EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:	**CASE NO.**
EMPLOYEE - claimant	UD807/10

Against

EMPLOYER - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly BL

Members: Mr T. O'Grady
Ms. N. Greene

heard this claim at Dublin on 24th August 2011, 7th December 2011, 8th December 2011 and 2nd February 2012

Representation:

Claimant: Mr. Marcus Dowling BL, instructed by McDowell Purcell, Solicitors, The Capel Building, Mary's Abbey, Dublin 7

Respondent: Ms Rosemary Healy Rea BL, instructed by Chief State Solicitor's Office, Osmond House, Little Ship Street, Dublin 8

The determination of the Tribunal was as follows:-

Respondent's Case:

The respondent is a Government Department with responsibility for the Irish Prison Service. The claimant was employed as a nurse officer in the prison service. GC was Deputy Medical Officer during the claimant's tenure. Following a period of sick leave the claimant was firstly referred to GC on 31st January 2005. Medical certificates continued to be submitted by the claimant.

In late January 2006 the claimant applied for ill health retirement. In mid-February 2006 GC recommended that the claimant be referred to an occupational physician. That physician's report recommended that she was fit to return to work providing management was willing to facilitate herwith duties that did not involve responding to emergency situations and that management meet withthe claimant to discuss a method of facilitating her return to the

workplace. The claimant hadindicated that she would like to return to work.

GC recommended that management meet with the claimant to facilitate her return to work. Throughout 2006 the claimant remained on sick leave and submitted medical certificates.

On 31st January 2007 the claimant attended a consultation with GC. The claimant maintained at that consultation that she was anxious to resume duties but had some difficulties with aspects of her work. GC believed that with some accommodations the claimant could carry out the great majority of her duties. However, at this time the claimant suffered a second health problem and had a pending appointment.

On 5 September 2007 the claimant attended another consultation. GC indicated at that time that the claimant could not carry out CPR and advised that the claimant resume duty on reduced hours and part time if possible. It was suggested that management should meet the claimant to discuss how best the claimant could resume duty.

Following a meeting between the claimant and the Governor (LD), GC sought a meeting with LD. In the meantime GC felt it would be of value if the claimant had a Functional Capacity Evaluation (FES) of her physical status. The tests undertaken by the claimant showed that she could do better than her own perceptions and that she was fit to return to work.

GC visited the prison where the claimant had worked and subsequently wrote to the Governor and advised that the claimant was fit to resume duty with the exception of CPR, in the prison on reduced hours so that she may be phased back into full normal duties. GC also confirmed this after a consultation with the claimant on 7th January 2008.

In a consultation with the claimant in May 2008 the claimant contented that the insistence that she be able to perform CPR was a stumbling block for her return to work. GC had discussed several issues and modifications and subsequently wrote to PG suggesting that she not be required to carry out CPR, minor adjustments to night duty if required, and a phasing in period. The claimant was fit for modified duties.

The claimant underwent surgery and recovered well. In November 2008 GC contended that the claimant should be able to resume duty in due course.

Following another consultation between TD and the claimant on 15th January 2009 TD suggested that the possibility be explored of the claimant doing day time work, a shorter working week and be excluded from CPR at least during her period of rehabilitation back to work. TD was in receipt of an ill health retirement form from the claimant's GP in late February 2009 but TD did not think the claimant was eligible for ill health retirement. The claimant subsequently appealed this decision and was referred to an occupational health physician RR for an occupational health assessment. Having considered the nature of the claimant's complaints, RR did not believe that early retirement on grounds of ill health was appropriate.

GC could not understand why the claimant would not return to work.

LD is Governor of the prison where the claimant was employed. He commenced working there in 2007. The prison comprises long term prisoners.

He initially met the claimant on 10th October 2007 to discuss her situation and peruse the various

options available to her which could bring about her return to work. The claimant discussed her medical condition and that she could not kneel down to perform CPR if required. LD asked for all her medical reports and said he would review the situation and submit an overall report on her.

LD concluded at that meeting and on receipt of medical reports that he was not in a position to facilitate the claimant's return to work. The claimant's inability to perform CPR was a major contributing factor which influenced his decision. Contrary to CMO opinion her inability to carry out CPR was a major negative consideration for LD from a health and safety perspective and from his legal duty of care.

LD was sympathetic but felt the claimant had a stumbling block about returning to work. He deemed the duties of a nurse officer to be of a fairly light nature, such as providing basic medical care to prisoners.

LD met GC in December 2007 to help her make an assessment of the claimant's work area and volume of work therein.

As the claimant had a medical consultation in around 17th/18th December 2007 LD met with her on 11th January 2008 and subsequently wrote to the claimant on 17th January 2008 offering her return to work duties such as no night roster, excused from a/h hours and that she would not be working alone. Alternatively he offered the claimant an 8 to 5 duty Monday to Friday for the first month back. LD was prepared to have a further review at the end of that month. LD asked the claimant to indicate her intentions to return to work and expected the claimant to report for duty at 8 am on 2nd February 2008.

The claimant did not report for duty. On 15th May 2008, PG, Human Resources Directorate, following a report from GC who advised that the claimant's duties will not include CPR, wrote to LD and the claimant and asked the claimant to report for duty on Monday 26th May 2008. The claimant continued to submit medical certificates during her absence.

The claimant, through her union representative, expressed an interest in returning to duty as a prison officer and to work in the tuck shop. LD deemed this work to be far more strenuous and inappropriate. LD asked PG to issue the claimant with a dismissal note.

The claimant had further surgery and was asked to provide a medical report to GC. The claimant outlined in her letter of 22nd September 2008 her current medical condition and that she had a further medical appointment on 3rd November 2008.

The CMO's office met with the claimant on 14th January 2009 and asked LD to explore the possibility of the claimant working during the day, have a shorter working week and to exclude her from CPR duties at least during her period of rehabilitation back to work. The CMO also asked that the claimant get an up to date medical report from her general practitioner in six weeks time.

LD met the claimant on 12th March 2009 to explore options available which would facilitate her return to work on a phased basis initially The possible work options were discussed. The psychology service was offered to the claimant. LD was open to other suggestions but these were not forthcoming. The claimant was certified sick until the end of March 2009. The claimant again applied for ill health retirement an on 13th March 2009 she appealed the decision to turn down her application for ill health retirement.

He arranged to meet her again on 2nd April 2009.

The claimant was invited to attend a medical appointment with Dr. RR on 21st April 2009. RR was of the opinion that retirement on ill health grounds was not appropriate and the claimant's application was not granted.

LD again wrote to the claimant on 4th August 2009 asking she report for duty on 12th August 2009. The claimant subsequently asked that the latter date be deferred until 31st August 2009. The return date was subsequently deferred to 12th August 2009. A third return date of 24th August 2009 was offered to the claimant and on 25th August 2009 LD recommended that the claimant be dismissed. He never considered applying the code of discipline to the claimant and thought it to be inappropriate.

HC is Personnel Officer in the Department since 30th June 2008.

On 25th January 2009, following the claimant's extended absence on sick leave since 18 October 2004 and following consultations with the CMO, HC wrote to the claimant outlining return to work conditions for one month. The claimant was asked to contact LD within 7 days to agree a date for her return to duty. HC outlined in that letter should the claimant not accept the proposed offer, she had no option but to submit her file to the Secretary General with a recommendation that she bedismissed from her position. The claimant was offered a right of appeal within 14 days. No appealwas received.

HC wrote to LD and the claimant on 25 February 2009 offering her the following conditions for one month:

(1) No night roster
(2) Excused from annualised hours during that period
(3) Not working alone for that month and/or
(4) An eight to five duty Monday to Friday for the first month back

There would a further review at the end of that month to assess her operational situation. The claimant was expected to carry out full nursing duties as per the normal roster, HC outlined in that letter that should the claimant not contact LD within a certain timeframe not to accept the proposed offer, that she would have no opting but to submit her file to the Secretary General with a recommendation that she be dismissed.

The claimant again applied for ill health retirement and remained on certified sick leave.

The claimant appealed this decision to refuse her application for ill health retirement.

LD furnished HC with a list of nursing duties that would be expected of the claimant upon her return to work.

HC referred the claimant to an independent medical referee following the refusal of her application for ill health retirement. HC asked that the Human Resources Directorate to liaise with LD to agree a return to work date.

On 6th August 2009 HC wrote to the claimant insisting that she report for duty on 12 August 2009 and that failure to do so would result in her file being sent to the Secretary General for

consideration for dismissal.

The claimant instructed her solicitor to write to HC on 11th August 2009. Her solicitor outlined that the claimant was not in a position to report for duty. The claimant subsequently submitted a medical certificate to cover the period 11th August 2009 to 8th September 2009. HC wrote to the claimant's solicitors that the CMO and the independent medical practitioner deemed the claimant fit for duty. Consequently, the claimant's return to work date was deferred to 17th August 2009.

The claimant's solicitors again asked that the claimant's file not be sent to the Secretary General for consideration for dismissal as she was certified as currently being unfit to return to work.

HC issued the claimant with a formal final warning on 19 August 2009 and advised her that failure to attend for duty on 24th August 2009 would result in her file being sent to the Secretary General for consideration for dismissal.

HC formed the view that the claimant had every opportunity to resume work. The claimant had received warning letters. HC was conscious of the process and satisfied that the process was followed and had engaged with the CMO. It was made clear to the claimant the consequences for not reporting for duty.

She was satisfied that every opportunity was given to the claimant and that the disciplinary code was not applicable. Circular 14/2006, the Civil Service Disciplinary Code revised was not relevant to Prison Officers and there was no obligation to adhere to it. The claimant was dismissed for failure to report for duty. The CMO had found her medically fit to return to work.

EH works in HR Directorate and one of her roles entails monitoring sick leave. She ensures the sick leave regulations are applied.

She drafted a dismissal submission which came as a result of her monitoring of sick leave. She passed this to HC. The claimant was not furnished with a copy of this submission. The submission captured the facts and outlined the claimant's case. The recommendation to the Secretary General to dismiss the claimant issued on 25th August 2009 and the claimant was afforded a right of appeal within 14 days.

SA was Secretary General during the claimant's tenure. Prior to this he held the position of Director General of prisons for a five year period.

In December 2009 a detailed dismissal submission was forwarded to him. He read this document, noted the medical opinions set out, efforts made to facilitate the claimant's return to work and representations made on her behalf by her solicitors.

He attached a lot of weight to the CMO's recommendation together with the independent medical opinion concerning the claimant's fitness to work and that the CMO had taken a generous view of an employee in difficulty. The claimant had been offered a graduated return to work and it did not seem there was any prospect of her ever returning to work. She had been furnished with warnings. He deemed the termination of the claimant's employment to be appropriate, the necessary procedures had been followed and he acquiesced with the recommendation.

SA subsequently read the letters furnished from the claimant's solicitors and contended that these

did not offer substantial rebuttal of the case that was before him.

SA contended that S. I. No. 289/1996 – Prison (Disciplinary Code For Officers) Rules, 1996 did not apply to prison offers and that it was not binding on him. He had no reason to believe that these regulations affected such decisions and he had engaged previously with the unions in relation to these regulations. He also understood that the regulations said that he had power to dismiss.

He contended that while the claimant had not been furnished with a copy of the submission she had received all the necessary correspondence.

Claimant's Case:

The claimant commenced employment as Prison Officer on 31st January 1987. She undertook training in nursing and assumed the role of nurse officer in 2003. She contended that she had an exemplary record.

In 2004 following a serious incident in the prison she had difficulty while kneeling down to perform CPR on an inmate. She had chronic pain in her knees. She also had hip problems. It was routine following such incident to see the psychologist. She was distressed at this time.

She met with the Assistant Governor and for health and safety reasons she could not return to work. She was absent on sick leave from October 2004.

She had several consultations with GC. Following a meeting with the welfare service she was advised to apply for ill health retirement. She was assessed by an occupational health physician. She then met Governor Q and asked to be accommodated elsewhere in the prison. There was a pilot project in the offing which he thought might suit her and said that he would speak to HR and revert to her. Unfortunately, this project never materialised due to budget constraints.

The CMO had recommended after several consultations with the claimant that she was fit to return to work with certain modifications. It was recommended that the claimant not perform CPR.

In 2007 the claimant suffered another health problem and remained on certified sick leave. She met LD in October 2007. He was adamant that she carry out full nursing duties which included CPR. She was taken off the payroll at this time. She was told it was a management decision as the CMO could not provide a return to work date for her.

In early January 2008 the claimant met LD and he was insistent that she carry out CPR as it was part of her duties. She contended that the CMO was forcing LD to facilitate her return to work and she was caught between the two.

On 8 May 2008 the claimant met the CMO and showed her a letter she had received from LD. The CMO observed that she was suffering from depression. She advised the claimant to visit her GP.

The claimant could not return to work in May 2008 as she was medically certified as suffering from depression. In June the claimant applied for a position in the Tuck Shop but did not secure a position there. In September 2008 she underwent a hip operation and was on sick leave until December 2008.

Throughout her illness she attended the welfare service.

Again in March 2009 the claimant together with her union representative attended a meeting with LD. LD was still adamant that she would have to perform CPR and that medical evidence did not back this up.

While a phasing in period of one month was offered to the claimant, and while the offer included that she would not be working alone, she was still conscious that she was not exempt from CPR duties. She was concerned what would happen after a month. She was not being accommodated in relation to the CPR duties.

While LD invited her to call into work on more than one occasion she was not ready mentally or physically. She was still not being accommodated in relation to CPR duties. On receipt of letters from LD she always picked up the telephone and spoke to him. She did not lodge any formal complaint about LD as she wanted to avoid confrontation. She felt if someone died she would be held responsible and that she would be dismissed if she could not perform CPR.

The claimant contended that she never wished to apply for ill health retirement and it was the welfare officers who had suggested this to her. LD prevented her returning to work.

She lodged a grievance in August 2009 but this was not dealt with. She sought legal advice after that.

During her absence from work she tried to increase her mobility. Her health has now improved greatly and the claimant contended that there was ample work available that she could perform which excluded CPR duties.

The claimant was dismissed on 17th December 2009. She secured new employment in February 2010 and is working in an administrative division in private industry.

Determination:

The Tribunal has very carefully considered all of the evidence adduced at the hearing of the matter, the documentation submitted and the legal submissions lodged.

It is clear from the evidence that the claimant had significant ongoing medical difficulties. The claimant first went out on sick leave on the 18th October. 2004. She was absent from work for a period of in excess of five years until she was dismissed on the 17th December, 2009. The claimant was on full pay for six months, half pay for six months and on pension rate of pay from September, 2005 to 25th October 2007.

After a lengthy process the claimant was requested to return to work on 02.02.2008, 26.05.2008, 12.08.2009 (extended to 17.08.2009) and 24.08.2009.

The first request to return was made in writing on 17.01.2008. The claimant was informed that she would return to "*light duties"* and that "she *would not be working alone for that month".* The claimant stated she did not return to work on that occasion for fear that she would be placed in a position where she would have to do CPR. The Tribunal's understanding of "*not be working alone"* was that the person she was working with would be in a position to carry out the CPR if necessary. The Tribunal does not accept the claimant's reason for her failure to return to work.

The second request was made in writing on the 15.05.08. That request specifically stated that *your duties will not include CPR".* The claimant stated that she did not return on that occasion due to the fact that she was suffering from depression. Apart from her sworn testimony, there was no documentary evidence of that fact in relation to that specific time.

The third request was made by letter on the 12.08.2009. The claimant was certified unfit to return to work from the 11.08.2009 to 08.09.2009. She was informed on the 12.08.2009 that her failure to report for duty would result in her file being forwarded to the Secretary General for consideration in relation to her dismissal. Whilst the Tribunal understands the respondent's frustration, it should not have taken this course of action whilst the claimant was on certified sick leave.

The fourth request was made on the 19.08.2009. It requested the claimant to return to work on the 24.08.2009, notwithstanding the medical certificate deeming her unfit for work until the 08.09.2009. The respondent stated that as far as their medical officer was concerned she was fit to return to work. There is a clear conflict between the two medical opinions which were within the knowledge of the respondent. Before taking any action that would affect the status of the claimant's employment, the respondent should have sought their own independent medical report with a view to clarifying the conflict. That was not done in this case. The respondent seemed to ignore the claimant's medical certificate and placed all of their emphasis on their own medical officer's report.

The claimant was recommended for dismissal on 25.08.2009 whilst on certified sick leave.

The Tribunal finds that the claimant's failure to report for duty on the 02.02.2008 and the 25.05.2008 was clearly a breach of the S.I. No. 289/1996 – Prison (Disciplinary Code for Officers) Rules, 1996 under both Section 3 and Section 12 of the "ACT OF OMISSIONS BY AN OFFICER CONSTITUTING BREACHES OF DISCIPLINE".
"Section 3: Disobedience to orders, that is to say, without good and sufficient cause failing to carry out any lawful order, whether in writing or not".
"Section 12: Absence without leave, that is to say being without reasonable excuse, absent without leave from the place where his or her duties require him or to be".

The respondent should have adopted the Preliminary Procedure set out in the Code as stated below.

Preliminary Procedure

Section 7

> *(1) Where it appears that an officer may have committed a breach of discipline and the Governor, having considered any statements and other relevant information, decides that there is a case to be answered, particulars of the breach shall be entered in a Complaint Form. A Complaint Form shall be in the form set out in the Second Schedule.*
>
> *(2) An allegation against an officer of a breach of discipline shall be made to the Governor as soon as practicable, but not later than 7 working days, after the coming to the notice of a relevant superior officer of the information which gave rise to the allegation.*
>
> *(3) A Complaint Form shall specify the paragraph number in the First Schedule of the breach of*

discipline alleged and there shall be attached to it a copy of a statement in writing of the evidence of each witness concerned in relation to the breach and the Form shall contain —

(a) such particulars as will enable the accused officer concerned to understand the nature of the allegation made against him or her, and

(b) a summary of the evidence on which the allegation is based.

No statement (other than a statement that constitutes or is part of the breach of discipline alleged), whether written or oral, made by the officer before the Complaint Form is given to him or her may be used in any subsequent proceedings in relation to the said breach without the officer's consent.

(4) Where more than one breach of discipline is alleged against the same officer, each one shall be entered in a separate Complaint Form.

(5) Each Complaint Form on which an alleged breach of discipline has been entered shall be given to the accused officer as soon as practicable.

(6) The accused officer shall state in the Complaint Form—

> *(a) whether he or she admits or denies the allegation,*
>
> *(b) any comments he or she may wish to make on the allegation, and*
>
> *(c) the names of any persons (from whom the Governor may request a written statement of evidence) whom he or she would wish to call as witnesses at any oral hearing of the allegation.*

(7) A Complaint Form shall be submitted to the Governor immediately on completion of the relevant section of it by the accused officer and in any event not later than 48 hours after its receipt by the accused officer. The time limit referred to in this paragraph may be extended by the Governor if he or she is satisfied that the accused officer cannot, for good reason, comply with it or needs additional time to take advice.

(8) If a Complaint Form is not returned to the Governor within the time as specified in paragraph 7 or that time as extended under that paragraph, the Governor may deal with the allegation under Rule 9.

(9) Upon the submission of a Complaint Form to the Governor in accordance with paragraph (7) the Governor, having considered the matter, including any comments of the accused officer, if he or she is satisfied that the breach of discipline alleged is a serious one, shall arrange for the holding of an oral hearing of the allegation.

(10) Notwithstanding paragraph (9), if the accused officer concerned—

> *(a) admits the alleged breach of discipline, or*
>
> *(b) denies the alleged breach of discipline and admits another such breach and the Governor substitutes in the Complaint Form the admitted breach for the alleged breach,*
>
> *the Governor may dispense with an oral hearing of the allegation and deal with the admitted breach under Rule 9(2).*

(11) Where the Governor dispenses with an oral hearing under paragraph (10), the accused

officer concerned, or another officer acting on his or her behalf, if so requested by the accused officer, may make representations orally or in writing or both to the Governor.

Oral Hearing

8. *(1) An oral hearing shall be conducted by the Governor.*

(2) The accused officer shall be present throughout an oral hearing and may put forward his or her answer to the allegation and call any relevant witness.

(3) The accused officer shall be allowed to have an officer of his or her choice to act on his or her behalf or assist him or her in the presentation of his or her case at an oral hearing.

(4) The accused officer or, on his or her behalf, the officer assisting him or her, if so requested by the accused officer, may present any relevant evidence, put questions to witnesses and address the Governor at an oral hearing.

(5) The officer making the allegation may be present throughout an oral hearing and may present any relevant evidence, put questions to witnesses and address the Governor at the hearing.

(6) At an oral hearing any question directed to a witness may be disallowed by the Governor.

(7) At an oral hearing the Governor may put questions to any person present.

(8) The Governor shall make or cause to be made a record of the proceedings at an oral hearing, including any rulings of the Governor in the course of the hearing.

Conclusion of Investigation

9. *(1) At an oral hearing the Governor —*

(a) shall if he or she is satisfied that the commission by the accused officer of any breach of discipline alleged has not been proved or admitted, dismiss the allegation, or

(b) may, if he or she is satisfied that the commission by the accused officer of a breach of discipline alleged has been admitted or proved—

> *(i) in case the breach is of a minor nature, deal with it under Rule 5, and*
>
> *(ii) in case the breach is not of a minor nature, deal with it under paragraph (2).*

(2) Where the Governor decides to deal with a breach of discipline under this paragraph he or she may —

> *(a) award a reprimand, or*
>
> *(b) award a reprimand and recommend to the Minister that the officer concerned be reduced in rank, where appropriate, or suffer a reduction in pay by way of deferment of one or more than one increment for one month, three months, six months or twelve months or such longer period as he or she may specify, or*
>
> *(c) award a reprimand and recommend to the Minister that the officer be dismissed from the Prison Service and shall notify the officer accordingly*

(3) The Governor shall notify the Minister of the award of a reprimand and of any recommendation under paragraph (2).

10. *(1) On receipt of a notification from the Governor under Rule 9(3) the Minister, having*

considered the record of the oral hearing concerned or, if there has not been an oral hearing, the matters on which the Governor based his or her decision, shall —

(a) in case he or she is not satisfied of the guilt of the accused officer, reverse the finding of guilt and notify the Governor and the accused officer accordingly.

(b) in any other case, notify the accused officer that he or she intends to confirm the finding of guilt and confirm, vary or quash any penalty and confirm or quash any reprimand and notify the officer of his or her right to appeal under paragraph (2), and

(c) unless an appeal is brought under paragraph (2), cause any reprimand to be implemented and implement any penalty confirmed or varied under subparagraph (b) or, where appropriate, recommend to the Government the implementation of any such penalty.

(2) (a) Within 14 days of the receipt of a notification under paragraph (1)(b), the accused officer may appeal to the Minister against one or more of the following, that is to say:

(i) the reprimand,

(ii) the penalty,

(iii) the severity of the penalty,

(iv) the Governor's finding of guilt in relation to charge of a breach or breaches of discipline.

(b) The accused officer shall, if he or she decides to appeal, give to the Minister, within the time aforesaid, notice in writing of the appeal and shall include in the notice detailed particulars of the grounds of the appeal.

(3) Where an appeal is brought under clause (i), (ii) or (iii) of paragraph (2)(a) but not under clause (iv) of that paragraph, the Minister, having considered any grounds of the appeal, notice of which was duly given to him or her pursuant to paragraph (2)(b), shall confirm or quash the reprimand or penalty concerned or vary the penalty concerned and he or she shall notify the accused officer of his or her decision and no further appeal shall lie in relation to the manner.

(4) The Minister shall implement any penalty confirmed or varied by him or her (or, if appropriate, recommend to the Government the implementation of any such penalty) and cause any reprimand so confirmed to be implemented, and the Governor shall record any such penalty or reprimand in the accused officer's record of service.

(5) Where an appeal is brought under clause (iv) of paragraph (2)(a)—

(a) if having considered any grounds of the appeal, notice of which was duly given to him or her pursuant to paragraph (2)(b), the Minister is satisfied that the matter should be reviewed, he or she shall establish a committee consisting of 3 persons (referred to in these Rules as a "Disciplinary Review Committee") and he or she shall refer the appeal concerned to that Committee, or

(b) if having considered any such grounds of appeal as aforesaid, the Minister is not satisfied that the matter should be reviewed, he or she shall so inform the accused officer concerned and any appeal under clause (i), (ii) or (iii) of paragraph (2)(a)

shall be dealt with under paragraph (3).

(6) (a) The Disciplinary Review Committee, having considered the matters on which the Governor based his or her decision in relation to the breach of discipline concerned or, in the case of an oral hearing, the record of the hearing, any submission made to the Minister and any submission made or evidence offered to it (being evidence not presented at the oral hearing), shall advise the Minister—

(i) that the finding of guilt concerned be reversed and any reprimand or penalty quashed, or

(ii) that the finding of guilt be affirmed, any reprimand be confirmed or quashed and any penalty be confirmed, varied or quashed,

and the Minister shall accept the advice of the Committee, notify the Governor and accused officer accordingly and implement any penalty confirmed or varied by the Committee (or, if appropriate, recommend to the Government the implementation of any such penalty) and cause any reprimand so confirmed to be implemented and the Governor shall record any such penalty or reprimand in the accused officer's record of service.

(b) (i) The Disciplinary Review Committee shall afford the accused officer concerned, the officer referred to in subparagraph (iii) and the officer making the allegation concerned an opportunity to make oral submissions, to present any relevant evidence not presented at the oral hearing by the Governor and to put questions to witnesses.

(ii) The accused officer shall and the officer making the accusation may be present throughout any oral hearing held by the Disciplinary Review Committee for the purposes of subparagraph (i).

(iii) The accused officer shall be allowed to have an officer of his or her choice to act on his or her behalf or to assist him or her in the presentation of his or her case to the Disciplinary Review Committee, including such presentation to an oral hearing by the Committee.

(c) The members of a Disciplinary Review Committee shall be appointed by the Minister and shall consist of

(i) an officer of the Minister

(ii) a Governor of the Prison Service (other than the Governor who dealt with the allegation concerned), and

(iii) a person selected by the Minister from a panel of not less than 3 persons appointed by the Minister after consultation with the trade union or staff association officially recognised under the Conciliation and Arbitration Scheme for the Civil Service as representing officers of the same rank as the accused officer.

Recommendations for Dismissal

11. *A decision to dismiss an officer from the Prison Service shall be made—*

(a) in case the officer is on probation, by the Minister, and

(b) in case the officer has successfully completed his or her period of probation and has been finally appointed, by the Government.

The procedures for such dismissal shall be those which apply to civil servants generally.

There was a complete failure on the part of the respondent to follow the disciplinary procedures. Furthermore, dismissal submissions were forwarded to the Secretary General on 14.02.2009. Those submissions were not forwarded to the claimant and she was never given an opportunity to respond to them. In fact she did not have sight of them until the hearing of this matter. That is fundamentally unfair and in breach of the principles of natural justice and fair procedures. It is also noted that the submissions were not a complete and fair reflection of the full facts of the matter. There were omissions from the submission, omissions the Secretary General knew nothing about. The Secretary General dismissed the claimant on the 18.12.2009 effective from the 17.12.2009 in the absence of the full facts and without following the correct procedure.

Several attempts were made by the claimant's solicitors to clarify what process/procedure the respondent was following. They never received a satisfactory response to those requests.

The claimant's solicitors informed EH on the 23.12.2009 that the claimant intended to appeal the decision to dismiss her. They wrote again on the 03.02.2010 not having received a response to their letter of the 23.12.2009. It would seem from the respondent's reply on the 05.02.2010 that they totally ignored the claimant's request to appeal her dismissal. Correspondence went back and forthbetween the respondent and the claimant's solicitors in relation to the dismissal, however, it neverresulted in the claimant's appeal hearing being dealt with.

There were very serious breaches of procedure in this matter resulting in the claimant being unfairly dismissed.

The claimant seeks re-instatement. The Tribunal finds that re-instatement is wholly inappropriate. The claimant specifically stated when questioned by the Tribunal that whilst she had made improvements medically she would still be unfit to carry out CPR due to the ongoing medical issue with her knees. The claimant conceded that she was unfit to carry out all of the terms and conditions of her employment immediately prior to her dismissal. She gave examples of the different types of roles she would be medically fit to carry out with the IPS and stated she was most anxious to return to the IPS.

The Tribunal finds that the claimant's dismissal was unfair and finds that the appropriate redress is under Section 7(1)(b) re-engagement by the respondent of the claimant on terms mutually agreed between the parties. There is to be no break in the claimant's continuity of service for all purposes other than her remuneration. There is to be no break in the continuity of the claimant's pension contributions. Re-engagement is to commence on 26th March 2012.

Sealed with the Seal of the

Employment Appeals Tribunal

This ______________________

(Sgd.) ______________________
(CHAIRMAN)