

THE HIGH COURT

2020/297 SP

IN THE MATTER OF SECTION 80(5) OF THE VETERINARY PRACTICE ACT 2005 (AS AMENDED) AND IN THE MATTER OF A REGISTERED VETERINARY PRACTITIONER AND ON THE APPLICATION OF THE VETERINARY COUNCIL OF IRELAND

BETWEEN

THE VETERINARY COUNCIL OF IRELAND

APPLICANT

AND

TIMOTHY BRENNAN

RESPONDENT

Judgment of Irvine P. delivered the 14th day of December 2020

Background

1. This is an application brought by the Veterinary Council of Ireland ("the Council") under s. 80(5) of the Veterinary Practice Act 2005, as amended by the Veterinary Practice (Amendment) Act 2012 ("the Act").
2. The Council seeks an order confirming its decision taken under s 80(1)(b) of the Act to cancel the respondent's registration for a period of two months in circumstances where the respondent has not appealed that decision within the time prescribed for such an appeal under s 80(3).
3. The alleged wrongdoing which formed the basis of the Council's decision to suspend the registration of the respondent relates to his handling of animal remedies, specifically:
 - i. his failure to provide an adequate description of animal remedies;
 - ii. having in his possession unauthorised animal remedies;
 - iii. his failure to include a serial number on labels affixed to animal remedies; and
 - iv. his failure to keep adequate records.
4. An inquiry into the aforementioned allegations was held by the applicant's Fitness to Practice Committee ("the Committee") on 17 December 2019. The respondent was present and legally represented. Oral evidence as well as character references were considered as was the documentation which has been exhibited before this Court. The Committee was satisfied that the allegations at 1 to 4 above had been proved beyond a reasonable doubt and decided that allegations 2, 3 and 4, having been admitted – amounted to professional misconduct representing a serious falling short of the standard that could reasonably be expected of a registered veterinary practitioner. In light of its findings the Committee considered that the respondent's conduct merited a six-month suspension. However, in light of certain mitigating factors to which I will later refer, it recommended that the period of suspension should be reduced to a period of four months.

5. Having met via Zoom to consider the Committee's report and recommendations the applicant later decided, pursuant to s 80(1)(b) of the Act, to cancel the respondent's registration for a period of two months.

The Role of the Court in assessing sanction

6. I propose to briefly refer to the statutory provisions relevant to the Court's jurisdiction on an application such as this, given that these provisions are somewhat different to those which apply to applications brought in similar circumstances by the Medical Council under the Medical Practitioners Act 2007 and the Council of the Nursing and Midwifery Board under the Nurses and Midwives Act 2011.
7. The Veterinary Practice Act 2005 makes provision for a person to appeal to the High Court against a decision of the Council made in respect of a disciplinary matter. In circumstances where an appeal is lodged against such a decision within 21 days, s. 80 (4) applies but where an appeal is not lodged, as in the present case, s. 80 (5) applies. The relevant provisions provide as follows:

"80(3) A person who receives a notification under subsection (2) may appeal to the High Court against the decision specified in the notification within a period of 21 days beginning on the date of such receipt.

 - (4) On the hearing of an appeal under subsection (3) by the registered person to whom the decision relates, the High Court may make—
 - (a) an order affirming or setting aside any decision of the Council in relation to matters referred to in subsection (1) concerned,
 - (b) an order remitting the decision of the Council in relation to matters referred to in subsection (1) with or without directions to the Council, for reconsideration by it and the making of a new decision in relation to it, or
 - (c) any other order that it considers appropriate.
 - (5) Where the registered person to whom the decision relates has made no application under subsection (3) within 21 days of the notification under subsection (2), the High Court may, on an application to it in a summary manner by the Council make—
 - (a) an order confirming or setting aside the making of the decision concerned,
 - (b) an order remitting the decision concerned with or without directions to the Council, for reconsideration by it and the making of a new decision in relation to it,
 - (c) any other order that it considers appropriate."
8. The first observation I would make is that it is the court's jurisdiction as provided for in s. 80 (5)(c) above that distinguishes its power on an application such as this from that which it enjoys when dealing with an application to confirm a sanction on a registrant under the Medical Practitioners Act 2007 or the Nurses and Midwives Act 2011, where no appeal has been lodged.

9. In respect of the Nurses and Midwives Act, Kelly P. in his judgment of *Nursing and Midwifery Board of Ireland v M.M.G.* [2019] IEHC 947 at paras 3 to 5, explained the role of the Court when asked to confirm a sanction under that legislation where the registrant had not appealed:

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

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

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

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

10. In respect of the Medical Practitioners Act 2007, the process whereby a registrant appeals a decision of the Medical Council regarding a proposed sanction is governed by s. 75 which provides:

“75.— (1) A registered medical practitioner the subject of a decision under section 71 to impose a sanction (other than a sanction referred to in section 71 (a)) may, not later than 21 days after the practitioner received the notice under section 73 (1) of the decision, appeal to the Court against the decision.

- (2) The Court may, on the hearing of an appeal under subsection (1) by a medical practitioner, consider any evidence adduced or argument made, whether or not adduced or made to the Fitness to Practise Committee.

- (3) The Court may, on the hearing of an appeal under subsection (1) by a medical practitioner—

(a) either—

(i) confirm the decision the subject of the application, or

- (ii) cancel that decision and replace it with such other decision as the Court considers appropriate, which may be a decision—
 - (I) to impose a different sanction on the practitioner, or
 - (II) to impose no sanction on the practitioner,

and

- (b) give the Council such directions as the Court considers appropriate and direct how the costs of the appeal are to be borne.”

11. This procedure, which in effect provides for a *de novo* appeal, is very different to the s 76 procedure which applies when a registrant does not appeal within the prescribed time limit:

“(1) Where a registered medical practitioner does not, within the period allowed under section 75 (1), appeal to the Court against a decision under section 71 to impose a sanction (other than a sanction referred to in section 71 (a)) on the practitioner, the Council shall, as soon as is practicable after the expiration of that period, make an application to the Court for the confirmation of the decision.

(2) An application under subsection (1) may be made on an *ex parte* basis.

(3) The Court shall, on the hearing of an application under subsection (1), confirm the decision under section 71 the subject of the application unless the Court sees good reason not to do so.”

12. For some reason, which is not all clear, the court’s jurisdiction under the Veterinary Practice Act, in terms of the orders it can make when asked to confirm the imposition of a sanction, is not significantly different regardless of whether or not the registrant has appealed that decision. Nonetheless, what is clear from the wording of section 80(5) is that, unlike the other statutory regimes earlier mentioned, the court is not obliged to confirm the Council’s decision unless it sees good reason not to do so.

13. The apparently broad jurisdiction of the court provided for in s.80(5)(c) comes into sharp focus when compared with the equivalent provision in the Medical Practitioners Act 2007. Relevant in this regard is what was stated by Kelly P. in *Medical Council v MAGA* [2016] IEHC 779, [2016] 12 JIC 1905 concerning the limited jurisdiction of the Court, when dealing with an application under s. 76(3) of the Medical Practitioners Act 2007, to interfere in the decision rendered by the applicant. He observed that the Court’s jurisdiction was not that of an appellate court. And, in the following manner, at para 32 of his judgement, he explained why he would not set aside the decision of the Medical Council:

“...I am unable to come to the conclusion that the Medical Council in this case has come to such an unreasonable conclusion as to amount to a good reason for this court to disturb it. The decision here is not an unreasonable one as that term is understood in the context of judicial review concepts.”

Also, at para 34 he stated:

“It is the Medical Council that is charged with the maintenance of standards and competence among registered medical practitioners. It is the Medical Council which is primarily charged with ensuring the maintenance of public confidence in the medical profession. That is not a function of this court. The function of this court insofar as s.76 (3) is concerned is to intervene only in circumstances where there is good reason, as properly understood, to warrant the court's intervention.”

14. Of further relevance is what Kelly P stated in *Medical Council v Lohan-Mannion* [2017] IEHC 40, at para 62 and 63:

“62. In carrying out the function which is prescribed under s.76 (3) of the Act, I have to have regard to the limited jurisdiction which is vested in this court. As I have already pointed out I can only refuse the order sought in this case if I am of opinion that the Medical Council came to such an unreasonable decision that no reasonable medical council could have so done.

63. I am unable to come to that conclusion and thus cannot refuse to confirm the Medical Council's decision. The threshold which has to be achieved in order to demonstrate such unreasonableness is similar to that required to quash the decision of any administrative body on judicial review. It is a high threshold and has not been achieved here.”

15. In this case, however, the Court is entitled to make “any order it considers appropriate” notwithstanding the fact that the registrant has not appealed. The Court is not confined to confirming the decision of the applicant “unless the court sees good reason not to do so” as would be the case if the Court was hearing a similar application brought by either of the other professional bodies already mentioned. However, neither does s.80 (5) of the Act give the Court the same power as it would enjoy if it was hearing an application to approve a disciplinary sanction where the registrant had appealed under the Medical Practitioners Act or the Nurses and Midwives Act. This is because in each instance the relevant statutory provision makes clear that in hearing such an appeal the Court may hear new evidence, a provision which is absent from s.80(5) of the Veterinary Practice Act.
16. Why there is this difference in the Court’s jurisdiction under the statutory provisions which govern the regulation of disciplinary matters in these three different professions is entirely opaque. However, it is not necessary or desirable for the Court on the present application, to seek to resolve these differences as the Court’s jurisdiction was not debated in any meaningful way. Suffice for the moment to observe that the Veterinary Practice Act does not expressly curtail the jurisdiction of the Court such that it is clear beyond doubt that I must adopt the extremely strict and limited role described in *MAGA* and *Lohan-Mannion*. It is sufficient for the purpose of these proceedings to go no further than to distinguish *MAGA* and *Lohan-Mannion* from the within proceedings.

17. For the purposes of dealing with the present application, I have also considered the relevance of the judgment of Charleton J. in *Hermann v Medical Council* [2010] IEHC 414, which was opened to the Court, albeit briefly in the course of the hearing. Having done so, I do not think it necessary to embark upon an analysis as to what is therein stated concerning the jurisdiction of the Court and the proper approach to evidence in a *de novo* hearing. This issue does not arise on the present application as it is not a *de novo* hearing. What is of relevance however, because it is to the forefront of every decision made when it comes to sanction, is what Charleton J., quoting Finlay P. in *The Medical Council v. Murphy*, (High Court, Unreported 29th June 1994 Finlay P.) stated about sanction at para 6 of his judgment:

"First, I have to have regard to the element of making it clear by the order [made by the High Court on appeal] to the medical practitioner concerned, the serious view taken of the extent and nature of his misconduct, so as to declare him from being likely, on resuming practice to be guilty or like or similar misconduct. Secondly, it seems to me be an ingredient though not necessarily the only one that the order should point out to other members of the medical profession the gravity of the offence of professional misconduct and thirdly, and this must be some extent material to all these considerations, there is the specific element of the protection of the public which arises where there is misconduct and which is, what I might describe as the standard in the practice of medicine. I have as well an obligation to assist the medical practitioner with as much leniency as possible in the circumstances."

18. In light of the various statutory provisions to which I have already referred, for the purposes of the present application I think it suffices to state that it is not clear that the Court, on the application pursuant to s. 80 (5)(c) of the Act is necessarily confined to taking the strict "Wednesbury reasonableness" approach (from the oft-cited case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223)) in which the Court will only set aside a decision which is so unreasonable that no reasonable decision maker could have taken it. However, a more considered decision of the Court's jurisdiction under this section will have to await a case in which the issue is fully argued.

Decision

19. As mentioned earlier, allegations 1 to 4 were proved beyond a reasonable doubt and it was found that allegations 2, 3 and 4, having been admitted – amounted to professional misconduct representing a serious falling short of the standard that could reasonably be expected of a registered veterinary practitioner. And, the Fitness to Practice Committee, in its report dated 30th March 2020 recorded that it considered the respondent's serious level of disregard for the 2007 Regulations would merit a suspension of six months. However, it was also satisfied that the respondent had made various admissions of fact which had considerably shortened the length of the inquiry and that in those circumstances a suspension of four months would be more proportionate.
20. I have considered the submissions later made on behalf of the respondent to the Council wherein it was argued that a suspension was not warranted on the facts as found, having

regard to the totality of the mitigating factors which included a series of devastating personal tragedies experienced by the respondent. Likewise, I have considered the submission that the Council was obliged to impose the least restrictive sanction and that it should exercise leniency, as far as possible. In that regard, counsel for the respondent laid emphasis upon the fact that a suspension would constitute a significant interference with the respondent's constitutional right to earn a livelihood.

21. It is clear from the transcript of the hearing that took place on 8th October 2020, that the Council attached significant weight to the mitigating factors relied upon by the respondent insofar as it reduced the period of suspension recommended by the Committee from four months to two months. From what appears at p 47 of the transcript of that meeting, it is clear that the Council relied upon the following six mitigating factors:
 - i. the respondent's years of unblemished experience as a vet;
 - ii. the respondent's co-operation with the inquiry and his admission of certain facts;
 - iii. the context pertaining to the respondent's misconduct did not indicate a pattern of sustained wrongdoing;
 - iv. the fact that the respondent would not repeat the professional misconduct;
 - v. certain difficulties which the respondent experienced in his personal and professional life at the time of his misconduct; and
 - vi. the professional and character references furnished.
22. At the hearing before me on 30th November 2020, I expressed some concern in relation to the Council's reliance upon factors (iv) and (v) above as a valid basis upon which it could reduce what it considered would otherwise have been the appropriate sanction.
23. Counsel for the respondent conceded in relation to factor (iv), that this was not a strong mitigating factor and that in relation to factor (v) there was no direct causal connection between the very tragic personal difficulties experienced by the respondent at the time of his misconduct, and the misconduct itself. And, he correctly observed that it is difficult to know just how much weight the Council placed on those factors when reaching its decision. He surmised that little weight was likely to have been attached to these two factors.
24. Having considered the submissions of the parties, I am satisfied that the Council was not entitled to mitigate the sanction it had agreed was appropriate in respect of the respondent's misconduct (six months) on the basis that he would not repeat the misconduct which he was found to have committed (factor iv). It is the respondent's professional obligation to practice in accordance with the professional standards required of his profession and to propose that he should in some way be rewarded for the fact that he was considered unlikely to repeat his misconduct in the future is to completely misunderstand both his professional obligations and the concept of mitigation. I am also

satisfied that the Council erred as a matter of law in relying upon the respondent's unfortunate personal circumstances, which, whilst extremely distressing, were completely unconnected with his misconduct, to mitigate the sanction which it considered would otherwise have been appropriate to mark his misconduct.

25. The reason I did by not give my judgement on the day of the hearing was to allow me to consider the consequences of the Council's errors when asked to approve a sanction that was ultimately not validly constructed. The question now to be addressed is how the Court should respond to the error made by the Council having regard to all of the relevant circumstances.
26. It is clear that I am entitled under the provisions of section 80(5)(b) to remit the decision to the Council for its reconsideration. And, if I thought that a different outcome would be likely in the event of me adopting that approach, that is the order that I would make. However, I do not believe that such an order would be in the interests of the parties, the profession or the public, for a number of reasons. First, whilst it is difficult to know the weight which the Council attached to each of the six mitigating factors, I think it is highly likely that the offending factors i.e. factors (iv) and (v) are likely to have carried significantly less weight than other factors such as the respondent's unblemished record as a veterinary surgeon, his cooperation with the inquiry and his character references. Thus, even if factors (iv) and (v) were excluded, it is not by any means certain that the Council would necessarily alter its decision. And, if it did, it would likely only be a very modest alteration. I also take the view that if the decision was to be referred back for reconsideration, the respondent would be entitled to ask the Council to mitigate the sanction proposed by reason of damage done to his reputation arising out of all of the publicity attendant upon his misconduct which has been very significant indeed. And, it seems to me that if this approach was taken it is unlikely that the Council's decision regarding sanction would likely change from that which it had decided upon at its meeting on 8th October last.
27. Having taken that view, I consider it important to remind those professionals whose conduct is subject to the Court's regulation when it comes to the imposition of a sanction for professional misconduct, to understand that it is not the role of the Court to rubberstamp decisions made by their governing bodies and that there will be circumstances in which the Court will refuse to endorse the Council's decision. However, this is not one such case.
28. Before I conclude I should say that having considered the evidence on the present application, I myself was of the view that the sanction proposed by the Council was, on the facts before it, somewhat less stringent than it might have been. However, it seems to me that to refuse to confirm a sanction proposed by the Council I would have to have reason beyond the fact that had I been the primary decision maker, I might have favoured a somewhat less lenient approach.
29. In deciding whether or not to confirm the sanction decided upon by the Council (or indeed to make any other order, such as remitting the decision to the Council for

reconsideration), I must bear in mind that the Council has a large amount of specific knowledge at its disposal, knowledge which the Court does not, and could not, have access to. For example, the Council is best placed to advise on whether misconduct is on the serious end of the scale, having the benefit of knowing what other types of misconduct are routinely dealt with in disciplinary processes. The Council also has industry and profession-specific knowledge which the Court does not, and these are all factors which may reasonably influence the assessment of a sanction, based on the seriousness of the misconduct found proven. In other words, the Court should afford some degree of deference to the Council when it comes to considering whether or not to confirm a sanction that it has proposed.

30. On the other hand, there are areas in which the Council may conceivably err, and which are within the Court's specific expertise to assess. These include, for example, the proper approach to mitigation and the question of causality between circumstances of personal hardship and professional misconduct. There is, therefore, a balancing act to be achieved by the Court – in recognising that some aspects of a decision should be guided by matters within the specific and specialised knowledge of the Council and some aspects which may call for correction by the Court where the Council has erred.
31. Even if another decision maker would not have exercised as much leniency as the Council did in the present case, I do not think the leniency shown was per se unreasonable such as would justify the Court refusing to confirm the sanction proposed, even if I may have a broader jurisdiction than that which I would enjoy if hearing an application such as that made in *MAGA* or *Lohan-Mannion*. The sanction still satisfies the purposes identified in *Murphy* in that it makes clear to the registrant the serious view taken of the extent and nature of his misconduct. Secondly, it reminds other members of the profession of the gravity of engaging in professional misconduct and thirdly, it serves to protect the public.
32. For the aforementioned reasons I will confirm the decision of the Council pursuant to the provisions of s 80(5) of the Veterinary Practice Act.