Neutral Citation Number: [2011] IEHC 34

THE HIGH COURT

[2010 No. 692SP]

IN THE MATTER OF SECTION 71 OF THE MEDICAL PRACTITIONERS ACT 2007

AND IN THE MATTER OF A REGISTERED MEDICAL PRACTITIONER

AND ON THE APPLICATION OF THE MEDICAL COUNCIL

BETWEEN

MEDICAL COUNCIL

APPLICANT

AND

EYNSFORD STEPHEN KWAKU BOATENG

RESPONDENT

Judgment of Mr. Justice Hedigan delivered on the 1st day of February, 2011.

1. These proceedings arise out of an inquiry into allegations of misconduct made against the respondent which took place on the 19th May, 2010. In its report the Fitness to Practise Committee of the Medical Council found that four allegations of professional misconduct were proven.

2. The inquiry arose out of the respondent's treatment of a three month old baby while working as a general practitioner in the United Kingdom on or around the 23rd June, 2006. The respondent diagnosed that the baby was suffering from colic. The respondent carried out an inappropriate and unnecessary examination of the baby and then prescribed an inappropriate and excessive dose of medication for the baby. Arising from these circumstances the Medical Council decided on the 21st July, 2010 to censure the respondent and to impose certain conditions on his continued registration on the Medical Register.

3. By virtue of the Medical Practitioners Act 2007, the applicant is the public body charged with the registration and control of medical practitioners in the State. Under Part 6 of the Act, it is obliged to maintain a register of medical practitioners and Parts 7, 8 and 9 of the Act deal with complaints concerning the fitness to practise or alleged misconduct of registered medical practitioners. Parts 10 and 11 of the Act deal with education and training and the maintenance of professional competence among its registered medical practitioners. The statutory scheme provides for complaints to be first considered by a preliminary proceedings (?) committee who make a decision as to whether there is a *prima facie* case for the conduct of an inquiry into a registered medical practitioner's alleged misconduct. Where they do decide so, the complaint is then referred to the Fitness to Practise Committee who conducts an inquiry into the allegations of professional misconduct. It is noteworthy that, although the Committee has many of the powers, rights and privileges vested in the High Court in relation to enforcing the attendance of witnesses, examining witnesses on oath and compelling the production or discovery of documents, there is no power to award costs to either party in respect of the inquiry.

4. At the conclusion of the inquiry, the Fitness to Practise Committee makes a report to the full Medical Council under the provisions of s. 69 of the Act of 2007 setting out the nature of the complaint that resulted in the inquiry, the evidence presented to them, and their findings as to whether any allegation was proven. The Committee is also entitled to include such other matters relating to the registered medical practitioner as it thinks appropriate and as a general rule, the Fitness to Practise Committee makes recommendations to the full Medical Council as to the sanction which ought to be imposed upon a registered medical practitioner. The Committee itself makes no decision in relation to sanction.

5. Once a report has been made to the Council by the Fitness to Practise Committee, the matter comes before the full Council to decide on sanction. The practitioner in respect of whom the report has been prepared is entitled to attend before the full Council and make representations to the Council as to what sanctions are in fact appropriate. Normally, the Chief Executive Officer does not make representations in relation to sanction.

6. Under the provisions of s. 71 of the Act of 2007, the Council is entitled to impose one or more sanctions on the practitioner. *Inter alia*, the following sanctions may be imposed:

> (i) cancellation of the practitioner's registration,
>
> (ii) suspension,
>
> (iii) the attachment of conditions to the practitioner's registration including restrictions on the practise of medicine that may be engaged in by the practitioner,
>
> (iv) advice, admonishment or censure.

7. However, under the provisions of s. 74 of the Act of 2007, a decision by the Council to impose a sanction (other than advice, admonishment or censure per s. 71(a) of the Act) does not take effect until the decision is confirmed by the High Court on an application made pursuant to s. 75 or s. 76 of the Act of 2007. In that way, it is the High Court, not the Medical Council, that ultimately decides what sanction is appropriate, and imposes that sanction.

8. Section 75 of the Act of 2007 gives the registered medical practitioner a right to appeal against the decision of the Council. Although the statute refers to an appeal against a decision to impose a sanction, it is clear from the authorities that an appeal made under s. 75 of the Act of 2007 allows the practitioner concerned to appeal against any finding of fact, misconduct or sanction and essentially involves a full rehearing *de novo* of the inquiry into his alleged professional misconduct.

9. However, even if there is no appeal against the decision the Act requires the Council to apply to Court for confirmation of any decision in relation to sanction. The relevant section is s. 76 of the Medical Practitioners Act 2007 which provides that:

> *"(1) Where a registered medical practitioner does not, within the period allowed under section 75(1), appeal to the Court against a decision under section 71 to impose a sanction (other than a sanction referred to in section 71(a) on the practitioner, the Council shall, as soon as is practicable after the expiration of that period, make an application to the Court for the confirmation of the decision.*
>
> *(2) An application under subsection (1) may be made on an ex parte basis.*
>
> *(3) The Court shall, on the hearing of an application under subsection (1), confirm the decision under section 71 the subject of the application unless the Court sees good reason not to do so."*

10. An application was made pursuant to s. 76 of the Medical Practitioners Act 2007 to confirm the decision of the Medical Council to censure the respondent herein.

11. These applications are normally made *ex parte* to the President of the High Court, as provided for in s. 76(2) of the 2007 Act. As the costs of such *ex parte* applications have invariably been awarded to the applicant even in circumstances where the doctor concerned indicated his consent to the applicant in advance, the solicitors for the respondent wrote to the applicant by letter of the 10th August, 2010. They confirmed the respondent would not be appealing the decision of the applicant and asked to be put on notice in the event that an application was to be made by the applicant for costs. The applicant was so notified.

12. When the matter was listed before the Court on Monday, 11th October, 2010 counsel for the applicant confirmed that the respondent was consenting to the application under s. 76 and that the only issue in respect of which the respondent was seeking to be heard related to the issue of costs.

13. It is agreed that the confirmation process by the High Court is one which is required under the Constitution having regard to the decision of the Supreme Court *In Re The Solicitors Act 1954* [1960] I.R. 239. See also *M. v. The Medical Council* [1984] I.R. 485 and *C.K. v. An Bord Altranais* [1990] 2 I.R. 396. The Medical Council following on its investigation and decision must refer the case to the High Court and this action is the last part of its disciplinary function in matters of the kind herein. The application may well be described as being in the doctor's interest because it is a vindication of his constitutional right to practise his profession.

14. The relevant statutory provisions make no reference to the costs of such an application. However, I am referred to the decision of the Supreme Court in *Medical Council v. PAO* (Unreported, 1st April, 2004) which dealt with s. 51 of the Act of 1978 (now replaced by s. 60 of the Act of 2007) which provides for similar but more urgent applications. Both sections were and are silent as to costs. On appeal from the President of the High Court refusing to grant costs to the Medical Council on a literal construction of s. 51, the Supreme Court, Denham J. held there was jurisdiction to make an order for costs in such applications. She stated at page 16:

> *"Section 51 is silent on the issue of costs. However the absence of a reference to the issue of costs in s. 51 does not exclude the general law and rules as to costs. If the legislature intended that no cost orders were to be made in a s. 51 application it would have said so expressly. In the absence of such an expressed statement, the general law stands. …"*

Later at page 18 she continued:

> *"Section 51 does not expressly deal with the issue of costs. I am satisfied that s. 51(3) does not by inference relate to the issue of costs. Thus the question of its interpretation, literal or otherwise, does not arise. Nothing in the Act of 1978 expressly or impliedly excludes the jurisdiction of the Court to determine the issue of costs. Nothing in the Act of 1978 excludes the rules of the Superior Courts. Consequently, I am satisfied that the High Court has jurisdiction under the law as set out under the Rules of the Superior Courts to determine the issue of costs in an application under s. 51 of the Act of 1978. …"*

15. Applying this decision, it is clear that the Court does have power to make an order for costs notwithstanding the silence of the statute in relation thereto and that this is a part of the discretionary power of the Court to award costs in any case.

16. I am told that the Court invariably awards costs in s. 76 applications. That may well be so, but the Court still retains its discretion. It goes without saying that this discretion must be exercised in a judicial manner. I accept the Court should not award costs as a punitive measure. The Medical Council has the power after due consideration to impose punitive measures such as a monetary fine. Moreover, since the doctor will always have been at fault, were the Court to use his fault as a criterion for awarding costs then it would forgo its discretion. The same holds true for the argument that the application is made in his interest, *i.e.* vindication of his constitutional rights. It always will be. I do consider however that it is a reasonable consideration to weigh in the balance that the Medical Council is obliged by law to come to the High Court to seek confirmation. Therefore, in the absence of some special grounds for doing otherwise, it is a perfectly reasonable exercise of the Court's discretion to award costs to the Medical Council even where they have been notified by the doctor that he will not oppose confirmation.

17. What those special grounds might be is not for me to list here. There may be as many as there are cases. It is for the Court to decide in the particular circumstances if they are such as to warrant the making of no order in favour of the Medical Council.

18. In this case no special reasons have been advanced as to why there should not be an order for costs in favour of the Medical Council and therefore I will make the order granting them their costs of this confirmation application.