

THE HIGH COURT

[2021] IEHC 282

[Record No. 2020/154 JR]

BETWEEN

RAY O'SULLIVAN

APPLICANT

AND

HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered electronically on the 27th day of April, 2021

Introduction

1. The applicant is a consultant gynaecologist. In these proceedings he is challenging a number of decisions that were made by the CEO of the respondent in connection with his investigation of certain events that occurred on 4th and 5th September, 2018.
2. The events the subject matter of the investigation, will be described in greater detail later in the judgment. Suffice it to say that certain unauthorised procedures were carried out on five patients, which procedures were carried out by a doctor acting under the direction and control of the applicant.
3. The applicant challenges a decision that was made by the CEO of the respondent to place him on administrative leave on the basis that that decision was irrational having regard to the fact that it was made some 10 months after the events the subject matter of the investigation, during which time there had been no complaint or concern raised in relation to the applicant's suitability to treat patients.
4. The applicant also challenges a decision made by the CEO on 23rd December, 2019 to make a recommendation that he be dismissed from his position of employment as a consultant gynaecologist with the respondent. The applicant states that that decision was fatally flawed, due to the fact that he did not have the opportunity to comment on an expert's report which had been obtained by the CEO and formed part of the material on which he based his decision.
5. The applicant also challenges a subsequent decision made by the CEO of the respondent on 31st January, 2020, which was also to the effect that he would make a recommendation that the applicant should be dismissed, because that decision flew in the face of the opinion that had been given in the report that had been commissioned by the CEO from a medical expert of international standing. It was submitted that as the CEO was not medically qualified, nor qualified in the area of medical ethics, his decision to ignore the opinion given by the expert, was irrational and ought to be struck down.
6. Finally, the applicant alleged that the entire investigatory process had been tainted by bias, due to the fact that he had been an outspoken critic of management at the hospital and of the respondent generally, over a long period of time.
7. In response, the respondent argued that the applicant was out of time to challenge the decision to place him on administrative leave, as that decision had been made on 6th

August, 2019 and the applicant had not moved his ex parte application seeking judicial review until 24th February, 2020. It was submitted that the applicant had not provided any reason, let alone a good and sufficient reason, as to why he had not moved his application within the time period provided for under the rules.

8. The respondent further submitted that the decision to place the applicant on administrative leave was not irrational having regard to the material that was then before the CEO.
9. The respondent submitted that the decisions made by the CEO on 23rd December, 2019 and 31st January, 2020 were not vitiated by any absence of fair procedures. The CEO had sent the expert's report to the applicant in advance of making the first decision, but he had not received it due to a malfunction within the computer infrastructure in his solicitor's office.
10. It was further submitted that even if that did constitute any want of fair procedures, such deficiency had been cured by virtue of the fact that the applicant was re-sent the report and was given an opportunity to make submissions on it prior to the CEO making his ultimate decision on 31st January, 2020.
11. It was submitted that the CEO, as the person designated to make the relevant decision, was not bound to follow the opinion given by the expert in his report. It was submitted that it was only necessary that the decision-maker should engage with that opinion and set out clearly the grounds why he did not propose to follow it. It was submitted that that had been done in the letters sent by the CEO on 23rd December, 2019 and 31st January, 2020.
12. Finally, it was submitted that there was no evidence of bias on the part of any of the persons who had carried out investigations into the events of 4th and 5th September, 2018; nor was there evidence of bias on the part of the CEO. It was submitted that the CEO had at all times treated the applicant and his solicitor with the utmost fairness and courtesy.
13. That is a very brief summary of the main issues that fall for determination on this application. The issues and the arguments on behalf of each of the parties will be dealt with in greater detail later in the judgment.

Background

14. The applicant is employed as a consultant gynaecologist in the respondent's hospital in Kilkenny.
15. On 4th and 5th September, 2018 the applicant directed his registrar to carry out a procedure whereby a small disposable balloon catheter, with a pad affixed to the end of it, was inserted into the vaginas of five patients. Three of these patients were being treated in the outpatients' department and two of the patients were being treated under general anaesthetic. All of the patients had been referred to the applicant for the purpose of having a hysteroscopy procedure carried out. The applicant had directed that the

catheter with the pressure pad be inserted into the vagina to measure pressure on the vaginal wall at various points. The purpose of these measurements was to provide a feasibility study, to see whether it would be possible to carry out a larger study, which would potentially lead to the possibility that certain procedures could be carried out without the use of a speculum.

16. None of the five patients had been informed that the feasibility study was going to be carried out. None of the patients had consented to the insertion of the wire and the pressure pad into their vaginas. None of the patients were aware at the time, that the procedure had been carried out on them.
17. The applicant had not sought or obtained any clearance from the hospital's ethics committee to carry out the feasibility study. The applicant had sourced the instrumentation which was used for this procedure, otherwise than through the usual procurement channels in the hospital. He had in fact purchased the equipment from a reputable supplier, with his own funds. None of the data obtained as a result of the feasibility study, was entered on the patients' charts. Some of the measurements taken during the procedure, were stored on the applicant's mobile phone. It was subsequently deleted.
18. The matter came to light because some of the nursing staff were concerned that there was an infection control risk with the procedure.
19. When details of the procedure came to light, and when it became known that the patients had not consented to the procedure, a decision was made that an open disclosure meeting would have to be held with each of the patients. In advance of those meetings, advices were taken from Dr. Doyle, a microbiologist employed at the hospital, as to whether the procedures could have resulted in a risk of infection being transferred from one patient to another. Dr. Doyle advised that, notwithstanding that separate probes were used for each patient, there was still a risk of transmission of infection from one patient to the other. It was decided that testing for infection in the patients would be advisable.
20. On 10th and 11th October, 2018, Prof. Gary Courtney, the Clinical Director of the hospital, held open disclosure meetings with each of the patients, some of whom were accompanied by their husbands/partners. Each of the patients was informed that a procedure had been carried out to which their consent had not been sought in advance. They were further informed that the applicant had not sought, or obtained, approval from the ethics committee in the hospital for the carrying out of such procedures. They were further informed that there was some risk of transmission of infection due to the procedures. They were advised that they should be tested for infection, including testing for HIV.
21. The patients were greatly shocked and upset by these disclosures.

Investigations

22. On 28th September, 2018 a preliminary assessment of the incidents was commenced by Prof. Peter Doran and Ms. Sinead Brennan. On 29th September, 2018, the applicant sent an email to Prof. Mary Day, the CEO of the Ireland East Hospital Group, stating that there was no risk of cross infection as a result of the procedure that had been carried out on each of the patients. On 1st October, 2018, the report of the preliminary assessment was presented to Prof. Day. As already noted, the open disclosure meetings were held on 10th and 11th October, 2018. Testing of the patients followed thereafter. None of the patients were found to have become infected as a result of the procedure.
23. On 16th November, 2018, a Systems Analysis Review (SAR) was commenced under the chairmanship of Prof. Donal Brennan. This was a review of the systems in the hospital and whether those systems had catered adequately for the events that had taken place. It was a very comprehensive review, which included interviews with all of the relevant parties, including the patients. The SAR report was furnished on 9th May, 2019. The report made a large number of recommendations in relation to how systems in the hospital could be improved to ensure that a repeat of the events of 4th and 5th September, 2018 did not re-occur. The review also recommended that the applicant should undertake further training in two specific areas. The applicant subsequently undertook the necessary online training and produced certificates to confirm that he had done so.
24. Prof. Day asked Prof. Peter McKenna, Clinical Director of the National Women and Infants Health Programme, to give his views on the SAR report. On 28th June 2019, Dr. McKenna provided his feedback in relation to the SAR report. He was so concerned by the events covered in the SAR report, and he replied earlier than the date specified in the request by Prof. Day. In his reply he stated that while none of the patients had suffered physical harm as a result of the procedure, several had suffered psychological injury. He stated that the significant issue was not harm, but wrong to the patient. He noted that the research was conducted without ethical approval and without patient knowledge or consent. The research was of an intimate and personal nature. He noted that the applicant appeared not to have demonstrated insight or remorse for his actions.
25. He went on to note that the SAR report did not address the suitability of the applicant to be involved in patient treatment, or the training of junior medical personnel and students. He stated that given the statements of the patients that they had suffered psychological harm, the breakdown in trust that had occurred and a serious lack of insight on the part of the consultant involved, he had significant reservations about the applicant's continued involvement in clinical practice until those issues were fully resolved.
26. On 1st July, 2019, Prof. Day wrote to the CEO of the respondent stating that she had concerns that the applicant may pose an immediate and serious risk to the safety, health and welfare of patients and staff. On 17th July, 2019, Mr. Paul Reid, CEO of the respondent, wrote to the applicant advising him that he was commencing the disciplinary procedure provided in Appendix IV of the Consultant Contract 1998. He invited the applicant to make representations if he wished in relation to the issue of whether he

should be placed on administrative leave pending investigation of the incidents. He also invited the applicant to make representations in relation to the substantive allegations of misconduct made against him.

27. On 19th July, 2019 the applicant's solicitor requested an extension of the time within which to make representations. On the same date the CEO agreed to the deadline for receipt of representations on the issue of administrative leave, being extended to 24th July, 2019.
28. On 24th July, 2019 the applicant made submissions to the CEO of the respondent. On 26th July, 2019 the CEO wrote to the applicant's solicitors and extended the deadline for submissions in relation to the issue of administrative leave, to 29th July, 2019. On that date the applicant's solicitor made representations to the CEO. The applicant's solicitor also threatened that if the CEO placed the applicant on administrative leave, they would have no alternative but to seek protection from the High Court.
29. On 31st July, 2019 the CEO wrote to the applicant's solicitors to confirm that he was still considering the issue of administrative leave and that any additional representations on that issue could be made by close of business on 1st August, 2019. Separately, he indicated that he would extend the deadline for representations to be made regarding the allegations of misconduct until 14th August, 2019.
30. On 6th August, 2019, the applicant was informed by letter that the CEO had made a decision to place the applicant on administrative leave on the basis that he was concerned that by reason of the applicant's conduct, he may pose an immediate and serious risk to the safety, health or welfare of patients.
31. On 8th August, 2019, the applicant's solicitor wrote to the CEO of the respondent to confirm that they had not responded to his previous correspondence on the basis that they believed that they had already addressed the issue of administrative leave and had nothing further to add. On 14th August, 2019, a further submission was made on behalf of the applicant to the respondent in relation to the substantive allegations of misconduct.
32. On 13th September, 2019, the applicant met with the CEO of the respondent. The court has had sight of the minutes of that meeting. It is not necessary to set them out in detail; save to note that in the course of the meeting the applicant stated that it had been an error of judgement on his part not to have obtained the consent of the five patients prior to undertaking the procedures. He also accepted that it was an error for him not to have obtained the prior approval of the hospital's ethics committee.
33. On 10th October, 2019, the CEO of the respondent wrote to the applicant's solicitor indicating that it was a matter for him to determine whether the shortcomings identified arising out of the incidents on 4th and 5th September, 2018, amounted to misconduct. He went on to state that before making any decision, he considered it necessary to undertake further examination; to that end he had decided to obtain an opinion from an expert, Dr. Michael O'Hare.

34. It is appropriate at this juncture to give a brief summary of Dr. O'Hare's qualifications and experience. Dr. O'Hare qualified as a doctor in 1970. He practised in the area of obstetrics and gynaecology at Daisy Hill Hospital, Newry, Co. Down. He was a consultant there for over 30 years. He was the Clinical Director for Obstetrics, Gynaecology and Paediatrics at Daisy Hill Hospital from 2002 to 2005. He was chairman of the Institute of Obstetricians and Gynaecologists, Royal College of Physicians of Ireland 2005 to 2008 and was chairman of the MRCPI examination committee of the Institute from 2002 to 2011. He remains a member of the committee and continues to examine. He was also MRCOG examiner for the Royal College of Obstetricians and Gynaecologists, London from 2003 to 2014. Since 2007, he has been chairman of the joint Institute of Obstetricians and Gynaecologists in Ireland/Health Service Executive Working Group on Maternal Mortality in Ireland. He was a performance assessor in obstetrics and gynaecology for the General Medical Council in the UK from 1997 and lead performance assessor (team leader) from 2003 until 2016. He has written in excess of 200 expert GMC fitness to practice reports at the investigation stage. He has taken part in a number of HSE serious adverse incident investigations. He is currently a member of the HSE central clinical team, providing feedback to CervicalCheck patients involved in the RCOG review.
35. By letter dated 16th October, 2019, the applicant's solicitor called on the CEO not to get further advice, but to proceed to make his decision. By letter dated 21st October, 2019, the CEO explained that he considered that obtaining a report from Dr. O'Hare was necessary, in order to obtain a clinical view on the issues. He requested the applicant's solicitor to confirm whether the applicant was still not agreeable to such opinion being obtained. By letter dated 23rd October 2019 the applicant consented to the CEO of the respondent obtaining a report from Dr. O'Hare.
36. On 4th December, 2019 Dr. O'Hare produced his report. It is fair to say that this report, while not exonerating the applicant completely, was certainly supportive of his position. He characterised the procedure carried out by the applicant in the following way:-
- "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 speciality 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 judgement, and was wrong in deciding to undertake this observational study as described without informed consent and ethical approval."*
37. Having had regard to the definition of "professional misconduct" and "poor professional performance" as defined in the Medical Practitioners Act, 2007 and in the case law of the Irish courts, Dr. O'Hare summed up his conclusions in the following way:-

"Using these definitions, I have given careful consideration to the facts of this matter, and opinions or concerns 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 manner. It is my understanding that this did not occur."

38. This report was sent by the respondent to the applicant's solicitor by email at 14:35 hours on 6th December, 2019. However, due to an IT issue in the office of the applicant's solicitor, the report was not seen by them. As they had not seen the report, no submissions were made thereon on behalf of the applicant. According to Mr. Patryk Shorbot, the IT expert retained by the applicant's solicitor, the email was received by them, but for some reason it went into Ms. McDermott's spam folder. It would have been automatically deleted after a number of days.
39. On 23rd December, 2019, the CEO of the respondent wrote to the applicant, advising that he considered the applicant guilty of serious misconduct in connection with the incidents on 4th and 5th September, 2018. He further informed the applicant that he proposed to recommend the applicant's removal from his position of employment as a consultant gynaecologist employed by the respondent. He invited the applicant to make representations by 14th January, 2020. This period was subsequently extended and submissions were made on behalf of the applicant on 20th January, 2020.
40. By letter dated 31st January, 2020, the CEO of the respondent advised the applicant that he had decided to propose the removal of the applicant from his employment with the respondent. Pursuant to the Consultant Contract he would notify the Minister for Health with a view to having a committee established to consider his proposal that the applicant should be dismissed from his position as a consultant employed by the respondent.
41. On 24th February, 2020 the applicant secured leave from the High Court to issue judicial review proceedings challenging a number of aspects of the procedures that had been adopted arising out of the events on 4th and 5th September, 2018, culminating in the decision of the CEO of the respondent to recommend his dismissal from his position of employment.

Relevant Contractual Provisions and Legislation

42. Before coming to the issues in this case, it will be useful to set out the relevant parts of the Consultant Contract 1998 and the relevant legislation that pertains to this case. Appendix IV to the Consultant Contract deals with disciplinary procedure. It provides in Clause 1 that where the CEO 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 shall inform him that any representations in regard to the matter may be received by the CEO from the consultant within two weeks of the issue of the notification and will be considered.

43. Clause 3 provides that where it appears to the CEO that there may be an immediate and serious risk to the safety, health or welfare of patients, or staff, the consultant may apply for, or may be required and shall, if so required, 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 in accordance with the provisions of the contract.
44. Clause 4 deals with the options that are available to the CEO when he has carried out his investigation. The relevant portions of clause 4 are in the following terms:-

"4. The Chief Executive Officer of a Health Board, Chief Executive Office, Secretary/ Manager of a hospital or other health agency or the appropriate person, after consideration of any representations which the consultant may make in regard to the matter, and after carrying out such further examination into the matter as he considers necessary may:-

(a) if he is satisfied that the matter was trivial or without foundation, so inform the consultant in writing,

or

(b) if he is satisfied that the consultant had not complied with the terms of his appointment or had otherwise misconducted himself in relation to his appointment, and if he thinks fit, issue a warning or other like communication to the consultant,

or

(c) where he is the Chief Executive Officer of a Health Board, decide to act in accordance with the provisions of sections 22, 23 and 24 of the Health Act, 1970 and the regulations made thereunder [...]"

45. Section 23 of the Health Act, 1970 deals with the removal of officers and servants of the HSE. The section provides that an officer or servant of the HSE may be removed from being such officer or servant by the CEO to the Board. Section 23 (2) provides that a permanent officer shall not be removed under the 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)".*

46. The provisions of section 24 of the Act are relevant to this case. The salient parts of that section are in the following terms:-

"(1) Whenever it is proposed to remove a permanent officer of a health board under section 23 because of misconduct (except as referred to in section 23 (3)) or

unfitness, the Minister shall appoint a committee to perform the functions specified in this section relating to the proposal for such removal.

[...]

- (4) 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.*
- (5) 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.*

[...]

- (9) When a committee under this section recommends the removal of an officer, the chief executive officer may remove the officer after the expiration of a period of twenty-one days, unless a request has been made to the Minister under subsection (10).*
- (10) An officer in relation to whom a recommendation for removal has been made under subsection (5), may, in the prescribed manner and subject to the prescribed conditions, request the Minister to issue a direction to the chief executive officer in relation to that recommendation.*
- (11) Where a request is made to the Minister under subsection (10), the Minister may give to the chief executive officer a direction to remove the officer, a direction not to remove the officer or such other direction as he considers appropriate, and the chief executive officer shall comply with the direction."*

47. Finally, the provisions of S.I. 110/1971, the Health (Removal of Officers and Servants) Regulations, 1971 are also relevant to this case. The salient provisions are as follows at regulation 4:-

- " (1) Whenever it is proposed to remove an officer or servant of a health board from being such officer or servant, the officer or servant shall be given notice in writing by the chief executive officer or an officer authorised to act on his behalf-*
- (a) of the intention to remove;*
 - (b) of the reasons for such removal;*
 - (c) that the chief executive officer will consider any representations made by him or on his behalf before the expiration of seven days after the giving of such notice;*
 - (d) of details of any proposal to appoint him to another office or employment.*

[...]

- (5) *The chairman of a committee shall convene the first meeting of the committee not less than ten days after the committee is established.*
- (6) *During the conduct of a committee's proceedings, the chairman shall have discretion as to the conduct of the proceedings and in particular shall—*
 - (a) *decide the order of appearance of persons appearing before the committee,*
 - (b) *permit the officer to appear in person or to be represented or assisted by another person, and*
 - (c) *hear, if he thinks fit, any person who is not a party to the proceedings,*
- (7) *A committee shall make its recommendation in writing to the chief executive officer and shall send a copy of the recommendation to the officer.*

[...]

- (10) *Whenever a committee recommends that an officer be removed, the officer may request the Minister, within fourteen days after the committee has sent its recommendation, to issue a direction to the chief executive officer in relation to that recommendation.”*

Issues Arising

(a) The Administrative Leave Issue

48. The applicant challenges the decision that was made by the CEO of the respondent on 6th August, 2019 to place him on administrative leave. In essence, he submits that that decision was irrational and unreasonable for the following reasons: (1) he had been permitted to continue in his position as a consultant for the 10 months between the dates of the incidents in question and the date on which he had been placed on administrative leave, without there being any risk to the safety or health of patients, or staff being identified during this period; (2) the Systems Analysis Review team had been specifically tasked with drawing to the attention of the hospital authorities, any concerns that there may have been in relation to patients' safety or health and no such concerns had been raised; (3) Prof Courtney, with whom the applicant did not get along, had lodged a complaint against him with the Medical Council, which had the power to apply to the High Court for the necessary orders in the event that they were of the opinion that his continuing in practice posed any risk to the safety or health of patients, or staff and no such application had been made; (4) the applicant had furnished a written undertaking that he would not carry out any further feasibility studies of the type carried out on 4th and 5th September, 2018. In these circumstances, it was submitted that the decision to put the applicant on administrative leave, which decision had enormous financial and reputational consequences for the applicant, was irrational, unjust and disproportionate.

49. In response to this argument, it was submitted on behalf of the respondent that the applicant was out of time to challenge the decision to place him on administrative leave. That decision had been made on 6th August, 2019 and the applicant had not brought his application seeking leave to challenge that decision until 24th February, 2020. It was submitted that that was long outside the time provided for in Order 84, rule 21 of the Rules of the Superior Courts. It was submitted that the applicant had not provided any evidence which would constitute good and sufficient reason why the application had not been made within the requisite three month period, nor had he provided any evidence as to why his delay in bringing the application had been due to circumstances that were outside his control. As such, it was submitted that the applicant did not come within the circumstances that would permit the court to extend the time within which to enable him to challenge the decision made on 6th August, 2019 pursuant to Order 84, rule 21 (3).
50. It was pointed out that the applicant's solicitors had written to the CEO of the respondent in advance of his making the decision on 6th August, 2019, threatening that if a decision was made putting the applicant on administrative leave, such decision would be challenged in the High Court. Therefore, the applicant and his solicitors were well aware that such a decision was imminent and were aware that if such a decision was made, they had three months within which to challenge it. They had done nothing within the three month period. It was submitted that in these circumstances, there was no basis on which the court should extend the time for bringing a challenge to that decision.
51. In response to that argument, it was submitted on behalf of the applicant that the reason that the decision to place the applicant on administrative leave had not been challenged within the three months after that decision being made, was due to the fact that there was an ongoing investigation, which the applicant anticipated would be concluded within a short period of time. In those circumstances, it was submitted that it was reasonable for the applicant to hold off bringing any challenge to the administrative leave decision, in anticipation of the fact that the investigation itself would be completed within a short time and that, if necessary, both decisions could be challenged in the one set of judicial review proceedings. It was submitted that that was a reasonable approach for the applicant to have taken. It constituted a reasonable basis on which the court could extend time pursuant to the provisions in the rules.

Decision on the Administrative Leave Issue

52. The court is satisfied that the argument made on behalf of the respondent in this regard is correct. The applicant knew that the CEO of the respondent was considering the issue whether he should be placed on administrative leave pending the conclusion of the investigation. The applicant made submissions in relation to that decision. The applicant, through his solicitors, had indicated that if a decision was made by the CEO placing him on administrative leave, that decision would be challenged in the High Court. Notwithstanding the threat of proceedings, the applicant chose to do nothing when the decision placing him on administrative leave was made. He allowed the three-month period to elapse and did nothing in relation to challenging the administrative leave

decision until he moved his application seeking leave to proceed by way of judicial review on 24th February, 2020.

53. The applicant has not satisfied the court that there was good and sufficient reason why he had not brought his challenge to the decision placing him on administrative leave within the three months after the making of that decision. Nor has he persuaded the court that the reasons why he did not bring his application challenging that decision until February, 2020, were due to circumstances beyond his control. In the absence of being satisfied on either of these grounds, it is not appropriate for the court to extend the time to enable the applicant to challenge the decision to place him on administrative leave, which decision was made on 6th August, 2019.
54. Insofar as it was submitted on behalf of the applicant, that it was reasonable for him to defer taking any steps to challenge the administrative leave decision until the overall investigation by the CEO had been completed, which investigation the applicant anticipated would be concluded within a reasonable time; the court is not persuaded by this argument. By October 2019, when it became clear that the CEO was going to obtain an expert opinion from Dr. O'Hare and where he had indicated that the applicant would be given an opportunity to comment on that report prior to the finalisation of his investigation; it should have been abundantly clear to the applicant and his legal advisers that that process would not conclude within the three month time period allowed under the rules for challenging the decision made on 6th August, 2019. The court is not persuaded that this argument provides a basis for it to extend time pursuant to O.84, r.21(3).
55. Accordingly, the court holds that the applicant is out of time to challenge the decision made by the CEO of the respondent on 6th August, 2019 to place him on administrative leave.
56. However, that is not entirely the end of the matter. In the submissions lodged on behalf of the applicant on 20th January, 2020, the applicant referred to the opinion furnished by Dr. O'Hare in his report and called on the CEO to reinstate the applicant with immediate effect. However, that request was bound up with an assertion that the entire investigation should be wound up in light of the opinions expressed by Dr. O'Hare. The relevant portion of the applicant's submission in this regard was in the following terms: -
- "We hereby call upon you to discontinue the within disciplinary process, reinstate Prof. O'Sullivan with immediate effect bearing in mind the conclusion of Dr. O'Hare that there is no immediate or serious risk to the health of patients, and quash any and all findings that you have purported to make against him to date."*
57. Thus, the request to reinstate the applicant was not a stand-alone request based on fresh evidence, being the opinion expressed by Dr. O'Hare; instead, it was made as part of an overall submission that in light of the expert's report, the entire investigation had to be wound up.

58. The CEO responded to the submission on the administrative leave issue in the following terms at paragraph 12 of his letter dated 31st January, 2020:-

"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. I considered this issue, at some length, before deciding to place your client on administrative leave. As you are aware, I afforded your client several opportunities to make written and oral submissions to me on a number of separate occasions in regard to that issue."

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 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. That 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 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 stand-alone 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 would 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.

(b) The Prematurity Issue

63. It was submitted on behalf of the respondent that the applicant's current application could not succeed because it was premature. The application sought to challenge the decision reached by the CEO of the respondent on 31st January, 2020, when that was but a stage in the entire investigation process that had been commenced in July 2019, when the matter had first been referred to the CEO.
64. It was pointed out that under the relevant provisions of the Consultant Contract, the CEO only had three options: he could decide that the alleged misconduct was either not proven or was trivial in nature; in which case that would be the end of the matter. Alternatively, if he found that there was misconduct on the part of the doctor, his options were either to give a warning to the doctor, or to recommend that he be dismissed, which proposal would have to be put before a committee appointed by the Minister.
65. In the circumstances of this case, the CEO had reached the decision that the misconduct on the part of the applicant was of sufficient gravity to warrant him making a recommendation that the applicant should be dismissed from his post. That recommendation would have to be investigated by a committee appointed by the Minister. That step had not yet been undertaken, due to the fact that the applicant had obtained a stay on the further progression of the investigation, when he obtained leave to proceed from the High Court in February 2020.
66. It was pointed out that the statutory provisions which applied in these circumstances, made provision for the committee to receive representations on behalf of the doctor and other interested parties; the committee could subpoena witnesses before it and could administer an oath in the course of its hearings. Thus, the committee had very real investigatory empowers, which would be exercised in a manner designed to ensure that the applicant's rights to a fair investigation were properly observed. In these circumstances it was submitted that the investigation process had not concluded; the case law was strongly in favour of permitting such investigations to continue to a conclusion, before a party could seek to challenge elements of the investigation leading to the decision that might ultimately be reached. In this regard, the respondent relied on the decision in *Rowland v. An Post* [2017] 1 I.R. 355.
67. In response, it was submitted on behalf of the applicant that the investigation process carried out by the CEO came to an end with the issuance of his decision on 31st January, 2020. Thereafter, the rights which the applicant enjoyed in relation to making submissions in respect of that decision arose under the provisions of S.I. 110/1971.
68. It was argued that in such circumstances, where the applicant wished to challenge the legality of the decision that had been reached by the CEO, it was appropriate for the applicant to proceed to challenge same by way of judicial review at this stage,

notwithstanding that the next step, being the consideration of the matter by the committee and the Minister, had not yet taken place.

Decision on the Prematurity Issue

69. The court is satisfied that the appropriate principles to apply when considering the issue of prematurity are those laid down by the Supreme Court in *Rowland v. An Post* and in particular the principles set out at paragraphs 8 – 19 in the judgment of Clarke J (as he then was).
70. In essence, that case provides that even where there can be shown to have been an error in the procedure, which procedure is still ongoing, the court will not necessarily intervene to stop the procedure, unless it is satisfied that any such error, or adverse consequence for the affected party, cannot be satisfactorily addressed by the necessary steps being taken at a later stage in the disciplinary, or investigatory procedure.
71. Firstly, for reasons that will become clear later in this judgment, the court is not satisfied that there are any substantive grounds of complaint raised by the applicant in relation to the conduct of the procedure thus far. In those circumstances, the issue of prematurity of challenge to the procedure, does not arise. However, even if it could be shown that there was some error or unfairness in the procedure adopted to date, the court would still accede to the respondent's application to refuse relief at this stage, on the grounds that it would be premature for the court to intervene.
72. The court is satisfied that having regard to the nature of the inquiry that will be carried out by the statutory committee, which is the next stage in the procedure, that even if there was any unfairness to the applicant due to the fact that he did not have an opportunity to comment on the O'Hare report prior to the decision being taken by the CEO on 23rd December, 2019, any such perceived unfairness or adverse consequence was removed by virtue of the fact that (a) the applicant was given an opportunity to make submissions on the report and the ultimate decision that would be made by the CEO and he availed of such opportunity by making submissions on 20th January 2020; and (b) he will have the opportunity to make whatever submissions he wishes on whatever aspects are of concern to him when the matter comes before the statutory committee in due course.
73. In these circumstances, the court holds that the within application is premature as the investigatory process has not come to a conclusion. It had merely reached a stage where it might have concluded, had the CEO made certain decisions; but given that the CEO has not made the decision to treat the matter as either trivial, or as being one that could be adequately dealt with by a warning or other similar communication, the process is still continuing. On this basis alone the court would have refused the relief sought by the applicant herein.
74. However, even if I am wrong in that, for the reasons set out hereunder the court would not set aside the decisions made by the CEO on 23rd December, 2019 and 31st January, 2020.

(c) The CEO's Decision of 31st January, 2020

75. The applicant advanced a number of grounds of challenge to the decision reached by the CEO on 31st January, 2020. Firstly, he submitted that as the applicant had not had the opportunity to make submissions on the O'Hare report prior to the CEO making his decision as communicated in the letter of 23rd December, 2019; that decision and the subsequent confirmation of that decision on 31st January, 2020, were fatally flawed and could not stand.
76. The applicant submitted that it was a fundamental requirement of natural justice that he be given the opportunity to comment on the O'Hare report in advance of the CEO reaching his decision. Indeed, the CEO had stated in correspondence that he would have that opportunity prior to reaching his decision. In the events which transpired, which it was accepted were not due to any fault on the part of the respondent, the applicant had not had that opportunity, prior to the CEO reaching his decision. It was submitted that that meant that the initial decision of the CEO to recommend that the applicant be dismissed, which was made on 23rd December, 2019, was made in breach of the applicant's constitutional right to fair procedures.
77. It was submitted that it was not sufficient that subsequent to the issuance of the decision in the letter of 23rd December, 2019, the applicant had been afforded an opportunity to make representations on that decision and also on the content of the O'Hare report. The applicant stated that that was simply too late, as his right to make submissions on the O'Hare report was a right which vested in him to be exercised prior to a decision being reached by the CEO. It was not sufficient for him to be given that opportunity after the initial decision had been made by the CEO.
78. It was submitted that what the CEO should have done, when he learnt that due to the IT glitch, the applicant had not in fact had an opportunity to comment on the O'Hare report prior to the decision being reached, was that he should have annulled his decision of 23rd December, 2019 and should have reconsidered the matter in light of the submissions made by the applicant on the O'Hare report.
79. It was submitted that the fact that the applicant had not in fact had the opportunity to comment on the O'Hare report prior to the CEO reaching his decision on 23rd December, 2019, was fatal to the decision. It was submitted that this situation could not be remedied by virtue of the fact that the applicant would be given an opportunity to make representations to the committee at a later stage, because while the committee might reach a different decision to that reached by the CEO, the letters of 23rd December, 2019 and 31st January, 2020 would remain on the applicant's file forever. That would cause him permanent and irreparable reputational damage.
80. In response to that assertion, it was submitted on behalf of the respondent, that the CEO had done all that could have been expected of him. He had indicated that he proposed to take the advices of an expert in the field. That had been consented to by the applicant. The CEO had indicated that he would give the applicant an opportunity to comment on that report when it was obtained; he had done that by sending the report to the

applicant's solicitor on 6th December, 2019. The CEO was not to know that due to some malfunction in the applicant's solicitor's IT infrastructure, they did not in fact obtain sight of the report. All the CEO knew was that the report had been sent by electronic means to the applicant's solicitor and there had been no notification that that transmission of documentation had failed. When the CEO heard nothing further from the applicant's solicitor within a reasonable time, it was both permissible and reasonable that he proceeded to issue his decision on 23rd December, 2019.

81. It was submitted that the fact that no representations were made to the CEO on behalf of the applicant in respect of the O'Hare report, which had not been due to any fault on the part of the respondent, did not mean that the decision reached by the CEO was fatally flawed. Furthermore, insofar as the applicant had been denied an opportunity to make representations in relation to the O'Hare report, he had been given a full opportunity to do so and had availed of that opportunity in making representations prior to the issuance of the decision by the CEO on 31st January, 2020. The applicant would also have a further opportunity to make whatever representations he wished on the O'Hare report and on any other matter that he considered relevant, when making submissions to the statutory committee.
82. It was submitted that in these circumstances, there had been no breach of the applicant's rights to fair procedures in the process leading to the making of the decisions by the CEO on 23rd December, 2019 and 31st January, 2020.
83. The second ground of challenge to the decision reached by the CEO was based on the fact that, as he was a man who was not a qualified doctor and was not an expert in ethical procedures in hospitals, or good governance in relation to patient health and safety, and where he had obtained a report on the relevant issues from an internationally renowned expert, it had been irrational on the part of the CEO to ignore that opinion and come to a diametrically different decision.
84. In particular, it was pointed out that Dr. O'Hare had given the opinion that while the conduct on the part of the applicant on 4th and 5th September, 2018 constituted misconduct, it did not amount to serious misconduct. It was submitted that in rejecting that opinion and in coming to the conclusion that the conduct did amount to serious misconduct, it was evident that the CEO had prejudged the matter and had decided that the applicant was guilty of serious misconduct and intended to stick with that decision, even though his own expert would not "swear up" in the way that he had hoped. It was submitted that that was the very antithesis of proper decision-making.
85. Alternatively, it was submitted that for a decision maker, who was not expert in the relevant field, to ignore an expert opinion which had been procured by him when reaching his decision, amounted to irrationality of such a degree that the decision should be set aside. In addition, the applicant pointed to the fact that the decision maker, in this case the CEO, was activated by bias in reaching his decision, which was due to the fact that the applicant had been an outspoken critic of both the authorities in his own hospital and of the HSE in general.

86. In relation to the argument that the CEO had acted irrationally when ignoring the conclusions reached in the opinion furnished by Dr. O'Hare, counsel referred to the decision in *McManus v. The Fitness to Practice Committee of the Medical Council & Anor* [2012] IEHC 350, in particular at pages 30 – 31 of the judgment. That was a case where the fitness to practice committee had ignored the evidence of its own expert.
87. Counsel submitted that this was really a case of the reverse operation of the doctrine of curial deference. Under that doctrine, courts afford a degree of curial deference to bodies which are recognised as having a particular expertise in their own area. It was submitted that in this case the reverse should also apply. As the decision-maker was not an expert in the particular area under consideration, he should have shown appropriate deference to the views of the international expert, whom he had retained to advise him in the matter.
88. It was submitted that one of the reasons why the CEO had not adopted the opinions given by Dr. O'Hare in his report, was due to the fact that one of those opinions was to the effect that the decision made on 6th August, 2019, to put the applicant on administrative leave, had been incorrect. Dr. O'Hare had given the opinion that there was no basis on which it could be considered that the applicant represented a continuing risk to the safety or health of his patients. Therefore, there was no basis on which one could justifiably have put him on administrative leave.
89. If the CEO had accepted Dr. O'Hare's report, he would of necessity have had to have accepted that he had been incorrect in the decision that he had reached to place the applicant on administrative leave on 6th August, 2019. On that aspect of the report, the CEO had merely stated that Dr. O'Hare had not been asked to furnish any opinion on the administrative leave issue.
90. It was submitted that in reaching his decision to reject the advices and opinions given by Dr. O'Hare in his report, not only had the CEO acted irrationally, but he had failed to give any adequate reasons why he was not accepting the opinion of Dr. O'Hare. In effect, all he had stated was that he, as an unqualified layperson in this area, simply did not agree with the views of an internationally renowned expert. It was submitted that that was not a rational basis on which to reach a decision that was diametrically opposed to the opinion given by Dr. O'Hare in his report.
91. In response, the respondent submitted that under the relevant provisions of the Act, the CEO was the only person who could make the decision. He could not delegate that function to any other person, no matter how expert they may be in a particular field. At the end of the day, it was incumbent upon the CEO to reach his own decision. It was submitted that he had done that. He had provided cogent reasons why he was not following the opinion furnished by Dr. O'Hare.
92. It was submitted that at law there was a duty on the decision-maker to give rational and cogent reasons for his decision. The CEO had done that in this case. It was submitted that, while the applicant may not agree with those reasons and may not like the decision that was reached, that did not mean that the decision was bad in law.

93. Insofar as the applicant sought to challenge the actual reasons given, it was submitted that the CEO had acted rationally and had based his decision on cogent reasons. In particular, it was pointed out that Dr. O'Hare had proceeded on the basis of the definition of professional misconduct, as set out in cases that came before the fitness to practice committee of the Medical Council and had relied on the definition of misconduct set down by the Supreme Court in *Corbally v. Medical Council and Others* [2015] IESC 9. It was submitted that it was within those parameters that Dr. O'Hare had reached his opinion that the conduct of the applicant in this case did not amount to serious misconduct.
94. It was submitted that the issue which the CEO had to decide was a different issue. He had to decide as an employer, whether the conduct which was admitted on the part of the applicant, in his opinion constituted serious misconduct, such that he was entitled to choose option (c) and recommend that the applicant should be dismissed from his post.
95. It was submitted that the CEO had considered all of the relevant matters, including various investigations that had been carried out into different aspects of the events; he had taken account of the effect of the events on the patients. He had taken account of the applicant's record and he had taken account of the opinion furnished by Dr. O'Hare, although he had not agreed with that opinion, and he had set out in clear terms the reasons why he had reached the decision that he had. It was submitted that in these circumstances, the CEO had complied with his legal duty to consider the matter and had reached a decision that was unimpeachable at law; notwithstanding that it was one with which the applicant did not agree.
96. It was submitted that just because the CEO had obtained an opinion from an expert in the area, that did not mean that he was obliged to follow that opinion. To hold that he was so obliged, would mean that effectively his statutory function in reaching the decision would have been delegated to the independent expert. All that the CEO, as decision-maker, was required to do, was to consider all relevant facts, including the opinion of the expert that he had retained, and reach a decision. It was submitted that he had done that and had set out his reasons for reaching his decision in clear terms, as was required by law. It was submitted that in these circumstances, the decision reached by the CEO on 31st January, 2020 was sound in law.

Decision on the Legality of the Decision of the CEO made on 31st January, 2020

97. There were a number of grounds of challenge to the decision that was made by the CEO on 31st January, 2020. The first of these was the assertion that because the applicant had not been given the opportunity to make submissions on the report furnished by Dr. O'Hare, prior to the time that the CEO made his initial decision on 23rd December, 2019, that that vitiated not only the decision of that date, but also the decision made by the CEO on 31st January, 2020, which had been made after the applicant had made submissions on both the initial decision of 23rd December, 2019 and on the O'Hare report.
98. The court is of the opinion that the decisions of the CEO made on 23rd December, 2019, or 31st January, 2020 should not be struck down on this ground. The CEO, with the

consent of the applicant, had obtained a report from Dr. O'Hare. He had told the applicant that he would have an opportunity to make submissions on that report. In compliance with that obligation, the CEO had sent Dr. O'Hare's report to the applicant's solicitor by email on 6th December, 2019. As such, the CEO had acted in an entirely proper fashion.

99. The fact that due to some glitch in the computer infrastructure in the applicant's solicitor's office, the email went directly into Ms. McDermott's spam folder and was subsequently automatically deleted, without her having been aware of it, with the result that neither the applicant, nor his solicitor was in a position to make submissions on the O'Hare report prior to the initial decision being taken by the CEO, does not vitiate that decision.
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 23rd December, 2019 without having received any further submissions from the applicant.
101. In the decision made by the CEO on 23rd December, 2019, he clearly set out his reasons why he was not going to follow the opinions given by Dr. O'Hare in his report. The CEO set out in very clear terms the basis on which he had reached an initial decision to recommend that the applicant should be dismissed from his post.
102. When that decision came to the attention of the applicant's solicitor and when they became aware of the existence of the O'Hare report, the CEO extended the time within which the applicant could make submissions on both his initial decision of 23rd December, 2019 and on the O'Hare report. Those submissions were ultimately made on 20th January, 2020.
103. It is fair to say that while the applicant was highly critical of the decision made by the CEO to propose his dismissal, he based his criticism of that decision on the content of the O'Hare report. In other words, he did not wish to make any submissions that were critical of any of the conclusions or opinions expressed by Dr. O'Hare in his report. To the contrary, he had relied on it in his criticisms of the decision made by the CEO. In these circumstances, it cannot be said that the fact that he had not been given an opportunity to comment on that report prior to the initial decision, which state of affairs was not the fault of the CEO, and having regard to the fact that he had been given a full opportunity to make submissions on both the report and the ultimate decision that would be made by the CEO; meant that there was any effective denial of his rights to fair procedures. Accordingly, the court holds that the decisions of the CEO on 23rd December, 2019 and 31st January, 2020, were not vitiated by the fact that the applicant did not get the opportunity to make submissions on the O'Hare report prior to the initial decision of 23rd December, 2019.
104. The second ground of challenge to the decisions made by the CEO on 23rd December, 2019 and 31st January, 2020, were based on the argument that, as the CEO had chosen

to obtain the opinion of an expert to assist him in reaching his decision, it was irrational for him to reach a decision that was diametrically opposed to the opinions given by the expert.

105. The applicant argued that as the CEO of the respondent was not a medical doctor, nor had any extensive experience in the area of hospital administration or medical ethics, it was irrational of him to disregard the opinion which he had commissioned from an expert of international standing; only to substitute for it his own opinion, which was apparently based on nothing more than his own view of the matter.
106. In this regard the applicant relied on the decision in *McManus v. The Fitness to Practice Committee of the Medical Council*, and in particular, counsel relied on the following portion from the judgment of Kearns P. at pages 30 – 31:-

"However, the decision of the Committee was to call such an expert. Having chosen that course, it seems to me that the Committee must accept the consequences of the expert not 'swearing up'. It was hardly fair or appropriate to reject or ignore the views of its own expert and elevate to that status for the purpose of its decision the evidence offered by Professor Patricia Casey. Whatever her qualifications and experience, Professor Casey was the complainant in the case and it had never been intimated that the Committee would regard her as anything other than a witness as to fact."

107. The court does not consider that the *McManus* decision goes so far as to establish the proposition contended for by the applicant. It does not state that wherever a decision-maker obtains advice for the purpose of making his decision, he must adhere to that advice and disregard any contrary views that he may have on the matter.
108. The comments cited by counsel in argument, have to be seen in the context of the overall decision. In the *McManus* case, a junior doctor had altered his notes in the wake of the unfortunate suicide of one of his patients. The FPC had commissioned an expert report from a psychiatrist, Dr. Siobhan Barry, as to whether the alteration of the notes constituted misconduct. Her report was to a great extent supportive of the position of the applicant. In those circumstances, the FPC had effectively disregarded her expert evidence and instead, had based its conclusions on the evidence of another psychiatrist, Dr. Patricia Casey. She had been a witness as to fact at the hearing and had been the complainant in the matter.
109. It was in those circumstances, that the court held that there had been a breach of fair procedures by the FPC, when it had elected to treat Dr. Casey's evidence as expert evidence, rather than merely evidence as to fact. It was held that in elevating her status to that of an expert witness, without notice to the applicant's legal team, they had been deprived of the opportunity to cross examine her in the manner appropriate to her evidence being received as expert testimony. The essential difference being that a witness to fact can only give evidence of what they saw, heard or did at a particular time. Whereas an expert can give opinion evidence on the matter that is subject matter of the

enquiry. On that basis the decision was struck down. Thus, it can be seen that the *McManus* case turns on the fairness of elevating the evidence of a witness as to fact, into evidence of an expert, without notice to the applicant of such change in status.

110. It is clear from both the *McManus* decision and the decision in *Corbally v. The Medical Council*, that decision-makers are always free to depart from advice that they have been given, as long as they provide clear and cogent reasons why they are departing from that advice. In the cases mentioned above, the court in each case made it clear that the decision-maker was entitled to depart from the advice given by its own legal assessor, as long as it stated its reasons for so doing.
111. The court is of the view that the submissions made by Mr. Quinn SC on behalf of the respondent are correct, when he pointed out that it is the CEO alone who must make the requisite decision under Appendix IV of the Consultant Contract and under the statute.
112. The ultimate question which the CEO had to determine was whether in his opinion, as the employer, the applicant had engaged in conduct which warranted a proposal being made to the committee that he should be dismissed. In reaching that decision, it is clear that the CEO did not ignore Dr. O'Hare's report. He referred to it in detail in his decisions of 23rd December, 2019 and 31st January, 2020. Having noted the conclusions reached by Dr. O'Hare in his report, the CEO stated as follows in his letter of 23rd December, 2019:-

"I have further noted and considered Dr. O'Hare's view that 'Prof. O'Sullivan, nevertheless, made an error of judgement and was wrong in deciding to undertake this observational study as described without informed 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 that 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:-

'You must make sure patients have given their consent before you provide any medical investigation, examination or treatment. Consent is required by law and it is an essential part of respect for any patient's autonomy. They also have the right to refuse medical treatment or withdraw consent'. (My emphasis) [Meaning emphasis by CEO]

'... you must make sure that all research participants are fully informed about all aspects of the study and understand the proposed intervention or

treatment, especially if the intervention may not be of benefit to them, for example, if they receive a placebo'. (My emphasis) [Emphasis by CEO]

'... if you act as an investigator in a clinical trial or any form of medical research, you must submit and receive approval from the relevant research ethics committee before the research begins. You must make sure that the trial conforms to the Declaration of Helsinki and any relevant national legislation'. (My emphasis) [Emphasis by CEO]

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 in total disregard for the patient's 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 (ii) 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 actions available to me under Appendix IV of the Consultants' 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."

113. The CEO went on in that letter to state that he had reached the decision, having considered all relevant material that was before him, including the oral and written submissions made on behalf of the applicant and had come to the conclusion that the appropriate decision was to recommend his dismissal.
114. After the applicant had made further submissions in the matter by letter dated 20th January, 2020, the CEO issued his decision of 31st January, 2020. Again, he dealt in great detail with the opinion furnished by Dr. O'Hare in his report and set out clearly why he did not agree with that opinion and why he proposed to recommend the dismissal of the applicant.
115. In these circumstances, it cannot be said that the CEO had ignored Dr. O'Hare's report. He pointed out that Dr. O'Hare had reached his opinion on the applicable standard for professional misconduct as applying at hearings before the Fitness to Practice Committee of the Medical Council, as set out in the *Corbally* decision. However, given the nature of the events at issue, which events were not disputed by the applicant, he had reached the decision that the conduct alleged did not warrant a warning, or similar communication and therefore the only other option was that of recommending that the applicant be

dismissed. Thereafter, the matter would be dealt with by the statutory committee and the Minister pursuant to statute.

116. The court is satisfied that when one reads the two letters of 23rd December, 2019 and 31st January, 2020 in their entirety, it is clear that the CEO gave great consideration to all relevant matters; including matters that were in favour of the applicant, such as his long unblemished record and his undertaking not to carry out such studies without ethical approval in the future. Having considered these matters and in particular, the fact that procedures had been carried out to the five women without their knowledge or consent and that a feasibility study had been carried out without the knowledge or approval of the ethics committee in the hospital, he had reached the conclusion that it was appropriate to recommend dismissal of the applicant to the statutory committee.
117. When one has regard to the rights enjoyed by patients who place themselves in the hands of medical practitioners and when one has regard to the events of 4th and 5th September, 2018 that were the subject matter of this investigation, the court cannot hold that the decision made by the CEO was unjust, irrational or disproportionate.
118. It is noteworthy, that even at this stage years after the events, while the applicant 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. That was made abundantly clear in the submissions lodged on his behalf on 14th August, 2018, when it was stated as follows:-

"[5.2] it is respectfully submitted on behalf of Prof. O'Sullivan that the error of judgement that he made in not believing it necessary in September 2018 to obtain the consent of the patients and also not to inform them that he was monitoring the sterile water pressure in their vagina during the routine vaginoscopic hysteroscopy procedure does not amount to misconduct.

[5.3] Prof. O'Sullivan has acknowledged from an early stage that he should have followed the Helsinki Declaration, that he should have made a submission to an Ethics Committee and that he should have informed the five patients that he was conducting research ancillary to the procedure they were undergoing. Prof. O'Sullivan accepts that he should not have obtained the medical equipment used outside of formal procurement channels and in this regard he also acknowledges that he should have advised Hospital Management of his proposed study.

[5.4] Furthermore, and as stated in our letter dated 29 July 2019, Prof. O'Sullivan accepts the findings of the Review Group and has undertaken to carry out the additional training as recommended in that report.

[5.5] Prof. 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 Prof. O'Sullivan be reinstated with immediate effect and this matter be brought to an immediate conclusion."

119. On Day 4 of the hearing before this court on 26th March, 2011, Mr. Clifford SC reiterated that position in the following terms:-

"The only concession that was ever made throughout this process, judge, and it is made for the first time, and that is a letter dated 29th July, is that if you want to call it, wrongdoing is admitted. Prof O'Sullivan accepts that no consent was given by these five ladies to the additional procedure and he later accepts that he didn't go through the proper ethical approval. So that is given. Now that doesn't, as I think Mr Quinn was hoping perhaps it did, or that there would be a concession to the effect that that automatically meant misconduct per the consultants contract was effectively being conceded. It didn't. That, in fact was the job charged to Mr Reid, because, what Mr Reid then had to decide was this; given what has been admitted by Prof O'Sullivan and further to whatever investigation I deem necessary, I will have to decide which of the three categories this behaviour falls into. That's: trivial or without foundation; conduct meriting a warning; or conduct meriting a recommendation of dismissal."

120. Thus, it appears that despite the limited admissions made on behalf of the applicant, he does not admit that there was any misconduct by him, but submits that that issue falls at the first stage to the determination of the CEO. The CEO cannot be criticised for making the decision that he was statutorily obliged to do as the nominated decision-maker under the contract.
121. Thus, when the CEO came to consider the matter in December 2019 and again in January 2020, the issue of whether there was any misconduct on the part of the applicant arising out of the events of 4th and 5th September, 2018, was still very much alive. The applicant had steadfastly maintained from as far back as August 2019, that while he had been in error in failing to obtain the informed consent of his patients and in failing to obtain the approval of the ethics committee for the carrying out of the feasibility study and that he had not procured the equipment through the normal procurement channels in the hospital, nor had he recorded the data formally in the patient's medical records; this did not amount to misconduct on his part.
122. In reaching his decision, the CEO was entitled to have regard to all of the material that was before him. That included the preliminary assessment that had been carried out by Prof. Doran and Ms. Brennan. Having referred to the provisions of the Helsinki Declaration that had been breached in the course of the events under investigation, being principles 22, 23, 25, 26 and 35 of the Declaration, they had come to the following conclusion:-

"This study was not done in line with requirements. Ethical approval was not obtained, nor an exemption granted. Patient consent was not obtained. The classification of this study as a pilot or feasibility is of no consequence. As the study

involved additional procedures patient consent should have been obtained, to provide the five ladies in question, and the 20 planned, with the opportunity to autonomously decide on their participation. By not seeking consent the patient's wishes were not considered."

123. The CEO was also entitled to have had regard to the detailed SAR report dated 9th May, 2019. In that report the review team had set out a number of ways in which proper systems and procedures had not been followed. In particular, they found that there had been a failure by the applicant to acknowledge that the vaginal pressure measurement study required full ethical approval; he had failed to obtain full ethical approval for the study prior to undertaking it; there had been failure by the applicant to seek clarification on his incorrect understanding that the Research Ethics Committee was not operational in an adjoining hospital; that there had been a failure by the applicant to obtain informed consent from patients for the study prior to undertaking same and that there had been a breach of appropriate systems by the independent procurement and utilisation of non-approved and non-stock hospital equipment for clinical use by the applicant.
124. The CEO was also entitled to have regard to the views expressed by Dr. Peter McKenna, Clinical Director of the National Women and Infants Health Programme, in his letter dated 28th June 2019:-

"Despite my reservations about the suitability of one patient's inclusion in the study, no patient suffered physical harm. Not surprisingly several have suffered a psychological injury. However the significant issue here is not harm, but wrong to the patient.

Research was conducted without ethical approval and without patient knowledge or consent. The research was of an intimate and personal nature. The principal investigator (SM 1) appears not to have demonstrated insight or remorse for his actions.

The first recommendation of the hysteroscopy systems analysis review report suggests clinical research training for SM 1. This implies that following this, SM 1 may return to further clinical research. Whilst not suggesting that this may be unhelpful, it does not address the suitability of SM 1 to be involved in patient treatment or the training of junior medical personnel and students.

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."

125. The CEO was entitled to weigh these matters in the balance, along with the report from Dr. O'Hare, when coming to his ultimate decision. In so doing, he also had regard to the extensive submissions that had been made by the applicant and had regard to the meeting that he had had with the applicant in September 2019. The court cannot hold

that merely because the CEO is a man who has no medical training and had very little experience of running a national health service at that time, that he was therefore bound to follow the opinion furnished by the independent expert, Dr. O'Hare, when he had before him a considerable body of evidence, which on any reasonable analysis, has to be seen as being supportive of the decision that he ultimately reached.

126. The court is 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 that was before him in December 2019 and January 2020. Accordingly, the court refuses to strike down either the decision communicated in the letter from the CEO dated 23rd December, 2019, or his ultimate decision as set out in his letter of 31st January, 2020.

(d) Allegation of Bias

127. The applicant alleged that the disciplinary process was vitiated by bias at various stages. He alleged that given the acrimonious relationship that he had had over a protracted period with Prof. Courtney, it had been wrong to allow Prof. Courtney to conduct the open disclosure meetings with the patients. It was alleged that Prof. Courtney had acted with bias in conducting those meetings and in particular, in subjecting the patients to unnecessary testing.

128. There is no substance in this allegation. Prof. Courtney was the Clinical Director of the hospital. It was entirely appropriate that it was he who conducted the open disclosure meetings with the patients after the incidents that had occurred on 4th and 5th September, 2018.

129. Furthermore, an allegation of bias can only arise where it is made against a person who either has made or has to make a decision. In this case Prof. Courtney was not a decision-maker. By virtue of his position as the Clinical Director of the hospital, he met with the patients concerned. He had not made any decision in relation to the interests or rights of the applicant. Insofar as he may have made the decision to hold the open disclosure meetings with the patients, the applicant conceded that it was entirely appropriate to hold such meetings with the patients in the circumstances that had arisen.

130. Insofar as the applicant alleged that there was bias on the part of Prof. Courtney in advising the patients to undergo testing for infection, the court is satisfied that there is no substance in this allegation, due to the fact that an opinion had been obtained from Dr. Doyle, a microbiologist employed at the hospital, who had given the opinion that there was a risk of cross infection to the patients. In such circumstances it was absolutely essential for the hospital authorities to firstly, notify the patients of such risk and secondly, to offer testing to the patients in relation to whether or not they had been infected as a result of the unauthorised procedures carried out on them. Therefore, in advising the patients to undergo further testing, including testing for HIV, it cannot be said that Prof. Courtney was acting in a biased fashion against the applicant.

131. Had the hospital authorities not advised the patients of the risk of infection and had they not offered such tests to the patients, they would have left themselves open to an action

for damages for negligence and breach of duty in respect of the failure to give such advice and carry out such testing. Indeed, they may have left themselves open to a claim for exemplary damages.

132. The court appreciates that the applicant is strongly of the view that there was no risk of infection to the patients. However, the hospital authorities had obtained the opinion of a qualified microbiologist; in so doing they acted reasonably and in acting on her advices, they had also acted reasonably and prudently. Indeed, they were legally obliged to act on her advices.
133. Alternatively, the applicant alleges that due to his criticism of the respondent in relation to the running of the hospital and in relation to the carrying out of its operations generally, the respondent and its servants or agents had been biased against him from the outset.
134. There is no evidence that Prof. Day had acted in a way that was biased against the applicant. He does not like some of the opinions that were expressed by her when referring the matter to the CEO in her letter dated 1st July, 2019. The court is not satisfied that in expressing such opinions Prof. Day was activated by bias or malice against the applicant. It appears to the court that, faced with the circumstances that she was at the time, she acted prudently and reasonably.
135. The applicant complained that at various stages in the process that information had been leaked to members of the media. He vehemently denied that he had been the source of any such leaks. He stated that he only made comments to journalists, when they had first approached him seeking his comment on items of information that were already in their possession.
136. The court is not satisfied that any such leaks can be attributed to the respondent, its servants or agents. There is simply no evidence whence the leaks came. Where there were incidents that were known to a significant number of medical personnel and which became known to the patients involved and their families, it was inevitable that there would be discussion of these incidents among various people connected to the hospital in question, or possibly connected to the patients. It is not possible to say from where the leaks emanated.
137. The applicant alleged that due to his persistent criticisms of the respondent, the CEO of the respondent was activated by bias against him in the manner in which he carried out the investigation and in particular, by his failure to act in accordance with the opinion that had been furnished by Dr. O'Hare. The court is not satisfied that there is any substance in this allegation. The court is satisfied that the CEO of the respondent afforded the applicant and his legal advisers all relevant opportunities to make representations as the process evolved. He kept them informed of the steps that were being taken. He extended time for them to make representations from time to time. His correspondence was at all times appropriate and courteous. His meeting with the applicant in September 2019, appears to have been conducted in a civil and appropriate manner. There is no suggestion

to the contrary in the affidavits sworn by the applicant. The court is satisfied that there is no evidence that in making the decisions that he did, the CEO was activated by bias against the applicant.

138. The court accepts the assertion in the affidavit sworn by Prof. Day on 20th June, 2020, that it is not unusual for consultants in various disciplines in medicine, to make criticism of the HSE, or the government, in relation to the provision of health services in various areas. The fact that a particular consultant in a particular hospital may express concerns from time to time, does not mean that management in the HSE will hold it against the consultant that he or she made such views known in the media. Nor does it necessarily mean that they will act in a biased manner against him or her, due to the fact that they made such views known. The court is not satisfied that Prof. Day, or the CEO acted with bias against the applicant in the manner in which they conducted their part in the investigations following the events of 4th and 5th September, 2018. There is no evidence that the CEO of the respondent acted in any way that was unfair, unjust, or biased towards the applicant.

Conclusions

139. For the reasons set out herein, the court refuses all of the reliefs sought by the applicant in his notice of motion. The court would also propose in its final order to lift the stay on the further progression of the investigation into this matter, which had been put in place by virtue of the order of Meenan J. made on 24th February, 2020.
140. As this judgment is being delivered electronically, the parties will have two weeks from receipt of the judgment within which to make written submissions in relation to the terms of the final order and costs, and in relation to any other matters that may arise.