THE HIGH COURT

[2021] IEHC 571

[2021 No. 1028 P]

BETWEEN

SAMUEL VAN EEDEN

PLAINTIFF

AND

THE MEDICAL COUNCIL

IRELAND

THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT (Ex Tempore) of Mr. Justice Twomey delivered on the 28th July, 2021

SUMMARY

1. This is a motion for an order extending the plaintiff's existing grounds of relief against the defendants to include a declaration that the practices engaged in by the Medical Council contravene Article 38 of the Constitution, on the grounds that the Medical Council purports to make findings of criminal conduct, which is reserved by Article 38 to a court of law.

2. The substantive proceedings relate to the issue by the Medical Council of a Notice of Inquiry on the 22nd September 2016 to the plaintiff regarding the holding of an inquiry as to whether the plaintiff had engaged in professional misconduct or poor professional performance, following the plaintiff's acquittal by the District Court of various charges relating to the importation of various medicinal products without a marketing or manufacturing authorisation.

3. In the substantive proceedings, the plaintiff seeks ten declarations with a particular focus on invidious discrimination and a breach of the equality provisions in Article 40.1 of the Constitution i.e. at paragraphs 1, 2 3, 4, 9 and 10 of the Plenary Summons and also *res judicata* at paragraphs 7 and 8. In addition there is a claim that the Medical Council usurped the powers of a court contrary to Article 37 of the Constitution which article deals with '*matters other than criminal matters'*, since Article 38 deals with criminal matters.

4. Although the proceedings in this case were issued on 19th February, 2021 and the parties were given a four-day hearing commencing on 27th July, 2021, the first full day of that hearing was taken up with a motion from the plaintiff to amend his pleadings.

5. It is clear from Order 28, rule 1 of the Rules of the Superior Courts that a Court has a discretion to allow either party to amend its pleadings for the purpose of determining the real questions of controversy between the parties.

6. For the reasons set out below, this Court has determined that the application to amend should be refused.

ANALYSIS

7. First, no excuse has been provided as to why this application to amend was not brought sooner. In fact, it is clear from as early as September 2016 (when the Medical Council furnished the Notice of Inquiry to Dr. Van Eeden) that the plaintiff, who was legally

advised at that stage, had all the facts in his possession to claim, as he is now doing in this proposed amended pleading, that the practices of the Medical Council, and in particular the issue of the Notice of Inquiry, contravenes Article 38 of the Constitution.

Yet for some reason no such claim was made then, nor indeed was any such claim made in the unsuccessful judicial review proceedings issued by the plaintiff against the Medical Council in 2017. This fact militates against the exercise of the Court's discretion in favour of the amendment.

8. Secondly, the application to amend comes very late in the day, not so much on the eve of the trial but actually on the first day of the trial and has taken up a full day of the four-day trial. As noted by the Supreme Court in Tracey v. Burton [2016] IESC 16:

> *'Court time is not solely the concern of litigants or their legal representatives. There is a strong public interest aspect to these issues'*

Accordingly the use of the first day of trial and therefore of scarce public resources because of the plaintiff's omission to include Article 38 in his pleadings, and for which no excuse has been offered, is a further factor against the exercise of this Court's discretion in favour of the amendment of the pleadings.

9. Thirdly, it appears to this Court that the plaintiff may be seeking to introduce during the hearing of the action a substantive new claim regarding inquiries by disciplinary bodies in relation to matters which overlap with criminal law (and it is to be noted of potentially wide-ranging effect regarding regulatory mechanisms generally). In this regard, the State has argued that the proposed amendment appears to be claiming that a person who is subject to a disciplinary hearing should not be put to the hazard in a regulatory inquiry on any matter which amounts to an accusation of a criminal offence.

10. If this Court is correct that a substantive new claim is being introduced by means of the proposed amendment, this will prejudice the defendants as they have already prepared detailed legal submissions which have been filed for some time and they will have to respond to a substantive new legal issue during the trial, for no other reason than the plaintiff omitted to do so earlier, for which omission he has provided no excuse. A defendant is entitled to know the case he has to meet at the delivery of the pleadings, save for good reason. Accordingly, this factor also militates against the exercise of the Court's discretion in favour of the amendment.

11. It is however relevant to note that the plaintiff's solicitor has provided sworn evidence that the amendment is simply being sought as '*a matter of professional proprietary and as a courtesy to the cour*t'.

12. Fourthly therefore for this reason, if this Court is wrong about it being a substantial amendment, and the plaintiff is correct and this proposed amendment is not in fact introducing anything substantially new into the proceedings, then it follows that little or no prejudice will be suffered by the plaintiff if the amendment is refused.

13. Fifthly, it seems to this Court that the proceedings in this case are in substance judicial review proceedings since the effective aim of the proceedings is to quash the Notice of Inquiry issued by the Medical Council, although it is framed as declaratory relief sought in plenary proceedings and there is a claim of unconstitutionality against Part 8 of the Medical Practitioners Act, 2007.

14. In this regard, it is clear from the Court of Appeal decision in *Mungovan v. Clare County Council* [2017] IECA 321 that a plaintiff cannot avoid the strictures of judicial review proceedings in relation to time periods and the contents of the statements of grounds, by taking what are in substance judicial review proceedings in the form of seeking declaratory reliefs by way of plenary proceedings. In *Mungovan*, the addition to declaratory reliefs by way of plenary proceedings, of a claim for damages in tort for breach of a constitutional right, was not sufficient to avoid the well-established principle in *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301 that judicial review principles apply by analogy to proceedings which are judicial review in nature.

15. Similarly, it is this Court's view that the addition of a claim of unconstitutionality by the plaintiff in this case does not save his proceedings, which are judicial review in substance, from of the application by analogy of judicial review principles to such proceedings. In view of the strict time limits which operate in judicial review therefore, and bearing in mind that the plaintiff could have raised the Article 38 issue some five years ago in September 2016, this is a further factor against the exercise of the court's discretion in favour of the amendment of the pleadings.

16. Furthermore, it is clear from the recent Supreme Court decision in *Casey v. Minister for Housing* [2021] IESC 42 that there are very good reasons why the courts should take a strict approach to judicial review proceedings. This is because as noted by Baker J. at paragraph 33:

> "The commencement of judicial review proceedings has a chilling effect on administrative activity until the issue is resolved one way or another."

17. The same chilling effect obviously applies to the commencement of plenary proceedings that are judicial review in nature. Baker J. went on to note, in the context of restrictions on the taking of judicial review actions, that such restrictions aim to:

> "minimise the risk that the implementation of the decisions concerned will be delayed by involving the decision maker in fending off spurious claims and to introduce finality at the earliest opportunity" (quoting De Blacam in *Judicial Review* (2017) at paras 53-01)

18. Whether the plaintiff wins or loses these substantive proceedings, his proceedings are nonetheless a very good example of that '*chilling effect on administrative activity'* because it is now almost 5 years since the Notice of Inquiry issued and in that time no Inquiry by the Fitness to Practice Committee has taken place, nor has there been a court decision ruling in the plaintiff's favour preventing such an inquiry proceeding.

19. Clearly, it is in the plaintiff's interests, the public's interest and the Medical Council's interests that any legal issues surrounding the issue of that Notice of Inquiry should be dealt with so as to *'introduce finality at the earliest opportunity'*.

20. Yet, permitting the introduction of further grounds of challenge, some five years after the Notice of Inquiry, would, in this Court's view run contrary to these recently espoused principles by the Supreme Court. Accordingly, this is a further factor in favour of the exercise of the Court's discretion against the grant of the amendment of the pleadings.

21. For all these reasons therefore, the application to extend the existing grounds of relief is rejected.