Neutral Citation No. IEHC 349

THE HIGH COURT
JUDICIAL REVIEW

2003 No. 295 JR

BETWEEN:

GEOFFREY O'DONOGHUE

APPLICANT

AND
SOUTH EASTERN HEALTH BOARD

RESPONDENT

Judgment delivered by Macken J. on the 5th day of September 2005

1. The Applicant holds the post of Consultant Chief Psychiatrist at St. Senan's Hospital in Co. Wexford and is the incumbent of a statutory office pursuant to the Health Act 1970 and is also Resident Officer under the Mental Health (Treatment) Act 1945 at the above hospital. The Respondent is a statutory body under the Health Act 1970 and is the employer of the Applicant under a Contract known as the Consultant's Common Contract (hereinafter "the Contract") regulated by Comhairle na nOspidéal. The Applicant lodged the within proceedings in the usual way on the 28th April 2003. On that date by order of this court (O'Donovan, J.) the Applicant was granted leave to issue judicial review proceedings in respect of the following reliefs:

(i) A Declaration that the purported decision of the Chief Executive Officer of the Respondent of the 8th April 2003 purporting to place the Applicant on administrative leave is without efficacy and *ultra vires*.

(ii) A Declaration that the purported decision of the Chief Executive Officer of the Respondent to place the Applicant upon administrative leave was not a bona fide exercise by the Respondent of its statutory powers and its obligations under the Consultant's Common Contract.

(iii) A Declaration that the Respondent was performing a quasi-judicial function in purporting to place the Applicant upon administrative leave and was accordingly required to act in accordance with the principles of natural and constitutional justice.

(iv) A Declaration that in purporting to place the Applicant on administrative leave, the Respondent has acted unreasonably, oppressively and arbitrarily.

(v) An Order of Certiorari quashing the purported decision of the Respondent to place the Applicant on administrative leave as embodied in a letter from the Chief Executive Officer of the Respondent to the Applicant on the the 8th of April 2003.

(vi) An Injunction restraining the Respondent, its servants or agents from proceeding with ort embarking upon or otherwise subjecting the Applicant to the purported decision to place the Applicant upon administrative leave.

(vii) An Injunction restraining the Respondent, its servants or agents from interfering with the lawful tenure of the Applicant as Consultant Chief Psychiatrist at St. Senan's Hospital, Enniscorthy, Co. Wexford.

(viii) A Declaration that the Applicant continues to be the lawful incumbent of the permanent and pensionable position and office as a Consultant Chief Psychiatrist at St. Senan's Hospital, Enniscorthy, Co. Wexford and is entitled to carry out all reasonable and lawful duties and responsibilities pertaining thereto without let or hindrance.

(ix) A Declaration that the treatment of the Applicant by the Respondent, its servants or agents, is and has been at all material times, unreasonable and in breach of Contract, in breach of duty (including breach of statutory duty) and in breach of natural and/or constitutional justice.

(x) A Declaration that the purported decision to place the Applicant upon administrative leave is in breach of the provisions of the Consultant's Common Contract, in breach of the provisions of the Health Act, 1970 and in breach of the Applicant's right to natural and constitutional justice.

(xi) A Declaration that the Respondent's Chief Executive Officer has formed or reached a pre-judgment that the Applicant has failed to comply with the terms of his appointment or that he has misconducted himself or presents a serious risk to the safety, health and welfare of patients or staff as would prevent a fair and independent investigation or consideration of the relevant issues.

(xii) Damages.

2. The grounds upon which the relief is sought are lengthy and extensive and I synopsise them as follows:

(a) In making the decision to place the Applicant on administrative leave the Respondent invalidly invoked and relief upon Clause 3 of Appendix IV of the Contract.

(b) Given the circumstances of the events leading to these proceedings, the above decision could not have been made on the basis that the Applicant's conduct posed an immediate risk to the safety, health or welfare of patients or staff. Further the Chief Executive Officer of the Respondent failed to place the Applicant upon immediate administrative leave and failed to conduct the required investigation with all practical speed as required.

(c) The procedure provided under Article 1 and not under Article 3 of the Contract is the applicable one where a Consultant is accused of conduct amounting to a failure to comply with the terms of his appointment or of misconduct. The Respondent did not comply with the provisions of Clause 1 by (i) failing to notify the Applicant in writing of the alleged concerns; (ii) failing to indicate the substance, basis or reasons for such concerns; (iii) failing to afford the Applicant a period of two weeks in which to make representations and (iv) by failing to give any or any adequate grounds or reasons for the decision or any adequate opportunity to respond to the allegations, or to consider properly the responses actually given.

(d) The Respondent took into account irrelevant considerations in making his decision and/or failed to take account of relevant considerations and the decision was based on matters which were not put to the Applicant.

(e) The opinion of the Chief Executive Officer of the Respondent that the Applicant posed an immediate and serious risk to the safety, health and welfare of patients or staff was not reached *bona fide*, was not reasonable or factually sustainable or credible.

(f) The Chief Executive Officer prejudged the consequences of the Applicant's alleged conduct and is therefore biased. There are accordingly good grounds for the Applicant to fear that this would prevent a fair and independent investigation process and/or decision.

(g) The decision to place the Applicant on administrative leave is an infringement of or alternatively an interference with the Applicant's right to earn a livelihood and with his good name and his right to natural and constitutional justice.

The factual background

3. As mentioned above the Applicant holds the position set out at the commencement of this judgment having been appointed in August 1992. Differences between the parties have arisen in the past. According to the materials before the court, the Applicant previously sought judicial review of a decision made to establish an investigation team to look into certain allegations against him. The Respondent apparently conceded or consented to an order being made in those proceedings in May 2002.

4. On or about the 28th April 2002 the Respondent set in train a process governed by Appendix IV of the Contract, which is entitled Disciplinary Procedures. The Applicant was furnished with seven appendices of complaint from nine complainants. He responded to these in June 2002. He was furnished with further submissions in respect of those complaints on the 12th October, the 25th October and the 12th November 2002 and responded to these on the 6th December 2002. Up to the date of the commencement of these proceedings he had received no further significant communication in respect of that investigation. Details of that investigation were invoked by the Respondent as a significant factor in these proceedings. It has furnished as part of its response to these proceedings a large number of affidavits from the several complainants in respect of matters arising in the course of that investigation. I will deal with this matter during the course of the judgment.

5. The Respondent's decision which is the subject of these present proceedings arises out of an incident which occurred on the 3rd January 2003. Briefly there has been a dispute in the hospital in relation to the allocation of non-consultant doctors, as between the Applicant, as Resident Medical Superintendent, and a Dr. Watters, as Clinical Tutor, as to who should have final responsibility for the allocation of such doctors. That dispute had been the subject of correspondence and references to professional bodies, but apparently the matter was not yet resolved. An incident then occurred in the interview room of a ward of the hospital on 3rd January. The Applicant contended that during this incident he was verbally abused, threatened, and physically manhandled by Dr. Watters in the presence of patients and staff.

6. The Applicant immediately made a formal written complaint in respect of this. He delivered this complaint to the hospital manager. It was in turn forwarded to the Regional Manager and thence to the Chief Executive Officer who thereupon appointed two persons by letter of the 6th January 2003 to investigate the incident and report back to him. The investigation was notified to the Applicant as being carried out under the terms and conditions of the Contract. The Applicant avers in one of several affidavits that the letter did not make clear what precise terms and conditions were being referred to, nor was he clear as to the precise nature of the investigation being carried out and he notified the Chief Executive Officer of this by letter dated the 14th January 2003. That letter also indicated he was prepared formally to withdraw a complaint in relation to the incident which he had also made to the Gardai, so as to enable the Respondent deal with the situation.

7. Dr. Watters submitted his position to the investigating team in a letter dated the 14th January 2003 and by a statement of the 21st January 2003 and on the same date the Applicant met with the investigators to put his position. In that regard the Applicant has drawn the court's attention to his own report of the interview which took place on that occasion and which states:

> "Our discussion revealed that the team were establishing the facts for the Chief Executive Officer under the disciplinary procedures of the Contract and that I was not the subject of any complaint".

8. That statement was not directly challenged by the Respondent in any of the several affidavits filed on its behalf. In the report of the investigating team dated the 21st February 2003 each of the complaints which the Applicant had made against Dr. Watters was considered and reported on.

9. In its report to the Respondent the investigation team states firstly, that the relevant comments complained of were made in a tense situation and did not constitute verbal abuse. It also concluded that it could find no evidence to support the allegation of any threat to the Applicant. As to the alleged physical assault or manhandling, it found that Dr. Watters did place his right hand on the Applicant's right elbow and ushered him through the doorway. The investigating team also recorded that one of the witnesses heard the Applicant put his to hands in the air and state "take your hands off me". It concluded that it was unable to find evidence to support an allegation that the Applicant was pushed, punched and manhandled through a doorway.

10. Shortly after receipt of the report, by letter from the Chief Executive Officer of the Respondent dated the 24th February 2003, the Respondent wrote to the Applicant invoking the findings of the investigation, and stating:

> "From the report of the investigation team I have reached the following decisions:
>
> Allegation No. 1 – that Dr. Watters verbally abused you on the morning of Friday, 3rd January 2003.
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> Decision: in the circumstances prevailing, the words directed to you by Dr. Watters did not constitute verbal abuse.
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> Allegation No. 2 – that Dr. Watters verbally threatened you with the words 'you are in trouble already and I will see to it that this gets you into further trouble'.
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> Decision: in the absence of any supporting evidence despite the presence of witnesses, on the balance of probability this did not occur.

Allegation No. 3 – that Dr. Watters physically assaulted you in the presence of patients and staff and more specifically that you were 'pushed, punched and manhandled' through the doorway, causing soft tissue bruising to your side.

Decision: you unquestionably sustained a soft tissue injury during the relevant time frame. However in the absence of any corroboration by the witnesses present at the time on the balance of probability this did not occur during the incident that took place in or around the interview room, St. Claire's Ward, St. Senan's Hospital, on 3rd January 2003.

I am satisfied that the allegations made by you are without foundation.

It appears to me that your conduct in bringing such a complaint presents an immediate and serious risk to health, safety and welfare of staff, Consultant Psychiatrists at St. Senan's Hospital, Enniscorthy. In accordance with paragraph 3 of Appendix IV of the Consultant Contract Document 1998 in these circumstances I am now obliged to consider requiring you to take immediate administrative with pay while this matter is investigated. Before considering such action I require your response within 72 hours to the question below:

Why did you take the actions you did on the morning of the 3rd January 2003 and subsequently make unfounded allegations against Dr. Watters?"

11. The report of the investigating team was sent to the Applicant by post by the Director of Human Resources on the 26th February 2003 and reached him on the 27th. The Applicant states that at the time he received this letter he was on certified sick leave from the hospital. The Applicant had, prior to the receipt of the report, responded to the above letter within the 72 hour period fixed, on the 26th February, 2003, in the following terms, in its relevant portion:

"You now propose to suspend me on pay because of my making the complaint. This is not only unfair but grotesque. I do not lightly make a complaint against a colleague. How can you have any basis to regard my complaint as malicious? Even on your own words there were 'prevailing circumstances'. You 'unquestionably' accept that I sustained an injury. Is it being suggested by you that I deliberately beat myself up to ground a complaint? If this is the case this is an extraordinary conclusion on your part. Please clarify.

In answer to your question, I made my complaint in absolute good faith and with the utmost personal reluctance. You enquire why I made unfounded allegations against Dr. Watters. I did not do so.

In conclusion I deeply regret that my suggestions of conciliation and mediation have been ignored and presumably rejected. Surely any reasonable employer would attempt to resolve these issues rather than now seek confrontation".

12. Subsequent correspondence was exchanged between the parties, some of which is incorrectly dated and therefore rather confusing in terms of sequence. In a letter of the 11th March, 2003, the Applicant had stated that in light of the fact that the Chief Executive Officer appeared to have already prejudged the Applicant's guilt, he was biased. At the conclusion of this exchange on the 8th April 2003 the Chief Executive Officer of the Respondent wrote to the Applicant and, again in its relevant portion, the letter states as follows:

"I note the matters raised by you in your letter dated 11th March 2003 and do not accept your contention of bias on my part. All matters are being dealt with in accordance with the Consultant Common Contract 1998 and the provisions of the Health Act 1970 and I can confirm that the health and safety of all of the staff in the South Eastern Health Board is a consideration for me.

Your letters dated 26th February 2003 and 11th March 2003 do not satisfactorily address the question I asked you to respond to. I require you to attend a meeting with me at 2 p.m. on Thursday, 17th April 2003 in Room 4 at SEHB Headquarters, Lacken, Dublin Road, Kilkenny. This meeting is part of my investigation into your actions on the morning of 3rd January 2003 as provided for at paragraphs 3 and 4 of Appendix IV of the Consultant Common Contract 1998 and is an opportunity for you to respond fully to the question I have put to you in my earlier correspondence. In particular I require an explanation of how your actions on 3rd January 2003 relate to your statutory obligations and the discharging of your proper responsibilities in the best interests of patients, staff and the proper management of St. Senan's as referred by you in your letter dated 11th March 2003.

…

With reference to my letters of 24th February 2003 and 7th March 2003 it appears to me that your conduct in bringing such a complaint presents an immediate and serious risk to the health, safety and welfare of staff being Consultant Psychiatrists at St. Senan's Hospital, Enniscorthy. In accordance with paragraph 3 of Appendix IV of the Consultant Common Contract 1998 I require you to take immediate administrative leave with pay for such time as may reasonably be necessary for the completion of my investigation into your conduct.

13. Against that background the Applicant commenced the within proceedings.

14. A Notice of Opposition was filed on behalf of the Respondent much later on the 24th October 2004. This Notice of Opposition is also lengthy and extensive, but in essence pleads:

(a) The invocation of Clause 3 of Appendix IV of the Contract by the Respondent was valid, lawful and *intra vires* in that:

(i) The Respondent's Chief Executive Officer was entitled to form the view that by reason of the Applicant's conduct there may be an immediate and serious risk to the safety, health and welfare of patients and staff so as to require that the Applicant be placed on administrative leave with pay until such time as might be reasonably necessary for the completion of an investigation into the Applicant's conduct.

(ii) The decision to place the Applicant on administrative leave was amply warranted and derived from the well grounded belief that the Applicant's conduct gave rise to immediate health and safety concerns on the part of his Consultant and other medical colleagues and that this decision was taken in accordance with the principles of

natural justice, the Respondent having received notice on the 22nd January 2003 from two Consultant Psychiatrists expressing concern about the adverse affect on their clinical judgment.

(iii) The Respondent also invoked an affidavit sworn on the Respondent's behalf on the 3rd June 2003 by a Doctor.

(b) In concluding that the Applicant be placed on administrative leave the Respondent's Chief Executive Officer did not confine himself to a consideration of the events of the 3rd January 2003 but also took into account letters dated the 22nd January 2003 from three Doctors, in somewhat similar terms, expressing concern about the Applicant and about the Applicant's imminent return to work in the hospital.

(c) The Applicant is not entitled to impugn the decision of the Chief Executive Officer to place him on administrative leave where the said decision was made *bona fide* and pursuant to receipt of serious complaints from personnel, which are confirmatory of an immediate and serious risk to the safety, health and welfare of patients and staff so as to necessitate the placing of the Applicant on administrative leave until such time as may be reasonably necessary for the completion of an investigation into the Applicant's conduct.

(d) The Respondent pleads that the Applicant had all allegations placed before him and was afforded every opportunity of responding to them. In that regard the Respondent points to the fact that the Applicant co-operated with the investigation conducted into the events of the 3rd January 2003 and is not entitled to impugn the same in these proceedings.

15. The Respondent also pleaded and claims that matters predating the 3rd January 2003 are relevant to any consideration of the Applicant's challenge to the Respondent's decision to place him on administrative leave, it being clear, it is said, that there are serious and longstanding difficulties in working relationships between the Applicant and certain consultant colleagues at the said hospital. The Respondent claims that there is evidence to suggest a complete breakdown in the Applicant's relations with those colleagues and a deterioration in staff morale at the hospital, with inevitable repercussions for patient care. In the premises, the Respondent pleads that the court should in the exercise of its discretion refuse the Applicant the relief which he seeks.

The Applicants' submissions

16. The Applicant makes several wide-ranging submissions. He submits that the letter of the 8th April is a legally flawed invocation of Clause 3 Appendix IV of the Contract. He argues that at the time he received this letter he was and remains on certified sick leave from the hospital and says that Clause 3 of the Contract is appropriate only where a consultant is on the Board's premises and needs to be removed forthwith to prevent an immediate danger. The clause is not for use in circumstances where there can be no rational basis for believing that the consultant poses such an immediate danger, as here, since the events of which complaint was made had occurred many weeks previously.

17. Further, the letter of the 8th April 2003 suggests that the Respondent considers that the Applicant has failed to comply with the terms of his appointment or that he has in some way misconducted himself. In such event, Clause 3 cannot apply, and the procedure set out at Clauses 1 and 4 of Appendix IV to the Consultant's Contract are the applicable ones. Clause 1 entitles him to be notified in writing of the reasons for concerns as to his conduct and to be given two weeks from notification in which to make representations. The letter gives him no indication of the basis upon which the Chief Executive Officer has concluded that the Applicant poses an immediate or serious risk to the safety, health or welfare of staff nor the source of basis for the concerns in relation to any alleged failure to comply with the terms of his Contract, or as to his conduct, even though the Applicant had sought clarification of the same.

18. The Applicant contends that the Chief Executive Officer has, on the contrary, now commenced a disciplinary procedure which invokes not only Clause 3 but also Clause 4 of the Appendix to the Contract of 1998 and the letter of the 8th April 2003 confirms that the procedure or investigation being invoked goes beyond that sanctioned by Clause 3 and represents a fundamentally different and more far reaching procedure, as governed by Clause 4 of the Appendix. The Applicant further submits that the Respondent has therefore failed to comply with the provisions of Clauses 1 and 4 of the Contract.

19. Further, the Applicant's natural and constitutional rights have been infringed or have not been guaranteed. In that regard the Applicant submits that the Respondent:

(a) Has failed to furnish any basis for his view that the Applicant poses an immediate and serious risk to the health or safety of staff or patients.

(b) Has failed to set out in what way the Applicant has not complied with his the terms of his Contract or has misconducted himself.

(c) Has obliged the Applicant to glean the substance of the Respondent's complaint against him from the correspondence, from which the only basis for the Respondent's view is either the incident itself which occurred on the 3rd January 2003, or the fact that the Applicant made and pursued a complaint about such incident which was ultimately not upheld.

20. The Applicant contends it was his clear understanding during the investigation of the incident on the 3rd January 2003 that he was not himself the subject of any complaint, but rather the investigation was into a complaint made by him against another person. Had he known that he was the subject of an investigation he would not have participated in a process which could conceivably have resulted in any sanction or any disciplinary process against him, without appropriate safeguards. There had been no formal complaint made against, him and no allegation notified to him to which he was requested to respond.

21. Further the Applicant argues that the question posed in the letter of the 24th February 2003 from the Chief Executive Officer of the Respondent presupposes the guilt of the Applicant because, it is alleged, the allegations concerning the incident on the 3rd January which he made against Dr. Watters are unfounded. No criticism of his behaviour on the 3rd January 2003 or of the fact that he made a complaint had ever been put to him by the Respondent. The correspondence on the other hand makes it clear that the Chief Executive Officer has unilaterally concluded that his actions on the 3rd January 2003 are to be criticised, that the allegations which he made are in fact unfounded, and that the very making of such allegations is itself a form of misconduct.

22. Further the Applicant says that the letter of the 8th April 2003 clearly shows that the Chief Executive Officer has already formed an opinion that the Applicant's conduct in bringing the complaint presents an immediate and serious risk to the health, safety and welfare of staff. In the circumstances the Applicant says that he has a reasonable fear that the Chief Executive Officer has already prejudged the issue against him and that further investigatory or disciplinary processes cannot be conducted fairly or independently.

23. Finally on this aspect of his case, he says the only matter of concern notified to the Applicant in the letter of the 24th February 2003 subsequent to the conclusion of the investigation and in the letter of the 8th April 2003 relates exclusively to the incident of the 3rd January 2003 and the alleged "unfounded allegations" made on foot thereof. However, in the Notice of Opposition and in affidavits sworn by the Chief Executive Officer, the Respondent now seeks also to invoke matters set out in letters from three consultants dated the 22nd January 2003. While copies of those letters were furnished to him, the Applicant argues they were never included within the scope of the investigation held into the 3rd January events. Nor were they stated to be of any relevance to that investigation, were not put to him as part of that investigation, nor did the investigation team make any findings in respect of the same. They were never stated to be of relevance to either the procedure invoked under Clause 3 nor to any contemplated (and so far un-notified) procedure under Clause 4 of Appendix IV of the Contract, nor are they mentioned in the Respondent's letters of the 24th February and the 8th April 2003. The only relevance they have, if any, is to the still ongoing investigations commenced in April 2002. The Applicant submits that an employer cannot turn around at the end of a procedure based on a complaint by A against B when the complaint is not upheld and proceed to treat that as the basis for an allegation against A on the same facts, or an allegation that the complaint was made maliciously when (i) A was at no time the subject of the complaint, and (ii) there was no allegation enquired into that the complaint was made maliciously.

24. The Applicant finally submits that there is no rational basis for the decision to place him on so called administrative leave, it appearing from the correspondence that the decision to do so is a precursor to the invocation of the procedures set out in Clause 4 of Appendix IV of the Contract. If he is placed on such leave in these circumstances it will inevitably and irreparably damage his career standing and reputation, as well as interfering with the office which he holds.

The Respondent's Submissions

25. The Respondent contends that its decision to place the Applicant onadministrative leave was a *bona fide* exercise of its powers and was made in accordance with the Contract and the powers vested in the Respondent under statute. Essentially the Respondent says that:

> (i) The placing of the Applicant on administrative leave was due to events which occurred after an investigation into a complaint made by the Applicant against a consultant colleague, which the Respondent held to be unfounded. The Applicant did not challenge that finding.
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> (ii) During the investigation of that complaint which concerns the matters arising on the 3rd January, 2003 concerns on the part of consultant colleagues came to light. The Applicant was furnished with copies of letters of the 22nd January 2003 from the doctors in question.
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> (iii) These letters contained serious allegations including in the case of one consultant that his position had been made virtually impossible due to the stressful and hostile atmosphere existing at the hospital. Furthermore according to the Respondent, Dr. Watter's letter alleged that the Applicant had "falsely accused him of assault".
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> (iv) Prior to considering what action if any to take against the Applicant, the Applicant was provided with an opportunity to respond.
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> (v) According to the Respondent, the position therefore was as follows:
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> > (a) The Applicant was apprised of all matters of concern, that is, the correspondence of Doctors Falvey, Gormley and Watters.
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> > (b) He was apprised of the conclusions of the said investigation.
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> > (c) He received additional correspondence from the Chief Executive Officer extending through February and into the month of March 2003.
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> > (d) He was given an opportunity to respond to the Chief Executive Officer, and
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> > (e) He failed to provide a satisfactory explanation for acting the way in which he did on the 3rd January 2003. The Respondent argues therefore that the Applicant was on full notice of all matters of concern and was afforded an opportunity to challenge or refute the same which he duly availed of. The Respondent submits that the disciplinary provisions of the Common Contract were adhered to in all respects and the Applicant participated fully in the investigative process and was afforded all his rights and entitlements in accordance with the dictates of natural justice. In the circumstances it contends that, pending a full investigation, the Applicant should not be permitted to return to his employment.

26. The Respondent also contends that the decision to place the Applicant on administrative leave was entirely reasonable. In that regard it invokes as a basis for its decision *inter alia*, the above two letters dated the 22nd January 2003 and the results of the investigation report. Therefore there is sufficient factual justification for the decision and the consultants in question have sworn affidavits in support of their complaints. In that regard the Respondent relies on the decision in the *State (Keegan) v The Stardust Victims Compensation Tribunal* (1986) I.R. 642, as applied in *Stroker v Doherty* (1991) 1 I.R. 23.

27. The Respondent in addition argues it had sufficient information upon which to make a decision, which decision was made bona fide. This contention is based on, *inter alia*, an affidavit sworn on behalf of the Respondent on the 3rd June 2003 in which a Dr. James Falvey deposed that there was a complete breakdown in relationships between the Applicant, Dr. Falvey and other consultant colleagues. The Respondent submits that Dr. Falvey's averments are confirmatory of a serious and continuing risk to patient welfare, care and management. The Respondent also relies on an affidavit sworn on behalf of the Respondent on the 4th June 2003 by Dr. Joan Daly in which she stated that she believed the Applicant's conduct poses an immediate and serious risk to staff health, safety and welfare "at this juncture". And the Respondent also relies on the affidavit of Dr. Watters which repeats what he had previously stated in putting the Respondent on notice of the serious situation which he alleged the Applicant has created and which Dr. Watters believed threatens the integrity of patient care and services in the hospital.

28. Apart from the foregoing the Respondent submits that the Chief Executive Officer had proceeded with due expedition and without delay. The Applicant had been absent from the hospital on sick leave and it was his intended imminent return which necessitated the Chief Executive Officer deciding to place the Applicant on administrative leave.

29. As to the question of Clause 3 of Appendix IV of the Contract, the Respondent submitted that it was entitled to invoke Clause 3 where the Applicant posed an imminent and serious risk to the safety, health and welfare of staff and patients, as deposed to in the affidavits sworn by Consultants in the hospital In support of its opposition to the claim, and apart from the affidavits sworn by the CEO, the Respondent also filed approximately nine affidavits from various parties averring to a series of matters arising prior to the 3rd January 2003 and which are the subject of the investigation mentioned at the commencement earlier which commenced in late April 2002. The affidavits in turn exhibited substantial quantities of additional material all concerning the same matters.

The Law

30. Since the decision of the Supreme Court in *Glover -v- BLN Limited* [1973] I.R. 388, it has been recognised that public policy and the dictates of constitutional justice require that statutes, regulations or agreements setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures, as is clear from the judgment of Walsh, J. in that case.

31. This principle applies also to an agreement regulating the relationship of an employer and employee, such as the Contract in the present case, following the decision of the Supreme Court in *Gunn -v- Bord an Cholaiste Naisisiunta Ealaine is Deartha* [1990] 2 I.R. 168, in which McCarthy, J. stated as follows:

> "Barrington J. in delivering judgment in the Supreme Court in *Mooney -v- An Post* on 20th March, 1997 stated:-
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> > "... But the purpose of the passages was to emphasise that the difference between employee and office holder was not the determining issue as to whether the principles of natural and constitutional justice applied. Certainly the Court appears to have gone out of its way to emphasise this point. It appears to me that what the Court was saying is that society is not divided into two classes one of whom - office holders - is entitled to the protection of the principles of natural and constitutional justice and the other of whom - employees - is not. Dismissal from one's employment for alleged misconduct with possible loss of pension rights and damage to one's good name, may, in modern society be disastrous for any citizen. These are circumstances in which any citizen, however humble, may be entitled to the protection of natural and constitutional justice".

32. Barrington J. also in that latter case, held that what the justice of a particular case will require may vary with the circumstances of the case, for example, in a case involving a contract of employment, whether it stipulates the procedure to be followed in dismissing an employee for misconduct or not. If no procedure is stipulated, the employee is entitled to the benefit of fair procedures but what these demand will depend upon the terms of his employment and the circumstances surrounding his proposed dismissal. The minimum an employee is entitled to, is to be informed of the charges against him and to be afforded an adequate opportunity to rebut or attempt to rebut them.

33. The extent to which an employer, in adjudicating on charges of misconduct against an employee, is constrained by the requirement to adhere to basic fairness of procedures was also considered by the Supreme Court in *Gallagher -v- The Revenue Commissioners* (No. 2) [1995] 1 I.R. 55., in which Hamilton, C.J. adopted the following passage from the judgment of Henchy J. in *Kiely -v- The Minister for Social Welfare* [1977] IR 267 at page 281:-

> "Tribunals exercising quasi-judicial functions are frequently allowed to act informally - to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures, and the like - but they may not act in such a way as to imperil a fair hearing or a fair result".

34. The matter was further considered in the case of *Maher v Irish Permanent Plc* (1998) I.R.302, in which the above jurisprudence was reviewed, and in which, the court found, *inter alia*, that having regard to the diverse nature of the allegations made and in particular having regard to the significance of credibility in determining whether the allegations in question were well founded, the Plaintiff was entitled to be furnished with copies of the statements made by the staff members in advance of the hearing, and was entitled to be legally represented at the hearing.

35. The obligations to provide for a fair hearing and the entitlement of an employee in the face of disciplinary investigations, were also considered in the case of *Aziz v Midland Health Board*, unreported, 29 October 1999, in which the Supreme Court, in a unanimous decision, stated as follows:

> "As has been repeatedly emphasised in recent decisions, judicial review is concerned not with the decision but with the decision making process: see judgment of Griffin J in this court in *The State (Keegan) v Stardust Compensation Tribunal* (1986) I.R. 612. As the trial judge pointed out, there was evidence before the defendants which beyond argument entitled them to reach the conclusion that, not merely had the plaintiff failed to comply with a proper instruction from the relevant consultant and failed to report for duty, but that the misconduct in question was of so serious a nature and so potentially damaging in its consequences to the patients of the hospital that it fully justified the termination of his contract of employment. The issue in the High Court and again in this court, however, was not as to whether there was sufficient evidence to justify such a conclusion but rather as to whether fair procedures had been adopted in arriving at that conclusion. The issue which the defendants, acting in a quasi-judicial capacity, had to resolve was whether the plaintiff was entitled to conclude that Dr. Taaffe was accepting his non-attendance on the Saturday morning because of the absence of SHO cover, pending a review of the matter by the hospital administration.
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> That case, however tenuous it might be, was one which the plaintiff was entitled to have considered by the defendants in accordance with accepted norms of natural justice and those norms were unfortunately not met … Given the clear conflict between the plaintiff and Dr. Taaffe as to what happened at the crucial meeting between them on the Friday, this failure to observe proper procedures could not, in my view, be disregarded.
>
> As I must again emphasise, the fact that there was ample evidence to justify the conclusion by the CEO that not merely had the misconduct been established but that it was of sufficient seriousness to warrant the plaintiff's dismissal, did not absolve the defendants in a matter of this gravity from adhering scrupulously to fair procedures."

36. The same approach is also evident from the judgment of Kearns, J. in the case of *McNamara v South Western Area Health Board*, unreported 16 February, 2001, which concerned a consultant orthodontist, and a decision by the respondent to suspend her, although in that case it was without pay, so as to enable the respondent enquire into the applicant's alleged misconduct in the course of her employment, in circumstances where the applicant was in serious disagreement with her consultant colleagues..

37. The respondent in that case had argued, as here, that there was no obligation to provide an opportunity to the applicant to make

representations prior to her suspension, as it did not involve any finding or determination, nor did it amount to a sanction. It was simply the first step in a process and the Court should not intervene when the respondents were following agreed procedures. In that regard the respondent had invoked, as here, the decision in the case of *Deegan v Minister for Finance* and, also as here, the respondent had argued that the applicant was well aware of the matters likely to give rise to her suspension, and the suspension was nothing more than a holding operation, rather than a sanction. Given that the applicant had been furnished with the reasons for the decision, her only entitlement was to make representations at a later stage.

38. Against that background, Kearns, J. held as follows, so far as may be relevant to the issues arising in these proceedings:

> "I can under the force of [the respondents] submission that the question of suspension should not be looked at in isolation. However, the fact that statutory procedures exist does not absolve the respondent from the obligation to discharge those responsibilities, at any and every stage in the process, in a fair, responsible and reasonable manner.
>
> An allegation of misconduct against a senior consultant is a serious matter. .. Nothing in the ongoing dispute between the parties suggest the applicant was "unfit" in the performance of her duties.
>
> Whether a suspension invokes fair procedures or not seems to me to hinge entirely on the gravity of the reasons for the suspension, the implications for the person concerned and the likely consequences following suspension. Obviously, there can be decisions with adverse implications for the person affected thereby which nonetheless fall short of infringing their legal rights. In Murtagh -v- Bord of Management of St. Emer's National School (1991) 1 I.R.P. 482, the Supreme Court found that a three day suspension of a pupil from a National School was an ordinary application of disciplinary procedures inherent in the school authorities which did not involve an adjudication or determination of rights and liabilities and therefore the remedy of certiorari did not lie. Hederman
>
> J stated (at p.488):-
>
> > 'A three day suspension from a National School either by the Principal or by the Board of Management of that school is not a matter for judicial review. It is not an adjudication on or determination of any rights, or the imposing of any liability. It is simply the application of ordinary disciplinary procedures inherent in the school authorities and granted to them by the parents who have entrusted the pupil to the school.'
>
> That situation can only be seen as being in total contrast with the situation in the instant case. Here the suspension was open ended and non-specific in duration. It seems to me that the suspension of a Senior Consultant without pay must be seen as something more than the mere 'holding operation' contended for by Mr. Stewart. It is, in my view, a sanction, and a severe one at that, which can only have damaging implications for any professional person in the Applicants position. This is even more so the case where the suspension is a second suspension, suggesting as it must that events are inexorably moving towards the possible removal of the Applicant.
>
> While the right to make representations is reserved under the 1971 Regulations to the stage of proposed removal from office, a suggestion of misconduct convinces me that the Chief Executive Officer should at least have before him some statement of the Applicants position on the matters in issue before proceeding to suspend.
>
> At the time of forming his opinion, the Chief Executive Officer did not have before him the detailed report furnished by the Applicant on the 15th of September.
>
> Much more significantly, he did not have before him any response of any sort from the Applicant in relation to the suggestion that she was fobbing off patients and suggesting they seek appointments from those effectively charged with administrative duties, the very behaviour which provided the basis for the finding or charge of misconduct on the part of the Applicant.
>
> The letter furnished by Mr. McMahon on the 19th of September can only, it seems to me be construed as containing findings or charges prejudicial to the Applicant to such a degree that a suspension should only have been made after Mr. Donnelly had some up to date account of both sides of the case on those issues before him. While arguably the lengthy correspondence and reports submitted from time to time by the Applicant may have being known in a general way by Mr. Donnelly, they did not address all of the issues, notably the third reason given for suspension. Specifically, he did not have her report of the 15th September, 2000, which attempted to address the other issues.
>
> Mr. Stewart seeks to meet this difficulty by stating that the Applicant's other reports did not adequately deal with the fundamental issues in respect of which the Respondents required reassurance. I would have thought that that constituted an even stronger reason for seeking some clarification from the Applicant before proceeding to make the determination which was in fact made."

Application of the Law to the Facts : Conclusions

39. I have great sympathy for both parties in these proceedings, particularly in light of the fact that there is a lengthy pre-existing investigation taking place, there were already been proceedings commenced by the Applicant and terminated in 2002, and it is clear that there is a real and serious dispute in existence at the hospital, not yet resolved, in which many parties are affected. It is equally unfortunate that matters should lead to the type of incident which occurred in January 2003. Nevertheless, even if there are difficulties of the type mentioned, the Respondent is bound by the principles of natural justice and fair procedures in dealing with such issues. It is clear here, as it was in the case of McNamara, that an allegation of the type made against the applicant in these proceedings, whether it be classified as misconduct, as he says, or as conduct which threatens the health and safety of patients or staff, is an extremely serious matter, and especially so for a person holding the position of the applicant, which includes a statutory office.

40. Although there are large numbers of reliefs sought, for certiorari and declarations, and equally a lengthy Notice of Opposition, and although the affidavits are numerous, extensive and repetitive, there are essentially only two main issues between the parties. Firstly an issue arises as to the basis for the decision to place the Applicant on leave, and secondly there is a question as to the relationship between Clause 3 and Clause 1 of the Contract, and whether Clause I should apply to any enquiry or investigation to be carried out under Clause 3.

41. As to the first question, the major matter which has to be resolved is whether, in the circumstances which arise, the Applicant was fully aware of the basis for the action proposed, namely the suspension, or the investigation, and the second is as to the precise nature of what was being proposed or decided. The second of these really is the starting point. There is a clear dispute between the parties, evident from the affidavits, as to what the Chief Executive Officer was deciding, and even what precise action was under way from the date of the first letter of the 24th February 2003 from him to the Applicant.. According to the Applicant what was taking place was disciplinary action following on from an investigation arising out of the events which occurred on the 3rd January 2003, and therefore the Respondent is embarking on a process which includes the disciplinary sanctions provided for under Clause 4 of the Appendix.

42. The Respondent refutes this by putting forward two propositions, which in my view are somewhat contradictory. Firstly the Respondent says that what is in fact occurring is that the Applicant is simply being placed on administrative leave with pay, so that Chief Executive Officer could investigate the matter, he being of the opinion that the Applicant poses a threat to the safety of staff. On that basis, it is simply the starting point for a fresh investigation, and not a continuing part of the investigation which had commenced on the 6th January 2003. The proposed meeting for the 17th April 2003 was part of that investigation and was intended to give the Applicant an opportunity to make such representation as he wished, and therefore the present application is premature. But for the interruption by the applicant of the investigation, the matter would have been disposed of in the ordinary way.

43. Secondly, however, the Respondent says that the investigation is one also arising from the concerns expressed by consultants in letters of the 23rd January 2003 already referred to, and that in light of the imminent return of the Applicant to the hospital from a period of certified sick leave, the Respondent took the view, bona fide, that it was in the interest of the safety and health of staff to place the Applicant on administrative leave with pay, pursuant to Clause III of the Contract. The Respondent, in affidavits, has stated that those letters contain very serious allegations against the Applicant, and in the case of one consultant, Dr. Watters, also contained an allegation that the Applicant had "falsely assaulted him".

44. A further matter is put forward by the Respondent in the letter of the 24th February, 2003, namely that, at the conclusion of the Report of the Investigation Team into the incident which occurred on the 3rd January 2003, the Chief Executive Officer made a decision that the complaints of the Applicant, the subject of the Investigation, were unfounded, he was in the course of considering the suspension of the Applicant, and therefore entitled to invite the Applicant to the proposed meeting of the 17th April to hear any representations "before considering such action." I understand that phrase to mean the action of suspending the Applicant.

45. In the Notice of Opposition and also in the affidavits, it is pleaded and averred to that the Applicant had full notice of the fact that the investigation was one based on a combination of the decision arising from the Investigation commenced on the 6th January and the letters from the consultants of the 23rd January, 2003, that the Applicant had fully participated in the investigation, and therefore had a full opportunity to be heard, and the Applicant had duly taken advantage of that procedure.

46. It is not easy to glean from these various arguments and submissions made on the part of the Respondent, the precise process which the Respondent was carrying out. If the decision being taken was one following on from the investigator's report and the proposed decision to suspend as indicated in the letter of the 24th February to the Applicant, then it appeared to be part of the decision making process of that investigation, and would ordinarily constitute the commencement of possible sanction. The position in the letter of the 8th April is slightly different. It states that the meeting is part of an investigation into unfounded allegations arising from the investigation into the January 2003 incident. Separately, it requires the Applicant to take administrative leave with pay.

47. If one looks however at that investigation, it will be seen that the Respondent correctly set this in train by appointing an investigation team, by fixing appropriate terms of reference, by allowing the investigation team to carry out its work independently in the usual way, and by their reporting the outcome of the investigation, also in the usual way.

48. The investigation team was appointed by the Chief Executive Officer of the Respondent by letter dated the 6th January 2003, in response to an incident which occurred on the 3rd January 2003 and in respect of which the Applicant made a complaint.

49. In case there was any doubt about what precisely the investigating team's remit was, it is of assistance to consider the letter sent to the Chief Executive Officer by Mr Finnegan, Regional Manager of the Respondent on the 3rd January 2003. This letter enclosed respective letters received from Dr. Watters and Dr. O'Donoghue in respect of which they make allegations and counter-allegations against each other and he draws attention to the fact that the difficulty arises from the allocation of junior hospital doctors. He proposed to refer that matter to the College of Psychiatrists "as in the first instance it is a training matter and I will obtain their views". My understanding of that letter is that the allegations and the counter-allegations concerning the allocation of junior hospital doctors was being dealt with by Mr Finnegan at least on a preliminary basis to a request for advices from the College of Psychiatrists. The letter continues however:

> "The more serious issue however is referred to in Dr. O'Donoghue's letter of 03/01/03 which he handed to Mrs Jeanne Hendrick, Hospital Manager. St. Senan's Hospital, on the morning of 03/01/03. In it he makes allegations against Dr. Watters as being mentally abused and physically assaulted in the presence of other staff and patients in St. Claire's Ward on the morning of 3rd January. Dr. Watters in his letter re the same incident complains of Dr. O'Donoghue being irrational and discussing an issue, which was not appropriate to the time or place. Mrs Hendrick also obtained two statements from two junior doctors who were present at the time of the incident and I enclose copies of both statements. There was a staff nurse present also at the time and I am endeavouring to have a statement received from this nurse. Because of the seriousness of the incident I recommend that an immediate investigation be carried out as I am seriously concerned that this incident will make the governance of St. Senan's even more difficult than it is at present".

50. When read in conjunction with the report of the investigation team it is obvious that what the investigation team was considering were the specific complaints of Dr. O'Donoghue against Dr. Watters. In the report itself under the title "Background" there is a background note of the dispute concerning the allocation of doctors and the report continues under the title "Complaint" as follows:

> "A complaint was made by Dr. Geoffrey O'Donoghue, RMS to the CEO dated 3rd January 2003. In his letter of complaint Dr. O'Donoghue alleges the following:
>
> · Dr. Liam Watters verbally abused him on the morning of Friday, January 3rd 2003.
>
> · That Dr. Liam Watters physically assaulted him in the presence of other staff and patients in St. Claire's on the morning of Friday, January 3rd.
>
> · In a subsequent letter to the CEO on 14th January Dr. O'Donoghue provided further details of the incident in which

he further alleges that Dr. Watters verbally abused him, issued verbal threats to Dr. O'Donoghue and punched, pushed and manhandled him through the doorway. The allegations are strenuously denied by Dr. Watters".

51. The report then continues by analysing the complaints and considering the witness statements under the three specific allegations, and it comes to a brief conclusion in relation to each separate allegation. No other allegation of any description is mentioned in the report, and so I conclude that although in his letter to the Chief Executive Officer of the 3rd January, Mr Finnegan mentioned that "Dr. Watters in his letter re the same incident complains of Dr O'Donoghue being irrational and discussing an issue which was not appropriate at the time of place", this did not constitute part of the investigating team's formal investigation. The report of the investigating team dated the 21st February 2003 was duly sent to the Chief Executive Officer of the Respondent. None of the three complaints made by the Applicant was considered to have been established. What appears to have been going on at that stage was part of the decision making process on that investigation, and hence a possible sanction.

52. But if as the respondent says the basis for the proposed suspension and the decision actually to suspend, includes the content of the complaints in the letters of the 22nd January 2003 if they be classified as complaints against him, this does not arise out of the investigation carried out into the 3rd January incident, but is something either entirely new, or alternatively forms part of the earlier investigation commenced in April 2002. I am satisfied on balance that what was being considered was a fresh investigation, not part of the sanctioning process

53. Nowhere in the correspondence leading up to the investigation commenced on the 6th January 2003 and nowhere in the investigation team's report and nowhere in the letters addressed to the Applicant either on the 24th February nor the 8 April 2003 is there any indication or even any implied suggestion that the decision proposed and eventually taken concerning the Applicant, arose out of a basis other than the 3rd January incident and the findings on that emanating from the investigation team, and certainly no reference at all is made to the content of or the allegations contained in the letters from the consultants..

54. I am quite satisfied that the Respondent is, of course, entitled to suspend the Applicant pursuant to the terms of the Contract, in the event the Respondent *bona fide* believes, on reasonable grounds, that the safety of the staff or of patients is threatened. It is clear from the jurisprudence, however, and is self evident, that such a step is a draconian one. It is for this reason that the courts have stated, with clarity, that a short term suspension, even without pay, may be imposed, provided that the appropriate procedures are adopted and that any investigation is carried out with suitable speed, depending on the circumstances of each individual case. In such a case, the suspension is truly of a holding nature, and an example is found of a short three day suspension in the jurisprudence cited above.

55. In the present case, as in the case of McNamara, supra., however, the suspension is open ended, with no time frame indicated, and it might well be of considerable length, even if intended to be reasonably speedy. I am fortified in my view that it might be of considerable length, having regard to the fact that the investigation commenced in April 2002 had not yet terminated in April 2003.

56. The jurisprudence of this court and of The Supreme Court makes it equally clear that in such serious circumstance, the party affected is entitled to know why he is being suspended, and to know this with some particularity. Having regard to the position held by the Applicant, both pursuant to the Contract, and pursuant to statute, it does not seem to me that a suspension with pay is any less serious, onerous or potentially damaging than one without pay, and I apply the jurisprudence without regard to that distinction. He is also entitled, in the event of a threatened investigation, to have proper notice of the complaints being made against him.

57. I deal first with the scenario proposed by the Respondent, which proceeds on the assumption that there was to be an investigation, and that the Applicant was being invited to make representations at the meeting proposed for the 17th April, 2003. His constitutional right to a fair hearing was not met when he did not have any prior notification of the substance or basis for the complaints being laid against him, if it was to include, as admitted, the allegations contained in the letters received on the 22nd January 2003. That is not to say that those letters could only be used in the context of the pre existing investigation commenced in 2002, as contended for by the Applicant. I am not satisfied that the Respondent, as the managers of the hospital in question, ought to be restricted in adopting decisions which best ensure the health and safety of both staff and patients, and therefore they ought not be stymied in that regard, provided the decision is made bona fide and on appropriate grounds. As to whether that decision can be made under Clause 3, or only under Clause 1, as contended for by the Applicant, I will deal with the arguments on that issue separately, since it applies equally to both bases contended for by the Respondent.

58. Nor do I accept that the Applicant is entitled to a finding that the Respondent did not act bona fide, in so far as this alternative basis for the suspension is concerned. The Chief Executive Officer had letters containing serious concerns expressed by highly qualified and presumably competent personnel – as is the Applicant also – which gave the Respondent very serious cause for concern. Those letters had been furnished to the Applicant, and he would have appreciated their content. I am not concerned here to know whether they were justifiable concerns.

59. What is essential is to ensure that the caveat which the law obliges an employer to guarantee, namely that the Applicant be on full notice of the nature of any investigation being carried out, and has been informed of the allegations which he has to meet. In the case of suspension, as here, the Applicant was also entitled to know the basis upon which the Respondent was seeking to suspend him. Whether he was being invited to make his case as to why he should not be suspended, or whether he was being invited to meet an investigation which the Chief Executive Officer was to carry out, in either case he was entitled to be informed, as above, and to make an informed decision or submission in that regard.

60. I am satisfied that, although the Respondent was entitled, in this alternative scenario, to consider suspending the Applicant, or actually to suspend, and/or carry out an investigation, it was only entitled to do so, on the Applicant having full information on the same and a proper opportunity of being heard. This was certainly not the case here, and his legal rights were thereby infringed.

61. I return now to the first possible basis for the suspension.

62. As is clear from the decisions in *McNamara*, supra., and *Aziz*, that even if there is considerable concern on the part of the Respondent as to the actions of a person who has made a complaint, nevertheless, the Applicant is entitled to know, with precision, was is being alleged against him, and the basis upon which it is being alleged. The respondent is not entitled to say, as it does, that the applicant was fully aware of the nature of the allegations which were to be the subject of the proposed investigation, unless this is in reality the case. As to the letter written on the 24th February 2003, upon receipt of the investigation report, while it is not for this court to indicate how the respondent should frame an allegation against a party, it might be appropriate to revisit the question posed, since it is clear from the letter written by the applicant on the 26th February 2003 that the basis for the claim that the allegation was unfounded is not evident from the letter.

63. I agree with the Applicant. Here the investigation team found that the three complaints of the applicant had not been established. That situation could well arise in the event the allegations were brought by the Applicant, fairly and *bona fide*, or in the contrary circumstances, namely without any foundation or maliciously. In the circumstances in which it was being contended that the complaints were unfounded or brought maliciously, it was essential for the Respondent to set out for the Applicant, who was being threatened with suspension, and was being invited to make submissions, what the precise basis is for the contention that the allegations were not in fact made *bona fide*, or were made maliciously or were without foundation. Having regard to the decision of the Respondent, in particular in respect of the third complaint of assault, which, *inter alia*, forms part of the basis for the investigation, and which appears to suggest that the claimed injuries may have been sustained in circumstances separate altogether from the events on the 3rd January, 2003, although claimed to have arisen from them, it would be even more important that the basis for the contention that the complaint was brought without foundation, be furnished. Given the nature of the allegation that the assault claim was without foundation, which, apart from an allegation of professional negligence, is about as serious an allegation as could be made against any person in the position of the Applicant, it was necessary that the Applicant should know the precise basis upon which this was being suggested. A simple question inviting the applicant to explain why he brought unfounded allegations does not meet the requirement that the applicant be made aware of the basis for the proposed suspension, and the reasons for the same. I also agree with the Applicant that the letter of the 24th February makes it clear that the Respondent took the view that the Applicant had (a) made unfounded allegations, and (b) that they were made maliciously. Now it is not clear on its face what is meant by "unfounded" in the context in which it was used. Ordinarily that word could apply to a complaint which was simply not sustained or not proven, but nevertheless which was made in good faith. But the most natural meaning to be attached to it in the present case is adverse to the applicant, that is to say, that there was no justification whatsoever for bringing the complaint in the first place. The Applicant had sought clarification in his letter of the 26th February, although not, it must be said, with great clarify, as to the basis for suggesting the complaints were unfounded, and more particularly as to basis upon which it was the opinion of the Chief Executive Officer that the injuries claimed by him to have occurred during the 3rd January, were allegedly not sustained as part of the incident, and were therefore unfounded and malicious. He may have been correct or not. As was quite clearly pointed out by The Supreme Court in *Aziz*, supra., the Court is concerned, in judicial review proceedings, not with the merits or otherwise of the Respondent's contention against the Applicant, but with whether or not correct procedures have been followed.

64. I am not satisfied, however, that the Applicant has made out a case that due to bias, there can be no proper or impartial investigation, as such an investigation can well be established in circumstances which permit full impartiality.

65. The same situation arises in connection with the Respondent's contention that the investigation is to be based also on the content of the letter from the consultants and what the Chief Executive Officer calls the "serious allegations" contained in those letters. While the letters were furnished to the Applicant, it is not clear what the precise complaints being made against the Applicant are which, in the Chief Executive Officer's opinion represent misconduct on the part of the Applicant or a breach of the terms of his contract.

66. In the foregoing circumstances, whether one accepts the first of the Respondent's contentions, that is to say, that what was occurring was part of the decision stage following on from the investigation carried out into the events which occurred on the 3rd January 2003, or the alternative scenario proposed, namely that it concerned the letters received from consultant colleagues on the 22nd January, 2003, or even a combination of both, as is also contended, the Respondent was obliged to ensure that the decision to suspend the Applicant and the investigation, whether ongoing or prospective, complied with the constitutional requirements as to a fair hearing. It did not so comply with that obligation when (a) the Applicant was not informed of the basis, or one of the key bases, for the possible suspension and the subsequent decision actually taken to suspend him, or of the investigation which the Respondent was carrying out or was proposing, (b) had no prior indication that the same was to form such a basis, and therefore could not have been expected to meet such a case, and/or (c) when the Applicant sought to have clarification of the basis for the proposed decision to suspend, in his letter of the 24th February and was not furnished with the same, or any clarification.

67. As to the second of the two main grounds upon which the Applicant brought his application, he argued that the Respondent was not entitled in any event to proceed pursuant to Clause 3 of the Contract, as this was a clause which only applies in circumstances, in effect, of emergency, where there was a real threat to patients in the hospital, and where the applicant was on the hospital premises, and that only Clause 1 provides for an investigation into misconduct or a failure to comply with the terms of employment.

68. Clause 3 reads as follows:

> "Where it appears to the … Chief Executive Officer … of a hospital or other health agency or his authorised representative, that by reason of the conduct of a consultant there may be an immediate and serious risk to the safety, health or welfare of patients or staff the consultant may apply for or may be required and shall, if so required, take immediate administrative leave with pay for such time as may reasonably be necessary for the completion of any investigation into the conduct of the consultant *in accordance with the provisions hereof*. This investigation should take place with all practicable speed. …" (emphasis added).

69. It is the inclusion of the underlined phrase which the Applicant invokes to argue that the investigation must be one pursuant to Clause 1. I accept that the wording of Clause 3 is not one marked by great clarity, speaking, as it does of "any investigation into the conduct of the consultant in accordance with the provisions hereof." and which the Applicant contends means an investigation pursuant to Clause 1.

70. The Respondent submits that Clause 3 is a stand alone clause, that it is wholly applicable in the present circumstances, and that there is no reason why it should be considered as associated or dependent in any way on an investigation under Clause 1. As such a stand alone clause, it is intended to deal with a situation in which the Respondent must be entitled to take immediate steps to protect the health and safety of staff and patients. Nor is it the case that in the event Clause 3 is invoked, the only investigation which is permitted is one which is governed by the provisions of Clause 1. It is not necessary for me to go into the extensive arguments made by one or other party on this issue. The dispute between them as to the correct interpretation is clear.

71. On that aspect of the matter, Appendix IV of the Contract appears to provide a very specific set of procedures to be adopted under Clause 1, and that clause is clearly applicable in case an allegation of misconduct or failure to comply with the terms of a contract is alleged. It does not follow, of course that because certain behaviour or a set of events can be classified as being a breach of contract or a form of misconduct, the suspension provisions of Clause 3 cannot apply, in the event there is a risk to the health and safety of staff or patients. To that extent therefore, Clause 3 is independent of Clause 1. However, while the suspension can take place exclusively pursuant to Clause 3, the only form of investigation provided for in Appendix IV covering the conduct of a consultant or his failure to comply with terms of his contract, is in fact that provided for under Clause 1. There is no other. It is true that another form of investigation or examination of a matter is provided for under Clause 4, in certain very specific circumstances which apply, by analogy, to certain provisions of the Health Act 1970. However that certainly does not apply to the circumstances in

the present case. Clause 1 reads as follows:

> "Where:
>
> (a) …
>
> Or
>
> (b) The Chief Executive Officer, … of a hospital … hereinafter called "the appropriate person",is concerned that a consultant may have failed to comply with any of the terms of his appointment or may have otherwise misconducted himself in relation to his appointment, he shall notify the consultant in writing of the reasons for such concerns and inform him that any representations in regard to the matter may be received by the Chief Executive Officer or the appropriate person, as the case may be, from the consultant within two weeks of the issue of the notification and will be considered."

72. Mr. Stewart sought to get around the difficulty flowing from the clear use of the phrase "for the completion of any investigation into the conduct of the consultant in accordance with the provisions hereof" in Clause 3 by suggesting that the "conduct" in question referred to in Clause 3 of Appendix IV is not the conduct which is caught by Clause 1, in that it is not necessarily improper or incorrect conduct of a consultant which is being considered. In the context of the present proceedings, there is absolutely no doubt but that the conduct which is being complained of, whether arising as a result of the decision of the Chief Executive Officer following on from the investigation commenced on the 6th January 2003, or the content of the letters received from the consultants, can only be classified as being adverse conduct on the part of the Applicant, and therefore "misconduct" as referred to in Clause 1.. Moreover, the correspondence from the Chief Executive Officer specifically indicates that the applicant's ability to comply with the terms of his contract is being put in issue.

73. Whereas an interpretation proposed by the Applicant would have an effect of limiting by a considerable degree the power of the Respondent to deal with events which, while constituting misconduct and/or a breach of contract, also have an adverse effect on the health and safety of patients or staff, to protect the integrity of patient care even, and to dispose of a problem more speedily than would clearly be the case in the event of an investigation under Clause 1, nevertheless I do not accept Mr. Stewart's contention that the conduct referred to in Clause 3, at least in the present case, is anything other than misconduct within the meaning of Clause 1. I have to assume that when the Contract was being negotiated, if it was intended that an investigation into the conduct of a consultant could be carried out either under Clause 1, with all the procedures which that entails, or in the case of the safety of staff or patients, by means of a different unspecified investigation, without conditions, as to time or otherwise, the parties would have provided for that.

74. Although somewhat reluctantly, I find that on a correct interpretation of Appendix IV, the only investigation provided for covering the conduct of an applicant or his failure to comply with any of the terms of his appointment in the circumstances of the present case, is that provided for under Clause 1.

75. But even if I am wrong in interpretation of Clause 3 of Appendix IV, and an investigation, of an unspecified nature is permitted, into the conduct, including misconduct of the Applicant, or into his alleged failure to comply with the terms and conditions of his Contract, nevertheless such an investigation is still subject to the caveats contained in the jurisprudence. While the Clause therefore would give a right to suspend, that suspension and any investigation proposed must comply with the rules relating to a fair hearing, and I am satisfied that the rights of the Applicant have not been met, for the same reasons which I have set out above. I have already found that in the present case, the constitutional right of the Applicant to a fair hearing was not complied with

76. I draw attention finally to the large bundle of documents in the form of affidavits and copious exhibits furnished in the course of these proceedings on behalf of the Respondent concerning the pre existing situation, and the matters which are part of the on going investigation commenced in 2002. These materials were not really of assistance to the court, and indeed might comfortably have been dispensed with. It was said on behalf of the Respondent that they were filed so that the court would understand the nature of the ongoing dispute between the Respondent and the Applicant and the several complaints which have been made. I do not doubt but that was the intention. However I did not read these affidavits. It seems to me it would be quite wrong for the court to embark on so doing, when that investigation is mid stream, so to speak, in case the court should inadvertently stray into an area which is the remit of other parties, or express a view in relation to the same which might be understood by one or other party as having some influence over the outcome of the investigation. I mention the foregoing to explain why I have not considered these affidavits and the materials contained in them in the course of this judgment.

77. There were several subsidiary arguments raised by the Applicant or by the Respondent. I do not consider it helpful or necessary to consider these further, in light of my findings on the above two main and substantive issues. Having regard to my findings, I will make an order quashing the decision of the 8th April 2003 made by the Respondent suspending the Applicant with pay, and will hear the parties on the precise form of order which should be made, or any subsidiary or consequential orders required in the circumstances.

78. I express the view that it would be in the interest of all parties that the pre existing investigation, if not already terminated, ought to be brought to a conclusion within the earliest possible timeframe, for the benefit of all parties, as well as the patients at the hospital.