Neutral Citation No. [2012] NICh 11 | *Ref:* **MOR8341**

Judgment: approved by the Court for handing down | *Delivered:* **17/04/12**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

UNITED DAIRY FARMERS LIMITED

Plaintiff;

-and-

THE NORTHERN IRELAND LOCAL GOVERNMENT OFFICERS SUPERANNUATION COMMITTEE

Defendant.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER OF AN APPLICATION BY UNITED DAIRY FARMERS LIMITED FOR JUDICIAL REVIEW

IN THE MATTER OF A DECISION OF THE DEPARTMENT OF THE ENVIRONMENT

IN THE MATTER OF THE LOCAL GOVERNMENT PENSION SCHEME (AMENDMENT NO. 2) REGULATIONS (NORTHERN IRELAND) 2010

MORGAN LCJ

[1] United Diary Farmers Limited (UDF) is a Co-operative Society registered under the Industrial Provident Societies Acts (Northern Ireland) 1969 and 1976. It is a leading UK dairy co-operative owned by 2000 member farmers. Under a Scheme

of Re-organisation approved on 20 January 1995 by the Department of Agriculture pursuant to Article 5 of the Agriculture (Northern Ireland) Order 1993 UDF took over many of the responsibilities of the Milk Marketing Board for Northern Ireland (MMB).

[2] The Local Government Pension Scheme in Northern Ireland (the Scheme) is a statutory defined benefit pension scheme established by the Local Government (Superannuation) Act (Northern Ireland) 1950 (the 1950 Act) and the Local Government (Superannuation) Regulations (Northern Ireland) 1950 (the 1950 Regulations). NILGOSC is the body established under the 1950 Act to administer the Scheme.

[3] By Section 2 of the 1950 Act the relevant Minister was authorised to make provision by regulations for the granting of pension benefits to officers of local authorities or designated bodies, defined in Section 8(1) of the 1950 Act as any body which the Minister may, with the consent of the body concerned, designate for the purposes of the relevant regulations. By letter dated 13 July 1955 the Minister of Health and Local Government designated MMB as a designated body within the meaning of Section 8(1) of the 1950 Act. At that time the administration of the scheme was governed by the 1950 Regulations as amended.

[4] The designation process was replaced by a system of admission agreements which was introduced into the Scheme by Regulation 3(1) of the Local Government (Superannuation) Proscribed Persons (Regulations) (Northern Ireland) 1975. The effect of these Regulations was to provide that the employee of a designated body should be entitled to participate in the Scheme as if the designated body were a local authority.

[5] There are three types of employees of UDF/MMB who have been admitted to the Scheme and with which this litigation is concerned. The first are active members who are in employment at any particular time and in respect of whom contributions to the fund are being paid. There are approximately 75 such people employed by UDF. The second are deferred members who were employed by UDF/MMB and in respect of whom contributions were made during their employment but who have not yet reached pensionable age and who therefore are not yet entitled to receive pension benefits. There are approximately 350 such persons. The third group are pensioners who are no longer employed and have reached pensionable age and are, therefore, receiving benefits.

[6] The Local Government (Superannuation) (Milk Marketing Board for Northern Ireland) Regulations (Northern Ireland) 1997 provided that the 1955 designation, continued in force as an admission agreement under the Local Government (Superannuation) Proscribed Persons (Regulations) (Northern Ireland) 1975, should continue in force from and including 1 March 1995 as if made under the then relevant 1992 Regulations in relation to an employee of the company or any wholly

owned subsidiary thereof who immediately prior to 1 March 1995 was an admitted employee.

[7] UDF is giving serious consideration to ceasing the accrual of future pension benefits of its employees who are active members of the scheme. Before it proceeds further it wishes to ascertain whether such a cessation would bring an end to its liability to contribute to the Scheme in respect of any of its current or former employees who are, or who as a result of such cessation would become, either deferred members or pensioners of the scheme.

[8] On 9 March 2010 UDF commenced proceedings in the Chancery Division by Originating Summons seeking a declaration that on the true construction of the Local Government Pension Scheme (Administration) Regulations (Northern Ireland) 2009 (the 2009 Regulations), the relevant Regulations at the time of the issue of the proceedings, determination by UDF of the future of accrual of pension and other benefits under the Scheme in respect of UDF's employees who are currently active members of the Scheme would terminate UDF's liability to contribute to the Scheme in respect of any of its current or former employees who are, or who would as a result of the said termination of accrual be, deferred or pensioner members of the Scheme.

[9] In October 2009 the Department of the Environment published a preliminary notice of consultation in which it indicated an intention to amend the 2009 Regulations. This was followed by a consultation exercise initiated in April 2010 after the commencement of the Chancery proceedings. On 10 December 2010, prior to the hearing of the Chancery proceedings, the Department laid before the Assembly the Local Government Pension Scheme (Amendment No 2) Regulations (Northern Ireland) 2010 (the 2010 Regulations). UDF contends that the 2010 Regulations introduce for the first time an obligation to make a payment for the anticipated liabilities of deferred and pensioner members on leaving the Scheme.

[10] Solicitors for UDF wrote to the Minister on 5 January 2011 complaining that the 2010 Regulations had been laid without any form of Regulatory Impact Assessment and asserting that the proposed regulations had significant financial implications for UDF. That submission noted that the Explanatory Note to the amending Regulations stated that a full impact assessment had not been produced because no impact on the private or voluntary sectors was foreseen. The correspondence to the Minister was copied to the Assembly Environment Committee and was discussed by that Committee on 20 and 26 January 2011. The Committee resolved on 26 January not to seek the annulment of the 2010 Regulations.

[11] On 13 January 2011 UDF issued an application for judicial review of the decision of the Department to introduce regulations 33-37 of the 2010 Regulations. Leave was granted by Mr Justice McCloskey on 14 January 2011 on the sole ground that the Department had failed to carry out a Regulatory Impact Assessment before

making the 2010 Regulations. The Department's contention on the substantive dispute is that the 2009 Regulations already provide that where an admission agreement ceases to have effect a cessation valuation may be required from the outgoing employing authority. The Department submits that if UDF ceases to have active members in the Scheme and no-one eligible to join the Scheme the admission agreement will then cease to have effect.

[12] There is broad agreement between the parties that if UDF continues its participation in the Scheme its liabilities will be of the order of £15 million. Were it to withdraw from the scheme under the 2010 Regulations it would have to make a payment of the order of £27 million or possibly more. UDF seeks to establish that it is entitled to withdraw from the scheme under the 2009 Regulations without any liability to make a cessation payment. If correct on this it seeks to quash the 2010 Regulations on the basis that a Retail Impact Assessment ought to have been carried out to identify and assess the liability to which the 2010 Regulations exposed UDF.

The 2009 Regulations

[12] Regulation 2(2) provides that reference to members or membership generally within the 2009 Regulations refers to active members or active membership unless the context indicates a different meaning. General eligibility for membership is dealt with in Regulation 3 which provides that a person may only be an active member of the Scheme if Regulation 4, among other provisions, enables him to be one. Although there are other methods of entry, this is the only relevant method in this instance. Regulation 4(1) provides that NILGOSC may make an admission agreement with any community admission body. It is accepted that UDF is a community admission body with whom NILGOSC has made a deemed admission agreement. It is also common case that this is a unique deemed admission agreement in that UDF has continued to benefit from the arrangement despite the fact that it is a body which operates for gain as a result of the Scheme of Re-organisation referred to at paragraph 1 and the 1997 Regulations referred to at paragraph 6 but otherwise has all of the attributes of a community admission body. It stands in the shoes of the MMB and just as MMB might have ceased to be a community admission body if it had lost the relevant attributes the same must apply to UDF. No aspect of the admission agreement has been reduced to writing.

[13] The funding of the Scheme is provided for in particular in Regulations 31 to 34. By virtue of Regulation 31(4) NILGOSC must obtain a rates and adjustments certificate specifying –

(a) the common rate of employers contributions;

(b) any individual adjustments; and

(c) the total contribution rate payable,

for each year of the period of 3 years beginning with 1 April in the year following that in which the valuation date falls. The common rate of employers' contribution is the amount which in the actuaries' opinion should be paid to the fund by all bodies whose employees contribute to it so as to secure its solvency, expressed as a percentage of the pay of the employees who are active members. Regulation 34 imposes an obligation on the employer to pay the sums set out in the rates and adjustments certificate.

[14] The liability to contribute in respect of a rates and adjustments certificate was at issue in R (South Tyneside Metropolitan Borough Council) v. Lord Chancellor and Secretary of State for Justice and another [2009] EWCA Civ 299 which considered the terms of the Local Government Pensions Scheme Regulations 1997. Those regulations mirror the provisions of Regulations 31 and 34 of the 2009 Regulations in respect of the liability to pay under a rates and adjustments certificate. The court held that a rates and adjustment certificate could only issue in respect of active members and it is common case, therefore, that if UDF determined the future accrual of pension and other benefits under the Scheme in respect of its employees who are currently active members of the Scheme it could not be required to make any contribution pursuant to a rates and adjustment certificate.

[15] It is submitted on behalf of NILGOSC, however, that UDF would then become liable pursuant to Regulation 33 of the 2009 Regulations which set out special circumstances where revised actuarial valuations and certificates must be obtained. The relevant provision in this case is Regulation 33(2).

> "**33.**—..(2) Where an admission agreement ceases to have effect, the Committee must obtain—
>
> (a) an actuarial valuation on an appropriate basis determined by the fund's actuary as agreed with the Committee as at the date on which that agreement ceases to have effect, of the liabilities of the fund in respect of current and former employees of the admission body which is party to that admission agreement ("the outgoing admission body");
>
> (b) a revision of any rates and adjustments certificate provided under regulation 31(4) (actuarial valuations and certificates), showing the revised contributions due from or surplus due to the outgoing admission body; and
>
> (c) such revised contributions due to the fund or surplus due to the outgoing admission body from the fund will be paid as a lump sum within one month of the date of the rates and adjustments certificate or such longer period as

> the Committee and the outgoing admission agreement body agree. ”

It is clear, therefore, that if the admission agreement ceases to have effect as the Department contend would happen in the circumstances proposed by UDF, an actuarial evaluation would be triggered under Regulation 33(2)(a), the rates and adjustment certificate would be revised under Regulation 33(2)(b) and UDF would be obliged to pay within the time stipulated in Regulation 33(2)(c) by virtue of Regulation 34.

Consideration

[16] The issue between the parties concerns whether or not it can be said that the admission agreement ceases to have effect where there is a cessation of accrual in respect of active employees in the circumstances set out at paragraph 8 above. There is no definition within the Regulations of “ceases to have effect”. There is also no written admission agreement governing the admission of UDF members to the Scheme and the admission of such members is the result of the deemed admission agreement which was established by the statutory arrangements set out at paragraphs 4 and 6 above. There is, therefore, no express term providing for termination of the admission agreement. This is to be contrasted with the position of transferee admission bodies as defined in Regulation 5(2) of the 2009 Regulations who are required by Schedule 2 of those Regulations to have a provision for termination within their admission agreement.

[17] Regulation 6(2) of the 2009 Regulations provides that an admission agreement must terminate if the admission body ceases to be such a body although the parties may make such other additional arrangements for termination as they wish. The term “admission agreement” is defined in Schedule 1 of the 2009 Regulations and “in relation to an admission body, means an agreement that all, or any designated class, of the body’s employees may be members.” There is no reason to conclude that the context of the reference to “members” means other than active members. Any other interpretation would invite the conclusion that pensioner or deferred members could join the Scheme even though no contribution for their benefits would have been secured from the employer through a rates and adjustment certificate. In fact under the deemed admission agreement it is only those taking up active membership who can join the Scheme.

[18] “Admission body” is defined in Schedule 1 as meaning a body mentioned in Regulation 4(2) (employees of community admission bodies) or Regulation 5(2) (employees of transferee admission bodies). Community admission bodies are defined in Regulation 4(2) of the 2009 Regulations.

> “**4.**—(2) The following are community admission bodies—

(a) a body which provides a public service in the United Kingdom otherwise than for the purposes of gain and which either—

(i) has sufficient links with an employing authority for the body and the employing authority to be regarded as having a community of interest whether because the operations of the body are dependent on the operations of the employing authority or otherwise, or

(ii) is approved by the Department for the purpose of admission to the Scheme."

As set out at paragraph 12 above this deemed admission agreement is made with UDF as a community admission body rather than as a result of approval by the department for the purpose of admission to the Scheme.

[19] It is clear from Regulation 4(2)(a)(i) of the 2009 Regulations that in order to be a community admission body it is necessary for the employing body to have sufficient links with an employing authority for that body. An employing authority is defined in Schedule 1 as meaning a body employing an employee who is eligible to be a member. If UDF proceeds, as it proposes, to cease the accrual of future pension benefits for its employees it will have to persuade its employees to give notice of their withdrawal from the Scheme under Regulation 10(2) of the 2009 Regulations. It will then cease to have active members in the Scheme. Those employees could not thereafter re-join the Scheme as they would have become deferred members in relation to their past employment and could not regain active status unless eligible to join the Scheme. They would not be so eligible because of the 1 March 1995 cut-off. In those circumstances UDF could no longer be an employing authority as it would no longer have any employees who were eligible to become members

[20] In my view it follows that in those circumstances UDF would no longer be a community admission body for the purpose of the 2009 Regulations and by virtue of Regulation 6(2) of the said Regulations the admission agreement would terminate and therefore cease to have effect

[21] It follows from this analysis of the 2009 Regulations that I have concluded that the admission agreement is in effect a gateway into the Scheme rather than a feature which binds any form of member to the Scheme so long as there still active, deferred or pensioner members as argued by UDF. The cessation of the admission agreement does not, of course, affect the rights of those who are entitled to benefits under the Scheme. UDF submitted that the early pension provisions in Regulation 30 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations (Northern Ireland) 2009 supported the view that the admission agreement in this case did not cease while such elections might still have to be

considered. I do not agree. The provisions of Regulation 30 of those Regulations make it plain that there are three parties to the election, the member, the Scheme and the employing authority. If there are still active members there will be a possible financial consequence for the employing authority. If there are no such members there may be no such consequence. None of this supports the view that the admission agreement remains in force. In any event it seems to me plain that Regulation 33 of the 2009 Regulations clearly contemplates the existence of liabilities for deferred and pensioner members as a result of the cessation of an admission agreement. Their rights are not dependent on the existence of the admission agreement.

Conclusion

[22] For the reason set out above I decline to make the declaration sought in the Notice of Motion in the Chancery proceedings. It also follows that the judicial review challenge must fail. The applicant contended that a Regulatory Impact Assessment was required because the 2010 Regulations introduced an obligation to make a cessation payment which was not required by the 2009 Regulations. In light of my conclusion on the meaning of the 2009 Regulations, that argument can no longer be sustained.