

# Opening Statement to the Oireachtas Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach on 14<sup>th</sup> December 2022

**SUBJECT: The Continued Withholding of Pay Awards Approved by Government pursuant to the Review Body Report No. 42 on Higher Remuneration in the Public Sector, dated 14<sup>th</sup> September 2007**

## A. Introduction

Chairman, Members of the Committee, I wish to convey our very sincere thanks to you for affording us some time on your busy schedule to highlight a matter that has been allowed to fester for the last 15 years.

We note this Committee's report and findings published just 12 months ago on the *"Processes and Procedures Applying to the Appointment of Senior Executives in the Public Service"*.

What we have here today is a further example of issues concerning senior civil servants which came to light in that report whereby:

- (1) A decision of the Government to pay an award was overruled.
- (2) A formal letter of sanction from the Department of Finance to implement a pay award was ignored.
- (3) An attempt was made to alter the findings of Review Body Report No. 42 i.e., an independent report on pay in the public service.
- (4) A Labour Court recommendation was ignored.

## B. Background

The Review Body on Higher Remuneration in the Public Sector was established in May 1969, i.e., over 53 years ago. The purpose of the Review Body was *"to act as a standing body whose primary function will be to advise the Government from time to time on the general levels of remuneration appropriate to certain senior grades in the civil and public service"*.

The most recent report pertaining to salaries across all higher grades in the civil and public sector is Review Body Report Number 42, dated 14<sup>th</sup> September 2007.

The Government accepted the recommendations of that review without exception to pay all the awards [emphasis added] over three phases (Phase 1 was capped at 5%). The Department of Finance then issued sanctions to the various Departments, including the Department of Health and Children.

All senior officials across the civil and public service were paid except senior officials of the HSE and the Voluntary Hospitals, who were unjustly picked out for unfair treatment, and payment of the awards was

never sanctioned by the Department of Health and Children (what would normally be a rubber stamp exercise, following Government approval and Department of Finance sanction).

**NOTE:** All the awards were subsequently capped by Government at 5% in 2008 due to the downturn in the economy.

### **C. Why was Payment of the Awards Blocked by the Department of Health and Children?**

Very spurious reasons were initially provided to block payment of the awards, which are on the record.

The letter of sanction from the Department of Finance to the Department of Health and Children was issued on 28<sup>th</sup> April 2008, thus clearing the way for payment.

However, five days previously (23<sup>rd</sup> April 2008), the then Secretary General, Department of Health and Children, had written to the CEO of the HSE. It is clear from the letter that the Secretary General had formed certain negative views about paying the awards to HSE senior managers, even before receiving the formal sanction.

Following further exchanges of correspondence between the Secretary General and the CEO where the CEO was completely in favour of paying the awards, the following happened:

1. **10<sup>th</sup> March 2009:** the Secretary General, Department of Health and Children, prepared a letter of sanction to the HSE CEO. It appears that even though this letter of sanction is still on file at the Department of Health, it was never issued to the HSE. There is no logical reason for this.
2. **1<sup>st</sup> April 2009:** the Secretary General (Department of Health and Children) wrote to the Minister for Health and Children thus:

*“It would be very difficult to justify withholding the increases from HSE staff when they have already been paid in the rest of the public service” [emphasis added].*

3. **21<sup>st</sup> April 2009:** the Secretary General wrote again to the Minister thus:

*“I don’t think we can justify withholding the increases from HSE staff given that they have been paid (within the limits set by Government) in the rest of the public service. Nor do I think we can justify withholding retrospection ...” [emphasis added].*

However, it is evident from the correspondence that there were other motivations for delaying the sanction to pay the awards.

1. The Secretary General and senior civil servants at the Department of Health and Children sought to use the Report No. 42 pay awards as leverage with further minor “restructuring” of senior grades in the HSE although the Government decision to implement the awards was not in any way conditional on future changes for any group of beneficiaries. The awards

recommended for HSE management were based on the roles as they stood after major HSE restructuring had already taken place and further major restructuring did not commence until March 2012.

2. The Secretary General, Department of Health and Children, unilaterally proposed reducing the awards to health officials at the Assistant National Director level from 5% (Phase 1) to 2.3%, thus dismissing the findings of the Review Body and the formal decision of the Government to implement them.
3. The Secretary General seemed determined to use the Review Body Report to unilaterally tear up the Registered Agreement reached between the Interim HSE and IMPACT in 2004, before the establishment of the HSE on 1<sup>st</sup> January 2005, thus breaking long-established pay relativities, e.g., a proposal to unilaterally abolish Hospital Network Manager posts without consultation.

It is the strongly held view of those impacted by non-payment of the awards that the Secretary General (and the senior civil servants at the Department of Health and Children) had no authority to adopt this course of action and may have acted *ultra vires* their powers.

It is important to point out to the Committee that when the FEMPI legislation became operational in January 2010, 2 years and 4 months had lapsed since the publication of the Review Body Report. Therefore, there was ample time to resolve any matters of concern at the Department of Health and Children level.

In contrast, it is worth noting that those very same senior civil servants had arranged to pay themselves their awards within 7 weeks of the publication of the Review Body Report.

## D. The FEMPI Legislation

After over six months of complete silence, our Union representative was told on 4<sup>th</sup> December 2009 by the Department of Health and Children that the awards would be paid.

This led to a flurry of activity in the Department of Health and Children on the 9<sup>th</sup> and 10<sup>th</sup> of December 2009, coinciding with the first reading of the FEMPI (No. 2) Bill 2009 on the 8<sup>th</sup> of December 2009.

The 3 emails, 2 memos (the second memo raised very issues about questionable practices) and a letter over two days at the Department of Health and Children were characterised by double speak: firstly, to pay the awards and then to block payment.

- In one of the emails, the injustice of not paying the awards was recognised, i.e., HSE senior managers would suffer a **“double hit”**, i.e., non-payment of the awards and then salary reductions under FEMPI.
- There is a clear record of an agreement between an Assistant Secretary at the Department of Health and Children and a counterpart in the Department of Finance to pay the awards (9<sup>th</sup> December 2009).

However, everything changed the following day. Somebody recognised that FEMPI presented an opportunity to prevent payment of the awards indefinitely.

- The exchanges between the same Assistant Secretaries show that having agreed on 9<sup>th</sup> December 2009 that the awards should be paid, there was a complete about-turn on 10<sup>th</sup> December 2009, i.e., that the penal aspects of yet-to-be-operational FEMPI legislation should be considered to block the payment of awards sanctioned and approved for payment more than two years previously.

There was no provision in the FEMPI legislation for retrospective effect, and there was no legal impediment to implement the award, as it had been granted prior to FEMPI. Senior personnel at the Departments of Health and Children, and Finance cannot have been unaware of this. Nevertheless, they used the penal aspects of yet-to-be-enacted legislation to frustrate the Government decision to pay the award and to deny the HSE employees their contractual entitlement to the benefit of nationally agreed pay settlements. This in our view created a very dangerous precedent.

## **E. The Role of the Department of Finance**

Following the flurry of activity in December 2009, the FEMPI legislation became operational in January 2010. It was clear that Report No. 42 and rectifying the associated injustice were no longer a priority.

Five months later (28<sup>th</sup> May 2010) a submission was made to the then Minister for Finance by the Head of the Pay Policy Unit, Department of Finance. This was in response to the correspondence between the Departments of Health & Children and Finance on the 9<sup>th</sup> and 10<sup>th</sup> of December 2009.

The timing of this submission was deeply flawed as it purported to deal with a question posed by the Department of Health and Children pre the enactment of the FEMPI (No. 2) Act 2009 six months previously.

The content of that submission strongly suggests a senior civil servant acting as sole judge and juror on whether the awards should be paid. The submission contained incomplete and incorrect information (e.g., no reference to Section 4 of the FEMPI Act which could possibly have enabled a resolution), thus leaving the Minister in a position to arrive at the only conclusion possible in the circumstance, i.e., not to pay the awards. The submission clearly laid the blame for the delay in bringing about payment at the hands of the Union rather than the Department of Health and Children.

## **F. The Labour Court**

The matter was the subject of a full Labour Court hearing in 2011. The Labour Court in its recommendation noted, *inter alia*, that:

- *“The Department of Finance, in April 2008 sanctioned payment of the relevant monies and the Department of Health has in effect acknowledged that the complainants are entitled to payment of the first phase of the award.”*

- *“The Department did not dispute the merit of the Complainants grades entitlement to be paid.”*
- *“There is agreement on the substantive issue between the employer and employees affected.”*
- *“Both sides are in agreement that the 1st phase of the Review Body award should be paid. It is a matter for the parties to bring this about.”*

Both the Department of Health and Children and the Department of Finance were respondents at the Labour Court hearing.

Despite the Court’s Recommendation, nothing has happened to bring about payment in the intervening eleven years.

## G. Fair is Fair

The following statements are noteworthy:

The current **Tánaiste, Mr Leo Varadkar TD** (and then Minister for Health) stated in a radio interview on the RTE Radio 1 *News at One* programme on 15<sup>th</sup> March 2016 concerning the ED crisis:

*If you make an agreement with your staff down [at] the WRC, it has to be honoured and honoured in full ...*

AND

*...if people agree; if the unions on the one side and the public sector or the public body ... on the other side makes an agreement ... a deal is a deal and that’s it! If there is any row about funding and so on, that has to be sorted out on the Government side. Under no circumstances should an agreement made at the WRC be reneged upon ...*

In an interview on the *Today with Sean O’Rourke* (RTE Radio 1, 16<sup>th</sup> November 2016), **Mr Paschal Donohoe, TD** (then Minister for Public Expenditure and Reform), concerning the Lansdowne Road Agreement and the implementation of a Labour Court recommendation for another group said:

*“... we have to be fair ... to everybody ... an independent body, the Labour Court ... intervened ... made a recommendation ... we represent the Government, I am a member of the Government ... if we did not accept that recommendation, you [Sean O’Rourke] correctly, would have had me in this studio [charging that] you’re now undermining the very body that’s the final court of arbitration for industrial relations in our land ... I accept that that recommendation does have consequences ...”*

In contrast, the civil servants took a different position from the two Government Ministers and has made no effort to honour the Labour Court Recommendation.

## H. Have Subsequent Events Overtaken Report No. 42?

Any suggestion that events have overtaken Report No. 42 recommendations, as approved by the government, simply does not stand up.

**Firstly**, the grades of National Director and Assistant National Director are still in existence and report directly, or at one remove, to the CEO of the HSE.

**Secondly**, while the Hospital Groups have now replaced the Hospital Networks, the salary applicable to the Hospital Network Manager grade is still in place. It is now the salary for the Chief Officers in charge of Community Health Organisations as well as other grades, e.g., Assistant National Directors.

## I. Summary

1. The awards were approved by Government in October 2007.
2. The Labour Court recommended that the awards be paid and acknowledged that all parties agreed to this.
3. The HSE has made a provision in its accounts to pay the awards. **(See the attached).**
4. The awards have not been paid:
  - a) There was an unreasonable delay of 2 years and four months initially at the Department of Health and Children level.
  - b) The FEMPI legislation was used unfairly in the first instance and then cited for the past 12 years as a reason not to honour the awards.
  - c) FEMPI is now effectively unwound.
  - d) There are many examples of correspondence having been ignored by several Departments/Agencies, presumably in the hope that the matter would go away. The most recent example is a letter from the General Secretary - Forsa to the HSE on 30<sup>th</sup> September 2022 (75 days ago). A meaningful reply had yet to be received.
5. Health service senior managers have been blatantly picked out for unfair treatment and to feel undervalued in comparison with all other grades who benefitted from Report No. 42 across the civil/public services.
6. We have avoided taking industrial action to date, but we believe that in any other cohort of staff, industrial action would have happened already.
7. Some retirees have recently passed away (RIP) having never enjoyed the benefits of Report No. 42 while their spouses are now on incorrect pension rates.

8. The very civil servants who are refusing to implement this award are themselves in receipt of it since 2007.
9. There can be no wisdom or justification in permitting this debacle to develop into something that is patently avoidable. As the present Tánaiste said, “*a deal is a deal*”.

## **J. Conclusion**

Chairman, if it is appropriate to do so, we request this Committee to ask the Minister for Public Expenditure and Reform to intervene with his colleague, the Minister for Health, to either request or direct his Secretary General to issue the necessary sanction to the HSE to pay the outstanding awards with full retrospection.

The reason for our request is that the HSE, as the employer, has continually said that it cannot resolve the matter without the approval of the Department of Health. The Department of Health has in turn stated on several occasions that it cannot proceed without the approval of the Department of Public Expenditure and Reform. This sorry chapter needs permanent closure by delivering a just outcome.

Our sincere thanks to you, Chairman, and your Committee Colleagues for permitting us to appear here today. Apart from the Labour Court hearing in 2011, this is the only other opportunity afforded us over a decade and more to state our case person to person. We engaged in voluminous and detailed correspondence over those years with government departments; sadly, the vast amount of which was ignored.

This Opening Statement was Delivered to the Committee Meeting at Leinster House by:

Mr John O’Brien, Retired Hospital Network Manager

14<sup>th</sup> December 2022