Neutral Citation Number: [2011] IEHC 352

THE HIGH COURT

2011 87 SP

IN THE MATTER OF THE MEDICAL PRACTITIONERS ACT 2007 AND IN THE MATTER OF SECTION 75 THEREOF

BETWEEN

DR. T.

APPELANT

AND

THE MEDICAL COUNCIL

RESPONDENT

JUDGMENT of Kearns P. delivered the 19th day of July, 2011

This application is one for an order pursuant to s. 75 of the Medical Practitioners Act 2007 cancelling the decision of the Medical Council made on 19th January, 2011 whereby, having regard to the report of the Fitness to Practise Committee dated 22nd December, 2010, the applicant was found guilty of professional misconduct in respect of two allegations in relation to conduct alleged to have occurred on a single occasion in or around January 1996 at his surgery in a rural part of Ireland. The complaint was of an inappropriate internal examination of the complainant in circumstances which did not warrant any such examination.

Far from coming forward with a speedy complaint, a period of some 14 years elapsed before the complainant eventually did come forward to make a complaint to the Medical Council, and they did, quite properly, have serious regard to the complaint and did deploy their various procedures in relation to it and a *prima facie* case was found to have arisen by virtue of the complaint which led to a full three day hearing before the fitness to Practise Committee. But the question which now arises on appeal, as a preliminary issue, is the very issue that arose at the very start of the full hearing before the Fitness to Practise Committee and it is this: can there be – in the particular circumstances such as arise in the instant case – a fair hearing having regard to the delay and its prejudicial consequences for the applicant arising from that delay?

The application before the Court raises various grounds of appeal but basically the grounds of appeal are that the Fitness to Practise Committee should not have proceeded further with the hearing because of the lengthy delay and secondly the allegations were not proved beyond a reasonable doubt which really goes to the merits of the decision. And further a complaint that the suspension was wrongful, as it was coupled with a condition which was outside the statutory scheme. There are other complaints that material was circulated in advance of a particular meeting to the members of the Medical Council and there was also apparently a conclusion that the doctor had wrongfully destroyed relevant medical records, although evidence had been placed, uncontroverted evidence apparently, before the Fitness to Practise Committee from a reputable medical professional that the length of time the doctor in this instance had preserved and kept his records was in accordance with good and proper medical practice.

It is unclear to me whether other complaints against the doctor which arose subsequently were taken into account to any degree by the Council in imposing ultimately the severe sanction which they did impose but what I really have to consider is whether it was an unfair hearing which would be replicated in this Court by a repeat hearing if the matter were to proceed and this preliminary point has been raised for determination at the outset.

Now, I have pointed out to both sides that in the ordinary course where at the outset of a hearing an application is made that it not proceed because of delay and its prejudicial consequences and that application is refused that that decision is the subject matter of a judicial review challenge. That did not happen either at the outset of the hearing or three days into the hearing when a similar application was made. The parties have reached agreement that the evidence that was given can form the basis now for this Court's consideration of whether the Fitness to Practise Committee did correctly decide that particular issue and I have been referred in detail to the evidence given by the complainant to explain her delay in coming forward and indeed, to a limited degree, to the evidence given by the doctor in relation to it. Both sides agree that the decided cases in the area of sex delay cases on the criminal side are of considerable importance and relevance here given that any allegation of this nature must be proved beyond a reasonable doubt. So, the burden of proof as to whether such a complaint can be made out is the same and therefore similar, if not identical, considerations do arise.

Insofar as the situation of the complainant is concerned, this is not a case where there is evidence that the doctor in question was in a position of trust or authority or exercising dominion over her. I think in the circumstances therefore it would be necessary, after such a lengthy interval of time, to have some reasonable explanation, backed up by appropriate medical evidence, to explain why such a lengthy period of time passed before complaint. It is true that she gave evidence herself that she had a number of difficulties in the years that followed but on my reading of that evidence, even on her own account her problems seem to have stemmed from unrelated issues. First, she went to the United States for seven years. Then at the time of the birth of a child she suffered from pre-eclampsia. She also had a kidney infection. She had postnatal depression after the birth of a child. One of her brothers had a psychotic breakdown and her father developed Alzheimer's disease, all of which contributed apparently to a significant level of depression insofar as the complainant is concerned but I have to bear in mind she had no problem apparently telling a large range of people about her complaint against the applicant and no psychiatric evidence or psychological evidence was offered in support of her supposed inability to come forward at an earlier time or within a reasonable time. I think the doctor in this case was placed in a virtually impossible position I trying to meet the complaint that has been made. I know it is often said that on a one-versus-one basis a matter can proceed but I have to bear in mind that there is uncontradicted evidence in this case that at the relevant time in 1996 this particular doctor had between 1,500 and 2,000 patients in his practice. He has given sworn testimony to a hearing that he has no recollection of this particular patient and he has not records which he can check because it all happened so long ago and the

records which he did have he did not keep beyond a certain time because he had not particular reason to do so. This complaint was only made, as I say, 14 years later in 2010, the matter in question allegedly having arisen in 1996.

So, it seems to me that the application brought on behalf of the applicant in this case is properly made out and genuine case of an applicant suffering a degree of unfairness which was the subject matter of the decision of the Supreme Court in *Toal. v. Duignan* to which reference has been made by counsel for the applicant. The other cases indicating the requirements of proof in such cases have also been referred to, including *Shine v. The Medical Council*. I think there would be a substantial unfairness in allowing this matter to proceed now, as it were, to a full rehearing and as I say with the records now gone there are obvious difficulties and prejudice accruing to the applicant. He has no way of checking what condition the complainant actually complained of if and when she did consult him. He has not record at this sate of any advice he may have given.

Apparently this was a once off only visit and there is no clear or coherent evidence to suggest that there were follow up visits. The consent form which the complainant says she signed for the prescription for the pill, the morning after pill, again that has long since disappeared and it seems to me the rights and wrongs of this matter are really lost now in the mists of time and it would be an injustice and a want of fair procedures to allow this matter proceed any further. So, in the particular circumstances I think I should allow this appeal and cancel the decision of the respondent made on 19th January, 2011. In the particular circumstances having reached the conclusion I have reached I think it would be appropriate for me to request that the name of the medical practitioner in question be not published or the particular parish or locality where he has his practice still is located.