[2020] IEHC 481

THE HIGH COURT

IN THE MATTER OF S. 45 OF THE PHARMACY ACT 2007 AND IN THE MATTER OF A REGISTERED PHARMACIST AND ON THE APPLICATION OF THE PHARMACEUTICAL SOCIETY OF IRELAND

[2020 No. 243 SP]

BETWEEN

COUNCIL OF THE PHARMACEUTICAL SOCIETY OF IRELAND

APPLICANT

AND

A.B.

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on Wednesday the 30th day of September, 2020

1. This appears to be the first written judgment on the suspension of pharmacists under s. 45 of the Pharmacy Act 2007, although the principles in relation to suspension of other professionals are closely related. Section 45 of the 2007 Act allows the court in certain circumstances to direct the suspension of a pharmacist pending the processing of a complaint, and sub-s. (5) provides for such applications to be heard in private unless the court otherwise orders. Accordingly, the judgment has been redacted.

2. It is unnecessary to go into the facts in detail because the pharmacist here accepts in para. 2 of his affidavit that "*I should not be practicing as a pharmacist for the time being. I have developed significant issues arising from mental health and as a consequence, have now developed an addiction to alcohol and medication*".

3. On 3rd September, 2020, concerns about the respondent were conveyed to the Society. On 11th September, 2020, the Society by remote meeting considered an undertaking offered by the respondent not to practice, but decided to apply to the court for an order suspending the respondent from the register. The reasons for taking that approach included:

   (i). the overall seriousness of the allegation;

   (ii). an allegation that he had dispensed the wrong product;

   (iii). an allegation that he had attended while drunk;

   (iv). an allegation that he sought to conceal the taking of medication by asking staff to leave the pharmacy;

   (v). evidence of denial when confronted with wrongdoing; and

   (vi). an allegation that methadone was left for patients in an alleyway or a bookie's shop.

4. The Society said that it expected that there would be an undertaking not to practice pending the application to the court. The respondent has voluntarily ceased to be

superintendent pharmacist of the pharmacy concerned and states that he has not worked there since 4th September, 2020. He no longer holds keys or passwords. He resigned as a director of the company operating the pharmacy on 18th September, 2020.

5. The special summons in this case seems to have been filed on 17th September, 2020 although it is incorrectly dated 23rd September, 2020. In that summons, the applicant seeks an order suspending the registration of the respondent and prohibiting the respondent from engaging in the practice of pharmacy "*pending further procedure under Part 6 of the Act in relation to the complaint in respect of the Respondent*". Consequential orders are sought for notification of interested parties and entitling the applicant to amend the respondent's registration status on the "*public facing register of pharmacists*" to indicate that he is suspended. On foot of that application, I have received helpful submissions from Ms. Zoe Richardson, Solicitor, for the applicant, and from Mr. Simon Mills S.C. for the respondent. On 23rd September, 2020 having heard the matter I informed the parties of the order being made and indicated that reasons would be given later.

Options available to the court

6. Section 45(1) of the 2007 Act provides that, "*[t]he High Court . . . may by order suspend the registration of a registered pharmacist … against whom a complaint has been made.*" Two significant conditions are set out in the section. Subsection (3) provides that, "[*t]he High Court shall not make an order … unless satisfied that the Council has notified the registered pharmacist . . . of its intention to apply for an order*". Subsection (4) provides that, "*[a]n order … may be made only if the High Court considers that there is a risk to the health and safety of the public which is of such magnitude that the pharmacist's … registration should be suspended pending further procedure under this Part"*

7. Subject to consideration of whether the fact that the respondent now offers an undertaking dissipates the risk involved, the threshold for making such an order is clearly met here. Questions that might arise in other cases such as hardship to the practitioner, the draconian nature of suspension and the need to avoid unduly lengthy suspensions (see *Ó Ceallaigh v. An Bord Altranais* [2000] IESC 21, [2000] 4 I.R. 54) are not as critical where, as here, the practitioner is clearly stating that he is not going to practice. Those considerations could have more relevance where an allegation was equivocal and hotly denied, or where methods were available to enable continued earning of a livelihood without there being a real risk to the public.

8. Informal options may be available if a regulator is prepared to accept undertakings by a practitioner either to restrict practice or not to practice. However, at least in the pharmacy context, that has no statutory basis. Also, the meaningfulness of informal undertakings is diluted by their lack of enforceability, a point made by Kelly P. in *Teaching Council of Ireland v. M.P*. [2017] IEHC 755, [2018] 3 I.R. 249, at para. 60.

9. Section 59(1) of the 2007 Act allows a pharmacist to cancel their registration on request, but that option is not available where a live complaint exists. There is no corresponding

provision for suspension of registration at the request of a practitioner without recourse to the court.

10. The register is provided for by s. 13 of the 2007 Act, with the particulars to be entered in that register prescribed by the Pharmaceutical Society of Ireland (Registration) Rules 2008 (S.I. No. 494 of 2008), rule 7(1). The Society also maintains a "*public-facing register*" which is essentially an online directory of registered pharmacists. The public-facing part of the register does not have a statutory basis and essentially is a set of extracts, what Ms. Richardson calls "*a summary, if you like*" of the official register. On occasion, the public-facing register can include extra notes, for example to contact the registrar regarding the status of a particular practitioner or the fact that they have given an undertaking not to practice. That does give a certain amount of flexibility as to how any particular voluntary or compulsory restriction on practice can be presented to the public.

11. Returning to the question of whether sufficient risk exists here, part of Mr. Mills' argument was that "*risk*" means risk construed holistically in all the circumstances of the case which would essentially have the implication that where an undertaking is given, there wasn't sufficient residual risk, so there would be no need for an order. However, the legislative scheme seems to me to imply that the risk should pre-exist the taking of action. In my view, "*risk*" means the risk independently of the application of the regulatory regime against the practitioner. On that logic, an undertaking doesn't kill off the process, and the regulator or court having identified a risk can then go on to assess whether an undertaking or a suspension is the most appropriate response to mitigate that risk. Such an analysis would involve considering the differences between the two approaches.

Undertaking versus order

12. Mr. Mills says that there are a number of reasons why an undertaking should be preferred to an order. Firstly, he says that his client should not be subjected to a draconian order if there is another method available. But the order isn't in fact draconian if the practitioner isn't going to be practicing anyway. Secondly, he refers to his client's good name and reputation. But that is affected either way. Thirdly, he refers to the need for expedition. However, but that in itself isn't a reason to accept an undertaking and indeed expediting the disciplinary process is, if anything, more pressing when there is an order suspending a practitioner. In any event, the complaint may well be resolved before the respondent's recovery. Mr. Mills says that an extra-statutory process could give the respondent more freedom if he recovers early, but that could alternatively be viewed as a negative if it diluted the effectiveness of the regulatory regime. In response to that possibility, he suggested that the undertaking could continue until the end of the disciplinary process, but if that happened it isn't more favourable to the respondent than a suspension. Fourthly, he argued that this case concerned a health issue and, therefore, it was preferable to "*respond to the respondent's engagement*". Without diminishing the need to encourage the respondent's engagement, I don't accept that argument as necessarily constituting a compelling reason not to suspend. On the contrary, it may be more likely to be in the respondent's long term interest to have to face up the consequences.

Indeed, Ms. Richardson also says that as a matter of principle where there are addiction issues that could dilute the meaning and effectiveness of an undertaking. She also points out that certain features of the evidence and allegations against the respondent suggest some degree of unreliability in relation to the assurances proffered by him prior to this point. Finally, Mr. Mills is concerned about information being communicated to third parties. He has no problem with the notion of relevant third parties being left in no doubt as to the respondent's status, but he preferred that to be articulated in terms of an undertaking rather than suspension. That to some extent comes down to a question of perception. Overall, I am not convinced that accepting an undertaking is really much more favourable in practice to the respondent than simply making an order for suspension.

13. On the other side of the equation, firstly, the enforceability of undertakings is less convenient. At one level, whether a person is suspended or gives an undertaking, either way the society would be coming back to the High Court on a contempt motion. But as against that, there is also a specific statutory offence to practice while not having a current registration: ss. 31 and 32 of the 2007 Act. That does not apply if one simply gives an undertaking. That is certainly one difference that dilutes the effectiveness of an undertaking.

14. Secondly, the legal status of registration will be ongoing notwithstanding an undertaking.

15. Thirdly, the terms of the public-facing register and the information available to third parties should reflect the respondent's non-practicing status and that was more appropriately achieved by a suspension order, rather than a mere undertaking.

16. Finally, there is the element that the undertaking was not in the terms of the order sought, although in fairness Mr. Mills said he would be prepared to expand it if that was an issue.

17. Overall, I am satisfied that a risk exists as specified in s. 45, warranting suspension of the respondent. Having considered whether that is adequately mitigated by an undertaking having regard to the fact that in material respects an undertaking in the circumstances is less effective in addressing the risk than an order for suspension, I consider that suspension is the appropriate approach to take here.

Ancillary order regarding directions

18. There was a specific issue about whether the court should give directions in relation to what the Society could say to third parties who made enquiries. Mr. Mills argued there was no jurisdiction to give such directions. One could see the argument that if the proceedings were in public, the Society wouldn't necessarily need any directions from the court, but s. 45(5) renders the proceedings private save where the court otherwise decides. That gives the court a definite role in what can or cannot be communicated to third parties. Mr. Mills also says that the statute leans against disclosure. And so it does, to some extent. But it also leans in favour of protecting the public. A situation where there is no general publicity, but where the Society can respond to queries, strikes

the appropriate balance here. There was no issue ultimately about the question of what was to be disclosed, which was the terms of the order rather than the background information.

Order

19. Accordingly, the order I made on 23rd September, 2020 was as follows:

    (i). an order in terms of para. 3(a), (b) and (c) of the special summons, suspending the practitioner and granting related reliefs;

    (ii). an order under para. 3(d) of the special summons directing the applicant to make an appropriate amendment to the public-facing register regarding the respondent;

    (iii). an order under para. 3(e) of the special summons allowing the applicant to disclose the terms of the order in response to inquiries;

    (iv). liberty to apply by either side on 48 hours' notice;

    (v). an order by consent reserving costs to the finalisation of the proceedings - that is in the context where, while admittedly all relief in the special summons has been granted, there will ultimately be a further application to the court to finalise proceedings after the disciplinary process.

20. Before concluding, I hope that I might be forgiven for venturing to note possible inflexibilities in the legislation that this case has highlighted. Mr. Mills has helpfully drawn attention to the fact that the Oireachtas is currently considering this area in the form of the Regulated Professions (Health and Social Care) (Amendment) Bill 2019. While any decision is entirely a matter for the Oireachtas, it seems to me that the present case possibly demonstrates an aspect where the legislative scheme could be improved, specifically by allowing a practitioner to voluntarily agree to a measure which would have equivalent legal effect to a suspension, but without the need for recourse to the court for a formal order. Perhaps, especially at a time when the legislation is being reviewed anyway, it could be worth drawing the attention of the Department of Health to the possibility of considering, for example, the following in the pharmacy context (and possibly with a read-across to other disciplines depending on the legislative scheme there):

    (i). a statutory basis for undertakings to or arrangements with the regulator to allow enforceable voluntary agreements not to practice or to restrict practice that would have equivalent effect in all respects to an order of the High Court suspending a practitioner, or to put it another way, a statutory basis for voluntary administrative suspension as an alternative to compulsory judicial suspension, with equivalent provision for consequential matters such as the extent and content of notification of third parties, the terms of the register and its public-facing version, and the prohibition of any unilateral withdrawal of such undertakings; and

(ii). consequentially adjusting the statutory offences so that they would cover practicing contrary to any form of voluntary restriction or undertaking on an equal basis to practicing when suspended by the court or unregistered.