NEUTRAL CITATION NUMBER [2012] IEHC 350

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 562 JR]

BETWEEN

SAMUEL MCMANUS

APPLICANT

AND

THE FITNESS TO PRACTISE COMMITTEE OF THE MEDICAL COUNCIL

AND

THE MEDICAL COUNCIL

RESPONDENTS

JUDGMENT of Kearns P. delivered on the 14th day of August, 2012

This is an application for judicial review arising from an inquiry conducted by the first named respondent into the conduct of the applicant pursuant to the Medical Practitioners Act 2007. The applicant had been served with a Notice of Inquiry dated 9th June, 2010 setting out seven allegations against him and indicating the witnesses who would be called at the hearing which took place on 8th October, 2010 and on 10th and 11th days of March, 2011. One of those witnesses was to be Dr. Siobhan Barry, a psychiatrist, who it was proposed to call as an expert witness on the matters in issue.

The first respondent committee is constituted pursuant to s. 20 (2) of the Medical Practitioners Act 2007 for the purposes of enquiring into the conduct of registered medical practitioners. At the time of his alleged professional misconduct, the applicant was working (as part of his general practice training) as a senior house officer (SHO) in psychiatry at the Mater Hospital in Dublin. On the evening of 12th April, 2008, an African national, K.W., attempted suicide by throwing himself into the Liffey. He was admitted the following morning to the St. Aloysius Ward of the Mater Hospital by the applicant where later that afternoon he again attempted to commit suicide. On this occasion the mode of attempted suicide was hanging by use of his shoe laces from a shower rail. While that suicide attempt was interrupted, the patient never regained consciousness and died on 28th April, 2008.

Prior to the suicide attempt, the applicant made various clinical notes including notes which stated:-

> "... current suicidal ideation.
>
> IMP. High suicide risk ..."

Later that day, after the suicide attempt, the applicant altered these notes with a pen using different ink in a clearly visible manner. He altered them so that they then read:-

> "Denies current suicidal ideation ...
>
> IMP. ~~High~~ suicide ~~risk~~ attempt"

When this alteration to the medical records became known, the applicant was the subject matter of a complaint by Professor Patricia Casey to the Medical Council. The facts were not in dispute and the essential issue for the committee to consider was whether the facts amounted to professional misconduct. The Medical Practitioners Act 2007 requires that the first respondent must have a majority of non medical members. The members of the first respondent committee in the present case were Dr. Deirdre Madden (Chairperson and lay member), Dr. Abdul Bulbulia (registered medical practitioner member) and Stephen Kealy (lay member). The legal assessor to the first respondent was Mr. Kevin Cross S.C. (as he was then).

The following allegations of professional misconduct were made against the applicant; that he:-

> (i) made retrospective additions and/or amendments to patient K.W.'s medical records which he knew or ought to have known was inappropriate in the circumstances; and/or
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> (ii) failed to identify one or more additions and/or amendments to patient K.W.'s medical records as retrospective additions and/or amendments which he knew or ought to have known was inappropriate in the circumstances; and/or
>
> (iii) failed to record the date and time of the retrospective additions and/or amendments to patient K.W.'s medical records, which he knew or ought to have known was inappropriate in the circumstances; and/or
>
> (iv) altered patient K.W.'s medical records so as to significantly change the meaning of patient K.W.'s medical records; and/or
>
> (v) failed to bring to the attention of the consultant in charge any of the retrospective additions and/or amendments to patient K.W.'s medical records; and/or
>
> (vi) failed to take any or any adequate steps arising from his concern that patient K.W. had suicidal ideations and/or was a suicide risk; and/or

(vii) fell seriously short of the standards expected from a senior house officer in respect of the totality of the treatment afforded by him to patient K.W.

The Committee heard evidence from seven witnesses, including the two other doctors involved in the patient's care, Dr. F. Jabber and Prof. Casey, four nurses and the expert witness, Dr. Siobhan Barry, whose report had been furnished in advance to the applicant's legal advisors. Furthermore, the Committee had available to it certain documentary material including the observations and comments furnished to the Preliminary Proceedings Committee (the second respondent's complaints screening committee) on 22nd April, 2010. In those observations and comments, the applicant himself stated, *inter alia* that:-

> "My intention was to go to the ward after I had finished assessing the other referrals in the A & E Department and complete K.W.'s notes in full. However, before I could do that I was called by the ward and was told that he had been found hanging in a shower cubicle on the ward. I went directly to the ward where I found the on-call medical team attempting to resuscitate K.W. and I phoned Prof. Casey to inform her of the situation.
>
> On review of my notes at this stage I realised they did not accurately reflect my opinion of the patient on his admission, nor did they contain my plan for the patient once he had reached the ward and I accept that I amended the notes retrospectively at this stage.
>
> I realise that I should not have amended the notes in this way and that I should have made a clearly marked retrospective note confirming the actual time and context in which it was made."

At the opening of the Inquiry the applicant specifically admitted the facts of allegation (1) and, in particular, that he ought to have known that it was inappropriate to make retrospective additions and/or amendments to the records. His counsel stated that:-

> "Dr. McManus has accepted at all times that he did make retrospective additions and amendments to K.W.'s records and he admits that he should not have done so. What is denied is that this would constitute misconduct..."

At the hearing, the applicant himself did not give evidence to amplify or further explain the admissions made both by him and on his behalf. At the conclusion of the Inquiry, the Fitness to Practise Committee found that the applicant was guilty of professional misconduct in respect of five of the allegations.

In respect of the finding of professional misconduct in relation to the first allegation, the Committee stated that it was of the opinion that the making of additions and/or amendments to patient K.W.'s medical records subsequent to K.W.'s suicide attempt retrospectively changed the original formulation on which the treatment plan for W. was constructed and, in the circumstances of this case, represented a serious falling short of the standards expected of doctors.

In relation to the second allegation, the same was also found to have been proven in that the applicant failed to identify one or more additions and/or amendments to K.W.'s medical records as retrospective additions and/or amendments which he knew or ought to have known were inappropriate in the circumstances. The Committee was of the view that in the circumstances of the case the failure on the applicant's part to clearly identify the additions as retrospective represented a serious falling short of the standards expected of medical practitioners.

The third allegation was also found to have been proven, namely, that he failed to record the date and time of the retrospective additions and in this regard the Committee gave as its view that the failure to do so in the circumstances of the case represented a serious falling short of the standards expected of medical practitioners.

The fourth allegation was also found to have been proven and the reason given for this finding as to fact was that, by his own written admission, the applicant made the additions and/or amendments to the records as they did not accurately reflect his opinion of the patient. The Committee was of the opinion that the significance or otherwise of the alteration and the circumstances of this case was not a matter of clinical expertise to be dealt with exclusively by the evidence of Dr. Barry. The Committee took into account the evidence of Prof. Casey and Nurse Fowler in reaching the conclusion that the records were altered so as to significantly change their meaning. The Committee thus concluded that in the circumstances of this case, this represented a serious falling short of the standards expected of medical practitioners.

No finding of misconduct was made in respect of allegation (5) and allegation (6) was not proven as to fact.

Finally, allegation (7) was found proven as to fact, namely, that the applicant had fallen seriously short of the standards expected from an SHO in respect of the totality of the treatment afforded by him to patient K.W. The Committee gave as its reason for this finding that, by his own admission, the applicant made retrospective additions and/or amendments to K.W.'s records subsequent to his suicide attempt. The Committee also found as a fact that Dr. McManus failed to identify such additions and/or alterations as retrospective and did not record the date and time of the additions and/or alterations. The Committee also found as a fact that the additions and/or amendments significantly changed the meaning of K.W.'s medical records. The Committee was satisfied that it had been proven that Dr. McManus's conduct fell seriously short of the standards expected from a medical practitioner.

The present judicial review application seeks to have the report of the first respondent dated 4th April, 2011 quashed and further seeks to have quashed the decision made by the second named respondent on 14th April, 2011 that the applicant was guilty of misconduct.

The first respondent recommended a sanction of admonishment m its report following the Inquiry, but at a meeting of the second respondent, the lesser sanction of 'advice' was imposed pursuant to s. 71 (a) of the Medical Practitioners Act 2007. In those particular circumstances (*i.e.* where the sanction fell short of the imposition of conditions or the suspension or erasure of the applicant's name from the Register of Medical Practitioners), the applicant has no statutory right of appeal against the decisions of the first and second respondents.

In bringing these judicial review proceedings, the applicant essentially advances two contentions being as follows:-

> (a) It is contended that the respondents in failing to follow the advice of the legal assessor both on an application that the applicant had no case to answer, and at the conclusion of the Inquiry, and in failing to give adequate weight to the evidence of Dr. Siobhan Barry, and because inadequate reasons were given for the failure to follow the advice of the legal assessor or evidence of Dr. Barry, failed to comply with basic standards of natural and constitutional justice; and

(b) that, in any event, the findings of misconduct were irrational and ought not to be allowed to stand.

In response to these contentions, the respondents argue as follows:-

(a) There was adequate evidence and ample findings of fact upon which the respondents were entitled to find the applicant guilty of professional misconduct.

(b) The only obligation in the particular circumstances was to give adequate and sufficient reasons for those findings. This was duly done and there was no obligation to separately identify the basis upon which the assessor's advice was rejected or why Dr. Barry's evidence was not followed.

To understand the basis of the applicant's case, it is necessary to consider in further detail what actually transpired at the Inquiry. The applicant, however, accepts that the present application to the court is not to be considered as an appeal on the merits of the case, but is one confined to the usual grounds for intervention by the Court by way of judicial review.

THE HEARING

In opening the case on behalf of the CEO to the Committee, Mr. J.P. McDowell, solicitor, indicated that the Committee would hear from various witnesses as to fact and would further hear from evidence from an independent expert, Dr. Siobhan Barry, a consultant psychiatrist. However, in the immediate aftermath of the opening statement, counsel on behalf of the applicant submitted that Dr. Barry's report, which had been submitted in advance to the applicant's advisors, contained observations and conclusions which simply made it impossible for the case against the applicant to be proven to the criminal standard of proof necessary. By way of example, he referred to those portions of Dr. Barry's reports where she commented as follows:-

"As all of the additions and/or amendments were made in different ink, they can be easily identified as retrospective additions and/or amendments and do not indicate an attempt at deception, which would be highly inappropriate under the circumstances."

In respect of allegation (4), Dr. Barry's report stated:-

"Taken in their totality, patient K.W.'s records were not sufficiently altered so as to significantly change the meaning of the records. The initial notes taken by Dr. McManus were somewhat sketchy, but under the circumstances of eliciting a history from a very poor historian, who had spent the night in a busy A & E department, they raised key risk issues that then needed to be adequately managed."

In essence, therefore, it was submitted from the outset that there was no significant adverse criticism of the steps taken by the applicant and certainly nothing which would have materially altered the outcome from the patient's point of view. Thus Dr. Barry had also observed that Dr. McManus had secured a bed for the patient on St. Aloysius' Ward which was the most appropriate way of responding to the suicide risk posed by the patient.

These submissions having been rejected by the Committee, the Inquiry proceeded to hear evidence from various witnesses, including Professor Patricia Casey, consultant psychiatrist in the Mater Hospital and Professor of Psychiatry at U.C.D. She told the Inquiry that on the day following the suicide attempt Nurse Fowler, who was on duty that morning, said to her that she had concerns that the notes in relation to the particular patient had been altered. When she discussed the matter with the applicant he admitted having made the changes and accepted that he should not have done so. Professor Casey said that he explained the reason he had made the insertions was because he was busy and was called away and there was a lot happening in the ward so that he left and came back and inserted the changes later. While she had initially only observed the alterations made to the observations of the patient and what had occurred on the day, she later discovered the further changes which formed the subject matter of the present complaint. She told the Inquiry:-

"I was concerned about these because they suggested that an attempt was being made to undermine the level of risk that the gentleman was posing when he was seen, and it did not tally with what I had been told. I mean Dr. McManus had told me during I think our second conversation, when he told me the patient was being admitted, that he was not suicidal at the time, but yet this indicated that perhaps he had been and that an attempt had been made to change them. That was what concerned me."

At the conclusion of her evidence, Professor Casey stated in reply to a question from the chairman:-

"Q. Is it justifiable if one is busy that one might add notes subsequently as long as one dates it carefully?

A. It is not usual practice, there is no question of that, it is not usual practice. I can conceive of a situation where somebody is writing up notes - they are called away because there might be somebody in the accident department trying to leave and in those circumstances they have to leave and come back and complete the notes later, and that should be indicated and in that context, in that situation one should indicate that this was not a contemporaneous note, it was a retrospective note.

Q. The addition of the retrospective note Is not an exceptional occurrence, is that correct?

A. Oh it is exceptional, it is exceptional, yes. I have never had to do this before, I have never had to give this advice before. It is very rare that that happens."

Nurse Fowler also gave evidence, and, in response to a question from Dr. Bulbulia stated as follows:-

"Q. If the word was not there, if 'denies' was not there, would that alter the notes completely?

A. Well, it would have indicated that the patient was exhibiting suicidal ideation at the time of admission.

Q. And by putting the word 'denies' that changes the note which had been made?

A. In my opinion, yes."

Dr. Barry gave evidence in line with her report and indicated that m her view retrospective notes are not uncommon. A number of

changes made to the notes in this case had made no material difference. Asked by the chairperson if the addition of the word "denies" and the crossing out of "high" and "risk" changed what was already written, she replied:-

> "The listing of various things that are in the negative, and if one were to try and emphasise it, then 'denies' could actually go in there without this being any alteration of what was meant to be in place. I have a greater, I suppose difficulty, if that is the word with 'high suicide risk' and 'suicide attempt' because I cannot find any reason for changing that."

Overall, in her view there was very little change in the meaning of the records because they were a very small part of a much bigger history. She did however expect that an alteration of this kind would be timed and dated.

The case for the Medical Council having thus concluded, an application for a direction was made by counsel for the applicant. It was submitted that this was a case in which no question of a finding of misconduct on grounds of moral turpitude could arise and there was no allegation against the applicant that he was guilty of deceit or intention to mislead. In terms of falling short of the expected standard, no evidence to that effect had been given by Dr. Barry. While the applicant admitted having made the amendments and had further admitted he should have done it in a way differently from the way in which it was done, he did not accept he was guilty of professional misconduct, nor had Dr. Barry expressed any view that his actions represented a serious falling short of the expected standard.

In response Mr. McDowell cited the principles from *R. v. Galbraith* [1981] 2 All E.R. 1060 to argue there was sufficient evidence before the Committee to allow it proceed. In particular, he submitted, the Committee were entitled to consider the evidence of Prof. Casey and further referred to the evidence given by Nurse Fowler as to the effect the changes made to the meaning of the notes. Mr. McDowell further referred to the applicant's correspondence to the Council wherein he conceded he should not have amended the notes in the way in which he had done and apologised for his actions.

In pointing out that the Committee was free to reject his legal advice, Mr. Cross noted that Dr. Barry's evidence was exculpatory of the applicant in respect of each of the allegations raised against him. On some occasions she had found he had done nothing wrong and on other occasions where she had found some fault she had said it was not significant. The height of her criticism was to say that she would have expected the changes made to the notes to have been timed and dated. It was his view that the application should be granted in respect of allegations (1) - (6), and as allegation number (7) could only be advanced on the basis that the findings on the earlier charges had been established, it must follow that allegation number (7) would fail as well.

Having taken time to consider the application and the various submissions, the Committee indicated that it had "decided not to accept the application for a direction as it wishes to hear evidence called on behalf of Dr. McManus.".

In the event, the evidence led on behalf of the applicant was confined to references, assessments and certificates of attendance at relevant courses, which documentary evidence was admitted without the need for formal proof.

Counsel on behalf of the applicant then made further legal submissions at the conclusion of the applicant's case that no finding of misconduct should be made and that, save as admitted by the applicant, the facts alleged against the applicant were not proved. Submissions were made on behalf of the CEO of the respondent and the legal assessor gave further legal advice to the first respondent along similar lines as that previously furnished. Judgment was then reserved until 9th April, 2011 when the first respondent's report of the Inquiry, submitted to the second respondent and furnished to the applicant, found that five allegations were proven and amounted to professional misconduct by reason of a serious falling short of the standards to be expected among doctors.

The first respondent recommended a sanction of admonishment in its report following the Inquiry, but as previously pointed out, the second respondent instead imposed the sanction of advice.

APPLICABLE TEST FOR PROFESSIONAL MISCONDUCT

It is common ground that the standard for assessing whether the applicant was guilty of professional misconduct or not was in this particular case the fifth limb of the test as elaborated by Keane J. in *O'Laoire v. Medical Council* (Unreported, High Court, Keane J., 27th January, 1995 at 106-7):-

> "Conduct which could not properly be characterised as 'infamous' or 'disgraceful' and which does not involve any degree of moral turpitude, fraud or dishonesty may still constitute 'professional misconduct' if it is conduct connected with his profession in which the medical practitioner concerned has seriously fallen short by omission or commission of the standards of conduct expected among medical practitioners."

It is common case that no part of the allegations against the applicant or any part of the findings against him were to the effect that he was guilty of any other form of professional misconduct.

SUBMISSIONS OF THE PARTIES

It is submitted on behalf of the applicant that the first respondent failed to heed or give any due weight to the advices offered on two occasions by the legal assessor, Mr. Kevin Cross, S.C., both at the conclusion of the CEO's case against the applicant and following closing submissions at the end of the case. The overall tenor of that legal advice was that there was no sufficient evidence upon which the panel could find against the applicant. In relation to the expert evidence, Mr. Cross had advised that the evidence of Dr. Barry was exculpatory of the applicant in relation to allegations of misconduct. On some occasions she had found there was nothing wrong and on other occasions where she found some fault, she said that the fault was not serious or significant. It was submitted that the Committee had failed to give this advice due weight or consideration, effectively ignoring the statement in *Mahfouz v. General Medical Council* [2004] EWCA Civ. 233 to the effect that "the legal assessor is much better placed than the Committee to express the objective view of the 'fair minded observer'; indeed that is precisely what he is or should be".

While it was accepted that the Committee was nonetheless free to reject the advice of the legal assessor, it was necessary for the first respondent to give clear and cogent reasons for doing so. Arising from the application for a direction of no case to answer, the only reason afforded by the chairperson of the first respondent was that the Committee wished to hear evidence called by the applicant. Insofar as this can be stated to be a reason, it was submitted it was insufficient.

Insofar as the further advice of the legal assessor was rejected at the stage of closing submissions, no reason for so doing was furnished by the first respondent in the report prepared by the first respondent for consideration by the second respondent. Indeed, there was no mention in the report that on two occasions the first respondent was advised by the legal assessor that there was no evidence against the applicant, nor was there any mention of the fact that the first respondent had rejected that advice.

It was further submitted that it was not open to the first respondent to reach the conclusion that the applicant was guilty of a serious falling short of expected professional standards without there being appropriate evidence from a medical expert which was capable of satisfying a reasonable and objective committee beyond a reasonable doubt that there had been a falling short of the expected standards and that any such falling short was a serious one. Dr. Barry had indicated that the clear tenor of her report and of her oral evidence did not support a finding of misconduct. The affidavits filed on behalf of the respondent in the judicial review made it clear that the Committee instead relied on the evidence of Prof. Patricia Casey as the basis for its finding against the applicant. Given that Prof. Casey was a witness as to fact at the Inquiry and not an expert witness in relation to professional standards, it was, at the very least, an unfair procedure on the part of the Committee to treat her evidence as if it were expert evidence in circumstances where, had the applicant known that her evidence was to be relied upon as expert evidence, then objection could have been raised to the admissibility of such evidence and an entirely different cross-examination of Prof. Casey would have ensued.

Furthermore, the Committee was under a general duty to give reasons for not relying on the views of Dr. Barry. The decision of the first respondent was thus irrational and unreasonable within the meaning of that term in judicial review. The failure of the Committee to notify the applicant's legal advisors that it intended to rely upon the evidence of Prof. Casey as expert evidence meant that the applicant's legal advisors had made a decision on whether or not to call the applicant as a witness in circumstances where the first respondent had heard no evidence of professional misconduct and had been advised by the legal assessor in the clearest terms that there was no evidential basis for a finding against the applicant. Thus the decision of the first respondent to find the applicant guilty of professional misconduct was disproportionate having regard to all the circumstances of the case.

Finally, it was submitted that the Committee had given no adequate reasons for the particular findings which it made in which the applicant was found guilty of professional misconduct. Those stated in the report were cursory and non-informative.

In response, counsel on behalf of the respondents accepted there was an obligation on the Committee to provide reasons for coming to the conclusions reached. Reasons were given which were adequate and sufficient. The Committee was entitled both to reject the advice of the legal assessor and to prefer other evidence than that tendered by Dr. Barry.

It was well established that the respondents were entitled to reject the advice given to them by the legal assessor. A legal assessor should not make the decision for the inquiry committee but should give the committee the advice it requires in order to make the decision.

It could hardly be the case that the respondents were required to give a discursive judgment identifying both the reason for particular findings of fact and misconduct and specific reasons why they rejected advice given by the legal assessor. No authority in support of that proposition had been furnished and it was clearly undesirable that such an approach be adopted.

In relation to the issues of the expert witness, the respondents were entitled quite separately to form the opinion that the admitted changes to the medical notes in this case were wholly unacceptable and seriously below the standards expected from a medical practitioner. There had been no suggestion in the evidence of Dr. Barry that findings of misconduct could not be made by the Committee. A difference had to be drawn between reasons for findings of fact and misconduct and reasons for the rejection of a witness's evidence. There was no duty to explain in detail the reasons for the rejection of a particular witness's evidence or the preference by the Committee of that evidence of one witness over another. Further, in this case the Committee had gone considerably beyond furnishing a minimal explanation for its particular findings and had furnished detailed reasons in relation to its findings and each of the allegations both in relation to the issues of fact and the basis upon which the Committee found that the facts as proven constituted professional misconduct.

It could thus be seen that the applicant had essentially brought this challenge because he disagreed with the decision of the Committee and sought to appeal its findings. This was not a ground for setting aside the decision as it failed to meet the threshold for doing so established in *The State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642 and *O'Keeffe v. An Bard Pleanála* [1993] 1 I.R. 39. The case of *Meadows v. The Minister for Justice* [2010] 2 I.R. had not modified that test but merely took into account the concept of proportionality when applying it.

In relation to the refusals to grant a direction, counsel on behalf of the respondent submitted that it was a misconception to equate the proceedings before the Committee with a criminal trial. While the standard of proof might be that of proof beyond reasonable doubt, it did not follow that the procedures of an inquiry were identical with those of a criminal trial. In the instant case it was entirely understandable that the Committee wished to hear the evidence of the applicant. In the context of an inquiry, as opposed to a civil or criminal trial, this is a perfectly valid reason to refuse a direction. It does not seek to reverse the onus of proof or force the applicant to give evidence.

Finally, it had to be emphasised that the alteration of medical reports had always been viewed within the medical profession, and indeed by the courts of this jurisdiction also, as a most serious matter. In *Philp v. Ryan* [2004] 4 I.R. 241, the Supreme Court had characterised as "an extremely serious finding" the finding of the trial judge in that case that the medical practitioner had altered medical notes following receipt of a solicitor's letter concerning the treatment of a particular patient.

At the end of the day, the plain fact of the matter in the present case was that the applicant had altered medical records and had fully admitted doing so and had further admitted that the changing of notes was inappropriate. It was for the Committee to determine whether such conduct was merely inappropriate or went further into the area of professional misconduct.

It could not be said that the finding of the Committee "flew in the face" of fundamental reason and common sense or was disproportionate.

DECISION

As already noted, the first respondent recommended a sanction of admonishment in its report, but at a meeting of the second respondent the sanction of advice was imposed pursuant to s. 71 (a) of the Medical Practitioners Act 2007. In circumstances where the sanction fell short of the imposition of conditions or the suspension or erasure of the applicant's name from the Register of Medical Practitioners, the applicant has no statutory right of appeal against the decision of the second respondents. I say this at the outset because this judicial review application strikes one as being more in the nature of an appeal on the basis of insufficient evidence, rather than a judicial review in the true sense. The absence of a right of appeal may explain the course adopted on behalf of the applicant and indeed it is the applicant's case that the absence of a right of appeal is in contravention of the Constitution and in violation of the European Convention on Human Rights. However, the Court has been informed that it was agreed between the parties that the question of constitutionality be held over for argument in the event that the applicant is unsuccessful in his argument that the procedures and decisions in the present case were variously unfair and/or irrational.

Firstly, in relation to the issue of reasons, the respondents accept the statement of law set forth in the decisions of the High Court in *Prendiville v. Medical Council* [2008] 3 I.R. 122 and *Brennan v. An Bard Altranais* [2010] IEHC 193. In the former case Kelly J. stated:-

> "In my view, the Fitness to Practise Committee was obliged to give reasons for coming to the conclusion which it did. It was not obliged to provide a discursive judgment ... a statement of the reasons for the Fitness to Practise Committee decision would have been essential so as to enable the council to hear submissions and decide on whether or not it ought to confirm the Fitness to Practise Committee's findings. Even if I am wrong in the view which I take concerning the role of the council ... the applicants are entitled to know the basis of the decision in the context of an application for judicial review. As was said by Keane J., reasons are necessary in order to ensure that the Superior Courts may exercise their jurisdiction to enquire into, and if necessary, correct such decisions."

In my view reasons have been given by the Committee for the decisions arrived at (as cited above) and they are sufficient to allow the applicant (and indeed the Court) understand how and why the particular findings were made against him.

This was not a difficult or complex case. Indeed the essential facts were admitted and a quite minimal explanation would have been adequate in the particular circumstances of this case. I am satisfied that the reasons given go considerably beyond any minimal explanation which the law may require.

Insofar as it is alleged that the Committee was irrational in failing to follow the advice of the legal assessor, it is accepted by both sides in this case that the Committee were not obliged to accept it. In *Sivarajah v. General Medical Council* [1964] 1 WLR 112 (at pp. 116-117) the Privy Council stated:-

> "The legal assessor is, however, in no sense in the position of a judge summing up to a jury, nor is the committee's function analogous to that of a jury. The legal assessor's duties are confined to 'advising on questions of law referred to him and to interventions for the purpose either of informing the committee of any irregularity in the conduct of their proceedings which comes to its knowledge, or of advising them when it appears to him that, but for such advice, there is a possibility of a mistake of law being made ... the committee are masters both of the law and of the facts."

Further, in *Gopakumar v. General Medical Council* [2008] EWCA Civ. 309 at para. 31, the Court of Appeal held that:-

> "The differences between judge and jury in a criminal trial and members of a panel and its legal assessor are obvious. The panel is not a jury. They take legal advice from the assessor but they are not bound to follow it. The assessor is not a judge. He gives legal advice but he does not give direction as such and does not sum up the evidence to the panel."

These observations seem particularly apt to the facts of the present case where the advice furnished by the legal assessor was directed more to the weight of evidence, rather than any other complex legal consideration. That was ultimately a matter for the Committee to determine. While the assessor described in the course of his advices the procedural milestones which might attend a criminal trial, it must be remembered that this was, in fact, an inquiry. Although the standard of proof for both processes is that of proof beyond a reasonable doubt, it does not follow that the two processes are in all other respects identical. The fact that the Committee rejected a request for a direction at the conclusion of the CEO's case on the basis that they wished to hear the applicant might transgress the rules of a criminal trial, but in the context of an inquiry does not strike me as being an objectionable course for the Committee to have adopted. This is not to say that the applicant was obliged to give evidence, or that the onus of proof was reversed or altered in any way.

I am equally satisfied that there was no obligation on the Committee to give detailed reasons or a discursive judgment on why it decided not to accept the views offered by the legal assessor in this case. As previously indicated, these views were directed almost entirely to the weight of the evidence which was peculiarly a matter for the Committee itself to determine.

I am also satisfied that there was adequate evidential material before the Committee to enable it reach the particular conclusions which it did reach. While the evidence offered by Dr. Barry was undoubtedly exculpatory to a significant degree of the applicant insofar as his reasons for making the alterations to the notes was concerned, the Committee had in addition the evidence of Nurse Fowler and Prof. Patricia Casey to which they were also entitled to have regard in reaching their decision at the conclusion of the Inquiry. In such circumstances, the decision of the Committee can hardly be said for this particular reason to offend the principles laid down in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. Furthermore, having regard to the relatively mild sanction imposed in the case it is difficult to see how the applicant could invoke the decision of the Supreme Court in *Meadows v. The Minister for Justice* [2010] 2 I.R. to argue that the sanction was disproportionate, particularly in circumstances where the facts of the case had been admitted and the inappropriateness of amending or altering the notes was also admitted by the applicant.

That leaves the single point of fair procedures in this case.

I would have thought the keeping of accurate medical records was a matter of such basic importance to the discharge of the functions of any medical practitioner and that no expert evidence on this topic would have been required or put forward by the Committee in the course of this Inquiry. However inconvenient and burdensome it may be to write up medical records accurately, such records constitute a vital safeguard 'for both medical practitioners and patients alike in any situation where it later becomes necessary to conduct any form of investigation as to what transpired during the course of a patient's treatment. Every practitioner must be taken as knowing that records may later be used in court proceedings or other investigations or inquiries and hence their importance is self evident.

However, the decision of the Committee was to call such an expert. Having chosen that course, it seems to me that the Committee must accept the consequences of the expert not 'swearing up'. It was hardly fair or appropriate to reject or ignore the views of its own expert and elevate to that status for the purpose of its decision the evidence offered by Professor Patricia Casey. Whatever her qualifications and experience, Professor Casey was the complainant in the case and it had never been intimated that the Committee would regard her as anything other than a witness as to fact. The cross-examination of Prof. Casey was predicated on the assumption that Dr. Barry would be giving the material expert evidence on misconduct. In those circumstances the applicant contends that his legal team were deprived of an opportunity to mount an altogether different form of cross-examination of Professor Casey. They argue that different decisions as to the strategy and conduct of the defence might have been made had it been appreciated that the Committee would switch from the opinion of its own expert and substitute in its place the view of a witness as to fact who was also the complainant. The applicant argues that, at the very least, he should have been given due warning of any such intention so as to permit an effective cross-examination and not one which was necessarily restricted in the circumstances.

The importance of adhering scrupulously to the requirements of fair procedures is central to the proper conduct of disciplinary

processes which may result in serious sanctions for the person who is the subject matter of the process. This hearing was a matter of the utmost gravity to the applicant, a doctor with a hitherto unblemished record, and the imposition of any finding of professional misconduct and/or imposition of sanction (with all its attendant adverse career consequences) could be justified only in circumstances where the Committee ensured that all the requirements of fair procedures were scrupulously followed and extended to the applicant throughout the disciplinary process.

As O Dalaigh C.J. stated in *In re Haughey* [1971] I.R. 217 at p. 264:-

> "In proceedings before any tribunal where a party to the proceedings is on risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution the State, either by its enactments or through the Courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating those rights"

On that basis the court found that a person in that position was entitled to the following 'minimal protection' (at p. 263):-

> "(a) that he should be furnished with a copy of the evidence which reflected on his good name;
>
> (b) that he should be allowed to cross-examine, by counsel, his accuser or accusers;
>
> (c) that he should be allowed to give rebutting evidence; and
>
> (d) that he should be permitted to address, again by counsel, the Committee in his own defence"

This passage - so often relied upon in the decisions of the highest court in this jurisdiction - must be taken as implying that the right of cross-examination be free and unrestricted and not one undertaken under a mistaken assumption created by the tribunal and for which the applicant is in no way responsible.

In the instant case, while I am satisfied that the applicant in altering the medical notes did something wrong (and for which he accepts responsibility), he may also have been disadvantaged to an appreciable degree by the procedures adopted by the Committee in arriving at and justifying its decision. In those circumstances I believe the decisions arrived at by the respondents should be quashed.