Neutral Citation Number: [2009] IEHC 68

THE HIGH COURT

2008 544 SP

IN THE MATTER OF THE NURSES ACT 1985

BETWEEN:

GERTRUDA KUDELSKA

APPLICANT

AND

AN BORD ALTRANAIS

RESPONDENT

Judgment of Mr. Justice Hedigan, delivered on the 10th day of February, 2009

1. The applicant is a Polish national who has been living in Ireland since November 2005. She was entered on the Register of Nurses in Ireland on the 1st of September 2006.

2. The respondent is a statutory body, which was established by s. 6 of the Nurses Act 1985 ('the 1985 Act'). It has the sole responsibility for the maintenance of professional standards in nursing and midwifery.

3. The applicant seeks the following reliefs:
(a) an order, pursuant to section 39(3) of the 1985 Act, cancelling the decision of the respondent dated the 18th of June 2008 to erase her name from the Register of Nurses; and
(b) an order directing the respondent to reinstate the applicant's name to the Register of Nurses.

I. Factual and Procedural Background

4. I have had the benefit off reading through the proceedings of the inquiry committee held herein and I have heard the evidence of Pauline Treanor, Georgina Farran, Mary Whelan, Fiona Hanrahan, Anne O'Byrne, Ian Brangan and Aideen Keenan. On the basis of this examination and the evidence of these witnesses I have ascertained the following as the factual and procedural background herein.

The applicant first came to Ireland in or around November 2005 for the purposes of establishing herself as a nurse and midwife in this country. Having been entered on the Register of Nurses on the 1st of September 2006, she secured employment as a staff midwife at the Rotunda Hospital ('the Hospital') in Dublin from the 17th of September 2007. In light of the considerable experience which was detailed in her application, in which she described her work as a mid-wife over the course of some 30 years, the applicant began her employment at the top tier of the relevant pay-scale.

5. Upon commencing work at the Hospital, the applicant underwent an induction programme and a course to improve her knowledge and level of English. Immediately after her employment began, however, the applicant's colleagues as well as the senior midwifery staff at the Hospital became concerned about her basic levels of skills and competence. They also became concerned at her level of written and spoken English which they considered would prevent her from communicating at even a fundamental level with women within her care.

6. The Hospital has extensive experience in recruiting nurses and midwives from many countries, including Poland, where midwifery practice is sometimes considerably different from that in Ireland. It is a clear policy of the Hospital that such individuals should be given ample opportunity and support in adapting to their new working environment. In keeping with this policy, the applicant received additional support, training, supervision and assessment from her colleagues within the Hospital. Professional English language tuition was also arranged for her free of charge.

7. Between the 21st of September 2007 and the 30th of November 2007, two reports were prepared by clinical skills facilitators within the Hospital regarding their work with, and supervision of, the applicant. The applicant was also instructed to prepare, within working hours, reflective logs detailing her experiences and learning objectives. One of the clinical skills facilitators, Ms. Charmaine Scallan, was assigned full-time to the applicant for a number of weeks and assisted the applicant throughout clinical practice and reflective discussions.

8. Both of the clinical skills facilitators reached a number of common conclusions in relation to the applicant. They were of the opinion that her level of medical knowledge and comprehension of the fundamentals of clinical practice were both extremely low. They likened the applicant's standard to that of a midwifery student in her very first term of study. Both facilitators further concluded that the applicant's awareness of her own limitations and deficiencies was lacking; she seemed unwilling to accept that her knowledge was well below the standard expected and persistently referred to her extensive experience in Poland by means of justification. Both facilitators noted that the applicant's level of written and spoken English did not materially improve during the course of their assessments. Overall, they concluded that if left to work alone the applicant would pose a substantial risk to the safety of mothers and babies and that the level of support and supervision which she required was far beyond that which would ordinarily be afforded to a staff midwife. Throughout this period, it should be noted that the applicant had a number of meetings with Ms. Pauline Treanor, the Director of Nursing and Midwifery and the Hospital, at which the criticisms of her practice were extensively discussed.

9. Between the 5th and the 7th of November 2007, a formal assessment of the applicant was also carried out by Ms. Fiona Hanrahan of the Community Midwifery Services department of the Hospital. This assessment was devised to evaluate the clinical skills of the applicant and was commissioned by Ms. Treanor. Ms. Hanrahan concluded in her report that the applicant did not provide safe and effective care and did not demonstrate any understanding of the physical changes in the post-natal period. Ms. Hanrahan in particular noted that the applicant was unable to verbalise the steps she would take in two of the most common post-natal emergencies, namely post-partum haemorrhage and baby collapse.

10. Subsequent to the facilitators' reports, a number of further formal assessments of the applicant took place. On the 3rd of December 2007, the applicant's English language skills were evaluated by Mr. Ian Brangan of the Alpha College of English. Mr. Brangan concluded that the applicant had a relatively functional level of English, equivalent to 6 to 9 months of English language study, however there remained some serious deficiencies in her capabilities. For example, he concluded that she would not be able to

properly transact over a telephone nor would she be capable of writing reports which were in any way complex or non-formulaic.

11. Assessments of the applicant's progress in terms of her clinical skills and knowledge were also carried out on the 4th and 5th of December 2007. These were again conducted at the request of Ms. Treanor and were performed by Ms. Anne O'Byrne, the Practice Development Co-ordinator of the Hospital and Ms. Aideen Keenan of the Delivery Suite. Despite the fact that the assessments arose concurrently, the reports arising therefrom were prepared separately by the two assessors. The conclusions of both assessors were nonetheless highly similar. Both assessors expressed serious and grave concern in relation to the safety of women and babies in the applicant's care. Ms. O'Byrne further opined that the applicant seemed unable to accept her own level of ability, while Ms. Keenan explained that the applicant would not, in her opinion, be in a position to support the learning needs of students, either medical or midwifery. It is important to note that these assessments occurred following a ten week period of practice, nine weeks of which had been on the Delivery Suite while under direct supervision and intensive instruction.

12. In response to the findings contained within the numerous reports and assessments, Ms. Treanor arranged a meeting with the applicant on the 19th of December 2007. The applicant was invited to bring a work colleague or other representative, in light of the seriousness of the subject matter. The meeting was ultimately attended by Ms. Treanor, the applicant and Mr. Kieran Slevin, Human Resources Manger at the Hospital. The applicant was advised that her performance was unsatisfactory but nonetheless requested that she be permitted to continue to work. Ms. Treanor indicated to the applicant that the level of supervision and support which the applicant required, owing to her apparent lack of professional knowledge, was unsustainable and therefore her employment would have to be terminated as of the 19th of January 2008. Ms. Treanor also advised the applicant that she was obliged by the concerns raised in the review to advise the respondent of her doubts as to the professional competence of the applicant. All of this was confirmed by a formal letter from Ms. Treanor to the applicant on the 20th of December 2007.

13. A formal complaint was lodged with the respondent by Ms. Treanor on the 2nd of January 2008. The applicant was advised of this fact by the respondent on the 14th of January 2008 and invited to make a statement in relation to the allegations contained within the complaint. On the 26th of February 2008, an interlocutory injunction was granted by the High Court suspending the applicant from the Register of Nurses pending further order, pursuant to s. 44 of the 1985 Act.

14. On the 7th of April 2008, the applicant received notice of the intention of the
Fitness to Practice Committee to hold an inquiry under Part V of the 1985 Act. This enquiry proposed to specifically consider four allegations of misconduct against the applicant, namely:-
(1) That she failed to have or display a level of competence or carry out her duties in a manner which would enable her to deliver a safe or acceptable standard of professional midwifery care to patients;
(2) That she failed to demonstrate knowledge to underpin her practice and the expected management of situations that arose during the delivery of midwifery care;
(3) That she failed to achieve an ability to communicate in English either verbally or in writing at a level that would enable her to deliver a safe or acceptable standard of professional midwifery care to patients; and
(4) That notwithstanding the special arrangements put in place by the management team at the Hospital, whereby she received additional support, training, supervision and assessment, she failed to achieve an acceptable level of competence, knowledge or English language skills that would enable her to deliver a safe or acceptable standard of professional midwifery care to patients.

15. The enquiry into the applicant's conduct was conducted by the Fitness to Practice Committee on the 8th and 9th of May 2008. Direct evidence was given by a number of witnesses *inter alios* Ms. Treanor, Ms. Scallan, Ms. Hanrahan, Ms. O'Byrne and Ms. Keenan. The applicant was invited to put questions to the witnesses, to call her own evidence and also to make general submissions. She was provided with an interpreter throughout the proceedings, as she was before this Court. On the 5th of June 2008, the Committee released its report in which it upheld each of the four grounds of stated misconduct against the applicant and recommended that the applicant's name should be erased from the Register of Nurses and further that it should not be restored until:
(a) the applicant attended and completed to the respondent's satisfaction a course in English; and
(b) the applicant attended and completed to the respondent's satisfaction and undergraduate course in midwifery. The applicant's name was duly erased from the register by the respondent.

16. On the 3rd of July 2008, the applicant issued a special summons seeking to cancel the decision of the respondent.

II. The Nature of the Proceedings

17. Section 39 of the 1985 Act provides *inter alia* as follows:
"(1) Where a nurse:-
(a) has been found, by the Fitness to Practise Committee, on the basis of an inquiry and report pursuant to *section 38* of this Act, to be guilty of professional misconduct or to be unfit to engage in the practice of nursing because of physical or mental disability…

> the Board may decide that the name of such person should be erased from the register or that, during a period of specified duration, registration of the person's name in the register should not have effect…
> (3) A person to whom a decision under this section relates may, within the period of 21 days, beginning on the date of the decision, apply to the High Court for cancellation of the decision and if such person so applies:-
> (a) the High Court, on the hearing of the application, may:-
> (i) cancel the decision, or
> (ii) declare that it was proper for the Board to make a decision under this section in relation to such person and either (as the Court may consider proper) direct the Board to erase such person's name from the register or direct that during a specified period (beginning not earlier than 7 days after the decision of the Court) registration of the person's name in the register shall not have effect, or
> (iii) give such other directions to the Board as the Court thinks proper,
> (b) if at any time the Board satisfies the High Court that such person has delayed unduly in proceeding with the application, the High Court shall, unless it sees good reason to the contrary, declare that it was proper for the Board to make a decision under this section in relation to such person and either (as the Court may consider proper) direct the Board to erase the person's name from the register or direct that during a specified period (beginning not earlier than 7 days after the decision of the Court) registration of the person's

name in the register shall not have effect,

(c) the High Court may direct how the costs of the application are to be borne…

(5) The decision of the High Court on an application under this section shall be final, save that, by leave of that Court or the Supreme Court, an appeal, by the Board or the person concerned, from the decision shall lie to the Supreme Court on a specified question of law."

18. Section 39 of the 1985 therefore lays down a discreet appellate procedure from decisions of the respondent. However, no guidance is given in the 1985 Act as to the form which such an appeal should take. It falls for the Court to consider, therefore, whether the present proceedings ought to be dealt with by way of a complete re-hearing of the evidence or a mere review on affidavit of the procedures adopted by the respondent. In *K. v. An Bord Altranais* [1990] 2 IR 396, Finlay C.J. considered the appropriate procedure to be adopted under s. 39 and concluded as follows:-

> "In order for the court to be the effective decision-making tribunal leading to a conclusion that the name of a person should be erased from the register or the operation of registration should be suspended, it is, in my view, essential that having regard to the particular facts and issues arising in any case, it is the court who should make the vital decisions. In a case such as this undoubtedly is, where the whole question as to whether the applicant is a fit person to remain as a registered nurse depends upon the truth or falsity of evidence as to her conduct and not on any question of standards or rules or principles of professional conduct, it seems to me essential that the High Court must reach its own conclusion as to the truth or falsity of those allegations. In order for it to do so, it must, it seems to me, hear the witnesses, for not on any other basis could it safely reach any such conclusion. Were the matter now to be tried on affidavit, as is contended on behalf of the respondent, and the High Court to be bound by the findings of fact made by the Fitness to Practice Committee, then the effective decision with regard to the erasure of the applicant's name from the register would necessarily have been made by that Committee. The High Court would, in the particular facts of this case, if it confined itself to affidavit evidence, be merely endorsing the procedures of that Committee and, of necessity, accepting its findings of the facts. I appreciate that there are a great number of cases and, indeed, with regard to the disciplinary proceedings in professional bodies possibly the great majority of cases, in which the issues are not direct issues of fact but rather are questions of propriety, professional conduct, professional standards and the consequences of undisputed facts. In all those cases no necessity may arise in any proceedings under s. 39 of the Act of 1985 for any oral evidence in the High Court, but in the case of the description which I am satisfied this case is, such a necessity, in my view, arises. I reject the submission that this conclusion has the consequence of making futile or useless the hearing before the Committee. Such a hearing may well in many cases lead to a dismiss of all charges or to a finding acceptably dealt with by advice, admonition or censure. In addition a guarantee of consideration of a charge of professional misconduct by professional colleagues in the first instance is an important contribution to the independence of professions."

19. It is therefore clear that there may be cases under s. 39 of the 1985 Act which could appropriately be disposed of on affidavit alone. However, the adequacy of such a procedure will depend heavily on the circumstances of the individual case, in particular the level of contest as to the facts in issue. In the present case, the applicant submits that a number of the findings of the Fitness to Practice Committee were fundamentally erroneous. Having regard also to the fact that the applicant is a foreign national with a limited understanding of English, the seriousness of the findings of the Committee, the severity of the potential consequences of the present proceedings and the limited scope for any further appeal, I am satisfied that the correct approach in the present case was to proceed by way of a plenary re-hearing of the matter.

III. The Submissions of the Parties

20. The applicant submits that the findings of the Fitness to Practice Committee and the respondent were not justified by the evidence and that they were wrong in law and fact. Further and in the alternative, she submits that the sanction recommended by the Committee and imposed by the respondent was disproportionate and therefore in breach of the applicant's right to natural and constitutional justice as well as Article 6 of the European Convention of Human Rights. The applicant also argues that her rights under EC Law were breached by the sanction, in that it amounts to an indirect restriction on her entitlement to recognition of her qualifications and her rights of free movement as worker.

21. In support of these arguments, the applicant contends that the deficiencies in her practice were exaggerated at the hearing before the Fitness to Practice Committee and that many important facts were omitted such as the fact that she delivered several babies unsupervised during her time at the Rotunda. To this end, the applicant also argues that she was not afforded the opportunity to make representations or pose questions to witnesses as she would have liked. She also submits that she was not given sufficient time to adapt to the very different surroundings and processes which she claims exist in Ireland when compared with Poland. She states that the majority of the problems which she encountered while working in the Rotunda were owing to the deficiencies in her command of English.

22. The respondent rejects the suggestion of any impropriety on its part, or indeed that of the Fitness to Practice Committee, in terms of the procedures adopted, the conclusions reached or the sanctions imposed in the present case. The respondent argues that the evidence in the present case points overwhelmingly to the conclusion that the applicant was guilty of such incompetence as to amount to professional misconduct and that the sanctions imposed were absolutely necessary in order to protect the safety of mothers and babies in its care.

IV. The Court's Assessment

23. It is clear as a matter of law that gross incompetence or negligence may amount to professional misconduct in certain circumstances. In *McCandless v. General Medical Council* [1996] 1 WLR 167, the Privy Council held that serious professional misconduct was not restricted to conduct which was morally blameworthy but could include seriously negligent treatment measured by objective professional standards. This conclusion was approved of by this Court, in the specfic context of s. 39 of the 1985 Act, in *Perez v. An Bord Altranais* [2005] 4 IR 298. In that case, O'Donovan J. upheld the finding of the Fitness to Practice Committee that the applicant was guilty of professional misconduct in circumstances where she had: (i) frequently communicated imprecise and incomplete information to other nurses with regard to the welfare of patients; (ii) failed to follow proper aseptic techniques and

hygiene standards particularly in the context of dressings; (iii) given medication to the wrong patient on one occasion; and (iv) placed dirty swabs on a patient's breakfast tray. O'Donovan J. assessed this evidence and concluded by stating:-

> "I was persuaded by the sworn testimony of the several nurses who gave evidence before me that the conduct of the applicant, when she was employed as a staff nurse at the nursing home between the months of November, 2002 and August, 2003, not only fell far short of the standard of conduct expected among nurses but did not accord with the code of professional conduct for nurses laid down by the defendant, in that, I am satisfied that the applicant was an incompetent nurse and did not take appropriate measures to develop and maintain the competence necessary for professional practice. In that regard, I am satisfied that the applicant's conduct and her failure to observe the said code of professional conduct for nurses amounted to professional misconduct and I confirm the decision of the said Fitness to Practise Committee that her name be erased from the register of nurses pursuant to the provisions of s. 39(1) of the Act of 1985."

24. Applying these principles to the present case, I am satisfied that the applicant's conduct amounted to professional misconduct, in particular having regard to her refusal to accept that her clinical skills and knowledge were so far below that which was reasonably expected of her. She was, in my view, lacking the very fundamentals required of a professional nurse and, had she been allowed to work unsupervised, would have posed a considerable danger to both mothers and babies. All of the hospital witnesses before this Court were highly professional women who gave evidence in accordance with that which they had given before the Fitness to Practice Committee. Their determination to maintain the highest standards of midwifery in the Rotunda Hospital was clear and is highly creditable. I cannot accept the applicant's suggestion that their testimony gave a one-sided impression of her time in the Hospital. I consider that their evidence was in each case fair and balanced. In the light of the litany of instances of incompetence on the part of the applicant their opportunities to speak well of her were of necessity limited.

25. The applicant alleged at various stages that the staff at the Hospital who supervised her were in some way prejudiced against her. Again, this is a submission which I must reject. In the present case, all of the witnesses for the respondent gave evidence in a very composed and impartial manner. Their assessment of the applicant's competence was wholly based on the skills and knowledge which she displayed in her capacity as a midwife and was in no way directed towards her in her personal capacity. Indeed, many of the witnesses gave specific evidence that the applicant is a pleasant and congenial woman. They were unable however to overlook the chronic deficiencies in her practice on this basis.

26. Finally, I must reject the applicant's submission that she has been denied her rights of natural and constitutional justice, or indeed those under Article 6 of the European Convention of Human Rights. It seems to me that the applicant was afforded every possible opportunity to make her case throughout the proceedings: she was invited to bring a representative and make extensive submissions at her meeting with Ms. Treanor on the 19th of December 2007; she was again afforded the same rights before the Fitness to Practice Committee on the 8th and 9th of May 2008; and ultimately received the same opportunities before this Court. The formal assessments which were carried out as to the applicant's competence and proficiency in English were conducted by independent parties who had no previous experience of her capabilities. Overall, the authorities at the Hospital and the Fitness to Practice Committee dealt with this very difficult situation with all the propriety and professionalism one would have hoped for. The applicant cannot have any grievance with the investigative methods employed. They seemed to me to be eminently fair given the requirement to ensure the highest standards in the care of mothers and babies.

V. Conclusion

27. In light of the foregoing, I am satisfied that the findings of the Fitness to Practice Committee were a true and accurate assessment of the evidence which was put before it. I am further satisfied that the respondent acted *bona fide* in respect of the applicant at all times and the requirements of natural and constitutional justice were rigorously complied with. No credible evidence was presented before the Court which served, in any way, to impugn the conclusions reached in the report of the Fitness to Practice Committee which was subsequently affirmed by the respondent. On the basis of the evidence before this court the respondent was entirely correct and proper in its decision to erase the applicant's name from the Register of Nurses. In the result, the Court will confirm the order made by the respondent in the manner prescribed by section 39(3)(a)(ii) of the 1985 Act.