Re-engagement for prison officer, ‘incomprehensible’ lack of contact noted

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> **A WRC adjudicator has ordered the prison service to re-engage a prison officer, almost two years after her dismissal, for failing to maintain regular contact with her employer and to provide medical certificates to “verify her situation.”**

The employee was absent without leave between 27 November 2018 and June 2020, when she sought to return to work.

WRC adjudicator (AO) Breiffni O’ Neill ruled that the respondent’s conduct in the run up to the dismissal was “ wholly unreasonable and unfair.”

In his view, the respondent committed a series of serious procedural breaches; its conduct throughout the process was “highly prejudicial” to the complainant. Mr O’Neill was also highly critical of the failure of the respondent to offer the option of an appeal and to inform the complainant of the reasons behind the dismissal.

The adjudicator took into account the complainant’s own failings in his decision to stipulate that the period of the complainant’s re-employment should only run from the date of the WRC decision: 24 April 2023. He stipulated that the period from the date of dismissal on 16 July 2021 and the date of the decision should be treated as a period of unpaid suspension.

He observed that there was “compelling evidence” put forward at the hearing regarding the failure of the complainant to supply supporting medical evidence during her leave of absence.

However, he also pointed to the “blemish free” employment record of the complainant prior to her departure on leave. He also noted her direct evidence that several other prison officers had not been dismissed despite turning up to work under the influence of alcohol, or drugs.

(The decision was anonymised on the basis of the complainant’s sexuality, which she said has caused and continues to cause her difficulties. The employer did not object to anonymisation when the AO informed it of his intent to anonymise the case, but subsequently did object to anonymisation. However, the AO said the respondent put forward no cogent reason to make him change his mind).

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On 29 March 2019, the respondent – four months after the expiry of the complainant's last medical cert – warned the complainant that if she did not meet her obligation to maintain regular contact with them, her retention in the service would be at issue.

However, it appeared that the letter was not received. AO O'Neill observed that in the circumstances, it was "incomprehensible" that the respondent did not contact her again until 12 June 2020.

The AO focused on three messages sent on June 12, 23 and 25, 2020.

The first was an email from the Governor, Ms P, to the complainant, in which the Governor sought to find out the reason for the complainant's absence, while informing her about available employee supports.

The second was a reply from the complainant to the Governor informing her of her keenness to return to work and her engagement with the Employee Assistance Programme. No reply was received.

The third was a letter from Ms X of the HR Directorate to the complainant, stating that her file had been submitted to the Secretary General of the Department, with the letter also stating that the complainant had seriously breached her terms and conditions of employment and as a result her dismissal from the service may be recommended.

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AO O'Neill considered that Ms X in her letter to the complainant breached the Code of Practice on Grievance and Disciplinary Procedures (SI 146 of 2000) as well as principles of natural justice given that the allegations should have been put to the complainant and the latter should have been given an opportunity to respond, before her file was sent to the Secretary General.

AO O'Neill also pointed out that Ms X decided to suspend the complainant without pay, in effect, from 18 November 2019.

X was the same person who carried out the investigation and recommended dismissal.

In his view, a further breach of the disciplinary code occurred when the respondent "augmented the allegations". when Ms X wrote to the Director General of the prison service in February 2021 stating that the complainant "abandoned her post."

According to 'Redmond on Dismissal Law' (by Des Ryan BL), the employer's duty to set out the allegations clearly from the outset is paramount. It is made clear that an employer is not entitled to add to the list of allegations as the process unfolds.

AO O'Neill noted that the termination letter gave no reason whatsoever to explain the dismissal and it contained no reference to an appeal.

The denial of an oral hearing was a breach in his view of the principle of natural justice and of SI 146 of 2000.

The AO reiterated the importance of procedural fairness, citing the Supreme Court ruling in *Glover v BLN* (1973) and the UK decision of Judge Megarry in *John v Rees*. (1969). As Megarry J stated: "The path of the law is strewn with examples of 'open and shut' cases which somehow were not."

The complainant was represented by Roddy Maguire BL, instructed by S Bartels Solicitors. The respondent was represented by Peter Leonard BL, instructed by the Chief State Solicitors Office. *(ADJ-00036309, AO: Breiffni O'Neill)*