Neutral Citation Number: [2011] IEHC 383

THE HIGH COURT

JUDICIAL REVIEW

2010 148 JR

BETWEEN

SANDRA DUNNE

APPLICANT

AND

MINISTER FOR DEFENCE

RESPONDENT

JUDGMENT of Ms. Justice Dunne delivered on the 20th day of July, 2011

The applicant herein sought leave to apply for judicial review by way of certiorari quashing the order of discharge of the applicant from the Defence Forces on 12th August, 2009, and an order reinstating her as a member of the Defence forces serving without engagement as and from 12th August, 2009. Leave to apply for judicial review was granted by the High Court (McKechnie J.) on 11th February, 2010.

Background

The applicant herein enlisted as a member of the Defence Forces for a five-year term on 12th July, 2000. Therefore, her period of service expired in July 2005. She applied for an extension of service at that time, but was not recommended for an extension of service because, although she was of the requisite weight to engage in her annual fitness test, she failed a fitness test in May 2005.

The applicant became pregnant and was therefore exempted for the period of her pregnancy from undergoing a fitness test. She gave birth in 2006. Unfortunately, the applicant suffered from postnatal depression. She attempted to return to work in November 2006, but was unable to cope. She came under the care of Cmdt. Tobin, psychiatrist, at that time, and was prescribed leave together with medication. In January 2007, the applicant was paraded and served with a Health Related Fitness Assessment (HRFA) having failed the earlier fitness test. She was not permitted to undergo a fitness test at that time as her Body Mass Index (BMI) was in excess of the limit permitted for members of the Defence Force required to take fitness tests. She went on sick leave again in April 2007, and remained on sick leave until July 2007. She was informed in July 2007, and subsequently, in November 2007, that she would not be recommended for reengagement. In July 2007, and again in November 2007, the applicant appealed those decisions and she was informed that her service would be extended until February 2008. The purpose of those extensions was to allow her to achieve the requisite standard for fitness to enable her to continue serving in the Defence Forces.

During the period between January 2007 and February 2008, the applicant had managed to reduce her weight from 95 to 90 kgs. but her BMI remained above the maximum limit and, consequently, she was not allowed attempt a fitness test in February 2008. Subsequent to that, again a decision was made not to recommend the applicant for extension of service. The applicant appealed that decision and ultimately, in October 2008, she was informed that her service extended until January 2009. She was served with a Health Related Fitness Assessment. In January 2009, she applied for a further extension of service and this was granted until March 2009. She was informed at that point that no further extension would be granted. She failed a fitness test then on 23rd March, 2009, and subsequently on 27th March, 2009, and in April 2009, was informed that she would not be recommended for a further extension of service. Ultimately, in April 2009, an application for her discharge was completed and in May was approved by the General Officer in Command. That decision was confirmed towards the end of July, and on 12th August 2009, the discharge of the applicant from the Defence Forces took place. It is clear that throughout the period following the conclusion of her first period of service, the applicant's service was extended regularly to enable her to pass the requisite fitness test.

Grounds of Application for Judicial Review

The complaints made by the applicant centre around the Defence Forces Training Instructions dated 28th February, 2007. In the Statement of Grounds, reference is made to the fact that where a member of the Defence Forces is placed on a Health Related Fitness Assessment, a threefold process must then be followed pursuant to 12D and 13J(1) and (2) of the Training Instructions. It would be useful at this point to refer in some more detail to the Statement of Grounds which provides as follows:-

> "8. Pursuant to 13J(2)(a) and 12D, a party must be assessed and provided with a personal training programme and a personal trainer, and be afforded a twelve week period within which to prepare for a further test. Pursuant to 13J(2)(b) if the member fails the next test, he or she is to be provided with a further period of eight weeks to prepare for another test, again with the assistance of a remedial training programme and personal assistant. In the event that the member fails the second test, he or she can, after having been medically cleared, be tested again within a seven month period.
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> 9. Contrary to 13J(2)(a) of the Defence Forces Training Instructions outlined above, the applicant was not the subject of an assessment in October 2008, nor was she monitored during the course of the twelve week period or given any assistance from her personal training assistant. Further her trainer was substituted on the 22nd December, 2008 and she was supplied with a new training programme.
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> 10. The applicant was scheduled for her second test at the end of January 2009, which was postponed until March 2009, as she was ill. The applicant was tested on the [23rd] March, 2009 and failed. Contrary to 13J(2)(b) of the Defence Forces she was not afforded another period of eight weeks of assisted training within which to prepare for a further test, rather she was tested again on the 27th Mach 2009 and failed. The applicant was then informed, as she had been informed previously, that having failed her test she would be discharged.

. . .

13. Having regard to the matters aforesaid the respondent acted in breach of the principles of natural and constitutional justice, and the provisions of the Defence Forces training instructions, in particular:

(1) The respondent breached the procedures outlined in 13J(2)(a) of the Defence Forces by failing to assess the applicant and supply her with a tailored fitness programme and adequate assistance;

(2) The respondent breached the procedures outlined in 13J(2)(b) of the Defence Forces in failing to afford the applicant a further period of eight weeks of assisted training before subjecting her to a further fitness test."

Statement of Grounds of Opposition

The first issue raised is delay. It was set out in the statement of grounds of opposition as follows:

> "She was informed that her services would be continued beyond March 2009 if she did not pass her fitness test, which she failed. Consequently, she was informed on the 8th April, 2009 that she would not be recommended for further extensions of service. The applicant was afforded a seven day period within which to make representations. She confirmed on the 15th April, 2009 that she did not wish to make any representations. Her application for discharge was completed by her commanding officer on 28th April, 2009. This application for discharge was approved by the GOC Command [General Officer Commanding] of the Second Eastern Brigade, to which the applicant was attached on the 14th May, 2009. On the 27th July, 2009, the OC of Second Infantry Battalion concurred with the recommendation against the extension of the applicant's service. Consequently, the applicant was discharged with effect from the 12th August 2009."

It is thereafter contended that the latest date capable of constituting the decision under challenge is the endorsement of the Commanding Officer's recommendation dated 27th July, 2009.

The second point raised on behalf of the respondent is that the contested decision was lawfully taken *intra vires* the provisions of the Defence Forces Act 1954, as amended, and in particular, s. 81 thereof.

It was also pleaded that compliance with the Defence Forces Training Instructions is not amenable to judicial review.

Further, it was pleaded that the applicant was not entitled to challenge the contested decision in circumstances where she made no representations as to why her Commanding Officer should not proceed with the recommendation against the extension of service on grounds of physical unfitness.

Delay

The application for leave to apply for judicial review in this case was made on 11th February, 2010. The application was made on the basis that the date of the contested decision was 12th August 2009. If that date was, in fact, the date on which the contested decision was made, the application was made within time, albeit with no room to spare. However, it is clear that the decision that gave rise to the discharge of the applicant from the Defence Forces took place before 12th August, 2009, no decision was in fact made that day. The case made by the respondent is that the latest date that could be considered as being the date of the contested decision is 27th July, 2009. On that basis, the applicant was two weeks out of time in seeking to apply for leave to judicially review the decision.

Having accepted that 27th July, 2009, was the latest that could be considered as being the date of the contested, it was strongly contended that, in fact, the actual decision of relevance was made on 8th April, 2009, when the applicant was informed that there would be no further extension of service. She was paraded on 15th April, 2009, and a memorandum of the parading of the applicant was exhibited in the affidavit of Alan Rath, in which it was noted that the applicant was asked if she wished to make any representations as her deadline for extension of service had been reached. She declined to make any representations and advised as to what she proposed to do when she finished work in the Defence Forces. A number of other comments are noted.

It would be relevant to set out two paragraphs of the grounding affidavit sworn by the applicant on 10th February, 2010. She stated:

> "18. I attended with my solicitor, Mr. Denis Boland of PV Boland and Son on the 24th August, 200[9] and relayed the history of the matter. He requested that I furnish him with all relevant regulations and training instructions which I believed had been breached in this matter, so that he could progress the matter.
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> 19. At this point I was extremely upset by the whole process. I had served as a member without engagement for nearly three years. I have been the subject of a series of fitness tests without the benefit of assistance and felt let down by the absence of any meaningful support for my position and obvious breach of procedures. While I was asked to return with the information to PV Boland and Son, for a number of months I simply wished to forget about what had been a lengthy ordeal and to try and maintain my mental balance.
>
> 20. I was contacted by Mr. Boland in January of this year and informed that if I wished to take any further step in this matter that I would have to proceed before the 12th February, 2010 at the latest. After a number of months reflecting on the matter I now feel am able (sic) to address how I was treated in respect of this matter."

Although it was strongly argued on behalf of the respondent that the relevant date was in April, it was also pleaded on behalf of the respondent that the relevant decision was that of 29th January, 2009, in circumstances where the applicant was aware of a decision taken by the General Officer commanding to Eastern Brigade's decision of 29th January, 2009, that her service would not be extended beyond 27th March, 2009.

The first question to be considered by the Court on the question of delay is when did the grounds for bringing an application to challenge a decision by way of judicial review first arise. Effectively, there are a number of different dates on which decisions were made. The first decision was made in January 2009. The decision is contained in a letter of 28th January, 2009 and noted:-

> "Private Dunne will be afforded an extension up until 27th March, 2009.

> Private Dunne's application for EOS will be finally reviewed on the 27th March, 2009, there will be no further extensions beyond this date."

The applicant was then paraded the following and advised accordingly. She was also told that she must take the opportunity to pass the fitness test.

The point was made in the course of submissions on behalf of the applicant that while the final step in the decision-making process may have been made on 27th July, 2009, the decision was not communicated to her until 12th August, 2009. Further, the point was made on behalf of the applicant that there was nothing in the affidavit sworn herein on behalf of the respondent to indicate that there was any prejudice to any third party by reference to the failure to act "promptly". On that basis, it was contended that it was open to this Court to extend the time within which to bring the application.

Could the actual decision at issue in these proceedings be that of 29th January, 2009? At that stage, the applicant was informed on her application for further extension of service that she would have her service extended until March 2009, but there would be no further extensions. She was told that if she failed her fitness test in March 2009, she would not get a further extension of service. She failed the test in March 2009. A further decision was taken on 8th April, 2009, that the applicant would not be recommended for further extension of service and she was so informed on 15th April, 2009. At that stage, she did not seek to make any further representations and she accepted the non-recommendation of extension of service. This was done in circumstances where, up to this, the applicant had successfully appealed a number of recommendations to the effect that she would not recommend for an extension of service. It is on that basis that it is contended that the decision under challenge is the decision of 28th January, 2009, to the effect that no further extension of service would be granted beyond 27th March, 2009. Alternatively, it is argued that the decision was that taken on 8th April, 2009, which was communicated to the applicant on 15th April, 2009, at which stage the applicant indicated that she was not going to make any further representations in relation to the matter. As it happened, she indicated that she was going to take up employment elsewhere. The decision in April 2009 went further than the earlier decision of 28th January, 2009, in that it said, "her discharge should be processed accordingly".

In the course of submissions, I was referred to a number of authorities, namely, the decision in the case of *Weldon v. Minister for Health* [2010] I.E.H.C. 444, and *O'Donnell v. Dun Laoghaire Corporation* [1991] 1 I.L.R.M. 301, the decision in the case of *O'Brien v. Moriarty* [2006] 2 I.R. 221and the decision in the case of *McGrath v. Minister for the Defence* [2004] I.R. 386.

In the case of Weldon, Kearns P. commented:-

> "In accordance with O. 84, r. 21(1) time begins to accrue "when grounds for the application first arose". The key issue to be determined is to ascertain as to when the grounds first arose. O. 84, r. 21(2) provides that where *certiorari* is sought in respect of a judgment, order, conviction or other proceeding, the date when the grounds first arose is to be taken to be the date of that judgment, order, conviction or proceeding. In this case, that date must be deemed to be the 28th August, 2008. It is a matter for the discretion of the Court whether the time limits in O. 84, r. 21(1) will be extended and the exercise of that discretion involves a consideration of all the relevant circumstances as detailed in *De Róiste v. Minister for Defence* [2001] 1 I.R. 190. The applicant must demonstrate the "reasons which both explain the delay and afford a justifiable excuse for the delay" as stated by Costello J. in *O'Donnell v. Dun Laoghaire Corporation* [1991] 1 I.L.R.M. 301 at p. 315. This was cited with approval by Fennelly J. in *De Róiste v. Minister for Defence* who also stated the view, that delays in making an application for judicial review requires both explanation and justification consistent with the provisions of O. 84, r. 21."

I think one can safely rule out the January date as being the operative date of the decision to discharge the applicant. When the applicant was paraded, she was advised as to the fact that she had been granted an extension until 27th March, 2009, and she was told that she must take the opportunity to pass the fitness test. The clear indication given was that there would be no further extensions beyond 27th March, 2009, to afford the applicant the opportunity to pass the fitness test. Presumably, if she had passed the test, it would then have been necessary to consider her application for an extension of service. As the direction of 28th January, 2009, said, her application would be finally reviewed. There was a statement to the effect that, "there will be no further extensions beyond this date" in the letter of 28th January, 2009, but I think it is clear that the final review would have depended on whether or not the applicant passed the fitness test. Accordingly, I am satisfied that the January date is not the relevant date.

I have come to the conclusion that in this case, the relevant decision at issue in these proceedings is the decision of 27th July, 2009, which appears to have been communicated to the applicant on 12th August, 2009. That is the date upon which the formal decision to discharge the applicant from the Defence Forces was made. The applicant had been told previously on a number of occasions that an extension of service would not be recommended. Nevertheless, it was extended on several occasions following the making of representations. One of the points made on behalf of the respondent is the fact that in April 2009, she did not appeal that decision.

In my view, the applicant in this case could not have been expected to bring proceedings until such time as the final and formal decision which affected her had been notified to her and as it does not appear to be in issue that this took place on 12th August, 2009; it seems to me that the applicant is within time in bringing the application in accordance with the provisions of O. 84, r. 21 of the Rules of the Superior Courts.

The Substantive Issue

The substantive issue in these proceedings relates to the circumstances in which a member of the Defence Forces may be discharged and the extent to which the statutory provisions which provide for discharge may be circumscribed by the Defence Forces Training Instructions. In essence, complaint is made that the timeline set out in the Training Instructions for those who have failed a fitness test has not been adhered to in this case, and that in those circumstances, the decision to discharge the applicant should not have been made.

The terms of engagement of members of the Defence Forces are prescribed by the Defence Act 1954, as amended. Section 63(1) of that Act provides that the Minister may, by regulations, vary the conditions of service. It also provides for the possibility of an extension of service. The Act contemplated a period of service of twelve years. Section 64 provides for re-engagement. Section 81(2) provides as follows:-

> "The Minister may make regulations as to the manner in which and the persons by whom the discharge of men is to be carried out.
>
> (3) Until the discharge of a person who is a man of the Permanent Defence Force or the Reserve Defence Force is carried

out in accordance with regulations made under subsection (2) of this section, such person shall remain a man of the Permanent Defence Force or the Reserve Defence Force (as the case may be)."

The Defence Force Regulations set out the terms of enlistment and it is clear from Regulation 8 of the terms of enlistment and in particular Regulation 8(1)(e) that the term of enlistment for a person in the position of the applicant, that is, a recruit for general service who come under the description of "line class" in respect of persons enlisted after 1st January, 1994, is now five years in the permanent Defence Forces. Regulation 9(2) provides for extension of service in the following terms:-

> "Notwithstanding anything contained in these Regulations, a person enlisted in the permanent after 1st January, 1994, under the provisions of subparas. (8)(i)(d)(ii), (8)(i)(e)(i)(ii), or (8)(i)(e)(ii), will not be permitted to extend the term of his/her original enlistment unless –
>
> (i) He/she fulfil such criteria as may be laid down from time to time by the deputy chief of staff (support) in regard to such matters as conduct rating, physical fitness, medical category, overseas service, and successful completion of appropriate military course of instructions;
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> (ii) He/she is recommended by his/her commanding officer for an extension of service; and
>
> (iii) He/she is specially selected by a selection Board established for that purpose."

Discharge from the permanent Defence Force is provided for in Regulation 58. The Regulation provides for the giving of a reason for the discharge, prescribes the officer authorised or the prescribed military authority who are authorised to make a recommendation as to discharge and provision is also made for special instructions. In this case, the discharge of the applicant was pursuant Regulation 58(s). Under that heading, the reason for the discharge of the applicant was the determination of service by the Minister for Defence. As was pointed out earlier, the chain of events leading to the discharge of the applicant followed the failure of the fitness test in March 2007, culminating in the decision of Lt. Col. McAndrew in a letter of 2nd April, 2009, to the GOC in which it was stated:

> "Following a personal interview with GOC2EBDE on 01 Oct. 08 on the occasion of the GOCs inspection of Cathal Brugha Barracks, it was directed that Pte. Dunne be given a deadline of the 20th January, 09 to complete her fitness testing so as to satisfy the criteria to extend in service.
>
> 2. A number of weeks before 20th January 09 Pte. Dunne went sick. She was unable to undergo her fitness test. An application was made to the GOC to extend the deadline. A new deadline was granted by the GOC. He extended the deadline to the 27th March 09. She continued to be the subject of a HRFA programme.
>
> On the 23rd March 09 Pte. Dunne presented for ITs and failed the BMI test. She again presented for testing on the 27th March, 09 and again failed the BMI test.
>
> Pte. Dunne has not satisfied the criteria for extension of service and I do not recommend her for extension of service."

The decision was confirmed on 27th July, 2009, and communicated to the applicant on 12th August, 2009.

I also want to refer to the Defence Forces Training Instruction. The aim of that document is set out in para. 7 and is, inter alia, to outline the standard of physical fitness which each individual in the Defence Forces is required to attain and maintain; to outline the tests by which the standard will be measured and to set out the administrative procedures through which the tests will be undertaken and recorded.

It sets out a number of objectives to be achieved and the applicant relies on para. 8(d) which is as follows:

> "The implementation of the appropriate remedial training programme for those failing to achieve the minimum standard in the tests (as per HRFA para.)".

One of the elements comprised in the tests includes a Body Mass Index test as per annex C. Paragraph 13 is one which is headed 'Administrative Concept' and goes on to deal with a number of issues. The applicant in this case relies primarily on para. 13J(2). It provides:

> "Personnel who fail the DF fitness test after repeat testing (if permitted by BPEO) will be required to undergo the health related fitness assessment (HRFA), See para. 12D.
>
> The following procedure will be followed:
>
> (a) First failure: verbal appraisal by the testing officer. The testing officer at this stage may initiate the HRFA if he/she deems it necessary. If the HRFA is deemed necessary, procedure outlined at para. 13D will be strictly adhered to. The individual has 12 weeks within which to achieve the minimum standard.
>
> (b) Second failure: verbal appraisal by unit commander, administration of the HRFA with the appropriate remedial training programme monitored by the Unit PTI, as per para. 13D. The individual then has eight weeks within which to achieve the minimum standard. The testing officer will forward a written report to the BPEO.
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> (c) Third failure: The BPEO will test the individual and will forward a written progress report to the unit commander. The unit commander refers the individual to the MO. Retest within seven months having received medical clearance."

The essence of the case made on behalf of the applicant is that, having failed a fitness test, and in circumstances where a Health Related Fitness Assessment was deemed necessary, the procedures outlined in para. 13D were not adhered to. I was referred to two other passages from the Defence Force Training Instructions, namely, para. 14 which provide: "it is the responsibility of the individual to attain and maintain a level of fitness in keeping with the individual's role within the Defence Forces.". I was also referred to para. 15 which provides that the unit commander is: ". . . to ensure that all personnel on HRFA programmes receives the necessary support (para. 13D refers) from the unit PTI in order to assist them attain the minimum standard necessary to pass tests 1, 2 and 3."

It has been contended on behalf of the applicant that having been placed on HRFA in October 2008, she did not have the necessary support or training programmes as required by the provisions of para 13J(2)(a) of the DFTI which provides:

> "The unit commander will ensure that the unit PTI conducts a health related fitness assessment and produces an appropriate training programme for the individual. Unit commanders must ensure the personnel are reminded of their individual responsibly for attaining and adhering to the fitness standards as laid down by DDST from time to time. Where a qualified testing officer . . . is available within the unit, he/she will monitor unit personnel's progress on HRFA. Alternatively, guidance is available from the BPEO on request.
>
> The unit PTI will closely monitor the individual's progress on the training programme throughout the HRFA process and report to unit commander."

The applicant has complained that she was given a generic training programme which did not relate to her personally. She said that Lt. Ryan acted as her personal training assistant but that she had little or no contact with him. Cpl. Jackson then substituted as her personal training assistant and provided a different training programme. Following that, she did lose weight as was recorded by Cpl. Jackson. She was hospitalised prior to the date scheduled for her next fitness test at the conclusion of the 12-week period when she had pneumonia. She was then required to undergo a fitness test on 23rd March, 2009, and as her BMI was over the required standard, she failed her fitness test as a result. She was not afforded a period of eight weeks thereafter of assisted training before being tested again, but was the subject of a further test on 27th March, 2010, which she failed. It was after that, that she was informed that she would not be recommended for an extended engagement in the Defence Forces and was to be discharged.

In the course of the proceedings herein, a number of affidavits have been sworn on behalf of the respondent taking issue with some aspects of the applicant's averments, including a brief affidavit from Lt. Ryan, a detailed affidavit sworn by Capt. Fitzpatrick and an affidavit which is the main affidavit sworn herein on behalf of the respondent by Lt. Rath. It is not necessary at this point to go into all of the details and areas of conflict between the applicant and the various members of the Defence Forces.

As I have said, the main point made on behalf of the applicant is that para. 13J(2) sets out the procedures to be followed in the event of a failure of a fitness test. It is maintained on her behalf that the respondent failed to comply with the timeline provided for in para. 13J(2) and that in those circumstances, her discharge was not in accordance with the procedures provided for by the Defence Forces.

It is contended by the applicant that she was scheduled for her first test under the HRFA in January 2009. She contends that she did not get the benefit of the procedures set out in the Training Instructions. There does appear to be a difference of approach taken by the applicant and the respondent in regard to the issue of when the first failure occurred. It is pointed out on behalf of the respondent that having failed her fitness in May 2005, she was required to undergo the HRFA in January 2007, on her return to work. She was unable to do so at that stage, and went on sick leave, as has been outlined previously. It was pointed out that she again failed her fitness test in February 2008, and she was again put on the HRFA in October 2008. As things turned out, she was not re-tested until March 2009. Accordingly, there is a degree of conflict between the applicant and the respondent as to when the first failure occurred. It does appear to me that the applicant was placed on HRFA in January 2007 and again in October 2008. It is not entirely clear from the Defence Forces Training Instructions whether the fact that somebody is placed on HRFA at one stage, and subsequently requires that when they are subsequently placed on HRFA, that the testing procedures starts all over again. Whatever the answer to that question may be, it is submitted on behalf of the respondent that the Defence Force Training Instruction is not a legally binding document and has to be read subject to the provisions of the Defence Act 1954. As such, it was always open to the discretion of her Commanding Officer not to recommend her extension on service.

Decision

In the course of the affidavits sworn herein, there was complaint made by the applicant as to the level of assistance provided to her from October 2008. A number of affidavits dealt with these issues by way of response. This issue was not relied on to any great extent in the course of the hearing before me. The main emphasis was placed by the applicant on the contention that there was a failure to adhere to the timeline provided for in the Defence Force Training Instructions. In essence, the applicant's case is quite simple. It is said that before the applicant could have been discharged, the applicant, having been placed on HRFA, had to be afforded the procedures provided in the training instructions in respect of a HRFA. Because those procedures were not followed, it was argued that this was a breach of fair procedures which has infected the decision to discharge the applicant. Part of the applicant's contention is that the HRFA procedure was set in train in October 2008.

I have to say that I have prefer the arguments made on behalf of the respondent to the effect that, in fact, one should regard the HRFA procedure as having been initiated in January, 2007. There is no dispute that the applicant was placed on HRFA in January 2007, but the point that has been made on behalf of the applicant is that when she was placed on HRFA in October 2008, this should be regarded as a de novo situation, and that the timeline should run from that date. I have some difficulty in accepting that, given that there is no dispute that the applicant was, in fact, placed on HRFA in January 2007.

I want to refer also to the argument made in relation to the status of the Defence Force Training Instruction. It was strongly contended on behalf of the respondent that the Defence Force Training Instruction could not circumscribe the discretion of a Commanding Officer to recommend non-reengagement. Counsel on behalf of the applicant did not disagree with that general proposition, but said that the role of the Defence Force Training Instruction was one which effectively informed or aided the exercise of discretion by the Commanding Officer. Further, it was contended that it was a breach of the rules of natural justice to allow the applicant to go through a process, but not to give her the full benefit of that process.

In the course of argument, I was referred to the decision in the case of *Byrne v. Minister of Defence and Another* (Unreported, High Court, Finnegan P., 31st March, 2004). That case considered the provisions of s. 64 of the Defence Act. In that case, it had been argued on behalf of the applicant that in order to qualify for reengagement, certain requirements must be met, *inter alia,* that the Commanding Officer must make a recommendation pursuant to the Defence Act 1954, s. 64, and the man must have an appropriate medical grading. However, the practice for many years had been to treat men with lower than stipulated grades as eligible; finally, the man's conduct must be assessed as being not lower than "good". It was argued that the applicant in that case satisfied the requirement to the effect that he had an appropriate medical grading as applied in practice so that it was not open to the Commanding Officer to have regard to his medical condition in deciding whether or not to make a recommendation. In the course of his judgment, Finnegan J. at p. 5 stated:-

> "I am satisfied that s. 64 confers upon the commanding officer a discretion without restriction on the matters to which regard may be had in the exercise of the same. To read the section in conjunction with Defence Force Regulations A10 or A12 as limiting that discretion would render the Regulations inconsistent with the Act and so ultra vires the Minister. Similarly the discretion of the commanding officer could not be curtailed by an Army administration instruction. I am satisfied that the discretion conferred upon the commanding officer by s. 64 of the Act to make a recommendation in

favour of a member of the permanent Defence Force is a precondition to reengagement and not as contended by the applicant one of three requirements."

That decision may be of relevance, principally to the interpretation of s. 64, which deals with the reengagement of men of the permanent Defence Force as opposed to the extension of service. However, it makes clear the status of such documents as the Defence Force Training Instruction. It was argued by Ms. Barrington in the course of her submissions that the Training Instructions are not binding, but are merely guidelines. This is undoubtedly the case, having regard to the decision of Finnegan J.

It has to be borne in mind in this particular case that the applicant first failed a fitness test in 2005, which resulted in her being placed on HRFA. The second failure, it is contended for on behalf of the respondent, was in February 2008, and resulted again in her being placed on HRFA in October 2008. I have already indicated my view on that argument.

The Defence Forces Training Instructions are a guideline, and as such, do not provide a prescriptive set of rules that must be adhered to in every case before a Commanding Officer makes a recommendation not to extend the service of a member of the Defence Forces, leading to ultimately a discharge of the member. To paraphrase the words of Finnegan J. set out above, the discretion of the Commanding Officer could not be curtailed by the Defence Forces Training Instruction. There has been no breach of fair procedures or natural justice. For that reason, I am satisfied that I cannot give the applicant the relief sought herein.

In the event that I am wrong in reaching that conclusion, it has to be borne in mind that judicial review by way of *certiorari* is a discretionary remedy. In this case, the applicant suffered a number of unfortunate circumstances. After the birth of her baby, she suffered from postnatal depression. Thereafter, she returned to work, and in January 2007, was hospitalised with pneumonia. It is clear that the applicant is someone who has an exemplary record with the Defence Forces and is also someone who is very anxious to remain a member of the Defence Forces. However, when one examines all of the matters contained in the affidavit of Lt. Rath, it appears that over a significant period of time, every possible opportunity was given to the applicant by the Defence Forces to overcome the difficulty she had in relation to weight, BMI and fitness. It has to be borne in mind that the first fitness test was failed in 2005, and the applicant served without engagement as a result of the failure to pass the annual fitness test until her discharge in August 2009, a period in excess of four years. She was given every practical facility in terms of time to facilitate her to pass the fitness test. At the end of the day, the applicant struggled unsuccessfully to meet the necessary requirements to continue as a serving member of the Defence Forces. In all of the circumstances outlined in this case, I could not exercise my discretion to grant judicial review, even if I had been satisfied that there was a breach of fair procedures or natural justice.

In conclusion, I must refuse the application herein.