Neutral Citation Number: [2008] IEHC 234

THE HIGH COURT

2008 No. 1845 P

BETWEEN

SHAFIQ KHAN

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT

Judgment of Mr. Justice McMahon delivered on the 11th day of July, 2008

Introduction

1. The plaintiff is a temporary locum consultant psychiatrist with the Health Service Executive, North Eastern area pursuant to a contract of appointment dated the 2nd August, 2005 and renewed from time to time continuously. The plaintiff was born and educated in Pakistan and came to Ireland in 1996. He is married with four children and has Irish citizenship. He became a member of the Royal College of Psychiatrists in December, 2004 and has been training and working as a psychiatrist since 1996.

2. Under the contract of appointment, the plaintiff is entitled to a combination of disciplinary procedures arising by contract and also disciplinary procedures arising pursuant to the Health Act 1970, as amended. Appendix 4 of the Consultants' Common Contract, *inter alia*, provides that:-

> (i) There is a procedure for the placing of a consultant on immediate administrative leave for a period of time to allow for the completion of an investigation in accordance with clause 3 of appendix 4.
>
> (ii) The placing of a consultant on immediate administrative leave is a decision reserved for the Chief Executive Officer of the Health Board (or his delegates) where the conduct of a consultant presents an "immediate and serious risk" to the safety, health or welfare of patients or staff.
>
> (iii) In placing a consultant on such immediate administrative leave, the Chief Executive Officer (or his delegate) is required to consult with the Chairman or Secretary of the Medical Board.

3. The plaintiff was placed on administrative leave by letter dated the 4th January, 2008 but no specific provision of the Consultants' Common Contract has been invoked. The plaintiff assumes that the defendant is relying on the provisions of clause 3 of appendix 4 of the Consultants' Common Contract.

4. The defendant has communicated to the Medical Council by way of a letter dated the 18th January, 2008 that the Health Service Executive has "concerns about Dr. Khan but no evidence that the concerns have validity".

5. The decision to place the plaintiff on administrative leave was made at a meeting on the 4th January, 2008 and the main complaint that the plaintiff makes in the present proceedings relates to what happened at that meeting. Before I examine the circumstances and the procedures followed at that meeting, however, it is appropriate to note that the origins of the dispute between the parties dates from mid September, 2007 when Dr. Jackson, a colleague and Clinical Director of the Louth/Meath Mental Health Services invited the plaintiff to meet with her in her office in Navan. On that occasion Dr. Jackson phoned Mr. John Kelly, an Employee Relations Manager of the Health Service Executive, to meet with her and the plaintiff. Mr. Kelly explained that Dr. Jackson had requested a meeting and it was intended that the meeting would be an informal one. A meeting was held on the 20th September, 2007 between Dr. Jackson, the plaintiff and Mr. Kelly. Mr. Kelly mentioned that Dr. Jackson had some issues regarding the plaintiff's clinical practice and that some of his colleagues had brought their concerns to her. When the plaintiff asked for particulars of the concerns and who had raised the concerns he was not furnished with any details. A further meeting between Dr. Jackson and the plaintiff took place on the 11th December, 2007 at which Dr. Jackson said that there were four patient cases that she was concerned with and that she would like the plaintiff to explain his treatment of these patients to her. Dr. Jackson confirmed that the meeting was an official meeting and that she was meeting with him as Clinical Director. She furnished the names of the four patients. The plaintiff alleges that he was led to believe that the meeting was to be an informal one and he got upset and felt he had been deceived. He also alleges that Dr. Jackson became visibly angry, turned her back on the plaintiff and requested that he leave the room.

6. On the 11th December, 2007 Dr. Jackson wrote a letter of "complaint" to Anne-Marie Hoey who is the Local Area Manager in the HSE.

7. The plaintiff was due to fly to Pakistan on annual leave on the 13th December, 2007 and on that day Ms. Hoey wrote a letter to the plaintiff which was to be delivered personally to him. Unfortunately, this was not possible as the plaintiff was already at Dublin Airport. There was some confusion then in relation to the delivery of the letter, the details of which need not concern us at this juncture. Suffice to say that Ms. Hoey intended to call a meeting for the 21st December, 2007 where Mr. Tevlin from the Human Resources Department of the defendant and Dr. Jackson were to be present. The plaintiff attended for work as normal on the 26th December, 2007 and worked again on the 31st December, 2007. It was only on that day that he found that another letter, dated the 18th December, 2007 addressed to him and advising him not to take up his clinical duties, had not been delivered and had been posted to the wrong address. A meeting scheduled for the 2nd January, 2008 was postponed until 4th January. The plaintiff met with Ms. Hoey personally on the 2nd January, 2008 and expressed some dissatisfaction with the limited notice he had been given and with the fact that Dr. Jackson, who had already indicated unfriendliness, would be a participant in the meeting, especially since she was also the "complainant" against him. He also indicated his difficulties in obtaining representation. On the same day that Ms. Hoey furnished the plaintiff with the patients' names, he alleged that he had difficulty getting the medical records when he went to look for them. Ms. Hoey rescheduled the meeting for the 4th January. By that time, the plaintiff was able to identify the six patients about whom concerns were expressed. They had been seen by him between seven months and one year and seven months previously. They were not recent patients and they were all patients he had seen when providing cover for other consultants.

The Meeting of the 4th January, 2008

8. The plaintiff attended the meeting with Mr. Donal Moore, a representative provided by the Irish Medical Organisation. When he entered the room, seated at the far side of the table were Ms. Hoey, who was the chairperson, her personal secretary, Ms. Keenan, who was merely there to take notes, Mr. Tevlin, Employee Relations Manager for the defendant and Dr. Jackson. The plaintiff and Mr. Moore took their seats on the opposite side. Ms. Hoey advised that the purpose of the meeting related to the correspondence of the 11th December, 2007 from Dr. Jackson and the letter of the same date from Ms. Hoey requesting a meeting to give Dr. Khan the

opportunity to respond to the issues raised in Dr. Jackson's letter. The meeting then discussed the six individual cases in detail. After about three hours of discussions, which consisted of Dr. Jackson raising issues on the specific patients and the plaintiff responding, the plaintiff said he and his representative were asked to wait outside and they left. This was disputed. Ms. Hoey's version was that she called for a break and the minutes of the meeting states "Anne-Marie requested a 5 – 10 minute break". Without determining what exactly was said when the interval was called, it is clear that the plaintiff and his representative left the room and that Ms. Hoey, Dr. Jackson and Mr. Tevlin remained there. Ms. Hoey confirms that this was the situation, but stated that during the break, Dr. Jackson and Mr. Tevlin, for a short period, also went to the restrooms. When the plaintiff and his representative returned, the others were seated across the table in the same positions they occupied when the meeting broke up.

9. On their return, Ms. Hoey explained to the plaintiff that there was dispute between his position and that of Dr. Jackson in relation to the treatment of the six patients and as they were the only two doctors present at the meeting, his case would have to be decided by an independent inquiry and in the meantime he was to be put on administrative leave. He received a letter to that effect on the same day.

10. From the evidence it is quite clear that:-

> (i) The layout of the room was such that Ms. Hoey, Mr. Tevlin and Dr. Jackson and the secretary were seated at one side of the table when the plaintiff and his representative entered the room and they sat at the other side of the table.
>
> (ii) Although Ms. Hoey was the chairperson, Dr. Jackson led the meeting and it was her questions relating to the six patients which controlled the dialogue.
>
> (iii) Dr. Jackson remained in the room when the plaintiff and his representative left at the interval and was in the room, and in the same position at the table, when the plaintiff and his representative returned.

11. The plaintiff complains that there was a clear breach of fair procedures in that the complainant, Dr. Jackson, participated in the decision making process, or at the very least would give a reasonable person in the defendant's position the impression that she had done so, in breach of fair procedures. Dr. Jackson was the complainant; she was the person with the clinical knowledge and, according to the plaintiff, it is inconceivable that Ms. Hoey would have made her judgment without having discussed the matter, however briefly, with Dr. Jackson after the plaintiff and his representative left the room.

12. Although the plaintiff makes this averment in his affidavit of the 6th March, 2008, where he says that "Dr. Jackson had remained and participated throughout the decision making process", this matter was never explicitly denied in the four affidavits sworn by Ms. Hoey, who contented herself in cross-examination with saying that she stood by the averment made in her first affidavit, namely, that it was she who took the decision. Neither did Dr. Jackson, in her three affidavits, explicitly deny that she had any discussion with Ms. Hoey when the plaintiff and his representative left the room.

13. A feature in this case was that Ms. Hoey was tendered for cross-examination and while several matters were put to her, counsel for the plaintiff did not explicitly put that question to her.

14. Ms. Hoey did concede that when the plaintiff and his representative left the room some discussion did take place with Mr. Tevlin. In answer to question 21 of the transcript taken on 19th June, 2008 Ms. Hoey said:-

> "I remember very clearly when Mr. Moore and Dr. Khan left the room, Mr. Tevlin, who was sitting beside me, said what I already knew: 'Anne-Marie, you have to make the decision. We can't influence you. You have to call it.' I recollected (sic) then on the notes that I had taken. I asked Ms. Keenan, who was the note-taker, for clarification around a couple of issues in terms of her notes." (At pp. 8 – 9 of affidavit dated 16th May, 2008)

15. With regard to the dispute of fact surrounding the meeting of the 4th January, 2008, the plaintiff revisits the matter again in his affidavit of the 16th May, 2008, made after Ms. Hoey's affidavits of the 23rd April. In what Mr. Hogan, S.C., for the plaintiff says is the most important paragraph in all of the papers submitted to the court, the plaintiff avers as follows:-

> "As regards paragraph 10, it is not the case that 'we took a short break' and that Mr. Moore and I left the room. On the contrary we were asked to leave the room and it was clear to me as it had been in the layout of the room, that Dr. Jackson and Ms. Hoey and Mr. Tevlin were all on one side and Mr. Moore and I were on the other side. The meeting was adjourned to allow Mr. Tevlin, Dr. Jackson and Ms. Hoey together to decide what they were going to do. While I am not party to the discussions that took place while Mr. Moore and I were out of the room, I say that it is almost inconceivable that the matter in hand was not discussed. Ms. Hoey is likely to have received advice from Mr. Tevlin and from Dr. Jackson. I make no complaint about the advice given to Ms. Hoey by Mr. Tevlin but it was improper and a tainting of the process to allow Dr. Jackson who was making the complaints to participate in the decision whether or not I should be placed on administrative leave. Dr. Jackson was carrying on the role of witness, complainant, prosecutor and decision maker. If Ms. Hoey was going to make a decision it was appropriate that she should have asked Dr. Jackson and myself to leave the room. At best from the defendant's point of view, the failure on her part gives rise to a clear impressional (sic) or bias outcome."

16. When pressed by Mr. Hogan as to why she did not explicitly respond to these averments, Ms. Hoey said "maybe in hindsight I should have elaborated more in the affidavit, but I am trying to, I suppose, fill in the blanks at this stage".

The Proceedings

17. The plaintiff commenced proceedings by way of Plenary Summons dated the 6th March, 2008, seeking various reliefs including a declaration that the decision of the defendant dated the 4th January, 2008, purporting to place the plaintiff on administrative leave with pay from the said date, is without efficacy and is *ultra vires*; as well as a declaration that the plaintiff continues to be the lawful incumbent of the post of temporary locum consultant with the HSE and various injunctions, including an interlocutory or interim injunction restraining the defendant in proceeding with her investigation or otherwise subjecting the plaintiff to the purported decision to place the plaintiff on administrative leave, *etc*.

18. The matter comes before this court by way of Notice of Motion dated the 11th June, 2008 (amending with consent the original Notice of Motion dated the 31st March, 2008) in which the plaintiff seeks the following interlocutory orders:-

> 1. An Order that the purported decision of the defendant to place the plaintiff on administrative leave, as set out in a letter from the Health Service Executive to the plaintiff on 4th January, 2008 is null and void.

2. An Order that the purported direction of the defendant, dated 9th January, 2008 whereby the plaintiff was directed not to engage in clinical practice while on administrative leave is null and void.

3. An injunction restraining the defendant, its servants or agents from interfering with the post and office of the plaintiff as temporary Locum Consultant Psychiatrist at the Health Service Executive, North Eastern area and the discharge of his employment duties and clinical responsibilities until further Order.

4. An injunction restraining the defendant, its servants or agents from interfering with the post and office of the plaintiff as temporary Locum Consultant Psychiatrist at the Health Service Executive, North Eastern area, until further notice.

5. An injunction restraining the defendant, its servants or agents, from interfering with the plaintiff's contractual entitlement to attend at his place of work as temporary Locum Consultant Psychiatrist at the Health Service Executive, North Eastern area, until further order.

6. An Order restoring the plaintiff to his office and employment as a temporary Locum Consultant Psychiatrist at the Health Service Executive, North Eastern area, until further order.

7. An Order restraining the defendant from proceeding with a review purporting to be carried out as part of its disciplinary process involving the plaintiff by Capita Advisory Services, until further order.

8. Such further or other Order, as this Court deems just.

The Law on Interlocutory Injunctions

19. The principles governing the grant of interlocutory injunctions in this jurisdiction are set down by the Supreme Court in *Campus Oil Ltd v. Minister for Industry and Energy (2)* [1983] IR 88 (approving the landmark decision of the House of Lords in *American Cyanamid Company v. Ethicon Ltd* [1975] AC 396) and extensively applied in numerous decisions since that date. The courts have a discretion in determining whether to grant an interlocutory injunction or not and it will do so when it is "just and convenient to do so" (Order 50 r. 6 (1) of the Rules of the Superior Courts 1986. This discretion means that the courts must be able to respond in a flexible manner to the facts of each particular case. Nevertheless, the law as stated in *Campus Oil* provides valuable guidance to the court as to where the analytical starting point should commence in any given case. In considering whether it is appropriate to grant an interlocutory injunction the court should determine:-

(i) Whether there is a fair bona fide issue to be determined.

(ii) Whether damages is and would be an adequate remedy if the applicant was refused the injunction and went on to succeed at the trial.

(iii) Where the balance of convenience lies in making its determination.

20. It is in relation to this last heading in particular that the courts' equitable discretion is most clearly manifest.

Fair Procedures

21. Before addressing each of these requirements in more detail, I wish to address the claim made by the applicant that he was entitled to fair procedures at the meeting of 4th January, 2008. I will content myself in this regard, with two representative dicta in support of the applicant's assertion which I believe accurately reflects the law in this area. In *Carroll v. Bus Átha Cliath* [2005] 184, Clarke J. stated at p. 209:-

"If the stated reason for seeking to dismiss an employee is an allegation of misconduct then the courts have, consistently, held that there is an obligation to afford that employee fair procedures in respect of any determination leading to such a dismissal."

22. In *McNamara v. South Western Area Health Board* [2001] IEHC 24, Kearns J., in the case of the suspension of a consultant orthodontist came to the following conclusions in the course of judicial review proceedings:-

"It is difficult not to feel a measure of sympathy for both sides to this dispute, confronted as they were with the relentless problems created by huge waiting lists of patients.

I can understand the force of Mr. Stewart's submission that the question of suspension should not be looked at in total isolation as though there were no other procedures or avenues available to the applicant under the Health Act 1970 for the ultimate resolution of the major differences between the applicant and her employers.

However, as Mr. Hogan has pointed out, the fact that statutory procedures exist does not absolve the [r]espondents 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. As Mr. Hogan points out, nothing in the ongoing dispute between the parties suggests the [a]pplicant 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 persons affected thereby which nonetheless fall short of infringing their legal rights. In *Murtagh v. Board of Management of St. Emer's National School* [1991] 1 IRP 482, the Supreme Court found that a three day suspension of a pupil from a [n]ational [s]chool 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 [n]ational [s]chool either by a [p]rincipal or by the Board of Management of that school is not a matter for judicial review. It is not an adjudication on or a 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 [a]pplicant[']s 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 [a]pplicant."

23. In the present case, I am of the view that the principles applied by Kearns J. in *McNamara* are equally applicable here and conclude that the applicant was entitled to fair procedures at the meeting of 4th January, 2008. It is true that the applicant was not suspended but was only placed on administrative leave with pay. Nevertheless, the meeting was to investigate allegations of professional incompetence alleging that the applicant failed to treat patients properly and improperly prescribed medication. The determination at that meeting could and did lead to the applicant being placed on administrative leave and the commencement of an investigation process which could lead to ultimate suspension. Macken J. in *O'Donoghue v. South Eastern Health Board* [2005] 4 I.R. 217 stated at p. 241 that:-

> "[I]t does not seem to me that a suspension with pay is any less serious, onerous or potentially damaging than one with pay and I apply the jurisprudence without regard to that distinction."

What was the Health Service Executive to do?

24. At several points in his submission, counsel for the defendant asked, rhetorically no doubt, what was the HSE to do in the circumstances? This reflects Ms. Hoey's appreciation that the problem confronting her was a serious one which had to be addressed with some expediency. Recent experiences in the same health area heightened her awareness of the necessity to confront the issue.

25. It is not for the court to advise the HSE in circumstances like this but it must be said that whatever the HSE decides to do, it must comply with rules which adhere to fair procedure/standards. The defendants might like it to be otherwise. To those involved in administration, adherence to fair procedure standards may appear cumbersome, irritating and even irksome on some occasions. Undoubtedly, the necessary adherence may slow down the administrators and may not be conducive to efficiency. But that is the way it is. The battle between fair procedures and efficiency has long since been fought and fair procedures have won out. The insistence on fair procedures governs all decision makers in public administration. It governs the courts as well. None of us can ignore the principle. We might wish it were otherwise. We might like to cut through procedural niceties to secure what we perceive as justice in a more expeditious way but unfortunately for decision makers that is no longer an option available to them. It is not sufficient that we justify our decision by alleging that we were focusing on the ultimate objective. It is not sufficient that we were doing our best. It is not sufficient to say that we were motivated by public health and safety objectives. Fair procedures are at the very foundation of all legal systems and all decision makers must observe them whether we like it or not. Fair procedures are necessary for the common good. In relation to suspensions, they apply whenever the criteria articulated by Kearns J. in McNamara apply, as they do in this case.

26. What does fair procedures mean? At the very minimum it means that the person at whom a charge is levelled has proper notice of the charge; that he has proper opportunity to take legal advice and to prepare for hearing; that no one is to be a judge in their own cause; (*nemo judex in causa sua*) that both parties are given a full opportunity to be heard (*audi alteram partem*) and that the judge is free from bias. Moreover, it is *clichéd* law that not only must these principles be adhered to, but they must be seen to be adhered to. Justice must be seen to be done. Perception is significant and this is vital in the present case. It is unnecessary for me to cite extensively authorities for these well recognised principles and I will content myself with the well known quotation of Finlay C.J. in *O'Neill v. Beaumont Hospital Board* [1990] I.L.R.M. 419, at 439:-

> "In those circumstances, I take the view that applying the test which I have outlined in short terms and which I believe to be the appropriate test in this case, that a person in the position of the plaintiff who is a reasonable man and not either over-sensitive or careless of his own position, would have good grounds for a fear that he would not get in respect of the issues involved, from a body which included the chairman, an independent hearing. I emphasise again, particularly, as the chairman in regard to these matters did not give any oral evidence before the High Court and of course has not been heard by this Court, that that is not a suggestion that he would not be honest or seek to be honest. The test is an objective test as to whether a person in the position of the plaintiff who is a reasonable man might reasonably fear that the pre-judgment expressed by the chairman would prevent a completely fair and independent hearing of the issues which arise."

27. Adopting this criterion as the appropriate one for this case, the question that I must ask is would a reasonable person in the position of the plaintiff, Dr. Kahn, reasonably fear that he is not going to get a completely fair and independent hearing of the issues?

28. The relevant facts were; Dr. Jackson was the main complainant against the plaintiff; the layout of the meeting was such that Ms. Hoey, Dr. Jackson, Mr. Tevlin and the note-taker were all seated on one side of the table; when the plaintiff and his representative entered they took up a position on the opposite side of the table; when the plaintiff and his representative left the room for the short break, Dr. Jackson stayed in the room; some discussion took place after the plaintiff had left with Mr. Tevlin. Although the plaintiff avers unequivocally in several of his affidavits that it is inconceivable that Dr. Jackson did not speak with the Chairperson after the plaintiff left the room, neither Dr. Jackson in her three affidavits nor Ms. Hoey in her four affidavits explicitly averred that no discussion took place between Dr. Jackson and Ms. Hoey after the plaintiff left the room.

29. It is true that when Ms. Hoey was tendered for cross-examination, counsel for the plaintiff did not put the direct question to her. Counsel for the plaintiff may have his own good reasons for choosing not to do so. The fact remains, however, that neither Dr. Jackson nor Ms. Hoey have made a positive averment that no such discussion took place, in spite of the plaintiff's strong averments that it was inconceivable that no such discussion took place.

30. Ms. Hoey's explanation as to why she did not specifically deny such a conversation was that she "stand[s] by [her] original affidavit". It is not improper for me in this situation to draw an adverse inference. Accordingly, I have come to the conclusion, that without trespassing on the trial judge's duties, the plaintiff has made a strong case to suggest that it is highly unlikely that some short discussion, however brief, did not take place between Dr. Jackson, Mr. Tevlin and the Chairperson after the plaintiff left the room.

31. But even if I was not prepared to reach that conclusion, I am still prepared to hold that the high standard set by Finlay C.J. in *O'Neill* has not been met in the instant case because a reasonable person in the place of the plaintiff would reasonably think that some discussion might have taken place during the interval, which would have the effect of influencing Ms. Hoey in her decision. The Chairperson should have insisted that both sides vacated the room at the same time or that when she called for a break that she left the room first, so that she would not be left alone with one of the parties to the dispute.

(i) The Fair Issue to be Tried/Strong Case Likely to Succeed

32. The first requirement laid down by the Supreme Court in *Campus Oil* is that in interlocutory applications the applicant must show that there is a fair issue to be tried. This is a relatively low hurdle to be cleared by the applicant and in recent years the bar has been raised where the relief the applicant is seeking at the interlocutory stage is a mandatory injunction. In such a case it is now clear from the authorities that the applicant must show that he has a strong case that he is likely to succeed at the hearing.

33. In *Maha Lingham v. Health Service Executive* [2006] 17 E.L.R. 137 Fennelly J. delivering an *ex tempore* judgment on the 4th October, 2005 states that where:-

> "in substance what the plaintiff/applicant is seeking is a mandatory interlocutory injunction and it is well established that the ordinary test of a fair case to be tried is not sufficient to meet the first leg of the test for the grant of an interlocutory injunction where the injunction sought is in effect mandatory. In such a case it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action."

34. The most recent review of the case law on this issue is to be found in the judgment of Clarke J. in *Bergin v. Galway Clinic Doughiska Ltd* [2007] I.E.H.C. 386. On this issue Clarke J. states at para. 4.2:-

> "The first legal issue which arises between the parties on this application is as to the appropriate standard to be applied in assessing the case which the plaintiff has to make out at this interlocutory stage. It is clear from cases such as *Fennelly v. Assicurazioni Generali* [1985] 3 I.L.T. 73 and *Maha Lingham v. Health Service Executive* [2006] 17 E.L.R. 137, that a plaintiff may be entitled to injunctive relief which would have, to some extent, the effect of continuing his or her employment but only, it would seem, where the plaintiff concerned can establish a strong case. That such can be the case even though damages might well be the appropriate remedy at trial, is clear from, for example, *Shortt v. Data Packaging Ltd [*1994] E.L.R. 251 and *Phelan v. BIC (Ireland) Ltd* [1997] E.L.R. 208."

35. In *Coffey v. William Connolly & Sons Ltd* [2007] I.E.H.C. 319, Edwards J. in addressing a similar case made the following comments in the course of his judgment:-

> "Although the injunctions (she the plaintiff) has claimed are couched in prohibitory language, the practical effect of the injunction claimed at paragraph 1 of her Notice of Motion, if granted, will be to require the defendant to treat the contract as continuing to subsist until the issue as to the validity or otherwise of the purported determination is decided at the trial. Undoubtedly the plaintiff has raised a fair issue to be tried. I am completely satisfied about that. However, I am not convinced that the plaintiff has discharged the onus upon her showing that she has a strong case that she is likely to succeed in her action."

36. If it is accepted that the higher standard, the strong case standard, applies when a mandatory injunction is sought, the quotations from Clarke J. and Edwards J. call for a closer scrutiny of the term "mandatory injunction" in this context. Is the higher standard to apply only were the applicant specifically seeks a "mandatory injunction" or does it also apply when the applicant seeks relief by way of declaratory order or some other relief which has the effect of achieving the same comfort for the plaintiff from the court. Does the higher standard apply where the relief sought, although not strictly a mandatory injunction amounts to the same thing at the end of the day? More specifically, in the present case does the higher standard apply where the applicant wishes to be restored to his position pending trial? In such case it is my view that I should focus on the substance of the relief claimed rather than the form. The strong case standard should in my view also apply where the employee seeks any order which will have the effect of keeping him in his position pending the hearing. This would clearly appear to be the conclusion reached by Edwards J. in the quotation I have just cited from his judgment in the *Coffey* case and it would also seem to be preferred by Clarke J. in the *Bergin* case where he says at para. 4.6 on this issue:-

> "The basis for the higher standard is that the substance of the relief sought is a mandatory order requiring the employer to keep the employee in employment. The order remains a mandatory order, even though the plaintiff claims that a purported determination of his employment is unlawful by reason of a finding of a wrongdoing having been arrived at in breach of the principles of natural justice. However couched, the substance of the relief is the same. I am not, therefore, satisfied that different standards apply depending on the nature of the claim advanced on the behalf of the plaintiff concerned. Where a plaintiff seeks to prevent an employer from exercising a *prima facie* entitlement to terminate a contract of employment, then that employee is, in substance, seeking a mandatory order requiring that his employment continue and that his employment entitlements are met."

37. Bearing in mind that the applicant has to prove at this interlocutory stage that he has a strong case which is likely to succeed at the hearing, I find that he has met that standard in this case. I come to this conclusion in some confidence since it is based on facts which are not in dispute.

38. It is salutary to remind myself at this junction that I am engaged here at the interlocutory stage of the process only and that I must exercise care that I do not trespass into matters more properly the business of the trial judge. I refrain in particular from determining:

> (a) Whether Ms. Hoey said at the interval to the applicant "would you kindly leave us" or "it is time for a break" and
>
> (b) Whether or not Dr. Jackson had discussions with Ms. Hoey during the interval.

39. What is not in dispute is that Dr. Jackson remained on for some time in the meeting room after the applicant withdrew and there was certainly some discussion with Mr. Tevlin during the interval. This latter fact alone is sufficient for me to conclude that the applicant has made out a strong case that he is likely to succeed at the hearing.

40. What I have concluded is that fair procedures were not observed when they ought to have been at the meeting on 4th January, 2008 and that the decisions of Ms. Hoey, including the decision to place the applicant on administrative leave, as a result, are vulnerable.

41. I now turn to address the other two requirements set out in *Campus Oil* namely the adequacy of damages as a relief and the question of "balance of convenience".

42. Recent developments in the law of employer/employee relations would also suggest that an element of good faith might now exist in the employer/employee contract and this might also complicate analysis in what can only be described as evolving jurisprudence. (See Clarke J. in *Carroll v. Bus Atha Cliath* [2005] 4 I.R. 184). The question then arises as to whether the plaintiff in this case has reached the appropriate standards.

(ii) The Adequacy of Damages

43. Would an award of damages be adequate compensation if I were to refuse the applicant the reliefs he now seeks in this motion and the court ultimately determined in his favour at the full hearing? The denial of an interlocutory injunction at this stage would have no effect on his salary since he is being paid while on administrative leave. For this reason, the level of financial loss may be limited to the applicant, although it must be acknowledged that he averred that his private practice has inevitably suffered and will continue to suffer during his forced leave. More significantly, however, in this context is the damage to the plaintiff's reputation and standing in his profession. Such leave might suggest to colleagues, patients, friends and acquaintances who know the plaintiff in a professional or social context, that something is amiss. There is also the suggestion that his skills level might suffer because of his inability to carry out his clinical work in a normal fashion during the lay off. There will no doubt be further delay before the matter comes on for trial and although no evidence was laid in this matter, the substantive case does not appear to have been set down for trial as yet. In these circumstances it can be anticipated that it could be more than a year before the case comes on for hearing in the normal course of events. The plaintiff alleges that he has attended his General Practitioner for stress and it is understandable that his self-esteem would suffer. Apparently he is on medication. It is not unreasonable to assume that the levels of upset and the stress will continue to rise during the hiatus.

44. One must not underestimate the seriousness of the decision to place such a professional person on administrative leave, even if it is with pay. (See Macken J. in *O'Donoghue v. South Eastern Health Board* [2005] 4 I.R. 217, where the learned judge granted an order of *certiorari* quashing the suspension of the applicant, a Consultant Chief Psychiatrist even though the suspension was with pay.) The decision raises questions about the applicant's competence as a professional man. The suggestion is that he is not adhering to the proper standards of his profession. Such accusations, once made can have a devastating impact on the person's self-esteem. Assurances that no definitive finding has been made and that the suspension is merely a "holding operation" with pay is frequently cold comfort in this type of case. Subjectively, the complaint itself, especially when coming from colleagues and especially when it challenges the professional competence and capacity of the consultant, can eat away at his self-esteem, can undermine his confidence and can prove to be increasingly self-destructive the longer the uncertainty continues. Such a decision can cause a kind of damage that is not easily amenable to monetary compensation.

45. For these reasons alone, it seems to me that damages in such a case will rarely be an adequate remedy if the complainant was eventually vindicated at the trial.

Balance of Convenience

46. Without entering the debate as to whether the adequacy of damages is independent of the balance of convenience assessment, or is in truth just one of several factors which the court will embark on in its weighing or balancing exercise, I will now briefly examine the concept as it applies to the facts before the court in this case.

47. I have already determined that damages would be an inadequate remedy if the plaintiff herein was refused interlocutory relief and succeeded at the trial. Looking at the other side of the coin, what is the effect of granting such interlocutory relief on the defendant, if it was successful at the trial? In this latter scenario, the defendant will be obliged to allow the plaintiff continue in his post in the interim. There will be no financial loss to the defendant of course, as the plaintiff is being fully paid while on leave. In fact there will be a financial gain as it will save the cost of a substitute/locum that might have to be engaged in the plaintiff's absence, or if no such replacement is contemplated, its waiting lists will be shortened by the plaintiff's continuance in office.

48. But what of the tension that will be reintroduced by reinstating the plaintiff, between Ms. Hoey and the plaintiff, and between Dr. Jackson (and her colleagues perhaps) and the plaintiff? Secondly, will the defendant have to expose itself to the increased risks of a malpractice action if the plaintiff, for whom the defendant is vicariously liable, proves at the end of the day to be incompetent?

49. More fundamentally, will the defendant be exposing to immediate risk the health and safety of the patients or other staff?

50. With regard to the latter question, it should be observed that the plaintiff's discipline is psychiatry and not surgery. This is not a case where if reinstated the plaintiff will immediately be in charge of ongoing surgical lists or will be exposed to the risk of the delivery room. The risks attached to his area of expertise, while undoubtedly significant, will not be as numerous or possibly as acute as these other areas of medical speciality. Moreover, in view of the concern now expressed over his prescription record, I expect the plaintiff will be much more careful and more conservative until the full investigation is complete. In these circumstances, it is possible that the plaintiff might agree to alternative precautions being put in place on a voluntary basis, to give comfort to the defendant in the interim. For example, the clinical director might put in writing to the plaintiff what he considers are inappropriate medications for particular conditions, arising out of the six cases already identified as causing concern. The plaintiff would be foolish to ignore such suggestions in the hiatus. Finally, the risk of injury to the patients must not be exaggerated. In its letter to the Medical Council on the 18th January, 2008, the defendant reported that while it had concerns about the plaintiff there was "no evidence that the concerns have validity". This does not suggest that the defendant thinks that there is an immediate risk to the plaintiff's patients.

51. With regard to the increased tension in the workplace following the plaintiff resuming his duties, some of this is a consequence of the defendant's own failure to observe fair procedures when dealing with the matter. Further the plaintiff's interaction with Ms. Hoey will not presumably be a daily occurrence, from the information before the court, and I have no reason to suspect that the plaintiff's colleagues and particularly, his Clinical Director, Dr. Jackson, will not approach the situation in a professional manner and with professional courtesies while the investigation, if there is to be one, proceeds. Professional disputes frequently surface within the health system. There is nothing unusual in that and while some such disputes develop into insoluble standoffs, the present situation does not appear to fall into that category. The vast majority of these internal disputes eventually find amicable solution.

52. For the above reasons I think that the balance of convenience also favours the plaintiff in this matter.

Delay

53. The defendant also suggests that the plaintiff has been guilty of undue delay in bringing this motion and for that reason the court's discretion should be used against him. In considering this matter it is relevant to recall the time sequence. First of all, a decision was made on 4th January, 2008, to put the plaintiff on administrative leave. This must have come as a shock to the plaintiff

and it is understandable if it took him some days to come to terms with it. When the plaintiff considered his options and decided that he needed to consult the lawyer he would have had to make inquiries to identify a suitable solicitor for such a case and he would have had to make an appointment. He would then have had to brief fully the solicitor and this perhaps would involve writing up a full biographical history and a full account of all the recent events in detail. Once the solicitor was in possession of this, he would have had to consider the matter and make a preliminary call as to whether he should engage counsel. Once suitable counsel was identified, contacted and engaged, a brief would have had to be compiled and forwarded. The solicitor would then have had to wait for counsel's opinion and this might have involved further consultations. When the applicant, having had the advice, finally gave his instructions, the drafting would have had to commence. All this takes time and in my view, the delay of two months between the meeting on 4th January, 2008, and the issuing of the plenary summons on 6th March, 2008, is not inordinate in the circumstances. I realise that the motion was not issued until 31st March, 2008, but the defendants were fully aware of the plaintiff's complaint when the plenary summons was issued and served on 6th March. I do not consider that there has been any inordinate delay in these circumstances.

Orders

54. In the circumstances I am prepared to make the following orders:

> 1. An order that the purported decision of the defendant, placing the plaintiff on administrative leave as set out in a letter from the Health Service Executive to the plaintiff on the 4th January, 2008, is without legal effect until further order.
>
> 2. An order that the purported direction of the defendant, dated the 9th January, 2008, whereby the plaintiff was directed not to engage in clinical practice while on administrative leave is without legal effect until further order.

55. Finally I would emphasise how important it is to ensure that this case proceeds as quickly as possible and I order the defendant to file its defence, if it has not already done so, within two weeks of today's date.