Neutral Citation [2015] IEHC 792

THE HIGH COURT

[2014 No. 382 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 140 OF THE PENSIONS ACT 1990 AS AMENDED BY THE PENSIONS (AMENDMENT) ACT 2002

BETWEEN

THE DEPARTMENT OF PUBLIC EXPENDITURE AND REFORM,

THE DEPARTMENT OF EDUCATION,

THE HIGHER EDUCATION AUTHORITY

APPELLANTS

AND

THE PENSIONS OMBUDSMAN

RESPONDENT

AND

MICHAEL GLEESON

NOTICE PARTY

JUDGMENT of Ms. Justice Baker delivered on the 27th day of November, 2015

1. This is a statutory appeal under s. 140 of the Pensions Act 1990 (as amended) against a decision by the Pensions Ombudsman ("the Ombudsman") relating to the exercise of a statutory discretion by the Minister for Education and Skills and the Minister for Education and Reform (hereafter collectively "the Ministers") in respect of the pension benefits of the notice party arising from his former employment as Secretary to Trinity College, Dublin.

The Scheme rules

2. The superannuation fund ("the Scheme") for Securing Pensions on Retirement and other benefits for employees of Trinity College ("the College") was established by an interim deed made on the 1st April, 1972, followed by a definitive deed of declaration of trust made on the 1st January, 1974 and certain general and special rules are thereby incorporated into the administration of the Scheme.

3. The normal retirement age for a member of the Scheme is 65 years, and general rule 4 sets out the nature of the benefits payable to a Scheme member, and provides at 4(a) that:

> *"The amount or rate of any such benefit shall, subject to the aforesaid provisions, be as set out in the Special Rules."*

4. The special rules, by amendment made by deed of the 23rd May, 1986, provide at special rule 1(b) as follows:

> *"Provided further that if a Member can complete at least 30 years' Service by his 65th birthday, the Employer may with the consent of the Member, decide that his Normal Pension Date shall be the 30th September coincident with or immediately following his 60th birthday."*

5. General rule 4(b) gives power to the trustees to augment the pension benefits of any member, and there are no substantive restrictions on the exercise of that discretionary power. However, the augmentation may be done only with the consent of the "principal employer". This rule was the focus of much argument in this case, and provides as follows:

> *"The Trustees may, with the consent of the Principal Employer, augment any of the benefits including pensions in payment to which any person may be entitled under the Rules."*

6. In 2002 the trustees became aware that the Scheme was underfunded, and determined that, as a matter of general policy and in order to preserve the sustainability of the fund, augmentation would not be permitted unless the increased benefits would be cost neutral to the Scheme.

7. In subsequent years, the level of deficit had reached a critical state and negotiations with the Department of Public Expenditure and Reform, the Department of Education and the Higher Education Authority led to an agreement in 2008 that the State would take over the pension fund of the College. Following the enactment of the Financial Measures (Miscellaneous Provisions) Act 2009 (the "Act of 2009"), the transfer of the assets of the Scheme, comprising €279 million, was made to the National Pensions Reserve Fund by S.I. 527/2009 on the 31st December, 2009, and at that date the liabilities of the Scheme were calculated to be €595 million.

8. By virtue of ss. 11 and 12 of the Act of 2009, the Ministers now have the power to exercise any discretion previously exercised by the trustees under the scheme.

The position of the notice party

9. Mr. Gleeson reached an agreement in 2005 that he be permitted to retire on full pension at aged 60. For that purpose, the sum of €544,000 was transferred to the Scheme by instalments commencing on 15th April, 2005, Messrs. Mercers, the Scheme actuaries, having identified the exact amount required to effect a cost neutral augmentation of the pension entitlements of Mr. Gleeson.

10. Mr Gleeson retired on the 31st July, 2011 when he reached the age of 60 and between 1st August, 2011 and 9th November, 2011, he was paid a full pension of €92,153 per year. Prior to his retirement, the Ministers had advised the College that it was not permitted to pay to Mr. Gleeson what they described as "the augmented pension", and that Mr. Gleeson was not to be paid a pension as if he had continued in employment with the College up to the age of 65. The College responded saying that, as it had already made a decision to "augment" the pension of Mr. Gleeson under the Scheme, and as this had been done in 2005 before the assets of the Scheme were transferred under the Act of 2009, that the decision with regard to the amount of benefits to which Mr. Gleeson was entitled did not lie with the Ministers.

11. On 9th November, 2011 the College was directed to adjust the pension of Mr Gleeson and to recoup excess amounts paid to him so as to reflect what was regarded by the Minister as an "early retirement" in respect of which an actuarial reduction was required to be made. Following the reduction in his benefits to the annual sum of €71,674, Mr Gleeson appealed.

The appeals
12. As is mandated by the provisions of the Universities Act 1997, a decision in respect of the pension of a Scheme member must in the first instance be appealed to the Higher Education Authority (the "HEA"). Certain observations were made by the notice party with regard to the appellate role of the HEA but that point did not come to be argued before me.

13. Mr Gleeson appealed the determination of the Ministers to the HEA on 19th December, 2011 and its decision rejecting his appeal was delivered on 24th July, 2012.

14. By notice of appeal dated 25th July, 2012 Mr Gleeson then appealed to the Ombudsman who delivered his determination on 24th June, 2014 allowing the appeal. The Ombudsman determined that the statutory discretion of the Ministers did not fall to be exercised in respect of Mr Gleeson, as the trustees had already made the relevant determination in 2005 before that discretion became vested in the Ministers.

15. It is from that determination of the Ombudsman that this is appeal is brought. The appellants argue that the Ombudsman fell into serious and significant error in his conclusions, and in particular that he made a fundamental error of law in that he wrongly interpreted the requirements of the Scheme rules, and that, having found what he described as "maladministration" in the decision making of the College, and that in 2005 formalities were not sufficiently observed, that he impermissibly nonetheless decided in favour of the notice party. In particular it is said that it was not open to the Ombudsman, on the basis of the findings he has made, to come to the view that the appeal be allowed.

Changes in Mr. Gleeson's contract
16. Until 2005 Mr. Gleeson had been employed in a senior role in the College as Secretary, but in the context of a reorganisation of the administrative structure of the College he agreed changes to his job specification, and took on instead the role of Director of Strategic Initiatives. The revised contractual arrangements were negotiated directly between himself and John Hegarty, the then Provost of the College. Part of the agreed revised job specification was that Mr. Gleeson would be entitled to retire on full pension from the date of his 60th birthday. By letter of the 15th July, 2005 to Mr Gleeson, the Provost confirmed in writing the agreed "significant changes to your job specification", and that he was happy "following appropriate consultation" to agree to the proposed changes. The third paragraph of this letter is central to the question before me and I quote it in full:

> "For the avoidance of doubt, you will be entitled to full pension (i.e. two thirds of retiring salary and the options already existing under the Scheme) from the date of your 60th birthday. If you seek earlier retirement, it will be subject to the provisions of the Plan. If you leave office before age 60 with a deferred pension, the pension payable at 60 will be based on service of 40 years less the difference between the age of departure and 60 years."

17. In accordance with the request in the letter, Mr. Gleeson endorsed his signature on the enclosed copy and the letter provided that the acceptance would "constitute part of your contract of employment". As noted at para. 9 above, a substantial capital payment had been made to the Scheme in respect of the revised pension arrangements.

18. A letter sent by Mercer on the 10th October, 2005 to Mr. Gleeson confirms that the trustees had "consented to augmentations provided appropriate contributions are paid", that the contributions identified as necessary to ensure a cost neutral change in the Scheme had been made, and that Mr. Gleeson's "augmented benefits" had been recorded in the Scheme. That letter referred to provisions that would apply should Mr. Gleeson elect to retire before age 60, and to the formula for calculating deferred pension on leaving service. None of these eventualities came to have any significance, as Mr. Gleeson did not retire before his 60th birthday, and his retirement did not trigger the requirements identified in the letter of the 10th October, 2005, that an early retirement was subject to "the consent of the Board of the College".

The decision of the Ombudsman
19. The Ombudsman delivered a lengthy and considered decision running to 34 pages. He identified the question for the appeal as whether the discretion formerly vested in the pension trustees under rule 4(b) to refuse "augmentation" resided in the Ministers at the date of Mr. Gleeson's retirement, or whether the decision to "augment" had been validly taken in 2005. He concluded following a detailed consideration of the evidence that revised terms of employment were agreed with Mr. Gleeson in 2005, under which he was entitled to retire at age 60 with full pension benefits. He also accepted that this could not be done without the "injection of a considerable amount of money, so that the solvency level of the Scheme would not be reduced as a result of the augmentation" (para. 10.1).

20. The Ombudsman determined in accordance with the contractual agreement reached between the parties in 2005, that the full pension benefits should be restored.

The law
21. The role of the court on a statutory appeal from a decision of the Pensions Ombudsman is well established, and the approach is akin to that adopted in regard to decisions of the Financial Services Ombudsman and in respect of which the Court of Appeal delivered judgment in *Financial Services Ombudsman v. Millar* [2015] IECA 127, namely that the focus of the court hearing a statutory appeal is to determine whether the decision as a whole contained serious and significant errors.

22. This approach is evident in the judgment of Kearns P. in *Willis v. Pensions Ombudsman* [2013] IEHC 352 where he said:

> *"… I am satisfied that this Court should only step in to set aside his conclusions (being those of an expert in this area) where a clear and serious legal error may be demonstrated."*

23. Further, as was noted in the judgment of Barrett J. in *Minister for Education and Skills & Anor. v. The Pensions Ombudsman* [2015] IEHC 466 the court hearing the statutory appeal is entitled to look at the "*entirety of the reasoned determination*" and consider whether the decision is vitiated by error.

24. Clarke J. in *Governey v. Financial Services Ombudsman* [2015] IESC 38 however expressed the view that deference does not extend to the decision of such a tribunal in deciding questions of law. The following observations are relied on by counsel for the appellants:

> *"…It seems to me to be at least arguable that, in such cases, and in relation to questions either of law or of the application of the law to agreed or established facts, there may be less of a case for the courts affording the F.S.O. any particular level of deference.*
>
> *There may well be a case for affording deference to the view which the F.S.O. takes as to, for example, the unreasonableness of lawful conduct on the part of a financial institution. But it does not necessarily follow that a court is bound to afford similar deference to the F.S.O. on its view of the law or the application of the law to facts which task is, after all, one of the core functions to be found in the administration of justice."*

25. Equally in *Bus Éireann v. The Pensions Ombudsman* (Unreported, High Court, 20th May, 2014) Birmingham J. said:

> *"However whilst recognising that the Ombudsman enjoys sufficient discretion in order to achieve a fair outcome in relation to a complaint, it is of course the case that the Ombudsman cannot make a determination which is not permitted by law."*

The appellants argue that the argued errors were matters of pure law in respect to which no deference is mandated.

Error of law?
26. The primary argument of the appellants is that the Ombudsman misdirected himself in the interpretation of the rules of the Scheme, primarily with regard to what counsel describes as the "pure law" question of whether, on a true reading of rule 4(b) of the general rules, consent to the decision to augment was required to be given by the Board. As the Ombudsman found that the Board had not addressed the question nor made a formal decision, that the Board did no more than "rubber stamp" retirements, and that no evidence was before him that the Board had delegated its function, it is argued that he was not competent to treat the decision as valid.

27. Further, it is argued that, as the Ombudsman found (at para. 10.5) that the wrong rule of the Scheme had been invoked to alter Mr. Gleeson's pension entitlements, there had been no valid exercise of the discretion vested in the trustees by rule 4(b) in 2005, and that the Ministers were therefore competent to refuse to permit Mr Gleeson to retire on full benefits at age 60.

The core finding by the Ombudsman
28. At para. 8.2 of his determination the Ombudsman made the following observation:-

> "…it does appear to me that we are not here considering a question of early retirement at all. What is at issue here, and what is apparent on the face of his employment contract is a change in Mr. Gleeson's normal pension age. This is, however, portrayed by the Department as an early retirement." (Emphasis in original)

29. The Ombudsman noted that special rule 1(b) gave power to the College to alter the normal pension age of an employee from 65 to 60 in certain circumstances, and that this could be done without consulting anyone but the member himself. However, "maladministration" had led the College to invoke the wrong rule of the Scheme to "alter the age of payment in line with the contractual arrangement entered into by the parties".

30. He took the view that if the alteration of the pension age had been done in accordance with special rule 1(b) the role of the trustees would have been limited to "seeing that the money to pay for the augmentation was paid, and certainly would have had no role in initiating augmentations", and under that rule the Board did not need to formally consent to a decision.

31. Counsel for Mr. Gleeson argues that the Ombudsman was correct and that Mr. Gleeson did not in truth retire early at all, because of the agreed change in his contract of employment as evidenced by the agreement of the 15th July, 2005. Both parties performed that contract, the College by paying the actuarially calculated amount into the Scheme, Mr. Gleeson by assuming the new role in College administration. Counsel argues that what had occurred in fact was not an "augmentation" of pension benefits for the purposes of rule 4 (b) of the general rules, but a contractual alteration to the employment contract which included an alteration in the pension entitlements. It is argued that, as to retire "early" would be to retire on a date before the date permissible in a contract of employment, Mr. Gleeson did not retire early but when he reached the contractually agreed date. While there was some degree of augmentation by the addition of a limited number of so-called "added years", no point was raised at any of the appeals with regard to that decision.

32. The findings of the Ombudsman, insofar as they are findings of fact, are not open to appeal. Finlay Geoghegan J. in *The Financial Services Ombudsman v. Millar* pointed out that the construction of a contract is a mixed question of fact and law:

> *"It is not permissible for the High Court on an appeal pursuant to s. 57CM to "examine afresh" a contractual construction placed by the Ombudsman on a relevant term of a contract. Rather he should consider whether an appellant has established on the balance of probabilities that on the materials before him the Ombudsman's construction contains a serious error."*

33. The construction of the rules of the Scheme is equally a mixed question of fact and law as is the characterisation by the Ombudsman of the events of 2005, in respect of which this approach identified by the Court of Appeal is mandated.

34. Before considering that question, I turn to deal with the argument of the appellants that the Ombudsman strayed impermissibly into questions of contract.

Was the contractual question outside the remit of the Ombudsman?
35. It is submitted by the appellants that the Ombudsman has no statutory jurisdiction to adjudicate on the issue of breach of contract, as his role is confined to the resolution of complaints in relation to occupational pension schemes and other pension arrangements covered by the legislation. I consider that such proposition is not consistent with the statement by Kearns P. in *Willis v.*

the Pensions Ombudsman, where he said:

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

36. This dicta recognises the broad remit of the jurisdiction of the Ombudsman and that he is entitled to consider the contractual nexus and to take "*this route*" in coming to a remedy or solution.

37. That is not to say that one must ignore the observation of McMenamin J. in *Hayes v. Financial Services Ombudsman* (Unreported, High Court, 3rd November, 2008) as to the role of the Ombudsman:

> *"What has been established, therefore, is an informal, expeditious and independent mechanism for the resolution of complaints. The respondent seeks to resolve issues affecting consumers. He is not engaged in resolving a contract law dispute in the manner in which a court would engage with the issue."*

38. In my view, whilst the Ombudsman may not engage the exercise of resolving an inter partes contractual dispute, his competence extends to interpreting the contractual terms operating between the parties to the dispute before him. It would make little sense that the Pensions Ombudsman would not regard it as important to understand, and if necessary to interpret, the pension elements of a contract of employment, and indeed the starting point for most disputes will be an argument that the contractual pension entitlements must yield a particular result.

39. Furthermore the legislation at s. 131 gives jurisdiction to the Pensions Ombudsman to investigate and determine "complaints and disputes", and that will involve him considering whether a person is an "actual or potential beneficiary" of a scheme under s. 131(2)(a), or whether the scheme has been managed correctly. The complaint before the Ombudsman in this case was not a dispute between Mr. Gleeson and his employer, a pure contractual dispute, but rather the complaint that the Ministers, with whom he had no contract and against whom a contractual claim in the courts would have been difficult to sustain, had wrongly sought to interfere with his pension entitlements, or sought to apply a discretion which he argued did not lie.

40. Thus I do not accept the argument of counsel for the appellants that the Ombudsman was not entitled to have regard to the contractual relationship between Mr. Gleeson and his employer, and with that in mind, to come to a determination as to whether the pension arrangements reached between them in 2005 were such as to leave in the pension trustees, and *ipso facto* in the Ministers following the enactment of the Act of 2009, the discretion to refuse augmentation when Mr. Gleeson retired in 2011.

Discussion on correct characterisation of events in 2005

41. As I consider that the characterisation by the Ombudsman of the events of 2005 is a mixed question of fact and law, I turn now to consider if the Ombudsman had sufficient evidence before him on which he could make the finding of fact that Mr Gleeson did not retire early, and that a decision to allow him to retire at aged 60 had lawfully been taken by the College in 2005.

42. Counsel for the Ombudsman argues that he was entitled on the basis of the evidence that was before him to come to the decision that he did and relies in particular on the judgement of Peart J. in *T v. Minister for Justice, Equality and Law Reform* [2007] IEHC 287 that:

> *"The whole of the decision must be read and considered in order to reach a view as to whether, when the decision is read in its entirety and considered as a whole, there was no reasonable basis for the decision maker reaching that conclusion."*

43. The primary evidence before the Ombudsman of the changes in Mr Gleeson's contract of employment is the letter of 15th July, 2005, excerpted at para. 16 above. In contractual terms, the letter is an offer to Mr. Gleeson of revised terms of employment, including a provision that enabled him to retire on full pension at age 60. The letter suggests that the Provost had made "appropriate consultation". There was an express provision that should Mr. Gleeson seek to retire *earlier* than his 60th year, he would be subject to the rules of the Scheme which made provision for *pro rata* deductions in pension entitlements.

44. The evidence before the Ombudsman was that some three months earlier on the 15th April, 2005, three senior members of the University, the Provost, the Bursar and the Senior Lecturer had discussed the "appropriate allocation" to be made to the pension scheme in respect *inter alia* of Mr. Gleeson's pension arrangements. That letter referred to an "allocation" to the fund, and not the "augmentation" of the fund, and it is common case that after that letter of the 15th April, 2005 various payments were made to the pension fund in respect of what at that stage was no more than anticipated contractual changes. On the 22nd July, 2005 Mercer, the Scheme actuaries, identified the cost of "increasing" the pension of Mr. Gleeson to allow him to retire at age 60, and taking into account the requirement already clear from a decision made by the trustees in 2002 that any change in the pension entitlements of members could only be effected were such change to be cost neutral from the point of view of the Scheme as a whole.

45. The Ombudsman had the evidence from senior members of the College including the current Provost, Dr. Prendergast, and the Head of Human Resources, Mr. McMahon. Each of them in lengthy submissions expresses a view that the change of the terms of employment of Mr. Gleeson, and of the payment of the actuarially calculated amount into the Scheme, was done with the approval of the relevant and necessary persons. The Ombudsman, while critical of the lack of good corporate governance in the College, did take the view that it could not be said that the relevant persons within management in the College had not made the decision, but rather that the evidence available to him was incomplete, corporate governance itself was poor, but that a decision had been made and acted upon.

46. The Ombudsman considered that it was not clear whether the revised contract was ever approved by the Board, but that it was "conceivable even probable, that College had given management a reasonably free hand in achieving the desired reorganisation among top positions in the College in 2005", and the "practical implementation of the contractual promise" to Mr. Gleeson.

47. I consider that there was ample evidence before the Ombudsman that Mr Gleeson had not retired "early", and that an

administrative decision had been taken by the College and acted upon, and his finding is consistent with the position adopted by the relevant parties, the College and Mr Gleeson, each of whom accepted that in 2005 contractual arrangements were made to which each was bound. Therefore he made a decision that the law did permit and within his competence.

48. Thereafter the Ombudsman determined that rule 4(b) was not applicable and that the matter fell to be considered under rule 1(b). This is a determination of law, being one as to the legal consequences that flowed from his primary finding of fact, but one which I consider to be legally correct, as Mr Gleeson had been found as a matter of fact not to have retired "early", and rule 4(b) is relevant only when there is a retirement of an employee before the contractually agreed date. Neither rule 4(b) nor 1(b) is unclear and no exercise in construction was engaged or necessary.

49. I conclude that the Ombudsman did not err in this part of his determination.

Other issues from the Determination
50. The lengthy submissions made to the Ombudsman were primarily focused on rule 4(b), and the respective roles of the trustees and the Board in making a decision to augment, but perhaps because he may have been met with a principled objection had he ignored the submissions before him, the Ombudsman did weigh other factors in coming to his decision and in respect of which the appellants also argue he fell into error. While I am of the view that his primary determination related to the established and not denied contractual rights of Mr. Gleeson, I turn now to consider those factors.

51. The notice of appeal raises 21 grounds of appeal, of which five grounds 8, 9, 12, 13 and 17 were abandoned in the course of the hearing. Whilst I consider that the core of the decision was correct for the reasons outlined above, I turn now to examine the other arguments. There is overlap, but I will attempt to group the grounds into categories as follows:

Category 1: failure to act in accordance with mandated requirements:

Grounds 1, 2, 3, 10, 11, 14,
52. The appellants argue that the Ombudsman erred in law in finding that the College had made a decision to augment the pension benefits of Mr Gleeson in 2005 and that the purported exercise by the trustees of their discretion was *ultra vires* in that it was not made with the consent of, or following a decision by, the Board. It is argued that the rules are clear and that any exercise of discretion by the trustees under rule 4(b) was required to be done with the consent of the "principal employer".

53. It is accepted by all parties that the College acts through its Board. This arises by virtue of the University Act 1997 as amended, and by virtue of Chapter II of the Act the Board has vested in it matters of governance. While the trust deeds do not specifically require a decision to consent to the augmentation of a pension to be made by the Board, the provisions of the Act make it clear that matters of governance, or matters in respect of which the College might be required to decide, are matters to be determined by its Board. Thus a decision to consent for the purposes of rule 4(b) is one required to be made by the Board as the governing body of the employer, or as "the principal employer".

54. The Ombudsman found maladministration in the making of the decision. The appellants argue that the Ombudsman made a serious and significant error in failing to have due regard to the fact that non-compliance with those "black letter" requirements invalidated any decision that was purported to have been made in 2005. It is argued that, having found maladministration in the decision making process, and there being no documentation in the form of minutes of meetings or any other appropriate evidence, the Ombudsman had no evidence on which he could come to a conclusion that the decision to augment had been validly made in 2005 by the Board as is required by rule 4(b).

Discussion
55. The question is not whether the Ombudsman was correct in each of his conclusions but whether, if there was an error or series of errors, it or they combined to vitiate the decision taken as a whole. In that regard it is important to note that the Ombudsman carefully outlined the very substantial arguments before him and did find maladministration. Had he chosen to absolutely ignore the maladministration, and the failure to meet the formal requirements of the Scheme, then a different criticism could be levied. Rather he took the view that the maladministration led to a process which was "technically flawed", but did not "necessarily result in unfairness or oppression of individual Scheme members". The Ombudsman weighed the factors, including a failure that he found in the strict observance with the Scheme rules, but considered that to insist on strict compliance with the rules, when both parties to the contractual arrangement had acted in accordance with a decision admitted to have been made by each of them, would itself be oppressive. Accordingly, and balancing these questions of fairness and the factors he identified, he took the view that fairness and respect for the contractual arrangements required that the maladministration ought not be given undue weight. He also looked at the practical implementation of those admittedly valid contractual arrangements and determined, in a reasoned fashion, that the maladministration, and the failure to apply the correct rule of the Scheme, were not such as to vitiate the entire arrangement made in 2005.

56. I note that the Ombudsman found maladministration in two senses: first in the fact the College engaged, or purported to engage, rule 4(b), and not rule 1(b); and second, that the College failed to comply with the mandatory requirements in rule 4(b) that the Board consent to augmentation. Having taken the view that rule 4(b) was not required to be invoked he was in my view competent to conclude that the decisions made in 2005 were not vitiated, as they were governed by the less procedurally onerous rule 1(b). This decision flows from his primary findings of fact.

57. Having characterised the contractual position and finding that Mr Gleeson did not retire "early" in my view the Ombudsman was competent to find that the Board had no mandated role in the decision to alter the terms of Mr Gleeson's contract. He was therefore in my view entitled to disregard the maladministration as not such as to invalidate the arrangements made in 2005, and because no requirement existed that formal Board sanction be given.

58. I consider that the Ombudsman has displayed a nuanced, careful and reasoned approach to the question, and that he was entitled in the context of his wide discretion to come to the decision he did, that he did so on adequate and identified reasons which support that decision, and that he was entitled to "devise a remedy", to borrow the phraseology of Kearns P. in *Willis v. The Pensions Ombudsman*.

Category 2: contract law grounds

Grounds 1, 2, 3, 10, 11, 14,
59. The other category of appeal may broadly be categorised as "contract law" objections. The appellants complain that the Ombudsman strayed impermissibly into the question of the contract of employment of Mr. Gleeson.

60. I have already dealt in some detail with this argument above and I consider that the Ombudsman was entitled as a matter of law and in the interests of achieving a fair result to engage considerations of contract law.

61. I do not consider that the Ombudsman treated the issue as one *inter partes* as to the enforceability of the revised contract of employment, but he reasonably in my view, took the view that, as the parties to the contract were quite clear as to the entitlements of Mr. Gleeson to retire, not early but at the time contractually agreed, his decision ought to reflect that overarching proposition. Indeed I consider that to have taken an alternative view would have involved an element of unreality, and would not have fully engaged with the facts.

62. It seems to me that the Ombudsman was faced with a dilemma in that the College argued that rule 4(b) was applicable and that its procedural requirements were met, when he himself thought that this starting point was an error, that the College had overlooked special rule 1(b) which allowed the alteration of the normal pension date of an employee "without consulting anyone but the member himself", and that if that special rule had been "properly invoked" that the trustees would have had a limited role, namely to receive the money to pay for the additional liability that would be imposed on the Scheme as a result of the contractual change. As he put it at para. 10.5:

> "any maladministration in this case seems to have consisted of the fact that the wrong rule of the scheme was invoked to alter the age of payment in line with the contractual arrangements entered into by the parties."

63. He had in my view sufficient evidence from the relevant College officers on which to come to the view that the decision was one left to management and this finding is not open to appeal.

64. I consider that the Ombudsman acted within competence in taking the view (at para. 8.2) that the appeal did not raise a question of early retirement at all, and (at para. 10.2) that the core question for him was whether the maladministration and the manner in which the benefits were augmented was sufficient to "invalidate what was done and thwart the clear intentions of the College as exhibited by the contract of employment" of Mr. Gleeson. As he said at para. 10.8:

> "…it is clear that, as far as the Scheme actuary was concerned, Mr. Gleeson's Normal Pension Age was now 60 and the funds had been properly placed in a position to cater for that."

65. I consider that he was competent to fashion a remedy in those circumstances and to resolve the issue by looking to the broader questions of fairness to which he was entitled to have regard.

Category 3: the role of the trustees

Grounds 3, 4, 7
66. I have dealt in passing with certain of these grounds above, and I consider that counsel for the Ombudsman is correct that the test that I must apply in the statutory appeal is whether the Ombudsman fell into serious or significant error. As indicated, I do not consider that he erred in his interpretation of the rules, and I consider that he was within his competence in his approach to the question, namely that the appropriate rule was 1(b) and not 4(b).

67. Apart from that proposition however, it seems to me that in the examination of how the Ombudsman came to his decision and whether on an analysis of the decision taken as a whole the Ombudsman was competent to come to the view to which he came, it is important to note that there was no evidence before the Ombudsman that the College did not approve the arrangement made with Mr. Gleeson in 2005.

The test: was the decision as a whole correct?
68. This brings me then to a consideration of whether the Ombudsman's decision was broadly correct. The approach of Kearns P. in *Willis v. the Pensions Ombudsman*, a detailed and considered judgment which must be considered the leading High Court judgment on the role of the High Court in a statutory appeal from the Pensions Ombudsman, suggests that the court is entitled to look to whether it was "*open*" to the Ombudsman "*to reach the same conclusion in the other ways addressed*".

69. As Kelly J. pointed out in *Murray v. The Trustees and Administrators of the Irish Airlines (General Employees) Superannuation Scheme* [2007] IEHC 27 the Act is a "*self-contained statutory code*" and the Ombudsman has a "*wide jurisdiction*". He is entitled to exercise his functions, as is apparent from s. 139 of the Act, to "make a determination" in order to achieve a result as he "*considers necessary or expedient for the satisfaction of the complaint or the resolution of the dispute*", and he has the power under s. 139(4) to award financial redress in such amount as he "*deems just and equitable having regard to all the circumstances*", and under s. 139(3) to order such redress "*as he considers appropriate*". It is established in the jurisprudence that the Ombudsman has significant powers "*to allow and achieve a fair outcome in relation to the complain*t" as was noted by Kearns P. in *Willis v. Pensions Ombudsman* (at p. 35). Such an approach was also confirmed by Barrett J. in *The Minister for Education & Skills & Anor. v. The Pensions Ombudsman*, where he pointed to the fact that the significant discretion enjoyed by the Pensions Ombudsman could lead him to "*quite legitimately arrive at a different conclusion as to how rightly to exercise his jurisdiction*", even in cases where similarities are found in the nexus of facts raised before him.

70. The determination of the Ombudsman is lengthy, and it is clear that the exercise he engaged was to weigh all of the factors. I consider that factors such as the costs implications of an adverse finding against Mr Gleeson were not relevant and outside his competence, but I do not find any serious errors in the decision as a whole for the reasons outlined. The question before him was whether the Ministers did have a discretion to refuse augmentation of Mr. Gleeson's benefits at the time he retired in 2011. His decision in that regard is clear, and reasoned, and flowed from his primary finding of fact that as Mr Gleeson did not retire "early", the attempt to retrospectively exercise such powers was impermissible and oppressive.

Conclusion
For the reasons stated, and taking the decision of the Ombudsman as a whole, and noting his power to achieve fairness, I do not consider that he fell into serious or significant error and I consider that the appeal must fail.