



THE COURT OF APPEAL
UNAPPROVED
NO REDACTION NEEDED

Neutral Citation Number [2022] IECA 74

Record Number: 2021/155
High Court Record Number: 2020/154JR

Noonan J.

Faherty J.

Murray J.

BETWEEN/

RAY O’SULLIVAN

APPLICANT/APPELLANT

-AND-

HEALTH SERVICE EXECUTIVE

RESPONDENT/RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered on the 25th day of March, 2022

1. This appeal concerns the suspension and proposed dismissal of the appellant from his position as Consultant Gynaecologist and Obstetrician at St. Luke’s Hospital Kilkenny as a result of alleged misconduct. In these judicial review proceedings, the appellant (“Professor O’Sullivan”) challenges a number of decisions of the CEO of the respondent (“the HSE”), Mr. Paul Reid. The effect of Mr. Reid’s decisions is that Professor O’Sullivan has been suspended on paid administrative leave since the 6th August, 2019, pending the completion

of an inquiry into certain matters concerning Professor O'Sullivan. The challenge to Professor O'Sullivan's suspension and proposed dismissal was dismissed by the High Court (Barr J.) in a judgment on the 27th April, 2021 and the consequential order made on the 20th May, 2021.

Relevant Background

2. Professor O'Sullivan has been employed as a Consultant Obstetrician and Gynaecologist at St. Luke's Hospital since 1992. His terms of employment are set out in a contract which was the common form of Consultants' contract with the HSE at the time it was made. It was described throughout these proceedings as the 1997 contract. It has since been replaced by subsequent iterations of the common contract for consultants employed subsequent to Professor O'Sullivan. The court was informed at the hearing of the appeal that only about eight 1997 contracts remain effective. Professor O'Sullivan has, from time to time over the years, been a publicly vocal critic of the HSE's approach to patient care.

3. In gynaecological practice, a speculum is a rigid instrument used by clinicians to facilitate clinical examination of the vagina, cervix and female pelvic organs. The use of a speculum can be uncomfortable for the patient and Professor O'Sullivan has for some time had a special interest in the development of alternative methods for such examinations that do not involve the use of a traditional speculum with a view to minimising discomfort.

4. On the 4th and 5th September, 2018, five women attended St. Luke's Hospital to undergo hysteroscopy procedures, two of which were done under general anaesthetic. The hysteroscope is a thin tube with a light and camera at the end which is passed through the vagina and enables the clinician to visualise the interior of the uterus.

5. As part of what he describes as a “feasibility study” Professor O’Sullivan decided, in furtherance of his research, to seek to measure the internal pressure on the vaginal wall of a number of his patients by the insertion of a small balloon catheter into the vaginas of each woman. He executed this during the course of the hysteroscopy procedure carried out on those patients. None of the patients were informed that this was being done nor was their consent sought. Ethical approval for such research would be required in advance from the relevant hospital ethics committee but such approval was neither sought nor obtained by Professor O’Sullivan. He did not inform any of the relevant hospital authorities of his intention to undertake this feasibility study. Further, the equipment used by Professor O’Sullivan was not hospital equipment but rather equipment personally purchased by him from his own funds, albeit it from a recognised supplier. None of the results of the study were recorded on the patients’ charts. In fact, the matter only came to light as a result of nursing staff present at the time having a concern about the undertaking of the procedure, in the particular context of the perceived risk of cross-infection. The nursing staff involved reported the matter to the hospital management which set in train a sequence of events which is still ongoing.

Subsequent Events

6. It would appear that senior hospital management brought the matter to the attention of the hospital clinical lead, Professor Gary Courtney, and also Professor Mary Day, the Chief Executive of the Ireland East Hospital Group. Professor Courtney is a Consultant Gastroenterologist. Professor O’Sullivan’s evidence, which is not disputed, is that prior to the events under discussion, there was considerable animosity between Professor Courtney and Professor O’Sullivan. Sometime shortly prior to the index event, Professor O’Sullivan claims that at a hospital meeting, he was defamed by Professor Courtney who threatened to

report him to the Medical Council over an unrelated, and highly disputed, incident. It would appear that Professor O'Sullivan subsequently issued proceedings for defamation against Professor Courtney but these were never served. In relation to Professor Day, it is of relevance to note that she is not a clinician.

7. Arising out of the report of the events received by her, Professor Day instructed that a review be carried out by outside experts. In that regard, two experts were instructed, Professor Peter Doran, group lead for research and Director of the UCD Clinical Research Centre, and Ms. Sinead Brennan, Director of Quality, Clinical Governance and Patient Safety. The Doran/Brennan review was carried out speedily and the results presented on the 1st October, 2018. The review concluded that the feasibility study had not been carried out ethically and in accordance with good clinical practice for the reasons, *inter alia*, I have already outlined.

8. Following receipt of this review, the hospital authorities considered that it would be necessary to make an open disclosure to each of the five affected patients. These open disclosure meetings were conducted on the 10th and 11th October, 2018. Professor O'Sullivan was not present, nor was he informed that the meetings were taking place. The meetings were conducted by Professor Courtney, an aspect of the process to which Professor O'Sullivan has taken considerable exception given the strong *animus* that existed between the two men.

9. During the course of these meetings, each of the women concerned were advised to undergo infection screening tests, including for HIV. Unsurprisingly, this caused considerable psychological distress to the patients in question, although it is not in dispute that they were not physically harmed in any way. Here again, Professor O'Sullivan strongly disputes the alleged infection risk or the necessity for screening and, insofar as psychological

harm was suffered by the women, he claims that this was inflicted by Professor Courtney and not by him. Each of the women have instituted proceedings in the High Court against the hospital.

10. Although the instructions given to Professor Doran and Ms. Brennan in carrying out their review are not known, it is relevant to note that despite various significant criticisms made by the review of the conduct of the feasibility study by Professor O’Sullivan, at no stage is it suggested that he presented a risk to patient safety.

11. Apparently arising from the findings of this review, Professor Day commissioned a further, much more in-depth, expert report in relation to these events. This report, titled a Systems Analysis Review (SAR) Report, was carried out by a team comprising Professor Donal Brennan, UCD Professor of Gynaecological Oncology and Consultant Gynaecological Oncologist at the Mater Hospital, the National Maternity Hospital and St. Vincent’s Hospital, Chair, Professor William Boyd, Consultant Gynaecologist at the Mater Hospital and Ms. Hilda Dowler, Quality Manager with the Ireland East Hospital Group. In the executive summary at the commencement of the report, the purpose of the review is identified in the following terms: -

“The purpose of the review was to identify any possible significant ongoing patient safety issues, and to make recommendations in respect of such if identified to ensure the five patients involved were informed and had follow up care as necessary.”

12. Although perhaps not entirely clear, while the review team was concerned with ongoing patient safety issues, initially, at any rate, those appeared to relate to the five patients involved. More broadly however, the terms of reference of the review group set out in Appendix 1 to the SAR Report make clear that patient safety generally was specifically part of the terms of reference which provides as follows: -

“Immediate safety concerns

Should immediate safety concerns come to the attention of the review team at any stage during the review, the review team will bring such concerns to the Commissioner’s [Professor Day’s] attention in writing in a timely fashion”.

13. The SAR Report is a very detailed and comprehensive document running to some 93 pages. It took some six months to complete and was presented on the 9th May, 2019. All relevant persons were interviewed including Professor O’Sullivan, the clinical and nursing staff involved and the patients themselves. The report identified five key causal factors and made recommendations in respect of each one. In brief summary, each of those factors were attributable to Professor O’Sullivan and comprised a failure to acknowledge that ethical approval was required, failure to obtain such approval, failure to establish the status of the research ethics committee of the hospital before proceeding, failure to obtain informed consent from the patients and using non-approved non-hospital equipment.

14. Two of the recommendations made by the group were relevant to Professor O’Sullivan personally. The first was that he should undertake good clinical practice, clinical research training and certification/accreditation within three months with an identified organisation and secondly, that he should undertake education and training with the Irish Medical Council regarding consent in line with the Medical Council Guide to Professional Conduct and Ethics for Registered Medical Practitioners 8th Edn. (2016) and HSE National Consent Policy 2017. Within three months of publication of the report Professor O’Sullivan had complied with each of these recommendations.

15. Among the findings of the review team were that, on the balance of probabilities, there was not an infection control risk. It also concluded that with the benefit of hindsight, a specialist/clinical lead in the area of obstetrics and gynaecology should have played a role

in the open disclosure meetings and have been available to address any specific speciality queries that arose at that initial time. Most importantly however, the SAR Report review team, having been specifically tasked with identifying any ongoing patient safety concerns, and indeed doing so before the report was completed should the need arise, identified no such concerns in relation to Professor O’Sullivan, who was the central focus of the report.

16. Although the report was dated the 9th May, 2019, it appears to have actually been sent to Professor Day by Professor Brennan under cover of a letter of the 20th June, 2019. In that covering letter, Professor Brennan confirmed that the review team had sought and obtained legal advice in relation to a number of matters when compiling the report including compliance with the principles of natural and constitutional justice, due process and fair procedures.

17. It would appear that following receipt of the SAR Report, Professor Day sought the views of Dr. Peter McKenna, Clinical Director of the National Women and Infants Health Programme, on the report. In his responding letter of the 28th June, 2019, Dr. McKenna noted that although none of the patients suffered physical harm, several suffered psychological injury. The significant issue was, in Dr. McKenna’s opinion, not harm but wrong to the patient. He suggested that Professor O’Sullivan appears not to have demonstrated insight or remorse for his actions.

18. While noting that one of the recommendations of the SAR Report was that Professor O’Sullivan should undergo clinical research training, he felt this did not address his suitability to be involved in patient treatment or training of junior medical personnel. In the final paragraph, he said: -

“Given the statement of the patients, that they have suffered psychological harm, a breakdown in trust, and a serious lack of insight on the part of the consultant

involved, I have significant reservations about his continued involvement in clinical practice until these issues are fully resolved.”

19. It is somewhat unclear as to what issues Dr. McKenna is here referring to or how he considered that they should be fully resolved. He appears in this sentence to identify three issues. First, the patients suffered psychological harm.- However, how that issue might be resolved by Professor O’Sullivan is not immediately obvious. Secondly, Dr. McKenna identifies a breakdown of trust as an issue and, again, how that might be addressed by Professor O’Sullivan is not explained. I note, however, that the SAR Report contains an apology from the review team at the outset to the patients concerned and a commitment to implementing all its recommendations as a matter of urgency, albeit no explicit acknowledgment of wrongdoing by the hospital. Thirdly, Dr. McKenna identifies a serious lack of insight on the part of Professor O’Sullivan. Presumably recommendation number 4 in the SAR Report, to the effect that Professor O’Sullivan must undertake further education and training regarding consent, is aimed at addressing this issue.

20. Of course, at the time Dr. McKenna made his comments, Professor O’Sullivan had not been made aware of the contents of the SAR Report or indeed the requirement for further education and training, with which he subsequently complied. To the extent therefore that Dr. McKenna had significant reservations about Professor O’Sullivan’s continued involvement in clinical practice until those issues were fully resolved, the only issue that Professor O’Sullivan could resolve was that concerning insight which, arguably, he did by complying with the SAR Report recommendations.

21. Dr. McKenna does not appear to indicate that any of his reservations about Professor O’Sullivan continuing in clinical practice were related to issues of patient safety. Dr. McKenna did not of course communicate in any way with Professor O’Sullivan before

reaching these serious conclusions but in fairness to Dr. McKenna, he was not asked to do so but merely to offer observations on the SAR Report. Nor was he suggesting that Professor O'Sullivan should be prevented from practicing medicine forevermore but "until these issues are fully resolved", whatever that may mean.

22. As I have said, on one view of the matter, the only issue about which Professor O'Sullivan himself could do anything, namely the question of insight, was subsequently addressed. If, despite that, the final sentence of Dr. McKenna's letter were to be relied upon, without more, as a basis for suspending and proposing the removal of Professor O'Sullivan from his employment, it would seem to involve a denial of the most basic fair procedures, that a person could find himself suspended and even dismissed on the basis of a comment made by somebody to whom he had never spoken, of whom he was quite unaware and in respect of which comment he was given no right to respond or defend himself. It seems to me that that would be a somewhat extraordinary state of affairs. That is all the more so in circumstances where those actually charged with identifying any danger to patient safety, namely the SAR Report Review Team, identified none.

23. On the 1st July, 2019, Professor Day wrote to Mr. Reid drawing these events to his attention and enclosing three documents, being the SAR Report, Professor O'Sullivan's contract of employment and Dr. McKenna's letter. Although she did not enclose it, Professor Day referred to the Doran/Brennan Review which she described as a preliminary report. She concluded her letter as follows: -

"Taking into consideration both the Systems Analysis Review Report findings and Dr. McKenna's commentary as enclosed, I am concerned that Professor O'Sullivan's conduct may pose **an immediate and serious risk to the safety, health and welfare of patients and staff**. In this regard, I would ask you to consider Professor

O’Sullivan’s conduct as outlined herein, in accordance with the disciplinary procedure provided at Clause 3, Appendix IV of the Disciplinary Procedure of his contract of employment...” (My emphasis)

24. It may be convenient at this juncture to refer to the terms of Professor O’Sullivan’s contract of employment and the relevant statutory provisions to gain a better understanding of subsequent events.

Relevant Contractual and Statutory Provisions

25. Appendix IV of Dr. O’Sullivan’s contract provides for the disciplinary procedure. The heading notes that Appendix IV may be subject to amendment when the Health Service Executive is established and relevant sections of the Health Act 1970 repealed. The HSE was established on the 1st January, 2005 but the contract relates to the period prior to that when separate regional health boards existed. While Appendix IV refers to the Chief Executive Officer of a health board, the parties are agreed that this now falls to be construed as a reference to the Chief Executive Officer of the HSE. Appendix IV provides for two different streams of disciplinary procedure, dependent upon whether it is initiated by the CEO or by an officer of lower rank described as an “appropriate person”.

26. Clause 1 of Appendix IV provides that where either the CEO or an appropriate person is concerned that a consultant may have failed to comply with any of the terms of his appointment or may have otherwise misconducted himself in relation to his appointment, he shall notify the consultant in writing of the reasons for such concerns and inform the consultant that he may make representations within two weeks. Clause 3 relates to suspension and provides that where either the CEO or an authorised representative considers that, by reason of the conduct of a consultant, there may be an immediate and serious risk to the safety, health or welfare of patients or staff, the consultant may be required to take

immediate administrative leave with pay for such time as may reasonably be necessary for the completion of any investigation into the conduct of the consultant.

27. Importantly, this clause provides that “this investigation should take place with all practicable speed”. Where this clause is invoked, the CEO or the authorised representative must consult with the Chairman or Secretary of the Medical Board or other equivalent structure.

28. Clause 4 is concerned with sanction and gives four options. The first applies equally to the CEO or an appropriate person who may, if satisfied that the matter was trivial or without foundation, so inform the consultant in writing. The second, also applicable to the CEO or an appropriate person, arises if he or she is satisfied that the consultant has not complied with the terms of his appointment or has otherwise misconducted themselves in relation to their appointment, he or she may issue a warning or other like communication to the consultant. The third option applies to the CEO only and is that he or she may decide to act in accordance with the provisions of sections 22, 23 and 24 of the Health Act, 1970 and the regulations made thereunder. The fourth and final option applies only to an appropriate person. Under this subparagraph, the appropriate person may request the Minister for Health to appoint a committee “to inquire into the matter”.

29. Clause 5 then makes detailed provision for the establishment and functioning of such a committee which, having inquired into the matter, may recommend a range of alternative sanctions up to and including the termination of the consultant’s appointment. Where a recommendation of termination is made, it takes effect after 21 days unless the Minister is requested to issue a direction to the appropriate person in relation to the recommendation, which appears, in effect, to give the consultant a right of appeal to the Minister from the determination of the committee.

30. As the contract provides, a different procedure applies where the CEO is involved and is contained in ss. 22, 23 and 24 of the Health Act, 1970. Section 22 empowers the CEO to suspend an officer of a health board and is not relevant for present purposes, as the suspension of Professor O’Sullivan was by virtue of the contract rather than this section. Section 23 deals with the power of the CEO to remove an officer or servant and provides in relevant part: -

“(1) Subject to subsections (2) to (4), an officer or servant of a health board appointed under section 14 may be removed from being such officer or servant by the Chief Executive Officer to the Board.

(2) A permanent officer shall not be removed under this section because of misconduct or unfitness except –

...

(b) on the recommendation of a Committee under section 24 or on a direction by the Minister under section 24(11) ...”

Thus, whereas an authorised person under the contract does not have the power to remove a consultant, the CEO has a statutory power to do so, but one which can only be exercised on the recommendation of a s. 24 Committee.

31. Section 24 provides that whenever it is proposed to remove a permanent officer of a health board under s. 23 because of misconduct or unfitness, the Minister shall appoint a committee to perform the functions specified in the section relating to the proposal for such removal. Section 24(5) provides that a committee under the section, having inquired into the proposal to remove the officer, shall make such recommendation to the CEO as it thinks fit.

32. It will be seen therefore that a statutory committee is established to inquire “into the proposal to remove the officer”, while a contractual committee is established “to inquire into the matter”. One of the appellant’s core arguments, to which I will return, is that this distinction is critical because it means that the statutory committee may only conduct a limited inquiry into, in effect, the sanction to be imposed for the misconduct already found by the CEO, whereas the contractual committee has a much wider remit which includes determining whether there was such misconduct.

33. Section 24 goes on to provide that when a committee under the section recommends the removal of an officer, the CEO may remove the officer after 21 days unless a request has been made to the Minister to issue a direction to the CEO in relation to the recommendation, which appears to be again a form of appeal to the Minister similar to that provided by the contract.

34. As will appear further, a committee has now been established in accordance with s. 24. During the course of this appeal, the court was informed by counsel for the HSE that ss. 22 – 24 of the Health Act, 1970 have in fact been repealed with effect from the 1st January, 2007. The High Court appears not to have been made aware of this fact. When this court queried how the Minister could now purport to exercise his power under s. 24 to appoint such a committee, the court was informed that this had been done instead on a consensual basis by the Minister.

Further Chronology

35. On the 17th July, 2019, Mr. Reid wrote to Professor O’Sullivan. He enclosed with that letter the following documents to which I have already referred, namely the Doran/Brennan Review, the SAR Report, Professor Brennan’s covering letter, Dr. McKenna’s letter, Professor Day’s letter and Appendix IV of the Consultant’s Contract. He then set out

particulars of the alleged misconduct as outlined in these various documents and continued:

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“In addition to my concerns regarding potential misconduct on your part, I must also consider the position of other patients and staff. Although the patients were not injured physically, it appears the patients were psychologically distressed to learn that a study/analysis of which they were totally unaware had been conducted during the course of an intimate procedure. I am concerned that by reason of the alleged misconduct that there may be an immediate and serious risk to the safety health and welfare of patients. Accordingly, I am considering whether I should require you to take administrative leave for such time as may reasonably be necessary for the completion of an investigation into your conduct in accordance with the Disciplinary Procedure.”

36. Mr. Reid went on to give Professor O’Sullivan a period of five days to make written representations regarding the proposed suspension and a further nine days to make representations about the alleged misconduct.

37. It is also relevant to note that shortly before this letter was written by Mr. Reid, it appears that Professor Courtney initiated a complaint to the Medical Council about Professor O’Sullivan in relation to the same alleged misconduct. Apparently that complaint has yet to be resolved but notably, although the Medical Council may, and do in appropriate cases, apply to the High Court pursuant to s. 60 of the Medical Practitioners Act, 2007, for an order suspending the registration of a registered medical practitioner, if the Council considers that the suspension is necessary to protect the public pending the outcome of enquiries under the Act, no such application has to date been made.

38. Following Mr. Reid's letter of the 17th July, 2019, correspondence ensued between him and Professor O'Sullivan's solicitors over the following three weeks. The solicitors argued that there was no basis for the contention that there was an immediate and serious risk to patients and gave an undertaking on behalf of Professor O'Sullivan that there would be no repetition of the conduct complained of.

39. By letter of the 6th August, 2019, Mr. Reid gave his decision on the administrative leave issue. In that letter, he referred to the fact that he had consulted with a number of persons before reaching his decision. He consulted the Chairman of the Medical Board, Dr. Waldron who advised him that before placing a consultant on administrative leave, he should be satisfied that there is no other alternative. He also said that before consulting Dr. Waldron, he also consulted with Dr. Colm Henry, the HSE's Chief Clinical Officer, and Dr. Peter McKenna. He said that both doctors expressed the view that there appeared to be a lack of insight on Professor O'Sullivan's part regarding the seriousness of the matter and regarding the importance of informed consent and ethical approval. Mr. Reid did not specify whether his consultation with these three doctors was written, or verbal, or both, nor did he make available any written record of such consultations.

40. Having referred to these consultations, Mr. Reid continued: -

“I am concerned that by reason of your conduct there may be an immediate and serious risk to the safety, health or welfare of patients in circumstances where it appears that:

- (a) you undertook an intimate procedure involving the insertion of a piece of equipment into the vagina of a number of patients, who were referred to you by their family doctor (in order to conduct a 'vaginal pressure'

measurement study'), during the course of conducting an entirely different and authorised procedure on the patients (a hysteroscopy);

- (b) without informing the patients of your intention to do so and without obtaining their informed consent;
- (c) without any ethics approval;
- (d) using a piece of equipment which you had purchased independently of the hospital;
- (e) in the furtherance of study or research in which you apparently have a financial interest.”

41. Mr. Reid continued that he was not reassured by the solicitor’s correspondence that Professor O’Sullivan acknowledged that he had made an error of judgment in obtaining neither patient consent nor ethical approval for the procedure nor because he had given an undertaking that what happened would not happen again. Mr. Reid concluded by saying: -

“... I wish to advise you that, in light of my concerns as set out herein and in my letters of 17 July 2019 and 26 July 2019, you are required to take immediate administrative leave with pay. You will remain on administrative leave for such time as may be reasonably necessary for the completion of any investigation regarding your conduct.”

42. In the 31 months that have passed since that letter was written, Professor O’Sullivan has remained on administrative leave.

43. Within days of this decision, reports of it appeared in the national media identifying Professor O’Sullivan. He says that these reports have been very damaging to his professional reputation and did not emanate from him. Mr. Reid has equally denied that he or anyone in his office leaked the story so that the source remains unidentified.

44. On the 14th August, 2019, Professor O’Sullivan’s solicitors made a detailed written submission on the issue of misconduct. This included complaints about the actions of Professor Courtney in relation to the open disclosure meetings and in particular of the fact that a mistaken view was arrived at concerning the infection risk based on incorrect information. This led, it was claimed, to unnecessary testing of the patients by Professor Courtney. It was submitted that it was entirely inappropriate for Professor Courtney to be involved in these meetings because of the “animus history” between him and Professor O’Sullivan and further, because he was not qualified in the relevant area of gynaecology, as noted in the SAR Report.

45. The solicitors refer to an excerpt from a statement of a patient identified as Patient T contained in the report: -

“Patient T stated that [Professor Courtney] wasn’t clear about what had happened and had left them with no reassurance but with more questions. Patient T noted that [Professor Courtney] advised her that staff were not aware of whether the instrument pack and the water used in the examination was sterile or not.”

46. The solicitors contended that the manner in which the open disclosure meeting was conducted by Professor Courtney caused more harm to the patients than Professor O’Sullivan’s actions. In their conclusion, the solicitors referred to the Irish Medical Council definition of misconduct and submitted that what Professor O’Sullivan had done did not amount to misconduct in that sense.

47. Finally, they stated: -

“5.5 Professor O’Sullivan is a highly regarded Professor of Obstetrics and Gynaecology with over 27 years’ experience and over 20 peer reviewed articles to

his name. He has been placed on administrative leave by the Health Service Executive and has had his reputation severely damaged by persistent leaks to the media. It is submitted that there is no need for any further action and that Professor O'Sullivan be reinstated with immediate effect and this matter be brought to an immediate conclusion."

48. Following receipt of these submissions, Mr. Reid wrote to Professor O'Sullivan's solicitors stating that he wished to have a face to face meeting with Professor O'Sullivan before proceeding further. That meeting took place on the 13th September, 2019. In the course of the meeting, Professor O'Sullivan said that he had not been given an opportunity to meet with the women himself to apologise for doing what he did without their knowledge. He said that in discussions with the SAR Report Review Team, Professor Boyd had asked him to imagine how he would react, were he to undergo a colonoscopy and later learn that an extra procedure had been carried out without his knowledge. Professor O'Sullivan acknowledged that when the situation was put to him by Professor Boyd in this way, he admitted that he had a point. He admitted that he should have obtained the consent of the women and his failure to do so was an error of judgment and a genuine oversight. He reiterated this several times during the meeting. He felt that placing him on administrative leave was disproportionate and that it was awful to have been taken away from his patients, some of whom were seriously ill. He indicated that he accepted fully the content and conclusion of the SAR Report. Professor O'Sullivan was anxious for an early resolution to the matter and conveyed this to Mr. Reid.

49. Subsequent correspondence from Professor O'Sullivan's solicitors also sought to progress matters as quickly as possible.

50. On the 10th October, 2019, Mr. Reid wrote to Professor O’Sullivan’s solicitors indicating that before making a decision, he considered it necessary to undertake further examination. He continued: -

“To that end, I intend to seek a written opinion from a clinician’s perspective, about the seriousness or otherwise of the shortcomings in the conduct of the ‘study’ conducted by your client on the five patients. It is my intention to obtain this opinion from Dr. Michael O’Hare (biography enclosed).”

51. It is common case that Dr. O’Hare is an Obstetrician and Gynaecologist of international renown. Mr. Reid went on to say that when he received Dr. O’Hare’s written opinion, he might invite Professor O’Sullivan to make further submissions before reaching his decision and he enclosed a draft letter of instruction to Dr. O’Hare. In that draft letter, Mr. Reid indicated that Dr. O’Hare’s remit would be to review all the documents and Professor O’Sullivan’s submissions and “provide me with a written opinion, on whether the manner in which the ‘study’ was conducted is a serious matter, viewed from a clinician’s standpoint”.

52. Mr. O’Sullivan’s solicitors initially opposed the appointment of Dr. O’Hare on the basis that it would delay matters unnecessarily. They pointed to the fact that the disciplinary procedure provided that the duration of the administrative leave can only be “for such time that may reasonably be necessary for the completion of any investigation” and given that the matter dated back over a year and was already the subject of at least two investigations, that any further delays would amount to a disciplinary sanction and not for the purpose specified in Appendix IV. They set out a detailed chronology in support of that contention suggesting that the delay meant that the suspension could no longer be regarded as lawful. The letter

(of the 16th October, 2019) concluded with a threat to issue proceedings within 7 days if a decision was not made.

53. Mr. Reid wrote back on the 21st October, 2019 saying that he proposed to engage Dr. O'Hare to obtain his expert clinical opinion regarding the seriousness or otherwise of the admitted shortcomings in how Professor O'Sullivan's study was conducted and that Professor O'Sullivan would have an opportunity to comment on Dr. O'Hare's opinion once received. He pointed out that obtaining an expert opinion from Dr. O'Hare was necessary given that the previous clinical input that he obtained had related to administrative leave as opposed to potential disciplinary action.

54. He was proposing, in fairness to Professor O'Sullivan, to obtain a further clinical view before making a decision concerning disciplinary action. However, he went on to say that if Professor O'Sullivan insisted on it he would proceed to make a decision without a report from Dr. O'Hare. Having reconsidered the matter, Professor O'Sullivan withdrew his opposition to this step. Dr. O'Hare was accordingly instructed on the 25th October, 2019.

55. Dr. O'Hare's report was completed and sent to Mr. Reid on the 4th December, 2019. As well as reviewing all relevant documentation, Dr. O'Hare met with Professor O'Sullivan and interviewed him. In the concluding section of his report, Dr. O'Hare said the following:

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“Rather than research of ‘an intimate and personal nature’ as described elsewhere, I consider the ‘study’ as an additional observational procedure in the course of a clinically indicated investigation of an intimate and personal nature. Prof. O'Sullivan is a long established and highly trained consultant in obstetrics and gynaecology, with acknowledged subspecialty skills. I believe that the ‘study’ on which he embarked was well intentioned and accept his assertion that it was a feasibility study.

On a boundary between practice and research, I consider that Prof O’Sullivan, nevertheless, made an error of judgment, and was wrong in deciding to undertake this observational study as described without informed consent and ethical approval.

In the course of recent correspondence, Prof O’Sullivan has:

- given an undertaking that there will be no repetition of the incidents of 04 and 05 September 2018;
- acknowledged that he made an error of judgment in relation to the study requiring full ethical approval;
- acknowledged that he made an error of judgment in relation to the study requiring patient consent;
- given an undertaking to comply with the recommendations of the systems analysis review reports.

I have also noted that, in response to the recommendations of the Systems Analysis Review Report, Prof O’Sullivan has, to date, successfully completed two online courses:

- Protecting Human Research Participants – October 2019.
- Introduction to Bioethics – October 2019 (Georgetown University, USA).

I have turned to the Medical Council’s Guide to Professional Conduct and Ethics (8th Edition, 2016) for a definition of professional misconduct. This is defined as:

- (a) *conduct which doctors of experience, competence and good repute consider disgraceful or dishonourable; and/or*

(b) *conduct connected with his or her profession in which the doctor concerned has seriously fallen short by omission or commission of the standards of conduct expected among doctors.*

In addition, poor professional performance as defined in the Medical Practitioner's Act, 2007, means a failure by the practitioner to meet the standards of competence (whether in knowledge and skill or the use of knowledge and skill or both) that can be reasonably be (*sic*) expected of medical practitioners practicing medicine of the kind practiced by the practitioner. This has been interpreted by the Supreme Court to mean a 'serious failure'. [This appears to be a reference by Dr. O'Hare to the judgment of the Supreme Court in *Corbally v The Medical Council & Ors* [2015] IESC 9]

Using these definitions, I have given careful consideration to the facts of this matter, and opinions of concern expressed by others in the documentation provided. I consider that Prof O'Sullivan's overall conduct has fallen below – **but not seriously below – the standard of conduct expected among doctors. Further, I consider that, on the evidence presented, Prof O'Sullivan does not pose an immediate and/or serious risk to the safety, health and welfare of patients.** In support of this view, I have noted that within the Terms of Reference of the Systems Analysis Review, there was a requirement that any immediate safety concerns were to be brought to the attention of the commissioner in writing in a timely fashion. It is my understanding that this did not occur.” (My emphasis)

56. In a letter dated the 6th December, 2019 sent by email on the same date, Mr. Reid wrote to Professor O'Sullivan's solicitors with regard to the opinion of Dr. O'Hare saying: -

“I refer to the above matter and your meeting with Dr. O’Hare on 25 November 2019. Dr. O’Hare has submitted his report to me and I am currently considering its contents. I will revert to you regarding my decision in this matter in the coming days.”

57. The email was despatched from Mr. Reid’s office to Professor O’Sullivan’s solicitors at 14:33 that day. The email attached the letter and Dr. O’Hare’s report.

58. Unfortunately, although the report was received by Professor O’Sullivan’s solicitors’ email system, due to a technical issue the report was deleted from the system and was never seen by its intended recipient or of course Professor O’Sullivan. He was thus deprived of the opportunity, through no fault of Mr. Reid, to make submissions on the O’Hare Report, an entitlement recognised by Mr. Reid in his letters of the 10th and 21st October, 2019.

59. Somewhat surprisingly, particularly having regard to the intensive level of engagement by Professor O’Sullivan’s solicitors up to that point in time, Mr. Reid proceeded to make his decision by letter of the 23rd December, 2019 without further recourse to Professor O’Sullivan in the absence of any submissions by Professor O’Sullivan. This letter was also sent by email at 6:07pm on the 23rd December, 2019 and was received by Professor O’Sullivan’s solicitors, but unfortunately when their offices had closed for Christmas. It accordingly did not come to their attention until the 2nd January, 2020.

60. Mr. Reid’s letter of the 23rd December, 2019, captioned “Notification of Decision”, is lengthy and detailed. He sets out all the documents he considered, including Professor O’Sullivan’s extensive written representations and submissions. He then makes findings of fact which are not in dispute and selects a number of extracts from the minutes of his meeting with Professor O’Sullivan. Significantly, he says that he has also considered the clinical views expressed by both Dr. Peter McKenna and Dr. O’Hare regarding the study. He quotes first from Dr. McKenna’s letter, to which I have already alluded. He specifically refers to

Dr. McKenna's conclusion concerning his reservations about Professor O'Sullivan continuing in clinical practice and I have already expressed my views about the context of that comment.

61. It is perhaps a little surprising that Mr. Reid is at this juncture still placing significant reliance on Dr. McKenna's opinion, even subject to the shortcomings I have identified, in circumstances where he has expressly advised Professor O'Sullivan that, among the reasons for him consulting Dr. O'Hare, was the fact that he had not previously obtained any clinical opinion on the misconduct issue but only on the question of suspension.

62. On the third page of his letter, Mr. Reid says: -

"I further noted and considered Dr. O'Hare's view that 'that Prof. O'Sullivan, nevertheless, made an error of judgment, and was wrong in deciding to undertake this observational study as described without informal consider (sic) and ethical approval.'

I note Dr. O'Hare's opinion that your *'overall conduct has fallen below – but not seriously below – the standard of conduct expected among doctors.'* While I agree with Dr. O'Hare's recital of the facts, I am afraid I cannot agree with his conclusions regarding the seriousness of your conduct. In my view, your misconduct in relation to the Study is extremely serious. In this regard, I have taken account of the following mandatory requirements set out in the Medical Council's Guide to Professional Conduct and Ethics for Registered Medical Practitioners (2016) concerning both informed consent and ethics approval...."

63. Mr. Reid proceeds to set out passages from the Medical Council Guide to which in particular parts he adds emphasis by underlining.

64. He then says: -

“It is very clear from the foregoing that ethics approval and informed consent are not optional but are essential in relation to research in the nature of the Study. As such, I have formed the view that you have seriously misconducted yourself in relation to your appointment as a Consultant by:

- (i) failing to obtain informed consent for the Study, thereby acting with total disregard for the patients’ right to bodily integrity and the mandatory requirements of the Medical Council’s Guide to Professional Conduct and Ethics for Registered Medical Practitioners (2016) and the HSE’s National Consent Policy; and
- (j) failing to obtain ethics approval for the study, further demonstrating your disregard for the patients’ fundamental rights to bodily integrity and the mandatory requirements of the Medical Council’s Guide to Professional Conduct and Ethics for Registered Medical Practitioners (2016).

I have considered the range of sanctions available to me under Appendix IV of the Consultant’s Contract. Given that I do not consider that your misconduct is either trivial or without foundation, there are two potential forms of action open to me, namely, if I think fit, I may issue you with a warning or other like communication or I may decide to propose your removal from your employment.

I have carefully considered the appropriate form of action. In view of the seriousness of your admitted misconduct, I do not consider that it would be appropriate for me to deal with the matter by way of a warning or other like communication. It is my view that a doctor undertaking an examination of an intimate nature owes a particular

duty of care to do no more than that which the consent which he or she has been given allows. It is my view that any healthcare practitioner who fails to obtain informed consent and ethics approval to undertake a study which will be undertaken during an intimate examination is not a fit person to be employed by this organisation. Therefore, I hereby notify you that I propose to remove you from your employment as Consultant Obstetrician Gynaecologist as a result of you having seriously misconducted yourself by covertly conducting the Study during the course of an intimate vaginal examination, and by failing to obtain ethics approval and informed consent before conducting the Study.”

65. Mr. Reid then indicated that he would consider any representations made by Professor O’Sullivan concerning the proposal to remove him from employment. Although not referred to in Mr. Reid’s letter, Professor O’Sullivan had in fact a statutory entitlement to make representations on the proposal to remove him pursuant to the provisions of the Health (Removal of Officers and Servants) Regulations, 1971, S.I. No. 110/1971. Regulation 4 provides that the CEO will consider any representations made within 7 days after the giving of a notice of a proposal to remove.

66. On the 8th January, 2020, Professor O’Sullivan’s solicitors wrote to Mr. Reid complaining of the fact that they had not received his letter of the 6th December with the enclosed O’Hare Report because of Mr. Reid’s failure to provide it. It subsequently transpired that this was incorrect as already explained. By that letter they sought a copy of Dr. O’Hare’s report immediately, together with an opportunity to respond to it. They complained that they had been deprived of the opportunity of making submissions in relation to a report Mr. Reid deemed necessary in order to reach a decision.

67. Mr. Reid responded on the 10th January, 2020 pointing out that the email had not been sent at 6:07pm on the 23rd December, 2019 as alleged, but rather at 5:07pm. Because the report had not been received, Mr. Reid agreed to extend the deadline for submissions by a further week. Further submissions were made by the plaintiff's solicitors in a letter of the 20th January, 2020.

68. In the course of those submissions, Professor O'Sullivan's solicitors said: -

“It appears that having retained Dr. O’Hare as the expert in this area you have decided without any other contrary indicator from any other clinician that you *‘cannot agree with his conclusions regarding the seriousness’* of our client’s conduct. This decision by you flies in the face of reason. Given the express findings of Dr. O’Hare which almost amount to a complete exoneration of our client it is clearly the case that you have not given proper consideration to the expert view of Dr. O’Hare. Furthermore, not one single report or clinical professional that you have engaged or consulted with appears to have found that Professor O’Sullivan posed an immediate and/or serious risk to the health of patients. Dr. O’Hare has expressly stated in this report that no such risk arises which means that our client has been wrongly placed on administrative leave since last August and has suffered significant reputational harm as a result. It seems clear that there was no evidence before you which would have allowed you to determine that Professor O’Sullivan’s conduct falls seriously below the standard to be expected from doctors as per Medical Council Guidelines. There is clearly therefore simply no objective evidence or basis upon which to recommend the dismissal of Professor O’Sullivan.”

69. The letter went on to allege bias on the part of Mr. Reid in relation to Professor O’Sullivan and called upon him to discontinue the disciplinary process and reinstate Professor O’Sullivan with immediate effect. The bias issue is no longer live in this appeal.

70. In response, Mr. Reid wrote on the 31st January, 2020 again setting out in some detail his reason for rejecting the views of Dr. O’Hare saying: -

“I confirm I had taken cognisance of the views expressed by Dr. O’Hare in his report dated 4 December 2019 (the ‘O’Hare Report’), but the decision is ultimately mine to make. In good conscience, having reflected on the O’Hare Report, I cannot accept that it could be appropriate, or a trivial matter to conduct a ‘Study’ of this nature, in the course of a hysteroscopy (an intimate procedure) while the individuals concerned remained in complete ignorance of what was occurring. I am concerned that your client’s actions displayed utter disregard for the fundamental rights of the five patients to their bodily integrity. This human right is fundamental to the dignity of patients. It is a right which I expect any medical practitioner and particularly a consultant, to understand, and to respect and to violate only in circumstances of medical necessity.”

71. He then considers a number of aspects of Dr. O’Hare’s report again summarising his view at para. 11 as follows: -

“Again, it is clear from my letter of 23 December 2019 that I considered, in great detail, Dr. O’Hare’s view that your client’s *‘overall conduct [had] fallen below – but not seriously below – the standard of conduct expected among doctors’*. In that regard, I consider Dr. O’Hare’s opinion by reference to the Medical Council’s Guide to Professional Conduct and Ethics for Registered Medical Practitioners (2016) (the ‘Guide’) and the manner in which it addresses the issues of informed consent and

ethics approval. I set out the relevant extracts from the Guide in my letter of 23 December 2019 and I do not propose to repeat those extracts in this letter. However, in summary, the Guide unequivocally states that both ethics approval and informed consent are mandatory and not, in any sense whatsoever, optional. As the CEO of the HSE which has a statutory mandate to *'improve, promote and protect the health and welfare of the public,'* I am obliged to consider employees conduct under the disciplinary procedure. Where I consider that an employee's actions are not consistent with this important mandate, I am obliged to take appropriate action.

12. Dr. O'Hare considered, based on the evidence presented to him, that your client did not pose an immediate and serious risk to the safety, health and welfare of patients. While I respect his opinion, this was not a matter which he had been asked to consider by me. I made my decision in relation to that matter before Dr. O'Hare was engaged...."

72. He refuted the bias claim and concluded by confirming his proposal to remove Professor O'Sullivan from his employment. He would notify the Minister accordingly so that the proposal could be considered by a committee.

73. Before that could happen however, on the 24th February, 2020, Professor O'Sullivan applied to the High Court (Meenan J.) for leave to seek judicial review, which was granted. In addition, the court put a stay on any further steps being taken on foot of the disciplinary process pending the determination of the proceedings or until further order. Following the dismissal of the proceedings by the High Court, that stay was lifted and on the 30th June, 2021, Mr. Reid wrote to the Minister for Health seeking the appointment of a committee as envisaged by s. 24. On the 21st December, 2021, the Minister wrote to Professor O'Sullivan

advising that while he, the Minister, recognises that s. 24 has been repealed, consultants with a 1997 contract may continue to avail of the procedures set down in s. 24.

74. Accordingly, arrangements were being progressed to establish a committee under that section. The Minister had sought and received nominations from the Irish Hospital Consultants Association and the Irish Medical Organisation and from the HSE for panels for the purpose of establishing the committee. On 14th February, 2022 the Minister confirmed the composition of the committee to Professor O’Sullivan, with effect from 10th February 2022. The committee has not yet sat but it seems reasonable to assume that it is likely to take at least a considerable number of months before it will be in a position to issue a recommendation which may have the potential for a further appeal to the Minister.

The Pleadings

75. In his statement of grounds, Professor O’Sullivan explicitly challenges Mr. Reid’s decision of the 31st January, 2020 proposing the appellant’s removal. The primary ground for this challenge is that Mr. Reid failed to give any or any adequate reasons for the decision and failed to consider Dr. O’Hare’s report. There is a bias allegation which is not now pursued. Although there is no explicit challenge to the suspension decision of the 6th August, 2019, it is implicitly challenged to the extent that an order of *mandamus* is sought directing the HSE to terminate Professor O’Sullivan’s suspension. Damages for breach of contract are sought.

76. Paragraph E of the statement of grounds identifies in the normal way the grounds claimed for the relief sought. In Paragraph E of the statement of grounds, at para. iv of the grounds for relief sought, Professor O’Sullivan pleads that he was suspended without any or any reasonable grounds for such suspension. He complains of the fact that the respondent failed to identify the manner in which he was alleged to pose an immediate and serious risk

to the safety health or welfare of patients or staff. He claims that both the suspension and removal decisions were unreasonable and irrational.

77. In its statement of opposition, the HSE pleads that the application for judicial review is premature in circumstances where no final decision concerning Professor O'Sullivan's removal has been made or can take effect until such time as the statutory committee decides the issue. Professor O'Sullivan disputes this on the basis that the finding of misconduct made against him by Mr. Reid is not one that can be revisited by the committee because its function is confined to sanction only. The HSE disagrees with that contention and accepts that the committee is at large in relation to all matters including the misconduct finding. I comment on this further below.

78. Although an explicit challenge to the suspension decision of the 6th August, 2019 is not articulated in the pleadings, this came into sharp focus during the course of the trial. The defendant pointed to the fact that the leave application was made over six months after this decision was given by Mr. Reid and accordingly was well outside the permitted three month time limit for seeking judicial review under O. 84. In response, Professor O'Sullivan's legal team sought to amend its statement of grounds to include a claim for an extension of time to seek judicial review. This was granted by the trial judge and an amended statement of grounds incorporating the new claim was delivered.

79. It is unnecessary to canvass in any detail the contents of the parties' affidavits other than to briefly touch on a few points. In his grounding affidavit, Professor O'Sullivan confirms that he has adhered to the recommendations in the SAR Report and completed the courses advised therein. In relation to the same report, he notes at para. 35 of his affidavit sworn on the 21st February, 2020 that: -

“35. It is worth noting that nowhere within this report is there any suggestion that I posed an immediate and serious risk to the health, safety and welfare of patients. This is crucial as it is an independent review that was carried out with a full investigation and having given all the concerned parties a right of reply and a right to be heard and make submissions.”

80. With regard to Dr. McKenna’s letter, Professor O’Sullivan says the following at para. 39: -

“By Email dated 28 June 2019 Dr. Peter McKenna, Clinical Director of the National Women and Infants Health Programme wrote to Professor Mary Day thanking her for having sent the Systems Analysis Review Report and making a number of observations. The observations on matters of fact are correct but Dr. McKenna went on to make a number of adverse inferences and findings against me from the report to the extent that he reached the completely unfounded conclusion that I may no longer be suitable to being involved in patient treatment or the training of junior medical personnel or students. Dr. McKenna carried out no independent investigation and nor did he speak to or hear from me prior to making the adverse findings. He concluded his email by stating that he had significant reservations about my continued involvement in clinical practice until these issues are resolved. This finding was unsubstantiated and unfair and was not made in accordance with natural justice and fair procedures.”

81. With regard to Professor Day’s expressed view in her letter of the 1st July, 2019 to the effect that Professor O’Sullivan may pose an immediate and serious risk to the safety health and welfare of patients or staff, Professor O’Sullivan observes that even Dr. McKenna had not gone this far.

Judgment of the High Court

82. The trial judge initially set out the relevant background facts together with the relevant contractual provisions and legislation as I have outlined them. He turned first to the administrative leave issue. He notes in this regard that the applicant's challenge is to the CEO's decision of the 6th August, 2019 on grounds which he identifies. He notes that Professor O'Sullivan contended that the decision was irrational and unreasonable because first, he had continued in his position for 10 months without any risk to patients or staff being identified during that period, second that the SAR Report had been specifically tasked with identifying such risks and had not done so, third, that despite Professor Courtney's complaint to the Medical Council, no application was made by the Council to the High Court based on any risk posed by Professor O'Sullivan and fourth, that he had given a written undertaking that he would not carry out any further feasibility studies.

83. He noted the HSE's position that this application was out of time. The judge agreed with the HSE's position on this point that not only was the application out of time, but Professor O'Sullivan had demonstrated no good or sufficient reason why he had not challenged this decision within time, having through his solicitors intimated an intention to do so within the three month period. The judge accordingly held that the decision of the 6th August, 2019 could, therefore, not now be challenged and Professor O'Sullivan has not appealed against that finding.

84. However, the trial judge noted that this was not the end of the matter because Professor O'Sullivan had advanced the argument through his solicitors' letter of the 20th January, 2020 that he had called on the CEO to reinstate the applicant with immediate effect on foot of the O'Hare Report. The trial judge noted that this was not a standalone request based on fresh evidence, being Dr. O'Hare's opinion, but rather was made as part of an overall submission

that in the light of the report, the entire investigation had to be wound up. He referred to Mr. Reid's response to the effect that he had not asked Dr. O'Hare for a view on the suspension issue, on which he had made his decision prior to the engagement of Dr. O'Hare.

85. In this respect, the trial judge said the following: -

“59. It is clear from the response given by the CEO, that he regarded the request for reinstatement by the applicant as being an assertion that his original decision of the 6th August, 2019 had been incorrect. Not unreasonably, he made the point that Dr. O'Hare's opinion had not been before him when he made the decision to place the applicant on administrative leave. It is, of course, trite law that a decision cannot be challenged on the basis of evidence that was not before the decision maker at the time that he made his decision.

60. However, it seems to me that neither of the parties can have anticipated that the applicant would have remained on administrative leave for a very lengthy period of time. This has arisen for two reasons: firstly, the investigatory process was halted by virtue of the stay which had been placed on it by the order of Meenan J. of the 24th February, 2020, which stay had been sought by the applicant. Secondly, the delay in the hearing of this judicial review application was caused by the onset of the Covid-19 pandemic.

61. The court accepts that placing a person on administrative leave is a serious matter which can cause them reputational damage and psychological distress. The court is of the view that in light of the receipt of the opinion from Dr. O'Hare, it is open to the applicant to make a standalone request of the CEO to reconsider the issue of his continued placement on administrative leave. In making such a request, it is open to the applicant to rely on the fresh evidence that was presented in the report furnished

by Dr. O'Hare. He can also rely on the fact that the SAR review team were mandated to report any concerns that they may have had during the course of their investigation concerning the applicant's continued treatment of patients and they did not express any concerns in that regard. The applicant will also be free to submit whatever other independent evidence that he wished on this issue.

62. If the CEO reconsiders his decision to continue the applicant on administrative leave in a manner that is unfavourable to the applicant, the applicant can challenge that stand-alone decision in the appropriate way. The court is of the view that this is the best way to proceed, because if either of the parties appeals this judgment to the Court of Appeal, there may be a further considerable delay in reaching a final resolution of the matter; the necessary consequence of that being that the applicant may remain on administrative leave for a considerable period. Thus, it is appropriate that the administrative leave issue be reviewed in light of the fresh evidence that has come to hand and dealt with as a stand-alone issue, if and when the applicant makes a specific request for such review by the CEO."

86. In reaching a decision on the prematurity issue, the judge placed reliance on the decision of the Supreme Court in *Rowland v An Post* [2017] 1 IR 355. He accepted the contention that where the disciplinary process was ongoing, the court would not normally intervene to stop the procedure unless satisfied that any error that had been made cannot be satisfactorily addressed by the necessary steps being taken at a later, and final, stage in the process. However the judge said (at para. 71) that prematurity did not arise in circumstances where he was not satisfied that there were any substantive grounds of complaint raised by Professor O'Sullivan in relation to the conduct of the procedure thus far.

87. He said that any perceived unfairness arising from the fact that Professor O’Sullivan did not have an opportunity to comment on the O’Hare Report prior to Mr. Reid’s decision of the 23rd December, 2019 was rectified by the fact that he subsequently did have that opportunity before a final determination was made by Mr. Reid on the 31st January, 2020. He also expressed the view (at para. 72) that because Professor O’Sullivan would have the opportunity to make whatever submissions he wishes on whatever aspects are of concern to him before the statutory committee, this in effect rendered the application premature.

88. However, in the event that he was wrong about that, for the reasons he set out, he would not set aside the decisions of the CEO of either of the 23rd December, 2019 or the 31st January, 2020.

89. He referred to Professor O’Sullivan’s argument that the CEO, when he became aware that Professor O’Sullivan’s solicitors had not seen the O’Hare Report, should have annulled his decision and reconsidered the matter following the receipt of further submissions.

90. He referred further to the argument advanced on behalf of Professor O’Sullivan that the CEO had been guilty of irrationality in declining to follow the opinion of his own expert and coming to a diametrically opposite view. He noted in that regard that counsel for Professor O’Sullivan relied on *McManus v The Fitness to Practice Committee of the Medical Council* [2012] IEHC 350. This was a case where the committee had ignored the evidence of its own expert which was held to have vitiated the decision.

91. In addition, it was argued that the CEO had failed to give any adequate reasons why he was not accepting Dr. O’Hare’s opinion. In effect, all he had stated was that he did not agree with it. In response to this, the HSE submitted that Dr. O’Hare had proceeded on the basis of the definition of professional misconduct as it appeared in the Medical Council Guidelines and as set out by the Supreme Court in *Corbally v Medical Council and Ors.*

[2015] IESC 9. The CEO, however, had to decide a different issue as an employer and that was whether the conduct which was admitted constituted in his, the employer's, opinion serious misconduct entitling him to propose a dismissal.

92. Having considered these submissions, the judge held that the decision of the CEO of the 31st January, 2020 should not be struck down. He said that although Professor O'Sullivan had no opportunity to comment on the O'Hare Report before Mr. Reid made his decision of the 23rd December, 2019, that was not Mr. Reid's fault. At para. 100 of the judgment, he made the following statement, which is strongly challenged in this appeal by Professor O'Sullivan: -

“100. Given that the O'Hare report was largely in favour of the applicant in terms of the opinions expressed therein, it was reasonable for the CEO to assume that the absence of any submissions on it, meant that the applicant did not wish to say anything further about it. Accordingly, it was reasonable in the circumstances for the CEO to proceed to make his decision of the 23rd December, 2019 without having received any further submissions from the applicant.”

93. In the course of the appeal, counsel for Professor O'Sullivan submitted that this conclusion was entirely unsupported by any evidence and in particular, despite Mr. Reid swearing lengthy and detailed affidavits, he himself had never made any such suggestion.

94. The judge went on to express the view that Mr. Reid had set out in clear terms the reasons why he was not going to follow the opinions of Dr. O'Hare. In any event, the judge was satisfied that Professor O'Sullivan had not been denied fair procedures because he had no opportunity to comment on the O'Hare Report initially, given that when he did so at the subsequent stage, he relied on it.

95. On the irrationality issue, the judge held that the *McManus* decision did not go so far as to establish that where a decision maker obtains advice for the purpose of making a decision, he must adhere to that advice and disregard any contrary views he may have on the matter. He distinguished *McManus* on the facts, saying that it was clear from both *McManus* and *Corbally* that decision makers are always free to depart from advice so long as they provide clear and cogent reasons why they are so doing. He was satisfied that the CEO had provided such reasons. It could not be said that he has ignored Dr. O'Hare's report.

96. The judge also commented (at para. 118) that it was noteworthy that even at this stage years after the event, while Professor O'Sullivan admits that he was in error in failing to obtain consent from his patients to the procedure and in failing to have the feasibility study cleared by the ethics committee in the hospital prior to its implementation, he does not admit that there was any misconduct on his part. The judge appeared to have considered that this was something that the CEO was entitled to have regard to in reaching his conclusions.

97. Significantly, the judge also considered that, in deciding whether there was misconduct and if so, what sanction was to be imposed, the CEO was entitled to have regard to the views of Dr. McKenna and to weigh those in the balance along with the report of Dr. O'Hare. He said (at para. 125), that the CEO had before him a considerable body of evidence which, on any reasonable analysis, had to be seen as being supportive of the decision he ultimately reached. The judge, however, did not identify this evidence. In the final analysis, he was satisfied that the CEO gave due consideration to all relevant matters and reached a decision that was open to him on the totality of the evidence both in December 2019 and January 2020. He declined therefore to strike down either decision.

The Appeal

98. The first ground of appeal advanced on behalf of Professor O’Sullivan is that in deciding whether the proceedings were premature, the trial judge failed to have regard to the decision of the High Court (Kearns J.) in *Rajpal v Robinson* [2004] IEHC 149 and whether that judgment had been impacted by the subsequent decision in *Rowland v An Post* [2017] 1 IR 255. The trial judge erred in concluding that there was no want of fair procedures arising from the fact that Professor O’Sullivan had no opportunity to make submissions on the O’Hare Report before Mr. Reid’s decision of the 23rd December, 2019 was made.

99. To this there were added various other complaints. It was said that the judge was further wrong to hold that adequate reasons had been given by Mr. Reid for departing from the views of Dr. O’Hare. The trial judge failed to have adequate regard to the fact that Mr. Reid was obliged to inform Professor O’Sullivan as to what was the relevant standard of misconduct that was applicable under the Consultant’s Contracts, if it was different from the Medical Council standard. The judge failed to have regard to the fact that Mr. Reid’s decision to propose the appellant’s dismissal was disproportionate, irrational and unreasonable.

100. At Ground 13 of his notice of appeal, Professor O’Sullivan contends that the trial judge erred in failing to find that Mr. Reid was obliged to consider afresh the suspension issue once he received Dr. O’Hare’s report and that there was an onus on Mr. Reid to do so.

101. In its respondent’s notice, the HSE takes issue with each of the grounds of appeal. With specific reference to the contention that the standard of misconduct had never been defined by Mr. Reid if it was to be different from that of the Medical Council, the HSE contend that this was not pleaded or argued before the High Court.

The Continued Suspension of Professor O'Sullivan

102. The suspension of any employee is a serious matter. I commented on this in my judgment in *Bank of Ireland v Reilly* [2015] IEHC 241 where I noted, at para. 40: -

“The suspension of an employee, whether paid or unpaid, is an extremely serious measure which can cause irreparable damage to his or her reputation and standing. It is potentially capable of constituting a significant blemish on the employee’s employment record with consequences for his or her future career. As noted by Kearns J. (as he then was) in *Morgan v. Trinity College Dublin* [2003] 3 I.R. 157, there are two types of suspension, holding and punitive. However, even a holding suspension can have consequences of the kind mentioned. Inevitably, speculation will arise as to the reasons for the suspension on the premise of there being no smoke without fire.”

103. Similar views were expressed by McMahon J. in *Khan v HSE* [2008] IEHC 234, [2009] 20 ELR 178 which concerned the suspension of a consultant psychiatrist who, as in the present case, was required to take administrative leave on the basis that he presented an immediate and serious risk to the safety health or welfare of patients. In the course of his judgment, McMahon J. said (at pp. 193-194): -

“One must not underestimate the seriousness of the decision to place such a professional person on administrative leave, even if it is with pay. (See Macken J. in *O’Donoghue v South Eastern Health Board* [2005] 4 IR 217, where the learned judge granted an order of certiorari quashing the suspension of the applicant, a consultant chief psychiatrist even though the suspension was with pay). The decision raises questions about the applicant’s competence as a professional man. The suggestion is that he is not adhering to the proper standards of his profession. Such accusations,

once made can have a devastating impact on the person's self-esteem. Assurances that no definitive finding has been made and that the suspension is merely a 'holding operation' with pay is frequently cold comfort in this type of case."

104. A suspension of this nature, particularly in a high profile case like the present which attracted national media attention, can result in reputational damage which may be, or become, irreversible, irrespective of the ultimate outcome of any inquiry. It is not merely reputationally and psychologically damaging, but financially damaging also. Professor O'Sullivan, like many consultants, enjoyed a private practice in addition to his obligations under his contract with the HSE. The longer the suspension continues, the more difficult it will become for the lost private income to be regained, if ever. As previously noted, the damage in this regard to Professor O'Sullivan was significantly amplified by virtue of the deliberate leaking of confidential information concerning the disciplinary process and the allegations against him to the media.

105. Quite apart from this, one must not overlook the public detriment arising from this state of affairs. Professor O'Sullivan's salary is paid out of the public purse and represents a significant loss to the exchequer and the public healthcare system while he remains off work. As in the *Khan* case, the fact that Professor O'Sullivan has been suspended because of an alleged risk to patient safety renders the suspension doubly damaging.

106. All of these factors in combination make it imperative that the disciplinary process should proceed and be brought to a conclusion as speedily as reasonably possible. Of course, this is what Professor O'Sullivan's contract expressly provides. The preamble to the contractual disciplinary procedure states: -

"The purpose of the disciplinary procedure is to ensure that complaints concerning the competence, capability or conduct of consultants will be dealt with in a matter

(*sic*) which has due regard to the rights and obligations of the parties. Where a complaint concerning a consultant is considered under this procedure it **shall be dealt with expeditiously** while affording the consultant adequate opportunity to reply to any complaint or allegation made against him..." (my emphasis).

107. Further, Clause 3 of Part IV provides that the administrative leave should be "for such time as may reasonably be necessary for the completion of any investigation into the conduct of the consultant in accordance with the provisions hereof. This investigation should take place with all practicable speed."

108. Professor O'Sullivan's suspension commenced on the 6th August, 2019 but the investigation into his conduct had commenced long before that and arguably as far back as September 2018. Professor O'Sullivan's suspension has now endured for a period of 31 months whereas the investigation has been ongoing for approximately 42 months.

109. It must of course be recognised that the investigation and accompanying disciplinary process had been paused as a result of the stay imposed by the High Court, on Professor O'Sullivan's application, on the 24th February, 2020 which was lifted by the court following the dismissal of his claim on the 20th May, 2021, a period of some 15 months. However, even subtracting the period of the stay from the overall timeline, what remains is that Professor O'Sullivan has been under investigation by the HSE for a period of 27 months to date.

110. Even now, as previously noted, the s. 24 committee has only just been established and it will inevitably take some, probably a substantial, period of time for that committee to marshal all the documentary evidence and records and consider what witnesses will be required to give evidence. Even when hearings by the committee eventually get underway,

it is not hard to imagine that these are likely to be lengthy and thereafter, the committee will have to prepare its decision and make a recommendation.

111. That will likely take a considerable number of months and thereafter, as I have already said, there is the prospect of, at least potentially, a further appeal to the Minister. None of that of course takes account of the potential legal complexities that may arise by virtue of the fact that this entire procedure is being operated on foot of a statutory provision that was repealed some fifteen years ago. By any reasonable standard, this could not conceivably be considered to be an investigation that is taking place expeditiously or with all practicable speed.

112. Given that the contract expressly provides that the power of suspension only endures for such time as may reasonably be necessary for the completion of the investigation, it begs the question as to whether a suspension may lawfully endure beyond that time.

113. A further question arises where the suspension is imposed by reason of a perceived immediate risk to patient safety at a particular point in time, as to whether that suspension may endure indefinitely irrespective of the current status of that risk and whether there is an ongoing obligation to keep that status under review. This is particularly so in cases such as the present where the perceived risk is now some years in the past, further significant events have transpired and yet the consultant remains suspended on the basis of the original perceived risk.

114. Whilst it may be argued that there is a case to be made in favour of periodic re-evaluation of a suspension that continues for a protracted period where an employee is suspended for a justifiable evidence based reason, and evidence comes to the attention of the employer which significantly undermines or casts doubt on the reason for which the suspension was imposed in the first place, in my view, the employer is duty bound to re-

evaluate the necessity for the continuation of that suspension. That seems to me to arise as a matter of basic fairness, irrespective of whether a review is specifically sought. It is implicit in the contract of employment by virtue of the mutual duty of trust and confidence and additionally, to give business efficacy to the contract. For example, evidence may well come to the attention of the employer which is unknown to the employee but undermines the basis for a continuation of suspension.

115. In the context of this case, it is I think important to understand how the process that led to Mr. Reid's initial decision to suspend Professor O'Sullivan evolved. The patient safety risk concern appears to have originated with Professor Day and in particular, her letter of the 1st July, 2019 to Mr Reid.

116. At that stage, Professor Day, who as I have said is not a clinician, had available to her three specific documents of relevance. The first was the Doran/Brennan Review of the 1st October, 2018. While it made certain criticisms of Professor O'Sullivan's feasibility study, it did not identify any risk to patient safety.

117. The second document was the SAR Report whose authors were, as noted, specifically tasked with identifying any patient safety issues and they identified none. They interviewed all the relevant actors, including Professor O'Sullivan and the patients concerned. At no time during the course of their six month investigation did the review team identify any patient safety concern in relation to Professor O'Sullivan despite being expressly charged with doing so, in advance of concluding the report if necessary. It must therefore be assumed that the review team, which comprised two Consultant Gynaecologists as well as a non-clinician, was entirely satisfied that no such risk presented.

118. The third document was Dr. McKenna's letter, to which I have already referred in a little detail. While Dr. McKenna expressed some reservations about Professor O'Sullivan's

continued involvement in clinical practice, that was subject to the caveats previously explained and was far from clear either in its terms or in what might be required to address those reservations. Unlike the authors of the SAR Report, Dr. McKenna's opinion was given without the benefit of any interaction with, or opportunity to respond by, Professor O'Sullivan. If Dr. McKenna's views constituted the basis for Professor Day's conclusion that Professor O'Sullivan may pose an immediate and serious risk to the safety, health and welfare of patients and staff, then in my view it was an entirely flawed conclusion arrived at in the teeth of the actual evidence.

119. The same applies perforce to the view arrived at by Mr. Reid on the 6th August, 2019. There was simply no evidence, or at least no evidence that could be relied upon, available to Mr. Reid which justified him in reaching his conclusion that Professor O'Sullivan presented an immediate and serious risk to the safety, health and welfare of patients. It must follow that the basis for Professor O'Sullivan's suspension was equally flawed.

120. While of course there is no appeal against the trial judge's determination that Professor O'Sullivan was out of time to challenge the suspension decision of the 6th August, 2019, it is nonetheless important to understand the basis, or lack of it, for this decision in the context of the events that subsequently transpired in December, 2019.

121. It will be recalled that in his report, Dr. O'Hare, as well as expressing his view as to whether or not Professor O'Sullivan had been guilty of misconduct, also explicitly stated that "Further, I consider that, on the evidence presented, Prof O'Sullivan does not pose an immediate and/or serious risk to the safety health and welfare of patients." This was crucially important evidence that became available to Mr. Reid from his own nominee, an expert of international standing, touching upon Professor O'Sullivan's continued suspension and casting considerable doubt upon, if not entirely undermining, the decision Mr. Reid had

arrived at to the effect that Professor O'Sullivan did pose a risk to patient safety. Of course, this was a view arrived at by Dr. O'Hare four months later with the benefit, no doubt, of additional evidence which included the intervening compliance by Professor O'Sullivan with the requirements of the SAR Report.

122. Mr. Reid's response to this new evidence was stark. He said that he had not asked Dr. O'Hare for an opinion about this, therefore implicitly suggesting that he was going to ignore it (a position which itself ignores the obligation on an independent expert when instructed in a matter of this kind to express his or her view on any matter he believes to be properly relevant to the issues the subject of their instruction). Furthermore, he stated that he made his decision in relation to the suspension before Dr. O'Hare was engaged, as if that decision, once made, was set in stone forever irrespective of how the circumstances might subsequently change. Mr. Reid was now being confronted with evidence that his original decision, which was in my view unsound in any event, could no longer be regarded as valid.

123. In this respect, I must disagree with the views of the trial judge who considered that the suspension decision would only fall to be reviewed if and when Professor O'Sullivan made a specific request for such review, which he appeared to consider had not been made. I cannot accept the proposition that Professor O'Sullivan is forevermore precluded from challenging his suspension, unless by the artificial contrivance of formally seeking a review and having that refused. In any event, I am quite satisfied that if there was any doubt on this issue, it was resolved by the letter of the 20th January, 2020 from Professor O'Sullivan's solicitors, from which I have quoted above, and which clearly was challenging, on all fronts, the continuation not just of the suspension, but the entire disciplinary process.

124. In my judgment, Mr. Reid was required as a matter of law, implicit in the terms of the contract, upon receipt of Dr. O'Hare's report to immediately review the necessity for a

continuation of Professor O’Sullivan’s suspension and to reach the only conclusion open on the evidence, namely that its continuation could not be justified. Although the trial judge seemed to consider that a challenge to the continued suspension would have to be brought by fresh proceedings, I do not accept that this is so. I have already pointed to the fact that in his pleadings, Professor O’Sullivan sought an order of *mandamus* directing the HSE to terminate his suspension and immediately reinstate him.

125. As is often the case where *mandamus* is sought to remedy an ongoing state of affairs, each day that the state of affairs continues gives rise to a new cause of action at the suit of the person affected. Having made such a claim in these proceedings, there is no necessity for Professor O’Sullivan to institute fresh proceedings to challenge the continuation of his suspension. I am quite satisfied, for the reasons I have explained, that Professor O’Sullivan is entitled to an order of *mandamus* terminating his suspension and reinstating him with immediate effect.

126. Lest there be any doubt, I consider that the suspension should have been lifted with effect from the 23rd December, 2019, being the date when Mr. Reid had a sufficient opportunity to consider Dr. O’Hare’s report to enable him to reach the decision of that date.

The Proposal to Remove Professor O’Sullivan

127. Professor O’Sullivan’s challenge to Mr. Reid’s decisions of the 23rd December, 2019 and 31st January, 2020 is premised on the basis that these are determinations by him of misconduct which cannot be revisited by the s. 24 committee, whose jurisdiction is said to be confined solely to the issue of sanction and whether Mr. Reid’s proposal to remove him should be endorsed. It follows from this, it is said, that Mr. Reid’s decisions do not simply form part of an ongoing process that has yet to reach its conclusion but represent final

determinations that cannot be revisited and thus fall to be quashed. Professor O'Sullivan, therefore, argues that the *Rowland* jurisprudence does not apply in this situation.

128. It is necessary therefore to consider the functions of the s. 24 committee.

129. Counsel for Professor O'Sullivan places particular reliance on the decision of the High Court in *Rajpal* and certain observations of Kearns J. in that case. There, the applicant held the post of Consultant Surgeon at Cavan General Hospital which then fell under the umbrella of the North Eastern Health Board - the case predating the establishment of the HSE. The first respondent was the CEO of the health board and the second respondent was the Minister for Health and Children. Complaints about the applicant were made by another consultant in the surgical department, Mr. Joyce, to the CEO.

130. The applicant had similarly made complaints to the CEO about Mr. Joyce. The CEO formed the opinion that the applicant had misconducted himself in relation to his post or was otherwise unfit to hold office and suspended him pending the establishment of, and investigation by, a committee to be established by the Minister. Unlike in the present case, the suspension of the applicant was imposed without pay pursuant to s. 22 of the 1970 Act. The applicant's contract was in the form of the consultant's common contract which appears to have been in substance similar, if not identical, to Professor O'Sullivan's contract.

131. The Minister duly appointed a committee under s. 24 to inquire into the cases of both the applicant and Mr. Joyce. The applicant brought judicial review proceedings in which he sought orders quashing the CEO's finding of misconduct and the Minister's decision to establish a committee. He also sought orders in relation to his suspension. The primary ground of challenge was that the CEO had never given any, or any sufficient, particulars of the allegations of misconduct nor had he afforded the applicant an adequate opportunity to defend himself. In particular, the CEO had refused to accept documents proffered to him by

the applicant in relation to the allegations made and importantly, had in fact made no proposal to dismiss the applicant.

132. It was suggested that the CEO had entirely misunderstood the correct procedure to be followed and in particular, sought the establishment of a s. 24 committee in circumstances where he made no proposal to remove the applicant from office. It emerged from the evidence of the CEO, and indeed it was not disputed, that he had entirely conflated the procedures applicable under the Consultant's Contract, on the one hand, and under the Act, on the other. The CEO had thought that all that was required of him was to decide whether the complaints were of substance and if so, he could then refer the matter to a committee to decide.

133. The CEO had fundamentally failed to comply with the necessary prerequisite to the establishment of a s. 24 committee by himself undertaking an enquiry, making a finding of misconduct and proposing removal. He had done none of these things. Accordingly, the decision of the CEO fell to be quashed and in consequence, so did the decision of the Minister to establish the s. 24 committee. The essential determination of the court, appearing at p. 33, was that the applicant found himself to be the subject matter of, firstly, a suspension and secondly, a purported proposal to remove him from office because of misconduct, in circumstances where the alleged misconduct had never been inquired into and where no adverse findings of misconduct had ever been made against him by the CEO. Therefore, there was never any proper basis for the impugned decisions which fell to be quashed.

134. The judge considered that even if he was mistaken, the failure to afford the applicant his right to make submissions under the 1971 Regulations, which would arise if a valid proposal to remove had been made, was not accorded to the applicant and deprived the committee of jurisdiction. He rejected counsel for the Minister's submission that the

applicant's rights under the 1971 Regulations arose only at the conclusion of the committee's investigation. He then went on say (at p. 34): -

“Even if I could gloss over the statutory irregularities in this case and reach the view that the matter, having now reached the committee, should be allowed to proceed, I cannot ignore the fact that this committee hearing, being one with the limited function and agenda set out in s. 24(5), is not one which starts *de novo*, but rather is one which only exists to inquire into the proposal to remove the officer concerned. Its statutory function relates to sanction, not to investigation. Accordingly, it cannot approach the matter *de novo* with an open mind in the manner of the committee described by Fennelly J. in *Traynor v Ryan*...”

135. In *Traynor v Ryan* [2003] IESC 36, the Supreme Court was concerned with a contractual committee appointed under Part IV of the Consultant's Contract rather than a statutory committee under s. 24.

136. In reaching his conclusion in *Rajpal*, Kearns J. accepted the submission made on behalf of Mr. Rajpal to the effect that there was a serious question mark as to whether a s. 24 committee had jurisdiction to actually inquire into the misconduct in question having regard to the terms of s. 24 (5). The court accordingly quashed the referral to the committee, but upheld the validity of the suspension.

137. This led to an appeal to the Supreme Court by Mr. Rajpal against the High Court's refusal to quash the suspension and a cross appeal against the order of certiorari in respect of the s. 24 committee. Hardiman J. delivered a judgment ([2005] IESC 39) with which the other members of the court agreed allowing Mr. Rajpal's appeal, quashing the suspension and dismissing the cross appeal. The judgment of the High Court was upheld on the basis that Hardiman J. agreed that the failure to make a proposal to dismiss Mr. Rajpal was fatal

to the decision to appoint the s. 24 committee. He therefore apparently did not find it necessary to consider the alternative basis on which Kearns J. found the decision invalid, namely, a failure to comply with the requirement under the Regulations to receive representations from Mr. Rajpal before making the decision.

138. In my view therefore, the passage cited above, upon which reliance is placed by counsel for Professor O’Sullivan, was *obiter*, but even if it was not, it does not bind this court and was not expressly or otherwise approved by the Supreme Court.

139. In the course of submissions in this appeal, counsel for Professor O’Sullivan argued that the language of s. 24(5), which refers to the committee “having inquired into the proposal to remove the officer,” fell to be contrasted with the language used in the Contract at Clause 5(1) of Appendix IV where the committee was appointed “to inquire into the matter”. However, in my view, the comparison here is not a relevant one. The language of the statute cannot fall to be construed by reference to what is contained in a contract between a public entity and a private individual. While there are obvious parallels between the two types of committee and a certain coincidence of function, that is immaterial to the correct construction of the statute.

140. Were it otherwise, it would mean that the statute would have to be construed in a different way at different times depending on the terms of a contract that may be renegotiated and redrafted from time to time. That cannot represent the correct legal position. Therefore, the statute has to be examined in its own terms.

141. Section 24, insofar as material here, commences with the following words:

“(1) Whenever it is proposed to remove a permanent officer of a health board under section 23 because of misconduct... or unfitness, the Minister shall appoint a

committee to perform the functions specified in this section relating to the proposal for such removal.”

142. The power to appoint a committee thus arises, not merely because it is proposed to remove an officer, but where that proposal is because of misconduct or unfitness. This would appear to clearly imply that the committee is concerned not only with inquiring into the proposal to remove but also the misconduct or unfitness which led to the proposal. Thus, the reference in s. 24 (5) to inquiring into the proposal to remove appears to necessarily import inquiring into the misconduct or unfitness also. S. 24 (5) provides as follows: -

“A committee under this section, having inquired into the proposal to remove the officer, shall make such recommendation to the chief executive officer as it thinks fit.”

143. There is no limitation to be found in the subsection on the powers of the committee to make any recommendation it considers appropriate, and in particular no words appear after the word “recommendation” such as “in relation to sanction” or any like expression. There is, in my judgment, no warrant to be found in the section for construing it in the narrow way contended for by counsel for Professor O’Sullivan.

144. It is also of some significance that in response to questions from the court during the course of this appeal, counsel for the HSE confirmed that it was prepared to concede that the s. 24 inquiry would be a full and wide ranging one which would properly consider the issue of misconduct.

145. There are other indications to be found in the section which support this view. Section 24(4) provides: -

“The chairman of a committee under this section shall, in relation to the functions of the committee, have the same powers as an inspector of the Minister has under section 86 of the Local Government Act, 1941, when holding a local inquiry.”

146. Section 86 of the Local Government Act, 1941 describes in the margin note “powers of inspectors and auditors to obtain evidence, etc”. The section provides that an inspector holding a local inquiry may take evidence on oath and for that purpose administer oaths. The inspector may require any person to attend before the inquiry to give evidence in relation to any matter in question at the inquiry or to produce any documents which relate to such matter.

147. Other provisions in the section provide for the recoument of expenses by persons required to give evidence or produce documents by the inspector. The section also provides that any person who refuses to attend, when required, to give evidence or produce documents shall be guilty of a criminal offence and liable to a fine on summary conviction. It is very difficult to reconcile these powers with an inquiry that is confined to little more than hearing testimonials concerning the good character and accomplishments of the person the subject of the inquiry, in effect a plea in mitigation.

148. I therefore must respectfully disagree with the views expressed by Kearns J. in *Rajpal* and I would decline to follow them.

149. That being so, the finding by Mr. Reid of misconduct on the part of Professor O’Sullivan is not one that binds the s. 24 committee in any way and it is entirely free to reach its own conclusions on this issue.

Mr. Reid's Decisions of 23 December 2019 and 31 January 2020

150. I turn now to consider the decisions made by Mr. Reid on the 23rd December, 2019 and the 31st January, 2020. Although as noted, Professor O'Sullivan does not in his pleadings directly seek to quash the earlier decision, I accept the contention that a challenge to the later decision inherently and necessarily involves a challenge to the earlier, given that the January 2020 decision could not have been arrived at by Mr. Reid in the absence of the December 2019 decision.

151. To understand the genesis of these decisions, it is necessary first to go back to the 14th August, 2019 when Professor O'Sullivan's solicitors made a detailed written submission to Mr. Reid on the issue of misconduct. In support of their contention that Professor O'Sullivan had not been guilty of misconduct, the solicitors relied upon an extract from the Irish Medical Council Guide, to which reference has previously been made. They were thus contending that this was the standard by which Professor O'Sullivan's conduct should be judged.

152. It will be recalled that subsequently, Mr. Reid held a meeting with Professor O'Sullivan on the 13th September, 2019. The notes of that meeting show that Professor O'Sullivan went into considerable detail about how the feasibility study arose and what it entailed and also his subsequent response to the concerns that emerged. At the conclusion of the meeting, Mr. Reid said it was up to him to reflect on whether further examination was necessary. He clearly concluded that it was necessary and said so in his subsequent letter of the 10th October, 2019. There, he said "before making any decision I consider it necessary to undertake further examination".

153. This would appear to be a clear acknowledgment by Mr. Reid that he required further expert assistance in order to make that decision. This is confirmed in the next paragraph of his letter where, to recap, he said: -

“To that end, I intend to seek a written opinion from a clinician’s perspective, about the seriousness or otherwise of the shortcomings in the conduct of the ‘Study’ conducted by your client on the five patients.”

154. It appears to me therefore that the conclusion is inescapable that Mr. Reid felt himself unable to reach a decision on the issue of misconduct without the opinion of an expert clinician as to the seriousness of that conduct. That was precisely what he instructed Dr. O’Hare to do in providing him with an opinion as to whether the manner in which the “study” was conducted was “a serious matter, viewed from a clinician’s standpoint.” It is entirely understandable that Mr. Reid, as a person with no medical training, felt himself unable to gauge the seriousness of the conduct concerned without the benefit of the opinion of an expert with such training.

155. Although Mr. Reid already had available to him the expert opinions of four consultant gynaecologists being Professor Doran, Professor Brennan, Professor Boyd and Dr. McKenna, Mr. Reid pointed out himself on the 21st October, 2019 that he considered that Dr. O’Hare’s opinion was necessary because the previous clinical opinions he received were in relation to the question of administrative leave and not potential disciplinary action arising from misconduct. It is also relevant to note that in giving instructions to Dr. O’Hare, Mr. Reid did not specify any particular standard of misconduct that he felt Dr. O’Hare should consider beyond the seriousness of the conduct being examined from a clinician’s perspective.

156. It can hardly be regarded as surprising, therefore, that when Dr. O’Hare came to consider the issue of misconduct, because after all that was what he was being asked about, he had regard, as any clinician would, to the definition contained in the Medical Council Guide. He evidently also had regard to the consideration of misconduct by the Supreme

Court in *Corbally*. On this basis, in a nutshell, Dr. O'Hare was of the clear view that Professor O'Sullivan had not been guilty of misconduct.

157. As we know, the report was sent by Mr. Reid on the 6th December, 2019, but unfortunately was never seen by Professor O'Sullivan and his legal team. Mr. Reid proceeded to make his decision some two and a half weeks later, on the 23rd December, 2019, having heard nothing whatsoever from Professor O'Sullivan's solicitors in the interim. This must surely have been a matter of considerable surprise to Mr. Reid. He had expressly agreed on the 21st October, 2019 and previously that Professor O'Sullivan would have an opportunity to make submissions on Dr. O'Hare's report once received.

158. Given the previous level of engagement by Professor O'Sullivan's solicitors, and that the process had now reached a critical final stage, it appears to me that the fact that Mr. Reid got no reaction whatsoever to the report ought to have raised a concern with him. It would have been a simple matter to seek confirmation that the report had been received or that Professor O'Sullivan did not wish to make any further submission about it, itself an extremely unlikely event given all that had gone before.

159. I am afraid I cannot accept the determination of the trial judge (at para. 100) that it was reasonable for Mr. Reid to assume that the absence of any submissions meant that Professor O'Sullivan did not wish to say anything further about the O'Hare Report.

160. There was absolutely no evidence before the High Court which could justify such a conclusion. Mr. Reid swore two affidavits and never at any time suggested that he had made such an assumption. There can be no doubt that fair procedures demanded that Professor O'Sullivan have an opportunity of making submissions on the O'Hare Report, irrespective of whether it was favourable or adverse, before Mr. Reid reached his decision on the issue of misconduct. While it is accepted that it was not Mr. Reid's responsibility that the report

was not received by Professor O'Sullivan, nonetheless when Mr. Reid became aware of that fact, he ought in my opinion, to have agreed to set aside his original decision and reconsider the matter.

161. I also must disagree with the view of the trial judge that this absence of fair procedures was cured by the fact that Professor O'Sullivan had a subsequent opportunity of making submissions before the final decision was reached by Mr. Reid on the 31st January, 2020. Professor O'Sullivan had a right to make submissions at both stages, the first, as a matter of basic fair procedures and the second, guaranteed by the 1971 Regulations. He was, in effect, entitled to two bites of the cherry and not just one.

162. It might reasonably be said that, Mr. Reid, having made the first decision, the die was to a significant extent cast and it then became an uphill battle for Professor O'Sullivan to persuade Mr. Reid to change his mind. For that reason, if for no other, in my view Mr. Reid's decision of the 23rd December, 2019 was invalid.

163. Further, it was, in any event, flawed for another reason. Mr. Reid had made clear, as I have explained, that he was not in a position to adjudicate on Professor O'Sullivan's alleged misconduct without the benefit of a clinician's view as to its seriousness. However, when he received that opinion, he entirely disregarded it and reached a diametrically opposite conclusion. That is not to say that Mr. Reid was bound by Dr. O'Hare's opinion as in effect, that would be to abdicate his responsibility for making the decision to Dr. O'Hare. However, the jurisprudence establishes that if he proposed departing from his own expert's opinion, he was obliged to give clear and cogent reasons for doing so – see *McManus v The Fitness to Practice Committee of the Medical Council* [2012] IEHC 350.

164. It will be recalled that in his letter, Mr. Reid says: -

“I note Dr. O’Hare’s opinion that your *‘overall conduct has fallen below – but not seriously below – the standard of conduct expected among doctors.* While I agree with Dr. O’Hare’s recital of the facts, I am afraid that I cannot agree with his conclusions regarding the seriousness of your conduct.”

165. Yet this is the very issue which some weeks earlier Mr. Reid said he could not decide without the opinion of a clinician. Having obtained that opinion on the seriousness of the conduct, he elected not to accept it which, contrary to what he had previously said, suggests that he did not require it in the first place.

166. During the course of the respondent’s submissions, counsel for the HSE urged on this court that Mr. Reid was entitled to reach a conclusion from an employer’s perspective, rather than from that of a clinician and thus, decide that there had been misconduct even if Dr. O’Hare thought there had not. The first point about that is if a different standard of misconduct was going to be applied by Mr. Reid, he should have said that from the outset and explained what that standard was. That is not in fact what Mr. Reid did. Instead he explicitly disagreed with Dr. O’Hare’s opinion on the express basis of what was contained in the Medical Council Guide, extracts from which he cited *verbatim*.

167. Having referred to these extracts from the Guide concerning ethics approval and informed consent, he went on to say: -

“It is very clear from the foregoing [extracts] that ethics approval and informed consent are not optional but are essential in relation to research in the nature of the study. As such, I have formed the view that you have seriously misconducted yourself in relation to your appointment as a consultant ...”

168. Thus, far from suggesting that as an employer, it fell to Mr. Reid to apply a different standard of misconduct than that which might be prescribed by the Medical Council Guide for a doctor, Mr. Reid actually adopted and relied on the Guide itself as support for his conclusion that he could not accept Dr. O'Hare's views. That is, with respect, an illogical position to adopt. It could not constitute a sufficient or cogent reason for purporting to dismiss Dr. O'Hare's opinion. I am again unable to agree with the view of the trial judge (at para. 115) that it could not be said that Mr. Reid had ignored Dr. O'Hare's report. That is precisely what he did.

169. I also have some difficulty with the trial judge's comment at para. 118 that even at this stage, years after the events, while Professor O'Sullivan admitted that he was in error, he does not admit that there was misconduct on his part. If that was intended as a criticism of Professor O'Sullivan, it is misplaced, because first, that is in fact what Dr. O'Hare found and second, that is the very thing that the committee must determine.

170. I also disagree with his conclusion that Mr. Reid was entitled, in coming to his view about misconduct, to have regard to the views of Dr. McKenna and I have already explained why.

171. Indeed, it would be somewhat extraordinary for Mr. Reid to rely on Dr. McKenna's views in circumstances where he had explained that one of the reasons he required an opinion from Dr. O'Hare was because Dr. McKenna's view had not been sought on the issue of misconduct but only on the question of suspension. For the same reasons, Mr. Reid's decision of the 31st January, 2020 is, to my mind, robbed of any validity insofar as its determination of misconduct is concerned. In the latter letter, Mr. Reid again confirms his reliance on the Medical Council Guide to dispute Dr. O'Hare's views.

Conclusion as to Decisions to Propose the Removal of Professor O’Sullivan

172. The question that remains is whether this court should quash these decisions for the reasons which I have identified. I have come to the conclusion that it should not, having regard to the *Rowland* jurisprudence.

173. It will be remembered that in *Rowland*, the Supreme Court held that a court should only intervene in an ongoing disciplinary process where it was clear that the process had gone irremediably wrong and that it was more or less inevitable that any adverse conclusion reached would be bound to be unsustainable in law. Since, as I have already held, the s. 24 committee will have an unrestricted remit to consider all relevant issues, including that of misconduct, and will in effect be starting with a clean sheet, I do not consider that, notwithstanding the flaws in the two decisions of the CEO concerning misconduct, those decisions have resulted in irremediable prejudice to Professor O’Sullivan.

174. Those decisions do not bind the committee in any way and it is entirely at large to come to its own conclusion on these issues. I am therefore satisfied that the proper course is for the disciplinary process before the committee to proceed and continue to conclusion. In this respect, I agree, at least in part, with the views of the trial judge that the application to quash these decisions is premature and Professor O’Sullivan’s rights will be fully respected and protected by the committee. He will thus suffer no irreversible prejudice by virtue of Mr. Reid’s decisions on the misconduct issue.

Order

175. In the result, I would allow the appeal on the administrative leave issue but dismiss the appeal against the trial judge’s refusal to quash the two decisions in question.

176. With regard to costs, Professor O’Sullivan has succeeded fully on the suspension issue. He has also succeeded to a substantial extent on the challenge to the misconduct decisions although has not obtained the relief sought on the basis of *Rowland*. His challenge to those decisions was made primarily on the basis of reliance on the judgment of the High Court in *Rajpal*, which for the reasons given, I have declined to follow. However, it was clearly not unreasonable to rely on that case and also on the fact that the trial judge had no regard to it.

177. Taking an overview of the matter, it seems to me that Professor O’Sullivan has prevailed on the merits of the appeal and my provisional view therefore is that he should be entitled to his costs both in this court and the High Court. If the HSE wishes to contend for an alternative form of order, it will have 14 days from the date of this judgment to apply to the Court of Appeal Office for a short supplemental hearing on the issue of costs. If such hearing is requested and does not result in an order different from that proposed, the HSE may be additionally responsible for the costs of the supplemental hearing. In default of such application, the order proposed will be made.

178. As this judgment is delivered electronically, Faherty and Murray JJ. have indicated their agreement with it.