[2019] IEHC 938

THE HIGH COURT
JUDICIAL REVIEW

[2017 No. 610 JR]

BETWEEN

ENDA O'ROURKE

APPLICANT

AND

THE DEPARTMENT OF EDUCATION AND SKILLS

RESPONDENT

JUDGMENT of Mr. Justice Meenan delivered on the 18th day of December, 2019

Background

1. As part of the response to the recent financial crisis that engulfed the State, legislation was introduced with a view to reducing the cost of public sector salaries and pensions. The central issue in these proceedings are the changes, concerning public service pensions, that were brought about by the provisions of the Public Service Pensions (Single Scheme and Other Provisions) Act 2012 (the Act of 2012). There were a number of Financial Emergency Measures in the Public Interest Acts which were passed to reduce public salaries.

2. The applicant is a qualified post-primary teacher. He has worked as a technical subjects teacher at Wesley College, Ballinteer, Dublin 16, since Autumn, 2007. Prior to working in Wesley College, he completed a one year teaching placement for the academic year 2006 - 2007 at the Patrician Brothers College, Newbridge, Co. Kildare.

3. From September, 2007 to September, 2016, the applicant was paid directly by Wesley College. The applicant was also informed that he could participate "*in accordance with the terms of the department funded scheme for supervision and substitution, which covers the classes of teachers who are absent and for the supervision and care of pupils outside class hours*". The applicant participated and so, from 2007 onwards, he was employed as a substitute teacher and provided special needs education, teaching supervision, general supervision and performed substitution duties.

4. In 2016, the applicant was designated a regular part-time teacher, an incremental post of one year's duration.

5. The remuneration of teachers, including the applicant, was reduced by the Financial Emergency Measures in the Public Interest Act, 2013. There then followed a period of industrial unrest which, eventually, lead to the Haddington Road Agreement. As part of this Agreement, the supervision and substitution scheme referred to at para. 3 above was no longer optional and did not attract any payment. All teachers were required to participate in this scheme, except for those who were eligible to opt out. The applicant was not so eligible and continued to provide the said supervision and substitution duties without pay for a period of some 57 weeks between October, 2013 and November, 2014.

6. The applicant made provisions for his pension and enrolled in the Secondary, Community and Comprehensive School Teachers Pension Scheme 2009 (the 2009 Pension Scheme).

On 1 January 2013, the Act of 2012 came into operation, the 2009 Pension Scheme was closed to new entrants and a new scheme, the Single Pension Scheme, was created. The terms of this pension scheme are less advantageous than those of the 2009 Pension Scheme. In the applicant's first payslip following his designation as a regular part-time teacher, it appeared that his most recent pension contribution had been attributed to the Single Pension Scheme. Thus, in effect, the applicant had been removed from the 2009 Pension Scheme and enrolled in the Single Pension Scheme created by the Act of 2012. The applicant believed that this was in error and, on contacting the respondent, was referred to Circular 0007/2013 which states: -

> "existing employees who resign /retire and have a break in employment of 26 weeks or greater will be members of the single scheme on return to employment."

7. The applicant sought legal advice and his Solicitor wrote to the respondent on 5 April 2017, stating: -

> "In June, 2016 our client ceased to receive remuneration from Wesley and was appointed to a fully State paid RPT teaching position. To his surprise, he has since received payslips which appear to show he has been enrolled upon the single pension scheme.
>
> This appears to be an error. Our client has received no notification of his disenrollment from the pension schemes of which he has been a member from 2007 up to June, 2016 and has not been notified of any reason why he should now be enrolled upon the single pension public services pension scheme."

8. The respondent replied to this letter on 15 May 2017. This letter accepted that the applicant had been employed as a substitute teacher on various dates between 5 October 2006 and 11 October 2013. Referring to the period between October, 2013 and November, 2014, when the applicant, on his uncontradicted evidence, did supervision and substitution duties without pay, the letter stated as follows: -

> "Mr. O'Rourke recommenced after a break in service of 57 weeks as a substitute teacher on 17th November, 2014 and was correctly put into the single public service pension scheme."

9. The applicant states that he has never resigned or retired nor did he cease to perform supervision and substitution duties. He never ceased to serve as a teacher in Wesley College and maintains that he was wrongfully removed from the 2009 Pension Scheme and put into the Single Pension Scheme.

The application for judicial review

10. On 24 July 2017, the High Court (Heneghan J.) gave leave to the applicant to apply, by way of judicial review, for, *inter alia*, the following reliefs: -

(a) An order of *certiorari* quashing the notification/direction of the respondent, made on the 15 May 2017, advising the applicant, *inter alia*, that he was no longer a member of the 2009 Pension Scheme;

(b) An order of *certiorari* quashing the notification/direction of the respondent, made on the 15 May 2017, advising the applicant, *inter alia,* that his employment with the respondent had terminated on 11 October 2013 and had recommenced after a break of 57 weeks, on 17 November 2014; and

(c) An order of *certiorari* quashing the notification/direction of the respondent, made on the 15 May 2017, advising the applicant that he had been enrolled on the Single Pension Scheme, on 17 November 2014.

11. The following issues have to be determined: -

(1) Was it lawful for the respondent to remove the applicant from the 2009 Pension Scheme and enrol him in the Single Pension Scheme? How the 57 week period, between October, 2013 and November, 2014, is legally characterised is central to answering this; and

(2) For the purposes of O. 84, r. 21 of the Rules of the Superior Courts, did the three-month period of time start to run from 15 September 2016, when he received his first payslip indicating that his most recent pension contribution had been attributed to a Single Pension Scheme? If so then, as application for leave was not made until 24 July 2017, these proceedings are out of time.

To resolve the first issue, it is necessary to examine the provisions of the Act of 2012, in particular, s. 10.

Statutory provisions

12. The Act of 2012 ended the system of specific pension schemes for various members of the public service and created a Single Pension Scheme for new entrants. For those who were not new entrants to the public service, the Act preserved membership of particular pension schemes for public servants who were already members of such schemes.

13. The Act of 2012 had to address the issue as to what is the position of persons who may have had a break in their public service but then returned. To answer this, s. 10(5) provides as follows: -

> "Where on or after the operative date a pensionable public servant who is not a Scheme member ceases to serve in a public service body, then, subject to section 48, that person shall, if he or she subsequently takes up a pensionable office or position within the public service, be regarded as a Scheme member in respect of such subsequent service unless he or she takes up appointment —
>
> (a) under the same contract of employment, or

(b) as a public servant no later than 26 weeks following the last day of service prior to cessation."

14. In interpreting s. 10(5), a number of definitions are relevant: -

"'pensionable public servant' means a public servant who –

(a) is employed in a pensionable post by a public service body, or
(b) holds pensionable office or other pensionable position in a public service body;

'public servant' means—

(a) a person who is employed by, or who holds any office or other position in, a public service body,
(b) …

'public service body' means—

(a) ...

(i) any other body (other than a body specified or referred to in the Schedule) that is wholly or partly funded directly or indirectly out of monies provided by the Oireachtas or from the Central Fund … and in respect of which a pre-existing public service pension scheme exists or applies or may be made, …"

"'scheme' means single public service pension scheme."

Submissions

15. Ms. Cliona Kimber S.C., on behalf of the applicant, submitted that a right to a pension is a property right protected by the Constitution and, thus, the provisions of the Act of 2012, which may have the effect of removing the applicant from the 2009 Pension Scheme and enrolling him in the less advantageous Single Pension Scheme, must be strictly construed. Ms. Kimber further submitted that the fact that, for a period of some 57 weeks, the applicant was not paid for supervision and substitution duties did not mean, as contended by the respondent, that he ceased "*to serve in a public service body*". If this is not the case, then the applicant relies on s. 10(5)(a) in that the applicant took up an appointment "*under the same contract of employment*". In both these situations it is contended that the applicant would be outside the terms of the Act of 2012 and thus entitled to remain in the 2009 Pension Scheme.

16. Mr. Michael O'Donnell S.C., on behalf of the respondent, submits that the 57 week period, when it is accepted the applicant received no remuneration from the respondent, amounts to ceasing "*to serve in a public body*". Mr. O'Donnell submits that the words "*ceases to serve in a public service body"* refer back to the expression "*pensionable public servant*" and thus mean ceasing to serve in a public service body in that capacity. The period of 57 weeks is clearly in excess of the 26 weeks, as is provided for in s. 10(5)(b), so, it is

submitted, the applicant falls within the provisions of the Act of 2012 and was lawfully enrolled in the Single Pension Scheme.

Consideration of issues

17. In his grounding affidavit, the applicant states that he provided supervision and substitution hours as a qualified post-primary teacher without break right up to his appointment as a regular part-time fully paid teacher in 2016. Though he was not paid for these duties, he states that he did not have a "*break in service*" between October, 2013 and November, 2014, the 57 weeks referred to. It was not disputed that the applicant did provide the services in that period.

18. In my view, this case turns on what interpretation is to be given to "*ceases to serve in a public service body*". It is not disputed that Wesley College is "*a public service body*". This narrows the issue. I accept, given its clear impact on the applicant's property rights which are protected by the Constitution, that s. 10(5) of the Act of 2012 must be strictly construed. I refer to the following passage from the judgment of Murray J. (as he then was) in the decision of the Supreme Court in *Bupa Ireland Ltd. v. Health Insurance Authority* (No. 2) [2012] 3 I.R. 442: -

> "… where the Legislature is enacting provisions, however sound the reasons for them may be, which have potentially serious implications for legal rights, including Constitutional rights, of persons or corporations, one must expect that the intended ambit or application of such provisions will be expressed in the legislation with reasonable clarity."

19. In my view, accepting the submission of the respondent that "*ceases to serve*" means ceasing to serve in the capacity as a "*pensionable public servant*" would offend this principle. In effect, the court is being asked to read words into s. 10(5) which are not there. In my view, such is not permissible in that the court would, in effect, be rewriting the subsection.

20. The applicant did serve in Wesley College during the said 57 weeks, although not paid for his substitute and supervision work. This was regarded as a period of service by the respondent, as per a letter dated 13 November 2016 which approved the applicant's application for the award of incremental credit. The "*period of service*" stated in the letter refers to "*1st September, 2007 to 31st August, 2016".*

21. The fact that for the period of 57 weeks the applicant was not paid by the respondent is not a determining factor. This was starkly illustrated in the High Court decision in *Nic Bhrádaig v. EAT and Mount Anville Secondary School* [2015] IEHC 305. This case considered the provisions and effects of the Financial Emergency Measures in the Public Interest (No. 2) Act 2009, which reduced certain public sector salaries. In this Act, the definitions of both public servant and public service body are identical to those in the Act of 2012. In this case, the applicant was employed by the second named respondent, a private fee paying secondary school, as a school secretary. As the applicant received no remuneration from the State, she argued that the provisions of the Act reducing salaries

did not apply to her and that the State would not benefit from any reduction in her salary. Baker J. held, in upholding the decision of the EAT, that the appellant was subject to the salary reductions in the said Act, stating: -

> "40. Thus it seems to me that while Ms Nic Bhrádaig may be correct as a matter of fact that the school does not benefit from the reduction in her salary, the legislation defines her as a person to whom the statutory reduction must be applied, and she is for the purpose of this Act, and no other purpose a "public servant", and employed by a "public service body" as defined in FEMPI (No. 2). Accordingly, I reject the appeal and affirm the order of the EAT."

22. Thus, service in a "*public body*" was sufficient for Ms. Nic Bhrádaig to suffer a cut in her salary notwithstanding the fact that her salary was not paid by the State.

23. By reason of the foregoing, I reach the conclusion that the applicant did not cease "*to serve in a public body"* and, as there was no such break in his service, he was wrongfully removed from the 2009 Pension Scheme. Given this conclusion, I do not have consider whether the applicant is entitled to avail of the provisions of s. 10(5)(a).

Time

24. Order 84, r. 21 of the Rules of the Superior Courts provides that an application for judicial review should be made "*within three months from the date when grounds for the application first arose*". The respondent maintains that the three months commenced when the applicant received his pay slip of 15 September 2016, which indicated that his pension contribution had been attributed to the Single Pension Scheme.

25. The issue as to when time commences to run has been the subject of a number of authorities. I refer to the decision of Clarke J. (as he then was) in *Veolia Water UK Plc. v. Fingal Co. Council* (No. 1) [2007] 1 I.R. 690 where he stated: -

> "It seems to me that the question of whether grounds may be said to have arisen on the facts of any individual case should be determined by reference to whether there has been a formal adverse consequence which has crystallised to the extent of a formal step in the process being taken adverse to the interests of the applicant concerned. The fact that informal steps, capable of reversal, have been taken does not, it seems to me, give rise to grounds for challenge because it should not be assumed that any such informal error (if it be an error) will not be discovered and corrected before the process comes to an end."

26. In *North East Pylon Pressure Campaign Ltd. & Ors. v. An Bord Pleanála & Ors*. [2016] IEHC 300, Humphreys J. stated: -

> "121. It seems to me that having regard to all of the considerations referred to in this judgment, only a formal decision having irreversible effects triggers the start of the running of time for the purposes of O. 84 (as with s.50). This is normally the final decision for the simple reason that most interim decisions are capable of being

rectified in substance in favour of the applicant prior to or by means of the final decision."

27. In order to start time running, there must a final decision. This is the case notwithstanding the fact that the final decision may affirm what was the first indication of an adverse decision.

28. In this case, the pension reduction referred to in the payslip of September, 2016 undoubtedly put the applicant on notice of a decision adverse to his interests. The applicant followed this matter up with enquiries both to the respondent and the Revenue. This culminated in a letter from his Solicitor to the respondent, dated 5 April 2017. The respondent replied by letter, dated 15 May 2017, wherein it was made clear that the reason why the pension deduction had been made in the payslips in September, 2016 was that under the Act of 2012 the respondent was now enrolled in the Single Pension Scheme and was no longer a member of the 2009 Pension Scheme. I am satisfied that this was the point in time when the three months for the purposes of O. 84, r. 21 of RSC began to run. As the application was made in July, 2017, the applicant is not out of time.

Conclusion

29. By reason of the foregoing, I am satisfied that the applicant is entitled to the reliefs sought herein and I will hear counsel on this.