

## THE HIGH COURT

[2013 No. 270 MCA]

## IN THE MATTER OF PART XI OF THE PENSIONS ACT 1990 AND IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 140

BETWEEN

MINISTER FOR PUBLIC EXPENDITURE AND REFORM

APPELLANT

AND

THE PENSIONS OMBUDSMAN

RESPONDENT

AND

JIM FARRELL

NOTICE PARTY

JUDGMENT of Mr. Justice Noonan delivered the 19th day of March, 2015

**Introduction**

1. This matter comes before the court by way of an appeal by the appellant ("The Minister") pursuant to s. 140 of the Pensions Act 1990 (as inserted by s. 5 of the Pensions (Amendment) Act 2002) against the determination of the Respondent ("the Ombudsman") made on the 18th July, 2013 in respect of a complaint made by the notice party ("Mr. Farrell").

**Background Facts**

2. For much of his working life, Mr. Farrell was employed in the private sector until 1990, when he commenced employment with the National Treasury Management Agency ("the NTMA"). During his years working in the private sector, Mr. Farrell built up a private pension fund. In 1996, he was invited to join the NTMA Pension Scheme ("the Scheme") and in February of that year he transferred the entire proceeds of his private pension fund into the Scheme in return for an agreed pension entitlement.

3. Prior to transferring the private pension fund into the Scheme, Mercer, the NTMA appointed actuaries for the Scheme, certified that the benefits to be provided to Mr. Farrell consequent upon the transfer would not result in a cost to the Exchequer. Mr. Farrell's pension entitlement which resulted from the transfer amounted to 62.7% of his pension with the balance of 37.3% being attributable to his service with the NTMA.

4. Subsequent to Mr. Farrell's retirement, the Financial Emergency Measures in the Public Interest Act 2010 ("the FEMPI Act") was enacted. The effect of the statute was to bring about, from the 1st of January, 2011, a sliding scale reduction in public service pensions ("the PSPR"), which included Mr. Farrell's pension.

5. In Mr. Farrell's case, this equated to a reduction of €22,929 per annum on his total pension entitlement. If however the public service pension reduction was confined to the 37.3% element of his pension funded by the NTMA, the reduction would be €4,405. Unsurprisingly, Mr. Farrell was aggrieved at this outcome believing it to be unfair, inequitable and potentially unconstitutional as amounting to a confiscation of his private property. He argued that he had privately paid for the major part of his pension at no cost to the Exchequer and the State, in applying the PSPR to the privately funded portion of his pension is actually making a profit at his expense, contrary to what he sees as the intention of the FEMPI Act.

6. Section 6 of that Act provides as follows:

"6. - Where the Minister [for Finance] is satisfied that exceptional circumstances exist (because of some particular aspect or condition relating to the public service pension or the public service pension scheme concerned, including the funding of that pension or scheme) in respect of a particular class or group of pensioners and those circumstances materially distinguish that class or group from other classes or groups of pensioners to which *section 2* applies, then, the Minister, if he or she considers it to be just and equitable in all the circumstances to do so, may by direction—

(a) exempt that class or group from the operation of *section 2*, either entirely or to such extent as the Minister considers appropriate, or

(b) modify the operation of *section 2* to reduce their public service pensions in such manner as the Minister thinks fit, having regard to the nature and degree of the financial burden that would otherwise be borne by that class or group,

and this Act, and any regulations made under this Act, shall be read subject to any such direction."

7. It would appear that in early 2011, Mr. Farrell raised these issues with the NTMA, who in turn brought them to the attention of the Department of Finance in a letter of the 8th February, 2011. It appears that in that letter, the NTMA on Mr. Farrell's behalf sought a determination from the Minister under s. 6 exempting the privately funded portion of Mr. Farrell's pension from the PSPR.

8. In a reply of the 7th March, 2011 from the assistant secretary of the Department, it was stated that there was insufficient information in the NTMA correspondence to allow the Minister to make such determination and it would be usual for the individual concerned to make his own case to the Minister. The assistant secretary suggested that Mr. Farrell should resubmit the claim with

any further information or argument he wished to raise.

9. Following the change of government, Mr. Farrell appears to have asked a friend of his, Mr. Kevin Norton, a chartered accountant, to correspond with the Minister for Justice, Equality and Law Reform, who appears to have been known to Mr. Norton, on the issue of Mr. Farrell's pension. In a letter of the 22nd May, 2011, Mr. Norton said:

"Under recent legislation, Jim's pension from NTMA is being cut. He has no problem with this in relation to the pension arising from his service with NTMA. But he thinks – and I agree with him – that cutting the portion of his pension that he earned in his previous employment (and which cost the State nothing) amounts to confiscation of his assets. I suggest that this is probably unconstitutional, and is certainly unjust and inequitable.

The legislation provides that the Minister is entitled to exempt or modify the reduction to a class of people to whom the legislation applies if he considers it just and equitable. It may well be that Jim is the only person in a particular class, but that does not mean that it is not a class under the Act. Accordingly, he requests that the Minister for Finance to (sic) make such an exemption/modification."

10. Mr. Norton enclosed with the letter a memorandum prepared by Mr. Farrell setting out his case and requested the Minister for Justice to ask the new Minister for Finance to review the case and allow an exemption.

11. Mr. Norton's letter was duly passed to the Minister for Finance, who replied to it on the 28th June, 2011. The Minister referred to the fact that his predecessor had received a claim under s. 6 of the FEMPI Act on Mr. Farrell's behalf which had not been decided and he proposed to treat Mr. Norton's letter as a reactivation of the same claim. He went on to say:

"While it is possible to make a case that Mr. Farrell's pension circumstances are materially different to other public service pensioners, because of the nature of the transfer value paid across, the fact remains that his pension is included within the scope of the [FEMPI] Act on the basis that he is the beneficiary of a public service pension scheme within the terms of the Act. It must be emphasised that all public service pensioners, as defined in the Act, are subject to the reduction.

The claim is essentially based on the fact that Mr. Farrell transferred cash into the NTMA scheme in 1996 in return for service. After careful consideration, this does not, in my view, materially distinguish Mr. Farrell's pension in that there are very many former public servants who have purchased service in a public service scheme either by instalment or with a lump sum.

The Act makes no distinction as to the nature of the service that produced the pension which is to be reduced by s. 2. Whether that pensionable service was produced by money transferred in from another pension scheme, purchased by the member or enhanced by added years awarded for ill-health reasons or for professional qualifications held by the member has no bearing on whether the reduction applies. I have carefully considered the application for exemption, but I do not find that it would be just and equitable in all the circumstances to exempt Mr. Farrell's public service pension from the reduction."

12. Mr. Farrell was naturally disappointed by this response and on the 29th September, 2011, he contacted the Ombudsman's office first by telephone followed up by a letter in which he asked the Ombudsman to examine his case and let him have a preliminary view prior to contacting the Department of Finance. In follow up correspondence in December, 2011, Mr. Farrell advised the Ombudsman that he had ascertained that the PSPR deductions from his pension were not in fact retained in the NTMA fund but remitted direct to the Exchequer.

13. Following further contacts with Mr. Farrell, the Ombudsman wrote to the Department of Public Expenditure and Reform ("the Department") on the 16th March, 2012 about Mr. Farrell's case, which the Ombudsman had previously discussed by telephone with an official in that department. It would appear that the functions of the Minister for Finance under the FEMPI Act were transferred to the Minister for Public Expenditure and Reform by the Ministers and Secretaries (Amendment) Act 2011. In that letter the Ombudsman refers to the merits of Mr. Farrell's case and to the fact that he had advised Mr. Farrell to make a formal appeal to the Minister for Public Expenditure and Reform.

14. Pursuant to this advice, on the 27th April, 2012, Mr. Farrell wrote to the Minister characterising his letter as an appeal from the decision of the Minister for Finance not to grant an exemption pursuant to s. 6 of the FEMPI Act in respect of 62.7% of his pension. In his letter, Mr. Farrell made a detailed submission in support of his claim.

15. The Minister issued his decision to Mr. Farrell by letter of the 22nd October, 2012. The Minister stated that the responsibility for considering s. 6 applications now rested with him as a result of the creation of his department in 2011 and he had decided to treat the "appeal" as a new s. 6 application. The Minister went on say:

"I have considered your further case for exemption/modification as set out in your correspondence. While I accept that the particularly high "purchase" element attaching to your pension considered in conjunction with the funded nature of the scheme and, in particular, the indexation methods applying, would, for the purposes of the Act, materially distinguish your case from those of other classes or groups of pensioners, I am not satisfied that it would be just and equitable, on the basis of the details you have supplied to date, to exempt or modify (in a partial manner or otherwise) the application of the reduction in your case. I have therefore decided not to grant an exemption or modification of the application of PSPR to your pension, and accordingly am upholding Minister Noonan's 2011 decision in your case."

16. Mr. Farrell copied the Minister's letter to the Ombudsman who entered into further email correspondence with the Department arising from it. In an email of the 25th October, 2012 to Mr. David Owens of the Department, the Ombudsman said:

"There is another, and more "equitable" solution available to the problem, which is not going to go away, as Mr. Farrell is extremely persistent.

Firstly, I feel that reference to indexation methods applied is a bit of a red herring, in the sense that there is most likely no prospect of any indexation happening in the short term.

In the case of Mr. Farrell, I think the matter could be approached in a slightly different way.

In the old Revenue Practice Notes there was a provision where, if a person had transferred benefit into a new scheme and

where at retirement, he would have received a smaller lump sum from the new arrangement than he would have had, had no transfer taken place, then Revenue were open to payment of lump sum that would have been payable in the absence of a transfer.

If we apply that logic to Mr. Farrell, we would apply the 0.6% pension levy for four years to the actuarial value of the private sector pension element (the purchased service), thereby effecting a reduction from 2011 of 0.6% each year in his annual pension, culminating in a permanent reduction of 2.4% for life (which in due course would also be reflected in any indexation, if indexation ever comes back!)

It seems to me that that sort of treatment would be equitable in the circumstances, where such a high proportion of his total pension comes from an external source.

I realise that this would, if treated as a precedent, mean a bit of work in other cases, but it could be that the net gain to the State, particularly in the case of relatively young retirees, would be much greater in the long term, while relieving the shorter-term pain which appears to be unjust and excessive in these cases."

17. Mr. Owens responded in an email of the 5th November 2012 as follows:

"Thanks for offering the idea of using old Revenue Practice Notes as a possible approach. I very much appreciate the helpful spirit in which you suggest this, however, as you will understand, we are in a formal process involving the Minister.

In his recent letter the Minister pointed to the absence of a financial case proving that Mr. Farrell's pension benefits are smaller than they would have been had he not transferred – if he decides to supply such a case, we and the Minister would consider this without prejudice and your idea could then be looked at as one possible option."

18. The Ombudsman responded by return of email the same day to advise Mr. Owens that Mr. Farrell had been in touch with the NTMA's pension scheme actuaries to enable a further submission to be made in support of his case.

19. On the 12th of November 2012, the NTMA's actuary, Mr. Michael Madden of Mercer, wrote directly to the Minister providing details of how Mr. Farrell's pension had been affected by the application of the PSPR and in effect inviting the Minister to review his decision in the light of this additional information. The Minister's private secretary responded direct to Mr. Madden in December, 2012 stating that the matter was under consideration in the Department, but Mr. Farrell's case had already been considered by two Ministers for Finance as well as the appellant.

20. Despite the statement by the Minister's private secretary that the matter was under consideration, it would appear that no further determination issued from the Minister.

21. On the 18th of July, 2013, the Ombudsman issued what is described as his final determination in the complaint made by Mr. Farrell. In his ten page determination, the Ombudsman set out the complaint, the background facts, and the relevant correspondence, details of his discussions with the Department, his observations thereon and his decision. In the course of his determination, the Ombudsman said:

"6.8 I therefore consider that the equitable solution in this case would be to treat that element of his pension which was funded from outside sources as if it had not been transferred into the NTMA pension scheme but remained outside it.

6.9 That would mean that the element of his pension which is (albeit indirectly) funded by the Exchequer, 37.3% should be subject to the appropriate FEMPI reduction. The balance, 62.7%, should be treated as if it were still in the private sector and subject to the private sector pension levy...

6.11 The main reason for coming to this conclusion is that the amount which was purchased by the transfer of Mr. Farrell's benefits from outside sources was far in excess of anything that he might have been allowed to purchase on a "notional service" basis in the light of his actual service with NTMA.

6.12 This case should not be treated as a precedent for any person who is not in exactly similar circumstances.

## **7. Final Determination.**

7.1 I determine that this complaint be upheld.

7.2 I therefore direct that the public service pension reduction under the FEMPI Act be calculated only by reference to that proportion of this complainant's pension which is funded directly by the exchequer and that the private sector pension levy be applied to the balance of his pension, 62.7% of the total initial pension to which he was entitled.

7.3 This case has no value as a precedent and any claim of a similar nature must be investigated and dealt with solely on its own merits."

22. The determination goes on to give notice that it is binding on all parties to the complaint and that it may be appealed to the High Court within 21 days.

## **The Pensions Act 1990 Part XI**

23. This part was inserted into the Pensions Act 1990 by s. 5 of the Pensions (Amendment) Act 2002 and establishes the Office of Pension Ombudsman. The provisions of the 1990 Act insofar as relevant to this appeal are as follows:

"131. – (1) The Pensions Ombudsman shall be independent in the performance of his functions.

(2) The Pensions Ombudsman may investigate and determine the following complaints and disputes –

(a) a complaint made to him by or on behalf of an actual or potential beneficiary of an occupational pension scheme or PRSA, who alleges that he has sustained financial loss occasioned by an act of maladministration done by or on behalf of a person responsible for the management of that scheme or, as appropriate, PRSA;

(b) any dispute of fact or law that arises in relation to an act done by or on behalf of a person responsible for the management of the scheme or, as appropriate, PRSA, and that is referred to him by or on behalf of the actual or potential beneficiary;...

(8) Where a question arises as to whether the Pensions Ombudsman has jurisdiction under this Part to investigate a complaint or dispute, such question shall be determined by the Pensions Ombudsman, whose decision shall be final...

139. — (1) On the investigation of a complaint or reference under this Part, the Pensions Ombudsman shall make a determination in relation to the complaint or dispute, and may in the determination give to the parties concerned such directions as the Pensions Ombudsman considers necessary or expedient for the satisfaction of the complaint or the resolution of the dispute.

(2) A direction under *subsection (1)* shall not require either—

(a) An amendment of the rules of a scheme or the conditions of a PRSA contract, or

(b) The substitution of the decision of the Pensions Ombudsman for that of the trustees of a scheme in relation to the exercise by the trustees of a discretionary power under the rules of the scheme.

(3) Subject to *subsection (4)*, the Pensions Ombudsman may under *subsection (1)* order such redress, including financial redress, for the party concerned as he considers appropriate, having regard to all the circumstances and to the provisions of this Part, and specifies.

(4) Any financial redress under *subsection (3)* shall be of such amount as the Pensions Ombudsman deems just and equitable having regard to all the circumstances but shall not exceed any actual loss of benefit under the scheme or PRSA...

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

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

24. The interpretation section for part XI insofar as relevant, provides:

126. — (1) In this Part —...

'party' in relation to a complaint or reference under this Part, means—

(a) A person by whom, or on whose behalf, the complaint or reference was made,

(b) A person responsible for the management of the scheme or PRSA to which the complaint or reference relates;...

(3) For the purposes of this Part, the following persons shall be deemed to be responsible for the management of an occupational pension scheme:

(a) any trustee of the scheme;

(b) any former trustee of the scheme;

(c) any employer to whom the scheme relates;

(d) any former employer to whom the scheme relates; or

(e) such other person or category of persons as may be prescribed.

### **This Appeal**

25. The appeal was instituted by way of originating notice of motion seeking an order pursuant to s. 140 above cited annulling the Ombudsman's determination. The essential grounds upon which the appeal is brought are set out in the notice of motion and may be summarised as follows:

1. The determination is unlawful and *ultra vires* the powers of the Ombudsman insofar as it purports to disregard and disapply s. 2 of the FEMPI Act.

2. There was in any event no maladministration or dispute of fact or law to ground the Ombudsman's jurisdiction.

3. Mr. Farrell's complaint did not relate to any acts done by or on behalf of persons responsible for the management of his pension scheme.

4. The determination was *ultra vires* insofar as it purported to treat Mr. Farrell's pension in a manner different to that which would otherwise have been applied under the rules of the Scheme.

5. The application of the purported "old Revenue Practice Notes" was *ultra vires* – it was agreed at the hearing that this ground is no longer relevant.

6. There was no, or no adequate evidence basing the Ombudsman's finding that Mr. Farrell was seriously disadvantaged by purchasing service in the NTMA pension scheme.

7. The remedy devised by the Ombudsman was *ultra vires* his powers under the Act where he did not determine what the actual loss to Mr. Farrell was.

26. The Ombudsman responded to these grounds in a points of defence style document entitled "Statement of Grounds of Opposition", presumably by analogy with judicial review proceedings. Although this document runs to 68 paragraphs, the essential points appear to be as follows:

1. The Minister is not entitled to bring this appeal on grounds of want of jurisdiction for two reasons:

(a) Section 131 (8) of the 1990 Act provides that the Ombudsman's decision on issues of jurisdiction shall be final and thus not subject to the statutory appeal to this court.

(b) The Minister failed to raise the issue of jurisdiction at any time prior to the Ombudsman's final determination.

2. Alternatively, the failure of the Minister to raise the jurisdiction point before the Ombudsman deprived him of the opportunity of making a final determination which would then have been subject only to judicial review by this court.

3. The determination was, in any event, made within jurisdiction.

4. Mr. Farrell's complaint related either to an act of maladministration by a person responsible for the management of the NTMA scheme or a dispute of fact or law in relation to an act done by such person thus conferring jurisdiction on the Ombudsman.

5. Alternatively, if the Minister is not a person responsible for the management of the scheme, then he cannot be a "party" as defined by s. 126 and therefore has no right of appeal under s. 140.

### The Arguments

27. Mr. Carolan BL on behalf of the Minister submitted that it was clear that the FEMPI Act applied to Mr. Farrell's pension in its entirety. The reductions provided for in s. 2 applied to a "public service pension" which was defined in s. 1 as "a periodic payment of a pension or other benefit by whatever name called, which is not a lump sum, payable to or in respect of a public servant or former public servant under a public service pension scheme". Section 1 also defines a public servant as "a person who is employed by, or who holds any office or other position in, a public service body and includes an office holder". The definition of "public service body" in s. 1 expressly includes the NTMA. There is in fact no dispute about this.

28. The Minister thus argues that the Ombudsman cannot simply disapply a statute and that, without more, is sufficient to justify annulling his determination.

29. The Minister submits that the Ombudsman is confined explicitly by s. 131 (2) of the Pensions Act 1990 (as amended) to what he may investigate. Thus, he may only investigate a complaint by a pension beneficiary who alleges that he has sustained financial loss as a result of maladministration by a person responsible for the management of the scheme in question or alternatively a dispute of fact or law arising in relation to an act done by such a person. In that regard, he contends that first, the complaint does not relate to acts done by a person responsible for the management of the scheme where the definition of such persons under s. 126 (3) is limited to trustees of the scheme, employers to whom the scheme relates or prescribed persons. The Minister falls into none of these categories. Secondly, the Ombudsman failed to identify any maladministration or dispute of fact or law in his determination and none such exists. This is a condition precedent to the Ombudsman's jurisdiction and in that respect he relies upon the judgments of the Supreme Court in *Ryanair v. Labour Court* [2007] 4 I.R. 199 and *Fitzwilton v. Mahon* [2008] 1 I.R. 712.

31. The Minister places reliance on the dictum of Lord Denning MR in *R. v. Local Commissioner for the North and East of England, ex parte Bradford Metropolitan City Council* [1979] Q.B. 287, where he considered the meaning of "maladministration" and says that nothing in the Ombudsman's decision here could conceivably come within that definition.

32. The Minister contends further that in reality the Ombudsman's determination in this case amounts to an impermissible merits based review of the Minister's exercise of his discretion under s. 6 of the FEMPI Act. The determination appears to have been considered on the basis of issues of fairness which are matters exclusively within the discretion of the Minister under the section. It was never open to the Ombudsman to conclude that the Minister's decision was not "just and equitable" or to act as an appellate body from that decision. Similarly, the Ombudsman is not entitled to take the view that the operation of the FEMPI Act and the policy behind it are unfair to Mr. Farrell. The Minister relies on *Garda Representative Association v. Minister for Finance* [2010] IEHC 78 and *Unite v. Minister for Finance* [2010] IEHC 354 as authority for the proposition that the discretion enjoyed by the Minister under s. 6 is very wide and an applicant carries a heavy burden in justifying its exercise in his favour. Thus, even if the Ombudsman had jurisdiction to review the exercise by the Minister of his power under s. 6, which he does not, there was no basis for doing so.

33. Similarly, with regard to the remedy directed, this was made without jurisdiction because it directly contravenes the FEMPI Act and in particular ss. 2 and 5 thereof. In any event, in the absence of any finding of maladministration, no remedy could be provided for in relation to an alleged loss. Finally, the Minister submits that the determination was made in error on the basis that the Ombudsman considered inappropriate comparators and his conclusion that Mr. Farrell was seriously disadvantaged was in fact based on no evidence.

34. The Minister submits that the determination here provides no insight into the statutory basis on which it was arrived at. This essentially relates to a failure to give proper reasons and in that regard the Minister relied upon the decisions of the Supreme Court in *Mallak v. The Minister for Justice Equality and Law Reform* [2012] 3 I.R. 297 and *Rawson v. The Minister for Defence* [2012] IESC 26.

35. Ms. O'Neill BL on behalf of the Ombudsman submitted that this was primarily a challenge to his determination on jurisdictional grounds. She said that the case was unusual for the fact that none of the arguments now advanced by the Minister to impugn the determination had been made previously. She contended that it was not open to the Minister to avail of the appeal process under s. 140 to argue want of jurisdiction where s. 131 (8) explicitly provides that the Ombudsman is the sole arbiter of his own jurisdiction

and his decision in that regard is final, subject only to judicial review.

36. It was submitted that quite apart from this statutory provision, it was well settled as a matter of public law that the Minister's failure to raise the jurisdiction issue before the relevant tribunal, here the Ombudsman, was fatal to an appeal on that point in reliance on *Harrington v. An Bord Pleanála* [2005] 1 I.R. 388.

37. The Ombudsman further contended that the Minister effectively put himself out of court by arguing that he is not a person responsible for the management of the relevant scheme. If that is so, then he is not a "party" as defined by s. 126 (1) and therefore not entitled to appeal as s. 140 confines that right to "a party".

38. The Ombudsman further relied upon a series of cases which established that the failure to raise the jurisdiction point at first instance could amount to a waiver and estoppel barring discretionary relief.

39. Without prejudice to those contentions, the Ombudsman further submitted that the Minister was in fact a person responsible for the management of the scheme by virtue of his powers under the FEMPI Act which related directly to the payment of benefits under the rules of the scheme. The point was further made that there was ample authority for the proposition that the court would be slow to interfere with decisions of expert bodies such as the Ombudsman, with a deferential standard of review being applied to statutory appeals from such bodies – see *Ulster Bank v. McCarren* [2006] IEHC 323, *Henry Denny and Sons (Ireland) Ltd v. Minister for Social Welfare* [1998] 1 I.R. 34 and *Willis v. Pensions Ombudsman* [2013] IEHC 352.

40. With regard to the merits of the appeal, the Ombudsman submitted that in reaching his determination, he arrived at an equitable and fair solution within his discretion under the Act. He says that the Minister, in arriving at his decision under s. 6 of the FEMPI Act that it would not be just and equitable to exempt Mr. Farrell's pension from the PSPR, clearly fell into error insofar as he accepted that Mr. Farrell's circumstances were exceptional and materially distinguishable but he nonetheless concluded that it would not be just and equitable to exempt his pension on the basis of an inappropriate comparator and in effect, because it was a large pension in comparison with the average.

### Analysis

41. As will be seen from the foregoing, there is no doubt that the Minister's primary argument here is that the Ombudsman's determination was made without jurisdiction. All the grounds advanced by the Minister are in effect judicial review grounds.

42. The jurisdiction of the Ombudsman to investigate and determine complaints and disputes is clearly defined in s. 131 of the 1990 Act. Save for complaints or disputes in categories prescribed by regulations made by the Minister, which are not relevant in this instance, the Ombudsman is confined to investigating matters arising solely from acts done by or on behalf of persons responsible for the management of a particular pension scheme. His jurisdiction is further limited to investigating two categories of such matters; first, acts of maladministration leading to financial loss and secondly, any dispute of fact or law arising in relation to the acts of such persons.

43. The manner in which such investigations are to be conducted is provided for in the Pensions Ombudsman Regulations, 2003, S.I. No. 397 of 2003. Whether or not a matter falls within the Ombudsman's investigatory jurisdiction under s. 131 (2) is a matter solely to be determined by him under s. 131 (8), which provides that his decision in that regard shall be final.

44. Analogous provisions in relation to the Financial Services Ombudsman were considered by this court in *Square Capital Ltd v. Financial Services Ombudsman* [2010] 2 I.R. 514. In the course of his judgment, McMahon J. said (at page 524):

"It follows from these definitions that the decision as to whether or not a complaint falls within his jurisdiction is one that falls to the Ombudsman to determine. This is not to suggest that the court never has a role to play in interpreting the Act, but it should intervene only in clear cut cases and then, only if such a case contains a serious and significant error.

It is significant to note that the appellant has not brought judicial review proceedings to quash the decision for want of jurisdiction..."

45. In the present case, although no specific question as to jurisdiction was raised by any party, it is clear that the Ombudsman considered himself to have jurisdiction from the very fact that he embarked on the investigation. This must have been evident to the Minister, having regard to the significant interaction between his Department and the Ombudsman by way of correspondence, telephone conversations and emails. Equally, there could have been no doubt in the Minister's mind as to what complaint was being investigated by the Ombudsman i.e. that successive Ministers had refused to grant Mr. Farrell an exemption under s. 6 of FEMPI Act in respect of his pension.

46. Not only was the nature of the complaint made clear to the Minister but also the nature of the remedy or "solution" that was being considered by the Ombudsman. Counsel for the Minister in his reply on the jurisdiction point argued that the Minister had no indication in advance that the Ombudsman was going to err in his jurisdiction and that he was entitled to assume that he would act within it. I cannot accept that submission when it must have been patently clear both what was being investigated and what remedy was being proposed. Counsel further argued that the Minister was not to know that a formal process of investigation was taking place and that accordingly he should make an objection to the Ombudsman's jurisdiction. One might reasonably ask in response, what did the Minister think the Ombudsman was doing? Lack of formality is a recognised feature of investigations of this nature. This is well described by McMenamin J. in *Hayes v. Financial Services Ombudsman and Ors* (Unreported, High Court, MacMenamin J., 3rd November, 2008) where he said (at para. 33):

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

The function performed by the respondent is, therefore, different to that performed by the courts. He is enjoined not to have regard to technicality or legal form. He resolves disputes using criteria which would not usually be used by the courts, such as whether the conduct complained of was unreasonable *simpliciter*; or whether an explanation for the conduct was not given when it should have been; or whether, although the conduct was in accordance with a law, it is unreasonable, or is otherwise improper. He can also make orders of a type that a court would not normally be able to make, such as directing a financial services provider to change its practices in the future. Thus, he possesses a type of supervisory jurisdiction not normally vested in a court. These observations are to be borne in mind when considering whether the decision made by the respondent was validly made within jurisdiction."

47. It seems to me therefore that it is unreal for the Minister to suggest that he did not take issue with the Ombudsman's jurisdiction to investigate Mr. Farrell's complaint because he did not appreciate that an investigation was afoot.

48. It is also clear that all of the jurisdictional infirmities which are now said to have existed both in relation to the investigation and determination ought to have been obvious to the Minister. Yet no objection was taken and consequently no explicit determination on the point was made by the Ombudsman under s. 131 (8).

49. The appeal in this case is of course not against a determination under s. 131 (8) because there can be no such appeal. The Ombudsman's decision is final.

50. Rather, s. 140 (1) provides that a party to an investigation may appeal to the High Court from a "determination" of the Ombudsman. Determinations of the Ombudsman are, as the marginal note indicates, provided for in s. 139. Therefore what may be appealed against is a s. 139 determination in relation to the complaint or dispute. Plainly, such determination cannot include a determination as to jurisdiction, even if made, under s. 131 (8).

51. As already stated, the Minister argues that he is not a person responsible for the management of the NTMA pension scheme and this fact alone deprived the Ombudsman of jurisdiction to consider the complaint. In that regard, s. 126 (3) is relevant as it provides:

"(3) For the purposes of this part the following persons shall be deemed to be responsible for the management of an occupational pension scheme:...

(e) such other person or category of persons as maybe prescribed."

52. Regulation 3 of the Pensions Ombudsman Regulations 2003 provides:

"The administrator of a scheme is prescribed for the purposes of s. 126 (3) (e) of the [1990] Act...

(3) In this Article –

(a) for the purposes of sub-article (1), "administrator" in relation to a scheme means – ...

(ii) any person to whom the performance of the duties of trustees of a scheme under section 59 (1) or (2) of the Act has been delegated;"

Section 59 (1) of the 1990 Act, as inserted by s.42 of the 2002 Act, provides:

"59. – (1) Without prejudice to the duties of trustees generally and in addition to complying with the other requirements of this Act, the duties of trustees of schemes shall include the following:...

(c) Where appropriate, to make arrangements for the payment of the benefits as provided for under the rules of the scheme as they become due, whether in the State or in any other member state, net of any taxes and transaction charges which may be applicable;..." (Emphasis supplied)

53. Counsel for the Ombudsman argues that the Minister, by the terms of the FEMPI Act, reduced the benefits payable to Mr. Farrell under the NTMA scheme and therefore made "arrangements for the payment of the benefits", thus assuming the duties of a trustee and thereby becoming a person responsible for the management of the Scheme. This rather tortuous construction of the statute is unappealing, not least because the Oireachtas, rather than the Minister, has provided for the PSPR by enacting the FEMPI Act. In my opinion therefore, the Minister is correct in submitting that he is not a person responsible for the management of the NTMA pension scheme.

54. However, the necessary consequence of that finding is that he cannot be regarded as a "party" to Mr. Farrell's complaint or to the investigation arising therefrom. Since only a party to an investigation may appeal to the High Court under s. 140, and because no appeal may in any event be taken on jurisdictional grounds, it follows that the Minister is not entitled to pursue this appeal.

55. Whilst that disposes of the matter, in deference to the arguments of the parties, I think I should express my view on the jurisdiction point. It seems to me that the finding that the Minister is not a person responsible for the management of the NTMA pension scheme necessarily excludes the Ombudsman's jurisdiction and explains why a s. 140 appeal never lay. It is beyond argument that the PSPR provided for in s. 2 of the FEMPI Act applies to the totality of Mr. Farrell's pension. His complaint rather is that the effects of s. 2 work an injustice to him in the particular circumstances of his case and for the reasons already outlined, the Minister should have exercised his discretion under s. 6 to exempt the privately funded portion of Mr. Farrell's pension from the operation of s. 2. The Minister declined to do so and gave reasons for exercising his discretion in the way he did. Had the Minister exercised his discretion unlawfully or in a manner contrary to natural and constitutional justice, Mr. Farrell would have been entitled to seek a judicial review of his decision. This is what happened in *Garda Representative Association v. Minister for Finance* [2010] IEHC 78, where the GRA sought to judicially review the Minister's refusal to exclude gardaí from the pension levy for not considering their application properly and giving no adequate reasons for his refusal.

56. In this case, Mr. Farrell elected not to pursue that course but rather made a complaint to the Ombudsman in effect seeking to appeal the Minister's decision.

## Conclusion

57. Whilst undoubtedly the Ombudsman entertained the complaint motivated by a well intentioned desire to correct what he perceived to be an unfairness to Mr. Farrell, it was simply not open to him to seek to disapply a statutory provision duly enacted by the Oireachtas in Mr. Farrell's case. He was equally not entitled to in any sense review the Minister's refusal to grant the exemption sought or to substitute his decision on the merits for that of the Minister which is in effect what he determined.

58. I am satisfied therefore that the Ombudsman strayed well outside his jurisdiction both in undertaking the investigation and making the determination in issue. The necessary corollary of that departure however is that a s. 140 appeal is inappropriate in all the circumstances.

59. Accordingly, for the reasons already given, I will dismiss this appeal.

