THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 973 J.R.]

BETWEEN

B.M.

APPLICANT

AND

FITNESS TO PRACTICE COMMITTEE OF THE

MEDICAL COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Meenan delivered on the 19th day of February, 2019

Introduction

1. The application before the Court is a challenge to a decision of the respondent of 15 September 2017 to proceed with an inquiry into allegations of professional misconduct and poor professional performance against the applicant. The applicant maintains that the allegations before the respondent go considerably beyond the complaint considered by the Professional Practices Committee (PPC) and, in particular, are unsupported by the expert report that was obtained by the PPC. The statutory provisions relating to the respondent and the PPC are set out in the Medical Practitioners Act 2007 (the Act of 2007). In the course of this judgment, I will consider the role, function and powers of the PPC in dealing with complaints made against a registered medical practitioner.

The complaint

2. The applicant is a consultant psychiatrist. On 23 October 2014 the Medical Council received a complaint from a former patient (the complainant) who had been referred to the applicant for treatment in or about 2006. The complainant itemised 21 matters of complaint in respect of her interactions with the applicant. In support of these complaints, she exhibited copies of text messages, gifts and cards.

3. Her complaint was investigated by the PPC pursuant to Part 7 of the Act of 2007. Following consideration by the PPC, the complaint was furnished to the applicant seeking his observations and comments. This was provided by the applicant on 4 January 2015 when he gave a detailed account of his treatment of the complainant and provided a response to each of the 21 matters of complaint.

4. The PPC sought an independent expert report to assist it in the consideration of the complaint. By letter dated 21 January 2016, Dr. Giles Constable, consultant psychiatrist, was requested to provide a report as to whether, in his opinion, there had been any failings on the part of the registered medical practitioner and whether any such failings were serious.

5. In preparation of his report, Dr. Constable had available to him, *inter alia*, the complaint (including supporting documentation), the detailed response from the applicant and statements from other individuals. In his report of 5 July 2016, Dr. Constable identified four failings on the part of the applicant. These failings were outlined as follows:

> "a. He failed to keep adequately detailed and regular notes about his sessions with her
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> b. He failed to ensure that he had regular supervision to inform how he conducted the case and to ensure that his relationship with [the complainant] maintained suitable boundaries and appropriate therapeutic focus. In my opinion he should have received supervision on at least a monthly basis.
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> c. Whilst I accept his explanation of therapeutic techniques used in the therapy, it is my opinion that they combined over time, and particularly during 2012, to erode the appropriate professional boundaries between himself and [the complainant[and, given [the complainant's] diagnosis, were highly likely to cause her to believe that she was entering into a relationship with him that went beyond a doctor-patient relationship.
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> d. Agreeing to meet with [the complainant] outside the workplace at a restaurant was a breach of professional standards
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> Opinion as to whether any failings on the part of [B.M.] are serious.
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> 1. Of the above failings noted, I believe the first two contributed significantly to the latter two. I do not believe that inadequate note keeping and the lack of appropriate supervision were necessarily serious but I believe they contributed to the erosion of professional boundaries culminating in [B.M.] agreeing to meet [the complainant] at a restaurant.
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> 2. It is my opinion that this was a serious failing and was an inappropriate act on his part. It appears to have occurred in the context of increasing self-disclosure on his part which is suggested in the texts sent from [the complainant] to [B.M.] around this time. However, this can only be inferred from the texts as no other detail is available.
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> 3. It is my opinion that [B.M.] realised that he had made errors in judgment and took appropriate steps to consult with colleagues and discontinue his relationship with [the complainant] but this was only after the serious failing in judgment set out above. His termination of his relationship with [the complainant] led to entirely foreseeable distress on her part leading to self-harm, hospital admission and further aggravation of her already deep mistrust of psychiatric professionals."

6. By letter dated 11 July 2016 the applicant was furnished with a copy of Dr. Constable's report. The letter confirmed that the PPC

would also be considering a case report, compiled by the case worker, and a copy of this report was enclosed. The letter also detailed steps which could be taken by the PPC, including making a decision in relation to the complaint as to whether there was sufficient cause to warrant further action being taken in relation to the complaint.

7. The applicant responded to this letter on 24 August 2016. The letter stated:

> "According to Dr. Constable's report, his professional opinion is that there were four failings on the part of our client in relation to the care provided to [the complainant], only one of which failings was serious, that being our clients meeting with [the complainant] in a restaurant in July, 2012. In light of the decision of the Supreme Court in *Corbally*, it is this failing only that can be considered by the PPC as to whether there is sufficient cause to warrant further action being taken in relation to the complaint."

8. I shall refer to the applicant's meeting with the complainant in a restaurant in 2012 as being the "restaurant complaint". The letter also contested other aspects of the complaint before the PPC.

9. By letter dated 18 November 2016 the applicant was advised that the PPC had decided to refer the complaint to the respondent. He was further advised that he would receive a notice of inquiry setting out the allegations to be made against him. The letter also enclosed a minute of the PPC's meeting which considered the complaint. This minute stated that:

> "[T]he committee carefully considered the case report and all documentation relating to this matter including the independent report of Dr. Giles Constable. Pursuant to s. 63 of the Medical Practitioners Act, 2007, the Committee formed the opinion that there is a *prima facie* case to warrant further action being taken in relation to the complaint against [B.M.], the matter being sufficiently serious, decided to refer the matter to the Fitness to Practice Committee on the grounds of professional misconduct and poor professional performance."

10. Before the matter could be considered by the respondent, the complaint was sent to the Chief Executive Officer of the Medical Council (the CEO). The CEO formulated a number of allegations arising from the complaint. These allegations were sent to Dr. Cian Denihan, consultant psychiatrist, on 4 July 2017 for his professional opinion as to whether the allegations, either individually or cumulatively, amounted to professional misconduct and/or poor professional performance. Dr. Denihan reported on 1 August 2017.

11. This report applied the accepted definition of professional misconduct, as set out in The Guide to Professional Conduct and Ethics for Registered Medical Practitioners prepared by the Medical Council:

> "conduct which doctors of experience, confidence and good repute consider disgraceful or dishonourable" (the moral turpitude test) and/or
>
> "Conduct connected with his or her profession in which the doctor concerned has seriously fallen short by omission or commission of the standards of conduct expected among doctors" (the expected standards test).

Dr. Denihan also applied the definition of poor professional performance as is set out in s. 2 of the Act of 2007. Poor professional performance is defined as:

> "poor professional performance, in relation to a medical practitioner, means a failure by the practitioner to meet the standards of competence (whether in knowledge and skill or the application of knowledge and skill or both) that can reasonably be expected of medical practitioners practicing medicine of the kind practised by the practitioner"

Dr Denihan was of the view that the actions and conduct of the applicant amounted to both professional misconduct (both the moral turpitude and expected standards tests) and poor professional performance.

12. Following the receipt of the report by Dr. Denihan, the CEO, on 11 August 2017, served a "notice of intention to hold an inquiry under Part 8 of the Act" on the applicant. This notice contained the following:

> "that you, being a registered medical practitioner and a consultant psychiatrist, affording psychiatric treatment from in or around February, 2006 to in or around October, 2012 to your patient, [the complainant], who was suffering from post-traumatic stress disorder and/or borderline personality disorder and/or emotionally unstable personality disorder and/or generalised anxiety order:
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> 1. Failed to maintain any and/or adequate professional boundaries between you and the patient, in particular during 2010 and/or 2011 and/or 2012; and
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> 2. Failed to maintain any and/or adequate clinical notes relating to the treatment afforded to [the complainant] and in particular in 2010 and/or 2011 and/or 2012"

13. The allegations set out in the notice are in the same terms as the allegations in respect of which Dr. Denihan was asked to give his professional opinion save for allegation one which had the additional words "including but not limited to arranging to meet and/or meeting with [the complainant] at a restaurant on or around 24th July, 2012."

14. The notice gave the names of those persons who would be giving evidence on behalf of the CEO together with a summary of their evidence.

15. In response to the receipt of the notice of inquiry, the applicant by letter dated 4 September 2017 reiterated the point which he had made in his earlier letter of 24 August 2016. The applicant further stated:

> "In the circumstances, we were most surprised by the contents of the notice of inquiry and report of Dr. Denihan. Clearly, the notice of inquiry does not limit the inquiry to the matter of our client agreeing to meet [the complainant] in a restaurant and in addition is worded in such a general way so as not to satisfy the requirements of s. 64 of the Medical Practitioner Act, 2007. He also notes that the notice of inquiry provided is different in wording to the draft notice of inquiry provided to Dr. Denihan for the purpose of his preparing his report."

16. The preliminary hearing of the allegations took place before the respondent on 15 September 2017. The applicant expressed the same objections to the ambit of the notice of inquiry as had been set out in earlier correspondence. The respondent, however, having

taken advice from its legal assessor, decided to proceed with the allegations as set out in the notice of inquiry. It is this decision of the respondent that the applicant has challenged by way of judicial review.

Judicial review proceedings
17. In his judicial review proceedings, the applicant seeks a number of reliefs being, *inter alia*:

> "1. An order of certiorari quashing the decision of the Respondent made on September 15th, 2017 to proceed with a fitness to practice inquiry into allegations of poor professional performance and professional misconduct other than an allegation that the Applicant agreed to meet his patient, [the complainant], in a restaurant.
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> 2. An order of prohibition preventing the Respondent from proceeding with a fitness to practice inquiry into allegations of poor professional performance and professional misconduct other than an allegation that the Applicant agreed to meet his patient [the complainant] in a restaurant.
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> 3. An order of certiorari quashing the decision of the Respondent made on September 15th, 2017 to proceed with a fitness to practice inquiry into allegations that the Applicant engaged in conduct which doctors of experience, confidence and good repute consider disgraceful or dishonourable.
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> 4. An order preventing the Respondent from proceeding with a fitness to practice inquiry into allegations that the Applicant engaged in conduct which doctors of experience, confidence and good repute consider disgraceful or dishonourable."

18. In his statement of grounds, the applicant contends that the respondent acted *ultra vires* in permitting the respondent to proceed in respect of allegations of poor professional performance and professional misconduct other than the allegation concerning the restaurant meeting. It was submitted that this was the only allegation that the PPC could legally send forward as it was the only allegation in respect of which it had *prima facie* evidence that amounted to poor professional performance or professional misconduct. It was submitted that the restaurant meeting was the only issue that Dr. Constable identified as "a serious failing" and that it fell within the "expected standards" rather than the "moral turpitude" limb of the definition of professional misconduct. Ms. Niamh Hyland S.C., on behalf of the applicant, submits that the PPC is confined to the terms of the report of Dr. Constable. It was submitted that the allegations before the respondent went far beyond the failings identified by Dr. Constable and that this was impermissible.

19. The respondent does not take such a restrictive view of the role of the PPC. Leaving aside the issue as to whether the PPC ought more properly to have been named as respondent in these proceedings, the respondent sees the role of the PPC as being more of an administrative one whose task it is to identify, at an early stage, complaints that do or do not warrant further action being taken. It is accepted by both parties that only complaints of a serious nature ought to go forward to the respondent. This was recognised in *Corbally v. the Medical Council* [2015] 2 I.R. 304 wherein Hardiman J. stated at p. 335:

> "There are, both in the Act of 2007 and elsewhere, various private non-accusatorial, non-adversarial strategies available to ensure high professional standards. This reflects the fact that not every shortcoming, and in particular not every "once-off" shortcoming must either be ignored entirely or, if noticed at all, be the subject of a full hearing before a Fitness to Practise Committee.
>
> > [52] I believe that, on a correct construction of the statute, there is indeed a threshold of "seriousness" to be met before a *prima facie* case for an inquiry before the Medical Council is made out."

20. Mr. Remy Farrell S.C., on behalf of the respondent, points to the distinction between a "complaint" and an "allegation". It is submitted that what the PPC does is to consider a complaint and, if satisfied that further action is warranted, refers the matter to the respondent whose task it is to hear and determine allegations arising out of the complaint. He submits that findings of professional misconduct and/or poor professional performance under the Act of 2007 can only be made in respect of allegations not complaints.

21. A further issue that arose was one of fair procedures. While the applicant does not go so far as to submit that a medical practitioner being investigated by the PPC is entitled to the full panoply of fair procedures that are to be afforded at a hearing before the respondent the applicant, nonetheless, sees the PPC as being, in a sense, a preliminary hearing of a complaint prior to a full hearing before the respondent. It is accordingly the applicant's submission that this requires that the report of Dr Constable be strictly interpreted.

22. To resolve these issues and reach some conclusions concerning the role and function of the PPC it is necessary to look, in some detail, at the statutory provisions of the Act of 2007. Other professions, such as solicitors, nurses, midwifes and pharmacists, have a similar structure as part of their disciplinary processes which has been considered in a number of authorities.

Preliminary Proceedings Committee
23. There are a number of provisions of the Act of 2007 that are relevant. Section 20(2)(a) provides:

> "(2) Without prejudice to the generality of subsection (1), the Council shall establish-
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> > *(a)* a committee, to be known as the Preliminary Proceedings Committee, to give initial consideration to complaints…"
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> Section 58 provides that a person may be appointed to assist the PPC to investigate a complaint. This person may carry out interviews but shall not administer oaths or take affirmations.
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> Section 59 sets out the procedures to be followed by the PPC when considering a complaint.
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> Section 59(5) requires the PPC to give notice in writing to the registered medical practitioner, the subject of the complaint, of the nature of the complaint and the name of the complainant. Section 59(9) states that the PPC:
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> > "shall before forming an opinion on whether there is sufficient cause to warrant further action being taken in relation to a complaint" consider –
> > *(a)* any information supplied under this section concerning the complaint, and

(b) whether the complaint is trivial or vexatious or without substance or made in bad faith."

Finally s. 63 provides:

"Where –

(a) the Preliminary Proceedings Committee is of the opinion that there is a *prima facie* case to warrant further action being taken in relation to the complaint, or

(b) …

the Preliminary Proceedings Committee shall refer the complaint to the Fitness to Practice Committee".

24. Thus, it can be seen that all references to what the PPC is permitted to consider refer to a "complaint". The nature of the proceedings change significantly when matters are considered by the Fitness to Practice Committee (the respondent). This is reflected in the statutory provisions that govern the respondent.

Fitness to Practice Committee

25. Section 20(2)(b) requires the respondent "to inquire into complaints". This is clearly a more serious exercise than that required of the PPC which is to "give an initial consideration to complaints", as per s. 20(2)(a).

26. If the PPC refers a complaint to the respondent, then s. 64 of the Act of 2007 comes into operation and the CEO is given specific duties. The CEO is required to give the medical practitioner, the subject matter of the complaint, notice in writing of the nature of the matter that is to be the subject of the inquiry, including the particulars of any evidence in support of the complaint. The provisions of s. 64 also give statutory recognition to the requirement for fair procedures in hearings before the respondent.

27. It is at this stage that another crucial step is taken in the proceedings in that allegations arising out of the complaint are formulated. Under ss. 69 and 70 of the Act of 2007 the respondent is required to report to the Medical Council as to whether any allegation is proved. If an allegation is proved then it is for the Medical Council to impose a sanction under s. 71. Thus, any finding of professional misconduct and/or poor professional performance is made in respect of an allegation not a complaint.

28. Section 2 of the Act of 2007 defines an "allegation".

"'allegation', in relation to a complaint, means an allegation —

(a) arising out of the complaint, and

(b) which falls within one or more than one of the grounds specified in section 57 (1)"

Section 57(1) refers to, *inter alia*, professional misconduct and poor professional performance. It is now necessary to examine a number of relevant authorities.

Authorities

29. As mentioned earlier, a number of other professional bodies have an equivalent to the PPC which has been considered in a number of authorities. Firstly, I refer to *The Law Society of Ireland v. Walker* [2007] 3 I.R. 581 wherein Finnegan P. considered the role the equivalent body in the context of Solicitors Disciplinary Tribunal. He stated at p. 600:

"[29] In the light of the authorities which I mention I am satisfied that the function of the tribunal is to consider all matters on affidavit before it. While at this stage of the procedures the tribunal is not the fact finding body it may for the purposes of deciding on whether a *prima facie* case is disclosed make findings of fact where the facts are clear, for example, where the complaint is based on a clear misapprehension as to the facts or the law. Subject to this the tribunal should consider all the material before it and determine whether the application has any real prospect of being established at an inquiry, any doubt being resolved in favour of an inquiry being held.

[30] The purpose of this stage of the regulatory process is to enable complaints which are frivolous, vexatious, misconceived or lacking in substance to be summarily disposed of."

30. In *Flynn v. the Medical Council* [2012] 3 I.R. 236, when considering the role of the PPC, Hogan J. stated at p. 246:

"[25] As we have already noted, the Preliminary Proceedings Committee is required to form an opinion for the purposes of s. 63(a) of the Act of 2007 as to whether the facts disclose "a *prima facie* case to warrant further action being taken in relation to a complaint". The statutory requirement that the committee must form an opinion is of some importance, because the use of this particular language is conventionally understood to import the triple requirements that any such decision must be *bona fide*, not unreasonable and factually sustainable: see, *e.g., The State (Lynch) v. Cooney* [1982] I.R. 337, at p. 361, per O'Higgins C.J."

31. I think it is important, at this stage, to refer again to the passage from the judgment of Hardiman J. in *Corbally*, at para. 19 above, which held that a threshold of "seriousness" must be met before a *prima facie* case for an inquiry by the respondent is made out.

32. In *Podariu v. the Veterinary Council Ireland* [2017] IECA 272, Hogan J. considered the role of the Preliminary Investigations Committee, a body equivalent to the PPC provided for in the Veterinary Council Act 2005. In that case, a complaint was sent forward to the Fitness to Practice Committee at which stage the notice of inquiry was amended to include a new allegation that had not been considered by the Preliminary Investigation Committee. Having considered the mandatory nature of the relevant statutory provisions, again equivalent to those in the Act of 2007, Hogan J. stated:

"32. These statutory requirements cannot be regarded as mere surplusage. Rather, they have been deemed by the Oireachtas to represent core protections for the professional person whose reputation and livelihood may be affected in a far-reaching way by a complaint of this nature."

Conclusions on the role and function of the PPC:

Having considered the relevant statutory provisions and authorities, I consider that the role and function of the PPC is as follows:

> (i) The PPC is limited to giving an initial consideration to complaints so as to identify those complaints where there is a *prima facie* case to warrant further action being taken and those complaints which do not warrant further action being taken or can be dealt with by another body, mediation or other informal means.
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> (ii) Before deciding to take further action on a complaint, the PPC must be satisfied as to the seriousness of the complaint.
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> (iii) Where the PPC decides the complaint warrants further action such further action includes, but is not limited to, referring the complaint to the respondent, formulating an allegation(s) that arise out of the complaint, obtaining expert report(s) and witness statement(s).
>
> (iv) The PPC only considers complaints and not allegations. It is only in respect of an allegation(s) that a finding of professional misconduct and/or poor professional performance can be made.
>
> (v) As the role and function of the PPC is limited, the requirement for fair procedures does not apply to the extent that it does before the respondent.

Consideration of issues

33. It is necessary to look at the request which the PPC made of Dr. Constable. The letter, dated 21January 2016, sets out the function of the PPC and stated that "at this stage, no factual disputes are resolved." The letter sought the advice of Dr. Constable based on the documents furnished as to:

> "1. Whether in your opinion there have been any failings on the part of the registered medical practitioner, and
>
> 2. Whether in your opinion any failings on the part of the registered medical practitioner were serious."

34. In my view, this letter correctly set out the function of the PPC, namely to give an initial consideration to the complaint. At this stage there were no allegations, as defined by the Act of 2007, and it would not have been appropriate to seek Dr. Constable's view on professional misconduct or poor professional performance. At this stage what the PPC was engaged in was a consideration of whether there was "sufficient cause to warrant further action being taken in relation to the complaint".

35. The opinion of the PPC that the report of Dr. Constable, together with the other information, disclosed a *prima facie* case against the applicant was a fair and reasonable one and fits the triple test identified by Hogan J. in *Flynn v Medical Council* as being "*bona fide*, not unreasonable and factually sustainable". Indeed, this was confirmed by the subsequent report from Dr. Denihan. The report from Dr. Denihan was a step in the process that led to allegations being formulated from the original complaint. Thus it is not open to the applicant to subject Dr. Constable's report to the forensic analysis which they have done. This, very clearly, is not the case with Dr. Denihan's report. The allegations which the applicant faces are supported by Dr. Denihan's report and it is only in respect of these allegations that findings of professional misconduct or poor professional performance can be made.

36. It follows from this that the CEO in formulating allegations was not confined to the "restaurant complaint" or the "expected standards" limb of the definition of professional misconduct. At para. 9 above, I have set out the reason provided by the PPC for their decision to send the matter forward to the respondent. It was stated within the Minute that the decision was made in accordance with s. 63 of the Act of 2007 and, correctly, specifically refers to the threshold of seriousness that must be met before a referral can be made to the respondent. Further, I see little material difference in the wording of the allegations, as formulated by the CEO, and sent to Dr. Denihan for his opinion and those allegations set out in the notice of inquiry.

37. Finally, it is clear from the correspondence that passed between the applicant's legal advisors and the PPC that the procedures set out in the Act of 2007 were followed. It was not suggested, nor could it have been for the reasons which I have already outlined, that the whole panoply of fair procedures that are required when the respondent is carrying out its functions should apply at the PPC stage.

Conclusion

38. By reason of the foregoing I refuse the reliefs sought by the applicant.