

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE
- *claimant*

CASE NO.
UD704/2009
MN722/2009

against
EMPLOYER
- *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms C. Gleeson B.L.

Members: Mr E. Handley
Ms M. Maher

heard this claim at Dublin on 22nd February 2010
10th May 2010 and 29th September 2010

Representation:

Claimant(s) : Ms. Rosemary Mallon BL instructed by Mr. Brian Gallagher, Gallagher Shatter,
Solicitors, 4 Upper Ely Place, Dublin 2

Respondent(s) : Mr. Tony Kerr BL instructed by Chief State Solicitor's Office, Osmond House,
Little Ship Street, Dublin 8

Preliminary point

At the outset of the hearing the respondent's representative conceded the claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005.

Respondent's Case

The first witness for the respondent gave evidence that she was the personnel officer with the respondent organisation that is bound by Department of Finance regulations. As such all civil service policies are applied. The witness gave background information on general policies in relation to sick leave. There is no entitlement to sick leave but there are allowable limits. The limit for uncertified sick leave is 7 days in a given year. An employee may take a maximum of 2 days uncertified sick leave but a medical certificate is required if sick leave extends beyond 2 days. With

regard to certified sick leave, an employee may be absent on full pay up to a maximum of 6 months. It is the policy of the respondent organisation to issue warnings if employees have been absent on uncertified sick leave for 5 days in a given year.

The claimant commenced employment on the 21 October 2006 as a recruit prison officer and in line with normal procedures was required to serve a 12 month probationary period. The purpose of this probationary period includes assessing newly recruited employees in respect of their work performance, general attendance and punctuality. As part of this process a number of probationary assessments are carried out on a case-by-case basis over the probationary period. The results of these assessments are forwarded to the Human Resources department.

The claimant's probationary period was extended on a few occasions and her performance was continually assessed during her periods of extended probation. Her level of absenteeism was extremely poor and her punctuality and general attendance was a cause for concern. Whilst her general assessment was fair and general work was good her attendance record and punctuality disapproved from her 6 monthly report to her 10 monthly report. This dis-improvement occurred despite the claimant receiving warnings concerning her attendance and punctuality.

The claimant's probationary period was then further extended to 18 months and then 22 months. Her 18-month report recorded that she failed to provide regular effective attendance and she was not recommended for confirmation of appointment. Her 22-month report again recorded her attendance record as bad. Her final report, which was a 26-month report, again recorded a poor sick leave record and very poor lates and her confirmation of appointment was again not recommended. At this point the claimant had worked for the respondent for over 2 years and had received numerous warnings in relation to her sick leave and punctuality. The witness gave further evidence that any sick leave absences attributable to the claimant's pregnancy were discounted when the decision was made to terminate the claimant's employment. The witness recommended that the claimant's employment be terminated and this recommendation was agreed with by the Director General and Secretary General of the organisation.

Under cross-examination she confirmed that it was the decision of the Secretary General to dismiss the claimant and this decision was made on the 11 March 2009. The claimant was offered the opportunity to make a written submission stating her position prior to her dismissal and the Secretary General agreed to this on 12 January 2009. The claimant did not avail of the therapeutic services available to her within the service until the very late stages of her employment. The claimant did not attend an oral hearing but there was no reason to suggest that this would not have been afforded to her if she had requested an oral hearing. The claimant did not contact the witness requesting an oral hearing and the witness was not aware if the claimant had contacted the Human Resources section requesting such a hearing. It was the overall record of the claimant that was taken into account in arriving at the decision to dismiss the claimant. The witness accepted that she did not request a report from the Chief Medical Officer prior to the claimant's dismissal. She conceded that there was a delay in issuing the claimant with her P45 and had no explanation as to why this delay occurred.

The next witness gave evidence that he is the Secretary General of the parent department of the respondent organisation. He told the Tribunal that the respondent organisation is utterly dependant on the loyalty and fidelity of employees. It is essential that employees report for work on time. Whilst employees are working within their probationary period great scrutiny is applied to their attendance at work. In January 2009 he received a submission from the Personnel Officer drawing his attention to the claimant's poor attendance record and poor timekeeping. He considered the

submission together with the supporting documentation and agreed with the recommendation of the Personnel Officer that the claimant be dismissed, subject to the claimant being allowed the opportunity to appeal the decision. He was open to persuasion or receiving an explanation as to why the claimant should not be dismissed. Accordingly the claimant was invited to make a written submission setting out the reasons why she should be retained in employment. The claimant made a written submission with supporting documentation from the Chief Welfare Officer and the claimant's union representative. He considered these submissions but did not find the claimant's explanations compelling and ultimately agreed on 11 March 2009 with the Personnel Officer and the Director General that the claimant be dismissed. In arriving at his decision to dismiss the claimant he relied upon her overall punctuality and attendance record. The claimant was not dismissed for her ill health or certified sick leave and he had no question with any of the medical documentation supplied to him on the claimant's file. He was never asked by anybody to conduct an oral hearing into the claimant's case.

The next witness told the Tribunal that he joined the respondent organisation in 1975 and had 34 years continuous service until his retirement as Deputy Governor in February 2009. He was responsible for the completion of all the claimant's probationary reports from her 6 monthly report to her final 26 monthly report. He did so in conjunction with the claimant. The claimant received a number of bad ratings for her attendance record in these reports and was given a number of warnings by the witness. Ultimately the claimant did not meet the required standard in relation to her attendance and punctuality and he did not recommend her confirmation of appointment.

Claimant's Case

On the Third day of the case the claimant gave direct sworn evidence. She commenced employment on probation for the respondent in October 2006. She was on sick leave from the 24th October 2007 to the 18th November 2007. She explained she had been ill for a couple of weeks, and had various doctors' visits and was eventually admitted to hospital with suspected TB. Of these 26 days of absence 12 of these were rest days and she was not due to be on duty. The claimant was out sick from the 22nd March 2008 to the 24th April 2008 and then for a further period of 10 days from the 29th April 2008. The claimant explained that during this period she had a cyst on her wrist artery, which was blocking her nerves that was operated on. She returned to work and the wound opened, the nurse and her work colleagues told her it might have been better that she had stayed out for longer. She returned to her doctor. In respect of this period of sickness that totals to 44 days, 23 were rest days and she was not rostered to work. In total during the course of her employment she was absent for 112 days, included in this was 47 rest days. All her sick leave in 2009 was pregnancy related.

During the course of her employment she was never referred to the Chief Medical Officer in person, however she had asked to see him but the deputy governor said it was up to Irish Prison service to refer her not him. The claimant was referred to a letter of the 28th June 2008 from the HR Directorate. This letter refers to her 18-month probation report and notes that since her 6-month report that the claimant has been absent nine times on sick leave for 84 days and that she also incurred 9 reckonable lates. The letter states that this is a cause for concern. The claimant wrote a letter to the Governor in response to this on 15th July 2008 in which she explained her medical conditions that caused her absence. The claimant wrote this letter as she felt that from an outsider's point of view, her sick leave might have seemed excessive but it was not noted that she was genuinely sick. She received an acknowledgment on the 12th August 2008, stating the contents of her reply were noted, and that the warning letter of the 28th June 2008 was issued as a warning

that her continuing high level of sick leave may lead to further action. The claimant explained she took this letter as a standard acknowledgement of hers and at no point did she get the impression that her job was at risk.

Her probation was further extended by letter on the 15th October 2008 until the 21st January 2009; this letter raises the concern over her sick leave. The claimant did not receive this letter until 5th November 2008. The claimant had an increment review with Gov Lynch on the 3rd October 2008. The Governor informed her that she was not receiving an increment because of her sick leave, at this meeting she asked if her probation would be extended, he told her not to worry that this was her punishment. The claimant was in contact with her union regarding the correspondence received and they had told her not to worry, as it was standard practice. At this time through advice from her union, she felt that she would not be dismissed but her probation would be extended. It was not until January 2009 that she realised her job was in jeopardy.

On the 14th January 2009 the governor gave her a letter from the HR Directorate informing her that her file was being submitted to the secretary general for consideration of her dismissal from her position. The claimant was upset; she had no representation when she received this letter. She explained to the governor that she was four months pregnant; he replied if you have any more sick leave you will be sacked. She never saw her file that was submitted to the secretary general, nor did she ever get to meet with anyone from the HR directorate. This letter gave her the opportunity to make written submissions to the secretary general for his consideration. The Prison Officers Welfare Service wrote on her behalf explaining the medical reasons for her absences and her personal situation that led to her accumulating lates. The Prison Officers Association also wrote on her behalf to the Minister outlining her position and her willingness to co-operate with an Employee Assistance Programme. The claimant also submitted a letter for consideration.

On the 17th March 2009 she received a letter dated 12th March 2009 from the governor, present also was the chief officer. This letter informed her that the secretary general's original decision to dismiss her still stood and her employment would terminate on the 21st March 2009. The claimant explained that this was the first time she was aware that there was an original decision to dismiss her. She was very upset; she was afforded no representative at this meeting and was just asked to sign for this letter immediately.

No one informed her in January 2009 that a decision to terminate her employment was made. She was never given the opportunity to meet with HR or the secretary general nor had she seen the submissions made to the SEC Gen from the HR directorate. The claimant confirmed her sick leave in 2009 was pregnancy related. While HR said they discounted this sick leave in coming to the decision to dismiss her, she did not know if this was the case. When her employment was terminated she was five months pregnant, so she was four weeks short of the statutory requirement to enable her to receive maternity benefits. She gave evidence of loss to the Tribunal.

Under cross examination it was suggested to her in relation to the rest days that a prison officer may not be rostered but that the potential was that they might be called in. The claimant explained that you are rostered on a 90-day period and you inform the prison if you are not available to work on your rostered days off. She could not recall if she had ever made herself available for the rest days during her sick leave. She was referred to her 6-month probation report in which she was given a good rating for her punctuality and a bad rating for her sick leave. The comments on this state that the governor informed her that he would not be recommending her for appointment because of her sick leave. The claimant denied he had said this to her and nor had he informed her that her sick

leave was bad and would have to improve. On foot of this probation report she received a letter from the HR directorate informing her of her sick leave and one late reminding her that she was on probation. The claimant understood from this letter that her probation would be extended to afford her an opportunity to improve.

The claimant was referred to her ten month probation report where she received a rating of fair for both her punctuality and sick leave, noted on this is that deputy governor informed the claimant that he would not be recommending her for appointment if her sick leave did not improve. The claimant denied he told her this, the deputy governor told her she had to improve her sick leave, looking back she suppose it could have been interpreted as warning. The claimant's eighteen-month review rates her punctuality as fair and sick leave as bad and again it is noted that she would not be recommended for confirmation of her appointment. The claimant could recall all her probationary reviews and she was always informed that she had to improve her sick leave she was never told her job was at risk. She was referred to a letter that issued to her on foot of her eighteen month probation report referring to her sick leave and late which states "You should be aware that the payment of future increments, suitability for promotion and your continued retention in this employment is contingent on your ability to provide regular service". The claimant accepted that this letter was warning her, however it was not a formal warning in her opinion, as it did not state that if her sick or punctuality did not improve she could be dismissed.

Her twenty-two month probation report notes that the loss of time recurring from her reckonable lates is 10hours 5 minutes this had increased from her previous probationary report. At the end of this meeting the deputy governor had wished her best of luck he never informed her that he was not recommending her for confirmation of her appointment. Her punctuality issues were as a result of her personal situation as her daughters father was not co-operating with her. She had received letters from Gov K in relation to this for her family law case. This issue with her daughter's father was not resolved until October 2009.

The claimant was referred to her letter of the 15th July 2008 in which she addressed the reasons for her absences but not her lates. She explained she did not refer to her punctuality in this, as she had never been written to about her lates, the deputy governor had addressed her punctuality in passing at her probationary reviews. It was not understood the trouble she had to go to not to be late and the party involved in making her late had admitted he had been difficult. She felt to a certain extent that the submissions written on her behalf on foot of the letter of the 13th January 2009 were not taken in to account in making the decision to dismiss her. She also felt that that senior management in the prison felt this way too. She was never given the opportunity to meet with anyone in relation to her position. At the time she met with the Prison officers association they told her that the procedures being used were unfair however they did not include this in their submission to the Minister. On advice from her union and from the governor she thought her probation would be extended.

Determination

The Tribunal carefully considered the evidence adduced at the hearing. The claimant in this case was dismissed while on probation. The claimant initially was required to serve a 12-month probationary period; the claimant's probation was extended on three occasions to provide her with the opportunity to improve. During the hearing the claimant maintained that she did not realise her job was in jeopardy until January 2009. The Tribunal are disinclined to believe this, letters received by the claimant from the HR directorate referred to continued retention of employment is

contingent on her ability to provide regular service. During a probationary period the onus is on the employee to prove that he/she are capable and committed to their role. The claimant failed to do this.

However when a dismissal occurs whether on probation or not fair procedures must be adhered to at all stages. Unknown to the claimant her dismissal had already been decided in January 2009 when she was informed that her file was being sent to the Secretary General of the parent department for consideration of her dismissal. She was given the opportunity to send in written submissions for consideration to the Secretary General not to dismiss her, however the claimant was not aware that this was an appeal of the original decision to dismiss her. The manner in which the claimant's dismissal was handled between January to March 2009 was flawed. At no stage did the claimant received an opportunity to meet with the HR directorate nor was she afforded with a representative and was unaware that the decision to dismiss her was already taken.

Having taken in to account all of the evidence, written and oral submissions adduced at the hearing the Tribunal find that the claimant was unfairly dismissed. However the claimant was the author of her own misfortune and contributed significantly to her dismissal therefore the Tribunal awards the claimant €15,000.00 under the Unfair Dismissals Act 1977 to 2007.

The claim under the Minimum Notice and Terms of Employment Acts 1973 – 2001 succeeds and the Tribunal awards €2,200.00 being the equivalent of two week's pay.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)