

**THE HIGH COURT
JUDICIAL REVIEW**

[2003 Rec. No. 586 JR]

BETWEEN**ALAN BURNS AND JOHN HARTIGAN****APPLICANTS****AND****THE GOVERNOR OF CASTLEREA PRISON****RESPONDENT****AND****THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM****NOTICE PARTY****Judgment of Mr. Justice Paul Butler delivered the 16th day of March 2005**

The applicants and each of them are and, at all material times, were Prison Officers employed by the respondent at Castlerea Prison Co. Roscommon. The Notice Party is the Minister with responsibility, *inter alia*, for prisons.

Facts

(i) On 26th April, 2002 the applicants were detailed to accompany a prisoner, Mr. Massey, from the said prison to Merlin Park Hospital in Galway, a medical appointment having been made for the prisoner for 10.30 on that morning. Their departures were delayed and they did not leave the prison until 10.25 and, due to a number of factors mentioned by the applicants, they were further delayed and arrived at the hospital at 12.00 noon. The medical examination concluded sometime between 12.30 and 1.00. They left the hospital at 1.15 and, for reasons which they give, they did not arrive back to Castlerea Prison until 6.35 that evening.

(ii) A complaint was initiated against the applicants in relation to the said escort duty by Chief Officer Melvin as he then was on 29th April, 2002. The complaint was to the effect that "*on doing a routine check with the hospital, I discovered that the Prisoner's and his business was completed at 12.40 pm. The said escort returned to Castlerea at 6.35 pm.*" The respondent sought further information in relation to that complaint. The applicants sought further time to take advice on the matter and the requests were granted on or about 24th June, 2002.

(iii) On 15th July, 2003, the applicants received complaint forms pursuant to the Prison (Disciplinary Code for Officers Rules 1996). The relevant parts of the complaint forms were as follows:

"2 Particulars of allegation including place, time, and date of breach of discipline alleged:-

That on 26.4.02 while assisting on an escort to Merlin Park Hospital Galway, a/c Prisoner Anthony Massey you made a false and inaccurate statement with intent to deceive.

3. Summary of the evidence on which the allegation is based:-

Report of C.O. Melvin 29.4.02 and Teresa Dempsey of Merlin Park Hospital."

"2. Particulars of allegation including place, time, and date of breach of discipline alleged:-

That on 26.4.02 while assisting on an escort to Merlin Park Hospital Galway, a/c Prisoner Anthony Massey you failed to carry out your duties in a prompt and diligent manner.

3. Summary of the evidence on which the allegation is based:-

As per complaint of C.O. Melvin 29.4.02."

"2 Particulars of allegation including place, time, and date of breach of discipline alleged:-

That on 26.4.02 while assisting on an escort to Merlin Park Hospital Galway, you knowingly solicited a unauthorised gratuity.

3. Summary of the evidence on which the allegation is based:-

As per complaint of C.O. Melvin's report of 29.4.02."

(iv) Correspondence followed including, a complaint by the solicitors for the respondent by letter dated 23rd January, 2003, that the 1996 Rules hadn't been complied with, that there had been excessive and unreasonable delay, that the Chief Officer Melvin who was appointed to carry out the investigation was the complainant, and that no sufficient documentation had been produced.

(v) A disciplinary hearing was ultimately arranged despite protests on behalf of the solicitors for the applicant and their request that the applicants have legal representation having been refused.

The hearing took place on 7th July, 2003. The applicants had two representatives from the Prison Officers Association their "Trade Union". A note was kept of the proceedings but it appears that there is no controversy about what took place. One of the applicants representatives indicated that the applicants were only in attendance because they were so obliged under Rule 8 section 2 of the Disciplinary Code. That representative, Mr. Perry, said that the applicants would not be taking part in the hearing because they were being deprived of legal representation. Governor Scannell said that there was no provision for legal representation in the 1996 Rules and indicated that his findings would be made known by the end of the week.

(vi) Section 9 (2) of the Prison Disciplinary Code for Officers Rules 1996, the Governor, where he decides to deal with a breach of discipline under that paragraph 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.

Subsection 3 of s. 9 provides that the Chief or Governor shall notify the Minister of the award of a reprimand and of any recommendation under paragraph (2).

(vii) By letters dated 8th July, 2003, the respondent wrote to the applicant in the following terms:-

"I refer to the oral hearing held on 7th July, 2003 in accordance with the prison (Disciplinary Code for Officers) Rules 1996 on charges issued against you 15th January, 2003.

In response to the charges as outlined against you, you stated through your advocate that you were not taking any part in the hearing because of deprivation of legal representation.

As pointed out to you at the hearing and indeed to your local representative in your correspondence of 18th June, anno, the code does not allow for any such legal representations in these matters.

I am satisfied, based on the evidence presented in the absence of any rebuttal of this evidence, that the alleged breaches of discipline have been proved.

I am satisfied that there was unnecessary delay on the departure and intentional delay during the escort.

Your conduct on this escort was totally unacceptable, created unnecessary overtime and contravened the Governor's orders regarding escorts.

As a consequence of your breaches of discipline I am reprimanding you with entry on your record sheet and I am recommending to the Minister that you should suffer a reduction in pay by way of forfeiture of one increment for 12 months.

Daniel J. Scannell.

Governor."

(viii) By further letter dated the said 8th July, 2003, the respondent wrote in the following terms:

"Following upon the adjudication of charges based against you on 7th July, 2003 I am directing, for operational reasons, that future duties assigned to you shall be preformed within the Prison Complex. This direction shall be reviewed after a period of twelve months.

I am satisfied that the time you spent on the escort was excessive and a reasonable return time would be 3.30 pm as against 6.35 pm as you claimed. You are required to make good these three hours overtime payment which have been paid to you."

In these proceedings the applicants seek the relief sent forth in the Notice of Motion herein. In short they attack the disciplinary hearing and its findings on the following three grounds namely: -

1. Delay
2. The denial of legal representation
3. Two of the "sanctions" were not provided for by the prison rules.

It is submitted on behalf of the respondent and notice party that the disciplinary code reflected in the 1996 Rules hereinbefore referred to and the Memorandum of Understanding were negotiated between the Notice Parties department and the Prison Officers' Association over a period between 1983 and 1985. The Code, it is argued, thus binds the applicants who were at all material times members of the said association as part of their conditions of service.

Section 8 (3) of the Code provides that:-

"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."

Accompanying the said Code there is what is described as a Memorandum of Understanding.

Counsel for the respondent and notice party suggests that the same is something like the explanatory memorandum accompanying a statute. The Memorandum does, however, describe itself as follows:-

"This memorandum sets out matters that have been the subject of discussion between the Department of Justice (The Official Side) and the Prison Officers Association (the Staff side) under the Conciliation and Arbitration and Scheme."

It appears to me simply to set out what was discussed and, in the case of representation, what was not agreed. Paragraph 5 thereof provides as follows:-

"The Code provides for an officer charged with an offence to call on an advocate to act on his/her behalf or to assist the officer in the presentation of his/her case at an oral hearing. The advocate must be a member of the prison service

but not necessarily from the institution in which the charge is made. There is nothing in the Code to exclude as an advocate BO officer of the POA, if the officers so chooses or, if the case is appealed to the Disciplinary Review Committee an officer from POA Headquarters."

The said Memorandum does, therefore, exclude legal representation other than by lawyers who are also members of the prison service. The Code, however, contains no such prohibition. It is clear that the Code reflects the agreement or lack thereof between the parties. If the same was to exclude open legal representation it could easily have done so by the use of clear and plain language. I am reinforced in this view by the judgment of O Caoimh J. in *Alan Garvey v. Minister for Justice, Equality and Law Reform and the Governor of Mountjoy Prison and the Attorney General* (Unreported High Court, 5th December, 2003) where, in considering the very same Rule he decided that the applicant in that case had failed to demonstrate that the rules operated to defeat his entitlement to natural and constitutional justice having made, at page 41 of the said judgment, the following observations:-

"While these rules provide for representation by a fellow officer, I am satisfied that they do not either expressly or impliedly restrict any right to legal representation."

It was further noted in the said judgment that, in that case, Counsel for the respondent:

"submits that the rules, insofar as they provide for representation by other officers are permissive in nature and are not such as to exclude rights to legal representation."

The breaches with which the respondents stood accused were not in the least trivial, in that, at the very least, they suggested dishonesty on the part of the applicants in carrying out their duties. The potential penalties which the applicants faced included recommendations for reduction in rank and dismissal from the Prison Service. I am satisfied that in the instant case natural or constitutional justice required that applicants should be entitled to legal representation.

As I have indicated the rules did not preclude or purport to preclude such representation. The respondent undoubtedly acted bona fide and in the belief that he was acting as he must in refusing the same. He was, however on my finding, wrong in so doing.

By reason of my said finding that the applicants were denied natural or constitutional justice the procedure was fatally flawed and the applicants are entitled to succeed.

For the sake of completeness I propose to mention the following four issues that also arose in the hearing:-

1. Other remedies.

In the light of my finding that the entire process has failed this question does not arise.

2. Delay.

Even if, which I do not accept, a case of undue delay had been made there is no indication of any prejudice caused thereby.

3. Despite what I accept to be the mistaken use of the word "*sanction*" in an affidavit, I am satisfied that directions concerning the applicants duties and the repayment of overtime did not amount to penalties for breach of discipline.

4. I am satisfied that the European Convention on Human Rights did not have an application as the European Convention on Human Rights Act, 2003 was not part of our law at the relevant time.

I shall hear the parties to the form of order that should be made having regard to the contents of this judgment.