Neutral Citation [2013] IEHC 607

THE HIGH COURT

[2012 No. 286 MCA]

BETWEEN

BLACKROCK COLLEGE

APPELLANT

AND

MARY BROWNE

RESPONDENT

JUDGMENT of Mr. Justice Hedigan delivered on the 20th day of December 2013

Application
1. The appellant seeks an order pursuant to s. 17 (6) of the Protection of Employees (Part Time Work) Act 2001, and pursuant to the provisions of O. 84C of the Rules of the Superior Courts setting aside the determination of the Labour Court of 18th July, 2012, made in favour of the respondent.

Parties
2. The appellant is a private school and has its place of business at Rock Road, Blackrock, County Dublin. The respondent is a secondary school teacher employed by the appellant.

Background
3.1 The respondent is a fully qualified secondary school teacher and is registered with the Teaching Council. She has been employed privately by the appellant to teach Spanish in the appellant college since 6th November, 2000. The appellant employs a number of fulltime and part-time teachers, most of whom are paid a salary and other benefits by the Department, and a small number (such as the respondent) who are paid directly by the appellant. The respondent teaches 14 hours a week. She is also required to perform certain work outside of school hours in the same manner as comparable full-time teachers that are paid by the Department of Education and Skills (hereinafter "the Department").

3.2 In accordance with circular 25/2011 published by the Department on the 8th April, 2011, the respondent is required to work up to an additional 33 hours each year. These additional hours are not pro-rata by reference to the respondent's part-time hours/salary. Her proportionate additional hours are therefore in fact greater than those of fulltime teachers in the school.

3.3 On 12th July, 2006, the respondent brought a complaint before the Rights Commissioner pursuant to s. 16 of the Protection of Employees (Part-Time Work) Act 2001, claiming that she had been treated less favourably in respect of her pay, pension and other conditions of employment than another teacher (the comparator teacher) paid by the Department and who is employed in a fulltime capacity. The Rights Commissioner on 30th September, 2008, decided that the respondent's complaint was well founded and directed that she be awarded a contract of indefinite duration comparable to her colleagues on the full time staff.

3.4 On 31st October, 2008, the appellant appealed this decision pursuant to s. 17 of the 2001 Act, to the Labour Court contending that the respondent should not be entitled to use as a comparator a fulltime Department-funded teacher. The Labour Court, with the agreement of the parties and with a view to saving costs, determined by way of preliminary hearing the question of whether the comparator nominated by the respondent was an appropriate comparator for the purposes of s. 7 of the 2001 Act.

In its determination of the preliminary issue of 2nd February, 2009, the Labour Court declined to uphold the school's case on the appropriateness of the respondent's chosen comparator finding that:-

1. The nominated comparator was a comparable employee *vis à vis* the respondent;

2. The respondent and the comparator were engaged in like work for the purposes of the act;

3. The respondent was entitled to succeed in her claim unless the impugned differences were justified on objective grounds.

3.5 When the case came on for hearing on 13th of February 2012, the appellant sought to have the Labour Court reverse or vacate its preliminary determination on the basis that the Labour Court's preliminary determination was in conflict with the decision of the High Court in *Catholic University School v Dooley & Keogh* [2010] IEHC 496 (hereinafter "*CUS*") which was delivered after this preliminary ruling. In that case, Dunne J. found that the Labour Court had misdirected itself in law in an almost identical ruling in a similar case in relation to the appropriateness of the comparator who was paid by the state rather than by the individual school.

3.6 The Labour Court ruled on 13th February, 2012, that it had no jurisdiction to vacate its preliminary determination and proceeded on the basis that there were two outstanding issues, namely whether there were objective grounds justifying the less favourable treatment and if there was no objective justification the redress to which the respondent was entitled.

3.7 On 18th July, 2012, the Labour Court determined that there were no objective grounds justifying the less favourable treatment and therefore found that the respondent's claim was well founded. It determined that the respondent was entitled to the same terms and conditions of employment as those afforded to her nominated comparator with effect from a date 6 months prior to the date on which her claim was initiated before the Rights Commissioner *i.e.* on 12th January, 2006.

The appellant has now appealed this ruling of the Labour Court to this Court.

Appellant's Submissions

4. 1. An appeal is appropriate.This appeal is brought pursuant to the provisions of s. 17(6) of the Protection of Employees (Part-Time Work) Act 2001 which permits an appeal on a point of law to this Court from a determination of the Labour Court. This section states:-

> "(6) A party to proceedings before the Labour Court under this section may appeal to the High Court from a determination of the Labour Court on a point of law and the determination of the High Court shall be final and conclusive."

The reliefs sought by the appellant concern the procedure adopted by the respondent and relate to the law as applied by the Labour Court. The appellant relies on the Supreme Court judgment in *EMI Records (Ireland) Limited v The Data Protection Commissioner* [2013] IESC 34, where, at para. 4.8 Clarke J. outlined the procedure to be followed in similar circumstances to those herein:-

> "4.8 Thus the overall approach is clear. The default position is that a party should pursue a statutory appeal rather than initiate judicial review proceedings. The reason for this approach is, as pointed out by Hogan J. in Koczan, that it must be presumed that the Oireachtas, in establishing a form of statutory appeal, intended that such an appeal was to be the means by which, ordinarily, those dissatisfied with an initial decision might be entitled to have the initial decision questioned."

An appeal is therefore entirely appropriate and the appellant would have been met with an objection that it had not exhausted alternative remedies had it failed to utilise that appeal mechanism.

4.2. There should be no referral to the Court of Justice of the European Union

The appellant does not agree with the respondent's submission that this Court should make a preliminary reference to the CJEU. Article 267 of the Treaty on the Functioning of the European Union is designed to be used only if there is a question to be answered which falls into one of the categories mentioned in the first part of that Article. Thus, the decision to make a preliminary reference is discretionary and that discretion is not absolute.

Article 267 states:-

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon…"

The respondent in this matter requested the Labour Court to make a referral to the CJEU for a preliminary ruling in relation to the very question that had already been answered by Dunne J. in the "*CUS*" case, namely whether the definition of "comparable full-time worker" encompasses a person who works in the same establishment but whose salary, terms and conditions are determined by a third party over whom the appellant has no control.

In *CILFIT Srl and Lanificio di Gavardo SpA v. Ministry of Health* (Case C- 283/81) the CJEU at para. 11 of its judgment made it clear that a reference need only be made when the national court:-

> "consider[s] that recourse to Community law is necessary to enable [it] to decide a case…"

Likewise, in *Monin Automobiles-Maison du Deux Roues* (Case C-428/93) at para. 9 the CJEU stated that for a reference to be admissible:-

> "…there must be proceedings pending before the national court and the answer to the problem of interpretation must be necessary for resolving those proceedings."

An application for a reference for a preliminary ruling is not a relief in itself. It is either necessary for the national court to make a reference in order to make its decision or it is not. The appellant argues that such a reference is unnecessary and therefore this Court should not refer the matter.

4. 3. The respondent chose the wrong comparator

The central issue in this case is whether the respondent is entitled to choose a department paid full time teacher as her comparator. Section 7(2) of the 2001 Act defines who can be a comparator for the purposes of a claim by a part-time employee to equal treatment with a fulltime employee.

The appellant contends that the comparator chosen by the respondent is not an appropriate comparator and that the appropriate comparator is a privately paid full time teacher employed by the appellant. It asserts that its view is supported by the wording of Directive 97/81/EC which the 2001 Act was intended to implement. Clause 3(2) of that Directive defines a full-time worker:-

> "2. The term 'comparable full-time worker` means a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills."

The appellant contends that the respondent has avoided comparing herself to an appropriate comparator since it could not be shown that she is treated less favourably by reference to that comparator.

4.4 The respondent and comparator have different employers.

Department paid teachers are employed within a tripartite contractual arrangement in which the appellant is one of the parties, the Department and the teacher being the other two parties. The bipartite contract which exists between the private teacher and the appellant is not the same type of employment contract or relationship which Department paid teachers have and it is submitted by the appellant that the respondent at no time has had any contractual relationship with the Department.

For Department paid teachers, the Department is their paymaster and is the sole determiner of their financial terms and conditions of employment including rates of pay, pension arrangements, sick pay and maternity leave. They are also registered with the Teaching Council and have access to the Teachers Conciliation Council (hereinafter "TCC") within a framework to which the appellant is not a party. Privately paid teachers are employed directly by the school, have no relationship whatsoever with the department and are not regulated by it. They do not enjoy the benefits enjoyed by the department funded teachers such as pension scheme, extensive sick pay and maternity pay entitlements, access to a re-deployment panel, access to career breaks and various other financial benefits which have been negotiated directly with the Department.

The respondent belatedly points out that the Joint Management Board (of which the school is a member) sits at the TCC and suggests that Dunne J. in *CUS* was not aware of this. The Labour Court in this case was never provided with any evidence or submissions to suggest that the Joint Management Board had any influence in any discussions which took place at the TCC between the teachers' unions and the Department in determining the terms and conditions of Department paid teachers that are regulated by the Department.

The appellant refutes any suggestion that the terms and conditions of Department teachers are set by the teaching Council and asserts that they are merely negotiated by them which is different. The Joint Management Board's role is observatory not active and there is no evidence that those negotiations influence the Minister for Education in setting the terms and conditions of teachers. Moreover, s. 24(3) of the Education Act 1998 (as amended) confirms that terms and conditions of Department paid teachers appointed by the Board of Management "shall be determined from time to time by the Minister". Therefore as a matter of law, the TCC cannot determine terms and conditions, including pay, for department paid teachers and cannot override clear legislative provisions.

The *ratio* of Dunne J. in *CUS* was not based on a finding that the Department has no input into the terms and conditions of privately paid teachers but rather that the school has no input into the Department paid teachers. Notwithstanding the above, it is argued that no concrete evidence was put before the Labour Court in this case that the school has such control.

The respondent's argument that the appellant retains pay cuts imposed on the respondent merely demonstrates to an even greater degree the absence of the Department's role in relation to the terms and conditions of privately paid teachers.

4.5 Relevance of Financial Emergency Measures in the Public Interest. Many of the factual claims now sought to be made by the respondent were not put before the Labour Court prior to the making of the determination in July 2012 *e.g.* the argument that extensive changes were brought about by the Financial Emergency Measures in the Public Interest Legislation (hereinafter "FEMPI") such as the imposition of 33 hours of unpaid work.

This court cannot be expected or required to examine factual matters which were not before the Labour Court, whether because they were not cited to the Labour Court or whether because that particular factual scenario had not materialised at the time of the Labour Court's determination of the issues.

Even if the respondent is correct to say that there is a difference in circumstances now to what pertained when *CUS* was decided and if FEMPI means the department has a role in the respondent's contract, the appellant argues that such role is no different to the role it exerted previously and could be likened to the role of the state in the solicitors' profession. If it in any way establishes a tripartite relationship it is an entirely different one to that argued by the respondent. All FEMPI does is increase the department's role in the respondent's job by imposing a percentage cut on her pay. This is not the same as setting her pay and does not signify that the Department has any input into her terms and conditions.

The respondent issued a fresh claim before the Rights Commissioner in December 2011 and it is submitted that that is the appropriate forum to ventilate any arguments she may have in relation to FEMPI. Such matters cannot be relevant to this Court's determination of whether the Labour Court misdirected itself in law in the conclusions it drew of the law and/or on the facts before that legislation was introduced.

4.6. *Catholic University School v Dooley & Keogh*

It is submitted that the decision in *CUS* to the effect that Department paid teachers were not suitable comparators was correct and the appellant contends that the Labour Court erred in law in failing to follow that binding judgment.

Dunne J. in *CUS* recognised that the department had some input into how a private teacher was treated by their employer *i.e.* the Board of Management. She found however that the state's ability to direct that the pay rate set by the school be subject to a percentage reduction was not sufficient to create a tripartite relationship. Likewise, it was accepted that private teachers had access to the department pension scheme, were obliged to teach the department curriculum and were subject to departmental evaluation. This notwithstanding Dunne J. found that the Department paid teachers were not the correct comparators.

The appellant relies on *Metock & Ors –v.- Minister for Justice Equality & Law Reform* [2008] IEHC 77 where Finlay Geoghegan J. stated at para.50 in a situation where the matter at issue was already the subject of another High Court decision that:-

> "50 . This is a decision of a court of equal jurisdiction by which I am not bound. Nevertheless, I should only depart from this decision if the applicants clearly establish that it was wrongly decided, in accordance with the principles set in *Irish Trust Bank v. Central Bank of Ireland* [1976 - 7] I.L.R.M. 50.

Thus, it is argued this Court should not depart from the decision in *CUS*.

Respondent's Submissions

5. 1. Appeal is not the appropriate remedy.

The present appeal is brought pursuant to s. 17(6) of the 2001 Act which provides for a confined jurisdiction on a point of law. The reliefs sought by the appellant concern the procedure adopted by the Labour Court and do not concern a point of law. These reliefs, the respondent argues, should therefore be sought by way of judicial review (an order of *certiorari* and/or *mandamus*) rather than appeal, and the appellant has not done this.

Moreover, the respondent contends that the time to lodge any appeal of the preliminary decision of the Labour Court has expired. Likewise, she contends, time has expired to appeal the determination of the Labour Court of the 13th February, 2012, in which it ruled that it could not vacate or alter its preliminary decision.

5. 2. The limited role of the Court to change a decision.

The respondent asserts that the Labour Court was fully entitled on the law and on the facts to determine that she and her nominated comparator were engaged in like work within the meaning of the 2001Act.

The burden of proof in establishing an error of law is on the appellant and it is an onerous one. In *Minister for Agriculture v Barry* [2008] IEHC 216, at p.618, Edwards J., referring to the role of an appellate court, made reference to the judgment of Sir John Donaldson M.R. in the English case of *O'Kelly v. Trusthouse Forte plc*. [1983] I.C.R 728 where he stated at pp. 760 to 761:-

> "Unless the direction on law has been expressed it can only be so satisfied if, in its opinion, no reasonable tribunal, properly directing itself on the relevant questions of law, could have reached the conclusion under appeal. This is a heavy burden on an appellant."

In *An Post v Monaghan* [2013] IEHC 404 this Court stated at para. 5 of the decision:-

> "5. This is an appeal on a point of law from a decision of the Labour Court. I will deal first with the role of the Court in such an appeal. It is plainly a limited role. The Court may only intervene where it finds that the Tribunal based its decision on an identifiable error of law or an unsustainable finding of fact. The Court should be slow to interfere with the decisions of the Labour Court because it is an expert administrative Tribunal. See *Henry Denny & Sons. v. The Minister for Social Welfare* [1998] 1 I R. 539. Unless a claim of irrationality is sustained, the Court cannot weigh the strengths or weaknesses of the arguments or evaluate its determination thereon. See *Wilton v. Steel Company of Ireland Ltd.* [1999] ELR 1, (O'Sullivan J., p. 5). The Court may, however, examine the basis upon which the Labour Court found certain facts. It can consider whether certain matters ought or ought not to have been considered or taken into account by the Labour Court in determining the facts. See *NUI Cork v. Ahern* [2005] IESC 40 (McCracken J.)."

5. 3. Objective justification

Council Directive 97/81/EC provides that part-time workers may not be treated in a less favourable manner than comparable fulltime workers solely because they work part-time unless different treatment is justified on objective grounds. The Protection of Employees (Part Time) Work Act 2001 was adopted to implement this Directive. In this instance it is argued that the respondent is clearly being treated less favourably than her fulltime comparator, in breach of the Directive. The respondent cannot claim parity with the Department paid teachers in respect of sick pay or indeed any pay, notwithstanding that any deductions imposed upon the Department funded teachers are automatically imposed upon the respondent. Moreover, she is obliged to attend meetings outside school hours in circumstances where she will not be paid for same while her comparator is paid. Thus the respondent is required to bear the same adverse measures as are imposed on a department funded teacher without receiving the same benefits.

5.4. The respondent is entitled to choose her comparator

This Court is being asked to decide whether the Rights Commissioner and the Labour Court were correct in finding that the respondent was entitled to choose a full time department funded teacher as comparator under s.7(2)(a) of the 2001 Act.

Section 7(2) of the 2001 Act provides:-

> "7.—(2) For the purposes of this Part, an employee is a comparable employee in relation to the employee firstly mentioned in the definition of "part-time employee" in this section (the "relevant part-time employee") if—
>
> (a) the employee and the relevant part-time employee are employed by the same employer or associated employers and one of the conditions referred to in *subsection (3)* is satisfied in respect of those employees,
>
> (b) in case *paragraph (a)* does not apply (including a case where the relevant part-time employee is the sole employee of the employer), the employee is specified in a collective agreement, being an agreement that for the time being has effect in relation to the relevant part-time employee, to be a type of employee who is to be regarded for the purposes of this Part as a comparable employee in relation to the relevant part-time employee, or
>
> (c) in case neither *paragraph (a)* nor *(b)* applies, the employee is employed in the same industry or sector of employment as the relevant part-time employee is employed in and one of the conditions referred to in *subsection (3)* is satisfied in respect of those employees."

The respondent chose as her comparator a teacher who works in the same school, who is engaged in like work with her and whose salary is paid by the Department. The respondent refutes the appellant's contention that the comparator chosen is not valid because the department pays the salary of the comparator teacher and the appellant pays the respondent's salary. The respondent asserts that the legal position is that in assessing whether there is equal pay for equal work, the work of the entire pool of workers in a group should be examined and not merely a subset of a group. By choosing that particular comparator the respondent was seeking to compare herself with a broad number of employees who represent the majority not the minority.

The CJEU decision in *Specialarbejderorbundet i Danmark v Dansk Industri* (Case C-400/93) was posed as to whether it was possible to section off a certain subset of painters and compare them with a certain subset of turners. The CJEU stated very clearly at para. 38 that such sub-division was not possible.

> "…[f]or the purposes of the comparison to be made between the average pay of two groups of workers paid by the piece, the national court must satisfy itself that the two groups each encompass all the women who, taking account of a set of factors such as the nature of the work…can be considered to be in a comparable situation and that they cover a relatively large number of workers ensuring that the differences are not due to purely fortuitous or short-term factors or to differences in the individual output of the workers concerned."

The respondent argues that it is settled law that an employee is entitled to choose her comparator and she made the correct choice. She relies on the comments of O'Sullivan J. in *Wilton v Irish Steel* [1999] ELR *1*, in this regard. In that case, O' Sullivan J. stated at p.3:-

> "I agree that that the plaintiff is entitled to choose her comparator…".

In the Supreme Court decision in *National University of Ireland, Cork v Ahern & ors.* [2005]SC IE40, referring to *Wilton,* Mc Cracken J. in giving the determination of the court stated at para.13 of his decision:-

> "Where a party is claiming discrimination under these provisions, it is for that party, in the present case the respondents, to nominate as comparators persons who it is alleged are doing 'like work'.

Moreover, in *The Minister for Finance v Una Mc Ardle* [2007] IEHC 98, the High Court affirmed the Labour Court's decision that the respondent was entitled to choose her own comparator.

Therefore it is argued that the respondent was entitled to choose a department funded teacher as her comparator within the meaning of s.7 of the 2001 Act and such comparator is valid in law.

5. 5. The decision in *CUS* should not be followed.

The appellant seeks an order compelling the Labour Court to follow the judgment of the High Court in *CUS*, delivered subsequent to the preliminary determination of the Labour Court in this matter on 2nd February, 2009.

The respondent argues however that the judgment in CUS is not determinative of this matter and it is contrary to decided authority, namely the Supreme Court decision in *O'Keeffe v Hickey* [2009]2 IR 302. That case is authority for the proposition that the school is the employer of both the claimant and the comparator. At para. 206 of the judgment Fennelly J found:-

> "Responsibility for day to day management and in particular, the hiring and firing of teachers remains with the manager… [a] teacher may not be employed if his qualifications are not recognised by the Minister, and ,if the Minister withdraws recognition, he may be unemployed. Nevertheless, it is the manager and not the Minister who decides on which teacher to employ. The contract of employment is between the manager and the teacher. The manager may dismiss a teacher without the sanction of the Minister."

In *CUS*, the court departed from this general legal position and based its decision on the conclusion that there existed a tri-partite relationship between teachers entirely paid by the Department, the school and the Department, while erroneously concluding that only a bipartite relationship existed between the privately paid teachers and the school. The court based its reasoning on the belief that the appellant has no part in the salary of the Department funded teachers and by implication the Department has no part in the salary of the privately paid teachers. This is not the case. The respondent and other privately paid teachers are in fact entitled to join the Department pension scheme. Privately paid teachers are inspected by the department in the context of whole school evaluations and course subject inspections. Likewise, the school plays a part in fixing the terms and conditions of all of its teachers, including those paid by the department. These terms and conditions are negotiated through the Teachers Conciliation Council at which the school is represented through the joint Boards of management. Therefore, as far as concerns all the usual *indicia* of employment Department teachers are actually employed by the school although they are paid by the Department. Moreover, for privately paid teachers there is a tripartite relationship such as exists for the comparator.

Even if it were found that the terms and conditions of the respondent and her comparator were determined by different processes this does not exclude the application of Directive as held by the Court of Justice of the European Union in *Dr Pamela Enderby v Frenchay Health Authority and Secretary of State for Health* (Case C- 127/92).

When *CUS* was decided Dunne J. was unaware of the State's power to intervene in private contracts. Subsequent to her decision, there was a significant change in the factual circumstances applicable to the employment of the respondent with the enactment of the FEMPI legislation. From the resultant changes imposed on the respondent's salary, it is now fully clear that the Department has always been empowered to determine to a large extent the terms and conditions of both Department funded and privately paid teachers and that the school no longer exclusively determines the terms and conditions of privately paid teachers such as the respondent. The Department has imposed upon the respondent a pay cut of 5% as of 1st May, 2011, which has been implemented by the school, and which deduction is not remitted by it to the Department. While it appears from correspondence sent by the appellant to the respondent that it did not wish to reduce her pay, it felt it was statutorily bound to do so. The respondent has also suffered a pay increment freeze, a pension levy introduced for public sector workers on the 1st March, 2009, and the requirement to work 33 additional hours per year pursuant to the Croke Park Agreement.

The respondent also argues that *CUS* should not be followed since it took the incorrect view of the definition of an employer.

The appellant relies on the difference in the paymasters of the respondent and the comparator to argue that the respondent is not entitled to compare herself to a Department paid teacher and relies on the *ratio decidendi* of the Dunne J. that:-

> "…the legislation expressly provides that the party paying the worker is, for the purpose of the legislation, the employer…"

If it is accepted as a general principle of law that the payer is the employer this would have immense implications for other persons for whom the State provides funding for their employment. It is a matter of fact that some teachers have part of their salary funded by the Department and part of their salary funded by the Board of management. CUS cannot be relied upon in situations where teachers are paid both publicly by the department and privately by the school. By the rationale of the decision in that case this would amount to these teachers having two separate employers which is an untenable position.

5. 6. Preliminary Reference

The respondent argues that the refusal of the court to refer to the CJEU in *CUS* arose from a procedural issue, namely that the request for a reference had not been made at the time that the matter was still pending before the court.

The respondent therefore argues that if this court is now to conduct a *de novo* consideration of the applicability of s. 7(2) of the Act to the respondent or is inclined to remit the matter to the Labour Court or in the event that the court is inclined to decide against her on the question of whether the existence of a bipartite relationship in respect of her employment and a tripartite relationship in respect of the comparator's employment justifies discrimination it should refer the matter to the CJEU for clarity.

DECISION

6.1 Is this appeal the appropriate format or should the appellant have moved in judicial review? It seems to me as the Oireachtas has provided a particular statutory appeal in this type of case, then that is the way the appellant should proceed. Here, the Labour Court has made a determination which, the appellant argues, is based on an error of law *i.e.* its preliminary finding was incorrect in law as

demonstrated by the subsequent decision of Dunne J. in *CUS*. Section 17(6) provides specifically for an appeal on a point of law. It is difficult to see how it would be more appropriate to move in judicial review in the circumstances of this case. Thus, it seems to me that the appeal format is the correct one in the light of the specific determination herein. See *EMI Records (Ireland) Ltd. v. The Data Protection Commissioner* [2013] IESC 34, Clarke J. at para. 4.8:

> "4.8 Thus the overall approach is clear. The default position is that a party should pursue a statutory appeal rather than initiate judicial review proceedings. The reason for this approach is, as pointed out by Hogan J. in *Koczan*, that it must be presumed that the Oireachtas, in establishing a form of statutory appeal, intended that such an appeal was to be the means by which, ordinarily, those dissatisfied with an initial decision might be entitled to have the initial decision questioned."

I gratefully adopt this *dictum*.

6.2 The role of the court in this kind of appeal was considered by this court in *An Post v. Monaghan* [2013] IEHC 404, at para. 5:

> "5. This is an appeal on a point of law from a decision of the Labour Court. I will deal first with the role of the Court in such an appeal. It is plainly a limited role. The Court may only intervene where it finds that the Tribunal based its decision on an identifiable error of law or an unsustainable finding of fact. The Court should be slow to interfere with the decisions of the Labour Court because it is an expert administrative Tribunal. See Henry *Denny & Sons. v. The Minister for Social Welfare* [1998] 1 I R. 539. Unless a claim of irrationality is sustained, the Court cannot weigh the strengths or weaknesses of the arguments or evaluate its determination thereon. See *Wilton v. Steel Company of Ireland Ltd.* [1999] ELR 1, (O'Sullivan J., p. 5). The Court may, however, examine the basis upon which the Labour Court found certain facts. It can consider whether certain matters ought or ought not to have been considered or taken into account by the Labour Court in determining the facts. See *NUI Cork v. Ahern* [2005] IESC 40 (McCracken J.)."

Thus, where as herein, the appeal is essentially one limited to a consideration of the legal question as to whether the correct comparator was used, the court must be satisfied that the Labour Court based its decision upon an identifiable error of law. Was the preliminary determination such an error?

6.3 It was agreed by both sides that the central question was as to whether the comparator chosen by the respondent was the correct one. Could she choose a fulltime 'Departmental' teacher or was she obliged to choose a fulltime 'private' teacher in order to find a true comparator. This question was directly addressed by Dunne J. in the CUS case (cited above). The appellant relies upon this judgment whilst the respondent argues that it was wrongly decided, primarily because the learned judge did not then know of the power of the Minister under the FEMPI legislation.

In that case, the key finding is set out at p. 520 of the IEHC report as follows:

> "[53] Although the chosen comparators appear to come within the definition of comparable full time employees as defined in the legislation, I have come to the conclusion that because of the fact that the Minister for Education determines the terms and conditions of the Department funded teacher and the school determines the terms and conditions of the privately paid teachers, the Labour Court has fallen into error in finding that the claimants were entitled to choose a full time Department funded teacher as a comparator. The school has no hand, act or part in determining the salary and other terms and conditions of the department funded teacher. In determining the employer for the purpose of the legislation in relation to agency workers, the legislation expressly provides that the party paying the worker is, for the purposes of the legislation, the employer. I think the school is in an analogous position. I do not accept that the chosen comparators have the same type of employment contract or relationship as the claimants with the school. To that extent, it seems to me that the Department has to be viewed as the employer of the chosen comparators for the purpose of the legislation."

Since that judgment, the FEMPI legislation was passed. Under it, the Department of Education imposed a 5% cut as of 1st May 2011, on the respondent and she was required to work 33 hours more under the Croke Park Agreement. Did this action on the part of the Department effect a substantial change in the nature of the relationship such that the above findings of Dunne J. are no longer valid? Does the Department now determine the terms and conditions of the appellant in place of the school? Does the Department now determine the salary and other terms and conditions under which the respondent works? Certainly, the reduction in her pay has been directed by the Department. It should be noted, however, that the school retains the 5% that it has deducted from her pay. So, also, the requirement to work 33 extra hours. Yet, the key rationale of Dunne J. is that:

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

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

The question as to whether I should follow this judgment of a court of equal jurisdiction does not arise because I agree with Dunne J's judgment.

This finding is dispositive of the case. I do not see any necessity, therefore, for a referral to the CJEU.

There will be an order setting aside the determination of 18th July 2012 of the Labour Court herein on the basis that it erred in law in finding that the respondent was entitled to choose a fulltime Departmental-funded teacher as a comparator.