[2019] IEHC 947

THE HIGH COURT

[2019/159SP]

BETWEEN

NURSING AND MIDWIFERY BOARD OF IRELAND

APPLICANT

AND

M.M.G.

RESPONDENT

***EXTEMPORE* JUDGMENT of Mr. Justice Kelly, President of the High Court delivered on 29th day of April, 2019**

Introduction

This is the application of the Nursing and Midwifery Board of Ireland ("the Board") made pursuant to s. 74 of the Nurses and Midwives Act 2011 ("the Act").

The respondent, MMG was the subject of hearings which took place before the relevant Fitness to Practise Committee of the Board (the Committee) and also the Board itself.

The statutory framework which obtains on an application of this sort is set out in s. 74 of the Act. It provides in subsection 1 that where a registered nurse or registered midwife does not, within the period allowed, appeal to this court against a decision to impose a sanction, then the Board shall, as soon as is practicable after the expiration of that period, make an application to the court for the confirmation of its decision. That is the application which is before me this afternoon.

Subsection 3 of s.74 sets out the parameters within which the court must operate. It reads:-

"The court shall, on the hearing of an application under subsection 1, confirm the decision under section 69, the subject of the application unless the court sees good reason not to do so."

That is the same statutory language as is used in the Medical Practitioners legislation which I had on a number of occasions in the recent past to construe as to its proper meaning. I concluded in those cases, as I do in this, that the provision does not constitute this court as an appellate tribunal on the merits from a decision of the Board. The only basis upon which this court could refuse to give effect to a decision of the Board would be in the event of the court concluding that the decision was either a wholly unreasonable one or that some other serious legal infirmity affected the decision of the Board.

Background

The respondent worked as a practice nurse in a general practice. The practice had five general practitioners. It was that practice which made the complaint in suit to the Board.

The respondent had worked in the practice for about 15 years so she was well known to the members of the practice and was well established within it. I am sure it came as a great shock to the general practitioners to discover what occurred on the afternoon of 23rd September, 2016.

Dr. L., one of the partners, was standing at the fax machine having just sent a fax. A fax came in. It was a prescription apparently written and signed by him for the respondent for Anxicalm 5 mg. tablets and was dated 29th August, 2016. In his complaint to the Board he stated that he was extremely shocked to see this fax as he had not written the prescription for the respondent and was not her general practitioner. His complaint then set out what occurred when he confronted her about this. This event resulted in the complaint being made and the hearing which took place before the Committee.

The allegations

A large number of allegations were made against the respondent and she was found guilty in respect of the bulk of them. They were held to amount to professional misconduct on her part.

The first allegation was that between 1st June, 2015 and 23rd September, 2016 she wrote and/or caused to have written one or more prescriptions for stock medication of Pethidine and /or Cyclimorph, when she knew or ought to have known that some or all of the medication was not required for stock. That allegation was proved against her both by virtue of her own admissions and also by the evidence of three doctors from the practice. It was held to amount to professional misconduct both on the basis of the conduct being a serious falling short of expected standards and also as disgraceful and dishonourable conduct in a professional sense. The Committee expressed itself as being satisfied beyond reasonable doubt that where a nurse writes a prescription for controlled drugs or any drugs, in circumstances where the stated purpose of the drugs is untrue and where the nurse intends to deceive the doctor or practice so as to obtain an improper benefit for herself, then that is conduct which reputable nurses would regard as involving clear elements of fraud and dishonesty amounting to disgraceful or dishonourable conduct by a nurse in a professional respect. The Committee was satisfied beyond reasonable doubt that the purpose as stated for the prescription of those drugs was stock purposes when the true purpose was to obtain the drugs for self-administration. It described that as a grievous breach of trust by the respondent. The conduct was also held to amount to noncompliance with the relevant code of professional conduct.

The second allegation was in respect of one or more of the prescriptions referred to in the first. The respondent requested and /or arranged for one or more of the medical practitioners in the practice to sign one or more of the prescriptions. That allegation was found to be proved both by the respondent's admissions and on the evidence of three of the doctors. It was found to amount to professional misconduct. The Committee said that it was satisfied beyond reasonable doubt that where a nurse, having written a

prescription, requests or arranges for such a prescription to be signed by a doctor in circumstances where the stated purpose of the acquisition of the drugs is untrue, and where the nurse intends to deceive so as to obtain an improper benefit for herself, then such conduct is of a type which reputable nurses would regard as involving clear elements of fraud or dishonesty amounting to disgraceful and dishonourable conduct. The respondent was also found guilty of non-compliance with the relevant code of professional conduct in respect of this allegation.

The third allegation was broken into three parts. The facts in respect of two of the allegations were proved against the respondent but not a third. This allegation was that on one or more occasions between June 2015 and September 2016, she added Pethidine and /or Cyclimorph to one or more prescriptions which had already been signed by a medical practitioner in the practice. There was a finding of professional misconduct and the Committee expressed itself as being satisfied beyond reasonable doubt that where a prescription is presented and signed by a doctor for drugs, and where the presenting nurse alters the drugs already prescribed to include additional or other controlled drugs so as to obtain such drugs for her own use and benefit, that is conduct which reputable nurses would and the Committee did regard as involving clear elements of fraud and dishonesty. That was also held to amount to disgraceful and dishonourable conduct by the respondent. She was also found guilty of noncompliance with the relevant code of professional conduct.

The fourth allegation related to the presentation for dispensing of those prescriptions by a named pharmacist. Again, there was a finding against the respondent and her conduct was found to be professional misconduct. She was also found to be non-compliant with the code of professional conduct.

The fifth allegation related to occasions where the respondent self-administered some or all of the pethidine and /or cyclimorph dispensed by the pharmacy. Those allegations were proved beyond reasonable doubt.

The sixth allegation related to the writing of one or more prescriptions for Anxicalm and /or Lexotan in her own favour where she signed one or more of the prescriptions in the name of Dr. L. without his knowledge or permission. Again this was found to be proved as a fact having regard to the respondent's admission. It must be said in her favour that she made admissions in respect of this and indeed the other allegations. Again this wrongdoing was found to amount to professional misconduct and noncompliance with the relevant professional code.

The seventh allegation related to the presentation for dispensing of one or more of the prescriptions to a different pharmacy and on this occasion the facts found against her were held to amount to professional misconduct.

The eighth allegation related to the self-administration of some or all of the Anxicalm and /or Lexotan. This allegation was made out and was found to amount of professional misconduct and failure to comply with the relevant code.

The next allegations were that the respondent had a relevant medical disability. It was alleged that she suffered from a history of dependence on Cyclimorph which might impair her ability to practise nursing or a particular aspect thereof. It is also alleged that she suffered from depression and/or anxiety which might impair her ability to practise nursing or an aspect thereof. The Committee found on the basis of her own admissions that she did indeed suffer from these medical disabilities by virtue of those conditions. The Committee noted that she was not at present impaired but that the conditions in question were chronic recurring ones. That was a view formed by it on the basis of expert testimony furnished by Dr. K. Dr. K said both conditions are individually chronic recurring ones.

Sanction

Having made these findings, the Committee decided on the appropriate sanction. Its report contains a detailed analysis and rationale as to why it came to the conclusion which it did. It has to be said that the allegations involving fraud and dishonesty on the part of the respondent in relation to the conduct of her professional tasks and duties as a nurse are at the most serious end of the spectrum. To forge prescriptions, to alter prescriptions already written, to mislead doctors in the practice as to the purpose for which prescriptions were being written, all destroy the trust which both the doctors of that practice and the patients of that practice are entitled to repose in the practice nurse. Were it not for the findings made by the Fitness to Practise Committee concerning the existence of her addiction and the attempts made by her to rehabilitate herself, it is difficult to see why there would not be a recommendation that she be struck off the Nursing Register. However, that Committee saw fit not to recommend such a sanction but instead that she be suspended from the Register for a period of eighteen months. That period was recommended to commence from the conclusion of this process. The process concludes today because none of the decisions of the Board have any effect until such time as this court confirms such decisions.

The Committee set out a series of conditions which it believed would satisfy the public interest in ensuring protection of the public from the respondent in her capacity as a nurse. The rationale for deciding not to recommend that she be struck off is stated as follows by the Committee where it:-

"… notes the efforts made by the registrant to rehabilitate herself to date and consider that this shows a committed engagement in her own rehabilitation. The Committee further has regard to her insight, albeit limited, to Cyclimorph, her efforts at keeping her family together in difficult circumstances, her obvious love for her profession and her clear shame at her conduct which has brought her before the Board, shows her active engagement in her own rehabilitation. The Committee does not consider that erasure as appropriate and believes that the registrant should be given a chance and is of the view that the period of suspension followed by the phased supervised return to work and the conditions recommended as outlined are the most appropriate and proportionate sanction, adequately protect the public, should maintain public confidence in the profession and uphold

professional standards whilst allowing leniency to the registrant acknowledging her attempts at rehabilitation to date."

That is the clear view of the Committee. As I have said on many occasions in the past, the question of the maintenance of standards and maintenance of public trust in any profession is primarily the responsibility of the profession's regulator and not of this court. The Committee believed that its recommendation protected the public and the reputation of the nursing profession.

The Board Hearing

The matter then proceeded to be dealt with by the Board. It held a hearing, the transcript of which has been put before me, which took place on 22nd January of this year. It decided, for reasons which are not apparent to me, to alter the recommended sanction. It recommended a reduction in the period of suspension from 18 to 12 months. I have carefully read the transcript of what occurred at that hearing. At no stage does there appear to have been any discussion during the hearing on the question of reducing the period of suspension. The only time that it is mentioned is in the actual decision of the Board as pronounced by the person who chaired the hearing. Mr. McDowell, solicitor for the Board, was unable to point to anything in the transcript which would suggest what the rationale for reducing the period of suspension might be. It is in my view highly desirable that if the Board is to depart from a considered decision of a Fitness to Practise Committee it ought to give reasons as to why it is taking such a course. In the present case the Committee gave a great deal of attention to this case. It produced a very detailed report and set out its rationale with great clarity. That was departed from by the Board which decided to adopt a more lenient view on the question of the length of suspension. I can find no basis as to why it made that decision to differ from the Committee. At the very least it ought to have indicated why it was taking a more lenient view than the Committee and the rationale for it. In any event, it decided to reduce sanction in respect of the misconduct to a period of 12 months' suspension. It then recommended the attachment of a number of conditions which, of necessity, had to be altered somewhat from those recommended by the Committee.

Those conditions are as set out in the endorsement of claim on the summons. They are that whilst the respondent is suspended she is to continue to actively engage with the clinician responsible for her care and with her mental health team. Second, prior to the end of the period of suspension and no sooner than nine months and no later than 11 months an independent psychiatrist approved of by the Board is to review the respondent and certify her fitness to return to practice. A report from that psychiatrist must be forwarded to the Board. Following the period of suspension and having been certified as fit to return to practice by the independent psychiatrist then, prior to returning to nursing in either a paid or voluntary capacity, the respondent has to successfully complete at her own expense a return to nursing practice course approved by the Board. She must provide proof of completion of that course to the Board. Following her return to practice as a nurse in a paid or voluntary capacity in this jurisdiction she must continue to actively engage with the clinician responsible for her care and the mental health team at least six

monthly or as prescribed by the clinician responsible for her care. She must also have a minimum of three random urinalyses samples taken and the results of them advised to the Board. She must also inform any nursing employer that she has been the subject of a fitness to practise process and the conditions attached to her registration. She must confirm to the Board that she has done so. If necessary, the Board may communicate with the employer in order to confirm this matter. These conditions are recommended to be reviewed by the Board twelve months after the respondent has returned to the practise of nursing.

As I pointed out to Mr. McDowell and he accepts, those conditions do not at all address the situation should the respondent not get a clean bill of health from the independent psychiatrist. Under the terms of the decision of the Council she is suspended for a definite period of 12 months and no more. It then envisages that she will be given a favourable report and will return to nursing. But the conditions do not seem to address what may be the case – I hope it won't be – that she may not get a clean bill of health. The evidence given by the independent expert was that her conditions are chronic and recurring. That being so, I would have thought that the decision in suit might address the prospect of her not receiving a favourable report. They do not. I cannot rewrite the conditions because I am not an appellate tribunal on the merits under this particular provision of the legislation. The court is given such a role in legislation concerning certain other professions and I have never been able to understand why its task should differ from one profession to another. That, however, is what the legislature has ordained. In the event of an unfavourable report being forthcoming in respect of the respondent it is the responsibility of the Board to ensure that the public is protected from her practising as a nurse in such circumstances. Her suspension will have lapsed but it would clearly be inappropriate that she would return to nursing in the event of an unfavourable report from the independent psychiatrist. In future the Board ought to provide in cases such as this for what the position should be in the event of an unfavourable report being given in respect of a nurse such as the respondent.

I am very limited in what I can do under the legislation. Unless I see good reason not to, I am obliged to give effect to the recommendation from the Board in this case. She may not practise as a nurse during the period of her suspension and thus the public is protected. If she obtains a favourable report and returns to nursing, there are conditions which she has to meet which I am satisfied protect the public. I am however concerned as to what protection the public has in the event of an unfavourable report being forthcoming. I have however drawn that lacuna to the attention of the Board. It has the statutory responsibility to ensure the public protection and the maintenance of trust in the nursing profession. That is the primary responsibility of the Board. It will be up to it to discharge its responsibility efficiently. Therefore, having drawn the Boards attention to this serious omission from its decision and reminded it of its obligations to protect the public and maintain nursing standards I will in accordance with the statutory requirements confirm the decision in question pursuant to section 74(3) of the Act.