



THE HIGH COURT

[2019] IEHC 267

[2019 No. 119 Sp.]

BETWEEN

THE HEALTH AND SOCIAL CARE PROFESSIONALS COUNCIL

APPLICANT

AND

KASHIMBA MUSONDA

RESPONDENT

EXTEMPORE JUDGMENT of Mr. Justice Kelly, President of the High Court delivered on the 25th day of March, 2019

1. This is the application of the Health and Social Care Professionals Council ("the Council") pursuant to the provisions of s.70 of the Health and Social Care Professionals Act of 2005, as amended in 2012, as further amended in 2014, and as further amended in 2017 ("the Act"). Section 70 of the Act provides that if a registrant who is the subject of an adverse finding by the Council does not appeal to this court within the stipulated period, then the Council may make an application to this court for an order confirming its finding. Under subsection (3) of s.70 it is provided that the Court shall on such an application by order confirm the Council's direction relating to the registrant unless the Court sees good reason not to do so.

2. The respondent to this application is Kashimbu Musonda. She was registered as a radiographer in Ireland under the relevant legislation and was the subject matter of a complaint which was made to the Council by the Radiography Services Manager in the Radiography department of University Hospital Waterford.

3. It is instructive to look at what was said in the complaint form concerning the respondent. It reads:

"Kashimbu Musonda took up a specified purpose post for six months from 2nd February, 2017 to 19th August, 2017 as a basic grade radiographer in UHW. She was appointed through the HSE national recruitment service and had CORU registration. She commenced employment on Monday, 20th February, 2017. She received a tour of the radiology department and hospital facilities and was given the induction policy and access to the relevant policies procedures and guidelines that she was required to familiarise herself with. She was also assigned a "buddy" to work with during her initial time in the department. Serious reservations regarding Ms. Musonda's competency and professional ability emerged almost immediately, but, as she was still in her first week of employment, she was afforded the opportunity to establish herself in the new environment and prove her competence. The UHW/UCD radiography clinical practice specialist, who is also a UCD student tutor, was assigned to supervise and mentor Ms. Musonda. The tutor produced a report spanning the period she supervised Ms. Musonda. The report catalogued specific incidents, recording Ms. Musonda's apparent lack of the requisite knowledge and skills to practise safely and effectively as a radiographer and her persistent failure to meet professional standards. It also gave rise to concerns with regard to patient safety and that of the general public. Two experienced radiographers also supervised Ms. Musonda's practice over the course of her employment." (It enclosed reports from those radiographers).

"In addition, several other radiographers also voiced their concern with regard to Ms. Musonda's ability and competence to practise safely.

Although qualified for 11 years, Ms. Musonda did not demonstrate that she could safely operate as an autonomous radiographer, so her practice was supervised by other radiographers. The specific concerns related to her were:

- (a) persistent failure to comply with the radiology department's patients' identification policy,*
- (b) annotation of radiographs and the use of markers,*
- (c) lack of knowledge of basic bony landmarks, radiographic positioning, and projects,*
- (d) poor understanding of exposure factors use and how to appropriately adjust,*
- (e) unfamiliarity with radiographic and medical terminology and common abbreviations,*
- (f) recurrent evidence of artefacts on radiographs produced,*
- (g) persistent failure to collimate images appropriately,*
- (h) delay and reluctance to finish images on the PAC system,*
- (i) poor knowledge of radiation protection and its practical application,*
- (j) reluctance to accept direction, advice or constructive criticism".*

4. The matter came before the relevant committee of the Council, which conducted an inquiry which lasted six days. The respondent was present for three of those days and participated to that extent. The findings of the committee are set out in a very detailed report specifying each of the allegations and the findings that were made. For the purposes of this ruling, it is not necessary that I should go through each and every one of them, save to record that there were multiple findings of both poor professional performance and professional misconduct. Many of those relate to the very basics of what a radiographer is about, and a number of them quite

clearly gave rise to concerns for patient safety and also for the safety of the public.

5. That committee report recorded the form of defence which was made by Ms. Musonda. She alleged a conspiracy based on racism. It is important that I should specify in some detail how that was dealt with by the committee. This is what it said concerning the conspiracy allegation.

6. *"She was employed as a basic grade radiographer for a period of just over two and a half working weeks, between the 20th February, 2017 and 8th March, 2017. She was employed as a basic grade radiographer on a six-month contract."*

Clearly her knowledge and her ability was so poor that she was allowed to remain in post for just two and a half weeks.

7. The committee went on to say:

"Concerns were expressed by colleagues at a very early stage about Ms. Musonda's practice as a radiographer. Arising from these concerns, there is no dispute but that Ms. Phelan was assigned to supervise and mentor Ms. Musonda arising from a meeting between her and Ms. Musonda at which she was advised of the concerns. At that meeting, Ms. Phelan told the committee that she catalogued specific instances recording Ms. Musonda's lack of requisite knowledge and skill, and Ms. Phelan's concerns about her professional standards. Ms. Musonda has not disputed that a meeting took place on 27th February, 2017 which resulted in her supervision by Ms. Phelan, nor has she disputed that on 3rd March, 2017 a formal HR meeting was arranged between the head of HR, Ciara Hughes, and Ms. Musonda and Ms. Diamond, where Ms. Musonda was informed she would be given one week more to demonstrate that she could operate on a stand-alone basis as a radiographer. On 8th March, 2017, during that week, an incident occurred involving a member of the public being outside the controlled area in the X-ray room when X-rays were taken. This is disputed by Ms. Musonda, who now states her opinion that she does not believe that there was any radiation exposure, and further that she only completed the State Claims Agency form because she was directed to do so then by Ms. Diamond and further was told specifically what to write."

Ms. Musonda has consistently denied all of the allegations against her and has set out in correspondence her position. In evidence she has rejected the allegations against her as a fabrication by the radiography staff in University Hospital Waterford and she asserts that this fabrication is motivated by issues of race. Essentially, she alleges that there is a conspiracy against her and that her practice as a radiographer does not and did not have any of the deficiencies outlined in the notice of inquiry or in evidence by the other radiographers from UHW. Whilst reference was made to specific issues in dealing with the individual allegations in the notice of inquiry at the outset, the committee wishes to state that it found no evidence of a conspiracy in the evidence of the witnesses from University Hospital Waterford. The committee considered it unlikely in the extreme that a conspiracy could be formulated between diverse members of the radiography staff in such a short period of time for no apparent reason or benefit to themselves or the hospital and where it is impossible to believe that all of the witnesses from UHW could be driven to or coerced into wrongfully participating in a discriminatory conspiracy which is then referred for scrutiny to a regulatory body by one of the alleged conspirators. Had there been any such conspiracy as contended for by Ms. Musonda, it is unlikely in the extreme that the conspirators would have consented to the detailed scrutiny that making a complaint to a regulatory body would of necessary have entailed."

The committee further notes that the radiography department in University Hospital Waterford employs radiographers from various international countries, including another radiographer who qualified from the same institution as the registrant, without issue."

So that was a clear rejection of this form of defence, namely an allegation of conspiracy based on racism.

8. The committee then went on to consider its recommendations concerning sanction and again set out in great detail the rationale for the sanction. Amongst its reasons -- and I mention only some -- is its view that this is a very serious case where multiple examples of serious deficiencies in the clinical conduct and judgment of Ms. Musonda were proven in evidence before it. The committee noted that such conduct carries with it a very high degree of risk that the public may be harmed in circumstances in which the patient is entirely dependent upon the radiographer to exercise the correct clinical judgment and skill so as not to harm the patient and where the patient cannot take any steps to protect him or herself as they rely, quite properly, on the radiographer having the correct technique, skill and clinical expertise to safely administer a diagnostic test without causing harm to the patient. The committee noted that the conduct proven in evidence before it was replete with examples of poor professional performance over the entire spectrum of radiological services provided in administering X-rays. The committee was satisfied that Ms. Musonda lacked appreciation of the danger and potential danger posed by her clinical deficiencies, absence of safe techniques, and failure to follow minimum guidelines. The committee was satisfied that she poses a danger to the public by reason of this lack of appreciation.

9. The committee also said that she had not demonstrated any insight into her conduct. She had not acknowledged any, and it underlines any, deficiencies in her conduct and did not admit of a single error, whether involving exposure factors, positioning, projection, imaging, equipment knowledge, triple patient identification check, LMP check, exposure to unnecessary radiation, or the concept of potential harm arising from her lack of skill with any of the above. There were many other reasons given by the committee justifying the recommendation which it made, namely that the only sanction that would demonstrate the upholding of professional standards and maintaining public confidence in the profession was that she should be struck off the relevant register.

10. It also said in the course of reaching that conclusion that she did not demonstrate any understanding of the obligations of a radiographer to take every step appropriate to protect the safety of the patient and/or not doing anything that might expose a patient to harm. She had no insight into her conduct and it apprehended that her ability to gain insight was unlikely to occur unless or until she acknowledged her deficiencies and until such time as she would do so she would remain a danger to her patients. Consequently, it recommended that she should have her name removed from the register, in other words, cancellation of her registration.

11. Under the extraordinarily cumbersome procedures which are provided for in the Act, that decision then had to go to the Radiographer Registration Board, where a second hearing had to take place. It came to precisely the same conclusions as the committee that had conducted the inquiry and which produced the detailed report from which I have quoted.

12. Then the matter had to go a further step, to the Council. It came to the same conclusion, and it made its decision as set forth in its report of 24th January, 2019. It said with regard to the recommendations made by the committee and the Board that the sanction is appropriate and proportionate. It agreed with the reasoning of the committee on the appropriate sanctions recommended. The

matter now comes before this Court in circumstances where Ms. Musonda has not exercised her right of appeal.

13. Mr. McDowell has explained to me the circumstances in which the respondent came to be on the register on the first place. Apparently, it was as a result of a ministerial decision made prior to the coming into existence of the Council. This case must call into question whether adequate or appropriate investigation was carried out before the respondent was entered on the register. But, even if a person gains registration, there is surely an obligation on any employer to ensure that even though a radiographer is on the relevant register, he or she knows the basics of what their profession is about. There must on this occasion, as on other occasions in relation to HSE recruitment, be questions as to how its recruitment policy and the procedures adopted by it could give rise to the employment of somebody who is so lacking in the very basics of radiography skills as in this case. To take up employment and to have to be let go within two and a half weeks of so doing in the circumstances which I have outlined speaks for itself. I have raised concerns before about junior hospital doctors who were recruited to take up HSE posts and within a very short time it became clear that they did not have any knowledge of, in some instances, the very basics of anatomy and rudimentary medical procedures. Now, in the context of a radiographer, I find precisely the same situation. It must call into question the recruitment procedure used to give rise to a result such as this.

14. Insofar as Ms. Musonda is concerned, I am quite satisfied, on the basis of the evidence that has been put before me, that the order sought ought to be granted. There is no good reason not to make the order and every good reason to do so, having regard to her substandard state of knowledge. She is a danger to the public and should not be allowed to practise as a radiographer.

15. Having regard to the way in which the committee framed its reasons and its view that she would remain a danger until such time as she gains sufficient insight into her lack of knowledge, I am also satisfied that the Council is justified in seeking an order prohibiting her from applying for re-registration for a period of 18 months. Of course, if she were to apply for registration again, she would have to satisfy the Council of her knowledge and skill. That is a matter for the Council rather than this court.

16. I now make an order confirming the decision of the Council that the respondent's registration be cancelled. I will also make an order that she be prohibited from applying for restoration to the register for a period of 18 months from today's date. I note from the affidavit evidence the intention, in my view a correct intention, on the part of the Council, that upon the making of this order it will notify the relevant regulator in Zambia and Botswana of the order.