

THE HIGH COURT

[2022] IEHC 288

[2022 No. 130 MCA]

**IN THE MATTER OF SECTION 60 OF THE HEALTH AND SOCIAL CARE PROFESSIONALS ACT
2005 (AS AMENDED)**

& IN THE MATTER OF A REGISTERED OPTOMERIST

& ON THE APPLICATION OF THE HEALTH AND SOCIAL CARE PROFESSIONALS COUNCIL

BETWEEN

HEALTH AND SOCIAL CARE PROFESSIONALS COUNCIL

APPLICANT

AND

AN OPTOMETRIST

RESPONDENT

**EX TEMPORE JUDGMENT of Ms. Justice Irvine, President of the High Court, delivered on
the 29th of June, 2022**

Proceedings

1. This is an application brought under s.60 of the Health and Social Care Professionals Act 2005 (as amended) ("the Act"). The applicant seeks an order under s. 60(1) of the Act directing that the registration of the respondent's name in the register of optometrists ("the register") be suspended until the determination of the complaint against him under Part 6 of the Act or until further order of the Court.
2. The within application is grounded on the affidavit of Ms. Mo Flynn, Chairperson of the applicant, sworn on 18th May, 2022. A replying affidavit was sworn by the respondent on 20th June, 2022.

Background

3. The background to this application follows a complaint concerning the respondent, who is an optometrist. The complaint concerned the respondent's clinical abilities when examining patients.
4. The respondent, having obtained his qualification outside the jurisdiction, started working in an optician chain ("opticians 1") in Ireland in January, 2022 and worked there until February, 2022. The respondent is no longer employed by opticians 1 and is currently outside the jurisdiction.
5. In March, 2022, the applicant's Preliminary Proceedings Committee ("PPC") met to consider the complaint. The PPC sent an email to the respondent, who was then outside the jurisdiction, seeking confirmation that he was not working as an optometrist anywhere in Ireland and seeking an undertaking that he would inform CORU in advance if he wished to take up a new position as an optometrist in Ireland. The respondent replied stating that he was not working as an optometrist in Ireland but that he would like to do so and was searching for job opportunities.
6. In March, 2022, the PPC was provided with two reports regarding the respondent. Very serious concerns were raised in respect of the respondent's competence.

7. In April, 2022, the respondent wrote to the applicant asking if he could take up a job offer if the opportunity presented itself. The applicant responded reminding the respondent of his undertaking to inform CORU if he decided to take up a new position and further flagged CORU's power to make a s. 60 application should it be considered necessary. On the same date, the respondent informed the applicant that he had received a job offer from another optician in Ireland ("opticians 2") and that he intended to start work in July, 2022, visa permitting.
8. The respondent provided his observations on the complaint made against him in April, 2022. He questioned how he could have worked for the previous 15 years without complaint if he was not competent. He rejected the allegation that he might be a risk to the public. In his defence he also claimed that he had not been adequately trained and that the complaints were based on misunderstandings. He accepted he needed some training in OCT which he said he was then undertaking in his own country.
9. In May, 2022 the PPC considered there was sufficient cause to warrant further action and referred the complaint to the applicant's Professional Conduct Committee on the grounds of poor professional performance and professional misconduct. Further, the PPC decided the matter should be referred to the applicant to consider whether to make a s. 60 application as it had significant concerns regarding the protection of the public. The reasons grounding this concern are set out in full from page 76 onwards in exhibit MF1 and include the respondent's alleged inability to examine the back of a patient's eye, his alleged inability to perform a refraction procedure and his apparent lack of clinical knowledge. These deficiencies were notified to the respondent in a letter dated 6th May 2022 and in respect of which he was invited to make submissions.
10. In May, 2022, the applicant met to consider whether to make a s.60 application to suspend the respondent's name from the register until further order. The respondent was present but not represented at this meeting. However, he did make submissions on his own behalf wherein he urged the applicant not to apply to suspend him. Ultimately, the applicant decided it was necessary to make such an application. The rationality for the applicant's decision are set out in exhibit MF3. These include its significant concerns over the alleged shortcomings in the respondent's competence and professional work and its view that the respondent's alleged shortcomings were such that his continued practise in Ireland would pose an unacceptable risk of harm to members of the public.
11. In his replying affidavit before this court, the respondent denied the conclusions made by the PPC and averred that the conclusions constituted an incorrect assessment of his clinical abilities. Further, the respondent averred that the conclusions reached by the PPC did not merit the suspension of his registration.
12. In his affidavit the respondent provided some background including the lead up to his 'resignation' from his earlier employment. He sets out some differences which he observed between the manner in which eye checks are performed in his own country and Ireland. The

respondent further sought to rely upon the fact that he had never been given any written protocol or training by his employers that might have helped him adapt to any additional requirements of the practise of optometry in Ireland.

13. At para. 19.4 of his replying affidavit, the respondent contends that he had informed his employers, in his interview, that he might need training on OCT instruments. However, he disputes the conclusion that he is incapable of performing OCT. Further, the respondent denies the PPC's second and third conclusions, namely, that he cannot perform refraction and that he lacks clinical knowledge.
14. In conclusion, the respondent averred that the complaint made against him is without substance or merit and should not result in the suspension or cancellation of his registration by CORU. For the reasons stated in his affidavit, the respondent maintains that allowing him to continue working pending the inquiry would not expose members of the public to a real risk of harm. He says he would like to work in Ireland and get some induction training and is anxious to take up the position offered to him by opticians 2 which is due to commence next month. Furthermore, he relies on the fact that opticians 2 are willing to give him prior training on overall practice and the OCT instrument before he begins his practice. As a result of this job offer, the respondent maintains that he will be gravely prejudiced if his registration is suspended pending the final determination of the complaint.
15. The s. 60 application was contested by the respondent in a hybrid hearing which took place in June, 2022, with the respondent joining the hearing by way of video link. Because of the poor internet connection, the respondent was asked to commit to writing the brief oral submissions he made to the Court during the course of the hearing. He did so by email later that day.
16. In the aforementioned submission, the respondent relied upon the content of his replying affidavit dated 20th June, stating that there were no grounds advanced by the applicant that could warrant his suspension. He reiterated his extensive experience in optometry and stressed the prejudice that would be caused to him if he was not permitted to take up the job offer he had received from opticians 2. In particular, he urged the Court not to make the order sought in circumstances where he submitted that no harm could come to members of the public as apprehended by the applicant, having regard to his knowledge, experience and skills and the further induction training he would receive from opticians 2, his intended new employer.

Law

17. Section 60 of the Act provides:

- (1) The Council may make an ex parte application to the Court for an order directing a registration board to suspend the registration of a registrant, whether or not the registrant is the subject of a complaint, if the Council considers that the suspension is necessary to protect the public until steps or further steps are taken under this Part.

- (2) An application under this section shall be heard otherwise than in public unless the Court considers it appropriate to hear the application in public.
- (3) After hearing the application, the Court may, in relation to the registrant—
 - (a) make any order it considers appropriate, including an order directing the registration board concerned to suspend his or her registration for a period specified in the order, and
 - (b) give to the Council or the registration board concerned any direction that the Court considers appropriate.
18. The Court, before it imposes a draconian order of this type, which could have a significant adverse consequence for the respondent in terms of his livelihood and reputation, must be satisfied that the suspension is necessary in order to protect the public.
19. As was stated by Morris J. in *Medical Council v. Whelan* (Unreported, 20th February, 2001), any order removing a registrant's name from the register will likely work a very great hardship on the respondent. Hence, the Court should only make such an order where no other order will serve to protect the community.
20. Furthermore, Kelly J. in *Casey v. Medical Council* [1999] 2 I.R. 534 has stated that interim suspensions should be reserved for exceptional cases where a practitioner has to be suspended from practice because it is in the public interest to do so and that is a principle to which I have had regard in reaching my decision.
21. It is also important that when asked to make an Order under s. 60, the Court seeks to balance the right of the public to be protected from a professional who poses a risk to their care and welfare against the right of the professional to continue his or her practice until such time as an adverse finding may or may not be made against them. Accordingly, subject to the considerations in *Whelan*, the question I have to ask myself on the present application is whether the public interest outweighs the rights of the optometrist in question to carry on his practice, earn his livelihood and avoid the reputational damage associated with the making of an order suspending his right to practice.
22. As to the Court's obligations on an application such as this, the Court must assess the background to the Council's decision to proceed with an application under s. 60 of the Act. Guidance as to the factors which the Board must have considered before approaching the Court for this relief are identified in the judgment of Barron J. in *O'Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 54, a case dealing with the interim suspension of a midwife pending the outcome of disciplinary proceedings under s. 44(1) of the Nurses Act.
23. In *O'Ceallaigh*, the Court held that the relevant matters to be considered by the applicant when determining whether an application should be made to the Court for an interim suspension are:

- (a) the seriousness of the conduct complained of;
- (b) the strength of the case against the practitioner; and
- (c) whether the likely outcome, in terms of sanction, in the event of the misconduct being established would be a strike off either on a definite or permanent basis.

Decision

24. Having regard to the evidence before the Court, I am firstly satisfied that the applicant has complied with the O'Ceallaigh principles. It considered the seriousness of the complaint made against the respondent and the weight of the evidence in respect of the claimed risk to the public should he be permitted to continue to work as an optometrist pending the hearing of the inquiry.
25. The applicant has stated that it is satisfied that the complaint regarding the respondent's alleged lack of clinical ability, knowledge and competence was very serious indeed and that the evidence against him is relatively weighty. In particular, in the context of the respondent's response to notification of the applicant's intention to consider a suspension application, the Council noted the risks that a failure to conduct a competent eye examination could have for patients. It also observed that examinations of the type that it was alleged the respondent was incapable of performing, provide the opportunity to detect, inter alia, tumours, swelling of the brain, diabetes, high blood pressure, retinal detachment and other systemic conditions as well as the ability of patients to drive a car safely.
26. It is to be inferred from the transcript that the applicant considered the risk to the public to be sufficiently great that a suspension application was warranted notwithstanding its acknowledgment of the damage that the suspension would inflict on the respondent in light of his job offer from opticians 2. It referred to the risk as one which it viewed as wholly unacceptable. Furthermore, the need for an order to protect the public was, in the view of the PPC, essential in circumstances where the respondent, by the manner in which he had met the complaint against him, demonstrated that he did not understand the significance of what had been said about his professionalism and competence as an optometrist. Overall, the applicant considered it had been left with no alternative but to make the s. 60 application.
27. It follows from what I have already said that I am satisfied that the approach of the applicant to the present application has been faultless and the evidence sufficient to justify the making of an order suspending the respondent pending the hearing of the inquiry, subject only to the Court's consideration of the extensive affidavit filed by the respondent which, in effect, challenges all of the allegations of lack of competence and clinical ability made against him. Not only does the respondent challenge the applicant's preliminary conclusions regarding his competence but he also challenges many of the facts which underlie the original complaint. And, it has to be said that such a challenge is unusual on a suspension application, where in most instances the underlying facts are not in dispute.

28. In delivering this judgment, I have focused upon the potential risk to the public if the facts are as asserted by the complainant and the respondent's competence is as per the preliminary view taken by the applicant. Clearly, there is a very significant risk to the public if the respondent was permitted to continue in the practice of optometry if the allegations made against him are correct.
29. It is not possible for the Court on the present application to determine the factual dispute inter partes. That can only be resolved at the inquiry. Accordingly, the Court must focus upon the potential risk to the public should it not make the orders sought by the applicant. In this regard, the respondent submits that the Court should assume, because he has practised as an optometrist for at least 15 years that he is competent in the manner in which he conducts himself as an optometrist. However, this is not an assumption that the Court can make in light of the evidence in Ms Flynn's affidavit.
30. Insofar as the respondent maintains that the risk to the public will be negated because he is due to take up employment with the opticians 2, I cannot agree that the evidence supports this proposition. The fact of the matter is that the respondent has not produced any evidence from the opticians 2 regarding the employment which he maintains he has been offered. Neither has the Court seen anything from opticians 2 indicating that it intends to train the respondent or if it was to train him, what form of training would be given.
31. In circumstances where the respondent is qualified as an optometrist, it seems to me most unlikely that if employed by opticians 2 he would be given training that would uplift his diagnostic and procedural skills, as well as his clinical knowledge, to a level that he would no longer, on the applicant's account of events, pose a risk to members of the public. The procedures in respect of which the applicant has raised concerns go to the very core of the technical competence of an optometrist and the most one would expect from an optician employing a qualified optometrist, would be that they would give their new employee some brief induction training.
32. Accordingly, I am driven to the conclusion that I cannot assume that the public will be safe merely because the respondent has plans to take up employment with a new firm of opticians in Ireland who, assuming that he is a competent optometrist of 15 years' experience, may give him some initial training. Indeed, the fact that the respondent is due to take up employment in Ireland in circumstances where his proposed employer may give him no training or none that would negate his lack of competence, if it be the case that he lacks competence, if anything tends to enhance the case of the applicant on the present application.
33. In making my decision to suspend the respondent, I have considered whether or not there is any lesser order that I could make that would protect the public pending the outcome of the inquiry because I am concerned that the allegations of misconduct are hotly disputed. However, having regard to the type of work carried out by an optometrist, any order which would restrict the respondent to working under supervision would not be realistic. To be

supervised, the supervisor would have to repeat the testing carried out by the respondent and this would render his work as an optometrist of no value to an employer.

34. In circumstances where I cannot see a way to allow the respondent continue working as an optometrist yet render the public safe, I have no option but to make the order sought. However, this is a case, as already stated, where there is a very significant conflict in the evidence and one in which the respondent will be gravely prejudiced in terms of his desire to come back to Ireland to work here in his chosen profession. For that reason, the respondent must expedite the inquiry and for this reason I am going to suspend the respondent's registration until 1st December 2022. If the inquiry is not completed on that date, the applicant will have to renew its application.
35. In all of the circumstances, I will make the order sought.