen comparators for the purpose of the legislation.

**Objective justification**
I want to make some very brief observations on this issue. The school in this case has argued that the different contractual and/or employment status of the chosen comparators as compared to the claimants constitutes objective justification for a less favourable treatment which has occurred as between the claimants and their chosen comparators. The Labour Court in the course of its determination stated that "the objective justification relied upon by the school appears to be that the School cannot afford to pay the cost associated with affording the claimants equal treatment." There is an abundance of authority to which reference has already been made to the effect that the issue of cost cannot justify unequal treatment. I have already referred to the decision in *Hill & Stapleton v. Revenue Commissioners & Department of Finance* and to the decision of the ECJ in *Jorgensen* above. It seems to me to be very clear and obvious that the purpose of the Directive and the legislation transposing the Directive into Irish law would be defeated if cost alone was accepted as a defence because as pointed out by the Labour Court "in every case in which it is necessary to implement principles of equality there is a cost to the employer".

As I have already mentioned, part of the argument in this case centred on the omission of the word "solely" from the legislation and in particular from the provisions of section 12 and section 7 referred to above. An argument was made on the behalf of the school to the effect that the omission of that word meant that the directors had been improperly transposed into Irish law. I do not accept that argument on the part of the school and I accept the arguments of counsel on behalf of the claimants in that regard. It is important to remember the purpose of the framework agreement, which has been put into effect by the directive and implemented by the legislation referred to in these proceedings. If one considers Council directive 1999/74/EC in relation to fixed term work it will be seen that its purpose is stated to be to:

> "(a) improve the quality of fixed term work by ensuring the application of the principle of non-discrimination;
>
> (b) establish a framework to prevent abuse arising from the use of successive fixed term employment contracts or relationships."

In the part time work directive it was stated as follows:

> "Whereas the signatory parties wished to conclude a framework agreement on part-time work setting out the general principles and minimum requirements of part-time working; whereas they have demonstrated their desire to establish a general framework for eliminating discrimination against part-time workers and to group and to contribute to developing the potential for part-time work on a basis which is acceptable for employers and workers alike."

In other words, the purpose of the Directives and the legislation implementing the Directives is to prevent discrimination against workers by reason of their status as fixed term workers or part time workers.

I accept that the test to be applied in considering a defence of objective justification is that set out in the case of *Del Cerro Alonso* referred to above, namely, that the unequal treatment responds to a genuine need; is appropriate for achieving the objective pursued and is necessary for that purpose. However, in the light of the finding as to the chosen comparator, it is not necessary to further address the arguments in this area.

**Conclusion**
As I have found that the Labour Court fell into error in relation to the selection of the chosen comparators, I will hear further from the

parties as to the effect of that finding.