

**THE HIGH COURT**  
**PLENARY SUMMONS**

2006 4432 P

**BETWEEN****SYED HUSSAIN****PLAINTIFF****AND****HEALTH SERVICE EXECUTIVE****DEFENDANT****JUDGMENT of Mr. Justice Roderick Murphy delivered on the 20th day of May, 2010.****1. Plaintiff's claim**

The plaintiff is an Irish citizen and a general medical practitioner who qualified as such on 11th August, 1990, practised in Pakistan for a number of years until August 1995 when he took up a position in Portlaoise General Hospital and other hospitals for subsequent seven years.

In 2004 he left Ireland for the United Kingdom to embark on a general practitioner's training scheme. He returned to Ireland a year later to complete his hospital training.

On 29th September, 2005, he obtained the Joint Committee and Post Graduate Training for General Practice certificate and claimed that he was fully qualified, experienced and trained to commence practice on his own accord as a principal general practitioner.

He had been appointed locum general practitioner in Strokestown, Co. Roscommon in January 2006 and who applied for the permanent post of general practitioner in Strokestown on 15th March, 2006. Though he appeared to have been the only candidate he was not appointed. Three months later on 29th June, 2006 he reapplied and was placed third. He was not appointed. Subsequently, having been elected to the Irish College of General Practitioners on 1st May, 2007, he was appointed to the permanent post of general practitioner in Belmullet, Co. Mayo.

The record of the interview and assessment of the plaintiff gave no rating for professional qualifications and research at any of those three interviews.

In relation to the selection criteria of "general suitability" the rating criteria for the locum interview in January 2006 in which Dr. Hussain was successful, was 80 which was in the "very good" rating criteria.

It is accepted that the requirements for a permanent general practitioner were higher than that for locum.

The record of interview and assessment on 15th March gave a score of 49 for professional qualifications and research, which was a mark just less than satisfactory; a score of 70 for general practice training and hospital experience as had been given in January and increased the score for general practice and experience from 40 to 49. Critically, his score for general suitability for the permanent general practitioner post was 49 which was just a point below the minimum for satisfactory.

It was not controverted that it was a necessary requirement to have a score for general suitability above 50 to be appointed irrespective of other scores.

No issue was taken in relation to the evidence that 49, while not being sufficient for appointment, was an encouragement to a candidate to reapply for a similar position.

The plaintiff says that at the March interview he should have been awarded a score of 60 rather than 49 for professional qualifications and research.

In the subsequent interview on 29th June, 2006, in circumstances where the position was still vacant, the plaintiff says that he should have received 60 rather than zero under the selection criteria for professional qualifications and research.

The plaintiff says that by virtue of a certificate of equivalent experience issued by the United Kingdom Joint Committee on Post Graduate Training for General Practice (JCPTGP), that he should have been awarded a score of 60. That certificate recited that:

"Having submitted particulars of his medical experience, and satisfied the joint committee on post graduate training for general practice that he has acquired the necessary medical experience to meet the requirements of (the pertinent) National Health Service Act provisions for England and Wales, Scotland and Northern Ireland)."

There was no reference to Directive 93/16/EEC.

On 25th April, 2006, the head of regulation of the Medical Council in Ireland confirmed as follows:

"In accordance with title, IV of Directive 93/16/EEC, the Medical Council confirms that Dr. Syed Maqsood Hussain ... has completed specialist training in general medical practice and is entitled to apply for entry to the General Medical Services Scheme in Ireland.

This letter is issued in accordance with Article 36 (5) of Directive 93/16/EEC."

A certificate to that effect was enclosed together with a further certificate that Dr. Hussain's name was entered into the register of medical specialists in the division of general practice valid from 1st July, 2006 to 30th June, 2007.

A year later the Irish College of General Practitioners wrote to Dr. Hussain advising him that he was elected to membership of the Irish College of General Practitioners on 1st May, 2007. He was assigned a tutor.

## 2. European Directive

Article 36 of Directive 93/16/EEC provides as follows:

"(1). From 1st January 1995, and subject to the acquired rights it has recognised, each Member State shall make the exercise of general practice under its national social security scheme conditional on possession of a diploma, certificate or other evidence of formal qualification as referred to in Article 30 [which refers to specific training and general medical practice].

Article 36 (5) provides:

"Nothing in paragraph 1) shall prejudice the possibility, which is open to Member States, of granting, in accordance with their own rules and in respect of their own territory, the right to practise as general practitioners under a social security scheme to persons who do not possess diplomas, certificates or other formal evidence of medical training and of specific training in general medicine practice obtained in both cases in a Member State, but who possess diplomas, certificates or other evidence of either or both of these types of training obtained in a non Member country."

Article 42 further provides:

"Member States shall designate the authorities and bodies competent to issue or receive the diplomas, certificates and other evidence of formal qualifications as well as the documents and information referred to in this Directive and shall forthwith inform the other Member States and the Commission thereof."

## 3. Department of Health Circular

By Circular 3/96 dated 19th June, 1996, the Department of Health, GMS Division referred to the 1994 Agreement between the Department and the Irish Medical Organisation (IMO) following the review of operations of the General Medical Services Scheme in relation to general practitioners, referred to discussions between the Department and the IMO who agreed on a revised version of entry to the GMS at paragraph 2 and enclosed the pre-existing guidelines for allocation of marks in interviewing applicants for vacancies in the GMS (Appendix 3). Appendix 5 related to entry to the GMS Scheme, to the European Union Directive 93/16, to acquired rights, qualifications issued by other EU Member States, the role of the Medical Council and experience requirements.

The second appendix, as varied as from 19th June, 1996 laid down criteria for filling vacancies and creating new posts and dealt with the consultation process. In relation to interviewing of applicants for vacancies in the GMS it referred to interview boards being comprised of an independent chairman nominated by the chief executive officer, the director of public health of the health board or a public health doctor with relevant experience and an independent general practitioner chosen from panels nominated every three years by the IMO and the Irish College of General Practitioners. Candidates would be short listed for interview on the basis of the information contained on their application forms.

A marking system for guidance of interview boards in awarding marks to candidates at interviews followed at appendix 3.

It is recommended that the guidelines be introduced to assist in producing uniformity in interviewing of applicants for vacancies in the General Medical Services scheme. The purpose of an interview, it was stated, *was to place candidates in order of merit* (Italics added).

To be eligible for interview all candidates must have satisfactorily completed a recognised vocational training scheme in general practice or have acquired rights under the EU Directive on specific training in general practice. This is a threshold requirement.

In addition marks should be awarded for:

- "(i) Qualification of an academic nature – membership, diplomas, etc. appropriate to general practice;
- (ii) Suitable hospital experience – most marks should be for the first three/six months in each speciality;
- (iii) Experience in general practice itself, taking into consideration the amount of responsibility the candidate exercised;
- (iv) Experience in research, teaching CME, GP Unit and other comparable experience;
- (v) General acceptability and suitability – the candidate's personality and other experience should be considered."

The maximum marks available for professional qualification and research was stated to be 100 marks.

Membership of the Irish College of General Practitioners or other recognised colleges of general practice was allocated 60 marks. A general practice based M.D. thesis would be awarded 40 marks; F.R.C.G.P., 30 marks; M.R.C.P.I., M.R.C.P., M.R.C. Psych., F.R.S.C.I., 20 marks; M.Sc., 20 marks and recognised diplomas 10 marks each for a maximum of two.

Published research relevant to general practice, 15 marks and other published work 5 marks with a maximum number of papers limited to two.

## 4. Evidence

### 4.1 Professional qualifications

It is common case that Dr. Hussain was registered in the register of Medical Specialists in the Division of General Practice valid from 1st July, 2006 to 30th June, 2007 and was, accordingly, entitled to 60 marks as from 1st July, 2006 when, indeed, he was appointed as general practitioner in Belmullet, Co. Mayo, in 2007.

Dr. Hussain acknowledged that at the time of the interviews in March and June 2006, he was not a member of the Royal College of General Practitioners, which, it was accepted, was the equivalent of membership of the Irish College of General Practitioners. The certificate of equivalent experience from the U.K. Joint Committee on Post Graduate Training for General Practice was not recognised

and that Dr. Hussain did not get any score in relation thereto.

It is common case that the certificate of equivalent experience related only to NHS in the United Kingdom and did not refer to title 4 of Council Directive 93/16/EEC. However the certificate of eligibility in general medical practice issued by the Medical Council on 26th April, 2006 was issued for the purposes of and in compliance with Article 36 (5) of the said Council Directive.

As has already been referred to, Article 36 (5) allows Member States to grant, in accordance with their own rules and in respect of their own territory, the right to practise as general practitioners under a social security scheme to persons who do not possess diplomas, etc.

The exercise of that right by a medical council appears to be co-extensive with the certificate of equivalent experience issued by the United Kingdom Joint Committee on Post Graduate Training for General Practice with the addition of a certificate of compliance with the Directive. It does not, of itself, equate with membership of the Irish College for General Practitioners.

Indeed, the evidence in relation to the certificate of equivalent experience of a third party doctor who was given a certificate under the National Health Service Acts and title 4 of the same Council Directive did not entitle her to receive any score in relation to professional qualifications and research.

#### **4.2 Interview panels**

The Court is satisfied from the evidence both in Chief and cross examination of Mr. Richard Broderick (Manager of Primary Healthcare West Galway – Mayo) and Dr. Fitzgerald (General Practitioner of Crosmolina), who were members of the interview panel on 29th June, 2006, that the same criteria was followed in the case of all candidates and that there was no discrimination in relation to Dr. Hussain.

In particular, it was put to them that remarks made by some members of the panel about whether Dr. Hussain was a naturalised Irish citizen or whether, having been several years as a houseman and registrar, he was a failed specialist, while it may not have been totally correct, did not amount to discrimination.

The court would not expect the second matter to have been raised, even in such an offhand manner, in every interview when a candidate had been a junior hospital doctor for several years.

However, the evidence of Dr. Fitzgerald was that she had asked the other candidate about his background.

A further concern of Dr. Hussain was remarks in relation to his handwriting which were applied to its being difficult to read. The Court accepts that while it might have been more professional to have an application form completed in a typed or word processed form, it might have been better not to have been referred to. Dr. Declan McKeon was part of the panel with Dr. Eleanor Fitzgerald in March and June 2006. Dr. McKeon found Dr. Hussain writing "challenging" and referred to the importance of presentation. Mental health experience and men's health were important for the Mayo post. He gave evidence of his reasons for marking the plaintiff at 49 – just below minimum. The Court is satisfied that, from the nature of the evidence given by Dr. Hussain and that given by Mr. Broderick, Dr. Fitzgerald, and Dr. McKeon that the interviews were not discriminatory.

The Court finds, having regard to the analysis of the Directive, and the ministerial circular, that there is no inconsistency between the Circular and Directive nor that the Circular improperly applied the Directive.

The object of the interview, as was clear from the powers given to the Member State under Article 36 (5) and to the Minister's Circular, was to place candidates in order of merit.

This was done in the case of the interview on 29th June, 2006. The evidence in relation to the March interview was that Dr. Hussain was the only candidate but, while he was awarded 49 marks for professional qualification and research, (possibly in error according to the evidence of Dr. Declan McKeown who was a member of the interview panel), this mark was, as already indicated, just outside the satisfactory rating criteria for general suitability.

The Court also observes that, even if Dr. Hussain had obtained 49 for professional qualifications and research in the June interview or, indeed, a full 60 marks for membership or its equivalent of a college of general practitioners, he would still have ranked as third.

The Court is satisfied that the interview panel, in applying the ministerial circular, and having regard to Article 36 (5), were correct in not awarding a score of 60 as Dr. Hussain had not, then, either the membership of the Royal College of General Practitioners or its equivalent.

Counsel also referred to the lack of recognition of the certificates obtained by Dr. Hussain.

The Court is satisfied that, under the ministerial circular that diplomas attracted 10 marks up to a maximum of 2. Dr. Hussain did not have diplomas. His evidence of a wide range of courses, including courses in management, did not indicate whether these were validated and, it would appear that he did not have certificates in respect of all of them.

The record of interview and assessment, insofar as it is a breakdown of the "example of marking system" which includes certificates x 5 marks seems somewhat misleading but I accept the evidence of Mr. Broderick and the other panel members that the form is a general one for all interviews. What is clear is that under the heading of "professional qualifications and research" there is no provision for marks for certificates.

#### **5. Conclusion**

The Court, accordingly, is satisfied that the defendant has not acted ultra vires its powers in and about the awarding of a contract under the GMS Scheme in granting the contract to Dr. Swannick. The plaintiff is not entitled to a declaration that he would be awarded the contract for that position. The Health Service Executive did not fail to comply with the requirements of Directive 93/16/EEC nor did it exceed its own rules or lack administrative reasonableness or abused power or was estopped from awarding the contract or denying the plaintiff's entitlement to the said contract.

In relation to the claim for an order directing the defendant to grant the position of principal general practitioner in Strokestown to the plaintiff, the Court observes that this position was, in fact, offered to Dr. Hussain after he had secured a similar position in Belmullet and he refused such offer.

The plaintiff is not entitled to a declaration that he satisfied the criteria for the position pursuant to the interview of March 2006 or

June 2006.

There has been no breach of the plaintiff's constitutional rights or statutory rights and the plaintiff is not entitled to damages.

#### **6. Proposed reference to the European Court of Justice**

Counsel for the plaintiff suggested the following questions to be referred to the European Court of Justice. These are as follows:

1. Where in 2006 an E.U. Member State national (Irish) and doctor held a medical qualification from another Member State (the U.K.) but twice failed to secure employment as a full time general practitioner in his national State's public medical service, in an interviewing process where no account was taken as a threshold requirement and no score awarded under professional qualification, or credit given for that (U.K.) qualification, was his right to freedom of movement under the Treaties and under Directive 93/16[1993] O.J. 165/1 infringed where -

(a) at the time of the interview for the first vacancy, (15/3/06), he did not possess from his Member State's regulatory authority (The Irish Medical Council) any formal recognition of that (U.K.) qualification.

The Court comments that account was taken of this qualification as a threshold requirement but no score was properly awarded under the heading of professional qualification. Moreover the U.K. qualification was confined to work with the N.H.S. and had no validity under the Directive.

(b) at the time of the interview for the second vacancy, (29/6/06), he did not possess from that authority certificates that he had completed the training "as satisfies the requirement of Title IV of" the Directive (date 25/4/06) and also that he had been entered on that Authority's Register for General Medical Practitioners "valid from 1st July 2006 to 30th June 2007" (date 26/6/06).

The Court has found that Dr. Hussain had not a recognised qualification which conformed with the Department Circular. No evidence that he was asked to demonstrate or comment on this matter which is a matter for the panel to determine on the basis of documents submitted with the application in accordance with the Department's Circular.

(c) at neither interview was he asked to demonstrate or comment on whether that (U.K.) qualification was equivalent to the national (Irish) required qualification;

No evidence was adduced as to whether Dr. Hussain was asked to demonstrate or comment on this matter which was a matter for the interview panel to determine on the basis documents submitted with the application in accordance with the Departments Circular;

(d) thereafter at interviews with the very same employer for identical vacancies, that (U.K.) qualification was never disputed as not being equivalent to the requisite national qualification.

This, as already indicated, was a matter for the panel to determine.

2. If there was a breach of Directive 93/16, on what basis should the doctor be compensated, especially for other than loss of remuneration resulting from the breach?

There was no breach of the Directive. The Court is, accordingly, satisfied that it is not necessary to refer the matter to the European Court of Justice.