THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 22

Record Number: 2017/337

Peart J.
Irvine J.
McGovern J.

BETWEEN:

TONYA MARTIN

APPLICANT/APPELLANT

- AND -

THE MINISTER FOR SOCIAL PROTECTION

RESPONDENT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 19TH DAY OF FEBRUARY 2019

1. This is an appeal against the order of the High Court (Binchy J.) made on the 14th June 2017 whereby the appellant's application for reliefs by way of judicial review was dismissed because, as explained in a written judgment delivered on the 31st May 2017 ([2017] IEHC 361), the trial judge was satisfied that the decision sought to be quashed was not a decision made by the respondent Minister, but rather by a different entity, namely Tolka Area Partnership ("the partnership") which is not party to the proceedings. The appellant now appeals to this Court against that finding.

2. In her proceedings the appellant sought, inter alia, an order quashing a decision dated 8th March 2016 to dismiss her from the Tús Programme, which is described as a new activation programme operated on behalf of the respondent by the Tolka Area Partnership ("the partnership"). Her dismissal followed an incident of misconduct by her on the 25th February 2016 involving "violent or threatening behaviour [and] malicious mischief resulting in danger to fellow employees or other persons or danger to or destruction of the organisation's property or equipment". A consequence of her dismissal from her employment on the programme was her disqualification from receiving Job Seekers Allowance from the Department of Social Protection for a period of 9 weeks.

3. The applicant had been in receipt of Jobseekers' Allowance for some 12 months, having been notified by letter dated 30th April 2015 from the partnership that she had been randomly selected by the Department of Social Protection to take part in the Tús Programme in which she had previously indicated an interest.

4. Part of the background of this case is that following the above incident a disciplinary meeting was arranged by the partnership for the 29th February 2016 to which the appellant was summoned to appear. At that meeting she denied the allegations. She was asked to submit a written account of the incident, and the meeting was put back to the 7th March 2016 at 4pm so that she could do so. However, she arrived 5 minutes late for the meeting on the 7th March 2016, and even though she had prepared a written account to submit to the meeting, and had made it known that she had arrived, and the reasons why she was slightly delayed, she was not permitted to participate in the resumed hearing which proceeded to a conclusion in her absence.

5. The appellant was notified of the decision to dismiss her from her employment on the programme by letter from the partnership dated 8th March 2016. She received this letter on the 11th March 2016. Its final paragraph notified her that she was entitled to appeal the decision to dismiss her "within three working days *of the decision*" [Emphasis provided]. The appellant says that she telephoned her supervisor, and informed her she had no opportunity to appeal within the specified period. She requested an extension of that period, but this was refused. By letter dated 15th March 2016 she was informed that since she had not lodged any appeal within three working days of the days of the hearing as required, her employment with the Tús Programme would cease on the 18th March 2016 and her file would be returned to the Department for Social Protection for review.

6. The appellant received a second letter dated 15th March 2016 from the Department stating that it had been decided that she was disqualified from receiving her Jobseekers' allowance for a period of 9 weeks on the grounds that she had lost her job though her own misconduct. The letter went on to state:

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

7. The appellant made an appeal to the social welfare appeals office who issued a decision dismissing the appeal on the 6th July 2016, stating: "It appears the Department acted in accordance with the legislation when it disqualified the appellant from receiving Jobseeker's Allowance for 9 weeks".

8. The trial judge made no findings in relation to the appellant's complaints about the fairness of the procedures that led to her dismissal, and stated that any such complaints should be directed to the partnership and not the Minister.

The trial judge's judgment
9. Having set out a summary of the relevant factual background, and the submissions made by the parties, the trial judge expressed his conclusions as follows, commencing at para. 38 of his judgment:

> "38. There cannot be the slightest doubt but that the decision that was taken to dismiss the applicant from her

employment by the Partnership, was a decision taken by the Partnership itself, and not the respondent. The mere fact that the respondent has a significant oversight role in relation to the administration of the Scheme, and provides funding for the Scheme, does not and could not serve so as to treat a decision of the Partnership as though it were as a matter of law, a decision of the respondent.

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

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

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

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

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

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

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

10. A number of grounds of appeal are set forth in her notice of appeal, as follows:

(i) The trial judge erred in law and fact by applying the wrong test or standard in determining that the impugned decision was a private law dispute;

(ii) The trial judge gave undue weight to the fact that the appellant's contract of employment was with partnership, and not with the respondent;

(iii) The trial judge failed to have adequate regard to the fact the applicant was required by the respondent to take up employment with the partnership in order to remain eligible for her statutory entitlement to a Jobseekers' Allowance, and that, as a result of arrangements arrived at by the respondent in exercising public law functions, her dismissal by the partnership gave rise to the loss of her entitlement to Jobseekers' Allowance to which she would otherwise be statutorily entitled;

(iv) The trial judge failed to have adequate regard to the fact that the breach of fair procedures, dismissal and penalty

were inextricably linked to the respondent, and that the respondent had failed to provide a fair or proportionate process leading to the decision impugned, as was the public law duty of the respondent;

(v) The trial judge failed to hold that as a result of procedures designed and adopted by the respondent, it had been determined that the appellant has deprived herself of an entitlement to the payment in question due to her own misconduct, but (a) without providing for hearing on the issue, (b) without ascertaining how or why that conclusion has been arrived at, (c) without adhering to the principle of *audi alteram partem*, and (d) in circumstances where the appellant was denied the opportunity to attend her own disciplinary hearing having arrived 5 minutes late, and in circumstances where in addition the applicant's written account of matters was not considered.

Legal submissions

11. In his submissions counsel for the appellant has urged this Court to look carefully at the way in which the administration of the Tús programme has been set up by the respondent Minister. Counsel submits that despite the apparent distancing of the Minister from any direct involvement in the Tús back to work programme by means of the agreement with the Partnership, it is nevertheless a ministerial or government programme, albeit one that the Minister has subcontracted to the Tolka Partnership to administer on his behalf.

12. It is submitted that when seen in that light the trial judge was wrong when he concluded that "the responsibility for the administration of the Tús programme rested entirely with the Partnership and not with the respondent", and that it was "beyond doubt that the decision that the applicant impugns in these proceedings is a decision taken by the Partnership and not by the respondent". It is submitted that this is to ignore the reality of the situation created by the Minister, and that it is wrong that the Minister should be able to hide behind the veil of the agreement with the Partnership in order to avoid responsibility for the decision taken in breach of fair procedures by the Partnership on the Minister's behalf, resulting in an unlawful decision by the Partnership.

13. Counsel has also highlighted the public nature of the purpose of the Tús programme, being a community-based scheme put in place by the Minister to encourage persons who have been unemployed for a lengthy period to return to work by engaging in work which is for the benefit of the community at large.

14. Reference is made also to the fact that in reality the appellant had little or no choice but to participate in the programme if she was to continue to receive her Jobseekers' Allowance, despite the fact that it appears from the Partnership's letter to the appellant dated 30th April 2015 inviting her to meet with the programme team on the 7th May 2015 that she had previously "indicated to the Department of Social Protection your interest in the Tús Programme". Counsel goes on to refer to the fact the same letter stated: "*As Tús is a government programme* failure to attend the above appointment may affect your D.S.P. (Social Welfare) payment" [Emphasis provided]. It is submitted that this makes it very clear that despite the fact that the administration or implementation of the programme has been subcontracted out to the Partnership, overall responsibility is retained by the Minister. Reference is made to the fact also that the salary of the appellant, including employers' PRSI, is paid from a fund provided by the Minister.

15. Counsel has referred to some of the provisions of the Tús Implementation Agreement entered into between the Minister's department and the Partnership in March 2011 which, it is submitted, demonstrate the control over the Tús programme which is maintained by the Minister despite its implementation being outsourced to the Partnership. For example, the heading of the Agreement describes Tús as "the Government's community work placement initiative", and para.3 under 'Duties' requires the Partnership to, *inter alia*, carry out its obligations in accordance with the terms of the Agreement "and from time to time revised by the Department …". There is reference also at para. 8 to all contracts being, inter alia, "in line with the guidance issued by the Department". Para. 12 provides that "the Department shall allocate the number of persons to be employed on placements and supervisory positions to be managed by [the Partnership]". Para. 21 provides that the Partnership is required "[to indemnify] the Department or its agents against any liability howsoever arising, or injury to any person as a result of any work done or action taken in connection with Tús or any activity relating to it whether now or in the future". Para. 25 provides that the Department shall fund the reasonable cost of insurance taken out by the Partnership in relation to the delivery of the Tús programme.

16. Apart from those already mentioned, there are other clauses under which the Department agrees to cover necessary expenses of the Partnership. Para. 40 of the Agreement refers to the Partnership's role being "the administration of Tús on behalf of the Department". Yet other clauses refer to the fact that the finances and expenditure of the Partnership will be subject to audit by the Department, that "the Department shall always be named in publicity or promotional material associated with Tús"" and that the Partnership "shall acknowledge and publicise the support of the Department for Tús in all public announcements, advertising and other publicity initiatives in relation to Tús", and further that the Partnership "shall comply with all reasonable requests and directions of the Department as may be made from time to time arising from the operation of Tús".

17. Counsel submits that these provisions make clear that the Partnership is implementing a government initiative (Tús), and is in reality the Minister's agent for all relevant purposes, and is under the effective control of the Minister's department. It is submitted accordingly that the Partnership cannot in any real sense be considered to be the appellant's employer, and that the Minister is the person ultimately responsible for the decision to dismiss the appellant, and not the Partnership, and is therefore the appropriate respondent in the present proceedings.

18. The public law element of the decision to dismiss the appellant is also said to be highlighted by the fact that Jobseekers' Allowance, the appellant's participation in the programme, and her disqualification from receiving benefit by reason of her misconduct, are matters that derive from statute. It is submitted that the proceedings are therefore in the realm of public law and not simply private law by virtue of the contract of employment entered into between the appellant and the Partnership on the 31st August 2015. As such, it is submitted that the decision to dismiss the appellant from her employment is amenable to judicial review, contrary to what was concluded by the trial judge.

19. Counsel has referred to the fact that the appellant is not a party to the Implementation Agreement between the Minister and the Partnership, so that it cannot be said to be binding in any way upon her. Insofar as the appellant was dismissed from the Minister's own Tús programme, it is submitted that this action could never be taken lawfully by somebody other than a person or body acting on behalf of the Minister. Accordingly, the Minister should be considered to be the person ultimately responsible for that decision. It is pointed out also that the letter from the Partnership to the appellant dated 8th March 2016 did not state that she had been 'fired' as an employee, or that her 'employment' was terminated as such, but instead referred to "her dismissal from the Tús programme" *i.e.* the Minister's programme. This is said to further enhance her argument that her removal from the programme is a decision made on behalf of the Minister, and not by the Partnership.

20. This Court is urged by the appellant to focus on the nature of the decision itself, rather than on the body that made the decision, when considering whether the decision is in the realm of public law and whether it is amenable to judicial review.

21. Counsel has referred to the judgment of Hardiman J. in *O'Connell v. The Turf Club* [2017] 2 I.R. 43. This was a case in which the respondent Turf Club had disqualified the first named applicant from riding for a period of four years having found him guilty of certain conduct in breach of its Racing Rules. The Turf Club was established by statute as the regulatory body for horse racing. One of the issues in the case was whether a decision of the Turf Club, a private body, was amenable to judicial review. The High Court held that it was, and the appeal against that finding was dismissed. In upholding the High Court decision, the Supreme Court held that the Turf Club as the racing regulatory authority was sufficiently within the field of public law and within the public domain that its decisions were amenable to judicial review. In his judgment Hardiman J., having referred to the judgment of Kingsmill Moore J. in *In re Solicitors Act, 1954* [1960] I.R. 239, and that of Kenny J. in *McDonald v. Bord na gCon* [1965] I.R. 217 stated at p. 67 that "A body which discharges a public function appears to me to be prima facie subject to judicial review".

22. In reliance on that statement, and focussing on the nature of the impugned decision *i.e.* to remove the appellant from a government back to work scheme for which she was selected by the Minister's department, and her consequential disqualification by the Minister from any entitlement to Jobseekers' Allowance for a period of 9 weeks, it is submitted that there is a clear and obvious public function performed by the Partnership on behalf of the Minister which must therefore be amenable to judicial review.

23. The appellant relies also on the judgment of Finlay C.J. in *Beirne v. Commissioner of An Garda Siochana* [1993] I.L.R.M. 1. This was a case in which the appellant's assignment as a trainee garda was terminated by a decision of the Commissioner who was of the view that the applicant was unsuitable for ongoing employment as a trainee by reason of misconduct. The applicant contended that the process by which that decision was reached had been unfair to him, and that the decision ought therefore to be quashed. An issue arose as to whether this was a private law matter or whether it was in the realm of public law. The passage to which the appellant refers is at p. 2 as follows:

> "The particular provision of that contract, contained in the document … was, of course, the right of the Commissioner to terminate the assignment of the applicant as a trainee if in his opinion he was unsuitable for continued employment as a trainee by reason of misconduct. The principle which, in general, excludes from the ambit of judicial review decisions made in the realm of private law by persons or tribunals whose authority derives from contract is, I am quite satisfied, confined to cases or instances where the duty being performed by the decision-making authority is manifestly a private duty and where his right to make it derives solely from contract or solely from consent or the agreement of the parties affected.
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> Where the duty being carried out by a decision-making authority, as occurs in this case, is of a nature which might ordinarily be seen as coming within the public domain, that decision can only be excluded from the reach of the jurisdiction in judicial review if it can be shown that it solely and exclusively derived from an individual contract made in private law."

24. It is submitted that the duty being performed by the Partnership in the present case is not "a manifestly a private duty" given that the programme is a government initiative for the benefit of members of the public who are unemployed for a long time, and that it does not derive "solely and exclusively … from an individual contract made in private law" for the reasons that have been submitted, as already set forth, and therefore is a decision that is not excluded from the ambit of judicial review.

25. Counsel for the respondent on the other hand submits that the decision by which the appellant was removed from the Tús programme is not amenable to judicial review as that decision was taken by the Partnership on foot of a private contract of employment with the Partnership, and as such it is a matter of private law, notwithstanding that the Minister funds the salary of the appellant. Counsel drew an analogy with the position of a national teacher who is employed on foot of a contract with the Board of Management of a school, but whose salary is funded by the Department of Education & Skills. Counsel accepted that the decision made on the 15th March 2016 *by the Minister* to disqualify the appellant from Jobseekers' Allowance for 9 weeks was within the public domain and therefore amenable to judicial review, but noted that the appellant had not sought to seek a judicial review of *that* decision. She had in fact appealed the decision, as she was entitled to, but the decision was upheld.

26. Counsel for the respondent submits that even if the decision which the appellant seeks to impugn was reached in breach of fair procedures and constitutional justice, (and it is accepted that there were deficiencies in that respect both in terms of not being permitted to attend the resumed hearing because she arrived 5 minutes late, and because of the lack of any opportunity to lodge an appeal within three days of the date of the decision), nevertheless the appellant has brought these proceedings against the wrong party. In counsel's submission it is clear that the party with whom she entered into her contract of employment should be the respondent in the proceedings, and not the Minister, if she wishes to impugn the decision to dismiss her from her employment. It is not accepted that simply because the Minister funds the programme, and is referenced in the Implementation Agreement in the various respects identified by the appellant in her submissions, the Minister is liable for any fault or breach of rights on the part of the Partnership in relation to her dismissal, or that her dispute becomes a public law matter.

27. Counsel for the respondent submits that the appellant's case is very different from *O'Connell v. The Turf Club* to which the appellant has referred in submissions. Instead, counsel has referred to the judgment of Denham J. (as she then was) in *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 I.R. 483, and the references therein to her own judgment in the earlier case of *Geoghegan v. Institute of Chartered Accountants* [1995] 3 I.R. 86 as follows at p. 487:

> "In [*Geoghegan* …] factors relevant to the issue as to whether or not the decision was amenable to judicial review were analysed. A number of those factors are relevant to this case and I apply those principles. First, this case relates to the fire service and to a station officer of that service, a service of importance in the community for fighting fires and flooding, amongst other matters. Such service is necessary within a state, either to be provided by the State or delegated by the State. Secondly, the sources of the general powers of the County Council are to be found in legislation. Thirdly, the functions of the County Council, the fire service, and the station officer come within the public domain of that State. Fourthly, the consequences of the County Council's decision may be very serious for the applicant. Amongst these factors, I lay emphasis on the functions of the County Council, the fire service, and the station officer as functions manifestly in the public domain of the State.
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> In conclusion on this issue, I am satisfied that the employment of the station officer of a fire station is a matter within the public domain and amenable to judicial review. While there was a contract between the applicant and the County Council, it has a significant public element and the decision to terminate was amenable to judicial review."

28. In *Geoghegan*, Denham J. stated the following at p. 130 when concluding that the activities of the respondent Institute were

amenable to judicial review:

> "(1) This case relates to a major profession, important in the community, with a special connection to the judicial organ of Government in the courts in areas such as receivership, liquidation, examinership, as well as having special auditing responsibilities.
>
> (2) The original source of the powers of the Institute is the Charter: through that and legislation and the procedure to alter and amend the bye-laws, the Institute has a nexus with two branches of the Government of the State.
>
> (3) The functions of the Institute and its members come within the public domain of the State.
>
> (4) The method by which the contractual relationship between the Institute and the applicant was created is an important factor as it was necessary for the individual to agree in a "form" contract to the disciplinary process to gain entrance to membership of the Institute.
>
> (5) The consequences of the domestic tribunal's decision may be very serious for a member.
>
> (6) The proceedings before the Disciplinary Committee must be fair and in accordance with the principles of natural justice, it must act judicially."

29. Counsel for the Minister has relied also upon the judgment of Cooke J. in *Bloxham v. Irish Stock Exchange Limited* [2014] 4 I.R. 91 in which the authorities already referred to, as well as others, were considered and analysed in relation to the applicable principles to be applied in relation to the question of amenability to judicial review. However, as Cooke J. remarked at p. 93 of his judgment: "As the arguments of counsel on either side of this case have illustrated, it is far easier to identify the legal principles which are relevant to that question than it is to apply them to a specific case". Ultimately, following a close examination of the authorities, and the factual background to the decision of the respondent to revoke or terminate the applicant's membership of the Irish Stock Exchange. Cooke J. determined that the decision made by the Irish Stock Exchange was not amenable to judicial review, and that "the case thus made clearly illustrates the reality of the objective sought to be pursued by the liquidator [of the applicant company] as one in the realm of private law and not a claim on the part of an undertaking arising out of direct commercial dealings between them".

30. Counsel further maintains that the appellant's real purpose in bringing these proceedings was to seek an injunction restraining the Minister from implementing the decision that she was disqualified from entitlement to Jobseekers' Allowance, as sought at paragraph (d)(ii) of her statement of grounds, so that she could continue to receive her Jobseekers' Allowance. That decision *by the Minister* was dated 15th March 2016. Relief (d)(i) sought an order of *certiorari* of the earlier decision of the partnership made on the 8th March 2016. She did not obtain that interlocutory injunction. The Court has been informed that in fact the appellant was, following her dismissal from the Tús programme, entitled to a basic Supplemental Income Payment which was just €2 less per week than her Jobseekers' allowance. Accordingly, her loss for the 9 weeks of disqualification is minimal in any event.

31. Counsel has also drawn attention to the fact that in her application for leave to seek judicial review the appellant did not refer at all to the fact that she had entered into a contract of employment with the Partnership. It is suggested that had she done so, leave may well have been refused, given that the Partnership was not named as a respondent.

32. It is submitted also that it was open to the appellant to avail of an alternative remedy against the partnership, namely an action for wrongful dismissal, even though it is accepted that she could not have brought an unfair dismissal claim given the duration of her employment. In all these circumstances, it is submitted that on a discretionary basis alone the appellant should not be considered entitled to relief by way of *certiorari* of the Partnership's decision dated 8th March 2016.

33. I have set out the conclusions reached by the trial judge above at para. 9. Like the trial judge, I too am satisfied that the impugned decision taken by the Partnership to remove the appellant from the programme for stated misbehaviour is a decision that cannot be imputed to the Minister on the basis that the Partnership was in effect and/or as a matter of law the agent of the Minister. I fully appreciate that in its own terms the programme was a government initiative for the benefit of the long-term unemployed, and that it is funded by the Minister. But in my view that is not sufficient, even if one aggregates the other matters to which the appellant has referred in relation to the Conditions and Rules contained in the Tús – Community Work Placement Initiative document to which the Court has been referred. The executive arm of the State reaches deep into society in so many different ways through bodies of one kind or another that receive funding from central government in order to perform their tasks. The respondent gave the area of education as an example where, in fulfilment of its duty under Article 42.4 of the Constitution, the State is required to provide for free primary education, and that it does so, *inter alia*, by the provision of funding for teachers' salaries, yet the teachers in question are engaged by Boards of Management on foot of private contracts entered into between the teacher and the Board of Management of a particular school. It is not the case that where such a teacher is dismissed by the Board of Management there is a cause of action against the Minister, whether by way of judicial review of the decision to dismiss him or her, or otherwise. The Board of Management is in no way the agent of the Minister. That, in my view, is an apposite example.

34. Another example of such arrangements that was referred to in the course of the argument before this Court concerns the Courts Service and its staff. That service receives funding from central government in order to provide for the administration of justice in the State. If some administrative decision is made which is sought to be judicially reviewed (leaving aside the question of whether it is public law or private law) the Courts Service and not the Minister for Justice and Equality will be the appropriate respondent to be named in the proceedings. Similarly, in the present case it is the Partnership with whom the appellant entered into her contract of employment, and it is the Partnership that made the decision to remove her from the Tús programme. In my view the trial judge was correct to conclude that "the mere fact that the respondent has a significant oversight role in relation to the administration of the Scheme, and provides funding for the Scheme, does not and could not serve so as to treat a decision of the Partnership as though it were as a matter of law, a decision of the respondent".

35. Furthermore, I do not accept, as is contended for in the appellant's notice of appeal, that the trial judge "gave undue weight to the fact that the appellant's contract of employment was with the Scheme and not the Respondent in the particular circumstances of the case". He was correct to rely upon the existence of that contract of employment, and to reject the contention that the particular circumstances of the case, such as the nature of the back to work scheme, its funding by the respondent, and the respondent's other links to the scheme, were sufficient to create a relationship of agency between the Partnership and the Minister, such that the Minister should be seen as the principal in the relationship to the appellant, and therefore the appropriate respondent in these proceedings. The appellant could have named the partnership as the respondent, but clearly, for some reason that has not been explained, chose not to do so. Equally, the appellant might have sought to challenge the Minister's decision dated 15th of March 2016 to disqualify her from receiving the payment for nine weeks, in which case clearly the Minister would have been the appropriate

respondent. But it was not open to the appellant to seek to impugn the decision of the Partnership in proceedings in which only the Minister is named as a respondent. In my view the trial judge was correct to so decide.

36. I would also uphold the trial judge's conclusion that the decision by the Partnership is in the realm of private law and not public law, and as such, is not amenable to challenge by way of judicial review, even if the Partnership had been the named respondent. The present case is to be distinguished from those other cases to which the Court has been referred by the appellant, where certain decisions were found to be in the realm of public law, notwithstanding that they were decisions made by private bodies such as the Turf Club, the Institute of Chartered Accountants, and Tipperary (South Riding) County Council, or on foot of a contract of employment between a trainee garda and the Commissioner of An Garda Síochána.

37. The judgment of Finlay C.J. in *Beirne* is helpful in clarifying the distinction between a purely private law decision which is not amenable to judicial review, and one which is within the public domain even though made by an individual or private body. As already stated, the decision in *Beirne* that the applicant was no longer suitable for continuing employment as a trainee was made on foot of a contract entered into by the trainee applicant. The appellant has referred to the passage from the judgment in *Beirne* at p. 2 to which I have referred above, and seeks support for her argument in the present case from the fact that Finlay C.J. stated that the exclusion from the ambit of judicial review of decisions made in the realm of private law and deriving from a contract, is confined "to cases or instances where the duty being performed by the decision making authority is manifestly a private duty and where his right to make it derives solely from contract or solely from consent or the agreement of the parties affected".

38. As explained above, it is the appellant's submission that there are wider aspects engaged in the establishment and operation of the Tús programme which take it beyond the narrow confines of private law and the private contract entered into between the appellant and the Partnership, and into the public domain. I have set those matters out earlier.

39. Finlay C.J. in *Beirne* was satisfied that while there was a contract of employment in existence between the applicant and the Commissioner which contained a power to terminate the contract on the grounds of misconduct, it was necessary to look beyond the contract itself and "explore the issue as to whether that was the sole or exclusive source of that jurisdiction and the right to make that decision vested in the Commissioner" in order to determine whether the decision was amenable to judicial review.

40. Finlay C.J. went on to state:

> "Examination of the background and circumstances surrounding the establishment of a training depot four members of the Garda Siochana and the functions and powers of the Commissioner concerning it lead inevitably, in my view, to the conclusion that the contract consisting of these conditions of service could not conceivably be the sole source of the power which the Commissioner had to terminate the training of a trainee by reason of his misconduct. It constitutes, in my view, no more than a reflection of a jurisdiction clearly vested in the Commissioner long before any contract was entered into between him and any individual trainee, and can be justified most properly as a warning to the trainee of the powers which were, in fact, otherwise vested in the Commissioner."

41. In the final paragraph of his judgment (see p.5) Finlay C.J. concluded as follows:

> " … I have no doubt that whilst the power of the Commissioner to terminate the training of the trainee by reason of his misconduct is stated to be one of the conditions of the employment and that statement is true, it is not a jurisdiction which is solely or purely or even mainly derived from contract, but is a clear jurisdiction necessarily vested in the Commissioner by reason of the office which he holds and the statutory powers which are attached to it. In those circumstances, I conclude that it is clearly within the jurisdiction of the courts to review that decision judicially."

42. The present case is very different. There is nothing in relation to the power of the Partnership to remove the appellant from the programme that could derive from any latent jurisdiction either in the Partnership or the Minister, and which is simply reflected in the Implementing Agreement or the Rules and Conditions of the Tús programme, which would bring the decision within the ambit of *Beirne.* The decision to remove the appellant derives solely and exclusively from the power vested in the Partnership by virtue of its Implementing Agreement with the Minister, and the Rules and Conditions of the Tús programme. In circumstances where the appellant complains about the fairness procedures leading to the decision to remove her from the programme, a remedy first of all did not lie against the respondent Minister, but against the Partnership, but secondly did not lie in any event against the Partnership by way of judicial review, since that decision was not amenable to judicial review for the reasons given.

43. I find no fault with the reasoning of, and the conclusions reached by the trial judge, and accordingly I would dismiss this appeal.