

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.
UD1790/2009
MN1716/2009

EMPLOYEE - *claimant*

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: Mr R. Maguire, B.L.
Members: Mr J. Hennessy
 Ms S. Kelly

heard this claim at Abbeyleigh on 9th June 2010
 and 30th September 2010
 and 12th January 2011

Representation:

Claimant: Mr. Cathal Murphy BL instructed by Gallagher
Shatter, Solicitors, 4 Upper Ely Place, Dublin 2

Respondent: Ms. Cathy Smith BL instructed by Chief State
Solicitor's Office, Osmond House, Little Ship Street, Dublin 8

Respondent's Case:

The governor of the respondent organisation gave direct evidence that the claimant was employed as a prison officer at a high security prison. The prison houses many disruptive and awkward prisoners. The claimant did all the normal range of duties assigned to prison officers. On 6 September 2007 the claimant was assigned duties at a local hospital guarding a prisoner who had been admitted to the hospital. The claimant was accompanied by a female prison officer on the night in question as it is normal practice for at least two prison officers to guard a prisoner in hospital. The shift period commenced at 8pm and ended at 8am the following morning and the prisoner was handcuffed to a prison officer at all times during the period of hospitalisation.

At approximately 2.30am the claimant abandoned his post, went home and did not return to his post. He left his post without permission without informing anybody. On the same night a separate

incident occurred at the claimant's home residence where Gardaí searched his house and discovered a quantity of drugs. The claimant was arrested and ultimately was convicted in court of the drugs offence. Immediately after the night of 6 September 2007 the claimant was suspended on full pay pending the outcome of an investigation. The claimant admitted himself to a treatment centre and received counselling. The investigation was deferred to allow the claimant to complete his course of treatment.

Following this, two separate oral hearings took place and the governor weighed up the evidence before him. The claimant pleaded guilty to the charge of absence without leave from his post. The witness formed the view that the claimant had abandoned his post and recommended his dismissal to the Minister. The claimant was informed of the recommendation and given 14 days to appeal the recommendation. The claimant lodged an appeal within 14 days but the Minister upheld the decision and the claimant was dismissed on 17 July 2009.

The witness told the Tribunal that the prison service operates a very strict regime whereby employees are randomly subjected to searches on attending for duty. This regime includes every member of staff from the Governor downwards. A record of the search is maintained and recorded on file.

Under cross-examination the witness confirmed that the claimant had admitted to two allegations of misconduct during the investigation. He admitted that he was absent from his post without permission and also that he was found to be in possession of controlled substances. The witness told the Tribunal that the claimant had been on day duty in the prison prior to reporting for his night shift on 6 September 2007. However he had a break of four hours immediately prior to reporting for his night shift and had volunteered for the night shift at the hospital.

The claimant was detailed to guard a prisoner at the hospital. The prisoner in question was in custody for affray and had previously carried out work within the confines of the prison walls. That work was supervised by a prison officer. Low risk prisoners are granted temporary release to attend hospital but no consideration was given to that in the case of the prisoner that the claimant was detailed to guard. A member of the prison management team had made the decision not to grant temporary release to that prisoner.

The witness agreed that he had never previously recommended the dismissal of an officer for absence without leave for a period of 5 to 6 hours. He had never dealt with a case where an officer had left his post in a hospital situation. He confirmed that the reason given by the claimant for leaving his post was that he had soiled his clothes. The witness was not aware of any other serving prison officer who had been prosecuted and convicted of a drugs offence. The claimant had never previously informed him of any difficulties he was encountering with drugs or alcohol. If he had, the witness would have sought help for him.

In response to questions from the Tribunal he confirmed that the female officer who accompanied the claimant on the night of 6 September 2007 did not contact the authorities prior to the end of her shift. She would have remained handcuffed to the prisoner during the night. He confirmed that other prison officers who have been convicted of drugs offences have been dismissed.

Evidence was heard from an Assistant Principal Officer of the Irish Prison Service.

Claimant's case:

On the third day of the hearing evidence was heard from the claimant. He commenced working for the prison service on 04th January 1999. He was stationed in prison A for 1.5 years, he then transferred to prison B for 1.5 to 2 years and finally moved to the prison where he remained up until the incident of 6/7 September 2007 and ultimately his dismissal 17 July 2009 (the period between 6/7 September 2007 and 17 July 2009 being suspension and appeals).

He was initially on a probationary period of two years and had reviews every 6 months. The reviews were opened to the Tribunal. He was as professional as he possibly could be to the prisoners. He did not take things personal. He was a (Class) officer i.e. was a key holder, a radio holder and worked on the front line. He got on with staff was a team worker and socialised with staff. He had a reasonable working knowledge of the prison rules. He had a positive review from the Governor of prison A, who said he was a respectful person. He had a review from Governor of prison B which said he had a good attitude, was respectful, a good knowledge of the rules and had an excellent disciplinary record. This vein continued into his third post. He was happy in his work. He tried to perform his duties as best he could.

The incident, which led the Governor of the prison recommending to the minister that he be dismissed, occurred on 7th September 2007. He commenced his shift between 07.00 am and 8.00 am, where he took charge of the E1 landing where serious offenders were held. E1 landing was a stressful position. A lot of officers would not work on the E1 landing and they were excused from working there. If there was going to be trouble it would be on E1 landing and the threats were more serious on that landing.

He received a call on that afternoon to say he was conscripted to do hospital duty that night so he was advised to do that duty. A prisoner was held in hospital and they had no staff to go on to that shift. He left the prison to get changed into civilian clothes at home and then on to the hospital.

There was a female prison officer in the hospital with a prisoner who was in for an appendix problem. The prisoner was in for an affray and had two months to serve. The prisoner was a trustee. A trustee would be quite mannered and get on with staff.

The claimant explained that he was in the hospital and did not feel well all evening. At 2.00 am he tried to get to the toilet but did not get there and soiled his clothes. He looked in on the other officer but was too embarrassed to tell her what had happened. He just went home. He lived five minutes from the hospital and intended to be back as quick as he could. His radio battery was dead.

He arrived home and put his clothes in the washing machine. He had a shower and lay down on the bed "for a minute". The next thing he knew Gardaí were entering through his door. They were banging on the door and he realised he had not locked the door. They showed him a warrant to search his house. They asked him if there was anything that should not be there, i.e. contraband, money, and phones. He pointed to a small tin metal box, which had a small amount of cannabis resin, that the Gardaí subsequently said was €70.00 worth. They arrested him and took him to Newbridge Garda station.

He went to court and the Judge ordered that he pay €500.00 to charity and to go to (named) rehabilitation entity and dismissed the case under the probation act.

On the following Monday 10th September he took union advice. He went into the rehabilitation entity and was put on a course. The course lasted 28 days. After the course he went for two hours every week to after-care. During this time he was suspended from work another 6 months that

after-care course was completed.

He kept the governor of the prison abreast of the activities. He also asked his doctor to write to the governor to hold off disciplinary proceedings until he completed the rehab course. He also asked the secretary of the rehab unit to write weekly reports to the governor.

During his suspension he attended prison every Monday and met with the governor. He also gave receipts for the rehab course to the governor. He also told the governor that he would provide blood and urine samples for proof to him. He was not provided with the Civil Service alcohol and drug policy until after the incident. He was not given support from his superior officer.

The disciplinary process commenced about one week after he finished rehab. The chief prison officer asked him to make a statement about the events at the hospital. He was served with two complaint forms in 2008.

Cross-examination:

The witness agreed when it was put to him that the disciplinary process was held off until after he completed rehab. He agreed that the dismissal was 2 years after the incident and that there were two separate oral hearings to deal with the complaints. He did not deny the facts to the Governor. He has no issues with the procedures and he did appeal his dismissal to the minister.

He agreed that he asserted that the prisoner at the hospital was a no hassle” type prisoner. He was asked if three officers were appropriate to accompany the prisoner and he answered that the guidelines stated that there be three. He agreed that the hospital was not a secure situation compared to prison. His radio battery was dead and his mobile phone was at home.

It was put to him that he had access to a landline and a mobile phone therefore why did he not phone. He replied, “Because it was my intention to return to the hospital I had left my jacket, book there”. It was put to him that he did not phone the prison to tell them and he explained that he did not as he had intended to return.

It was put to him that he expressly said the Gardaí did not find anything else (other than cannabis resin) and he agreed that this was so. It was then put to him that there was a second charge for possession of cocaine and he agreed that was correct. He agreed that they were treated as minor offences in the District court.

The Tribunal asked the claimant if he had looked in on the other prison officer and had not indicated to her regarding his return and he agreed this was so. He accepted his battery was dead. He was asked if he used a hospital phone and he replied, “No I didn’t”.

Determination:

The Tribunal having heard all the evidence in this case and heard submissions from both counsel makes the following determination.

The standard that the Tribunal have to apply is whether there were substantial grounds justifying the dismissal and in this case there were. The claimant was afforded fair procedures internally and his contract was adhered to. The claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

No evidence was adduced regarding minimum notice accordingly the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)