THE HIGH COURT

[2011 No. 10210 P.]

BETWEEN

P.H., P.D., W.D., D. McG. AND M.K.

PLAINTIFFS

AND

AN tAIRE DLÍ AGUS CIRT, COMHIONANNAS AGUS COSANTA

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 28th day of May, 2019

Introduction

1. The first, fourth and fifth plaintiffs were, and the second and third plaintiffs are, employed in the Bureau Analysis Unit of the Criminal Assets Bureau. The first plaintiff was, and the third plaintiff is, employed as a forensic accountant. The second plaintiff is, and the fourth and fifth plaintiffs were, employed as financial crime analysts.

2. All of the officers and staff in the Criminal Assets Bureau are paid an allowance, in addition to their salary. The plaintiffs' claim is that they are and were entitled to be paid, and ought to have been paid, a higher allowance than they have been paid.

3. The plaintiffs' claims have been particularised, on the assumption that the sums claimed automatically carry interest pursuant to the Courts Act, 1981, and on the assumption that the allowances would have been reckonable for pension purposes, at figures between €147,166 and €479,250, amounting in total to €1,222,684. By agreement between the parties, the calculation of any entitlement on the part of the plaintiffs was stood over until the determination of the issue of the defendant's liability.

The Criminal Assets Bureau

4. The Criminal Assets Bureau was established by the Criminal Assets Bureau Act, 1996. The objectives of the Bureau, as laid down by s. 4 of the Act, are to identify assets which derive or are suspected to derive from criminal conduct, to take appropriate action under the law to confiscate those assets, and to pursue any investigation or do any preparatory work in relation to any proceedings arising from those objectives.

5. Section 5 of the Act of 1996 sets out the functions of the Bureau. It is a multi-disciplinary agency with garda functions and functions under the Revenue Acts and Social Welfare Acts. By s. 5(1) those functions are to be undertaken by the Bureau "*operating through its bureau officers".*

6. Section 8 of the Act provides for the appointment, as bureau officers, of members of An Garda Síochána nominated by the Commissioner, officers of the Revenue Commissioners nominated by the Revenue Commissioners, and officers of the Minister for Social Welfare (now the Minister for Employment Affairs and Social Protection), nominated by that Minister, and vests in those officers, for the purposes of the Act, the powers and duties vested in them by being a member of An Garda Síochána, or under the Revenue Acts, or the Social Welfare Acts, as the case may be.

7. Section 8(6)(a) provides that a bureau officer may be accompanied or assisted in the exercise or performance of his powers or duties by such other persons, including bureau officers, as the bureau officer considers necessary. Section 8(6)(c) provides that a bureau officer who assists another bureau officer shall, for the purposes of that assistance, have and be conferred with the powers and duties of the first-mentioned bureau officer. So, for example, an officer nominated by the Garda Commissioner, and who is assisting an officer nominated by the Revenue Commissioners, is, for the purposes of that assistance, invested with the powers and duties of an officer of the Revenue Commissioners, and vice-versa.

8. Section 8(6A) of the Act of 1996, introduced by the Criminal Justice Act, 2007, makes express provision for the attendance by officers of the Revenue Commissioners or the Minister for Employment Affairs and Social Protection at interviews of persons detained under the Criminal Justice Act, 1984 and the Criminal Justice (Drug Trafficking) Act, 1996, and for the participation of such officers in questioning the person detained.

9. Section 9 of the Act provides for the appointment of the staff of the Bureau. Such staff are to be appointed by the Minister for Justice (now the Minister for Justice and Equality), with the consent of the Minister for Public Expenditure and Reform, and after consultation with the Garda Commissioner. The staff members are referred to in the Act as professional or technical members of the staff of the Bureau, and their statutory function is to assist the bureau officers in the exercise and performance of their powers and duties.

10. By s. 9(5)(a) professional and technical members of the staff of the Bureau, hold their office or employment on such terms and conditions, expressly including remuneration and superannuation, as the Minister for Justice and Equality, with the consent of the Minister for Public Expenditure and Reform, determines.

11. Section 10 of the Act provides for the anonymity of those bureau officers who are officers of the Revenue Commissioners or Minister for Employment Affairs and Social Protection, and of each member of staff of the Bureau.

The evidence

12. The first plaintiff was appointed by the Minister for Justice ("*the Minister*") on 19th August, 1999 as an accountant on a temporary unestablished basis in the Criminal Assets Bureau, on the terms and conditions set out in a written offer of employment, which he signed on 20th August, 1999. The appointment was made following an open competition advertised and conducted by the Civil Service and Local Appointments Commission.

13. At the time of his appointment, the first plaintiff was serving as an established civil servant in a department other than the Revenue Commissioners or Department of Social Welfare and he was seconded from that department for the duration of his

appointment to the Criminal Assets Bureau. The appointment was for a period of two years, subject to regular review during that time. The written terms and conditions provided for a salary equivalent to that paid to the plaintiff in his "parent" department, plus a variable non-pensionable allowance to bring his salary to IR£27,000 per annum, which was the advertised salary for the position.

14. By clause 6 of the terms and conditions, the plaintiff agreed to perform such "*duties as might be assigned from time to time appropriate to the position".* By clause 8, the plaintiff was to be paid appropriate travel expenses and subsistence allowances when absent from home and headquarters on duty.

15. The information booklet for the job set out the statutory objectives of the Bureau, described the principal duties of the post, and set out that from time to time the person appointed might be required to travel to locations within or outside the State, as directed by the Chief Bureau Officer. The principal duties were the provision of professional accounting advice, the examination of accounts, the provision of assistance in relation to financial analysis, and the preparation and submission of detailed reports on cases involving the tracing of assets. The job information form added that the work was to be "*mainly indoor office work*".

16. The first plaintiff's salary was increased to IR£35,000 with effect from 14th September, 2000.

17. The first plaintiff's case is that within a year of his appointment, there was a significant change in his duties. Specifically, he was asked to prepare a statement of evidence in the context of a criminal prosecution for corruption. It was in that context that he spoke to a solicitor from the Chief State Solicitor's Office who was working in the Bureau. The first plaintiff mentioned to the solicitor that he had been asked to prepare a witness statement and the solicitor said that there was "*danger money, a kind of allowance going for that stuff, there is an administrative one, a bureau officer one, he said, you should apply for that*." So he did.

18. By letter dated 12th March, 2001 the first plaintiff wrote to the Chief Bureau Officer and the Department of the Justice applying for what he called a security allowance. He observed that all non-garda bureau officers were in receipt of an allowance, and said that he understood that an allowance in the nature of pay was sanctioned for all clerical/administrative staff with effect from 23rd October, 1996. The first plaintiff made the case that in the interest of fairness and equality, a similar allowance should be paid to him, as the accountant. The first plaintiff's application was supported by the Chief Bureau Officer, and sanctioned by the Department of Finance and on and from 17th May, 2001 the first plaintiff was paid an allowance of IR£1,804 per annum, backdated to 29th August, 1999. The Minister's letter of 17th May, 2001 referred to "*an allowance to clerical and administrative staff employed at the CAB."*

19. In August 2001 the first plaintiff was offered, and accepted, an appointment for a further two years with effect from 19th August, 2001, on the same terms and conditions, save that his salary was increased to IR£37,664 per annum. The first plaintiff was given a further fixed term appointment in 2003 and in March, 2006 was given status as an established civil servant in the Department of Justice, with effect from 19th August, 2014, at a salary of €63,261 per annum. The change in the plaintiff's status in 2006 appears to have been made because he had been on a succession of fixed term contracts with the Department of Justice. His evidence was that he had never asked for a salary increase, but the change in his status came about because of a claim he made under the Protection of Employees (Fixed Term Work) Act, 2003 for a contract of indefinite duration in the Department of Justice.

20. On 2nd May, 2006 the second plaintiff was appointed by the Minister to an established position of financial crime analyst in the Criminal Assets Bureau, at a salary of €58,042. That appointment was also made following an open competition advertised and conducted by the Public Appointments Service.

21. The second plaintiff's conditions of service, which were attached to his offer of employment, provided that he would be required to undertake such duties as might be assigned by the Chief Bureau Officer from time to time, as appropriate to the position. The conditions of service set out a progressive salary scale but made no reference to any allowance.

22. In the information booklet prepared for the competition for that position, the job was described as "*to obtain, analyse and evaluate financial information, trends and structures arising in the course of investigations into assets linked to criminal activity*". The principal duties included working closely with investigation teams, the provision of concise and accurate reports for use within the Bureau and the Bureau's proceedings in the courts, and to give evidence when required. The conditions described the "*Working Environment"* as "*mainly indoor work. From time to time it may be necessary to travel to locations within/outside the State as directed by the Chief Bureau Officer*." The second plaintiff understood that he would be working mainly indoors and that his work would generally involve "*mining data*".

23. Shortly after he was appointed, the second plaintiff was told by the first plaintiff of the availability of an allowance. On 13th June, 2006 (using the first plaintiff's letter of five years previously as a template) the second plaintiff applied for payment of a "*security allowance"* and, on 11th October, 2006, was awarded an allowance of €3,055 per annum, backdated to the date of commencement of his employment.

24. On 2nd October, 2006 the third plaintiff was appointed by the Minister to an established position as forensic accountant in the Criminal Assets Bureau, at a salary of €59,493. That appointment was made following an open competition advertised and conducted by the Public Appointments Service.

25. The third plaintiff did not give evidence but his contract of employment and his claim for a "*security allowance*" were admitted by the defendant.

26. The terms and conditions of the third plaintiff's employment were the same as the second plaintiff's, save as to the job description. The conditions stipulated that he should perform such duties as might be assigned to him by the Chief Bureau Officer from time to time, as appropriate to his position. The information booklet made available to applicants for the position of forensic accountant described the job as being to provide professional accounting assistance in relation to investigations by the Bureau in the identification and tracing of proceeds of crime. The principal duties were said to be to provide professional accounting advice to the Chief Bureau Officer, to examine accounts and relevant documents (including computer records), to provide assistance in relation to financial analysis, to provide commercial and business experience and expertise to investigative teams, to prepare and submit detailed reports on cases involving the tracing of assets, and to give evidence to the courts where necessary.

27. There was no reference in the information booklet or in the third plaintiff's conditions of employment to any allowance.

28. Shortly after his appointment the third plaintiff was told of the availability of a "*security allowance*". By letter dated 16th October, 2006 (in the same terms mutatis mutandis is those previously used by the first and second plaintiffs) the third plaintiff applied for payment of a security allowance. The third plaintiff's application was supported by the Chief Bureau Officer, approved by the Department of Finance and on 27th October, 2006 the third plaintiff was awarded an allowance of €3,055 per annum, backdated to

the date of commencement of his employment.

29. The appointment of the third plaintiff in October, 2006 coincided with the appointment of a new Chief Bureau Officer, in the person of Detective Chief Superintendent John O'Mahoney. Chief Superintendent O'Mahoney undertook a reorganisation of the Bureau, forming the two forensic accountants and the financial crimes analyst into a Bureau Analysis Unit which, it was said, was thenceforth part of the operational side of the Bureau, going into the field and participating in searches. He also refocussed the operations of the Bureau, directing many more searches, or "*raids*", that had theretofore been the case. The Bureau Analysis Unit was said to have developed computer forensics, which that team brought into the field.

30. The first plaintiff's evidence was that in the initial years of his work he was required from time to time to attend at searches, specifically in white collar cases where it was anticipated that there would be huge numbers of documents, to identify for the bureau officers what they ought to seize. He said that up to 2006 he participated in three or four "*raids*" per annum. Thereafter, he was asked to attend at searches very much more often.

31. The first plaintiff described that there was a big difference between the garda officers and the others participating in the searches, but said that there was no difference between his role and that of the bureau officers nominated by the Revenue Commissioners and the Minister for Social Welfare.

32. Each of the first and second plaintiffs described, in detail, the security arrangements made at their homes (which were the same arrangements as were made for the non-garda bureau officers) and, by way of example, their participation in a couple of searches. The plaintiffs' evidence was that the searches are carefully planned and executed over the course of very long days, that many of the occupiers of the premises raided are unsavoury and potentially dangerous people, and that they, no less than their non-garda bureau officer colleagues, are put in fear and in peril. None of this was contested.

33. The first plaintiff gave evidence of a typical occasion on which he gave evidence in a proceeds of crime hearing. He described how, following a huge amount of preparation, he sat through a four to five-week trial, during which he had to give evidence, in the witness box, and to endure three days of cross examination. He described giving evidence, in general, as highly intense occasions. It was not suggested to the first plaintiff that his account was in the slightest melodramatic.

34. The first plaintiff attached particular significance to the fact that he and his Bureau Analysis Unit colleagues, along with the non-garda bureau officers, were issued with what was described as protective security clothing and equipment, comprising a pair of wellington boots, a pair of work boots, a fleece, a raincoat and a jacket with "*CAB*" written on the back of it. Whatever significance I might have attached to the clothing issued to the plaintiffs rather dwindled when it emerged in the course of the evidence of the fourth plaintiff that the warm and waterproof clothing had first been provided to the plaintiffs in 2012, and the "*raid jackets*" in 2013, long after the summons in this case was issued.

35. A few months after Chief Superintendent O'Mahoney was appointed and had reorganised the Bureau, the first plaintiff had a discussion with another solicitor from the Chief State Solicitor's Office, who was working in the Criminal Assets Bureau. Over a cup of coffee, the plaintiff told the solicitor that he and his Bureau Analysis Unit colleagues were out on searches. The solicitor volunteered that he and his colleagues in the Chief State Solicitor's Office who were working with the Bureau were being paid an allowance of €9,000 and he suggested that the first plaintiff should be getting the same as the "*in the field allowance*" that the Revenue and Social Welfare bureau officers were getting. The first plaintiff was shocked to be told that the bureau officers were being paid an allowance of €19,000 a year. He had assumed that he and his analyst colleagues had been in receipt of the same allowance as those with whom they were going into the field. The first plaintiff thought that he and his colleagues were not being paid properly for the work they were doing and he put together a submission.

36. In the summer of 2007 the first plaintiff drafted, and on 26th July, 2007 he and the second and third plaintiffs signed, a submission to the personnel department of the Department of Justice in relation to the pay and conditions of employment of the forensic accountants and financial crime analyst, Bureau Analysis Unit, Criminal Assets Bureau. They summarised the establishment of the Bureau and suggested that at the time of the establishment an allowance had been assigned to "*certain personnel*" of about IR£6,500, and an allowance for all clerical/administrative staff of IR£1,800. The then current clerical/administrative annual allowance was said to be approximately €3,000, the allowance (which the submission called a "*security allowance*") for the grade of State Solicitor was approximately €8,400, and the allowance paid to non-garda bureau officers on secondment from the offices of the Revenue Commissioners and the Department of Social and Family Affairs was €19,000. The allowance paid to the forensic accountants and financial crime analyst did not, it was argued, take account of the operational role which was part and parcel of their daily duties. The forensic accountants and financial crime analyst were afforded the same security at work and at home, and were afforded anonymity when performing their duties, as were the officers seconded from the Revenue Commissioners and the Department of Social and Family Affairs. The plaintiffs claimed an increase in the overall allowance in recognition of the special nature of their duties, to compensate for flexible working arrangements, extra attendance, and danger and stress of the position, at a rate equal to that currently payable to the "*civil servants from Revenue, Customs and Social and Family Affairs*"; that payment be backdated to the commencement of their present positions; that the allowance be in the nature of pay and reckonable for pension purposes and starting pay on promotion; that the allowance attract increases in the nature of pay; and that the plaintiffs be permitted to retain a proportion of the allowance on cessation of work for the Criminal Assets Bureau, in the same way as that payable to the "*civil servants from Revenue, Customs and Social and Family Affairs".* The submission was copied to the Chief Bureau Officer, and the Branch Secretary of IMPACT trade union, of which those plaintiffs were members.

37. The plaintiffs' submission was supported by the Chief Bureau Officer and the human resources department of the Department of Justice, Equality and Law Reform and sent on to the Department of Finance.

38. The decision of the Department of Finance, conveyed to the Department of Justice by a letter of 4th February, 2008 and to the plaintiffs, by the Department of Justice, by letter dated 18th February, 2008, was that the Department of Finance was not persuaded that the work of the plaintiffs should or did expose them to field work and the attendant risks, to the extent of their being comparable with "*Bureau staff*", but in acknowledgment of their "*occasional field work and work at a professional and technical level*" sanctioned the payment of an allowance at the rate of €9,527, which was the rate of allowance paid to CSSO solicitor grades, on condition that the allowance was not to be retained on any basis after the plaintiffs left the Criminal Assets Bureau.

39. The submission dated 26th July, 2007, it will be recalled, was copied to the branch secretary of IMPACT. Following the notification to him of the decision of the Department of Finance, the first plaintiff wrote to the personnel department of the Department of Justice on 10th March, 2008. That letter suggested on its face that it had been copied to IMPACT but the first plaintiff said that it had not been so copied. There was, he said, a significant security issue with involving the trade union because of an association of someone in that union with someone who was a target of the Bureau, and the Chief Bureau Officer issued an instruction that the

correspondence should not be sent to the union.

40. The first plaintiff was dissatisfied with the decision and engaged in further correspondence with the human resources division of the Department of Justice. He argued that the Department of Finance appeared to be operating on a misunderstanding as to the exact nature of the duties of the members of the Bureau Analysis Unit; that the field work undertaken was with the same degree of frequency as *"the civil servants from Revenue, Customs, Social and Family Affairs and the Chief State Solicitors Office in the Criminal Assets Bureau"*; and that the risk was constant. He suggested that the matter might be resolved through a process of internal mediation and negotiation, prior to the instigation of any formal legal proceedings.

41. The claim went back to the Department of Finance, which sought further information from the plaintiffs and the Chief Bureau Officer as to the number of raids carried out by the Bureau during 2008 and the number at which each of the forensic accountants and forensic crime analyst was required to attend and the reasons why the claimants were required to participate in raids. The information was sought by the Department of Justice from the Bureau and the response conveyed to the Department of Finance. In a letter of 27th February, 2009 the Chief Bureau Officer confirmed that over the course of 2008 the Bureau had conducted in the region of 200 searches and that members of the Bureau Analysis Unit were present at 141 of those searches.

42. The response from the Bureau did not precisely answer the question as to the number of searches at which each of the forensic accountants and forensic crime analyst were required to attend but (as I shall come to) by 2008 there were five members of the Bureau Analysis Unit, working with six investigation teams. As a matter of arithmetic, the assistance of a member of the Bureau Analysis Unit was required on about 70% of the searches. It was not suggested that there was regularly, or ever, more than one member of the Bureau Analysis Unit at any search. Assuming a more or less even participation by each of the plaintiffs, they each attended at about 30 searches in 2008, which was, on average, one in most weeks, but not every week.

43. In a letter of 30th August, 2010 (following a number of letters from the first plaintiff complaining of the delay in dealing with the claim) the Department of Finance conveyed to the Department of Justice, Equality and Law Reform that €9,509 per annum in addition to basic salary was the maximum which could be offered to the officers, and this was conveyed by the Minister to the plaintiffs by letter dated 23rd February, 2011.

44. In the meantime, following further open competitions conducted by the Public Appointments Service, the fourth and fifth plaintiffs had been appointed, in the case of the fourth plaintiff, on 4th February, 2008 and in the case of the fifth plaintiff, on 14th April, 2008 to established positions of financial crime analyst in the Bureau.

45. It is convenient at this point, to observe that on 28th February, 2011 each of the first, second, third and fourth defendants were paid a revised annual allowance of €9,509, backdated to 4th February, 2008 (which was the date on which it had been approved by the Department of Finance), and the fifth defendant was paid the same revised annual allowance backdated to the date of commencement of her employment on 14th April, 2008.

46. In the 2008 competition for financial crime analysts, the advertisements and the candidate information booklets described the role as obtaining, analysing and evaluating information, trends and structures in the course of investigations into assets linked to criminal activity, including assisting in the development of systems for such analysis.

47. The information booklet identified the principal duties of the job as being to analyse large volumes of raw data; to examine accounts, documentation and other data; to disseminate and present the information gleaned in a useable format; to work closely with investigation teams; to provide concise and accurate reports for use within the Bureau and in the Bureau's proceedings in the courts; to provide statements/affidavits on the analysis; and to give evidence to the courts when required.

48. Mirroring the documents used in the case of the other plaintiffs, the booklet described the working environment as mainly office work, and said that it might be necessary from time to time to travel to locations within and outside the State as directed by the Chief Bureau Officer.

49. The appointments of the fourth and fifth plaintiffs were made on a progressive salary scale from €59,697 to €74,180. In each case, their conditions provided, without saying why, that in addition to the salary, the post carried an allowance of €3,210 per annum.

50. Before applying for the job, the fourth plaintiff conducted considerable research. He looked at the annual reports of the Criminal Assets Bureau and the Department of Justice, Equality and Law Reform, as well, of course, as the candidate information booklet. The fourth plaintiff recalled, recovered, and put into evidence the Department of Justice Equality and Law Reform Strategy Statement 2005 – 2007. He pointed first to the "Mission Statement" of the Department which was:-

> *"To maintain and enhance community security and promote a fair society through the development of a range of policies and high quality services which underpin:*
>
> - *The protection and assertion of human rights and fundamental freedoms consistent with the common good;*
> - *The security of the State;*
> - *An effective and balanced approach to tackling crime;*
> - *Progress towards the elimination of discrimination, the promotion of equal opportunities and tolerance."*

51. The fourth plaintiff then pointed to the Department's statement of its "*Values*" which was:

> *"In delivering our mission statement, we are guided by the following core values: We seek to:*
>
> - *Ensure access to justice;*
> - *Apply fair and equal standards of treatment to all groups in society;*
> - *Demonstrate accountability for our actions;*
> - *Show courtesy, integrity and openness in our dealings;*

- *Provide excellent services to the public, and;*

- *Value the individual."*

52. The fifth plaintiff, in answer to a question as to whether she had considered any materials over and above those referred to by the fourth defendant, very candidly said that she went no further than looking up the legislation for the Criminal Assets Bureau.

53. Each of the fourth and fifth plaintiffs described that the duties assigned to them were dramatically different to what had been described in the candidate information booklet. Rather than manipulating databases, as he had in his previous employment and as he expected to be doing in the Bureau, the fourth plaintiff was assigned to digital forensic functions. He had not expected to be asked to assist in search operations or to have any interaction with criminals. He was routinely asked to go into premises as soon as they had been cleared by the gardai to disable the CCTV system. The fourth plaintiff was aware of the allowance which was part of his written conditions but was told by the first plaintiff that there was a much more substantial allowance paid to the "*social welfare officers*" and "*revenue officers*" and that the Bureau Analysis Unit had made an application to be paid the same allowance, which he referred to as an "*in-the-field*" allowance. He decided to take on the additional duties on the basis that the bigger allowance would be forthcoming.

54. The fourth plaintiff gave evidence of the home security provided to him and of a particularly dramatic and frightening raid. The fifth plaintiff gave evidence of participating in a less dramatic search but explained that her sense of being at risk was not confined to searches or giving evidence but was a burden which she carried all the time. She also was present at more high risk searches. For a number of the years the fifth plaintiff served between 2008 and 27th May, 2016 the fifth plaintiff, in keeping with Bureau policy, did not participate in searches because she was pregnant or on maternity leave. The fifth plaintiff was told by the first plaintiff of the submission which had been made for an allowance and because she was working for the Department of Justice and Equality, assumed that she would be treated justly and equitably.

55. The fifth plaintiff gave evidence that nobody had told her prior to the letter of 23rd February, 2011 to the first plaintiff, which was copied to her, that she was not entitled to the allowance which had been applied for.

56. Each of the second, fourth and fifth plaintiffs were recruited from industry, specifically from multinational corporations. They each confirmed that in their previous employment their roles and duties had changed from time to time. On each occasion, they said, there had been a discussion about whether there should be a change in their remuneration and their new duties and remuneration was agreed, written down, and signed by both parties.

The case pleaded and argued

57. The plaintiffs' claim is for a declaration that the defendant has unlawfully and/or without just excuse and/or justification discriminated against them in and about the calculation and/or payment of their allowances; a declaration that the plaintiffs and each of them are entitled to be paid a like allowance to the non-garda bureau officers; an order for the payment of all arrears of allowances; and damages for breach of contract, breach of duty, and breach of constitutional rights.

58. In the statement of claim the plaintiffs plead that it was custom and practice that civil servants appointed to serve as officers of the bureau were entitled to be paid an allowance, and cited an advertisement from an internal competition in the office of the Revenue Commissioners. All of the plaintiffs, however, were recruited by open competition through the Civil Service and Local Appointments Commission and the Public Appointments Service. Only the first plaintiff was a civil servant at the time of his application and even he, strictly speaking, was not, as such, appointed to the staff of the Bureau. None of the plaintiffs were appointed to serve as an officer of the Bureau, in the sense that "*officer*" is used in the legislation.

59. The statement of claim goes on to plead that the failure of the defendant to state clearly, prior to the appointment of the plaintiffs, that they would be excepted from the custom and practice amounted to a representation that the same or similar allowances would be paid to them, and that they accepted and were induced to accept their appointments on the basis of that representation and custom and practice.

60. Legally and logically, these pleas are full of holes. In the first place the plaintiffs were not officers of the Bureau. Secondly, as far as the first plaintiff is concerned, he was the first accountant appointed to the staff of the Bureau, so that there cannot have been a custom and practice as to what allowances might have been payable in respect of that position. Thirdly, as far as the second, third, fourth and fifth plaintiffs are concerned, the custom and practice at the time of their appointment was that the allowance they now claim was not paid to the accountant or financial crime analyst. Fourthly, a failure to tell the plaintiffs that they would not be paid an allowance (*a fortiori* an allowance of which they were unaware) cannot logically have amounted to a representation that it would be paid. Fifthly, the plaintiffs cannot logically have relied upon something that was not said, of which they were unaware, and which was not in any event the fact.

61. Mr. Ó Floinn in opening more or less but not quite abandoned these pleas. He suggested that the court might take the view that there was a breach of contractual duty by the defendant not to disclose all the details of the rates of allowance and the criteria for those. The first problem with this proposition, described by counsel as a "*slight caveat*", is that it was not part of the plaintiffs' case that it was a term of their contracts of employment (whether express or implied) that they would be told the details of the allowances and the criteria by reference to which they were payable. In any event, the proposition that the plaintiffs ought to have been told of the allowances presupposes that they were entitled to them, which begs the substantive issue in the case. It does not make much sense to contemplate an obligation to inform the plaintiffs of the existence of, and criteria applicable to, allowances to which they were not entitled. If there was such an obligation, a failure to inform the plaintiffs of the details of an allowance to which they were not entitled could not possibly give rise to a right to such an allowance.

62. The case argued was based on para. 13 of the statement of claim, which pleaded:-

> *"(13) Further and/or in the alternative, the defendant appointed or agreed to the appointment of the plaintiffs and/or each of them to the Bureau and the plaintiffs and/or each of them agreed to their appointment to the Bureau on the basis of the aforementioned custom and practice and it was an express and/or implied term of the appointment of the plaintiffs and/or each of them to the Bureau that:-*
>
> > *(a) The plaintiffs and/or each of them would not be discriminated against in comparison with other comparable officers of the Bureau;*

(b) The plaintiffs and/or each of them would not be treated unfairly or in breach of the applicable legislation and/or the principles of Bunreacht na hÉireann; and

(c) The plaintiffs and/or each of them would be paid an allowance in the same or similar terms to that paid to other civil [servants] appointed to the Bureau."

63. The legal principles applicable to the construction of contracts and the implication of terms, generally, into a contract are well settled and recently restated by Finlay-Geoghegan J. in her judgment on *Flynn v. Breccia* [2017] IECA 74; and the principles according to which terms may be implied by custom and usage were restated by Finlay-Geoghegan J. in her judgment in *Noreside Construction Ltd. v. Irish Asphalt Ltd*. [2011] IEHC 364, which was affirmed on appeal by the Supreme Court [2014] IESC 68.

Custom and practice

64. It seems to me that the plaintiffs' case on custom and practice does not get out of the blocks. At the time of the first plaintiff's appointment, he was the first accountant to come to work for the Bureau: so there cannot have been a custom, never mind a custom of such notoriety that the parties must be taken to have known of it. Such custom, if any, as had been established by the time the second plaintiff was employed was the payment of an allowance at the rate paid to the first plaintiff, that is the lower rate. And so on as the other plaintiffs came to be employed.

65. The case pleaded is that it was custom and practice that civil servants appointed to serve as officers of the Bureau were paid an allowance over and above their pay. There is evidence of a custom and practice of payment of an allowance to non-garda bureau officers. The plaintiffs describe themselves in the statement of claim as officers of the Analysis Unit of the Bureau. They are not and were not bureau officers. They are and were "*professional and technical members of staff*" who were appointed to assist the bureau officers in the exercise and performance of their, the bureau officers', powers and duties.

Express term

66. In opening and in closing Mr. Ó Floinn submitted that the plaintiffs' entitlement to the allowance claimed was an express term of their contracts. I fail utterly to understand how it can sensibly be contended that something that was not even discussed, and of which the plaintiffs were unaware, might have been an express term of the plaintiffs' contracts at the time they were originally made. When the first, second and third plaintiffs became aware of the higher rate of allowance, they applied for it and were awarded an allowance at the intermediate rate. The Department of Finance having refused to pay an allowance at the rate claimed, I cannot see how it can be contended that there was an express agreement to pay it.

67. The terms and conditions of employment were clear as to the remuneration to which the plaintiffs would be entitled. The first, second and third plaintiffs were not, on taking up employment, entitled to an allowance. They were each told, after taking up employment, of the possibility that they might apply for an allowance. They did apply for an allowance, and were granted it.

Implied terms

68. It is submitted that if the court were to reject the argument that the plaintiffs' entitlement to the allowance was an express term, this would somehow bolster their claim in the alternative that it was an implied term. I cannot see how this might be so. It seems to me that any implied term that the plaintiffs would be entitled to any higher (or lower) remuneration than that stated in their contracts of employment would contradict an express term. It makes no difference whether the additional remuneration is designated as an allowance or as salary. *A fortiori* in the case of the fourth and fifth plaintiffs, an implied term that they would be entitled to an allowance of any amount, or at any rate, other than that spelled out in their contracts of employment would contradict the express term as to what their entitlement was.

69. The plaintiffs contend that it was a term of their contract that they would not be discriminated against in comparison with other comparable officers of the Bureau. I cannot accept that argument. In the first place, any implied term that the plaintiffs might be paid more than they had each agreed to accept would contradict the express term of their contracts. Secondly, I do not accept that it could have been an implied term that they each would be paid the same amount, whether by way of salary or allowances. The evidence is that the plaintiffs were paid on different points of the same salary scale. There is no evidence as to what salaries were paid to the non-garda bureau officers. Thirdly, in any event, the plaintiffs were not bureau officers and the non-garda bureau officers were not comparable.

70. The plaintiffs contend that it was an implied term that they would not be treated unfairly, or in breach of the applicable legislation, or in breach of the applicable principles of the Constitution.

71. The plaintiffs did not point to any provision of the Constitution said to be applicable to their case.

72. Reliance was placed on s. 18 of the Act of 1996 which provides for special leave for bureau officers, persons appointed under s. 9, and persons seconded to the Bureau staff from the civil service, and which applies the provisions of the Garda Síochána (Compensation) Acts to bureau officers, members of staff, and solicitors employed by the Office of the Chief State Solicitor. It seems to me that the express provisions of the Act that bureau officers and staff are to be treated in the same way for particular purposes, if anything, underlines their difference for other purposes. As far as the legislation is concerned, s. 9(5)(b) of the Act of 1996 expressly limits the remuneration payable to staff to such amount as may be sanctioned by the Minister for Finance. By this action the plaintiffs seek to be paid monies which the Department of Finance has refused to sanction.

73. As to the alleged unfairness, much of the evidence and argument was directed to the reorganisation of the Bureau at the end of 2006 or early 2007 which resulted in a change in the first plaintiff's duties and a difference between the duties spelled out in the other plaintiffs' contracts of employment and what they were asked to do. It was suggested in argument that the direction that the plaintiffs would attend at searches was a breach of their contracts of employment. However, as Mr. Ward emphasised, the unfairness and breach of contract pleaded is not that the plaintiffs were asked to undertake duties other than those specified in their contracts of employment but rather that they were not paid the allowance they claim. The statement of claim does not make any reference to the reorganisation of the Bureau, referred to in evidence as the "*seismic shift*" directed by Chief Superintendent O'Mahoney. It does refer to the work undertaken by the plaintiffs and the dangers associated with that work, but no complaint is made that the plaintiffs were directed to undertake that work. Rather the plaintiffs point to the work which they did in the hope of showing that it is indistinguishable "*from the work carried out by the other civil servants who are in receipt of the aforesaid allowance.*"

74. The plaintiffs accept that it is no function of the court to assess the value of their work. There is no claim in *quantum meruit* in respect of the additional or alternative duties. In any event, there was no evidence as to what work is undertaken by the non-garda

bureau officers, save as to their participation in searches, which would have supported a finding that the allowance those officers are paid is paid in respect of the similarities between their work and the plaintiffs' work.

75. It seems to me that there is a disconnect between the plaintiffs' complaint and their claim. The complaint is that the Department of Finance was not persuaded to sanction an allowance at the same rate as was paid to the non-garda bureau officers, and that the Department of Justice knew, because it knew what work was being done by the plaintiffs, that the reasoning of the Department of Finance was false and inaccurate. The claim is for payment of the higher rate of allowance. It will be recalled that the plaintiffs' claim for the higher rate of allowance was supported by the Chief Bureau Officer and by the Department of Justice. The reason why the allowance was not sanctioned at the rate claimed was the decision by the Department of Finance. By the plain terms of the legislation, the defendant cannot pay to the plaintiffs any more than has been sanctioned by the Minister for Finance. To my mind, it makes no sense to complain about a refusal of sanction by the Department of Finance and then to claim payment by the Department of Justice of an allowance that cannot be paid without such sanction.

The submission to the Department of Justice

76. The statement of claim does not deal with the first, second and third plaintiffs' application for payment of the allowance at the higher level. The plaintiffs start with the letter of 18th February, 2008 which conveyed to them the decision of the Department of Finance, move to a suggestion that the Department of Justice knew that the decision was wrong, and then leap to the proposition that the defendant failed, neglected and refused to pay the allowance at the rate claimed. In fact, the Department of Justice, prompted by the first plaintiff, did follow up with the Department of Finance, offering further arguments in support of the claim until, by letter dated 23rd February, 2011, the Department of Finance declared that its decision was final. But even if it had not, the fact that the Department of Justice might have disagreed with the Department of Finance could not conceivably have justified the payment of an allowance which had not been sanctioned.

*Discuss*ion

77. The first plaintiff claims an allowance at the highest rate from the time he commenced employment in 1999, but his case is mainly based on the reorganisation of the Bureau by Chief Superintendent O'Mahoney in 2006, which he characterises as a "*seismic shift*". To the extent that the first plaintiff claims that his work after 2006 was the same as that of the non-garda bureau officers, it follows that he must accept that his work theretofore was significantly different. Incidentally, there was no suggestion that the increase in the number of searches directed by Chief Superintendent O'Mahoney resulted in any increase in the allowance paid to anyone else in the Bureau.

78. Part of the plaintiffs', in particular the first plaintiff's, case is that they were not made aware of the criteria applicable to the award of allowances. Their case, however, is not that they were not given information to which they were entitled but that they were not paid money to which they were entitled. Logically, any failure to spell out why the plaintiffs were not entitled to an allowance at a particular level could not give rise to an entitlement to that allowance. In any event, it seems to me that the plaintiffs were well aware of the criteria applied when assessing claims for the allowance which they claim: it was awarded to non-garda bureau officers. Bureau staff were awarded an allowance at a lower rate. The plaintiffs' sense of grievance is grounded in a belief that they were doing the same work as the non-garda bureau officers but were being paid a lower allowance, which was the basis upon which the first, second and third plaintiffs made their case that they should be paid the same allowance as those officers.

79. The plaintiffs, on the one hand, complain that they were not made aware of the criteria for the award of the allowance which they claim, and on the other they all refer to it as an "*in-the-field*" allowance. This characterisation of the allowance appears to have originated in the first plaintiff's conversation in 2006 or 2007 with the solicitor from the Chief State Solicitor's Office. It was certainly not an official designation. The evidence is that the allowance at the highest level was paid to the non-garda bureau officers, which the plaintiffs were not.

80. The same conversation appears to have been the origin of the characterisation of the lower rate of allowance as the "*clerical*" allowance, and of the intermediate rate paid to the solicitors as the "*solicitor*" allowance.

81. Each of the plaintiffs attached significance to the fact that the clerical and administrative staff, and the solicitors, did not take any part in searches, and were not issued with outdoor clothing. But the perceived significance of those differences lies in the premise that the criterion for payment of the higher allowance was outdoor work, which was not established.

82. Each of the plaintiffs attached significance to their entitlement to anonymity, created by s. 10 of the Act of 1996. The plaintiffs undoubtedly do have a right to anonymity, in the name way as the non-garda bureau officers, but so, too, do all of the civilian staff of the Bureau. Accordingly, the right to anonymity cannot, by itself form the basis of any claim for an allowance at any particular level.

83. From the time of the reorganisation of the work of the Bureau in 2007, each of the first, second and third plaintiffs had a good industrial relations argument to make that the change in their work should be reflected in a change in their pay. They made their case in 2007 and were successful in February, 2008. The award to the plaintiffs of an allowance at the same rate as that paid to the solicitors did not mean that their work was being equated with the work of the solicitors. The award of an allowance at the intermediate rate is said to have been an acknowledgement of the plaintiffs' entitlement to the payment of an allowance over and above their ordinary pay "*in the same manner as the other civil servants and appointed to the Bureau*". It seems to me that the award of an allowance at a particular rate cannot sensibly be said to have been an acknowledgement of an entitlement to be paid at any higher rate.

84. The plaintiffs' evidence that they were instructed by the Chief Bureau Officer not to copy the correspondence to IMPACT was not challenged. I accept that such an instruction was given, although I do not understand the basis for it. From the time the initial submission was copied to the union, the plaintiffs' identities and job descriptions, and the broad nature of their work and claim were all disclosed. There was no suggestion that the plaintiffs' claim was in any way impeded or hampered by the fact that the subsequent correspondence was not copied to the union, or that the outcome would have been different if it had been.

85. The plenary summons in this case was issued on 14th November, 2011 and promptly served on the Chief State Solicitor. In a letter dated 23rd December, 2011 to the first plaintiff (and copied to the other plaintiffs and their solicitors) the personnel officer of the Department of Justice pointed to the availability to the plaintiffs, through their union, of the Conciliation and Arbitration Scheme for the Public Service, but the plaintiffs elected instead to press on their action. I have to say that I found the explanation offered as to why this option was not pursued to be entirely unconvincing. I cannot accept that the pursuit of that option, behind closed doors, would have risked the disclosure of any "*very deeply sensitive information*" or of any information beyond what was disclosed in the course of the trial of this action in open court over four days.

86. Much is sought to be made of the fact that the defendant did not go into evidence. It was argued that the onus was on the defendant to prove an entitlement to treat non-garda bureau officers appointed under s. 8 differently to an accountant appointed under section 9. I cannot accept that. The onus of proof is on the plaintiffs to make out their case and to establish, if they can, that they are entitled to the allowances they claim. The plaintiffs all acknowledged in cross-examination that they were not s. 8 officers. The plaintiffs' complaint is expressed in terms of their having been excluded from an allowance paid to others in respect of the additional and different duties that they were asked to undertake. That in my view is to put the cart before the horse, in that the premise is that the allowance is payable in respect of those duties and that, accordingly, the plaintiffs are entitled to it. The evidence is that the claimed allowance, or the claimed rate of allowance, is paid to non-garda bureau officers, as such. The designation of the allowance, or rate of allowance, as an "*in-the-field allowance*", and the proposition that it is payable in respect of attendance at, or participation in, searches, originated with the first plaintiff, and was perpetuated by the plaintiffs amongst themselves.

87. The plaintiffs complain that notwithstanding what is said to have been an acknowledgement in the letter of 18th February, 2008 that they were entitled to an allowance, the defendant "*purported to differentiate*" between the amount payable to the plaintiffs and the non-garda bureau officers. I see no warrant for the proposition that the decision to pay the plaintiffs an allowance at one level is to be construed as an acknowledgement that they were entitled to be paid an allowance at the same rate as anyone else, *a fortiori* as an acknowledgement that they were entitled to be paid at a rate any higher than had been decided.

88. A significant part of the plaintiffs' complaint is that it was nowhere published what the amounts of the allowances were, or what the criteria were on foot of which they were awarded. In their claims for an allowance, the plaintiffs asked for a "*security allowance*". In evidence, the plaintiffs described the €3,000 per annum allowance as the "*administrative allowance*" and the €19,000 per annum allowance as the "in-*the-field allowance*" but there was no evidence that these were official designations or, as the plaintiffs said, that there were any written criteria by reference to which one or the other was sanctioned.

89. Each of the second, fourth and fifth plaintiffs attached great significance to the fact that they were not in their employment with the defendant, as they had in their previous employments, provided with a revised job specification and terms of remuneration, signed off by both sides. The first, second and third plaintiffs, whose appointments predated or coincided with the redirection of the work of the Bureau by Chief Superintendent O'Mahoney, were asked to attend at searches and made no complaint then, or at any time later, of the work they were asked to do, as opposed to what they were to be paid for doing it. I think that the fourth and fifth plaintiffs have a point that by the time they came to be employed the job specification should have included an indication that they would be required to attend at searches, but they did not complain either. Very soon after they were employed, the fourth and fifth plaintiffs would have learned from their colleagues that the Department of Finance had sanctioned an allowance of €9,527 in place of the allowance of €3,210 which they had been promised, and that the first plaintiff was continuing to press the claim that that should be doubled. As long as the additional remuneration or additional allowance was in negotiation, it could not be signed off. The best and final offer of the Department of Finance was not acceptable to the plaintiffs, so it could not be signed off.

90. The plaintiffs did not plead any case by reference to the Department of Justice, Equality and Law Reform Strategy Statement, its "*Mission Statement*", or its "*Values*". The fourth plaintiff, listening to the evidence of the first plaintiff, recalled this statement, found it on the Department's website, downloaded and printed it, and offered it in evidence. Mr. Ó Floinn picked up the ball and ran with it. Citing a decision of the Supreme Court in *Keogh v. Criminal Assets Bureau* [2004] 2 I.R. 159, and referring to the plaintiffs' replies to particulars, he first of all suggested that the Mission Statement might have given rise to a legitimate expectation on the part of the plaintiffs that they would be paid the allowances, and later, as I understand the argument, a duty on the part of the defendant to correct his misunderstanding that the allowance paid to the non-garda bureau officers was paid to them because they were such officers and was not, as the plaintiffs clearly mistakenly believed, an "*in-the-field*" allowance.

91. The first point to be made is that the Mission Statement was no part of the case pleaded. The claim or argument made in the replies to particulars was that it was the failure of the Department to inform the plaintiffs prior to their appointment that they would not be entitled to the allowance, and the well-established policy amounting to custom and practice, which induced the plaintiffs to enter their contracts, and not anything on the website, that gave rise to a legitimate expectation that they would be paid the full allowance.

92. In any event, the facts of *Keogh v. Criminal Assets Bureau* and the published statement considered by the Supreme Court in that case are clearly different to this case. *Keogh* was an appeal against the refusal of an application for judicial review. The Revenue Commissioners, having published a Taxpayers' Charter of Rights by which they specifically undertook to give taxpayers full, timely and accurate information as to the provisions of the Tax Acts (which Keane C.J. characterised as a notoriously opaque and difficult code) failed to inform the applicant of a statutory right of appeal. It seems to me that in this case the defendant's "*mission statement*" falls entirely into the category of what the Supreme Court characterised as praiseworthy statements of an aspirational nature. Unlike *Keogh* there is no clear undertaking to do anything specific for anyone in particular or any class or category of persons.

93. Even if I am wrong about that, I cannot see how it could possibly give rise to any expectation that these plaintiffs would be paid the allowances they claim. To the extent that the plaintiffs complain that they were unfairly treated, the substance of their complaint is not so much how their claim was processed but that they were not paid the allowance at the full rate. To the extent that the plaintiffs complain that they were not disabused of their mistaken understanding of the basis upon which the allowances they claim were paid, this was spelled out in the defence which was delivered on 26th November, 2012. Notwithstanding the explanation of the allowances set out in the defence the plaintiffs persisted in their case: from which the inexorable inference is that it would have achieved nothing to have given the explanation earlier.

Summary and conclusions

94. Each of the plaintiffs was employed by the Department of Justice to work in the Criminal Assets Bureau. They were all recruited by open competition. The fact that the first plaintiff was serving in another government department was not material.

95. Each of the plaintiffs found, soon or immediately after they started work that some of the work they were asked to do did not fit their job descriptions. They did not then, or since, complain about the nature of the work they were asked to undertake, but sought to be paid more for doing it.

96. Each of the plaintiffs found out soon or immediately after they started work of the possible availability to them of an allowance which they had not been promised, or a greater allowance than they had been promised.

97. The first, second and third plaintiffs applied for an allowance and got it: backdated to the date of commencement of their employment. They later learned that others employed in the Bureau were being paid higher allowances and applied for the highest allowance. They were awarded a higher allowance, but at a rate less than they had asked for.

98. The fourth and fifth plaintiffs learned shortly after their appointment that they were to be paid a higher allowance than had been promised to them, and that their colleagues were pressing their claim for more.

99. The plaintiffs were all employed as staff of the Bureau. They were not, under the legislation which established the Bureau, or in the performance of their duties, officers of the Bureau, rather their role was to assist the officers of the Bureau in the discharge by the officers of the powers and duties vested in bureau officers by the Criminal Assets Bureau Act, 1996.

100. There was an allowance payable to non-garda bureau officers, an allowance payable to Bureau staff, and an allowance payable to solicitors employed by the Chief State Solicitor's Office. The rates of allowance were different.

101. The plaintiffs' complaint that they were not told the appropriate criteria for the payment of the various allowances, or rates of allowance, is irreconcilable with the case they make that the allowances were payable, variously, in respect of attendance at searches, clerical or administrative work, and solicitor's work.

102. The designation of the allowances, or rates of allowance, as "*in-the-field*", "*clerical*" and "*solicitor*" originated with and was perpetuated exclusively by the plaintiffs.

103. There was no custom or practice, at any time, that the staff of the Bureau, or any class or category of the staff, would be paid the same allowance, or an allowance at the same rate, as the non-garda bureau officers.

104. The terms as to remuneration on which the plaintiffs were employed having been clear, there is no conceivable basis for their argument that the express terms of their contracts as to remuneration were other than they were.

105. The terms as to remuneration on which the plaintiffs were employed having been expressly agreed, there is no room for an implied term that they were otherwise.

106. There is no general right in law to equal pay for equal work. It makes no difference whether the pay is designated as salary or an allowance or a combination of both.

107. These plaintiffs are not comparable to the non-garda bureau officers of the Criminal Assets Bureau. Whatever superficial similarity there might be thought to be by observing a CAB search, the role of the officers is to conduct the search, and the role of the staff is to support them. The plaintiffs, in evidence, focussed on their outdoor work, but it is clear that the great majority of their time was spent on indoor work. There was no evidence of what the non-garda bureau officers were doing when not conducting searches.

108. Upon the change in their duties, or upon it becoming apparent that they would be asked to undertake duties other, in some respects, that those set out in their job description, the plaintiffs were entitled to make a pay claim. That is what they did, and the claim was successful, if not as successful as they hoped and expected. The plaintiffs were entitled to take the decision of the Department of Finance, with which they were dissatisfied, to conciliation and arbitration but did not do so. The High Court has no function in adjudicating on pay claims.

109. The plaintiffs have not made out a case in law, and I must dismiss the action.