Judgment Title: Mc Kenzie & Anor -v- Minister for Finance & Ors

Neutral Citation: [2010] IEHC 461

High Court Record Number: 2009 551 JR

Date of Delivery: 30/11/2010

Court: High Court

Composition of Court:

Judgment by: Edwards J.

Status of Judgment: Approved

Neutral Citation Number: [2010] IEHC 461

THE HIGH COURT

Record No: 2009 551 JR

Between

MICHAEL McKENZIE AND THE PERMANENT DEFENCE FORCES

OTHER RANKS REPRESENTATIVE ASSOCIATION

Applicants

- and -

THE MINISTER FOR FINANCE, THE MINISTER FOR DEFENCE,

IRELAND AND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Mr Justice John Edwards delivered on the 30th day of November, 2010 .

1. Introduction.

1.1 On the 25th day of May 2009 the applicants were granted the leave of the High Court by Mr. Justice Peart to seek diverse Orders and reliefs, including Orders of Certiorari and Mandamus as well as Declarations and Injunctions, by way of judicial review in what may be described as a challenge to the purported implementation of Department of Finance Circular 07/2009 on Motor Travel and Subsistence Rates to what is known as the "RDF Allowance" which is a special allowance paid to Non Commissioned Officers (hereinafter NCOs) and Privates (hereinafter PTEs) in the Permanent Defence Force who are employed on duty with An Fórsa Cosanta Áitiúil (hereinafter "the FCA").

2. Background Facts and Relevant Statutory Provisions

2.1 The first named applicant in this matter describes himself in his affidavit as a member of the Permanent Defence Forces by which it is presumed he means "the Permanent Defence Force", which is one constituent part of "the Defence Forces". The Defence Forces are comprised of both the Permanent Defence Force ("na Buan – Óglaigh" as gaeilge) and the Reserve Defence Force ("na h Óglaigh Cúltaca" as gaeilge), both of which have army, naval and air components as provided for in s.18 of the Defence Act, 1954 (hereinafter "the 1954 Act"). The FCA is part of the Reserve Defence Force (hereinafter "the R.D.F").

2.2 The first named applicant is an NCO holding the rank of Company Quartermaster Sergeant and serves within the army component of the Permanent Defence Force (hereinafter the P.D.F.). He is also a member of the National Executive of the second named applicant.

2.3 Under s. 2 of the Defence (Amendment) Act 1990 (hereinafter "the 1990 Act"):

> "the Minister [for Defence] may provide by regulations for the establishment of an association or associations (in this Act referred to as an "association") for the purpose of representing members of such rank or ranks of the Defence Forces as may be specified in the regulations in relation to matters affecting their remuneration and such other matters as the Minister may specify in the regulations ….".

2.4 Acting pursuant to s.2 of the 1990 Act the second named respondent made regulations by a statutory instrument entitled "Defence Force Regulations S.6 – Representative Associations" (hereinafter DFR S.6), and regulation 19 of DFR S.6 established the second named applicant.

2.5 The second named applicant is misdescribed in the title to these proceedings as "the Permanent Defence Forces Other Ranks Representative Association". It should of course be "the Permanent Defence Force Other Ranks Representative Association", and the Court of its own motion hereby amends the title to the proceedings so as to substitute the correct name for the second named applicant. The Permanent Defence Force Other Ranks Representative Association (herein after called "PDFORRA") is the representative association for members of the P.D.F. other than Commissioned Officers in relation to the matters specified in the Third Schedule to DFR S.6.

2.6 The Third Schedule to DFR S.6 is entitled "Scope of Representation" and is divided into four parts designated "A", "B", "C" & "D", respectively. In this case

only parts "A" and "B" are potentially relevant.

2.7 Part "A" of the Third Schedule is subtitled:

"Remuneration etc under the following headings:-"

and it continues:

> "(a) claims relating to remuneration and other emoluments whether in cash or kind (for this purpose "remuneration" means
>
> - pay
>
> - allowances
>
> - gratuities, or
>
> - grants
>
> payable to a member of the Permanent Defence Force or any
>
> - pension,
>
> - retired pay, or
>
> - gratuity
>
> for which a member may be eligible in respect of or arising out of his service as such a member); .
>
> (b) the administration of remuneration;
>
> (c) deductions from pay in respect of accommodation, rations and welfare services;"

2.8 Part "B" of the Third Schedule is subtitled:

> "Other Conditions of Service and Career Development
>
> under the following headings:-"

and (in so far as it is relevant) it continues:

> "(q) the application to the Permanent Defence Force of legislation which affects matters coming within the scope of representation;
>
> (r) (1) amendments to the Defence Acts, 1954 to 1990,
>
> (2) amendments to Defence Force Regulations,

(3) ….

(4) ….

which come within the scope of representation;"

2.9 The "scope of representation" of the second named applicant is set out in regulation 24 of DFR S.6. That regulation provides:

> "(1) Subject to section 2 of the Act, the matters which shall come within the scope of representation of the Association shall be those set out in the Third Schedule to these regulations.
>
> (2) To such an extent as may be set out in a scheme of conciliation and arbitration established by the Minister, in consultation with the Association, such of the matters referred to in the Third Schedule to these regulations as may be agreed between the Minister and the Association shall be processed under such a scheme.
>
> (3) Such of the matters referred to in the Third Schedule to these regulations as are not comprehended by a scheme of conciliation and arbitration referred to in subparagraph (2) .hereof shall be processed at meetings at national level between representatives of the Association and representatives of the Department of Defence.
>
> (4) Such of the matters referred to in the Third Schedule to these regulations as may be agreed between the Minister and the Association from time to time shall be processed at meetings at national level between representatives of the Association and representatives of the military authorities.
>
> (5) The matters which shall come within the scope of representation at Command and Barracks levels shall be such aspects of the matters provided for in the Third Schedule to these regulations as are of local application and as may be agreed between the Minister and the Association from time to time."

2.10 In November 1998 the second named respondent established the "Conciliation and Arbitration Scheme for Members of the Permanent Defence Force Up To and Including the Rank of Colonel" (hereinafter "the C & A scheme"). The purpose of the C & A scheme is expressed in Article 2(1) thereof as being:

> "… to provide means acceptable to the parties for the determination of claims and proposals relating to remuneration and conditions of service, within the scope of the scheme, of members of the Permanent Defence Force of the ranks represented by the Representative Associations. Matters within the scope of the scheme will be dealt with exclusively through the machinery of the scheme."

2.11 Further, and it is a matter of some importance, Article 3 of the C & A

scheme goes on to state:

> "The existence of this scheme does not imply that the Government have surrendered or can surrender their liberty of action in the exercise of their Constitutional authority and the discharge of their responsibilities in the public interest."

2.12 The first named applicant has deposed in paragraph 3 of his affidavit sworn on the 25th of May 2009 that he is engaged pursuant to a statutory contract the terms of which are determined by the 1954 Act, as amended, and the regulations made thereunder. In particular he contends that his pay and allowances as a member of the P.D.F. are dealt with under Chapter IV, of Part IV of the 1954 Act and regulations made thereunder. primarily "Defence Force Regulations S.3 – Pay and Allowances" (hereinafter "DFR S.3"). He is correct in this and it may be more specifically stated that the relevant regulations are made under s. 97 which appears within Chapter IV, of Part IV of the 1954 Act.

2.13 It is necessary having regard to issues that have been raised by the applicants and which the Court will address in this judgment to set out in full the provisions of s. 97 of the 1954 Act. It is convenient to do so now. S.97 provides:

> "97.— (1) The Minister may make regulations in relation to the following matters—
>
> (a) the rates and scales of pay, allowances and gratuities of members of the Defence Forces,
>
> (b) the grants which may be made to members and units of the Defence Forces,
>
> (c) the conditions applicable to the issue of such pay, allowances, gratuities and grants.
>
> (2) (a) The Minister may, with the consent of the Minister for Finance, make regulations in relation to the following matters—
>
> (i) the forfeitures and deductions to which the pay, allowances and gratuities of and grants to members of the Defence Forces may be subjected,
>
> (ii) the deductions to which grants to units of the Defence Forces may be subjected,
>
> (iii) the disposition of such forfeitures and deductions,
>
> (iv) the manner in which and the procedure whereby such forfeitures and deductions or any other deductions authorised by this Act are to be made,
>
> and such forfeitures and deductions may be made and disposed of accordingly.

(b) Regulations made under this subsection shall not prescribe—

(i) forfeiture of pay except in respect of—

(I) absence on desertion or without leave,

(II) custody, imprisonment or detention.

(III) absence from duty on account of a disease or disability arising out of the commission of any offence,

(IV) unclaimed amounts;

(ii) deductions from pay except in respect of—

(I) articles or services provided,

(II) marriage allotment,

(III) fines, penalties, damages, compensation or costs awarded,

(IV) public or service property lost, deficient, damaged or destroyed,

(V) public or service debt or disallowance,

(VI) unauthorised expenditure or commitment.

(c) The total deduction to be made under regulations made under this subsection from the pay of a man, except a man who is being transferred to the Reserve Defence Force or discharged from the Defence Forces, shall not in any week exceed such sum as would cause him to receive less than one-third of his pay for that week.

(d) Every regulation made under this subsection shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation is passed by either such House within the next subsequent twenty-one days on Which that House has sat after the regulation has been laid before it, such regulation shall be annulled accordingly but without prejudice to the validity of anything previously done under such regulation.

(3) Any forfeiture or deduction made under subsection (2) of this section may be remitted by the Minister in whole or in part.

> (4) References to pay, allowances, gratuities or grants in this Chapter shall be construed as references to pay, allowances, gratuities or grants payable under regulations made under subsection (1) of this section."

2.14 The evidence of the first named applicant is to the effect that as part of his terms and conditions of service (with particular reference to remuneration), he, in common with other members of the P.D.F., is entitled to receive a special allowance (hereinafter referred to as the "RDF Allowance") if he is involved in duties concerning training work with the R.D.F.. He states that this payment has been made to him and others in a similar situation to him over a long number of years and reflects the fact that the recipients leave home and have to remain on site at various locations in the country. Further, he says, and the respondents do not dispute it, that the RDF Allowance is a payment separate and distinct from the usual allowances paid to members of the P.D.F. in relation to travel and subsistence. He maintains, and again it is not disputed by the respondents, and indeed it is confirmed in paragraph 72(1) of DFR S.3, that it is specifically intended to cover all manner of expenses (including subsistence but excluding travelling expenses) incurred by him while he is involved in duties concerning training work with the R.D.F..

2.15 Paragraph 72 (1) of DFR S.3 states:

> "Non –commissioned officers and privates employed on duties with An Fórsa Cosanta Áitiúil or An Cór Breathnadóirí and holding substantive appointments may, with the concurrence of An Rúnaí and subject to the provisions of subparagraph (10) of this paragraph, be paid, in respect of the period of such employment, allowances as follows to cover all expenses (including subsistence) other than travelling expenses:-
>
> [Rates then set out] "

(Subparagraph (10) of paragraph 72 of DFR S.3 has no relevance in the present case.)

2.16 Arising out of the recent severe economic downturn the Government meeting in cabinet on or about the 3rd of February 2009 decided to reduce across the board for all public servants the rates payable to them by way of expense allowances for motor travel and subsistence. This decision of the Government was communicated to all public servants by the first named respondent by means of a circular issued on the 5th of March 2009, namely "Circular 07/2009: Motor Travel and Subsistence Rates". The circular was in the following terms:

> "A Dhuine Uasail,
>
> 1. I am directed by the Minister for Finance to inform you that the Government has decided to reduce travel and subsistence rates. The revised rates should be implemented from the date of this circular. Details of the new rates are shown in the Appendices to

this Circular.

2. Payment of the rates authorised in this Circular will be subject to the regulations issued with Circular 11/82 (as amended by Circular 18/2006) and any other instructions in force from time to time.

3. Heads of Departments should continue to ensure that only essential travel is undertaken and that the number of officers on any official journey is kept to the absolute minimum.

4. As a result of the revision of the subsistence allowances provided for in this circular, the allowances for certain departmental grades fall to be revised. Subsistence allowances for departmental grades should be revised to bring them into line with the new rates. Where there are no equivalent allowances overleaf, the subsistence allowance for the appropriate Departmental grades should be reduced by 25% with effect from 5 March 2009.

5. This circular should be brought to the attention of all bodies under the aegis of your Department or Office and all officers in your Department or Office who are responsible for travel.

6. Any enquiries about this Circular from Departments should be sent by email to Travel.Policy@financegov.ie. ***Personal enquiries from individual officers should be addressed to the Personnel Unit of the employing Department/Office.*** *This Circular is also available on the Department's website www.personnelcode.gov.ie.*

Mise le meas"

2.17 The second named respondent immediately sought to implement the said circular and to that end on the 11th of March 2009 amended DFR S.3 by means of "Defence Force Regulation S.3 Amendments - Amendment 343 of 2009" and "Defence Force Regulation S.3 Amendments - Amendment 344 of 2009", respectively, (hereinafter collectively referred to as "DFR S.3 A 343 & 344") made by him pursuant to s.97 of the 1954 Act. Then on the 12th of March 2009 the second named respondent caused an official in his department to write to the Deputy Secretary General of the second named applicant to advise him of revised rates payable in respect of the RDF Allowance with effect from the 5th of March 2009. A copy of circular 07/2009 was enclosed with the said letter.

2.18 The Deputy Secretary General of the second named applicant replied by return (i.e., by letter of the 13th of March 2009) stating (*inter alia*):

"……firstly let me state that I do not agree with your interpretation of the finance circular as it relates to RDF Allowance and I say the following.

RDF Allowance was reviewed on the 26th July 2007 and the review

> was in line with the provisions of Department of Finance Subsistence Circulars by the amount equal to four-fifths of the average increase in home subsistence allowance over the previous two years, the circulars in question was 18/2006 effective from I July 2006 and 24/2007 effective from I July 2007 (sic).
>
> The method of reviewing RDF allowance formed part of an agreement with PDFORRA and the next review would be due to take place in July 2009 this review in line with custom and practise would be based on subsistence allowances increases over the previous two years and not on a reduction of 25% announced in January 2009.
>
> Given your Departments actions are disputed by PDFORRA no deduction on RDF Allowance should be considered until PDFORRA is given an opportunity to discuss this issue through the C&A mechanism, further we are of the view that no review takes place until the due date July 2009."

2.19 Notwithstanding this correspondence and the purported invocation of the C & A scheme by the second named applicant, the second named respondent is insistent that he has lawfully implemented circular 07/2009 with respect to the RDF Allowance; and he has asserted, and continues to assert, that he was obliged to do so as it was based upon a government decision. The reductions effected were not based upon any proposal emanating from him or his department and accordingly no "conciliable" issue existed which was capable of being adjudicated upon within the framework of the C & A scheme. Moreover, the second named respondent points specifically to Article 3 of the C & A scheme in support of what he contends was his duty to ensure that a decision of the Government, duly communicated by means of circular 07/2009, was fully and properly implemented, and implemented without delay.

2.20 A subsequent course of correspondence then ensued between the solicitors acting for the second named applicant, and an official representing the second named respondent, in which litigation was threatened by the second named applicant, and this culminated with a letter of the 30th of April 2009 from the said official to the said solicitors in the following terms (*inter alia*):

> "Rates and conditions for the payment of all travel and subsistence allowances, including FCA allowance are subject to the sanction of the Department of Finance. In this regard, individual Departments, bodies and organisations including the Health Service Executive, Local Authorities and the Judiciary have applied the reduced rate as provided for in Department of Finance circular 7/2009. This reflects the Government decision on this matter and the Department of Finance advised that the 25% reduction in allowances should be applied throughout the public sector.
>
> We are surprised and disappointed at the approach taken given that the Conciliation and Arbitration scheme is a more obvious and appropriate forum and we consider that the issues raised should

be advanced within the scheme."

2.21 I must immediately remark that the letter of the 30th of April 2009 would appear to be incorrect in asserting that rates and conditions for the payment of all travel and subsistence allowances, including FCA allowance are subject to the sanction of the Department of Finance. That does not appear to be the case. Regulations concerning "(a) the rates and scales of pay, allowances and gratuities of members of the Defence Forces;

> (b) the grants which may be made to members and units of the Defence Forces; and (c) the conditions applicable to the issue of such pay, allowances, gratuities and grants", all fall to be made under s. 97(1) of the 1954 Act (which is within Chapter IV, of Part IV of that Act) and do not require the consent of the Minister for Finance. By way of contrast, regulations concerning "(i) the forfeitures and deductions to which the pay, allowances and gratuities of and grants to members of the Defence Forces may be subjected; (ii) the deductions to which grants to units of the Defence Forces may be subjected; (iii) the disposition of such forfeitures and deductions, and (iv) the manner in which and the procedure whereby such forfeitures and deductions or any other deductions authorised by this Act are to be made", fall to be made under under s. 97(2) of the 1954 Act, which subsection expressly qualifies the power of the second named respondent to make such regulations with a requirement that they be made "with the consent of the Minister for Finance".

2.22 Be that as it may, the court notes that DFR S.3 A 343 & 344 each respectively assert that they were:

> "Made and prescribed, with the consent of the Minister for Finance, in exercise of the powers in this behalf vested in me by section 97 of the Defence Act, 1954, as amended.
>
> Signed: William O'Dea
>
> Minister for Defence
>
> 11/3/2009"

In this Court's view, if, as appears prima facie to be the case, the consent of the Minister for Finance was not in fact required, the fact that it was nonetheless obtained is of no significance and has no implications for the validity of these measures. Conversely, if indeed it was required, the evidence is that that requirement was met.

2.23 The court otherwise interprets the letter of the 30th of April 2009, and in particular the last paragraph thereof, as indicating that although the second named respondent was not prepared in any circumstances to contemplate having circular 07/2009 adjudicated upon within the framework of the C & A scheme as a "proposal" in advance of its implementation, now that the measure has in fact been implemented he does not have a difficulty with the applicants' issues being adjudicated upon within that framework, effectively as a grievance "claim", and indeed is of the view that the C & A scheme is the appropriate

forum for the resolution of such issues rather than the courts.

2.24 The applicants are equally insistent that the second named respondent was not entitled to by-pass the C & A scheme; rather that they were entitled to make representations with respect to the proposed changes (before they were implemented) within the established conciliation process, as was the Minister; and that the conciliation body should have been allowed to adjudicate upon whether the proposed changes should proceed in the light of the representations made.

2.25 This polarization of positions represents the impasse that has given rise to the present litigation.

2.26 The nub, so to speak, of the applicants' case is as set at paragraphs 6, 7, 8, 9 & 10 respectively of the first named applicant's affidavit, from which it is appropriate to quote selectively. The first named applicant has deposed (*inter alia*) to the following matters:

> "6. I say that PDFORRA, in its representative capacity, deals with all matters concerning remuneration and any variation and alteration thereto is dealt with in the context of Defence Force Regulation S.6 and the process of Conciliation and Arbitration as therein referred to. I say and believe and am advised that no alteration or variation of pay and allowances pertaining to members of the Permanent Defence Forces has ever been implemented since the establishment of the Representative Association and the Conciliation and Arbitration Scheme until the mechanisms therein set out have been exhausted entirely. I say that the process of review of the RDF Allowance have been on a two yearly basis since even long before the establishment of PDFORRA and, since the establishment of PDFORRA, through the Conciliation and Arbitration process.
>
> 7. I say that the method of variation/alteration of the RDF Allowance has been on the basis of a two yearly review, the last review having been in July of 2007. I said that it has long been the custom and practice for the review to be based on an increase of allowances over the previous two years to the effect that the increase which was introduced in 2007 was based on an average increase in allowances over the years 2005 and 2006. Accordingly, the RDF Allowance which is again for review in July 2009 is to be varied and/or calculated on the basis of an increase in allowances over the years 2007 and 2008.
>
> 8. I say that, under regulation DFRS6 and in particular the third schedule thereof claims relating to remuneration, pay and allowances are identified as matters in respect of which the applicant association is seized of for the purposes of representation rights. Paragraph 24 (4) makes it mandatory that such matters be processed at meetings at national level between the applicant association and representatives of the military authorities. I say that the second named applicant and I as its

member and all members have conducted themselves and relied upon this agreement and course of conduct and have a legitimate and real expectation that it would be honoured.

9. I say that, in breach of the established procedure and agreement and contrary to the legitimate expectations of this deponent and other members of the Defence Forces in receipt of said allowance, both in respect of the continued payment of such and the proper invocation of the Conciliation and Arbitration process before alteration, the respondents have now unilaterally sought to alter the terms and conditions upon which members of the Defence Forces are remunerated with particular reference to the RDF Allowance and indeed other allowances …… . I say that the reduction therein set out has already been effected as of and from the 27th of March last and continues to be deducted and the allowance reduced. I say and believe, in addition to the above, the Circular is not in conformity with the obligations imposed on the Respondents and/or each of them by Chapter iv, Part iv of the Defence Act, 1954. I say that, while the RDF Allowance clearly stands separate and distinct from travel and subsistence and other allowances, also such other allowances are equally outside the terms and/or are not affected by Circular 07/2009 given the position concerning pay and allowances under Chapter iv, Part iv (Sic) of the Defence Act 1954 and the requirement to utilise the Conciliation and Arbitration Scheme.

10. I say that the respondents herein have accordingly unilaterally reduced the allowance and changed our conditions of service contrary to the law and have further acted in breach of the agreement between the Association and the Minister for Defence and in breach of the terms of the Conciliation and Arbitration Scheme and its operation. The second named respondent, his servants or agents were requested, in advance of any decision being finalised or such decision being implemented and effected, in accordance with the law and as per agreement, to deal with this matter through the Conciliation and Arbitration mechanism by virtue of correspondence dated the 13th of March 2009 but failed to do so. It is entirely wrong and nonsensical for the second named Respondent to now suggest that the matter be dealt with through the Conciliation and Arbitration Scheme as the reduction and decision to reduce has been implemented and effected and thus have entirely pre-empted and undermined the process of Conciliation and Arbitration."

3. The Pleadings

The legal grounds upon which relief is sought

3.1 The legal grounds upon which relief is sought are set out in detail in Part E of the applicants' Amended Statement of Grounds but may be summarized as follows:

I. The purported reduction of the RDF Allowance and travel and

subsistence allowances in general by purported implementation of Circular 07/2009 and purported application thereof by virtue of DFR S.3 A 343 & 344 is not in accordance with Chapter IV of Part IV of the 1954 Act and regulations made thereunder, with particular reference to s.97 (2) (d) thereof.

II. The second named respondent acted in breach of, and/or ultra vires, s.97 of the 1954 Act in making or enacting DFR S.3 A 343 & 344. In particular, disputed matters within the scope of representation of the second named Applicant under DFR S.6 are required in the first instance to be submitted to a process of conciliation within the framework of the C & A scheme. The second named respondent was therefore under a mandatory obligation to submit his proposed RDF Allowance variation to a process of conciliation once called upon to do so by the second named applicant, and his failure to do so thereby rendered his purported amendment of DFR S.3 by the making or enacting of DFR S.3 A 343 & 344 ultra vires his powers under the 1954 Act and unlawful.

III. The second named respondent acted in breach of, and/or ultra vires, the Payment of Wages Act, 1991 (hereinafter the 1991 Act) in making or enacting DFR S.3 A 343 & 344. In particular, the RDF Allowance variation thereby effected constitutes a deduction within the meaning of s. 5 of the 1991 Act in circumstances where the procedures and requirements set out in that Act were not complied with. Accordingly the second named respondent's actions were unlawful.

IV. The second named respondent acted in breach of, and/or ultra vires, the provisions of the Statutory Instruments Act, 1947 in making or enacting DFR S.3 A 343 & 344 and/or any purported compliance with said legislation is in breach of the constitutional rights and entitlements of the applicants. (The Court understands that these grounds are no longer being pursued).

V. The application of Circular 07/2009 and/or DFR S.3 A 343 & 344 constitutes a unilateral variation of the terms of employment and/or conditions of employment and/or remuneration of the first named Applicant and members of the Permanent Defence Force generally without any individual consideration, discussion or consent and constitutes the fettering of a discretion that had heretofore existed.

VII. The second named respondents abdicated his function and/or responsibility towards the first named applicant in relation to the terms and conditions of his statutory contract and also towards the second named applicant in terms of acknowledging and engaging with that association's representative role on behalf of its members including the first named applicant.

VIII The respondents have adopted and/or applied an over-rigid

and inflexible policy.

IX The respondents have disregarded fair procedures, alternatively have treated the applicants unfairly and contrary to the applicants' legitimate expectations concerning non unilateral variation of the contracts of employment and conditions of service of P.D.F. members, and concerning how any proposed variations to the RDF Allowance would be dealt with and progressed.

X. The respondents' actions were unreasonable having regard to DFR S.6, the terms of the C. & A. scheme, and the manner in which proposed variations to the RDF Allowance had been dealt with in the past.

The respondents' grounds of opposition.

3.2. The legal grounds upon which the respondents oppose the applicants' claim for relief are set out in detail in the respondents' Second Amended Statement of Opposition, but may be summarized as follows:

A. The respondents plead that the reduction of the RDF Allowance and travel and subsistence allowances in general by virtue of DFR S.3 A 343 & 344 was lawful and intra vires the second named respondent's powers under Chapter IV of Part IV of the 1954 Act and in particular reference to s.97 (1) thereof.

B The respondents deny that the reduction of the RDF Allowance and travel and subsistence allowances in general constituted a deduction within the meaning of s.5 of the 1991 Act. As the 1991 Act only applies to deductions from wages it has no application in the circumstances of the present case.

C. The second named respondent does not deny that the rate of the RDF allowance has been adjusted under an agreed formula prior to the introduction of the C & A scheme and subsequently within the context of the C & A scheme for members of the Defence Forces but pleads that there has never been any negotiation of these rates within the scheme as such adjustments, under the agreed formula, have always mirrored changes in the civil service subsistence allowances introduced by the first named respondent.

D. The respondents deny that it is a requirement that matters within the scope of representation by the second named applicant must be processed within the context of the said C & A scheme and further deny that it is mandatory that any variation in the RDF allowance and/or other allowances, or in particular amendments to DFR S.3 such as DFR S.3 A 343 & 344, be processed under the said C & A procedure. The respondents plead that the C & A scheme is not binding at law, whether by virtue of any contract or under statute.

E. The respondents do not deny that generally there is an obligation on the second named respondent to give notice and advance consultation of the making of amendments to the Defence Force Regulations, nor do they deny that same is required under the terms of the C & A scheme, but they plead that the second named applicant was advised of the Government decision of the 3rd of February 2009 and that allowances would be revised accordingly. Moreover, as the reduction arose from a Government decision taken in the public interest the issue could not be processed through the C & A scheme.

F. The respondents plead that the C & A scheme expressly states that the existence of the scheme does not imply that the Government have surrendered or can surrender their liberty of action in the exercise of their Constitutional authority and the discharge of their responsibilities in the public interest.

G. The second named Respondent denies that he is under any legal obligation to engage in any individual consideration, discussion or consent before exercising his powers under section 97 of the 1954 Act, and contends that to do so would fetter his discretionary powers thereunder. Moreover, he denies that in effecting a 25% reduction in relation to travel and subsistence rates he fettered his discretion.

H. The second named Respondent denies any abdication of function or responsibility on his part when he made or enacted DFR S.3 A 343 & 344.

I. The adoption and/or application of an over-rigid and inflexible policy is denied, as is the operation of fair procedures and or unreasonableness by the respondents.

J. It is denied that the making or enacting of DFR S.3 A 343 & 344 was ultra vires, or otherwise unlawful, void or of no effect.

K. The respondents' deny that the applicants, or either of them, had an expectation, legitimate or otherwise, that, in the current economic climate and in the context of the urgent need to take corrective action, the C & A scheme would be utilized to effect the reduction in travel and subsistence rates. The respondents plead, in particular, that, even were the applicants to have such an expectation, same could not fetter the second named respondent's discharge of his duties taken in the public interest pursuant to statute.

L. The second named respondent denies that the first named applicant, or members of the Defence Forces generally, had an expectation, legitimate or otherwise, that their remuneration and method of calculating alterations thereto would not be unilaterally varied or amended, The second named respondent has pleaded

that he at all times retains a discretion to vary the rates of the various allowances provided for in DFR S.3.

4. The Parties Respective Submissions

The Applicant's Submissions

4.1 The applicants, citing *N.U.R. v Sullivan* [1947] I.R. 77, have submitted to the Court that:

> "..a law which takes away the right of citizens, at their choice, to form associations and unions not contrary to public order or morality, is not a law which can validly be made under the Constitution".
>
> (per Murnaghan J, at p. 102)

Their contention is that the combined provisions of the 1990 Act, DFR S.6 and the C&A scheme, respectively, serve to facilitate the lawful and constitutional restriction of certain constitutional rights of the members of the Defence Forces, and in particular the right to freedom of association. In particular, they argue that the mechanisms provided for in the C&A scheme which sets out a detailed system for negotiation, arbitration and decision making on relevant matters falling within the scheme's remit, and those provided for in DFR S.6 requiring "meetings at national level" with respect to relevant matters not falling within the C & A scheme's remit, operate so as to render constitutional restrictions effected on the freedom of association of members of the Defence Forces, by providing alternative means by which they might be represented and have their voices heard on relevant issues. The applicants further submit that the C&A scheme, and DRF S.6, can only be effective in protecting the constitutionality of the restrictions in question provided that relevant matters are processed by the respondents in accordance with the letter and the spirit of both the legislation and the scheme. That being the case the respondents cannot unilaterally resile from the C & A scheme for relevant matters falling within its remit. Moreover, for matters falling outside the C&A scheme, the State must, likewise, discuss those at national level as envisaged by the legislation.

4.2 The applicants have further submitted that in so far as there was a discretion on the part of the Minister to establish the C&A scheme it cannot be realistically suggested that he could have intended that by the inclusion of matters in that scheme (i.e. the selection of matters from the Third Schedule) the applicants and members of the Permanent Defence Force should have weaker protection with respect to those matters than if those matters had not been so selected and agreed for inclusion. It was submitted that the contrary is the case. The C&A scheme was intended to give greater protection to the applicants. It therefore constitutes a more formal procedure, and it is one which cannot be terminated without six months notice.

4.3 Noting that the respondents claim in paragraph 10 of their Amended Statement of Opposition that "*as the reduction arose from a Government decision taken in the public interest, the issue could not have been processed through the Conciliation and Arbitration Scheme",* the applicants submit that all Government decisions are made in the public interest and they say that that proposition in no way excuses or, as claimed, prevents the operation of the

proper and mandated mechanism for the processing of the issue.

4.4 The applicants argue that regulations 24(2) and 24(3) of DFR S.6 make it mandatory (i) that *"such of the matters referred to in the Third Schedule to these regulations as may be agreed between the Minister and the Association shall be processed under"[*the C & A scheme] ; and (ii) that *"such of the matters referred to in the Third Schedule to these regulations as are not comprehended by* [the C & A scheme] *shall be processed at meetings at national level …"* The applicants submit that the respondents seek to resile from the C&A scheme which was formally established and contend that they are not entitled to do so. Moreover, it is also claimed that the applicants, and particularly the second named applicant, have/has an existing vested right under DFR S.6 to have relevant matters not coming within the remit of the C & A scheme, including amendments to the Defence Force Regulations (see (r)(2) in Part B of the Third Schedule), processed at meetings at national level. They say that this procedural requirement has not been complied with.

4.5 Correctly anticipating the respondents' reliance upon Article 3 of the C&A scheme, the applicants submitted that this provision simply does not arise or operate so as to avoid the mechanisms mandated and agreed. They say there is no suggestion on the part of the applicants that the Government by virtue of the C&A scheme has lost its constitutional authority or has ceased to discharge its responsibilities in the public interest. They say that the respondents appear to suggest that they are in some way free to simply avoid the statutory provisions and the C&A scheme. The applicants submit that there is no authority for such a proposition. No state of emergency was declared or enactment passed to reduce or set aside rights granted to the applicants and agreed with the respondents. They say that the respondents' position contains an implication or suggestion that the applicants' rights and entitlements have somehow been extinguished or put in abeyance. Once again, the applicants say that no authority whatsoever has been offered in support of this position by the respondents. No effort has been made to explain why it was not possible for the respondents to operate the C&A scheme in circumstances where a period of more than a month elapsed before the measures in dispute were implemented. The applicants contend that there was ample time to:-

> (a) fully inform the applicants of the full detail of the government decision of the 3 February 2009;
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> (b) fully inform the applicants of the nature of the allowances that would be revised;
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> (c) refer the matter to the Conciliation and Arbitration scheme;
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> (d) hear and consider any representations that might have been made on behalf of the applicants;
>
> (e) engage in the appropriate consultations.

The applicants stress that the C & A scheme was the only forum available to them. The applicants are not like a trade union and are required to avoid any

public agitation.

4.6 The point was also made on behalf of the applicants that all adjudicators and facilitators operating under the C & A scheme are obliged to take into account the criteria set out at paragraph 64 of the said scheme. This requires any conciliation, facilitation, adjudication or arbitration "*to take account of the state of the public finances, including the consequences of the Treaty on European Union, and the general economic and employment situation".*

4.7 The applicants have sought to emphasise, and the respondents seemingly do not significantly dispute, that the first named applicant's position is different to that of a civil servant in as much as he has a statutory contract. (I note, however, that the respondents say he only has a statutory contract as to his term. They say that in all other respects his engagement is akin to that of an office holder.) Moreover, the applicants say that this distinguishing feature is reflected in the fact that the terms of the conciliation scheme for civil servants established under s.17(2) of the Civil Service Regulation Act 1956 (hereinafter "the 1956 Act") are fundamentally different from those of the C & A scheme for members of the Defence Forces. S.17 (2) of the 1956 Act provides that "*The Minister may, for the purpose of subsection (1) of this section* [relating to the fixing of terms and conditions] , *make such arrangements as he thinks fit and may cancel or vary those arrangements."* They say that that situation and freedom does not apply in this case. The applicants are not governed by the 1956 Act and the C&A scheme cannot be unilaterally varied or revoked. Article 5 of the C&A scheme provides that it will continue unless and until terminated by six months notice given by the Ministers or by the representative associations.

4.8 The applicants have also submitted that there is clear authority to say that once there is a procedure in place for consultation or otherwise, such procedure must be followed. The applicants cite *Thompson –v- Minister for Social Welfare* [1989] I.R. 618 in support of this proposition. In that case an applicant for social welfare benefit had refused to attend training courses and as a consequence a deciding officer decided to disqualify him from receiving social welfare payments for a period of six weeks. The applicant appealed that decision to an appeals officer. The relevant Act obliged the appeals officer to sit with two assessors unless the applicant consented to dispense with their attendance. The applicant did not consent to dispense with their attendance but the appeals officer through oversight sat alone and affirmed the suspensions. While O'Hanlon J stated that the decision of the deciding officer was a lawful decision and that the refusal by the applicant to attend training courses "appears to be wholly unreasonable and indefensible", he then went on to add:

> "…but a decision to disallow further payments of unemployment assistance must, in my opinion, be made in compliance with the procedure prescribed by the Act and the relevant statutory regulations, and with due regard to the rules of natural justice."

On that basis he referred the matter back to the Appeals officer to determine in accordance with the proper mechanism.

4.9 The applicants further say that despite the severely weaker position pertaining to civil servants by virtue of the Civil Service Regulation Act 1956 and particularly s.17 (2) thereof, the following remarks of Costello J in *Gilheaney –v-*

The Revenue Commissioners [1996] E.L.R. 25 are nonetheless relevant, and are applicable to the situation of the first named applicant in the present case. He said (at p.38):

> "…it would be wrong to assume that because no contractual relationship arises from the appointment of a person as an officer in the civil service that no rights and obligations enforceable in a court of law exist. It seems to me that when a statute confers a power on a minister to grant a benefit to some person and that power is exercised it also confers a corresponding right on that person to receive the benefit. This means that there is a statutory right which the courts will enforce to the benefits contained in the terms and conditions of appointment of a civil servant (including, for example, those relating to remuneration) as well as to those benefits arising from the terms and conditions relating to promotion contained in administrative acts, until such time as the right is cancelled or varied by the valid exercise of a power in that behalf contained in section 17"

4.10 It was further argued that quite apart from this, even if the Court were to hold that the respondents were able to resile from the commitments given to the applicants, it could only be done after the second named applicant had been afforded some form of hearing. *Eoghan v University College Dublin* [1996] 2 I.L.R.M. 302 was cited in support of this proposition.

4.11 Moreover, the applicants contended, they had a legitimate expectation that the C. & A. scheme would be used as it is the mechanism established by the Regulations (which are a statutory instrument) for such matters. Further there had been an agreement that the issue of the RDF Allowance would be addressed within the C & A scheme and that, within that particular context, that it would be the subject of discussion and negotiation according to an agreed timetable. Specifically, the RDF allowance was to be dealt with every two years in accordance with agreement, practice and precedent. The applicants point out that the doctrine of legitimate expectations (as affirmed by the Supreme Court in Webb -v- Ireland [1988] I.R. 353) has been applied in circumstances where there was no explicit statutory or regulatory scheme. It is all the more applicable where statutory or regulatory schemes, or agreed procedures, exist.

4.12 The Court's attention was drawn to *Fakih –v- Minister for Justice* [1993] 2 I.R. 406, as well as to *Gutrani v Minister for Justice* [1993] 2 I.R. 427.

4.13 The *Fakih* case concerned a challenge to a negative decision upon an asylum application predating the Refugee Act 1996 wherein the High Court (O'Hanlon J.) held that the applicants had acquired a legitimate expectation that they would be processed in accordance with procedures privately agreed between the Minister for Justice and the United Nations High Commissioner for Refugees in 1985. In the course of his judgment O'Hanlon J quoted, ostensibly with approval, the following passage from the judgment of Lord Fraser in *Attorney General of Hong Kong –v- Ng Yuen Shiu* [1983] 2 A.C. 629 (at p. 638)

> "The justification [for the principle of legitimate expectations] is primarily that, when a public authority has promises to follow a certain procedure, it is in the interest of good administration that

> it should act fairly and should inplement its promise, so long as the implementation does not interfered with its statutory duty"

4.14 In the broadly similar *Gutrani* case the Supreme Court indicated that a concession by the Minister that he was obliged to consider the applicant's application (for asylum) in accordance with the 1985 agreement was proper. McCarthy J stated (at p. 436)

> "The Minister does not contest that he is obliged to consider the application within the framework of the letter of the 13th of December 1985. Having established such a scheme, however informally so, he would appear to be bound to apply it to appropriate cases, and his decision would be subject to judicial review. It does not appear to me to depend on any principle of legitimate expectation or reasonable expectation; it is, simply, the procedure which the Minister has undertaken to enforce."

4.15 Arguing by analogy, the applicants in the present case have submitted that they have a legitimate expectation, alternatively an entitlement based upon agreement, practice and precedent, that proposed changes to the RDF allowance would be negotiated, discussed and adjudicated upon within the context of the C. & A scheme.

4.16 The applicants have further argued that the action of the respondents constitutes a deduction within the meaning of s. 5 of the Payment of Wages Act, 1991. The relevant provision states:

> *"S5 (1) An Employer shall not make a deduction from the wages of an employee (or receive any payment from an employee) unless –*
>
> > *(a) the deduction (or payment) is required or authorised to be made by virtue of any statute or any statutory instrument made under statute,*
> >
> > *(b) the deduction (or payment) is required or authorised to be made by virtue of a term of the employee's contract of employment included in the contract before, and in force at the time, of the deduction or payment, or*
> >
> > *(c) in the case of a deduction, the employee has given his prior consent in writing to it."*

They say that if it were not so, it would be open to every employer to claim that they were reducing wages rather than making a deduction so as to avoid the protection of the legislation. The applicants contend that the procedures and requirements set out in the Payment of Wages Act, 1991 were not complied with and that accordingly the respondents' actions were unlawful.

4.17 It was further argued that the relevant government circular (Circular 07/09) does not in any event capture the subject matter allowance in this case as the circular refers only to the usual allowances paid to members of the P.D.F in relation to motor travel and subsistence. The R.D.F. allowance does not relate to motor travel at all and in so far as it relates to subsistence this is a special

allowance arising under a completely different heading of DFR S.3 to that concerning the usual allowances paid for "motor travel and subsistence".

4.18 Finally, the applicants have made the point, both in written submissions and in oral legal argument, that although they consider that the Financial Emergency Measures in the Public Interest Act 2009 has no direct application in this case, and that to the extent that the respondents purport to rely upon that Act their arguments are misconceived, it is nevertheless noteworthy that even the Financial Emergency Measures in the Public Interest Act 2009 envisaged a process of discussion and consultation, rather than the unilateral imposition of a deduction without notice which they suggest has occurred in the instant case.

The Respondents' Submissions

4.19 The respondents have argued by way of a preliminary point that it is an established and notorious fact, evidenced by recent legislation, that (to quote one of the recitals appearing after the long title to The Financial Emergency Measures in the Public Interest Act 2009) *"a serious disturbance in the economy and a decline in the economic circumstances of the State"* has occurred especially in the last eighteen months. The common good has required that the Government and the Oireachtas take strong budgetary action to reduce the gap between the State's revenues and expenditures by legislative action, by exercise of the delegated legislative functions, and by non-statutory corrective action at the Executive Exchequer level.

4.20 Moreover, the respondents say that under Article 28.2 of the Constitution, the Government has clear constitutional functions and duties, in discharging the executive power of the State, in the area of budgetary control in the public interest or in the interests of the common good. They argue that this overriding duty and right of Government is reflected and expressly acknowledged in Article 3 of the C & A scheme.

4.21 They further submit that by a decision of the Government of 3rd February 2009, a decision taken in the economic context previously referred to, each Minister and Department of State was mandated to reduce all travel and subsistence allowances by 25% in order to achieve an overall Exchequer saving of €1.4 bn in the public service pay bill. Pursuant to that Government decision, which was binding on each Minister in his capacity of Member of Government, the second named respondent made regulations under section 97 of the Defence Act 1954, reducing the allowances mentioned therein by 25%.

4.22 The respondents say that the second named respondent was, by section 97 of the Defence Act 1954, authorised in law to increase or decrease pay and allowances. As is reflected in Article 3 of the C & A scheme, he, while acting as a member of, and on behalf of, the Government was in no way inhibited or precluded from exercising that statutory power in the exercise of the Government's constitutional authority and in the discharge of the Government's budgetary responsibility in the public interest.

4.23 They further say that the decision of the Government of 3rd February, 2009 and the implementing statutory instruments, made by the second named

Respondent on 11th March, 2009 were lawfully made in circumstances intended and provided for by section 97 of the Defence Act 1954.

4.24 The respondents also contend that having regard to the decision of the Government made on the 3rd February 2009, there was no basis for, or purpose to, entering into a process of conciliation and arbitration. There was no issue to be submitted to arbitration. There was no function for conciliation. It was the duty of each Minister to execute the Government decision, and any engagement in conciliation or arbitration would have been inconsistent with the constitutional authority of the Government, and would have amounted to a meaningless pretence. Each Minister was bound by the nature of Government, which is (in the words of Article 28.4.2 of the Constitution) to *"meet and act as a collective authority",* to give effect to its decisions.

4.25 In short, the respondents say that the amending regulations, namely DFR S.3 A 343 & 344, were made lawfully by the second named respondent in exercise of his express authority under section 97(1) of the Defence Act 1954, on foot of a lawful budgetary decision of the Government made in the exercise of the executive power of the State in the interests of the common good.

4.26 Addressing the applicant's purported reliance upon the decision in *N.U.R. v Sullivan* [1947] I.R. 77 Mr Paul O'Higgins S.C., on behalf of the respondents, submitted that the applicants submission contained a conflation of concepts, namely the right to representation on the one hand, and the establishment of an administrative structure, ie., the C & A scheme, within which certain matters or claims which are amenable to a process of conciliation or arbitration may be processed. He argued that the establishment of the C & A scheme was wholly separate to, and was not integral to, acknowledgment of the right to representation. The scheme is not a regulated or statutory scheme. It was not set up by means of regulations although the Minister was empowered by regulations to set up such a scheme. Nevertheless it is a still just an administrative scheme which the Government is not obliged to have resort to in every case. According to Counsel the nub of the matter is that "the Government has to govern". It was implicit in the decision of the 3rd of February 2009 that no further consultation was possible. Moreover, the Minister's action could give rise to no "claim" "relating to remuneration and conditions of service". Neither was he proffering any "proposal" "relating to remuneration and conditions of service". What he was doing was legislating in circumstances of national financial emergency. There was therefore nothing capable of being conciliated or arbitrated upon. The Minister was entitled to act as he did, and his decision to do so in no way undermines the applicants' rights at law and/or under the Constitution.

4.27 In response to the argument based upon s.5 of the Payment of Wages Act 1991 the respondents submitted that the reduction in the PDF allowances is not a "*deduction*" from wages payable. It is a reduction of the allowance payable. The Act has no application to reductions (as distinct from "*deductions*").

4.28 The respondents further submit that the issue raised of non-compliance with s.5 of the Payment of Wages Act 1991 is not properly *justiciable* by the High Court. They contend that the legislature has provided a statutory enforcement scheme to which an aggrieved party may have recourse in the case

of alleged breaches of the 1991 Act, but that that Act does not confer independent rights at common law.

4.29 The respondents say that this principle of non-justiciability was clearly articulated by Fennelly J. in the Supreme Court in *Maha Lingham v. Health Service Executive* [2006] E.L.R. 137. The plaintiff in that case had sought an interlocutory injunction restraining the defendant from dismissing him from his post at Cork University Hospital. The plaintiff relied on, *inter alia*, the Protection of Employees (Fixed-Term Work) Act 2003, which implemented Council Directive 99/70. Having looked at the 2003 Act, Fennelly J. said:

> "It is unnecessary to go into it except that the general policy of the directive and the Act seems to be to protect employees who are employed on short term fixed-term contracts and who have been employed on such basis for a certain minimum number of years, either three or four years, and accepting for the sake of the purpose of the present case, that the Plaintiff is employed under such a contract of employment, the question would be whether he could make out a case to justify the grant of an interlocutory injunction. There are two major obstacles in the place of the plaintiff/appellant in this context: first that is the implementing Act, the 2003 Act, contains, like the Unfair Dismissals Act, its own statutory scheme of enforcement and it does not appear to be envisaged by the Act that it was intended to confer independent rights at common law or to modify in general the terms of contracts of employment to be enforced by the common law courts".

4.30 Similar views were expressed by Laffoy J. in the High Court in *Nolan v Emo Oil Services Ltd* [2009] E.L.R. 122 to which I have also been referred, and by Charlton J in the High Court in *Doherty v South Dublin County Council (No. 2)* [2007] 2 I.R. 696.

4.31 In *Doherty* the plaintiffs had sought a declaration that the Council's failure to provide them with a centrally heated, insulated and internally plumbed caravan was in breach, *inter alia*, of the Equal Status Acts 2000 and 2004. The Council submitted that the rights and obligations therein created "belong only with the scheme created by those Acts and administered within the mechanisms set up by them". In his judgment Charleton J. expressed the opinion that the Equal Status Acts did not create legal norms which were *justiciable* "outside of the framework of compliance established by those Acts" (see [2007] 2 I.R. 696, 704). In response to the submission that the High Court derived jurisdiction to determine the plaintiffs' equal status rights from Article 34.3.1 of the Constitution, Charleton J. said that the High Court's power thereunder was to determine "all *justiciable* matters and questions" (citing Henchy J. in *Tormey v Ireland* [1985] I.R. 289). He continued (at 706):

> "where, however, an Act creates an entirely new legal norm and provides for a new mechanism for enforcement under its provisions, its purpose is not to oust the jurisdiction of the High Court but, instead, to establish new means for the disposal of controversies connected with those legal norms ... In the case of the Planning Acts, in employment rights matters and, I would

> hold, under the Equal Status Acts 2000-2004, these new legal norms and a new means of disposal through tribunal are created. This expressly bypasses the courts in dealing with these matters. The High Court retains its supervisory jurisdiction to ensure that hearings take place within jurisdiction, operate under constitutional standards of fairness and enjoy outcomes that do not fly in the face of fundamental reason and common sense."

4.32 In seeking to reply to the applicants' legitimate expectation argument the respondents have drawn the court's attention to the Supreme Court case of *Glencar Explorations plc v Mayo County Council (No. 2)* [2002] 1 I.R. 84. In his judgment in that case Fennelly J drew the following conclusions (at pp.162-163) regarding the doctrine of legitimate expectation, which he described as provisional:-

> "Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly the representation must be addressed or conveyed either directly or indirectly or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted upon the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However the proposition I have endeavoured to formulate seems to me to be preconditions for the right to invoke the doctrine."

4.33 The respondents have urged upon this court that, adopting this approach, it should first assess whether either Minister, as regards the C & A Scheme, has made a statement or taken a position amounting to a promise or a representation. The respondents submit that no such representation was made.

4.34 They further say that as a second step the court should assess whether the representation, if made, was is addressed to an identifiable group of persons. The Respondents submit that, if any representation was made to the effect claimed (which is they deny), it was made to the members of the Defence Forces generally.

4.35 Finally, the respondents, making the further point that Fennelly J. expressly recognised that the doctrine of legitimate expectation could be qualified by public interest considerations, have also drawn the courts attention to similar statements by MacMenamin J. in *Power v Minister for Social and Family Affairs* [2007] 1 I.R. 543, 566 and by Dunne J. in *Curran v Minister for Education and Science* (unreported, 31 July 2009). In particular, in the Curran case Ms Justice Dunne was satisfied that:

> "declining economic circumstances were such that the overriding

public interest in taking the decision to suspend the [early retirement] scheme must outweigh any legitimate expectation the applicants had to pursue their application under the scheme".

5. The Court's Decision.

5.1 The Court is unimpressed by the applicants' argument that the second named respondent in enacting DFR S.3 A 343 & 344 so as to give effect to the decision of the Government of the 3rd of February 2009 as communicated in Circular 07/2009, without first of all giving the applicants an opportunity to make representations within the framework of the C & A scheme, served to undermine what they contend was the combined objective of 1990 Act, DFR S.6 and the C & A scheme, namely the facilitation of the lawful and constitutional restriction of certain constitutional rights of the members of the Defence Forces, and in particular the right to freedom of association.

5.2 It is part of the constitutional mandate of the Government that it should be able to act swiftly, and if necessary unilaterally, in urgent protection of the national interest. It is a matter of very wide public knowledge, and this court has no hesitation in taking judicial notice of it on that basis, that in late September of 2008 our country entered the most serious economic crisis in its history and that that crisis has been deepening by the week ever since.

5.3 The amendments to DFR S.3 to which objection is taken were made pursuant to the decision of the Government of the 3rd of February 2009 as communicated in Circular 07/2009. That Government decision was, without question, a decision that was out of the ordinary. It was a decision that applied to the public service across the board. It was decision made not just in the public interest, because as the applicants point out it is to be presumed that all Government decisions are made in the public interest, but rather it was also one that was made in the urgent national interest. As has been stated the Government must be free to govern. In certain instances it has to act urgently and unilaterally for to await the outcome of a public discourse or debate upon a required measure might well serve to undermine it or reduce its effectiveness. When it requires to act urgently the Government cannot be at the mercy of, or be expected to obtain the approval of, or to have to invite representations from, every single interest group. Rather, it's duty is to the country as a whole and it has, under Article 28 of the Constitution, a very wide freedom of action pursuant its mandate to discharge the executive power of the State in the area of budgetary control in the public interest or in the interests of the common good. This overriding duty and right of Government is reflected and expressly acknowledged in Article 3 of the C & A scheme. Moreover, the Court expressly rejects the suggestion contained within the applicants' submissions that a state of emergency requires to be declared before the Government can act in that way.

5.4 The Court considers that in the exceptional and quite unprecedented circumstances of the case the Government was entitled to act in the way that it did, and the second named respondent was not obliged to submit the Government's plans to scrutiny within the framework of the C & A scheme. This Government decision was not open for negotiation. There was no scope for discussion or debate about it. The applicants were simply being treated in the same way as everybody else in the public service. They were not being singled

out for special treatment or discrimination. The respondents are therefore right in contending that in the particular circumstances of the case there was nothing to conciliate or to arbitrate about. If one particular interest group was allowed to debate or make representations concerning the intended measure then every other interest group would have to be afforded the same facility and the Government would potentially have become mired in an extensive controversy which would most likely have given rise to significant delay in the implementation of the relevant measures to the prejudice of the overall national interest.

5.5 Moreover, the point made by the respondents to the effect that the C & A scheme is non-statutory and is only at the end of the day an administrative scheme is valid. While in normal circumstances the Government would be expected to have recourse to it, these are not normal circumstances. The scheme is set up in such a manner as to entitle the Government, and more specifically its representative the second named respondent, not to have recourse to the C & A scheme if to do so would fetter or hinder the Government's "liberty of action in the exercise of their Constitutional authority and the discharge of their responsibilities in the public interest."

5.6 This Court further rejects the applicants' case in so far as it is based upon legitimate expectation. I accept that the approach commended to me based upon Fennelly J's obiter dictum in *Glencar Explorations plc v Mayo County Council (No. 2)* is the correct one to adopt. Therefore I must first assess whether either Minister, as regards the C & A Scheme, has made a statement or taken a position amounting to a promise or a representation addressed to the applicants, or either of them, specifically that recourse would be had to the C & A scheme in every case involving a reduction or intended reduction of the RDF allowance. I agree with the respondents' submission that no such specific promise or representation was made. Such representations as may have been made were made to members of the Defence Forces generally, and were in any event expressly qualified by Article 3 of the C & A scheme.

5.7 In addition, even if the applicants could be said to have had a reasonable expectation that recourse would have been had to the C & A scheme, I completely agree with the approach of my colleague Dunne J in *Curran v Minister for Education and Science* (unreported, 31 July 2009) and would hold that declining economic circumstances were such that the overriding public interest in the Government taking the decision to reduce travel and subsistence allowances across the board within the public service, and the second named respondents decision to seek to implement that decision by unilaterally amending DFR S.3 so as to reduce the RDF allowance, must outweigh any legitimate expectation the applicants had that they would have recourse to the C & A scheme to debate any proposal to do so and make representations concerning that proposal.

5.8 Finally, the Court agrees with the respondents' submission that the Payment of Wages Act, 1991 has no application in the circumstances of this case. First, as has been pointed out, correctly in the Court's view, the reduction in the PDF allowance is not a "*deduction*" from wages payable. It is a reduction of the allowance payable. The Act has no application to reductions as distinct from "*deductions*". Secondly, even if that were not so, any alleged breach of the

Payment of Wages Act, 1991 is not a *justiciable* controversy before the High Court in circumstances where that Act sets up a specific enforcement mechanism to be availed of elsewhere in such circumstances.

6.0 Conclusion

6.1 In all the circumstances of the case I consider that both applicants have failed to discharge the burden of proof upon them in these proceedings, and I must dismiss their respective applications. I will hear submissions with respect to the issue of costs in due course.