THE HIGH COURT

[2016 No. 308SP]

BETWEEN

THE NURSING AND MIDWIFERY BOARD OF IRELAND

APPLICANT

AND

O.C.M.

RESPONDENT

***Extempore* JUDGMENT of Mr. Justice Kelly, President of the High Court delivered on the 19th day of December, 2016**

1. This is the application of the Nursing and Midwifery Board for an order pursuant to s.74(3) of the Nurses and Midwives Act 2011 confirming a decision made by the applicant in respect of disciplinary proceedings which were brought against the respondent.

2. The respondent was found guilty of professional misconduct under a number of different headings.

3. First, she was found guilty that while she was employed as a staff nurse at a regional hospital she furnished her divisional nurse manager with an undated letter that the respondent represented to have been written by a consultant cardiothoracic surgeon at another hospital when she knew or ought to have known that that was not the case.

4. The second finding of professional misconduct was that on a specific date when the respondent was questioned by the Director of Nursing about the authenticity of that letter and/or when questioned about her mother's alleged admittance to the hospital of the consultant cardiothoracic surgeon the respondent stated that the letter was written by that surgeon when she knew or ought to have known that such was not the case and/or stated that her mother was a patient at that hospital when she knew or ought to have known that such was not the case and/or stated that her mother was admitted as a patient around that time to that hospital using the Irish form of her name.

5. A third allegation which was found proved against the respondent was that on a number of unidentified dates in December 2011 she furnished one or more further undated letters to the Director of Nursing and represented that they had been written by the Consultant Surgeon when she knew or ought to have known that such was not the case.

6. The respondent failed to appear or to make any representations either to the Fitness to Practise Committee of the applicant or to the applicant itself when it fell to consider the recommendations of that committee.

7. At a meeting of the applicant which took place in March 2016 it indicated that it was minded to impose a sanction greater than the one which had been recommended by the Fitness to Practise Committee. The applicant had in mind a censure and the attachment of four conditions.

8. The conditions were that:-

> (1) The respondent undergo a period of counselling with a registered counsellor for a period of twelve months on a monthly basis;
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> (2) Prior to any return to work the respondent would have to successfully complete a return to nursing course approved by the applicant;
>
> (3) Prior to any return to work the respondent should furnish to the applicant a report from a psychiatrist to certify that she is fit to return to work as a nurse; and
>
> (4) Notice of the imposition of these sanctions would be notified to any prospective employer for a period of two years from the date of the conclusion of the process.

9. At a meeting of the applicant which was held on 25th May, 2016 a proposal to erase the respondent's name from the register was considered but that proposal was defeated. The applicant decided on the sanction of censure and the attachment of not four but two conditions namely that prior to any return to work as a nurse the respondent must successfully complete a return to nursing practice course approved by the applicant and for two years following any return to work as a nurse the imposition of these sanctions would have to be notified to any nursing employer.

10. When the matter came before me seeking confirmation of the decision of the applicant I expressed concerns. I was particularly concerned having regard to the necessity to maintain public confidence in the nursing profession and I queried whether the sanction which was being suggested namely a censure and the attachment of these two conditions was sufficient to meet the case.

11. I expressed particular concern at the nature of the dishonest conduct that had been embarked upon by the respondent. It involved forgery of a medical certificate both as to the form of the certificate, its contents and the signature of the consultant surgeon. I noted that in the evidence that was given to the Fitness to Practise Committee the consultant surgeon was so concerned that he made a formal complaint to the Garda. Rather to my astonishment, the Garda appeared to have little interest in the matter. Needless to say, anybody would be concerned that material that was not of their authorship would be misused such as was the case here. Such is particularly so in the case of a registered medical practitioner and where these acts of dishonesty were carried out by a registered nurse. I raised these concerns and the matter was adjourned so as to enable representations and submissions to be made to me.

12. Mr. Butler S.C. appeared before me on the adjourned date and made a suggestion which I acceded to, namely, that the matter would be adjourned from last term to this so that advice might be given to the applicant. Advice was indeed given and as a result of that advice the applicant reconvened to consider the matter afresh.

13. I wish to make it clear that I did not request the applicant to reconsider the matter contrary to what the applicant was told on three separate occasions by a lawyer who appeared before it. Accurate information was given to the Board by Mr. Murphy S.C. He correctly pointed out that although my decision was given *extempore* I had been very careful in the language that I used because I did not wish to trespass in any way upon a jurisdiction which is vested in the applicant and not in the court. It was the applicant of its own volition that decided to reconvene but not as a result of any request from the court still less as a result of any order or direction.

14. Having reconvened, the applicant came to a conclusion the terms of which I will refer to in a moment. Before it reconvened it was in receipt for the first time ever of representations from the respondent. They came in the form of a letter addressed to the applicant and it was considered by it. It is not necessary for the purposes of this ruling that I should refer to that *in extenso* save to record that it sets out what would appear to be a very full and thorough acceptance of responsibility and an expression of contrition for the activity in question. The respondent says that she is, amongst other things, thoroughly mortified at what she described as her disgusting dishonest behaviour. So, the applicant had that additional material before it. An opportunity was also given to the respondent to make representations to this court which she did in writing. In the course of that she apologised for not being present in court today. She set out her current lifestyle and she said as follows:-

> *"When I read about what I did I don't recognise that person any more. The person in me who was dishonest deceitful and frankly a bit batty at the time."*

Her letter goes on to say that she poses no harm to society and would never knowingly endanger a human being. She also says that she is aware of the sanctions placed on her if the decision of the applicant is to remain unchanged. For the sake of completeness I should point out that in her communication to the applicant she sought information as to the process that should be followed with a view to applying for removal from the nursing register provided that such could be done privately and indicated that she would wish to save embarrassment both to herself and her parents.

15. An affidavit has been placed before me indicating what occurred when the applicant of its own volition came to reconsider this matter. Its reconsideration resulted in a letter being written to the respondent which has been exhibited in that affidavit. The letter to her said:-

> *"… that after due reconsideration at its meeting on 23rd November, 2016 the Board believes that notwithstanding the admitted dishonesty, forgery and professional misconduct on your part that public confidence can be maintained in the integrity of the profession of nursing by the imposition of the recommended sanctions in particular the conditions imposed above."*

Earlier the letter set out details of the two conditions. The letter went on:-

> *"The Board is of the view that there were exceptional mitigating circumstances in this case namely:-*
>
> *(1) the relatively isolated incidents which occurred in the context of the ongoing acute distress which was suffered and which you have confirmed in your communication with the Board,*
>
> *(2) your prior unblemished record*
>
> *(3) your acknowledgment of your wrongdoing*
>
> *(4) the fact that you have suffered considerable psychological distress which resulted in you being hospitalised in order to receive psychiatric care and*
>
> *(5) the lack of evidence of harm caused to patients by your conduct."*

The letter went on to state that the most recent letter from the respondent confirmed her remorse and acknowledgment of her wrongdoing. The applicant went on to express the opinion that the exceptional circumstances of this case were such that public confidence could be maintained in the profession by the imposition of the sanction in question. In addition to this information I also of course have the communication received by the court from the respondent.

16. The statutory provisions under which I have to operate are rather similar to those which obtain in respect of the courts jurisdiction over the medical profession.

17. Section 74 of the Nurses and Midwives Act 2011 is as follows:-

> *"(1) Where a registered nurse or registered midwife does not, within the period allowed under section 73 (1), appeal to the Court against a decision under section 69 to impose a sanction (other than a sanction referred to in section 69 (1) (a) or (2)) on the nurse or midwife, the Board shall, as soon as is practicable after the expiration of that period, make an application to the Court for the confirmation of the decision.*
>
> *(2) An application under subsection (1) may be made on an ex parte basis.*
>
> *(3) The Court shall, on the hearing of an application under subsection (1), confirm the decision under section 69 the subject of the application unless the Court sees good reason not to do so."*

18. It is subsection 3 which is relevant to this application. It requires me to give effect to the recommendation which is made unless I can identify a good reason not to do so.

19. The integrity of the nursing profession, the competence of nurses who practise in this jurisdiction and the maintenance of public confidence in the nursing profession is vested primarily in the applicant and not in the court. (See s.8 of the Act). It is the applicant's obligation to ensure the competence of nurses in practice. It is the applicant's obligation to protect the public and to ensure that nurses who are on the register are of high standard and ones in whom the public can maintain confidence. It is the applicant's

obligation to maintain confidence in the nursing profession as a whole. It is not the responsibility of this court to do so save to the very limited extent as is provided for by statute.

20. The courts' jurisdiction is indeed limited because I am satisfied that the use of the expression "*good reason*" in s.74 (3), when considered as part of the statutory scheme created by the Act as a whole, does not confer a jurisdiction on this court to act as a form of court of appeal on the merits from a decision of the applicant. The court is justified in departing from a recommendation of the applicant only if it is satisfied that there was a substantial procedural irregularity in the way in which the Board conducted itself or that the norms of natural and constitutional justice were not observed or if it is satisfied that no reasonable board could come to the conclusion which the applicant reached. That imports notions of "Wednesbury" or "Stardust" type unreasonableness into the jurisdiction with which the court is concerned here. (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223; *State (Keegan & Lysaght) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642.)

21. Such being the construction which I place upon the statutory provisions I therefore (in the absence of any irregularities) have to ask myself the question:-

> Has the Board here discharged its functions as identified in the Act and reached a conclusion which is reasonable albeit not necessarily a conclusion which I myself might have reached?

Again I stress that the court is not of a court of appeal on the merits from the applicant. It merely has to exercise the statutory function imposed upon it under the Act.

22. Having considered the facts of this case, including the fact that the applicant in its original exercise of jurisdiction imposed a sanction in excess of that recommended by the Fitness to Practise Committee, having regard to the fact that it gave consideration to the possibility of an erasure but declined to do so on that occasion and having regard to the fact that it reconvened and considered the matter afresh and did so in the context of the first engagement ever on the part of the respondent, I have come to the conclusion that it cannot be said that the applicant came to an unreasonable conclusion such as to render it proper for me to depart from its recommendation. In so concluding I also take account of what is represented to the court by the respondent which seems to me to fortify the reasonableness of the view of the applicant. What she has said to me is in large measure reflective of the written communication which was sent to the applicant. In these circumstances I have come to the conclusion that I ought to assent to the application and to make the order which is sought for the reasons which I have given.