[2019] IEHC 864

THE HIGH COURT
JUDICIAL REVIEW

[2018/615 J.R.]

BETWEEN

PEADAR O'GRADY

PLAINTIFF

AND
HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT of Ms.Justice O'Regan delivered on the 18th day of December, 2019

Issues

1. On the 23rd of July, 2018, the applicant was afforded leave to maintain judicial review proceedings against the respondent seeking twelve reliefs in total, namely to quash the Acrux preliminary report of the 20th of March, 2018, together with allied declaratory and injunctive relief, on the basis of a breach of the applicant's right to fair procedure and his contractual rights. In addition, the applicant is seeking the relief of a declaration that his continued suspension is unlawful, restraining same and the applicant seeks to restrain the ongoing investigation.

2. The applicant in his statement of grounds asserts that the respondent acted with bias in conducting a second investigation into him, and the preliminary report of the 20th of March, 2018, had no valid basis for its adverse findings.

3. The complaint is made that the preliminary report issued without expert evidence and therefore without an opportunity to the applicant to challenge same. It is asserted that the investigative panel is relying on its own unstated views and opinions without scientific evidence.

4. The applicant complains that Dr. Wrate was strongly pro-medication and relied on National Institute for Health and Care Excellence (NICE) guidelines which have not been formally adopted in this jurisdiction. The applicant believes Dr. Wrate swayed other members of the panel.

5. The applicant contends that independent expert evidence was critical to enable the applicant test and counter Dr. Wrate's views - because of this, the process of the investigation commencing with a letter of the 11th March, 2015, has been irremediably compromised.

6. The applicant suggests bias on the part of Dr. Wrate because of his pro-medication views and suggests the panel showed bias to him in their inaccurate accounting of witness Dr. Doody's evidence.

7. Complaint was made as to the witnesses interviewed and indeed witnesses that were not interviewed, together with materials and files which the applicant believes are outstanding.

8. The applicant maintains that there has been delay in the process and that there is an overlap between this investigation and a prior investigation. He complains his suspension is manifestly unlawful and prolonged, and injunctive relief is sought.

9. The statement of opposition of the 5th of November, 2018, counters the applicant's claim. Of the entirety of the statement of opposition the following two provisions became relevant: -

   (1) At para. 8 the respondent asserts inordinate and unreasonable delay in challenging the preliminary report of the 20th of March, 2018. (The applicant argues in this regard that as no mention is made in para. 8 of O.84 of the Rules of the Superior Courts this point of opposition does not engage O.84); and,

   (2) At para. 40 the respondent asserts that the applicant did not challenge the panel's expertise or appropriateness to act as investigators at the commencement of the process (in this regard the applicant suggests that this point of opposition cannot be read as raising an estoppel argument as against the applicant).

10. The statement of grounds is supported by an affidavit of the applicant of the 22nd of July, 2018, which is some 31 pages. The applicant swore two further affidavits to ground his claim, namely one of the 29th of November, 2018, and the final affidavit of the 21st of March, 2019.

11. The claim is being resisted by the respondent based on three affidavits of David Walsh, HSE Interim National Director, respectively dated the 5th of November, 2018, the 8th of February, 2019, and the 8th of April, 2019.

Background

12. The applicant is a Consultant Child and Adolescent Psychiatrist attached to the Midlands Regional Hospital in Portlaoise and signed a contract in respect thereof on the 17th of December, 2010.

13. Prior to the 11th of March, 2015, an investigative process was in train in respect of issues concerning referrals to the Child and Adolescent Mental Health Services (CAMHS) for counties Laois and Offaly.

14. By letter of the 11th of March, 2015, Mr. Walsh wrote to the applicant stating that a number of cases which were previously referred to CAMHS had been reviewed and clinically reassessed. As a consequence thereof, *inter alia*, Dr. Garvin did not agree with a number of the clinical assessments made by the applicant. By reason of the foregoing Mr. Walsh reviewed all the files from a management perspective as well as considering communications made to him. Consequently, Mr. Walsh indicated that he, as Chief Officer of the HSE Midlands area had serious concerns about the applicant's clinical practice and that there may have been a serious failure by the applicant to deliver the standards of care required of him as a consultant.

15. The concerns were set out. Mr. Walsh went on to indicate that if his concerns were well founded the issues would constitute serious negligence and/or a serious dereliction of duty and/or matters considered to be serious misconduct under the applicant's consultants contract. It was indicated that as the issues then raised were of a clinical nature they were considered to be outside the terms of reference of the ongoing investigation aforesaid.

16. Accordingly, the HSE intended to undertake a separate formal investigation of the matters referred to in the letter of the 11th of March, 2015, from a clinical perspective, under the terms of the applicant's contract. If the concerns were considered well founded a stage four disciplinary hearing could be convened.

17. Mr. Walsh intended seeking the nomination of suitable experts from, inter alia, the UK. The communication also went on to indicate that Mr. Walsh was considering placing the applicant on administrative leave for such time as may be necessary for the completion of the investigation in accordance with the applicant's contract. The applicant was invited to respond to the communication within seven days.

18. Although the applicant did respond, no representation was made in respect of the proposal for administrative leave. The applicant, through the IMO, did raise queries as to the overlap in the initial investigation on the proposed investigation mentioned by Mr. Walsh. In the response of the 31st of March, 2015, Mr. Walsh indicated that the proposed investigation was wholly unconnected to the issues raised in the then ongoing investigation. Mr. Walsh indicated that the proposed new investigation would include suitably qualified and experienced clinicians who could assess the clinical concerns that Mr. Walsh had. The letter concluded with a request for submissions by the applicant within a two week period during which time Mr. Walsh would defer any decision on protective measures.

19. Further communications ensued and it is clear from a letter of the 15th of April, 2015, by the IMO on behalf of the applicant that it was considered still unclear how the proposed investigation substantially differed from the initial investigation.

20. In a letter of the 12th of May, 2015, Mr. Walsh again wrote to the applicant referring to his serious concerns and his consideration of placing the applicant on administrative leave. Reference was also made to the fact that the applicant had an opportunity to consider the matter and to provide a response, and the letter noted that no views or submissions were made in respect of the consideration of protective measures. In those circumstances Mr. Walsh indicated that he had decided to place the applicant on administrative leave with immediate effect pending the outcome of the investigation and subject to ongoing fortnightly reviews.

21. Insofar as the differential between the two investigations are concerned, by a letter of the 14th of May, 2015, the IMO indicated that the HSE's position that there are different terms of reference in respect of both investigations was considered understandable, although not echoed in the approach of the initial investigation.

22. Further communications ensued. However, noteworthy is the fact that the IMO did not continue to maintain a difficulty with a perceived overlap in respect of the two investigations (see for example the letter of the 4th of June, 2015, from the IMO in which proposals in respect of an alternative to administrative leave was put forward. However, the response of the 15th of July, 2015, from David Walsh was to the effect that such suggestions did not assuage his concerns).

23. In a letter of the 25th of January, 2016, from the IMO, it was indicated that no information had been provided in relation to the investigators suggested by the HSE and it was entirely unclear from the documentation what expertise those individuals possessed appropriate to sit on the investigation team.

24. In a separate letter of the 26th of January, 2016, the IMO raised an issue on delay with regard to the protective measure of administrative leave. However, in a response of the 16th of February, 2016, Mr. Walsh felt that he had moved promptly to place the applicant on such leave as soon as he had complied with the necessary procedures under the applicant's contract and afforded him fairness in respect of any consideration of same. This letter also indicated that the investigation would require detailed engagement by the investigators with the applicant and also involved engaging with other clinical experts.

25. By letter of the 30th of March, 2016, having previously obtained biographies in respect of the members of the proposed panel, the IMO confirmed that the applicant accepted the terms of reference as they then stood. On the 15th of May, 2016, the three investigators were ultimately appointed.

26. In July, 2016 the applicant was exonerated in the context of the first investigation.

27. Subsequently, other files were identified as raising concerns and ultimately by a letter of the 11th of September, 2017, the IMO on behalf of the applicant indicated that they had decided in the interest of bringing the long standing issue to a conclusion and to avoid further delays, that they would allow the additional files to be dealt with in the investigation.

28. In a proposed alternative to administrative leave, by letter of the 1st of November, 2017, the applicant, through the IMO, suggested that he would work two days a week in private research and three days a week carrying out consultations to other consultants. Notwithstanding two reminders to this proposal, no response was received from the respondent until the matter was dealt with in the affidavits before this Court, to the effect that such proposal was in fact considered, however, did not assuage the concerns of Mr. Walsh.

29. In accordance with the terms of reference and the applicable provision of the applicant's employment contract, a preliminary report of the investigation team of the 20th of March, 2018, issued and was furnished to the applicant seeking his submissions in respect of the matters therein contained, within a two-week period. From time to time this two-week period was extended.

30. By a communication of the 29th of May, 2018, the IMO indicated that certain documents from the files being reviewed were missing. This communication was addressed to Gerry Rooney on behalf of the investigation team and in a response of the 2nd of July, 2018, it was indicated that the request of the applicant in respect of such files had been made of the Commissioner (Mr. Walsh).

31. No further documentation had been received by the investigation team. It was indicated that in the absence of any further information being available, the investigation team was satisfied that the evidence provided to them was sufficient to enable them to draw conclusions. It was indicated that the clinical advisors to the investigation have advised that they are not aware of what information could change their conclusion on the files reviewed.

32. In an email of the 5th of July, 2018, from the IMO to Mr. Rooney aforesaid, a query was raised as to the identity of the clinical advisers and by return email of the same date, it was identified that they (namely, Michael Bambrick and Dr. Robert Wrate) were the clinical experts on the investigation team.

33. In the terms of reference, the investigation is identified as coming under stage four of the Consultants Common Contract (2008). The purpose and scope of the investigation was to establish if the conduct of the applicant, relating to matters described in the aforesaid letter of the 11th of March, 2015, individually or cumulatively constituted serious misconduct by the applicant under his contract of employment. It is provided that the investigation shall be entitled to assess the appropriateness or not of the clinical assessment diagnosis, and/or treatment.

34. Under Clause 2.8 it is provided that the process to be followed within the investigation will be determined by the investigators.

35. Under Clause 2.9 it is provided that the investigators, having considered all statements made to them and representations by the applicant, will draft a written report incorporating preliminary conclusions to be furnished to the applicant and the applicant will be invited to provide additional information or to challenge any aspect of the evidence.

36. Under Clause 2.13 it was noted that any potential disciplinary sanction would be exclusively for the disciplinary decision maker (i.e. not the investigation team).

37. Under Clause 3.5 it is provided that all notes, minutes and witness statements could be furnished to the applicant prior to his interview.

38. Under Clause 4.1 it is provided that the investigators must determine if the allegations set out at para.1.3 are substantiated on the balance of probability.

39. Under Clause 4.2 it is provided that Mr. Walsh on receipt of the final report, if the allegations are upheld, will refer the issue to the National Director who will then

determine whether it is appropriate to convene a disciplinary hearing in accordance with the applicant's contract.

40. The contract of the applicant aforesaid at Appendix 2 provides for a disciplinary procedure. Under stage four the concept of an investigation is set out and the parties conducting the investigation must be acceptable to both.

41. It is provided that if the investigation upholds an allegation of serious misconduct, a disciplinary hearing will be held and thereafter it is provided that insofar as the disciplinary hearing is concerned, the consultant is to be provided with a copy of the investigation report and all relevant documents and will be informed of the following:-

    (1) that the hearing is a formal disciplinary hearing under stage four;

    (2) the purpose of the hearing is to consider the representations of the consultant and to decide if disciplinary action is appropriate and the nature of the sanction if any;

    (3) the possible outcome of the hearing; and,

    (4) the right to be accompanied by a representative or work colleague.

42. The process envisaged under the disciplinary hearing then goes on to provide that the disciplinary hearing would be conducted in accordance with five bullet points which include: -

    - "The consultant and his/her representative will have the opportunity to present his/her case in response to the findings of the investigation." and,

    - "The disciplinary hearing will allow the consultant to raise any concerns regarding the investigation process if s/he feels that these concerns were not given due consideration by the investigation team."

43. It is provided that the outcome of the disciplinary hearing will be confirmed to the consultant in writing and the decision may be that the allegation is not upheld, to take no further action, to dismiss the consultant or to take disciplinary action.

Matters not in dispute

44. It is accepted that:-

    (1) the disciplinary process is ongoing and was not concluded by furnishing to the applicant, the preliminary report of the 20th of March, 2018 (in this regard see para. 87 of the applicant's affidavit of the 22nd of July, 2018);

    (2) the Supreme Court decisions in *Roland* and *McKelvey* apply;

    (3) natural and constitutional justice applies to all stages of the process; and,

    (4) the process of investigation is in fact an investigative and adjudicative process.

Submissions of the parties

45. The essence of the parties' respective submissions are as follows: -

The applicant's position

46. The core argument of the applicant is to the effect that Dr. Wrate and Mr. Bambrick, or in the alternative Dr. Wrate on his own, advised the panel in private and accordingly the applicant cannot know the advice given to the panel or indeed cross-examine the panel.

47. Furthermore, it is asserted that the applicant does not know the nature of the conversation between Dr. Wrate and a G.P. of a child whose file was being considered (in this regard in the preliminary report it is stated that Dr. Wrate had a conversation with Dr. Doody (G.P.) for the purposes of securing details of his notes).

48. For the purposes of bringing the within matter within the exception identified in the cases of Rowland v. An Post [2017] IESC 20 and *McKelvey -v- Iarnróid Éireann/Irish Rail* [2019] IESCDET 50, the applicant relies on a number of UK authorities which the applicant suggests are authority for condemning "backstage advisers", such that the procedure is rendered irremediably tarnished and the investigation must be abandoned. The applicant also relied on domestic jurisprudence.

49. It is suggested that the panel cannot overcome the error identified by the applicant, and that the process to date has taken so long it would be unfair and a breach of natural justice to allow a recommencement of the process with a wholly different panel.

50. Aside from attributing bias to the panel because of the overlap of the first and second investigations and the asserted bias on the part of Dr. Garvin, a colleague of the applicant's, bias is said to arise because of errors alleged within the preliminary report itself in respect of:

    (a) the summary of Dr. Doody's evidence;

    (b) the failure to secure all documentation; and,

    (c) the fact that Dr. Wrate is supportive of medication for ADHD.

51. The applicant also suggests that the procedure was unfair and in breach of natural and constitutional justice in that:

    (a) the panel relied on the NICE Guidelines which are not adopted within this jurisdiction;

    (b) the asserted involvement of Dr. Wrigley was unnecessary;

    (c) there are inaccuracies in the summaries;

    (d) some witnesses which might be helpful to the applicant were not called; and,

    (e) there was delay in the process.

52. In submission it is also suggested that there was no merit in the applicant making submissions as anticipated by the terms of reference and the appendix to his contract following the furnishing of the preliminary report, as it is asserted that the panel had already made up their minds. This is based on the emails of the 2nd and 5th of July, 2018, respectively from Mr. Rooney.

53. In this regard, it is noteworthy that the applicant did not argue, when raised by the respondent, that none of the issues now raised in this judicial review application were raised before the panel. The only indication of the applicant's difficulties as identified in the statement of grounds was the solicitor's letter of the 18th of July, 2018, which afforded the respondent just under two days to respond to the letter.

54. It is complained that there has been no sufficient engagement by the respondent to identify an alternative to suspension and/or the suspension is unwarranted and unlawful.

55. In the applicant's written submissions of the 20th of November, 2019, the focus of the argument is on the asserted "back stage advisers" (22 of 27 pages), with limited argument on bias (less than a page) and the suspension of the applicant (just over a page).

56. The other issues identified in the statement of grounds might be said to have been mentioned in passing. Oral submissions followed a like pattern.

57. In response to the respondent's submissions the applicant countered that:

    (a) there was no future opportunity to challenge the panel and their views;

    (b) the statement of opposition does not rely on O.84 and the Court should not raise that point on its own motion; and,

    (c) estoppel has not been included in the statement of opposition therefore the timing of the various complaints made should not influence the Court's decision.

The respondent's arguments

58. The respondent has resisted the entirety of the applicant's claim on the following grounds:

    (1) The main target of the application for judicial review is the preliminary report of the 20th of March, 2018, and therefore it is clear that leave was granted outside the three-month period contemplated by O.84 with no explanation given for the delay, and accordingly the relief should be refused because of delay. In this regard it might be noted that para. 8 of the statement of opposition does not raise O.84 but refers to inordinate and/or inexcusable delay. The argument of the respondent arose following this Court's query of the applicant as to whether or not his claim was in fact out of time.

    (2) Matters raised in a judicial review must be raised first before the panel. Accordingly, the judicial review application is premature as matters raised in the

statement of grounds (save for the letter of the 18th of July, 2018), were not raised in advance to the panel.

(3) If one reviews the contract of employment and appendix relevant to disciplinary procedure, it is clear that the applicant has the ability to raise matters now raised before the Court either by submissions as was anticipated following the issue of the preliminary report or indeed later on in the process of a disciplinary hearing.

(4) The within matter does not come within the exception identified in *Rowland* or *McKelvey*.

(5) The UK authorities cited don't in fact support the applicant's argument made.

(6) There is no basis on which the Court might find that the panel was biased and the applicant did not engage with the jurisprudence on bias.

(7) At para. 12 of the affidavit of David Walsh of the 5th of February, 2019, it is asserted that the procedure undertaken is normal within the Irish health system and this has not been countered.

(8) The applicant had an opportunity prior to agreeing the terms of reference to challenge Dr. Wrate and/or the proposal of a second investigation but did not do so and should not now be entitled to condemn that process or Dr. Wrate sitting on the panel.

(9) The applicant had an opportunity, following the communication of the 11th of March, 2015, and prior to the applicant's suspension on the 12th of May, 2015, to engage with the respondent in respect of his suspension but choose not to do so. Notwithstanding that, the applicant did engage in other aspects of the proposed investigation.

(10) Suspension pending the determination has been and continues to be justified as there are ongoing concerns in respect of patient safety.

Jurisprudence

59. In *Rowland v. An Post* [2017] IESC 20, the Supreme Court indicated that the courts should be reluctant to interfere with an ongoing process unless the process has gone irredeemably wrong, and that it was more or less inevitable that any adverse conclusion reached would be bound to be unsustainable in law. Where a plaintiff could not establish that the case met that standard, it would ordinarily be inappropriate for a court to interfere, and that instead the process should be allowed to continue to its natural conclusion at which stage it could be reviewed. The Court also indicated that the decision maker in such a process has a significant margin of appreciation as to how the process would be conducted, subject to the rules defined by reason of contractual or other legal terms governing the process, provided that the procedure adopted did not, to an impermissible extent, impair the effectiveness of the exercise of the rights concerned. Furthermore, unless the entitlement to obtain certain information or test evidence was

afforded at a stage that was so late that it could be said that the person whose interests were in potential jeopardy had suffered an irremediable detriment, the timing of when information was given or cross-examination allowed would not, in and of itself, breach the rules of constitutional justice.

60. In *McKelvey v. Iarnrod Eireann/Irish Rail* [2019] IESC 79, Clarke C.J. in the Supreme Court made reference to *Rowland* and indicated that the judgment in Rowland recognises that there may be cases where it is clear that, the process has "gone off the rails" to such an extent that there could be no reasonable prospect that any ultimate determination could be sustainable in law. It was held that the courts can and should intervene where the result of the process will almost certainly be redundant.

61. The applicant also relies on *Kiely v. Minister for Social Welfare* [1977] IESC 2 where Henchy J. was satisfied that tribunals exercising quasi-judicial functions are frequently allowed to act informally but they may not act in such a way as to imperil a fair hearing or a fair result.

62. In *Aziz v. Midland Health Board* [1999] IESC 71, the Supreme Court dealt with an assertion that fair procedures had not been adopted in arriving at the relevant conclusion. The CEO elected to have a private discussion with two parties in the absence of the plaintiff immediately before arriving at his decision to terminate the applicant's employment. Notwithstanding that there was a clear conflict between the applicant and one of such parties as to what happened at a crucial meeting, the court was satisfied that fair procedures had not been adopted.

63. In *J.F. v. The DPP* [2005] IESC 24, the applicant sought to restrain criminal proceedings in respect of an alleged historic sexual offence. The complaint had been assessed on a number of occasions by the prosecution, however, refused to be assessed by the applicant's clinical psychologist. The court was satisfied that this deprived the applicant of his entitlements provided in such cases as in *Re Haughey* [1971] IR 217 - the applicant had to be treated equally and the placing of the respondent's witness in a position superior to that of the applicant's was inconsistent with the right to fair procedure.

64. In *Prendiville v. The Medical Council & Ors.* [2007] IEHC 427, it was held objectionable that members of the Fitness to Practice Committee sat as members of the Council to consider their own report, and that it was inappropriate that legal advice was tendered to the Council by the same officer who presented the case against the applicant before the Fitness to Practice Committee. The court was satisfied that if there was an entitlement on the part of the Council to legal advice it should have been furnished to all and at the same time. In the circumstances of that matter, the Council relied on information obtained outside the hearing and not disclosed to the applicants who were adversely affected by it. It was noted by Mr. Justice Kelly that the parties had not been given an opportunity to comment on the advice, which fairness required before a decision is made.

65. I am not satisfied that that the UK authorities cited by the applicant in fact apply, or are of any assistance. In *Southall v. General Medical Council* [2010] EWCA Civ 407, the

obiter comment at para. 67 of the judgment, the court indicated that if there were any issues requiring specialist knowledge, that should be dealt with through the calling of expert evidence, as there would be a risk that the decision would be made on the basis of an expert view that had not been the subject of evidence or argument (in the within matter the views of the relevant panel were expressed in the preliminary report insofar as reasons were provided for the finding against the applicant and in accordance with the terms of reference the applicant was given an opportunity to address the preliminary report).

66. In *Lucie v. Worchester County Council & Ors*.. [2002] EWHC 1292, it was held that members should not give evidence to themselves which the parties had no opportunity to challenge. *Richardson v. Solihull Metropolitan Borough Council & Ors*. [1998] EWCA Civ 3535, makes a similar comment to *Lucie* aforesaid.

67. In *Dublin Well Woman Centre Limited v. Ireland* [1995] 1 ILRM 408, it was held that in considering bias, what was required was an objective test, being would a reasonable person apprehend that a chance of a fair and independent hearing on the question at issue does not exist.

68. In *The Governor & Company of the Bank of Ireland v. James O'Reilly* [2015] IEHC 241, the court found that the decision to suspend an employee on a holding basis was an extremely serious measure with potentially grave consequences. Accordingly, even a holding suspension was not to be undertaken likely and only after full consideration of the necessity for it pending a full investigation of the conduct in question. It will normally be justified and seen as necessary to prevent a repetition of conduct complained of or perhaps to protect persons at risk of such conduct.

69. In *Khan v. HSE* [2008] IEHC 234, the Court suggested a fundamental question will be, will the defendant be exposing to immediate risk, the health and safety of patients or other staff. In lifting the suspension, the Court had regard to the view that the plaintiff would be much more careful and more conservative in future until a full investigation was complete and felt that there was a possibility that the plaintiff might agree to alternative cautions. If the same were suggested by the Clinical Director, the plaintiff would be foolish to ignore such suggestions. The Court was satisfied that the risk of injury to the patient must not be exaggerated. The Court felt that the evidence before it did not suggest that the defendant thought that there was an immediate risk to the plaintiff's patients. The Court acknowledged that some disputes develop into insoluble standoffs, however, the Court was satisfied that that did not prevail in the matter before it.

70. In *Corrigan v. Irish Land Commission* [1977] IR 317, in the Supreme Court, Henchy J. expressed the view that it was set in law that if, with full knowledge of the facts alleged to constitute disqualification of a member of the tribunal, an applicant expressly or by implication acquiesces at the time in that member taking part in the hearing and in the decision, he will be held to have waved the objection on the grounds of disqualification which he might otherwise have had. The Court indicated that the rule that a litigant will be held estopped from raising a complaint as to bias where he expressly or impliedly

abandoned it at the hearing is inconsistent with the due administration of justice. A similar type situation prevailed in *State (Byrne) v Frawley* [1978] IR 326.

71. In *Sheehy v. Board of Management of Killaloe Convent Primary School* [2019] IEHC 456, the Court was satisfied that the disciplinary process for teachers was such that the stage four disciplinary process was a unitary process which does not conclude until the final decision of the Board and until that time, the time limits for judicial review do not start to run.

72. In *Mooney v. An Post* [1998] 4 IR 288, the Supreme Court acknowledged a right of fair procedure, however, what fair procedure constitutes will depend upon the terms of the individual's employment and the circumstances surrounding his proposed dismissal. In that matter the plaintiff sought to cross-examine a witness although it had made no statement therefore the nature of the cross-examination was not disclosed. The plaintiff's appeal was dismissed.

Decision

73. In all of the circumstances I am satisfied that the UK authorities are obiter on point and have not to date been applied in this jurisdiction and in any event do not apply to the factual matrix now under review – the applicant under the terms of reference aforesaid has the opportunity to raise any point he wishes with the panel's view as to why he might be considered guilty of misconduct. The panel's reasoning being clearly set out in the detailed report (103 pages together with extensive appendices).

74. In addition, I am satisfied that as the consultant and his or her representative will have the opportunity to present his or her case in response to the findings of the investigation and can raise any concerns regarding the investigation process before the disciplinary hearing, the applicant has not made out a case that any perceived error is irremediable.

75. The biographies of Dr. Wrate and Mr. Bambrick were furnished to the applicant in advance of agreeing to the terms of reference as aforesaid.

76. The distinction between the first and second investigations were acknowledged on behalf of the applicant. Furthermore, it is entirely inappropriate now to raise these points at this remove, at the very least in the context of due administration of justice.

77. The applicants did not accept that para. 40 of the statement of opposition when it stated "the applicant did not challenge their expertise or appropriateness to act as investigators", raised an estoppel. The court inquired as to what meaning would be ascribed to para. 40, however, the applicant did not engage further with this question.

78. I am satisfied that the issue of appropriateness of the timing of the matter was raised within the statement of opposition, para. 40. The assertions therefore that the panel were biased has not been made out and is not now an appropriate matter for the applicant to raise.

79. Given the reasoning and detail within the preliminary report, the terms of reference whereby the applicant is entitled to respond to the preliminary report and the procedures within the applicant's contract where the applicant will have a further entitlement to raise any concerns as to the investigation process, the applicant has not demonstrated that the issuing of the preliminary report in the circumstances comes within the exception identified in *Roland* and *McKelvey*.

80. It is not countered that the process of appointing expert investigators to review and understand clinical files and to continue to reach a finding in that regard is normal within the Irish health system. It is noted that in communications prior to agreeing the terms of reference the applicant insisted on being satisfied as to the expertise of the panel. Insofar as the applicant suggests that independent expert evidence was required prior to coming to a conclusion adverse to the applicant but such expert evidence would not be required if the conclusion favoured the applicant (this was the argument presented on behalf of the applicant when the Court inquired as to why it was not specified in the terms of reference of the investigation that an independent expert would be consulted) the applicant has not explained how the investigative panel would be entitled to reach a conclusion of no adverse finding against the applicant but it would not have such entitlement or expertise to reach an adverse finding without expert evidence, the same files being reviewed and appraised in both situations.

81. The applicant did not engage with the suspension process prior to the suspension being implemented on the 12th of May, 2015, pending the outcome of the investigation. He did however subsequently make a suggestion by email of the 12th of July, 2015, which was rejected by the respondent. He made a further suggestion in an email of the 1st of November, 2017, and no formal response was given to him save within the affidavits of Mr. Walsh in this judicial review process. A formal response should have been afforded to the applicant in all of the circumstances.

82. Nevertheless, I am satisfied that the applicant has not established a strong case for the lifting of the suspension pending the conclusion of the process having regard to the concerns of Mr. Walsh as expressed in his communications to the applicant and indeed in his affidavits before this Court.

83. There is clear intractable difficulty as between the applicant and Dr. Garvin based on the applicant's affidavits. Applying the decision of Mr. Justice Noonan in *The Governor & Company of the Bank of Ireland v. James O'Reilly* [2015] IEHC, I am satisfied that it is not appropriate for the courts to interfere with the suspension at this time.

84. The respondent's emails of the 2nd of July, 2018, and the 5th of July, 2018, must be reviewed in context – the applicant complained that files or part thereof were missing and notwithstanding effort, the respondent was unable to locate such missing documents. It was in this context that the panel indicated that they were unaware of what information could change their conclusion. It is not appropriate to categorise these emails as indicating that a final decision had been arrived at so that there was no benefit to the

applicant making submissions which he was invited to do and for a considerable period indicated that he intended to do.

85. I am of the view that the applicant has not come within the time limits in Order 84. In part the applicant has called in aid of one of the claimed reliefs Order 84. Notwithstanding the foregoing as it was the Court rather than the respondent who raised the issue of O.84 time limits I have dealt with the issues raised without regard to those time limits.

Conclusion

86. The applicant's claim for judicial review and other reliefs are refused.