Neutral Citation [2016] IEHC 423

THE HIGH COURT

[2015 No. 10026 P]

BETWEEN

JOHN O'CONNELL

PLAINTIFF

AND

ADELAIDE AND MEATH HOSPITAL DUBLIN INCORPORATING THE NATIONAL CHILDREN'S HOSPITAL

DEFENDANT

JUDGMENT of Mr. Justice David Keane delivered on the 22nd day of July 2016.

Introduction

1. This is an employment law injunction application. The plaintiff employee seeks to restrain an investigation by the defendant, his employer, of complaints made against him in 2011 and 2012 by three identified doctors.

2. In the underlying proceedings, the plaintiff seeks to prohibit that investigation and claims damages from the defendant ("the hospital") for breach of contract, the reckless or negligent infliction of emotional suffering, defamation and intimidation.

The Plaintiff

3. The plaintiff took up the position of Director of Human Resources at the hospital in 2005. He was later appointed Deputy Chief Executive Officer – Director of Operations, although precisely when that occurred is not clear from the affidavits before the Court. In July 2010, the plaintiff was requested to assume the role of acting Chief Executive Officer ("CEO") while a selection process was conducted to make a permanent appointment. The plaintiff was a candidate for that position but was unsuccessful. The successful candidate was appointed in May 2011 and took up the role in August of that year, when the plaintiff resumed the role of Deputy CEO. Depending on whose evidence you accept, the plaintiff became either 'Director of Human and Corporate Affairs/Deputy CEO' or 'Human Resources Director/Deputy CEO' in September 2012. As part of a broader agreement between the parties entered into on the 30th July 2014, the plaintiff agreed to relinquish the title of 'Director of Corporate and Human Resources/Deputy CEO' and to assume the title of 'Executive Director for Human Resources.'

Background

4. Among the documents exhibited by the plaintiff for the purpose of the present application is one that was published in May 2012 by the Health Information and Quality Authority ("HIQA" or "the Authority"). It is entitled *'Report of the investigation into the quality, safety and governance of the care provided by the Adelaide and Meath Hospital, Dublin incorporating the National Children's Hospital (AMNCH) for patients who require acute admission.'*

5. The 'Introduction and background' section of the executive summary in the report includes the following passage:

> "Since 2009, the Authority has had extensive engagement with the Hospital due to concerns raised in relation to risks to the health and welfare of patients associated with a number of aspects of the system of care provided to patients at the Hospital and, in particular, the clinical risks to patients who required acute admission being accommodated in the corridor adjacent to the Emergency Department (ED) while awaiting transfer to an inpatient bed at the Hospital. However, despite a number of actions having been taken by the hospital, the Authority was not assured that the immediate clinical, health and welfare risks to patients being cared for on the corridor adjacent to the ED were being adequately controlled and managed by the hospital.
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> In June 2011, the Authority received the report of the Hospital's internal review into the unexpected death of a patient in March 2011. The patient had been receiving care, initially in the ED, and subsequently on the corridor adjacent to the ED while awaiting admission to an inpatient bed. The Authority was concerned that the report of this review did not indicate that the Hospital was effectively identifying and managing the clinical, health and welfare risks to patients requiring acute admission to the Hospital despite the history of engagement with the Authority highlighting these risks.
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> On 24 June 2011, the Board of the Authority considered these risks, and the degree of assurances that had been provided by the Hospital, and took the decision to instigate an investigation into the quality, safety and governance of the care provided to patients who required acute admission to the Hospital. The investigation focused on the time period from 2010 to 2011 which included the latter part of the term of the Board that was in place at the commencement of the investigation.
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> In carrying out the investigation, the Authority looked in detail at the quality, safety and governance of the system of care in place for patients requiring both unscheduled (unplanned, emergency) care and scheduled (elective and planned) care in the Hospital and, in particular, those patients admitted through the Emergency Department.
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> The Authority also investigated the effectiveness of the Board of the Hospital and the corporate and clinical governance arrangements that it had in place to assure itself that risks to patients were being appropriately managed by the Hospital – particularly the risks to patients receiving care in the ED and requiring acute admission."

6. The 'Summary of findings' section of the executive summary of the report, under the heading 'Unscheduled care', includes the following text:

> "The mean waiting time in the ED for a non-admitted patient at the Hospital from January to August 2011 was within the spectrum of 6-7 hours and the Authority found that some patients were waiting within the ED for up to 61 hours before

being discharged. However, unscheduled patients who attended the ED, and subsequently required inpatient admission whilst awaiting transfer to an inpatient bed, were accommodated either within a designated area in the ED or on the corridor adjacent to the ED. Over 80% of the admitted patients were accommodated on the corridor adjacent to the ED and waited, on average, a further 13 hours for an inpatient bed, with the longest waiting reported as 140 hours. This was an unacceptable situation for patients.

The Authority found a number of serious issues specific to the use of the corridor adjacent to the ED as a waiting area for admitted patients awaiting an inpatient bed. These issues had the potential to compromise the quality and safety of care for these patients and the capacity of the ED staff to provide a timely assessment of newly arriving patients in the ED. Following an unannounced inspection by the Investigation Team on 24 August 2011 which highlighted these risks, the Chief Executive of the Hospital confirmed that the use of the corridor adjacent to the ED ceased on 29 August 2011. The cultural belief by individuals in any hospital that the routine practice of accommodating patients on trolleys in corridors is acceptable should not be tolerated. This is not satisfactory for patients and the public and should cease."

7. Also in the "Summary and findings" section of the executive summary of the report, the following text is included under the heading "Executive Management":

> "The Executive management arrangements at the Hospital had, over the last three years, gone through a number of significant changes with four members of staff acting in the role of Chief Executive. There was no clear scheme of delegation from the Board to the Chief Executive or to the Executive Management Team for delegating accountability in relation to the delivery and performance of the Hospital's functions."

8. And, later, under the same heading:

> "The turnover of senior executives in the Hospital, and the ongoing 'acting' status of individuals in key positions, created challenges in leadership, management stability, decision making, confidence and authority. This had the potential to impact on the ability of the Hospital to effectively address the quality, safety and financial challenges that it faced."

Consultant complaints
9. In the affidavit that he swore to ground the present application, the plaintiff draws attention to the fact that three doctors who are consultants in emergency medicine have made complaints to the hospital about him. As those persons are not parties to these proceedings, I do not propose to name them.

Complaint of Consultant A
10. The first of these complaints was made to the hospital's then CEO in a letter dated the 12th October 2011 from a person I will identify as 'Consultant A'. In that letter, Consultant A asserted that, over the past eighteen months, he and his consultant colleagues had repeatedly highlighted their concerns regarding patient safety as a result of gross overcrowding in the Emergency Department.

11. Consultant A's principal complaint was that the plaintiff had written as acting CEO to the Medical Education and Training Unit of the Health Service Executive ("HSE") to inform it that the hospital could not release Consultant A to participate in the National Skills Project, the aim of which was to improve patient safety through the introduction of skills training in crisis resource management for medical professionals. Consultant A stated that his participation was to take place outside his contractual working hours, and that the hospital's refusal to release him had caused him considerable embarrassment with the HSE, the Irish Association for Emergency Medicine Training and the Royal College of Surgeons of Ireland. Consultant A thanked the hospital's then CEO for clarifying with the HSE that he would be participating in the project.

12. Consultant A went on to assert his belief that the plaintiff's letter to the HSE was directly linked to the patient overcrowding concerns that he and his colleagues had expressed and was an attempt to intimidate him and to silence his advocacy on behalf of patients.

13. Consultant A sought the 'internal resolution' of his complaint by way of a formal apology for his treatment (from the hospital, rather than the plaintiff) and assurances (from the hospital, rather than the plaintiff) that he would not be subjected to any recurrence of the conduct alleged.

14. The CEO of the hospital wrote back to Consultant A on the 17th October 2011, welcoming his willingness to have the matter dealt with internally and confirming that she would write to him again with a proposal about how that might be done.

15. On the 2nd May 2012, the then CEO of the hospital wrote to the plaintiff to inform him that Consultant A's complaint had been 'satisfactorily resolved following an informal process', was thus concluded, and would not be progressing any further under the HSE *Dignity at Work Policy for the Health Service* (May 2009) ("the Dignity at Work policy"). That policy deals with 'Anti-Bullying, Harassment and Sexual Harassment Procedure.'

Complaints of Consultant B
16. A number of complaints were set out in a letter dated the 11th November 2011 to the CEO from a person I will describe as 'Consultant B.' That letter is stamped received by the CEO's office on the 16th November 2011.

17. Consultant B wrote that, while she had initially enjoyed a professional and pleasant working relationship with the plaintiff, his behaviour towards her changed after she sent an e-mail to the Medical Director of the hospital on the 14th March 2011. That e-mail included the following statements:

> "The current level of care being delivered by [the hospital] to patients boarded on the corridor and fire exits adjacent to the ED is dangerous.
>
> Whilst these patients are not under my or my colleagues' care, I cannot be indifferent to their neglect.
>
> My colleagues and I have highlighted on numerous occasions to yourself, management, the HSE, HIQA and the Medical Council that the practice of boarding patients on an open corridor without privacy, dignity, comfort or sanitation poses a most serious risk to the health and human rights of patients."

18. Consultant B continued that, later the same day, she had received a text from the CEO's office summoning her to a meeting with

the plaintiff the following morning. Her request for an agenda was denied. Consultant B asserts that, when that two hour meeting convened at, or shortly after, 8 a.m., the plaintiff spoke to her in an aggressive and disrespectful manner. Consultant B referred to certain aspects of the minutes of that meeting, which were prepared by the plaintiff's personal assistant, in support of the complaints that she makes about the plaintiff's conduct towards her during it. In summary, those complaints are:

> (a) That the plaintiff accused Consultant B of wrongly seeing private – that is to say, medico-legal – patients in the Emergency Department and not in private rooms, although under the relevant clause of the applicable Consultants' Common Contract such practice is expressly deemed not to be private practice, a position which the plaintiff subsequently acknowledged at a further meeting on the 1st July 2011.
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> (b) That the plaintiff inappropriately raised a number of matters during the meeting in an attempt to inhibit Consultant B from acting as an advocate on behalf of admitted patients boarded on trolleys in the corridor adjacent to the Emergency Department, including: the hospital's continuing support for humanitarian work in Africa in which Consultant B was involved; the supply of essential equipment to the Emergency Department; the staffing of the Emergency Department; and the shift patterns of Emergency Department consultants.

19. In her letter of the 11th November 2011, Consultant B also complains about the conduct of the plaintiff as a witness at a Coroner's Inquest that took place on the 11th August 2011. It was an inquest into the death of a patient at the hospital on the 22nd July 2011. Consultant B gave evidence to the inquest that it is inappropriate that any person found to require inpatient admission to a hospital should be left on a trolley in a corridor. Consultant B asserts that, shortly afterwards in the course of the plaintiff's evidence to the inquest, he revived and repeated the allegation that she was wrongly seeing private patients in the Emergency Department and went further to allege that she was also in dispute with the hospital concerning her working hours.

20. Consultant B asserts that these allegations were false and that the plaintiff was obliged to accept that they were false when, in the course of cross-examination, Counsel on her behalf confronted him with the relevant clause in the Consultant's Common Contract and with the relevant extract from the minutes of their meeting of the 15th March 2011.

21. Consultant B concluded her letter by seeking an assurance that the matter would be investigated.

The Complaints of Consultant C

22. A third Consultant, to whom I shall refer as Consultant C, wrote a letter of complaint to the CEO on the 22nd May 2012. The subject of that letter was the intimidation and bullying of emergency consultants that Consultant C alleged had occurred in response to their advocacy on behalf of patients against the overcrowding then endemic in the hospital's Emergency Department. Consultant C stated that he had deliberately refrained from raising the issue until after the publication of the HIQA report.

23. Consultant C pointed to the written instruction issued by the plaintiff in June 2011 in response to the consultants' expressions of concern about the accommodation of admitted patients on trolleys in a corridor. The instruction was that the consultants were to cease seeing medico-legal patients in the Emergency Department, an instruction that, according to Consultant C, the plaintiff's successor as CEO has since reversed.

24. Consultant C also specifically identified a letter that the plaintiff wrote to him on the 5th April 2011. That letter was written in response to correspondence in which Consultant C had reminded the plaintiff that the Emergency Department was unsafe due to a dangerously high number of admitted patients on trolleys in its environs. In it, the plaintiff stated that he had taken immediate steps to ensure the safety of the Emergency Department by instructing the consultants to work different rotas without agreement, by instructing hospital staff not to use the Emergency Department as an entrance to, or exit from, the hospital, and by directing the consultants to cease seeing medico-legal patients there.

25. Consultant C further took issue with a 'notice' of disciplinary action that the plaintiff had issued to him on the 18th March 2011 in respect of a letter that he had written to the hospital's Finance Department, which the plaintiff deemed offensive in tone and content and, hence, unacceptable.

26. Consultant C summarised his complaint by stating that these communications from the plaintiff were an abuse of his position as acting CEO and amounted to bullying and intimidation of Consultant C and his colleagues in response to their patient advocacy against Emergency Department overcrowding.

27. Consultant C requested written confirmation that the 'notice' of disciplinary procedure previously issued to him by the plaintiff on the 18th March 2011 had been withdrawn and a meeting with hospital management to discuss his complaint, failing which he indicated an intention to pursue the matter under the hospital's 'Dignity at Work Policy 2009.'

The current status of the consultants' complaints

28. As noted earlier, the hospital informed the plaintiff on the 2nd May 2012 that Consultant A's complaint was concluded and the plaintiff has adduced no evidence to suggest otherwise.

29. Consultant B's complaint is a different matter. By letter to the CEO dated the 5th December 2011, the plaintiff acknowledged that he had been furnished with a copy of Consultant B's letter of complaint on the 28th November 2011. Beyond recording his concern about the motives behind it and a belief that the allegations contained in it are 'spurious and vexatious', the plaintiff did not engage, and has not since sought to engage, with the substance of the complaints against him. Rather, he pitched his tent firmly on the procedural battlefield, where he continues to skirmish on several fronts.

30. On the 7th December 2011, the CEO wrote to Consultant B to seek confirmation whether she was alleging that the plaintiff had bullied her, in which case the matter would proceed under the Dignity at Work policy. On the 2nd February 2012, Consultant B wrote in reply that she was satisfied to proceed under that policy.

31. On the 15th October 2012, the CEO wrote to Consultant B, referencing a meeting between them on the 12th July 2012 at which Consultant B had been accompanied by a representative of the Irish Hospital Consultant's Association ("IHCA") and noting that Consultant B had expressed 'a desire to progress matters through an informal route' on the assurance that certain matters she had raised would be addressed. No reference is made in that correspondence to Consultant B's complaint against the plaintiff under the Dignity at Work policy save that it concludes with the statement:

> "I hope this correspondence addresses the key issues in your letter of November 11th 2011 and our subsequent meetings. I would welcome the opportunity to meet again to bring this matter to a mutually acceptable conclusion."

32. Consultant B replied by letter dated the 15th November 2012, stating that the issues raised in her letter of the 11th November 2011 had not been adequately addressed and requiring the completion of the internal resolution of those matters, if that was to occur, by December 31st 2012.

33. Consultant B wrote again to the CEO on the 13th August 2013, referring to undertakings provided at a meeting between them on the 28th November 2012 in the presence of a representative from the IHCA. Consultant B stated in that letter that she had not had any correspondence from the CEO since that time, and that the hospital's failure to process and investigate her written complaint in an appropriately acceptable time frame had been 'unduly vexatious,' leaving Consultant B with no option but to seek redress 'through external channels.'

34. On the 20th September 2013, Consultant B wrote to the chairman of the hospital's board, reiterating her complaints and seeking an assurance that the undertakings given by the CEO at the meeting of the 28th November 2012 would be confirmed in writing and honoured in full.

35. It may be significant to note that the then CEO was replaced by the present CEO in November 2013, in circumstances where there is no evidence before the Court concerning what, if anything, happened in relation to Consultant B's complaint for some time after September 2013. On the 20th June 2014, Consultant B wrote again to the chairman indicating that, to her knowledge, the hospital had not taken any action in response to her letter of the 20th September 2013 and informing him that the hospital's failure to fully investigate her concerns had left her in a position where she would have to seek an externally led investigation.

36. On the 19th November 2014, Consultant B wrote to the Minister for Health seeking a full investigation of her complaints, which – she suggested – should more properly be described as 'concerns over whistle-blower intimidation' rather than merely a dispute between staff and management. The Minister wrote to the chairman on the 15th December 2014, expressing his anxiety that Consultant B's allegations of intimidation be properly investigated and requesting the chairman to put in place an appropriate investigation process.

37. The chairman wrote to Consultant B on the 30th January 2015. In that letter, he accepted that the hospital's failure to deal with Consultant B's complaints was unacceptable to both her and the plaintiff, before stating that he had been advised that the appropriate procedure for progressing those complaints was the Dignity at Work policy. It has to be said that this was the position that the hospital had first adopted in December 2011; that Consultant B had agreed to accept in February 2012; and that had resulted in almost complete inertia in respect of the investigation of Consultant B's complaints over the ensuing three years.

38. In view of the plaintiff's position as Executive Director for Human Resources, the Chairman suggested a modification of the preliminary screening process under the Dignity at Work policy whereby that screening would be conducted by the HR Directorate within the HSE rather than by the hospital's own HR department. The chairman requested Consultant B to once again confirm her willingness to have her complaints addressed under the Dignity and Work policy and, if that was so, to once again set out her complaints in writing for the purpose of the preliminary screening process.

39. In her letter of reply dated the 23rd February 2015, Consultant B requested that the chairman identify the person in the HSE HR Directorate who it was proposed would conduct the preliminary screening process in order to enable her to properly consider the hospital's proposal.

40. It transpired that a suitable person to conduct the preliminary screening process could not be identified within the HSE HR Directorate and exchanges followed to identify a mutually acceptable independent external person to do so. On the 14th August 2015, Consultant B agreed to the appointment of Mr Cillian Feiritéar B.L. in that role.

41. In accordance with the chairman's suggestion, Consultant B once again set out her complaints in writing, this time in a letter to Mr Feiritéar dated the 15th September. Consultant B had an initial meeting with Mr Feiritéar on the 5th October, a further meeting on the 8th October (which had to be abandoned when Mr Feiritéar received news of a family bereavement), and a final meeting with him on the 13th October.

42. Mr Feiritéar furnished the CEO of the hospital with a preliminary screening report dated the 18th October 2015 under cover of a letter of the same date. According to the Dignity at Work policy, the purpose of preliminary screening is to decide if the alleged behaviour falls within the definition of bullying, harassment or sexual harassment as defined in the Policy. If the complaint is deemed to come within the scope of the policy, the matter may be referred for mediation. If it cannot be resolved in that way, a formal investigation will be carried out. Mr Feiritéar concluded that Consultant B's complaints concerning the conduct of the plaintiff at the meeting on the 15th March 2011 and at the Coroner's Inquest on the 11th August 2011 are covered by the scope of the policy as falling within the definition of matters that can be investigated in the context of 'workplace bullying.'

43. The plaintiff was furnished with a copy of Mr Feiritéar's report under cover of a letter from the CEO, dated the 19th October 2015. In that letter he was asked to confirm whether he was agreeable to mediation. The plaintiff wrote back on the 27th October 2015, stating that he was awaiting further legal advice regarding the request that he participate in mediation, before going on to express the view that the preliminary screening was 'null and void' and to make several complaints about the manner in which it had been arranged and conducted.

44. The plaintiff's position in relation to the investigation of Consultant B's complaints was later indirectly confirmed when his legal representatives wrote to the CEO of the hospital on the 13th November 2015, stating that 'it is untenable that an investigation into such complaints should continue' and requesting an undertaking that the hospital would not embark upon, or continue, an investigation of those complaints. By letter dated the 18th November 2015, the hospital's legal representatives replied that no undertaking in the terms sought could be given.

45. Consultant C's complaint took a distinctly different course. On the 4th October 2012, the then CEO wrote to the plaintiff, enclosing a copy of Consultant C's letter of complaint dated the 22nd May 2012. The then CEO sought to explain the delay in furnishing details of that complaint to the plaintiff by stating that she had been working towards agreeing the most suitable process for resolving the issues that had been raised. The then CEO continued that she had obtained Consultant C's confirmation that he would be interested in mediation (prior to, rather than in the context of, the processing of a Dignity at Work policy complaint). The plaintiff was asked to consider whether he wished to participate in mediation on that basis, and to respond accordingly. It is not clear from the papers before me what his response was.

46. On the 30th January 2015, the present CEO wrote to Consultant C, referring to his correspondence to her office 'in 2012 and 2013' in which he had alleged bullying and intimidation in consequence of his patient advocacy in the Emergency Department. In that

letter, the CEO accepted that the hospital's failure to deal with his concerns after such a long period of time was unacceptable to him and to the plaintiff. The CEO stated that his advice was that the appropriate procedure for dealing with Consultant C's complaints was the HSE Dignity at Work Policy and he requested confirmation whether Consultant C wished to proceed with his complaint in that way.

47. On the 13th May 2015, the CEO wrote again to Consultant C, noting that he had received no reply to his earlier letter and setting the 31st May 2015 as the deadline for confirmation that Consultant C wished to invoke the Dignity at Work policy, failing which it would be assumed that Consultant C did not wish to proceed with his complaint. The papers available to me do not disclose any response to that letter. The CEO has sworn an affidavit in opposition to the present application which includes an averment that, to date, Consultant B is the only Emergency Department consultant who has persisted with a complaint and who has invoked the Dignity at Work policy, from which averment it can be inferred that Consultant C either did not respond or responded in the negative. The former appears more likely than the latter in view of the contents of a minute of a meeting attended by the CEO and Mr Feiritéar on the 5th October 2015. That minute has been exhibited by the plaintiff. It records the CEO as stating that "there could potentially be a second complainant, [Consultant C], but that the focus of the current issue was the complaint by [Consultant B]."

48. From the terms of Mr Feiritéar's preliminary screening report and its appendices, it is quite clear that the preliminary screening process he conducted related solely and exclusively to the complaints made by Consultant B and that the scope of the investigation he found to be appropriate under the Dignity at Work policy is to be limited to the complaints made by Consultant B against the plaintiff.

49. By reference to the position as I have just described it, there is no evidence before the Court of any extant complaint against the plaintiff by either Consultant A or Consultant C. It follows that there is no basis for considering the grant of any relief directed towards restraining or prohibiting the investigation of any such complaint by the hospital.

Grounds for injunctive relief

50. When the present application came on for hearing before the Court on the 14th and 15th January last, the plaintiff had still not then delivered a statement of claim. In the absence of a properly particularised claim, it is necessary to attempt to identify the issues that the plaintiff seeks to have tried through a consideration of the reliefs sought in the indorsement of claim; the averments contained in the two rather discursive affidavits that the plaintiff has sworn, and the written and oral submissions that have been made on his behalf.

51. Beginning with the indorsement of claim contained in the plenary summons, the plaintiff indirectly identifies certain issues that he seeks to have tried in the context of the core reliefs that he seeks. In claiming a declaration that the hospital may not continue any investigation into the complaints made by Consultants A, B and C by reason of the hospital's "unwarranted and prejudicial delay", the plaintiff suggests that he seeks to have tried the issues of whether there has been 'unwarranted and prejudicial' delay in the conduct of the investigation of those complaints and whether such delay, if established, requires the hospital to halt that investigation. Those also appear to be the issues underpinning the plaintiff's claimed entitlement, in the alternative, to the public law remedy of an order of prohibition preventing any investigation, on the grounds that the complaints are 'of such vintage' that it would be 'unreasonable, oppressive and unfair and in breach of the plaintiff's right to fair procedures and due process, including his right to have such complaints processed without undue and unexplained delay.'

52. In going on to claim an injunction restraining any such investigation, the plaintiff does so on the basis that those complaints are 'out of time' both by reference to a compromise agreement entered into between the plaintiff and the hospital, dated the 30th July 2014, and by reference to principles of basic fairness. The manner in which the plaintiff frames these claims for relief, suggests that he seeks to have tried the issues of, first, whether there is a binding agreement between the parties that the hospital will refuse to entertain the complaints against him by the three consultants concerned as 'out of time' and , second, whether those complaints are, in fact, 'out of time' either as a matter of law or as one of basic fairness.

53. Having established, as best I can, the issues that the plaintiff seeks to have tried, I will briefly consider each in turn. For reasons that I hope will become apparent, it is convenient to do so in reverse order.

i. complaints out of time as a matter of law

54. The Dignity at Work Policy does not contain any express time limit within which an employee must make a complaint of bullying. Nor does it contain a specified time frame for an employer to deal with any such complaint. No legislative or administrative time limit or time frame is stipulated anywhere in respect of such complaints. It is difficult, therefore, to see how the term 'out of time' (or, indeed, the term 'within time') can be meaningfully applied to the making of any such complaint.

55. The written submissions filed on behalf of the plaintiff state as a fact that the complaints against the plaintiff were not lodged 'promptly' and go on to identify 'the original issue of concern' to the plaintiff as one of 'compliance of (sic) time limits; namely that the complaints were not lodged in a timely manner in the first instance.'

56. I have already found as a fact for the purpose of the present application that the only extant complaints against the plaintiff are those of Consultant B. The evidence before me is that Consultant B wrote a letter of complaint dated the 11th November 2011 that was stamped received by the CEO's office on the 16th November 2011. In it, Consultant B complained of alleged bullying that had occurred on the 14th/15th March and 11th August 2011. In a letter to the CEO dated the 5th December 2011, the plaintiff acknowledged that he had been furnished with a copy of Consultant B's letter of complaint on the 28th November 2011.

57. The plaintiff argues that a requirement to lodge a complaint within a reasonable time frame should be implied into the Dignity at Work policy and that a period of six months is a reasonable time limit for a complaint to have been lodged. Leaving aside the fundamental, if not insuperable, difficulty that if the framers of the policy – a working group comprising representatives from the HSE, voluntary hospitals and intellectual disability sectors, health service unions, the HSE employers' agency and IBEC – had considered a specific time limit in respect of complaints made under the policy appropriate they could simply and expressly have provided for one, two further problems with this argument immediately arise.

58. The first is that it is clear that the application of a strict six month time limit to complaints made under the policy is not appropriate. In this context, the plaintiff points to the paragraph in the policy that appears under the heading 'Statutory Redress.' That paragraph makes clear that the policy does not operate to prevent employees from exercising their statutory entitlements under, amongst other legislation, the Employment Equality Acts 1998 to 2008. It then goes on to state: "Complaints under the Employment Equality Act (sic) must be brought within 6 months of the last act of discrimination."

59. By a very strained argument, the plaintiff appears to invite the Court to conclude that, rather than merely alerting readers to the specific time limit they understand to apply to complaints under the Employment Equality Acts, the working group are implying without stating that the same time limit should apply and, therefore, does apply to complaints of bullying, harassment and sexual harassment under the policy. I am satisfied that there is no basis for drawing any such inference or for making any such unwarranted conceptual leap.

60. It is worth pausing here to consider the actual terms of the statutory time limit applicable to complaints under the Employment Equality Acts. S. 77 (1) of the Employment Equality Act 1998 ("the 1998 Act"), as amended, states in relevant part that a person who claims to have been discriminated against or subjected to victimisation in contravention of the Act may seek redress by referring the case to the appropriate authority. S. 77 (5) of the 1998 Act provides that such a complaint may not be referred more than 6 months after the date of occurrence of the discrimination or victimisation concerned or, as the case may be, the date of its most recent occurrence, which 6 month time limit may, for reasonable cause, be extended to one of 12 months.

61. This brings me to the second problem with the plaintiff's argument. Even viewing Consultant B's complaint through the distorting prism of a statutory time limit that plainly does not apply to it, such as the one just described, there is no basis that I can see for concluding that the complaint was not made 'promptly' or that it was not made 'in a timely manner', still less is there any arguable basis for suggesting that it was made 'out of time.' On the most restrictive view, the date of the most recent occurrence of an act of bullying complained of in the letter that the then CEO received from Consultant B on the 16th November 2011 was the 11th August 2011.

62. It follows that the plaintiff has failed to raise any meaningful issue that the complaints against him that the hospital now proposes to investigate (i.e. those of Consultant B) were made 'out of time' as a matter of law.

ii. a binding agreement between the parties preventing the investigation of the complaints

63. The plaintiff submits that he has raised a quite separate issue to be tried concerning whether, whatever the true position in fact or law, the hospital has entered into a binding agreement with him to deem the consultant's complaints (including those of Consultant A) to be 'out of time', which prevents it from conducting an investigation of those complaints.

64. The plaintiff has exhibited the signed written agreement that – he contends – contains a provision to that effect. The agreement is dated the 30th July 2014. It is signed by the plaintiff, as employee, and by the CEO on behalf of the hospital, as his employer. It recites that the parties have agreed to amend some of the terms of the plaintiff's contract of employment and that the agreement sets out the terms of those amendments and all matters arising from them.

65. As the recitals just described make clear, the only stated purpose of the agreement concerned is to effect certain agreed changes to the plaintiff's terms and conditions of employment. The four enumerated amendments under the agreement are as follows: (1) the plaintiff's pay is fixed at an identified point on the hospital's pay scale; (2) the plaintiff's non-pensionable allowance is to cease; (3) the plaintiff is to relinquish the title of Director of Corporate and Human Resources/Deputy CEO and to assume the title of Executive Director for Human Resources; and (4) the plaintiff is to participate in an 'on-call' rota arrangement for hospital management executives for a twelve month period, subject to subsequent review. The enumeration of those amendments is followed by a provision in the same clause which states that all other terms of the plaintiff's employment will remain unaltered.

66. The next clause of the agreement deals with a lump sum 'amendment payment' that is to be made to the plaintiff in consideration for his entering into the amendment agreement and a contribution that is to made by the hospital towards the plaintiff's legal costs incurred in connection with the negotiation and execution of it. The remaining clauses of the agreement deal with issues such as 'taxation', 'employee warranties and acknowledgments', 'confidentiality and related matters' and, under the heading 'general', miscellaneous issues of interpretation, governing law, dispute mediation and so forth.

67. The clause of the agreement that contains the provision on which the plaintiff relies is clause 5. It deals with the settlement of claims. The first paragraph is a 'comprehensive settlement' provision, whereby the plaintiff agrees that he accepts the terms of the agreement in full and final discharge and satisfaction of very nearly any conceivable right, dispute or claim that he might otherwise assert against the hospital in relation to his employment with it. The second paragraph binds the plaintiff not to commence or pursue any proceedings or claim of any sort against the hospital in respect of his employment by it.

68. The third and last paragraph of clause 5, namely sub-clause 5.3, is the one upon which the plaintiff now relies. It states:

> "It is explicitly agreed by both Parties that the issues relating to the out of time complaints by three named Emergency Medicine Consultants are not covered under section 5."

69. In the context of the present application, the plaintiff contends that he has raised a fair issue to be tried that the words of sub-clause 5.3 impose a binding obligation on the hospital to refuse to consider further the complaints of the relevant consultants, including Consultant B. I cannot agree with that submission.

70. In explaining why that is so, it is necessary to have regard to the applicable principles of law on the interpretation of contracts. As Fennelly J. pointed out in *ICDL v European Computer Driving Licence Foundation Ltd.* [2012] 3 I.R. 327 at 351-2, a court will always commence with an examination of the words used in the contract. Those words will normally be interpreted in accordance with their natural and ordinary meaning. The exercise is to be conducted objectively. The parties are not permitted to give evidence of their subjective intentions or of the negotiations leading to the conclusion of the contract. Subject to those principles, the Court may have regard to the meaning which the document would convey to a reasonable person having all the background knowledge reasonably available to the parties at the time of the contract; that is what Lord Wilberforce described in *Reardon Smith Line v. Young Hansen-Tangen* [1976] 1 W.L.R. 989 as 'the matrix of fact'. By reference to the background knowledge available to the parties at the time of the contract, the reasonable man may be enabled not only to choose between the different possible meanings of ambiguous words but also, where appropriate, to conclude that the wrong words or syntax were used. Accordingly, neither the reasonable man nor the court is required to attribute to the parties an intention they cannot have had.

71. Applying these principles to the sub-clause of the agreement upon which the plaintiff seeks to rely, several things are at once apparent.

72. First, the natural and ordinary meaning of the words used in sub-clause 5.3 is that the 'full and final settlement' provisions of clause 5 of the agreement *do not bind the plaintiff* in respect of any issue(s) he may wish to raise (or claim(s) he may wish to bring) in respect of the 'out of time complaints' of the three consultants involved. This is so because the general terms of clause 5 impose a

restriction on what would otherwise be the freedom of the plaintiff to bring any further claim he may wish against the hospital in relation to his terms and conditions of employment, and sub-clause 5.3 can only be read as a limited qualification in the plaintiff's favour upon that restriction.

73. Second, on no possible construction, however strained, can it be suggested that the plain meaning of those words, whether in addition to or instead of the meaning just ascribed to them, is that *the hospital is bound* to accept that the complaints of those three consultants are 'out of time.' Indeed, there is a compelling argument to be made that in order for the plaintiff to rely on sub-clause 5.3 to bring a claim against the hospital in respect of its treatment of any of the complaints concerned, it would be incumbent upon him to establish that such complaint was 'out of time' in order to do so, as it is only 'out of time' complaints that are the subject of the exclusion from what would otherwise be the binding effect *upon the plaintiff* of the 'full and final settlement' provisions of clause 5 generally.

74. Third, there is no conceivable basis upon which the reasonable man or the court might conclude that the wrong words or syntax were used when the parties purported to carve out a limited exception to the 'full and final settlement' agreement that the plaintiff was otherwise entering into, or that they cannot have had that intention. I do not think it unfair to say that the reasonable man would consider it preposterous if it was suggested to him that the obvious meaning conveyed by the words actually used was a mistake and that the hospital, as employer, must have intended instead, at the conclusion of a negotiation with a particular employee about his pay, allowances, job title and duties, to enter an agreement with him to deem serious allegations of bullying against him to be 'out of time' without any identified basis for doing so and without hearing any of the persons making those allegations on that issue.

75. For these reasons, I am satisfied that the plaintiff has failed to raise an issue to be tried concerning whether the hospital has entered into a binding agreement with him to deem Consultant A's complaints to be 'out of time', thereby preventing it from conducting any investigation of those complaints.

iii. delay in investigation in breach of terms of policy and right to natural and constitutional justice.

76. There is no doubt that the plaintiff has a case to make that there has been a delay by the hospital in addressing Consultant B's complaints against him that is neither understandable nor excusable. The correspondence that the plaintiff has exhibited suggests that his unhappiness and frustration in that regard are shared by Consultant B.

77. The Dignity at Work policy states in its introduction that the procedure it envisages 'sets out an investigation process which is designed to deal with complaints expeditiously and with minimum distress for the parties involved.' In the section that deals with 'Roles and Responsibilities under the Policy', beneath the heading 'Managers' and Supervisors' Responsibilities' it is clearly stated that '[m]anagers and supervisors have an obligation to deal promptly and effectively with any incidents of bullying or harassment of which they are aware or ought to be aware.' While, of course, some regard must be had to the particular logistical difficulties that arose in this case due to the fact that at the time of the conduct alleged against him the plaintiff was the acting CEO of the hospital and not accountable to any manager or supervisor (though plainly responsible to the board), it is clear that the process in this instance has not dealt with Consultant B's complaints expeditiously and that the hospital management has not dealt promptly with the incidents of bullying alleged against the plaintiff.

78. It is trite to observe that, in the interests of all concerned, procedures of the kind at issue in this case should be conducted as expeditiously as possible. The issue that the plaintiff seeks to have tried in that regard, is whether the established failure to deal with the complaints against him expeditiously or promptly in accordance with the Dignity at Work policy, either in itself or as an alleged interference with his constitutional right to natural and constitutional justice and fair procedures is such as to require the procedure to be halted.

79. It seems to me that a number of factors are relevant to the resolution of that issue.

80. The first factor is the nature of the procedure that the plaintiff seeks to halt. The procedure concerned is a 'formal investigation' under the Dignity at Work policy of the complaints of bullying that Consultant B has made against the plaintiff, in circumstances where it must be inferred from the present application that the plaintiff does not wish to participate in the mediation of those complaints or that, if mediation has occurred, it has been unsuccessful. If the complaint is not upheld, that will be the end of the matter, absent any evidence that it was not made in good faith. If the complaint is upheld, the only immediate consequence is "that appropriate action will be taken e.g. progression through the disciplinary procedure, counselling and/or mediation." In that sense, the effect of the inquiry is limited. It cannot, of itself, result in the imposition of any disciplinary sanction, much less the termination of the plaintiff's employment.

81. The second factor is the question of whether the relevant requirements of the Dignity at Work policy are mandatory or directory in effect. The Supreme Court decision in *Gillen v. Commissioner of An Garda Síochána* [2012] 1 I.R. 574 addressed the same question in the context of the requirement to appoint an investigating officer 'as soon as practicable' under the Garda Síochána (Discipline) Regulations 1989, concluding that the requirement of expedition concerned was directory (permissive) rather than mandatory. In reaching that conclusion, the Supreme Court had regard to several aspects of the disciplinary process at issue there: first, that it did not lay down specific time limits; second, that it did not stipulate that failure to comply with the requirement of expedition would render the process void; third, that the procedure under the regulations concerned was obliged to balance the interests of the member affected with the public interest in a properly disciplined and effective police force; and fourth, that the purpose of the regulations concerned could only be achieved where the issues raised were resolved on the merits and could not be achieved through the premature termination of the process on technical grounds.

82. It seems to me that precisely the same considerations arise here, allowing for the fact that under the Dignity at Work policy, the interests in the balance are those of the complainant (Consultant B) in having her allegations addressed, those of the plaintiff in defending himself against those allegations and those of the hospital in seeking to ensure a working environment that promotes and maintains the dignity of all employees. In considering the appropriate balance to be struck, it will have to be remembered that neither the plaintiff nor Consultant B bears any responsibility whatsoever for the delay that has occurred in the investigation of Consultant B's complaints.

83. The next factor that will have to be considered is the presence or absence of specific (or 'actual') prejudice to the plaintiff attributable to the delay of which he complains. There is nothing in the evidence so far presented to suggest that the plaintiff has suffered specific prejudice of any kind, such as the loss or destruction of relevant evidence or the non-availability of any material witness. In relation to the general or presumed prejudice associated with the inevitable dimming of memory that any delay entails, it cannot be overlooked that the incidents concerned appear to have been well documented contemporaneously. Documents were

produced at the meeting of the 15th March 2011 and notes were taken by at least some of the participants either during it or shortly afterwards. The coroner's inquest of the 11th August 2011 took place in public and both the hospital and Consultant A were legally represented at it. In other words, the contested events are attended by a veritable archipelago of islands of independently ascertainable fact, limiting the risk of prejudice attributable to the frailty of memory of any individual witness.

84. A further factor is the absence of surprise associated with the relevant delay in this case. The plaintiff was provided with a copy of Consultant B's letter of complaint on the 28th November 2011. As a result, he was in a position to begin preparing his defence to, or rebuttal of, Consultant B's complaints within a relatively short time of the occurrence of the events to which they relate. In doing so, he has had a significant opportunity to invoke a broad panoply of procedural rights and to exercise the full range of his entitlements under legislation such as the Data Protection Acts and the Freedom of Information Acts to the extent that he considers it appropriate to do so.

85. The plaintiff has invoked two factors that he submits are of particular relevance to the issue of delay. The first is that the plaintiff has been certified unfit for work on at least two occasions since the relevant complaints were made due to 'work-related stress', which he obviously attributes in no small part to the fact of those complaints. The second is that he believes he has been subjected to reputational damage, caused or exacerbated by newspaper reporting of his case that he attributes to leaks by the hospital in breach of its duty of confidentiality towards him.

86. The first factor the plaintiff has identified will ultimately have to be considered in light of a number of judicial *dicta* such as the following of Finnegan J. in *Gillen*, at p. 595 of the report:

> "…every complaint will lead to concern and anxiety and it is not something particular to the applicant in this case. Of itself this will not be a reason which will justify prohibition of disciplinary proceedings."

87. In respect of the second factor identified by the plaintiff, the first thing to note it that his allegation that the leaking of details of his threat of legal action against the hospital 'emanates from the highest level in the organisation' is countered on affidavit by the CEO who contends that the relevant leak can only have come from the plaintiff himself. Of course, I cannot resolve that controversy. But it does seem to me that the risk of reputational damage associated with employment disciplinary proceedings is, to borrow a phrase used in a slightly different context by Finnegan J. in *Gillen*, a hardship which is the unavoidable consequence of the complaint rather than of any delay associated with addressing it.

88. Having carefully considered the factors I have just described, I conclude that, while there has undoubtedly been an inordinate and inexcusable delay in the operation of the Dignity at Work policy in response to the complaints of workplace bullying made against the plaintiff by Consultant B, and while there must almost always be a fair issue to be tried concerning the extent to which a person's entitlement to natural and constitutional justice and fair procedures may require a disciplinary process to be halted or restrained in such circumstances, the plaintiff has failed to satisfy me that he has made out a clear case that that should be done here.

iv. miscellaneous other issues

89. The plaintiff has raised a considerable number of other issues on affidavit, none of which was pressed in the course of the application before me and none of which seems to me germane to the test I must apply.

90. For example, the plaintiff points to the fact that he invoked the hospital's internal grievance procedure by letter dated the 27th January 2015. In that letter, he stated that his grievance 'relates to the deficiencies in the hospital's actions, specifically the failure of the hospital to communicate to the Emergency Department consultants that any and all complaints as referred are out of time.' In respect of the subsequent failure to uphold that grievance, the plaintiff appears to contend that his complaint was wrongly misconstrued as a reference to the terms of the Dignity at Work policy rather than, what he contends is, the binding agreement to that effect which the hospital entered into with him on the 30th July 2014.

91. The plaintiff also contends that the investigation of his grievance was tainted by objective bias on the part of the external human resources consultant involved.

92. I cannot see the relevance of either of those controversies to the issues I must decide for the purposes of the present application. I do not think it is suggested that any onward referral of the plaintiff's unsuccessful grievance can or should operate as a stay on the investigation process in respect of the complaints of Consultant B, nor am I aware of any authority for that proposition.

93. The plaintiff separately alleges that, at a meeting he had with the chairman and CEO of the hospital in July or August 2014, the chairman agreed to provide him with a letter of indemnification in relation to any further dealings he may have with the any of the consultants concerned while "on call" and, more significantly, that at that meeting they discussed the provision to him by the hospital of a letter of exoneration in respect of his previous dealings with those consultants.

94. However, the plaintiff's counsel did not go so far as to suggest that the plaintiff has a binding agreement with the hospital that he stands exonerated by the hospital of the complaints against him, thereby preventing any investigation of those complaints. That would, indeed, be a remarkable state of affairs, if it were to exist.

95. For the avoidance of doubt, I should say that it is evident from the affidavits exchanged between the parties that there are significant disputes of fact between them in relation to each of the matters I have just described. However, those are controversies that cannot be resolved in the context of the present application and it is unnecessary to delve any further into them for the reasons I have just outlined.

The test to be applied

96. While interlocutory injunctions applications to restrain termination of employment; suspension from work; the imposition of disciplinary sanctions; and the conduct of disciplinary procedures are frequently lumped together as 'employment injunctions', I do not think that the very different situations they encompass make them all susceptible, either in theory or in practice, to the application of precisely the same test.

97. For example, as the decision of the Supreme Court in *Maha Lingam v. Health Service Executive* [2006] ELR 137 makes clear, the rationale underpinning the 'strong case' test applied to an application for an injunction to restrain a dismissal is that such an order is, in substance, mandatory in nature. This conclusion, I believe, derives from the proposition that it is more accurately characterised as an injunction to compel the continuation of an employment relationship rather than as an injunction to restrain the termination of that relationship; *Bergin v Galway Clinic (Doughiska) Ltd* [2008] 2 IR 205 at 214. It seems to me I would be at grave risk of a faulty

generalisation (or, as the philosophers say, a fallacy of defective induction) if I were to conclude that any application for an employment injunction necessarily has to meet the 'strong case' test.

98. Indeed, that becomes clear when regard is had to cases such as *Doherty & Anor. v. Health Service Executive* [2008] IEHC 331 and *Dillon v. Board of Management of CUS* [2008], in each of which an injunction was sought to restrain the imposition of a disciplinary sanction and in both of which the test applied was that of whether there was 'a fair issue to be tried.'

99. Similarly, the attention of the court has been drawn to the decision of this Court (*per* Hogan J.) in *Wallace v. Irish Aviation Authority* [2012] 23 E.L.R. 177, which highlighted the general jurisdiction invested in the High Court under statute to grant an injunction whenever it is just and convenient to do so, albeit to subtend the conclusion that it was just and convenient to grant the plaintiff in that case an interlocutory injunction restraining her suspension because her case appeared 'particularly strong.'

100. The plaintiff places particular reliance on the decision of Kelly J. in *Shelbourne Hotel Holdings Ltd v Torriam Hotel Operating Company Ltd* [2010] 2 I.R. 52 as authority for the proposition that, even where an injunction sought is properly characterised as mandatory in nature or effect, the Court might, instead of electing between the 'fair issue to be tried' and 'strong case' tests, instead adopt whatever course would carry the lower risk of injustice if it turned out to be the 'wrong' decision; following the approach of Hoffman J. in *Films Rover Ltd. v Canon Film Sales Ltd* [1987] 1 W.L.R. 670.

101. I have set out the foregoing principles in deference to the submissions of the parties. However, it seems to me the appropriate test is clear in cases where an injunction is sought to restrain an incomplete disciplinary process.

102. In *Becker v. Board of Management of St. Dominic's Secondary School* [2006] IEHC 130, when presented with an application for an interlocutory injunction to restrain a disciplinary process that had been initiated by a school board against a teacher, Clarke J. made the following observations:

> "In approaching the grant or refusal of an interlocutory injunction in a case such as this a number of legal principles, it seems to me, need to be applied. Firstly, it is my view that a court should only intervene in the course of an uncompleted disciplinary process in a clear case. It does not seem to me to be consistent either with a proper invocation of the court's jurisdiction or the proper conduct of disciplinary processes in an employment context that the court should be invited to intervene at a variety of stages in the course of that process.
>
> This should not be taken to mean that there may not be circumstances where it is appropriate for the court to intervene. But I would wish to emphasise that in my view the mere fact that there may be an argument as to whether a particular disciplinary process has taken an appropriate course does not of itself justify the court in intervening (even where the proposition put forward by the Plaintiff is arguable) to prevent the process moving to its natural conclusion.
>
> In general terms it seems to me that the circumstances in which the court should intervene is where a step, or steps, or an act, has been taken in the process which cannot be cured and which is manifestly at variance with the entitlement to fair procedures.
>
> In coming to a view as to whether that stage has been reached, it is important to note that the Court should not assume that unfairness will occur in the future, nor should it make assumptions about the likely future course of the process. The court should intervene only where it has been demonstrated that the process has already been so tainted with an absence of fair procedures that it cannot be allowed to continue.
>
> Also I should emphasise that the above approach does not mean that at the end of the day the process may not be the subject of an appropriate intervention by the court, if, at a full hearing, it can be demonstrated that the process failed to vindicate the legal entitlements of the person involved. The precise remedies that may be available in those circumstances are, of course, a matter of some debate. But it seems to me that very different considerations apply where it is sought to prevent a process being continued with on the one hand, and where the process has been completed and the Court is in a full position at trial to take a view as to whether it was properly conducted on the other hand."

103. Applying those principles to the evidence before me, I conclude that the plaintiff has failed to make out a clear case. If the Court were to intervene now to restrain the nascent investigation process and if the plaintiff's action was subsequently to fail, I do not believe or expect that he would hold himself barred from seeking the further intervention of the court in respect of any other procedural infirmity he might subsequently identify or allege. This would present the very mischief identified by Clarke J. in Becker; the spectre of a multiplicity of invitations to the court to intervene at a variety of stages of the process.

104. For the reasons I have set out earlier in the course of the judgment, I am satisfied that no step has yet been taken in the process that cannot be cured (since, regrettably, until now barely a step has been taken) and that the plaintiff has so far failed to establish that the undoubted delay in the process to date has resulted in consequences manifestly at variance with his entitlement to fair procedures.

105. In that context I would observe that, if the plaintiff pursues the present action with appropriate vigour and if he can make manifest - by establishing in evidence - some incurable prejudice that he has suffered in consequence of the undoubted delay in investigating the complaints against him, then there is no reason to suppose he cannot obtain the permanent injunctions he seeks and pursue a claim for damages. I do not think that it can be seriously argued, much less established, that damages would provide an adequate remedy for the hospital for the consequences of being wrongly prevented from proceeding with an investigation under its Dignity at Work policy.

106. Although I do not believe it is strictly relevant, I am also satisfied that, if it were appropriate to consider the balance of convenience or, more broadly, the course of action carrying the lower risk of injustice, either exercise would impel the same result. In a case where an investigation process has already been the subject of considerable delay, the further delay entailed in restraining its commencement pending the trial of the plaintiff's action and the implications which that would have for third party rights (specifically, those of Consultant B) and for the interest of the hospital in seeking to ensure a working environment that promotes and maintains the dignity of all employees, must pose a greater risk of injustice and weigh heavier in the balance than the defendant's interest in restraining an investigation which, in the event of an adverse finding, has the only immediate consequence "that appropriate action will be taken e.g. progression through the disciplinary procedure, counselling and/or mediation."

107. In conclusion, I can only echo the words of Fennelly J. in *Traynor v. Ryan* [2003] 2 IR 564 at 578:

> "[C]ases such as the present exemplify a regrettable tendency in some employment cases to treat procedural safeguards as the real battleground in preference to facing the substance of the complaints in accordance with an agreed procedure. The consequence of such procedural skirmishing is, all too often, to increase costs and delay resolution."

Conclusion

108. I would refuse the application.