

BETWEEN

ANDREW HALPIN

PLAINTIFF

AND

THE NATIONAL MUSEUM OF IRELAND

DEFENDANT

**JUDGMENT of Ms. Justice Murphy delivered on the 1st day of March, 2018**

1. This is the defendant's application for discovery pursuant to O. 31 r. 12, of the Rules of the Superior courts seeking an order requiring the plaintiff to make discovery on oath of "*all documentation concerning, evidencing or relating to the plaintiff's mental health including but not limited to any of the following; stress; pressure; anxiety; depression and counselling under gone by him including GP and other clinicians consultant notes and reports and counselling notes to cover the period of 1st January, 2005 to date.*"

2. The plaintiff is and has been an officer of the defendant and its predecessor since 1994. His current office is as Assistant Keeper of Irish Antiquities. He is currently suspended on full pay and has been so suspended since 28th February, 2017. At the core of the plaintiff's claim is his assertion that his suspension was and remains unlawful.

**Background**

3. It appears to the court that there is little dispute about the circumstances surrounding the suspension of the plaintiff. In or around mid 2016, a new board was appointed to the defendant. Since the appointment of the new board there have been several media reports concerning issues of institutional dysfunction and the existence of a toxic work environment within the defendant, which it is reported, had existed for the previous ten to twelve years. The new board commenced a wide ranging review of the operations of the defendant. This apparently included a survey of wellbeing among staff which was conducted in late 2016. The survey found extremely low levels of staff morale and a lack of trust in management. As a result of that survey, the board sought a report from management on all human resources issues. The management report was to be available for the purposes of discussing same at a board meeting on 16th March, 2017.

4. On 16th February, 2017, a report appeared in the press under a headline "*Man keeps job at Museum despite sexually harassing colleague*". On the following day 17th February, 2017, the same the newspaper published a report headed "*National Museum Board 'urgently examining' sex pest case*". While the plaintiff was not named in the articles, it is agreed and accepted that the reference in the articles was to him and to an investigation which had been conducted on behalf of the National Museum into a complaint of sexual harassment made against the plaintiff in 2006. The plaintiff complains *inter alia* that there were inaccuracies in that article which could and should have been corrected by the defendant. The plaintiff acknowledges that such an investigation had taken place and that he had been found guilty of sexual harassment and that sanctions were imposed in respect of those events in 2007. The sanctions appear to have been a loss of increments for a three year period and a requirement that he undertake counselling at his own expense. According to the replies to particulars, dated the 19th May 2017, the plaintiff underwent counselling from 2006 until approximately 2011.

5. Not referred to in the newspaper article, was the fact of a further complaint of sexual harassment made against the plaintiff in 2016. The complaint was made to management by an intern. There was also a complaint at the same time, relating to material on the plaintiff's work computer. The material consisted of hundreds of images of tall women some of which had been digitally altered. None of the images was deemed pornographic. The intern who had made complaint of sexual harassment, declined to give evidence to the investigators. The outcome of the 2016 investigation was that the plaintiff was directed to have no physical contact with his colleagues beyond a normal handshake; that he was not to work alone with female colleagues/interns; that his internet access was to be withdrawn with the exception of a small number of official websites; that he was to seek professional assistance from the employment assistance programme. It was envisaged that he would be met on a quarterly basis to review his work performance. As it happens, the plaintiff's internet access was not in fact, withdrawn, nor were there any reviews of his work performance throughout the rest of 2016.

6. On 17th February, 2017, following the publication of the two articles referred to above the plaintiff attended a meeting at the Maldron hotel, Smithfield, Dublin with Ragnall O'Floinn, a director of the National Museum. The outcome of this meeting was that the plaintiff agreed to take a leave of absence on full pay with immediate effect. A letter confirming the position, was sent to the plaintiff by Mr. O'Floinn on the same date. Having reflected on the matter the plaintiff considered that he had been given Hobson's choice, take leave or be suspended and that his decision to take a leave of absence had been procured under duress.

7. Ten days later, having apparently taken some legal advice, the plaintiff sent an email to the director who had put him on leave, complaining about the decision and the manner in which it had been imposed and indicating his intention to present himself for work on Wednesday, 1st March. He asserted in that email that the reason given for placing him on leave, namely the protection of his own health and wellbeing and the fear that the stress of the publicity might cause him to reoffend thereby placing others at risk, were in effect spurious and that the true reason for the decision was the publication of the article in the Irish Independent on 16th February 2017.

8. The director of the defendant replied on 28th February, 2017, reminding the plaintiff that the investigation in 2006 had not been the only complaint in relation to his behaviour and advising him that should he present for work on 1st March, 2017, a formal suspension would be invoked. Following some further emails, an email was sent at 21.12 on 28th February, 2017, by the Head of Operations Seamus Lynam, who was deputising in the absence of the director. The email referred to the plaintiff's refusal to take leave of absence on full pay, and goes on to state:-

*"please therefore take this letter as formal notification of my decision to suspend you on full pay with immediate effect pending a review by the board of NMI of all HR matters. Please do not attend for work tomorrow as this is not permitted"*

The email goes on to set out the reasons for the plaintiff's suspension as follows:

*"As you are aware there has been adverse negative publicity about the NMI in the national media in the last number of weeks. In particular, and while you have not been named, the Irish Independent has published two articles which are directly related to you. I am also aware that you have been made aware of comments made on-line.*

*In light of their contents, I must consider what I believe is best both for you and all staff within the NMI. I have not taken this decision lightly, however, having read the investigation reports into the two allegations of sexual harassment made against you, I note that in the report prepared by [names of investigators] you indicated that your behaviour in and around this period was linked to stress and a level of depression. I have no doubt that the publication of these articles will by their very nature cause you stress and anxiety and therefore, I consider it necessary to suspend you in order to prevent a repetition of the conduct previously complained of and to protect individuals at risk from such conduct."*

During the first two weeks of March, there was detailed and extensive correspondence between the plaintiff's solicitors and the defendant's solicitors, during which time the plaintiff remained suspended on full pay. The board of the NMI met on 16th March, 2017, and amongst other HR matters the board considered the plaintiff's situation. The decision of the board was communicated to the plaintiff's solicitor by letter dated 20th March, 2017. The decision of the board was stated to be as follows:-

- (a) the Museum has resolved that it is necessary to conduct medical assessments of your client and that this should be done as quickly as possible;
- (b) during the period of these assessments, your client will remain on suspension on full pay and should not attend work;
- (c) these assessments will be supervised by a [named] forensic psychiatrist and a [named] clinical psychologist and dates for the relevant appointments were provided;
- (d) Please confirm that your client will attend and engage in these assessments and, where necessary will allow access by these medical specialists to his own medical advisors.

The plaintiff's solicitor expressed shock at this request and objected to any information about the plaintiff being provided to the named specialists. On 24th March, 2017, the defendant's solicitors sent to the plaintiff's solicitor the proposed letter of instruction which they intended to send to the named psychiatrist and psychologist in the letter they set out the background to the referral as follow:-

*" Background*

*1.1 Dr. Halpin was the subject of two independent investigations arising out of allegations of sexual harassment and inappropriate internet use in 2007 and 2016 respectively, where appropriate disciplinary sanctions were imposed.*

*1.2 There are no existing allegations against Dr. Halpin and there is no ongoing investigation in place.*

*1.3 On the 16th February, 2017, the Irish Independent published an article which referred anonymously to the 2006 investigation report into the complaints against Dr. Halpin. There has also been further national media coverage on this issue and on- line.*

*1.4 Having reviewed both independent investigation reports Mr. Ragnall O'Floinn, Director of the Museum , came to the conclusion that in light of the adverse negative publicity about Dr. Halpin in the national media and online and as he has cited stress as one of the reasons to explain his behaviour, these events were therefore more likely than not to cause him considerable stress thereby creating the potential to re-offend.*

*1.5 Dr. Halpin having initially agreed to take a leave of absence, Dr. Halpin was suspended on health and safety grounds.*

*1.6 The Museum held a board meeting on the 16th March, 2017, at which it resolved that it is necessary to conduct medical assessments of Dr. Halpin and that pending such assessments he will remain on suspension with full pay and will not attend for work.*

*Report*

*Following your assessment of Dr. Halpin, we would be grateful if you could prepare a report commenting on his current diagnosis and fitness for work. Please also include any other comments that you think are relevant."*

9. The plaintiff's solicitors rejected the entitlement of the defendant to require the plaintiff to submit to psychiatric and/or psychological assessment. On 4th April, 2017, plenary proceedings were issued in which the plaintiff sought nine declaratory reliefs, three injunctions and damages under ten headings.

10. In the context of this application for discovery it is important to set out the equitable reliefs claimed by the plaintiff they are as follows:-

- 1 A declaration that the suspension of the plaintiff is without lawful authority;
- 2 A declaration that the defendant is not entitled to require the plaintiff to undergo neuropsychological assessment by any clinical psychologist.
- 3 A declaration that the defendant is not entitled to require the plaintiff to undergo psychiatric assessment by a consultant psychiatrist.
- 4 A declaration that the defendant is not entitled to require the plaintiff to permit access to his own medical advisers by a

forensic psychologist and clinical psychologist nominated by the defendant.

5 A declaration that the plaintiff is an employee of the defendant in good standing.

6 A declaration that there are no extant allegations against the plaintiff arising in the course of his employment or otherwise.

7 A declaration that the defendant its servants or agents are not entitled to reopen disciplinary matters that have concluded.

8 A declaration that the plaintiff's personnel records as an officer or employee of the defendant are confidential and are not to be disclosed or referred to save for good and proper reason.

9 A declaration that the defendant his servants or agents have acted otherwise than in good faith in relation to its treatment of the plaintiff.

The plaintiff sought injunctive relief as follows:-

1 An injunction restraining the defendant his servants or agents from unlawfully suspending the plaintiff.

2 An injunction restraining the defendant from denying the plaintiff access to his work email.

3 An injunction restraining the defendant from requiring the plaintiff to attend either neuropsychological or psychiatric assessment.

A forty five paragraph statement of claim was delivered together with the plenary summons. A notice for particulars was raised by the defendant on 12th May and was answered by the plaintiff on 19th May. A defence was delivered by the defendant on the 13th day of July, 2017. In its defence the defendant denied that the decision to suspend the plaintiff was unlawful and specifically pleaded that:-

*"without prejudice to the generality of that denial that defendant said that the decision to request the plaintiff to take leave of absence and the subsequent decision that the plaintiff would be suspended on paid leave pending appropriate medical assessments was lawful by virtue inter alia of:*

*(a) the defendant's duties pursuant to health and safety legislation and in particular pursuant to s. 23 of the Safety, Health and Welfare at Work Act, 2005;*

*(b) the contractual and legal powers available to the defendant including by virtue of the power contained in s. 13(1)(b) of the Civil Service Regulations Act, 1956 (as Amended); and*

*(c) the implied power of the defendant contained in the contract of employment.*

The defendant particularised the basis for its plea in twenty two particulars listed in its defence.

## **Submissions**

11. The foregoing is the context in which the defendant now seeks discovery of

*"all documentation concerning, evidencing or relating to the plaintiff's mental health including but not limited to any of the following; stress; pressure; anxiety; depression; and counselling undergone by him including GP's and other clinicians consultation notes and reports and counselling notes to cover the period the 1st January, 2005 to date."*

The defendant submits that discovery of records relating to the plaintiff's mental health are relevant and necessary for the fair disposal of the proceedings and for the saving of costs. The defendant maintains that it is implicit in the plaintiff's case that the plaintiff contends that he is fit to attend work. The defendant submits that the plaintiff has clearly pleaded that there is no valid reason for the defendant to have suspended him. This is disputed by the defendant. The plaintiff has acknowledged that following the 2005 incident which apparently was investigated in 2006 he attended counselling with a named counsellor for a period of five years until 2011.

As a second limb of its application for discovery the defendant points to the fact that among the reliefs being sought by the plaintiff is a declaration that the defendant is not entitled to require the plaintiff to undergo psychological or psychiatric assessment. The defendant asserts that this documentation is relevant to the decision of the court of trial as to whether or not to grant such declaratory relief. The court notes that the plaintiff in addition to declaratory relief, is also seeking an injunction restraining the defendant its servants or agents from requiring the plaintiff to attend either neuropsychological or psychiatric assessment. The plaintiff's mental health history according to the defendant is relevant to the determination of the issue of the lawfulness of his suspension and to the determination of appropriate remedy.

12. The plaintiff vehemently opposes the defendant's application for discovery of his mental health records. The plaintiff's counsel characterised the application as a classic 'fishing expedition' in which the defendant was trawling for information in an attempt to justify the defendant's wrongful decisions of 17th February, 2017, 28th February, 2017 and 16th March, 2017. The plaintiff submits that those decisions must stand or fall on the basis of the information available to the defendant at the time the decisions were taken. In respect of the decisions of the 17th February, 2017 and the 28th February 2017 taken respectively by Ragnall O'Floinn and Seamus Lynam, the available information appears to have consisted of the materials gathered and the reports made, during the two investigations into inappropriate sexual behaviour, which took place in 2006 and 2016. It seems to the court that the board in making its decision on 16th of March 2017, may have had additional material before it, derived from the management report on all HR issues which had been requested by the board in January 2017.

13. It is however clear that at the time the three decisions which the plaintiff now seeks to impugn were taken, the decision makers were not aware of the existence nor the content of any medical or counselling notes touching on the plaintiff's mental health. The potential existence of such information came to light in the plaintiff's statement of claim where at paragraph 8 he pleaded that following the 2006 investigation, he had complied with a requirement to undergo counselling at his own expense. Asked for particulars of the counselling, he replied that he had attended a named counsellor from 2006 until approximately 2011.

14. It follows therefore that those counselling notes played no part in the decision of the 17th February to place the plaintiff on paid leave; the decision of the 28th February, 2017, to suspend the plaintiff, and the decision of the board on the 16th March to require him to submit to psychiatric and psychological assessment before lifting his suspension. It is in these circumstances that the plaintiff argues that the defendant's application is a classic fishing expedition to attempt to locate evidence which would provide an *ex post facto* justification for its actions.

### **Decision**

15. The court is satisfied that the medical records touching on the plaintiff's mental health are neither relevant to, nor necessary for, the fair disposal of the core issue in the claim to wit, the lawfulness of the plaintiff's suspension. In defending the plaintiff's claim the defendant will have to justify the actions taken on three specific dates by officers of the defendant and by the board of the defendant, based on the knowledge which each had at the time their respective decisions were taken.

16. That however, in the court's view does not conclude matters. In his pleadings, the plaintiff has sought equitable relief in the form of declarations and injunctions. In particular, the plaintiff seeks a perpetual injunction restraining the defendant from requiring him to submit to psychiatric and psychological evaluation. In the event that the defendants are unsuccessful in their defence of the plaintiff's claim that he is unlawfully suspended, the court of trial will be called upon to exercise its discretion as to the reliefs it will afford the plaintiff. Should that eventuality arise then it appears to this Court that the court of trial in determining the appropriate remedy should have available to it all of those documents relating to the plaintiff's mental health which are now sought by the defendant on discovery. In determining whether or not such injunctive relief should be granted, the court of trial, if only on the basis of the principle that *he who seeks equity must come with clean hands*, should have access to these medical mental health records. The challenge for the Court lies in ensuring that the medical mental health documentation is available if required, without giving the defendant a potentially unfair advantage in the conduct of the substantive action. To achieve this aim, the court pursuant to its inherent jurisdiction proposes to make the following order:

The court will direct the plaintiff to make discovery on oath of all documentation concerning, evidencing or relating to the plaintiff's mental health including but not limited to any of the following: stress; pressure; anxiety; depression and counselling undergone by him, including GP and other clinicians consultation notes and reports, counselling notes, to cover the period 1st January, 2005 to date. In addition the court directs that the plaintiff produce copies of all of the relevant notes discovered.

To ensure that the defendant will not obtain any unfair advantage by having sight of the discovery and the documents prior to the hearing, and to avoid the possibility that the defendant's evidence on the substantive issue might unwittingly be contaminated by having sight of the plaintiff's mental health history, the court directs that the affidavit of discovery and the documents produced are to be sealed and placed on the court file. In this way they will be available if required by the court of trial in respect solely of the issue of appropriate remedy. Depending on the outcome of the claim, the court of trial will decide the ultimate use to which these documents may be put. The court realises that this is an unusual form of order, but considers that it is one that is necessary and appropriate, for the fair disposal of the entire matter.