THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 39

Appeal Nos. 2015/447

Finlay Geoghegan J.
Peart J.
Hogan J.

BETWEEN/

THE MINISTER FOR EDUCATION AND SKILLS

APPELLANT

- AND -

ANNE BOYLE

RESPONDENT

- AND -

THE LABOUR COURT and THE MANAGEMENT COMMITTEE OF HILLSIDE PARK PRESCHOOL

NOTICE PARTIES

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 24th day of February 2017

1. It may seem remarkable that some 185 years after the dispatch of the famous Stanley letter in October 1831 (so called after the name of the British Chief Secretary for Ireland who sent it) establishing the modern system of primary education in Ireland that the question of who the employer of a national teacher actually is remains unclear. That this is so is perhaps all the more surprising given that in the meantime we have had the establishment of the State in 1922, the establishment of the Department of Education in 1924 following the enactment of the Ministers and Secretaries Act 1924, the enactment of the Constitution in 1937 and the enactment of the Education Act 1998 (with subsequent amendments thereafter). Yet all of these events - which in themselves have all had significant implications for the system of primary education – have come and gone without, it seems, clarifying this question.

2. It is this question, however, which is nonetheless presented in this appeal from the decision of the High Court (O'Malley J.): see *Minister for Education and Science v. Labour Court* [2015] IEHC 429. Specifically, the question more particularly is whether the Minister of Education is the employer of a part-time pre-school teacher for the purposes of the Protection of Employees (Part Time Work) Act 2001 ("the 2001 Act"). The matter arises in the following way:

3. The appellant, the Minister for Education and Skills ("the Minister"), commenced judicial review proceedings in the High Court in order to quash a determination of the respondent ("the Labour Court") by which that body decided that the first named notice party ("Ms Boyle") was an employee of the Minister within the meaning of the 2001 Act, and that she had been treated less favourably than a full-time comparator in relation to pension rights. The Labour Court further directed that the Minister should admit her to the National Teachers Superannuation Scheme with effect from six months before the initiation of her claim and pay her a sum of €10,000 by way of compensation for discriminating against her.

4. The Minister sought to quash the decision of the Labour Court on the ground, essentially, that the Minister had no contractual relationship with Ms. Boyle and was not her employer within the meaning of the 2001 Act. For her part, Ms. Boyle has sought to uphold the conclusions of the Labour Court.

5. Ms. Boyle has also maintained that in the present case judicial review is not a proper avenue of redress, in that the Minister has also lodged an appeal on points of law, as provided for by the Act, but has not progressed that appeal pending the outcome of the judicial review. The Minister has rather candidly stated that judicial review, rather than the statutory process, has been pursued because the decision of the High Court on a point of law would be final, whereas judicial review left open the possibility of an appeal to this Court.

6. Before proceedings to examining these questions, it is necessary first to recount the background to these proceedings.

The background to the proceedings

7. Ms. Boyle was recruited and employed as a teacher in a grant-aided pre-school for the children of members of the travelling community for over 20 years, until it was closed in 2011. A grant amounting to 98% of the salary payable to a primary school teacher was paid by the Minister to the management committee of the preschool in respect of her salary. Ms. Boyle was the only teacher in the preschool and she worked 15 hours per week.

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

9. By 2011 the policy regarding pre-school traveller education had changed. When the Hillside Park pre-school was opened, there were relatively few pre-schools and this particular pre-school was designed to benefit traveller children. By the 2000s, all of this had changed and pre-schools attended by the bulk of the early school going population were common. In consequence the Minister decided that the special pre-schools (such as Hillside) should be closed and that there should no longer be special pre-school education for traveller children.

10. Before this complaint could be processed, however, Ms. Boyle was made redundant in consequence of the closure. The Minister made the redundancy payment, albeit that this Court was informed at the hearing of this appeal that the payment was first made to the (now defunct) Management Committee of Hillside School with a view to payment on to Ms. Boyle.

11. After a hearing in January 2011 the Rights Commissioner upheld the arguments made on behalf of the Department of Education and Science, concluding that it was neither the employer of Ms. Boyle within the meaning of s.3(1) of the 2001 Act nor an associate employer within the meaning of s.7(5) of the same Act. No finding was made in respect of the management committee. This decision was then appealed to the Labour Court.

12. Before examining the decision of the Labour Court, I should digress briefly to set out the relevant terms of the 2001 Act, given that the Labour Court's decision turns on its interpretation of this legislation and, furthermore, that the terms of this legislation are critical to the determination of this appeal.

Statutory context - Protection of Employees (Part Time Work) Act 2001
13. The long title of the 2001 Act states that it is to provide for, *inter alia*, the implementation of Directive 97/81/EC of 15 December 1997 ("the part-time workers Directive"). Section 9 of the 2001 Act lays down the general principle that a part-time employee shall not, in respect of his or her conditions of employment, be treated in a less favourable manner than a comparable full-time employee. This general principle does not apply where such treatment can be justified on objective grounds.

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

15. Section 3(1) defines the term "contract of employment" as meaning:-

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

16. The term "employee" is defined as meaning:

> "…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."

17. The term "employer" is further defined thus:

> " '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."

18. Section 17 then goes on to create the framework for comparisons between part-time and full-time employees. No issue arises in relation to this point, because the Minister meets the case on the somewhat different basis that he is simply not the employer. Section 16(2) of the 2001 Act provides that a Rights Commissioner (and, on appeal, the Labour Court) may require an employer who is found to be in breach of the Act to comply with the relevant provision and, if necessary, to pay "compensation of such amount (if any) as is just and equitable having regard to all the circumstances." This compensation is, however, limited to a maximum of two years' compensation.

19. It should also be observed that s. 24(5) of the Education Act 1998 (as substituted by s. 6 of the Education (Amendment) Act 2012) provides that the terms and conditions of teachers and other staff of a school appointed by a board of management, who are to be paid from monies provided by the Oireachtas, shall be determined by the Minister for Education with the concurrence of the Minister for Finance.

The evidence before the Labour Court
20. Returning now to the evidence before the Labour Court, the hearing took place over the course of several dates in 2011 and 2012, *i.e.*, after Ms. Boyle had been made redundant. As it happens, the management committee did not participate in the appeal, as by this stage it had effectively disbanded.

21. The evidence before the Labour Court was that the pre-school had been established in 1981 and Ms. Boyle had been employed there since 1989. Originally it was based in two rooms in the local community centre, but when that was demolished the school re-located to a different premises. It is noteworthy that all correspondence between the Department and the management committee was sent care of Ms. Boyle's home address.

22. The Departmental policy at the time was to grant aid traveller pre-schools to a maximum of 98% of a national school teacher's salary for a maximum of three hours per day, five days per week for the duration of a normal school year. It also funded 98% of the cost of school transport where that was provided.

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

24. This system of payment under the grant scheme continued until 2009 and that part-time teachers in special schools had been paid under the same system until January 2011. In 2008, however, the Department issued a circular (2008/88) which stated that the grant system was to be altered, on a phased basis, to a system of direct payment to the teacher. The circular made it clear that the intention of the change was to reduce the administrative burden on schools and also help to "ensure that the terms of the Protection of Employees (Part-Time Work) Act, 2001 are fully implemented for part-time teachers."

25. As part of the process the Department required records of service in relation to individual teachers so that it could ensure that they were paid the appropriate salary and to calculate any arrears that might be due. Part-time teachers were thereafter paid directly by the Department.

26. The terms and conditions of Ms. Boyle's employment, including her salary, were set by the Department in relation to issues such as sick leave, holidays, maternity leave, compassionate leave and entitlement to a qualification allowance. Until 1992, Ms. Boyle was paid a part-time hourly rate. In that year the Department introduced a scheme establishing "Pro-Rata Pay and Conditions for Eligible Part-Time Teachers in Special Schools and other Institutions." This scheme was open only to part-time teachers who were wholly or mainly dependent for their livelihood on their earnings from part-time teaching, and whose employment history met certain criteria. The "pro-rata" aspect was by reference to the earnings of full-time primary school teachers.

27. "Eligible part-time teachers" were those who were either fully qualified teachers, or part-time teachers who, though not fully qualified, had been sanctioned in their posts by the Department and who had at least one year's service prior to the 1st September 1990. The terms of the scheme specifically stated that it did not provide for any amendments to the current regulations in relation to superannuation. It was also stated that "The employment or re-employment of a teacher under the scheme is a matter for the employer, *i.e.*, the Management Authorities of Special Schools or other Institutions."

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

> "The main advantage of the EPT Scheme is the fact that you will be on a fixed annual salary which will continue to be paid during periods of Sick Leave or Maternity Leave."

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

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

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

32. After the coming into force of the Financial Emergency Measures in the Public Interest (No.2) Act 2009 ("the 2009 Act"), Ms. Boyle's salary was reduced on the same basis as that of national school teachers. In November 2010, the Department sent a circular (Circular 0070/2010) to the management of all primary, secondary, community and comprehensive schools and to VECs. This dealt with the question whether certain staff, who had not been subject to the pension levy introduced in earlier legislation, were subject to the pay reductions under the 2009 Act. The issue arose because the legislation in question defined "public servant" in different ways. The circular explained that:

> "Following receipt of legal advice it has now been determined that all staff employed by a recognised school or VEC come within the definition of "public servant" solely for the purposes of the Act. This applies regardless of the source of the money used to fund their salary, notwithstanding the fact that the Minister does not determine their terms and conditions of employment, and irrespective of whether or not they are eligible for, or members of, a public service pension scheme."

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

> "Any staff employed in a recognised school or VEC and falling into the following categories **who have not already been affected by the pay reductions introduced under the [2009] Act;** …
>
> ☐ Teachers employed in Traveller pre-schools ….
>
> It is important to point out that the fact that affected staff employed by recognised schools and VECs come within the definition of "public servant" solely for the purposes of the Act does not alter their employment status in any other respect."

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

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

"(a) a contract of service or apprenticeship, and

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

36. Reliance was placed upon the judgments in *Tobin v Cashell*, High Court, Kearns J., 21st March 2000), *Crowley v Ireland* [1980] I.R. 102 and *O'Keeffe v Hickey* [2008] 2 I.R. 72, [2009] 2 I.R. 302. While it was accepted that the specific issue at stake in *O'Keeffe* was vicarious liability, it was submitted that the judgments of the Supreme Court contained a broader statement of principle and that in large measure the decision rested on a finding that the Minister was not the employer of the teacher in question.

37. Section 2 of the Teachers' Superannuation Act 1928 permits the Minister, with the consent of the Minister for Finance, to prepare a pension scheme "in relation to any particular class or classes of teachers". In relation to primary school teachers the principal scheme is provided for in the National School Teachers' Superannuation Scheme, 1934 (S.R. & O. No. 23 of 1934), which defines "salary" as "the remuneration received by a teacher from the Minister out of moneys provided by the Oireachtas for duty in a National School…"

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

The determination of the Labour Court

39. The Labour Court gave its determination on the 4th July 2012. The Labour Court identified the issues arising as being, first, whether the Minister was Ms. Boyle's employer for the purposes of the 2001 Act and, second, whether the nominated comparator was a comparable full-time employee within the meaning of the Act. The second question turned on whether or not the chosen comparator was an appropriate comparator for the purposes of the Act, and whether she and Ms. Boyle were engaged in the same work or work of equal value.

40. The Labour Court found that the management of the school was vested in the management committee and that Ms Boyle was under the day-to-day control of that body in the discharge of her duties. However, it also found that it was clear that the committee exercised no control over the remuneration and other conditions attaching to her employment, and that these matters were "exclusively controlled" by the Minister.

41. The Labour Court then went on to note the statutory definitions of the terms "employer" and "employee" already referred to, before considering the applicable law as found by both the High Court and Supreme Court in a variety of decisions: *Tobin v. Cashell* (High Court, Kearns J. 21st March, 2000), *Crowley v. Ireland* [1980] I.R. 102, O'Keeffe *v. Hickey* [2008] IESC 72, [2009] 2 I.R. 302 and *Catholic University School v. Dooley* [2010] IEHC 496, [2011] 4 I.R. 517.

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

"…It seems to the Court that the *ratio decidendi* in *Dooley* is discernible from the passages of the judgment quoted above. It appears to be that in a tripartite employment relationship, where the worker is engaged by and works under the direction and control of one party, and his or her terms and conditions of employment are determined solely by another party and funded by that party, the party who determines and funds the wages is to be regarded as the employer for the purposes of the Act of 2001. As in *Dooley*, [the Minister] determined the terms and conditions of [Ms. Boyle's employment and [the committee] had no hand, act or part in determining her pay or her conditions of employment. [Ms. Boyle's] salary was set, adjusted and reduced on the directions of [the Minister] without any input by [the committee]……"

43. The Labour Court concluded that the comparator and Ms. Boyle were both employed by the Minister and that while they were not engaged in the same work they were engaged in work of equal value.

44. So far as the issue of redress was concerned the Labour Court noted that Ms. Boyle had sought an order directing the Minister to enter her into the National School Teachers Superannuation Scheme with effect from 1992, the year in which she became an "eligible part-time teacher". The Court considered that this was not possible, for two reasons. The first was that the Act under which the claim was brought was not enacted until 2001, and plainly Ms. Boyle could not have accrued any entitlement under the legislation prior to its enactment. Secondly, no complaint could be entertained unless made within six months from the date of the alleged contravention of the Act.

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

The decision of the High Court on the procedural issues

46. In the High Court Minister submitted that he was entitled to proceed by way of an application for judicial review to correct what he contended was an error of law which formed the basis for the impugned decision. The Minister relied in this regard on Supreme Court decisions such as *Farrell v. Attorney General* [1998] 1 I.R. 203 and *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 I.R. 483. As it happens, the Minister also elected to file a statutory appeal on a point of law.

47. While the decision to pursue two alternate remedies simultaneously is, of course, open to question, the Minister candidly explained that given the importance of the case and the fact that it had the potential to impact on the employment status of many teachers throughout the State, it was vital that the matter be taken , if necessary, to the Supreme Court. The Minister feared that as there was no right of appeal from the High Court from the decision on a point of law and as the High Court might itself feel bound to follow the decision in *Dooley* as a matter of judicial comity, it was important that the matter should be determined in judicial review proceedings, precisely because of the possibility of a right of appeal from the decision of the High Court.

48. Following the decision of the Supreme Court in *EMI Records (Ireland) Limited v. Data Protection Commissioner* [2013] IESC 34,

[2013] 2 I.R. 669, O'Malley J. held that this was one of these special cases where the Minister might legitimately elect to go by way of judicial review in the interests of legal certainty and the desirability of securing a definitive ruling from an appellate court on the status of the many primary and secondary teachers in the State.

49. In the event, it is not necessary to rule on either of these two questions. I will assume for present purposes that the issue as to whether Ms. Boyle was an employee of the Minister was a jurisdictional fact necessary for the Labour Court properly to assume jurisdiction for the purposes of the 2001 Act. I will further assume that the Minister was legitimately entitled to seek to proceed by way of judicial review with a view to having the decision quashed as distinct from proceeding by way of a statutory appeal under s. 17(6) of the 2001 Act.

The decision of the High Court on the substantive issue

50. Following an exhaustive review of the case-law, constitutional provisions and relevant legislation, O'Malley J. concluded that Ms. Boyle was, indeed, an employee of the Minister, at least for the purposes of the 2001 Act:

> "It is true that Ms. Boyle was not employed in a school "recognised" under the Education Act 1998. However there is no legislation, or other rule of law, to prevent the Minister from entering into the kind of arrangement under which Ms. Boyle was employed for over twenty years. During that time, she was paid at a rate determined by the Minister. In accordance with rules promulgated from time to time by the Minister, she was paid qualification allowances by the Department, put on a twelve-month salary with provision for sick leave and maternity leave, put on an incremental scale, and, ultimately, paid redundancy. While she was still in employment the Department adopted a policy of phasing in direct payment to teachers in her position, rather than via the management committee. All of this is consistent with the legal responsibility of an employer for pay-related issues. The Minister argues that Ms. Boyle has no entitlement to a pension because she was not a national school teacher, and the pension scheme is limited to national school teachers. It seems to me that this is a matter that goes to the appropriateness of her remedy rather than Ms. Boyle's substantive rights under the Act. If one accepts, as I do, that *for the purposes of the Act* she must be deemed to be employed by the Minister, then what she has to do is demonstrate that she has been treated less favourably than full-time employees who are doing comparable work within the definition of the Act. The Labour Court found in her favour on this aspect, and that finding is not challenged in these judicial review proceedings. The mere fact that she worked in a different type of establishment cannot in itself be a bar to redress, and the Minister would bear the burden of showing that there was objective justification for the different treatment."

51. O'Malley J. further held, however, that the Labour Court had no jurisdiction to direct that the Minister admit the appellant in the superannuation scheme for national teachers since the conditions for entry into that scheme was governed by the terms of the 1934 statutory instrument. On this point she said:

> "I do not think that the jurisdiction to direct compliance with the terms of the Act can encompass ordering the Minister to admit the claimant to a particular statutory scheme, the terms of which set out qualifying conditions including what appear to be a requirement to pay contributions. This goes beyond ordering an employer to cease discriminating and comply with the Act, and I consider it to be *ultra vires* the powers of the Labour Court.
>
> It seems to me that the loss suffered by the claimant in these circumstances is more appropriately dealt with by way of compensation. The power to award compensation is not limited by the terms of the Act to established special damage and I do not consider that the Labour Court acted irrationally or unlawfully in awarding €10,000 for the "general effects" of the discrimination suffered by Ms. Boyle. However, I propose to remit the matter to the Labour Court for reconsideration of the question of compensation, to take account of the findings of this court as to the invalidity of the direction to admit the claimant to the superannuation scheme."

52. It is against the terms of this judgment that the Minister has appealed, specifically the finding that Ms. Boyle was an "employee" of the Minister for the purposes of the 2001 Act. Ms. Boyle has, in turn, cross-appealed against that part of the judgment of O'Malley J. which found that the Labour Court had acted *ultra vires*.

The jurisprudence to date

53. Before considering the merits of this issue, it is, however, necessary to examine in some detail the relevant constitutional and statutory provisions and the case-law to date which has been thereby generated.

54. Article 42.4 of the Constitution reads as follows:

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

55. The historical background, and the reasons why Article 42.4 is worded in this manner, were most recently examined by the Supreme Court in *O'Keeffe v Hickey* [2008] IESC 72, [2009] 2 I.R. 302. All three members of the Court who delivered judgments (Hardiman, Geoghegan and Fennelly JJ.) explored in great detail the precise historical circumstances which had prevailed in the 19th century which led to the present state of affairs whereby – in essence – the school hires the teacher, while the teacher's salary is paid for by the State. As Hardiman J. explained, this was brought about by the fact that in the wake of Catholic Emancipation, the various individual churches opposed plans by the British Government to have non-denominational schooling. This ultimately led to a situation whereby both prior to and after 1922 the vast majority of national schools were under the patronage and management of the various churches, while the teachers were in turn paid by the State.

56. In *O'Keeffe* the plaintiff contended that the State was vicariously responsible for the conduct of the principal of a national school in respect of sexual assaults perpetrated upon her by the latter while she attended the school as a young pupil. A majority of the Court concluded that the State was not vicariously liable, largely because they concluded that it was the school itself which employed the principal and which was responsible for supervising him. The Court concluded that in these circumstances that it would be unjust to hold the State vicariously liable given the extent to which it was removed from the employment relationship.

57. All members of the Supreme Court - including Geoghegan J. in his dissent - accepted the contention of the State that the principal was employed by the manager of the school and was not employed by the State. Thus, for example, Geoghegan J. said ([2009] 2 I.R. 302, 345-346) said that it was clear that a teacher in a national school was in a contractual relationship with the manager of the school:

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

58. Fennelly J. spoke to like effect ([2009] 2 I.R. 302,366):-

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

59. The earlier case-law had, in many ways, anticipated the reasoning of the Supreme Court on the nature of the school-teacher's contractual relationship with the school and its board of management. Even so, it is also possible to discern in this earlier case-law a note of realism looking beyond the contractual formalities to the substance of that relationship.

60. In *Fox v. Higgins* (1912) 46 I.L.T.R. 222, Gibson J. referred to the "triangular pact" involving the National Board of Education, the school manager and the teacher. (The functions of the National Board of Education were later subsumed into the Department of Education after the enactment of the Ministers and Secretaries Act 1924). In Fox a teacher who had been absent through illness was refused permission to return to work by a new manager appointed during his absence. The rules in force at the time stipulated that a new manager was obliged to re-appoint teachers appointed by his predecessor. The teacher was held entitled to damages on the basis that the rules, although made by the Board, created a contract between him and the manager.

61. The reasoning in *Fox* was applied by the majority of the Supreme Court in McEneaney *v. Minister for Education* [1941] I.R. 430, a case in which the managerial system was described by Murnaghan J. in the following terms ([1941] I.R. 430, 439):

> "The selection of the teacher, who should, however, have the prescribed qualifications, was left to the manager, but the salary of the teacher was in general provided by the Board [of National Education]…By the Rules of the Board upon a change of manager the succeeding manager was under an obligation to reappoint the existing teachers under an agreement in writing in the same terms as the agreement by which they had previously been appointed. Further, whilst under the Rules the provision of salary for the teacher was made in the form of a grant to the manager and was paid to him unless he signed a request to have it paid direct to the teacher, the entire conditions as to remuneration usually depended upon the action of the Board…
>
> But the contract between the manager and the teacher does not comprise the entire relationship. *Fox v. Higgins* was an action in which a teacher sued a new manager for failure to re-appoint him in accordance with the Rule made by the Board, and Gibson J. held "that the National Board, the manager and the teacher are put together in a kind of triangular pact" and he awarded damages against the new manager who had entered into no new contract with the teacher. So far as the present case is concerned, as the manager did not own the school and was not carrying it on for his personal benefit, he is in the position of a trustee of an educational trust; but at the same time the Board, acting as an independent authority, has made published Rules by which it has made representations to both the manager and the teachers as to the way in which it would apply the funds entrusted to it by Parliament. In so far as Parliament has left to the Board a free discretion as to the application of these funds, the Board was legally bound by the representations which it had made."

62. Murnaghan J. continued by observing ([1941] I.R. 430, 442 - 443):

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

63. In *McEneaney* the Supreme Court held in effect that although there was no contractual relationship between the individual teacher and the Minister, the teacher could, where appropriate, sue to enforce the Rules for National Schools on the basis that these Rules created what in modern parlance would be described as a legitimate expectation. It is clear, nevertheless, that Murnaghan J. rejected as unreal the contention that the contractual relationship was entirely between the school and the teacher.

64. This issue was also in view in *Crowley v. Ireland* [1980] I.R. 102, where the issue was whether the State was in breach of its constitutional obligations in Article 42.4 to provide for free primary education in circumstances where a lengthy teacher's strike had resulted in the widespread disruption of primary education in west Cork. Central to this appeal was the issue of the role of the State and the Minister. Delivering the judgment of the majority, Kenny J. referred to this State's historical experience as being ([1980] I.R. 102, 126):

> "one of the State providing financial assistance and prescribing courses to be followed at schools; but the teachers, though paid by the State, were not employed by and could not be removed by it. This was the function of the manager of the school who was almost always a clergyman. So Article 42.4 prescribes that the State should provide for free primary education. The effect of this is that the State is to provide the buildings, *to pay the teachers who are under no contractual duty to it but to the manager or trustees,* to provide means of transport to the school if this is necessary to avoid hardship and to prescribe minimum standards." (emphasis supplied)

65. It can be seen from *Crowley* that Kenny J. stressed that the contractual relationship was between the school and the teacher.

66. All of this case-law, however, addressed the question of the teacher's employment status in a context – such as vicarious liability in *O'Keeffe* or the State's constitutional obligations in *Crowley* – which is somewhat removed from the present one, namely, whether the Minister is the employer for the purposes of contemporary employment legislation enacted by the Oireachtas. In this regard there is *one decision of the Employment Appeals Tribunal, Sullivan* v. Minister for Education [1998] E.L.R. 217 and two recent decisions of the High Court, *Catholic University School v. Dooley* [2010] IEHC 496, [2011] 4 I.R. 517 and *Blackrock College v. Browne* [2013] IEHC 607 which merit careful attention. In addition, the decision of Baker J. in *Nic Bhrádaigh v. Employment Appeals Tribuna*l [2015] IEHC 305 - a case concerning the application of the Financial Emergency Measures in the Public Interest (No.2) Act 2009 ("the 2009 Act") to the salary of a school secretary – is also helpful. It is to these authorities that I now propose to turn.

67. In *Sullivan* the claimant teacher maintained that she had been wrongly refused a particular allowance and claimed as against the Minister for Education under the Payment of Wages Act 1991 ("the 1991 Act"). In response, the Minister contended that she was not the employer, but was simply the "paying agent." This was not accepted by the Employment Appeals Tribunal ([1998] E.L.R. 217, 222):

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

68. It is important to stress, however, that the term "contract of employment" was given an extended – and, in some respects, a slightly artificial interpretation – interpretation in the definition provisions of s. 1(1) of the 1991 Act: since the definition extended to any other contract:

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

69. The 1991 Act thus deemed the person paying the teacher's salary to be the employer for the purposes of that Act. There could accordingly be no real doubt but that the Minister was the employer in that legislative context, if only by reason of the extended statutory definition which deemed the Minister to be the employer for this purpose.

70. The decision of Dunne J. in *Dooley* addressed this issue in the context of the 2001 Act. This case involved a claim under the 2001 Act brought by part-time teachers who were employed in a fee-paying school establishment but who were paid out of privately raised funds. They sought to compare themselves to full-time teachers in the same school whose salaries were paid by the Department, for the purpose of seeking to be paid at the same rate. There was no dispute as to the fact that they were treated less favourably. The Labour Court upheld their claim and the school appealed to the High Court on a point of law.

71. Although the claimant teachers relied heavily on the Supreme Court's decision in *O'Keeffe* in order to demonstrate that the school was the employer, Dunne J. did not consider that this was dispositive so far as the claim under the 2001 Act was concerned ([2011] 4 I.R. 517, 540):

> "There is no doubt that the school is the employer of the claimants. Bearing in mind the decision in *O'Keeffe v. Hickey*, it appears that the school is also the employer of the chosen comparators for the purposes of issues of vicarious liability. That decision highlights the unusual tripartite relationship between the Department funded teacher, the Department and the school. However, the provisions of s.24 of the Education Act 1998 are also of importance. Section 24(3) makes it clear that the task of appointing teachers funded by the State falls on the board of management of a school. Section 24(5) of the Act makes it clear that the terms and conditions of teachers funded by the State shall be determined by the Minister, with the concurrence of the Minister for Finance. In a private school there will be a cohort of Department funded teachers and usually there will also be a cohort of privately paid teachers. The paymaster for each cohort is different. In the case of *O'Keeffe v Hickey* to which I have referred above, the unusual nature of the tripartite agreement was described; the Board of Management was found to be the employer of the teacher concerned in that case which involved the question of vicarious liability although the teacher was paid by the Department. There is no tripartite arrangement in the case of the claimants."

72. Dunne J. went on to refer to the Tribunal decision in *Sullivan* and commented that it highlighted the different and complicated employment arrangements as between Department funded teachers and privately funded teachers. She continued ([2011] 4 I.R. 517, 541):

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

73. Dunne J. then observed that on the facts in *Dooley* the school had no input into the contract of a State funded teacher and no control over significant terms in such a contract. In contrast, the school did have control over those aspects of the claimants' contracts as they were not paid through public funds. She went on to find that if the school had had control over the fixing of the terms and conditions of all the teachers in the school, including the determination of remuneration and superannuation, there could be no objection to the chosen comparators, but that was simply not the case ([2011] 4 I.R. 517, 541-542):

> "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."

74. *Dooley* was followed by Hedigan J. in *Blackrock College v. Browne* [2013] IEHC 607. In that case, the claimant was, again, a privately paid part-time teacher who sought to compare herself to a full-time Department funded teacher in relation to pay, pension and other conditions of employment. The Labour Court found in her favour and the school successfully appealed to the High Court.

75. Hedigan J. rejected a submission on behalf of the claimant that the passage from *Dooley* quoted immediately above should no longer be regarded as good law, because of the intervening change in the relationship between the claimant and the Department brought about by reason of the enactment of the 2009 Act. The effect of that Act was that it effected a reduction in the salary of all teachers, irrespective whether such teachers were paid out of public funds or otherwise. Hedigan J. noted that the claimant's salary had been reduced, and her hours increased, by direction of the Department, but he held that the key rationale of Dunne J.'s decision was contained in these sentences:

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

76. Hedigan J. continued:

> "Thus, although the school has imposed upon the respondent new terms and conditions, it still remains the party that pays the worker, i.e., the respondent. Thus, the relationship of employer and employee continues to be, in essence, as Dunne J. found it and upon which she determined that the Departmental teacher was an incorrect comparator."

77. The final authority is the decision of Baker J. in *Nic Bhrádaigh*. In that case Baker J. held that in view of the definitions contained in the 2009 Act a school secretary who was paid by the school out of a private fund was nonetheless a "public servant" within the meaning of that Act, even if she could not be so described for any other purpose.

Is the Minister an employer of the claimant for the purposes of the 2001 Act?

78. This survey of the case-law demonstrates that there is no straightforward answer to the problem presented on this appeal. Specifically, the nature of the triangular pact identified by Gibson J. in *Fox* over 100 years ago still defies any standard conceptual analysis, at least for the purposes of the general law of contract.

79. There is no doubt, of course, but that there is a in part a conventional contract of employment between the school and the teacher. The decision to hire the teacher remains that of the school and the teacher is subject to the day to day control and direction of the principal of the school and its board of management (however described). This is explicitly recognised by s. 23(1)(a) of the 1998 Act (as substituted by s. 6 of the Education (Amendment) Act 2012) ("the 2012 Act") where the principal is vested with the task of "the day-to-day management of the school, including guidance and direction of the teachers and other staff of the school."

80. As, however, Murnaghan J. recognised in *McEneaney*, the position is nonetheless rather more complex than this. In the first instance, the salary of the teacher and all other employment benefits are paid for by the Minister. In the case of national teachers – who, after all, are Ms. Boyle's chosen comparators for the purposes of the 2001 Act – the Minister provides for a superannuation scheme, the entry and terms of which are governed by law. When, moreover, the Oireachtas took the painful decision by means of the 2009 Act to cut the pay of public servants in order to deal with a pressing financial emergency, the salaries of teachers were reduced along with those of other public servants. It was never suggested, for example, that as these were not employees of the Minister, the Oireachtas had no business in interfering with the contractual arrangements agreed between schools and their employees.

81. That in itself should be a powerful practical indicator that the national school teachers are, indeed, employees of the Minister, at least for the purposes of pay-related issues arising from social and employment legislation such as the 2001 Act which has been enacted for the benefit of such employees. One might otherwise ask: why is the Minister engaged in the payment of these salaries and benefits for persons who are for all purposes the employees of others? This is scarcely gratuitous benevolence on the part of the Minister, but rather reflects an underlying reality which transcends the formal contract of employment between the school and its teachers.

82. In this regard, the provisions of s. 24(1) to (7) of the Education Act 1998 (as substituted by s. 6 of the Education (Amendment) Act 2012) are of some importance:-

> (1) "Subject to this section, the board of a recognised school:-
>
> (a) shall, if not already appointed, appoint a person to be Principal of the school, and
>
> (b) may appoint such and so many persons as teachers and other staff of the school as the board from time to time considers necessary for the performance of its powers and functions under this Act.
>
> (2) The numbers and qualifications of the teachers and other staff of a recognised school, who are, or who are to be, remunerated out of monies provided by the Oireachtas, shall be determined from time to time by the Minister, with the concurrence of the Minister for Public Expenditure and Reform.
>
> (3) The terms and conditions of employment of the teachers and other staff of a recognised school, appointed by the board and who are, or who are to be, remunerated out of monies provided by the Oireachtas, shall be determined from time to time by the Minister, with the concurrence of the Minister for Public Expenditure and Reform.
>
> (4) The Principal, a teacher or other member of staff of a recognised school appointed prior to, and holding office immediately before, the commencement of this section, continues in office after such commencement as if appointed under this section.

(5) (a) Notwithstanding subsections (3) and (11), a teacher or other member of staff of a recognised school who is, or who is to be, remunerated out of monies provided by the Oireachtas may be redeployed to another recognised school in accordance with redeployment procedures determined from time to time by the Minister with the concurrence of the Minister for Public Expenditure and Reform following consultation with bodies representative of patrons, recognised school management organisations and with recognised trade unions and staff associations representing teachers or other staff as appropriate.

(b) A teacher or other member of staff redeployed in accordance with paragraph (a) shall, in accordance with the redeployment procedures determined under that paragraph, become an employee of:-

(i) the board of, or

(ii) the vocational education committee which maintains, the recognised school to which he or she is redeployed.

(6) Where all or part of the remuneration or superannuation, or both, of the Principal, a teacher or another member of staff of a recognised school is paid or is to be paid out of monies provided by the Oireachtas, such remuneration and superannuation shall be determined from time to time by the Minister, with the concurrence of the Minister for Public Expenditure and Reform."

83. In her judgment in the High Court O'Malley J. stressed how the triangular relationship should be viewed in different legal contexts. As she put it:-

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

84. This, of course, provides a complete explanation as to why the Supreme Court arrived at the conclusion which it did in *O'Keeffe* in the context of vicarious liability, precisely because conduct of the teacher giving rise to the liability on the part of the school concerned in a very direct way a key part of the teacher/school relationship. Critically, however, as the Supreme Court found, the State had no role in supervising such conduct. It was for that reason that a majority of the Court concluded that the imposition of vicarious liability in such circumstances would be unwarranted.

85. This, however, does not mean that the State could not be regarded as the employer in different legal contexts. As O'Malley J. explained:-

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

86. This reasoning ultimately led O'Malley J. to conclude:-

> "This, in my view, is one of the results of the unique tripartite arrangement in relation to education in this State. In relation to teachers whose salaries are paid by the State the role of employer is, uniquely, split. Part of it is played by the management of an individual school and part by the Department of Education. The former has the right to hire, discipline, dismiss and generally direct a teacher in the day-to-day running of the school. The Department, on the other hand, sets the rules about, and pays the salaries. Since it thereby takes on what would normally be the rights of an employer in relation to pay, it follows, in my view, that it carries the legal duties of an employer associated with pay. It has been clear since, at least, the 1940 decision of the Supreme Court in *McEneany* that compliance with its own Departmental rules is one such legal obligation, and is a matter of contractual right on the part of teachers. I cannot see that compliance with rules imposed on employers by legislation in respect of pay and pay-related matters should be treated any differently. To hold otherwise would be to impose on school management bodies legal responsibility where they have no legal power. The argument that it is open to individual schools to give better salaries or pension provisions if they wish does not deal with the primary liability to pay what is lawfully due."

87. It is true, of course, that the position of Ms. Boyle was slightly further removed from the Minister than that of the ordinary primary teacher. For most of the period of her employment, 98% of her salary was paid by the Minister to the school's management committee rather than to her directly. But even then this was just a method of payment which was in the course of being phased out by the Minister and was, over time, to be replaced by a system of direct payments by the Minister to the teachers concerned.

88. It is also true that the school in question was not a "recognised" national school for the purposes of the Rules for National Schools 1965. Ms. Boyle's appointment and employment for over twenty years was nonetheless contingent on the approval and consent of the Minister and she was paid at a rate determined by the Minister in the manner envisaged by s 24(2) of the 1998 Act (as amended). Furthermore, in accordance with rules promulgated from time to time by the Minister, she was paid qualification allowances by the Minister with provision for sick leave and maternity leave and was placed on an incremental scale.

89. When the Minister decided that the special arrangements for pre-school education for members of the travelling community should end, it was his decision which brought about the termination of Ms. Boyle's employment. The Minister was not, however, indifferent to her plight – as would, presumably, have been the case had Ms. Boyle been employed by a private sector body – but he rather took responsibility for her. It was the Minister who then organised and paid for her redundancy.

90. In addition, it cannot be forgotten that this is a case concerning the equal treatment of part-time employees and the 2001 Act. As O'Malley J. noted in her judgment, the Minister has in recent times been conscious of his obligations qua employer for the purposes of the 2001 Act:

> "As a matter of fact, it seems that over the years the Department has administered its functions with a consciousness of these responsibilities. The circular issued in 2008 is a good example. It states clearly that the Department was to phase in direct payment of salaries to part-time teachers in order to ensure compliance with the very Act under consideration in this case.
>
> If the Department did not act in this manner, it is difficult to imagine how the school system could function. It is not just the sheer impracticality of making individual members of boards of management legally responsible for teachers' payment issues in State funded schools - if that were the law, and it was known to be such by members of school boards, it would seem unlikely that they would be willing to act. The situation in this regard is as the Supreme Court saw it in 1940s Ireland [in M*cEneaney*] when it described the proposition put forward by the Minister as *"quite at variance with reality"*. There is also the fact that the school boards, unlike other employers, do not have control over the salary rates paid to their employees. It is therefore difficult to see how they could be responsible for paying them. As Dunne J. said of the EAT decision in *Sullivan*, that case could hardly have been decided any other way, given the unlikelihood that a claim could be made against the school in relation to a matter controlled by the Department.
>
> Similarly, if the Department decided for some reason to set rates of pay for part-time teachers in a manner which, without justification, treated them less favourably than full-time teachers, how could it be said that a part-time teacher's only remedy would be against the school?"

91. Viewed from these perspectives, it seems idle to deny that as a matter of reality the Minister was in substance the employer of Ms. Boyle, at least so far as matters relating to remuneration and employment legislation designed for the benefit of part-time employees such as the 2001 Act is concerned. It is true that there was no actual express contract of employment between the parties, but I find myself coerced to conclude in these circumstances that there must have been an implied contract of employment between the Minister and Ms. Boyle in relation to pay-related matters within the meaning of the definitions of "contract of employment" and "employee" contained in s. 3(1) of the 2001 Act.

92. It follows in turn that in view of that statutory definition that there must have been an implied contract of service between Ms. Boyle and the Minister in relation to pay-related matters. But this should not in itself be a surprising conclusion. If, for example, Ms. Boyle had not performed her teaching duties, could she have expected that the Minister would have been under a continuing obligation to pay her? Or, to take the example given by O'Malley J., if pay-rates had been introduced for part-time teachers which could not be objectively justified in comparison with the pay paid to full-time teachers, is to be said that the part-time teacher's only remedy was against the school? The very fact that the answers to these questions are so obviously in the negative illustrates in its own way why it would be unrealistic to conclude that there was anything other than an implied contract of service between these the Minister and the teacher, at least for pay-related matters in the context of the 2001 Act.

Comparing the definitions of employers in the 1991 Act and the 2001 Act

93. It is true that s. 1(1)(b) of the 1991 Act provides for an extended definition of the term "contract of employment" for the purposes of that Act. That extended definition – which I have already set out in full earlier in this judgment – expressly states that where A agrees to be employed by B, but C has agreed to pay for these services supplied by A, then C shall be "deemed to be the employer for the purposes of that Act." It is not disputed but that in view of this definition the Minister is deemed to be the employer for the purposes of the 1991 Act.

94. No similar deeming provision is, however, contained in the 2001 Act and counsel for the Minister accordingly invited the Court to conclude that the Minister could not be the employer for other statutory purposes (such as the 2001 Act) in the absence of a similar deeming clause which served to give an extended and artificial definition of the meaning of the term "employer" in the somewhat different context of the employment protection rights of part-time workers.

95. There are, I think, several answers to this. The first is that the 1991 Act is a particular, special Act which is not necessarily to be construed in *pari materia* with the 2001 Act. In this context it may be observed that whereas s. 1(2) to s. 1(7) of the 2001 Act provide that that Act is to be construed together as one with several distinct items of employment legislation such as the Minimum Notice and Terms of Employment Acts 1973 and 1984 and the Terms of Employment (Information) Act 1994, the 1991 Act is not of the six items of employment legislation which s. 1 provides are to be collectively construed with the 2001 Act itself.

96. The second stems from the very artificiality of the deeming provision mechanism which the draftsman employed in s. 1(1)(b) of the 1991 Act. As the Supreme Court observed in *Erin Executor and Trustee Co. Ltd. v. Revenue Commissioners* [1998] 2 I.R. 287, the critical question which arises in the case of a deeming provision of this kind is the extent of that deeming provision. As Barron J. said ([1998] 2 I.R. 287, 302-303):

> "When something is deemed by a statutory provision to be so, it becomes a matter of construction of that provision to determine to what extent it is deemed to be so. Is it deemed to be so for all purposes or only for some purposes? In the present case s. 4(4) [of the Value Added Tax 1972] clearly says that it is to be so deemed for the purposes of s. 3(1)(f). In other words, it is deemed to have been supplied so that tax becomes payable in respect of it. It is not deemed to have been supplied for any other purpose."

97. It is clear that the deeming technique employed in the 1991 Act is not expressed to be general and all encompassing. It is rather more specific in its purpose and range: it is a deeming provision used for the purposes of the 1991 Act and for that purpose only. The fact that this artificial deeming technique was not replicated in the 2001 Act does not lead to the inexorable conclusion that there was no such implied contract of service between the Minister and the teacher for the purposes of the 2001 Act if the legal realities of the relationship between the parties in truth suggest otherwise.

98. Third, it may be observed that, as the Long Title of the 2001 Act records, the object of the Act was to transpose a variety of EU Directives relating to the protection of part-time workers. Again, the very fact that an artificial drafting technique in relation to a deeming provision had been used in one purely national legislative context (*i.e.*, the 1991 Act) should not be held to mean that the 2001 Act (which was, of course, drafted in the entirely different context of the necessity to transpose key EU Directive into national law) should be interpreted in the light of that earlier Act. This is especially so when, as I have just observed, s. 1 of the 2001 Act does not provide for collective construction of the 1991 Act with the 2001 Act, even though the Oireachtas had done so with other items of employment legislation.

99. It is also true that all of this leads to the rather unsatisfactory conclusion – at least viewed from the perspective of orthodox principles of contract law - that Ms. Boyle had two employers and, furthermore, that whereas she had an express contract with the school, her contract with the Minister was merely implied. Nor is it satisfactory that Ms. Boyle must be regarded to be an employee of the Minister only for some purposes (such as, for example, availing of employment protections in matters relating to pay and remuneration contained in the 1991 Act and 2001 Act respectively) and not for others (such as vicarious liability as per *O'Keeffe*). Yet any other conclusion seems at variance with the underlying realities and would represent the triumph of contractual formalism over the substance of employment rights. In the context of the employment rights conferred by the 2001 Act - which in turn sought to transpose an EU Directive designed to protect a group of vulnerable employees in relation, *inter alios*, to pay related matters - it is surely the substance of that employment relationship which should count.

The issue of appropriate redress

100. It remains to consider the question of the appropriate redress. In the High Court the Minister argued that Ms. Boyle had no entitlement to a pension because she was not a national school teacher, and the pension scheme is limited to national school teachers. O'Malley J. found that this was a matter that goes to the appropriateness of the remedy sought rather than Ms. Boyle's substantive rights under the Act. As she explained:

> "If one accepts, as I do, that for the *purposes of the Act* she must be deemed to be employed by the Minister, then what she has to do is demonstrate that she has been treated less favourably than full-time employees who are doing comparable work within the definition of the Act. The Labour Court found in her favour on this aspect, and that finding is not challenged in these judicial review proceedings. The mere fact that she worked in a different type of establishment cannot in itself be a bar to redress, and the Minister would bear the burden of showing that there was objective justification for the different treatment."

101. O'Malley J. nonetheless proceeded to find that the Labour Court had acted ultra vires in one respect:

> "However, I consider that the Minister's complaint about the redress ordered by the Labour Court is to some extent made out.
>
> The powers of the Labour Court under s. 16 are to direct the employer to comply with s.9 (that is, to cease treating the part-time employee less favourably than the comparable full-time employee) and/or to direct the payment of compensation.
>
> The parties made submissions in this context as to the effects of Directive 97/81, and whether it required the Labour Court to hold that the limitations imposed on it by the Act were such as to amount to a breach of the Directive. Ms. Boyle's representatives argued that she should be retrospectively admitted to the superannuation scheme with effect from the date upon which she became an eligible part-time teacher in 1992. The Labour Court considered that it could not do that because the Act was not enacted until 2001, and because of the six-month limitation period for the making of complaints. It did not, therefore, attempt to interpret the Directive in the manner contended for but applied the terms of the Act as it understood them to be.
>
> However, I do not think that the jurisdiction to direct compliance with the terms of the Act can encompass ordering the Minister to admit the claimant to a particular statutory scheme, the terms of which set out qualifying conditions including what appears to be a requirement to pay contributions. This goes beyond ordering an employer to cease discriminating and comply with the Act, and I consider it to be ultra vires the powers of the Labour Court. It seems to me that the loss suffered by the claimant in these circumstances is more appropriately dealt with by way of compensation.
>
> The power to award compensation is not limited by the terms of the Act to established special damage and I do not consider that the Labour Court acted irrationally or unlawfully in awarding €10,000 for the "general effects" of the discrimination suffered by Ms. Boyle. However, I propose to remit the matter to the Labour Court for reconsideration of the question of compensation, to take account of the findings of this court as to the invalidity of the direction to admit the claimant to the superannuation scheme."

102. One cannot but agree with the reasoning of O'Malley J. in this respect. The criteria governing admission to the pension scheme are regulated by the 1935 statutory instrument, the terms of which also pre-supposed that any person admitted to the scheme should make the appropriate contributions. The relief directed by the Labour Court would, in effect, have compelled the Minister to change the law by altering the terms of the scheme in order to accommodate persons in the position of Ms. Boyle.

103. While it is true that the Labour Court is given wide powers to provide redress for persons suffering discrimination under the 2001 Act, there is no power to make an order of the kind just described. The redress available to Ms. Boyle must therefore be confined to compensation in the manner envisaged by O'Malley J. in her judgment.

Conclusions

104. All of this leads to the conclusion that the High Court was correct to hold that Ms. Boyle was an employee of the Minister in relation to pay-related matters pursuant to an implied contract of employment within the meaning of the 2001 Act, even if she was not so employed for other purposes. It follows, therefore, that the High Court was entitled to conclude that although Ms. Boyle was not a national school teacher, or a teacher in a recognised school, she was employed on the same basis as such teachers. She was found to have been treated less favourably than full-time teachers doing comparable work. The comparator is also an employee of the Minister for the reasons set out in this judgment. Ms. Boyle is therefore entitled to redress under the 2001 Act.

105. The High Court was also correct to rule that Labour Court was not, however, empowered to order that Ms. Boyle be admitted to the national teachers superannuation scheme, since this in effect amounted to a direction to the Minister to change or alter the terms of the 1934 statutory instrument governing the superannuation scheme for teachers.

106. In the circumstances it is not necessary to express any view on whether the Minister was entitled to proceed by way of judicial review.