

THE HIGH COURT

[2024] IEHC 70

2023 2405 P

BETWEEN

PAWAN RAJPAL

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT

JUDGMENT of Ms. Justice Egan delivered on the 1st day of February, 2024

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Introduction

1. The plaintiff, a consultant general and colorectal surgeon operating from Cavan General Hospital and Connolly Hospital, Blanchardstown, seeks an interlocutory injunction restraining his employer, the defendant (“the HSE”), from taking any steps in respect of a proposed investigation into alleged misconduct.
2. This is not the first occasion on which the parties have been before the courts in connection with their employment relationship. In 2003, the HSE’s statutory predecessor, the North-Eastern Health Board, suspended the plaintiff without pay for misconduct and also requested the Minister for Health and Children to establish a committee under s. 24 of the Health Act 1970 to inquire into a proposal to remove the plaintiff from his position. Kearns J. granted an order of *certiorari* in respect of the establishment of the committee but declined to quash the suspension ([2004] IEHC 149). On appeal, the Supreme Court affirmed the order of *certiorari* and quashed the decision to suspend the plaintiff ([2005] 3 IR 385).
3. In addition, as I will explain at para. 20 below, the plaintiff has recently commenced judicial review proceedings against the HSE.
4. The present proceedings arise from a complaint against the plaintiff of sexual assault by a fellow staff member (“the complainant”) made to the General Manager of Cavan General Hospital (“the GM”) on 26th August, 2022 (“the assault allegation”). The GM and the plaintiff exchanged text messages early on the morning of 27th August, 2022 in which she asked him not to return to duty pending investigation into the alleged assault. The following morning, the plaintiff’s General Practitioner (“GP”) certified him as unfit for work for two weeks. In the days following, the plaintiff wrote on five separate occasions to the GM requesting the name of the complainant, and details of the allegations against him and of the investigation being undertaken to which no substantive response was received. By correspondence of 6th September, 2022 the GM informed the plaintiff that the matter had been referred to the Chief

Executive of the HSE (“the CEO”) “*in line with your [the plaintiff’s] contract*” but declined to furnish any further details. The reference to the “*contract*” is to the disciplinary procedures set out at Appendix IV to the Consultant’s Contract (“Appendix IV”) (which I shall set out in more details below).

5. In the meantime, the GM had written on two occasions to the CEO requesting that the plaintiff be placed on administrative leave (i.e., suspended) with pay - under Para. 3 of Appendix IV - as a matter of urgency, on the basis of the immediate and serious risk posed to the health and safety of patients and staff.

6. By letter of 8th September, 2022, the CEO reminded the GM that the administrative leave provisions of Appendix IV required that details of the complaint were first shared with the plaintiff. In this instance, the complainant had also reported the alleged assault to An Garda Síochána who had apparently directed the GM not to communicate the allegations to the plaintiff lest it might prejudice an investigation. The CEO effectively informed the GM that suspension could not be considered until the contractual procedures and due process were adhered to.

7. By letter of 9th September, 2022 the GM furnished to the CEO a statement which she had taken from the complainant and confirmed that both the complainant and An Garda Síochána were agreeable that it could be communicated to the plaintiff. The GM again, urged the activation of the administrative leave provisions of Appendix IV. By this time, the plaintiff had still not been provided with any details of the assault allegation.

8. By letter of 15th September, 2022, the GM informed the plaintiff of a second allegation arising from prescriptions of medication to the plaintiff which had been signed by non-consultant hospital doctors (“NCHDs”) reporting to him (“the prescription allegation”). These prescriptions had been sent anonymously to the GM who informed the plaintiff of her “*intention to establish the facts relating to this matter*”. By this time, the GM had already

received statements from the two NCHDs involved who alleged that, at the plaintiff's request, the prescriptions had been signed blank, i.e., without documented medication.

9. By letter of 16th September, 2022 the plaintiff again requested details of the assault allegation and enclosed a certificate of fitness for duty from his GP. He objected to his having been *“kept completely in the dark, undermined, humiliated, professionally and socially in a close-knit community – for reasons unknown”* which, he stated was adversely affecting his profession and reputation.

10. By letter of 20th September, 2022, the GM outlined details of the assault allegation and furnished two statements from the complainant (to the GM and An Garda Síochána respectively). The plaintiff was informed that when his reply was received, the GM would *“then decide”* whether any further action may be required including bringing matters to the attention of the CEO. By this time, the GM had already written to the CEO on six separate occasions urging the activation of the administrative leave provisions of Appendix IV. The plaintiff was also informed that he was not permitted to discuss the assault allegation with the complainant.

11. By letter of the same date, the GM provided the plaintiff with further details of the prescription allegation. She enclosed statements from the two NCHDs and from the plaintiff's secretary stating that the plaintiff regularly instructed her to fax or email prescriptions for himself to the pharmacy and shred them afterwards. The plaintiff's written response was sought, and he was reminded not to discuss matters with the individuals who had provided these statements.

12. By letter of 26th September, 2022 the plaintiff confirmed that An Garda Síochána had not been in contact with him about the assault allegation and denied that anything inappropriate had occurred. He also responded to the prescription allegation, stating that they were written on foot of valid prescriptions by other medical practitioners for medication to be administered

to his parents who live in Pakistan and to himself. He stated that the prescriptions had not been left blank but had been completed in the presence of the NCHDs.

13. By letter of 29th September, 2022 the plaintiff enclosed reports from his parents' treating consultants outlining their long standing medication requirements and enclosed reports from two consultants in relation to the medication issued to himself. He also requested copies of any communications between the GM's office and the CEO's office.

14. By letter of 30th September, 2022, the GM stated that, as there were differences in their accounts, she had provided the plaintiff's account to the NCHDs and enclosed minutes of a meeting she and the clinical director of Cavan General Hospital ("the clinical director") had held with the NCHDs. The GM also informed the plaintiff that although she had already provisionally notified the CEO of the assault allegation, she was still gathering information and no decision had yet been made as to what action needed to be taken.

15. By letter of 3rd October, 2022, the plaintiff confirmed that he had still heard nothing from An Garda Síochána, the complainant or her solicitor. The plaintiff also objected, on data protection grounds to the treatment of the prescription allegation and sought details of the precise allegation being investigated against him.

16. By letter of 5th October, 2022 - furnished to the plaintiff five days later - the GM wrote to the Chief Executive Officer of the RCSI Hospital Group (of which Cavan General Hospital is part) in relation to both allegations. She noted that although the plaintiff denied the assault allegation, he had provided no further substantive response. The GM felt she had no option but to decide whether further action was required on the basis of the information received to date. As the assault allegation was of a serious nature and raised a concern that the plaintiff may have misconducted himself, the GM requested that the matter be referred to the CEO for further consideration in line with Appendix IV. In relation to the prescription allegation, the GM confirmed that the NCHDs' position remained that the prescriptions had not been fully

completed when furnished to the plaintiff; that the plaintiff did not appear to dispute that partially blank prescriptions were signed off for him to complete; and that both NCHDs had felt unable to refuse to do this. This suggested non-compliance with the Medical Council Guide to Professional Conduct and Ethics for Registered Medical Practitioners (“the Ethics Guidelines”) which provides that doctors should not prescribe for themselves or for family members. As such, the GM requested that the prescription allegation should also be referred to the CEO.

17. By letter of 21st October, 2022, the CEO formally notified the plaintiff under Para. 1 of Appendix IV of the two allegations and confirmed that he was concerned that the plaintiff may have misconducted himself. The letter set out particulars of the two allegations and afforded the plaintiff an opportunity to provide representations. The letter stated that the assault allegation raised concerns regarding the plaintiff’s behaviour and overall wellbeing and that absent a substantive response, the CEO was concerned that the plaintiff may have misconducted himself and also that there may be implications for patient care. The CEO emphasised that this was a concern only and that he was keen to meet with the plaintiff, discuss his response and receive his representations. The CEO informed the plaintiff that two allegations also raised concerns that there may be an immediate and serious risk to the health, safety and welfare of staff and potentially patients, and that he was considering requiring the plaintiff to take paid administrative leave pursuant to Para. 3 of Appendix IV. In such circumstances, Appendix IV provided that the CEO should consult with “*the chairman or the secretary of the medical board or equivalent structure*”. As there was no such continuing role, the plaintiff was informed that the CEO would instead consult with an individual in a role of equivalent structure, whose identity would be notified to him. The plaintiff was informed that, once representations were received, the CEO would consider whether any further action was required, including whether Para. 4 of Appendix IV should be invoked.

18. This letter was purportedly sent by registered post and to the plaintiff's personal email.

19. There is a dispute as to whether the hard copy letter was delivered, and it appears that the email was diverted to the plaintiff's junk folder. In any event, in the absence of a response, by letter of 17th November, 2022, the CEO again requested representations, suggested a meeting and informed the plaintiff that if a decision in relation to administrative leave was required, he would consult the clinical director.

20. By letter to the GM of 29th November, 2022, the plaintiff's solicitor objected to the plaintiff's continuing enforced administration leave and requested that he be restored to his duties. When this did not occur, judicial review proceedings were instituted by the plaintiff pursuant to which the HSE ultimately admitted that the plaintiff was entitled to a declaration that his exclusion from the workplace between 12th September, 2022 and 19th June, 2023 was otherwise than in accordance with his contractual rights and entitlements. The judicial review proceedings are ongoing and, at the time of the hearing of the present application, there was, as I understand it, an application pending to amend the statement of grounds.

21. It appears that by 2nd December, 2022, the correspondence of 21st October and 17th November had still not come to the plaintiff's attention. By letter of that date, the CEO informed the plaintiff that, in the absence of any response to the concerns raised he had provided a copy of the prescriptions (on a redacted and confidential basis) to a HSE pharmacist and had discussed the matter with the clinical director. The clinical director's response - which was enclosed - stated that the allegations (together with other issues of no present relevance) "*raise[d] potential serious and immediate danger to patients, staff and [to the plaintiff himself]*". The CEO's letter sought the plaintiff's response and informed him that the CEO was currently considering whether to commence a formal investigation or to place the plaintiff on paid administrative leave.

22. On 5th December, 2022, the plaintiff wrote to the CEO, stating that he had just become aware of this correspondence and requesting a further ten days to make representations. The CEO afforded a further four days and requested that the plaintiff attend a meeting on 12th December.

23. At a meeting with the CEO on 12th December, 2022 the plaintiff disputed the allegations and (assisted by his solicitor) made oral and written representations. In respect of the assault allegation, the plaintiff stated, *inter alia*, that there should be CCTV footage from within the hospital and from an external location at which the alleged assault was contended to have occurred. The plaintiff also requested that a colleague who he believed had witnessed conversations around the time of the alleged assault allegation should be interviewed. In respect of the prescription allegation, the plaintiff requested an opportunity to interview the NCHDs involved. In both respects the plaintiff objected to the “*ongoing enrolling attempt to expand allegations*”.

24. By letter of 23rd December, 2022, the CEO denied that there was any “*wider agenda*” against the plaintiff and stated that an investigation was warranted in respect of both the assault allegation and the prescription allegation, both of which were “*potentially serious*” and could not be resolved on the basis of the information provided to date and the plaintiff’s responses. Accordingly, the CEO would appoint a suitably qualified independent investigator. The allegations, if made out, raised potentially serious issues concerning the plaintiff’s performance, conduct, competence and capacity.

25. On foot of this letter, the plaintiff agreed to meet with the CEO. In advance, he requested clarification that the purpose of the meeting was to address the assault and the prescription allegations which was duly confirmed. The meeting took place on 2th February 2023, . During this meeting, and without prior notice, the CEO put to the plaintiff a further allegation; namely that the plaintiff had disclosed CCTV footage of the complainant leaving

his car after the alleged assault, to a number of work colleagues. The CEO asked the plaintiff on several occasions whether this was true, informed him that this could amount to victimising the complainant and requested that he desist. The plaintiff's response was that he had no recollection of showing the CCTV footage to any person. The CEO informed the plaintiff that if information contradicting this came to light, he would consider including this allegation ("the CCTV allegation") into the independent investigation. The CEO also informed the plaintiff that he intended that the said investigation would be conducted by an identified investigator ("the Investigator").

26. By letter of 24th February, 2023, the CEO confirmed his intention to engage the Investigator to carry out an independent investigation ("the Investigation") of the assault, prescription and CCTV allegations.

27. The terms of reference of the Investigation ("the Terms of Reference") provide as follows:

" 1. This investigation is convened in accordance with Appendix IV of the Consultant's Contract 1997, arising from the CEO of the Health Service Executive's (the "CEO") concerns that Mr. Pawan Rajpal, Consultant Surgeon may have misconducted himself in relation to his appointment and/or failed to comply with the terms of his appointment.

3. The investigator will endeavour to conduct the investigation expeditiously having regard to the requirements of fair procedures. The investigator agrees to provide the CEO with an update in relation to the progression of the investigation on a regular basis and/or when requested to do so.

5. The investigator will consider the concerns and allegations identified below and make findings on the balance of probabilities.

6. The investigator will provide a final report to the CEO setting out his findings by reference to the evidence gathered by him during the course of the investigation process. A copy of the final report will be provided to Mr. Rajpal.

7. No decision regarding disciplinary sanction will be decided upon until the decision-maker has held a disciplinary hearing with Mr. Rajpal."

28. The Terms of Reference provide that the Investigation would be carried out in accordance with Appendix IV and in accordance with the requirements of natural justice and fair procedures. The plaintiff was entitled to be legally represented at the hearing. The Investigator would interview witnesses and transcripts would be made of such interviews. The Investigator would determine the witnesses required to provide evidence and would be the final arbiter of any dispute in relation to the relevant witnesses.

29. The Terms of Reference also set out details of the assault allegation. Specifically, it was alleged that the plaintiff had sexually assaulted the complainant on the 25th August 2022; that he had “*on various dates*” during the course of her employment, sexually harassed her; that this breached her right to dignity at work and that this conduct and behaviour fell below the standard of conduct and behaviour expected of a senior consultant surgeon.

30. The Terms of Reference also set out details of the prescription allegation. Specifically, it was alleged that the plaintiff had knowingly encouraged the NCHDs to potentially breach their terms of employment and the Ethics Guidelines; had encouraged them to breach the terms of the HSE’s prescription policy and to act in a manner falling below the standard required of a NCHD; had thereby breached the NCHDs’ rights to dignity at work and had fell below the standard of conduct and behaviour expected of a senior consultant surgeon. It was further alleged that the plaintiff had regularly instructed his secretary to fax or email prescriptions for himself to a pharmacy and, thereafter, to shred same in breach of the HSE’s medication management policy.

31. The Terms of Reference also set out details of the CCTV allegation. Specifically, it was alleged that the plaintiff had shown footage of the complainant leaving his car on 25th August 2022 to “*multiple members of staff*” of the hospital including the clinical director; had asked people did the footage look like someone who had been assaulted and had discussed the fact of the complaint against him. It was alleged that in so doing the plaintiff had acted in breach of

the complainant's right to dignity at work; had interfered with her right to a safe work environment free from bullying and harassment; had acted in a manner amounting to victimisation and had thereby fallen below the standard and conduct expected of a senior consultant surgeon.

32. Subsequent to the above events, correspondence ensued as between the plaintiff and the Investigator and as between the parties' respective solicitors which it is not necessary to detail. Suffice it to say the following:

33. The Investigator informed the plaintiff that the Terms of Reference provided for a civil standard of proof and that it was not open to the Investigator to vary that standard to the criminal standard. The Investigator assured the plaintiff that he would not make any findings until the plaintiff had been given an opportunity to present his side of the account and also that he was not entitled to impose or recommend any sanction as against the plaintiff. The plaintiff was informed that the Investigator intended to and, in due course, had interviewed the relevant witnesses in respect of all three allegations. The plaintiff was asked to identify any other witnesses whom he felt ought to be interviewed and was also requested to furnish a copy of the CCTV footage. The plaintiff was informed that he would be provided with a transcript of the Investigator's discussions with the relevant witnesses and given an opportunity to respond.

The Investigator confirmed that he was willing to engage with any arguments that the plaintiff wished to make in relation to:-

- whether proceeding with the Investigation at a time when a criminal investigation was ongoing in relation to the assault allegation would interfere with the plaintiff's right to silence, his presumption of innocence or his right to deploy exculpatory evidence at a time of his choosing.

- whether, notwithstanding the Investigator’s general opinion that the gathering of evidence by conducting interviews was the appropriate way to proceed, different procedures should be adopted in respect of the assault allegation.

Relevant contractual and statutory provisions

34. It is convenient at this juncture to refer to Appendix IV of the plaintiff’s employment contract which provides for the disciplinary procedure and to the relevant statutory provisions.

35. The contract was executed prior to the establishment of the HSE on 1st January, 2005 when separate regional health boards existed. Therefore, whilst Appendix IV refers to the CEO of the relevant health board, the parties are agreed that this now falls to be construed as a reference to the CEO of the HSE as whole.

36. Appendix IV (which is itself attached as an appendix to this judgment) provides for two different streams of disciplinary procedure, depending upon whether it is initiated by the CEO or by an officer of lower rank described as an “*appropriate person*”. Here we are concerned with the former. Para. 1 provides that where the CEO (or other appropriate person) is concerned that a consultant may have failed to comply with the terms of his appointment or may have otherwise misconducted himself, he shall notify the consultant in writing of the reasons for such concerns and inform him of his right to make representations within two weeks. Para. 3 provides for a power of suspension with pay –referred to as administrative leave – which applies where the CEO considers that, by reason of the conduct of a consultant, there may be an immediate and serious risk to the safety, health or welfare of patients or staff. In such circumstances, the consultant may be required to take immediate administrative leave with pay for such time as may reasonably be necessary for the completion of an investigation into the conduct of the consultant. Before taking this step, the CEO must consult with the chairman or the secretary of the medical board or other equivalent structure. The present proceedings are

not concerned with a Para. 3 suspension¹ but rather, with Para. 4 which provides that the CEO (or other appropriate person), after consideration of any representations which the consultant may make pursuant to Para. 1, and after carrying out such further examination into the matter as he considers necessary, may decide on one of four alternative courses of action.

37. The first applies equally to the CEO and to an appropriate person who may, if satisfied that the matter is trivial or without foundation, so inform the consultant in writing. The second, also applicable to both the CEO and to an appropriate person, arises where he or she is satisfied that the consultant has not complied with the terms of his appointment or has otherwise misconducted himself and provides for a warning or other like communication to the consultant. The third option applies only to the CEO who may decide to act in accordance with the provisions of ss. 22, 23 and 24 of the Health Act 1970 and the Regulations made thereunder. I will comment below on these statutory provisions.

38. The fourth and final option, provided for at Para. 4 (1) (d)) applies only to an appropriate person who may request the Minister for Health to appoint a committee “*to inquire into the matter*”. Para. 5 then makes detailed provision for the establishment and functioning of such a committee (“the contractual committee”) which, having inquired “*into the matter*”, may recommend a range of alternative sanctions up to and including the termination of the consultant’s appointment.

39. Where the CEO is involved, Para 4 (c) provides for a different procedure, namely that contained in ss. 22, 23 and 24 of the Health Act 1970. Section 22, which is not relevant for present purposes, empowers the CEO to suspend without pay. Section 23 deals with the power of the CEO to remove an officer or servant and provides at s. 23 (2)(b) that a permanent officer shall not be removed because of misconduct or unfitness except on the recommendation of a

¹ The judicial review proceedings concerned an allegation that the plaintiff had *de facto* been placed upon administrative leave.

committee under s. 24 appointed by the Minister (“a statutory committee”) or on a direction of the Minister under section 24 (11). Thus, whereas an authorised person under the contract does not have power to remove a consultant, the CEO has a statutory power to do so, which however can only be exercised on the recommendation of a statutory committee appointed pursuant to s. 24.

40. Therefore, Para. 4 (c) of Appendix IV is only activated if, after consideration of such representations as the consultant might make pursuant to Para. 1 and after carrying out such further examination into the matter as he considers necessary, the CEO proposes to remove the consultant because of misconduct or unfitness. When Para. 4 (c) is activated, the Minister shall appoint a statutory committee. Section 24 (5) then provides that the statutory committee, having inquired into the proposal to remove the officer, shall make such recommendation to the CEO as it considers fit.

41. In summary, there are two potential procedures for removal of a consultant: first, the statutory procedure, activated on foot of a proposal of the CEO to remove a consultant pursuant to Para. 4 (c) of Appendix IV; and second, the contractual procedure, contained in Para. 4 (d) and Para. 5 of Appendix IV of the contract activated by the appropriate person. The appointment of the statutory committee is triggered by a “*proposal*” to remove the consultant, whereas the appointment of the contractual committee under Para. 5 of Appendix IV of the contract does not require any such proposal in order to be called into being. This is confirmed by *Traynor v Ryan* [2003] 2 IR 564 in which the Supreme Court, per Fennelly J. held that the function of the appropriate person is not to pronounce final conclusions on the presence or absence of misconduct. Rather, his sole function is to decide whether the complaints before him were of substance and incapable of being resolved in a summary fashion. If so, then the matter is to be referred to the contractual committee.

42. Before moving on from the distinction between the two sets of procedures, it is relevant to note a difference in wording between what the statutory committee (appointed on foot of a proposal of the CEO to remove a consultant) and the contractual committee (appointed on foot of a request by an appropriate person to the Minister) is that the statutory committee is empowered under s. 24 (1) to enquire into “*the proposal to remove*” whereas the contractual committee is required under Para. 5 to enquire “*into the matter*”. In *Rajpal v. Robinson*, Kearns J. found that this meant that the statutory committee did not have *de novo* jurisdiction to enquire into the misconduct but was limited to an enquiry into the proposal to remove. This aspect of Kearns J.’s judgment was not appealed to the Supreme Court but did not find favour with the Court of Appeal in *O’Sullivan v. Health Service Executive* [2022] IECA 74. Noonan J. held that the statutory committee was not in any way bound by the conclusions of the CEO². It was entitled to carry out a *de novo* inquiry and was entirely at large to come to its own conclusion on all issues. To this end, the statutory committee has the same powers as a committee appointed under s. 86 of the Local Government Act which provides for the recoupment of expenses by persons required to give evidence; and creates a criminal offence for failing to attend to give evidence at the inquiry and provides for the taking of evidence on oath, and the production of any documents which relate to the matter.

43. Finally, S.I. 110/1971 Health (Removal of Officers and Servants) Regulations 1971 (“the 1971 Regulations”), further provide that where it is proposed to remove an officer, he must first be given notice in writing by the CEO of the intention to remove, of the reasons for such removal, and of the right to make representations within seven days. Effect shall not be given to any such proposal to remove until such representations have been made and considered by the CEO.

² In *O’Sullivan v. HSE*, Dunne J., speaking for the Supreme court, referred to this aspect of Noonan J.’s judgment and did not demur therefrom.

44. Essentially, therefore, Appendix IV and the related statutory provisions provide for two rounds of notification and representations before a statutory committee is appointed. The first such opportunity arises pursuant to Para. 1 of Appendix IV and the second such opportunity arises pursuant to the 1971 Regulations when Para. 4 (c) of Appendix IV is engaged.

Issues to be tried

45. The parties are agreed that the issues in the present application to be tried are:

- 1.** Is this, in substance, an application for a prohibitory or mandatory injunction?
- 2.** Has the plaintiff raised a fair question³ to be tried (or, if necessary, a strong arguable case) regarding any of the following:
 - a. Has the CEO engaged in an unlawful delegation of his function or is the appointment of the Investigator a permitted ‘further examination’ into the matter in accordance with Para. 4 of Appendix IV?
 - b. Has the CEO improperly failed to refer the matter to statutory enquiry?
 - c. Has there been the necessary Para.1 notification?
 - d. Are the Terms of Reference appropriate by reference to the Para.1 notification provided, or at all?
 - e. Do the Terms of Reference accord the plaintiff the full rights to which he ought to be entitled?
 - f. Does the Investigation result in an impermissible interference with the investigation being undertaken by An Garda Síochána?

³ The parties use the formulation “serious issue to be tried”, rather than “fair question to be tried”, but these amount to the same thing.

- g. Does the Investigation result in an impermissible interference with the investigation being undertaken by The Medical Council?
 - h. Has the GM interfered with and contaminated the process to an impermissible extent?
3. Has the plaintiff raised a fair question to be tried (or, if necessary, a strong arguable case) that the CEO has exercised the contractual power vested in him in a manner which is unreasonable, capricious, arbitrary or unfair, applying the standard enunciated by the UK Supreme Court in *Braganza v. BP Shipping Line* [2015] 1 WLR 1661, or the Supreme Court in *O'Sullivan v. HSE* [2023] IESC 11, in respect of the matters outlined at para. 2 above.
4. If the plaintiff has established a fair question to be tried (or a strong arguable case), where does the balance of convenience lie, or what course of action entails the risk of least injustice, bearing in mind:
- i. An assessment of the adequacy or inadequacy of damages from the perspective of either party;
 - j. The fact that this matter is very likely to proceed to trial;
 - k. The jurisprudence which governs applications to halt ongoing disciplinary processes;
 - l. The stage in the disciplinary process and the protections (if any) available to the plaintiff in the context of the disciplinary process as a whole.
5. Whether the plaintiff is entitled to an injunction restraining the HSE from taking any further steps in respect of the Investigation.

Legal framework

46. In *Merck Sharp and Dohme v Clonmel Healthcare* [2019] IESC 65, O'Donnell J. (as he then was) summarised the principles to be applied in respect of the grant of interlocutory injunctions. As those principles are well known, I will not set them out here. Suffice it to say that the court should consider, *inter alia*, whether a permanent injunction might be granted to the plaintiff if he succeeds at trial, whether the plaintiff has established a fair question to be tried and, if so, where the balance of convenience and the balance of justice lie. I will consider the first and third of these issues in due course below.

47. For the moment I consider the requirement that the plaintiff establish a fair question to be tried. This engages the first issue in dispute, namely whether the injunction sought here is prohibitory or mandatory.

Issue 1. Is this, in substance, an application for a prohibitory or mandatory injunction?

48. An applicant for prohibitory relief need generally only demonstrate that there is a fair question to be tried (or a serious issue to be tried), which is a reasonably light threshold, whereas for mandatory relief, the applicant must demonstrate a strong case which is likely to succeed at trial (as set down in *Maha Lingham v. HSE* [2006] 17 ELR 137). The question is which of these bars applies to the present case. The plaintiff contends for the former and the HSE for the latter.

49. The plaintiff submits that the relief sought is prohibitory only in that what is sought is an interlocutory injunction restraining the HSE, its servants or agents from taking any further steps in respect of the Investigation. The HSE, on the other hand, argues that the consequence of the plaintiff's decision not to institute proceedings against the Investigator is that the relief sought is a mandatory injunction, directing the HSE to take positive steps instructing the Investigator to discontinue the inquiry.

50. The HSE's argument is, in my view, overly formalistic. Interlocutory mandatory orders do not attract a higher standard because of legal technicalities such as this. As Clarke CJ. stated in *Charleton v Scriven* [2019] IESC 28, a higher standard is imposed because of the greater risk of injustice which is, in turn, a function of the substance of the order sought and the consequences, which it might have for an individual who becomes bound to obey it at the interlocutory stage, but ultimately succeeds a trial. At least in general terms requiring someone to do something, which it may ultimately transpire they were not required to do, may give rise to a higher risk of injustice than simply requiring someone to refrain from doing something which they may ultimately be found entitled to do. Therefore, a grant of a mandatory injunction at the interlocutory stage may be difficult to undo, may cause irremediable prejudice to the defendant or may disrupt the status quo. In addition, mandatory injunctions are often more difficult to formulate and, in many cases, to supervise.

51. I am in agreement with the plaintiff that the substance of the order he seeks is prohibitory and not mandatory. He does not seek to compel the HSE to perform any action which may be difficult to undo or may cause it irremediable prejudice. In addition, as will appear below, the interlocutory order which I propose to grant does not halt the disciplinary process from proceeding in accordance with Appendix IV but only enjoins the Investigation in its current iteration.

Additional considerations in the context of an injunction restraining an ongoing disciplinary process

52. However, there is an additional element to the "*fair question to be tried*" in the context of an injunction to restrain an ongoing disciplinary process. Clarke J. explained in *Carroll v. Bus Atha Cliath* [2005] 4 IR 184 that in general, "*a court should be reluctant to intervene and in particular to intervene at an interlocutory stage. In an as yet incomplete disciplinary process*" (para 10) lest it might imperil the expeditious conduct of a disciplinary process, which would be amenable to review on conclusion.

53. In *Becker v. Board of Management of St. Dominic's School* [2006] IEHC 130, Clarke

J. identified the relevant principles as follows:

“12. Firstly, it is in my view that a Court should only intervene in the course of an uncompleted disciplinary process in a clear case...

14. In general terms it seems to me that the circumstances in which the Court should intervene is where a step, or steps, or an act, has been taken in the process which cannot be cured and which is manifestly at variance with the entitlement to fair procedures.

15. In coming to a view as to whether that stage has been reached, it is important to note that the Court should not assume that unfairness will occur in the future. Nor should it make assumptions about the likely future course of the process. The Court should intervene only where it has been demonstrated that the process has already been so tainted with an absence of fair procedures that it cannot be allowed to continue.”

54. In *Rowland v An Post* [2017] 1 IR 355, the Supreme Court returned to this theme. Clarke

J., delivering the unanimous judgment of the Supreme Court, stated:

“11. In many cases the proper approach of a Court when called on to consider-the validity of a disciplinary-like process is to look at the entirety of the procedure and to determine whether, taken as a whole, the ultimate conclusion can be sustained having regard to the principles of constitutional justice....

12. Precisely because problems can be corrected and because there may well be a significant margin of appreciation as to the precise procedures to be followed it will, in a great many cases, be premature for a Court to reach any conclusion on the process until it has concluded.

13. However, the practical consideration which leans against a Court interfering with an ongoing process may point in the opposite direction in a limited number of cases where the conduct of the process, up to the point when the Court is asked to review it, is such that it is clear that the process has gone irremediably wrong. In such a case, ... [the] practicalities point to stopping the process and thus saving all concerned from engaging in what must necessarily turn out to be the fruitless exercise of continuing a process whose conclusions if adverse are almost certain to be quashed.

14. However, in order for that latter conclusion to become the dominant factor in the Court's assessment, it follows that the Court must be satisfied that it is clear that the process has gone wrong, that there is nothing that can be done to rectify it and that it follows that it is more or less inevitable that any adverse

conclusion reached at the end of the process would be bound to be unsustainable in law. In any case where the plaintiff cannot establish that the case meets that standard it will ordinarily be inappropriate for the Court to intervene at that stage but rather the process should be allowed to continue to its natural conclusion at which stage it can, if any party wishes it, be reviewed.”

55. Clarke J. emphasised that a court “*should only intervene in an ongoing process where it is clear that the process has gone irretrievably wrong.*”

56. Similarly, in *McKelvey v Iarnród Éireann* [2020] 1 IR 573, Clarke CJ. stated that:

“It is well settled that a court should not restrain a disciplinary process prior to its conclusion unless it is clear at the stage when an injunction is sought that something has occurred which is sufficiently serious and incapable of being cured so that there was no realistic prospect that a legally sustainable conclusion could be reached at the end of the process.”

57. These general principles are reflected in the judgments of Binchy J. in *Joyce v Board of Management of Coláiste Iognáid* [2015] IEHC 809, Allen J. in *O’Neill v The Commissioner of An Garda Síochána* [2020] IEHC 448 and Butler J. in *Lally v Board of Management of Rosmini Community School* [2021] IEHC 633. In the last of these, Butler J. considered the interaction between the traditional threshold test and the requirement not to intervene unless it is clear that the process has gone irremediably wrong. Having identified the “fair question to be tried” as the appropriate threshold in the case before her she said:

*“61. This is not, however, the end of the matter because separate to the jurisprudence concerning the standard applicable to the grant of interlocutory injunctions, there is a line of case law relied on by the school to the effect that a court should not intervene in an ongoing disciplinary process unless it is clear that the process has gone irremediably wrong and it was more or less inevitable that any adverse conclusion reached against the plaintiff would be unsustainable in law. If the plaintiff cannot establish that the case reaches the standard, then the disciplinary process should be allowed to continue to its natural conclusion (see *Rowland v. An Post* [2017] 1 IR 355). This means that in establishing a “fair question to be tried”, it is not sufficient for the plaintiff simply to show that she has a stateable case on fair procedures or a breach of Circular 49/2018 or objective bias on the part of the decision maker. She must show that she has raised issues which suggest that the process has gone irremediably wrong and*

that any conclusion ultimately reached against her will be legally unsustainable. Whilst the fair question threshold has often been described as a light one, it becomes a more exacting threshold in a case of this nature by virtue of the fact that it must be applied to legal proceedings which themselves attract a specific and higher standard for the grant of a permanent injunction.

Butler J. then quoted from Clarke J.’s judgment in *Rowland* (quoted above) and went on to say:

“63. Obviously, sight should not be lost of the fact that this remains an application for an interlocutory injunction; the plaintiff is not required to show that she must succeed in her case once the Rowland criteria are applied. Rather she must show that she has raised a fair question to be tried, taking into account the high standard by reference to which that question will be judged at the substantive hearing.” [Emphasis added]

Therefore, to succeed in the current application, the plaintiff must show that there is a fair question to be tried, taking into account the requirement to prove at trial that the process has gone irretrievably wrong.

Braganza v BP Shipping Line – Issue 3

58. In assessing whether the plaintiff has shown a fair question to be tried on any of the grounds outlined at issue 2, it is convenient at this point to consider issue 3 and the “*Braganza* test” as enunciated in *Braganza v BP Shipping Line*. At issue 3 the parties ask whether the plaintiff has raised a fair question to be tried that the CEO has exercised the contractual power vested in him in a manner which is unreasonable, capricious, arbitrary or unfair, applying the standard enunciated in *Braganza v. BP Shipping Line* or the Supreme Court in *O’Sullivan v. HSE* [2023] IESC 11.

59. The *Braganza* test applies to contractual terms in which one party has power to exercise a discretion, or to form an opinion as to a relevant fact. In such circumstances, the UK Supreme Court held that it is not sufficient only that that party should be of the relevant opinion stipulated by the contract. Rather, as observed by O’Donnell CJ. in *O’Sullivan v HSE*, the discretion to act on foot

thereof is limited as a matter of necessary implication by the concepts of “*honesty, good faith and genuineness and the need for absence of arbitrariness, capriciousness, perversity, and irrationality*”.

Essentially, this means that such contractual discretion is limited by a requirement that the decision-maker will not be unreasonable in the *Wednesbury* sense.

60. In *O’Sullivan v HSE*, the Supreme Court accepted that this test applied to the exercise of the CEO’s discretion under Para. 3 of Appendix IV to place a consultant on immediate administrative leave. Dunne J. speaking for the Supreme Court, held that:

“*Thus, one can see that in considering the decision of the CEO in a case such as this where a discretion is to be exercised, that discretion should be exercised in a manner that first of all is carried out in good faith, the decision should also be one which is neither arbitrary, capricious, or irrational, and further, as was stated in Braganza, it follows that such a decision could be impugned, not only where it was one that no reasonable decision-maker could have reached, but also where the decision-making process had failed to exclude extraneous considerations, or to take account of all obviously relevant ones.*”

61. The key point for present purposes is that the *Braganza* test applies to the exercise of a contractual discretion. Therefore, although as presently phrased, issue 3 purports to apply the *Braganza* test to each of the issues identified at 2 (a) – (h), in reality, it has no application to a number of those issues. For example, in my view, the *Braganza* test has no application to the issues raised at 2 (c) and 2 (d) concerning the validity of an Appendix IV, Para. 1 notification. Nor do I see particular scope for the *Braganza* test to impact on the issues identified at 2 (f), (g), and (h).

62. In the present case, the *Braganza* test is primarily invoked by the HSE as applying to the CEO’s power, after consideration of representations to carry out such further examination into the matter as he considers necessary. In due course therefore, I will consider the *Braganza* test in the context of issue 2 (a).

Consideration of each of issues raised at paras. 2 (a) - 2 (l) of the issue paper

63. For ease of exposition, I have re-ordered the issues to be tried set out at para. 2 and split issue 2 (a) into two parts. I will commence my analysis with issues 2 (c) and 2 (d).

Issue 2 (c): Has the plaintiff raised a fair question to be tried that there has not been the necessary Para. 1 notification?

Issue 2 (d): Has the Plaintiff raised a fair question to be tried that the Terms of Reference are not appropriate by reference to any proper Para. 1 notification provided?

64. The plaintiff observes that the starting point for the present disciplinary process is that Para. 1 of Appendix IV requires the CEO to notify him in writing of the reasons for any concerns and inform him that he may make representations within two weeks. It is accepted that the CEO's letter of 21st October, 2022 is a Para. 1 notification.

65. The plaintiff submits that each discrete allegation must start at Para. 1 and that the CEO is not entitled to process one allegation and then add others at a later stage of the disciplinary procedure. He argues that the Terms of Reference go significantly beyond those matters set out in the CEO's letter of 21st October, 2022 in a number of respects.

66. First, the plaintiff objects to the inclusion in the Terms of Reference of "*fresh allegations*" of the assault allegation consisting of such as: breach of the complainant's right to dignity at work and behaviour falling below the standard expected of a senior consultant in the employment of the HSE. These do not constitute "*fresh allegations*". They are no more than a legal characterisation of the factual allegations previously notified.

67. Second, the Terms of Reference describe the prescription allegation as a "*complaint raised by two NCHDs*". This, the plaintiff states is "*totally inaccurate*" insofar as the NCHDs did not in fact raise a complaint but were requested by the GM to give statements on the matter.

68. I agree that the Terms of Reference do not reflect the manner in which this allegation first came to the attention of the GM (and ultimately to the CEO). The issue did not arise on foot of “*complaints raised*” by the NCHDs; rather the prescriptions were sent anonymously to the GM. On the other hand, it may well be that the NCHDs are now raising a formal complaint in relation to these matters. If it transpires that they are not, then this may be the subject matter of submissions to the Investigator. However, this issue could not invalidate the entire disciplinary process. As observed by Fennelly J. in *Traynor v. Ryan*, although the word “*complaint*” is used twice in the preamble to Appendix IV, restricting the power to invoke Appendix IV to circumstances in which a formal complaint is made would leave the employer devoid of power to investigate a serious matter of its own motion. Appendix IV permits the CEO to investigate if “*concerned*” about a matter without the need for a formal complaint.

69. The plaintiff also argues that the particularisation of the prescription allegation in the Terms of Reference - namely knowingly encouraging the NCHDs to breach various contractual, ethical and procedural requirements in relation to prescriptions and, furthermore, breaching their right to dignity at work - is different to its enumeration in the Para. 1 letter of 21st October, 2022.

70. I agree that the Terms of Reference are different in emphasis to the Para. 1 letter (which suggests that the core allegation is that the plaintiff himself breached the Ethics Guidelines in prescribing for himself and for members of his family). Having said that, there is no doubt that the allegation that both NCHDs had felt pressured to sign the prescriptions was a feature of the GM’s stated concerns from an early point in time. The iteration of the prescription allegation in the Terms of Reference is merely a slight re-framing of the factual allegations already notified.

71. The plaintiff also argues that the issue concerning his instruction to his secretary, whilst admittedly notified to him by the provision of her statement, was not previously alleged to

constitute a wrongdoing. This is, strictly speaking, correct. However, in the overall context of an allegation which essentially involves self-prescribing, it could not have come to the plaintiff as a surprise that this matter would be the subject of enquiry.

72. Overall, therefore, insofar as concerns both the assault allegation and the prescription allegation, I do believe a fair question to be tried has been made out that the allegations in the Terms of Reference go substantially beyond the Para. 1 notification.

73. I have also had due regard to the plaintiff's related complaint that the details of the assault allegation in the Terms of Reference are extremely vague. For example, the Terms of Reference include an allegation that the plaintiff sexually harassed the complainant "*on various dates*" whilst she was an employee of the HSE. I assume that this is a bundled up reference to the more specific allegations of harassment set out in the complainant's statements as already furnished to the plaintiff. If however, there are further specifics, then these ought to be appropriately notified.

74. This brings me to the CCTV allegation. This allegation was not included in the Para. 1 letter of 21st October, 2022. However, as the information giving rise to this allegation had not yet come to the CEO's attention, this is hardly surprising. In my view, it is open to an employer carrying out a disciplinary process on foot of Appendix IV to bring to the attention of the consultant in question a new allegation as and when it comes to the employer's attention - provided that this is done in a manner which does not breach the consultant's right to natural justice and fair procedures.

75. On the other hand, the plaintiff is on stronger ground in arguing that the actions of the CEO in raising the CCTV allegation matter during the course of the meeting of 2nd February, 2023 without providing prior written notification in advance was in breach of Para. 1 of Appendix IV. The failure to give the plaintiff advance notice of the allegation placed him in an invidious position. It deprived him of the opportunity to take legal advice on the allegation and

to respond in a considered manner. Instead, he faced repeated questions from the CEO on the allegation to which he responded without an opportunity to reflect.

76. The details of the CCTV allegation as set out in the Terms of Reference, namely that the plaintiff had shown the footage to “*multiple staff members of Cavan General Hospital*” have still not been formally notified to the plaintiff in compliance with Para. 1. Instead, by letter of 24th February, 2023, the CEO informed the plaintiff that this allegation would be subsumed into the Terms of Reference.

77. In addition, the allegation that the plaintiff showed the CCTV footage to “*multiple staff members of Cavan General Hospital*” lacks specificity. Without more detail, the plaintiff could not adequately respond to such an allegation.

78. In summary, therefore, I take the view that the plaintiff has not, at this point, raised a fair question to be tried that the HSE has acted in breach of Para. 1 of Appendix IV in relation to the notification of the assault allegation or the prescription allegation. On the other hand, for the reasons outlined, a serious issue arises as to whether the HSE breached Para. 1 of Appendix IV in failing to issue the appropriate Para. 1 letter in relation to the CCTV allegation either before the meeting of 2nd February, 2023 or indeed since and further as to whether the details formally provided to date of the CCTV allegation are sufficient to permit the plaintiff to respond.

79. That, however, is not the end of the matter because this court should only intervene in an ongoing disciplinary process where it is clear that the process has gone irremediably wrong and that it is more or less inevitable that any adverse conclusion reached would be found to be unsustainable in law. Where a plaintiff does not meet that standard, the process should be allowed to continue to its natural conclusion at which stage it can be reviewed, if necessary.

80. The question therefore is whether, even though Para. 1 of Appendix IV has not been complied with as regards the CCTV allegation, this error can be, and to some extent already

has been, rectified. The plaintiff has been appraised of the substance of this allegation for some time - since 2nd February, 2023. He has made a qualified admission in relation thereto. He has also now been informed on affidavit of the identity of all persons to whom he is alleged to have shown the footage.

81. The entire purpose of the Para. 1 notification and the ensuing procedures is to ensure that a consultant is given an opportunity to respond to a particular allegation; and the plaintiff now has that opportunity. It could not credibly be asserted that sufficient detail of the CCTV allegation has been provided at a stage which is so late that the plaintiff has suffered an irreparable detriment. The deficit to formally notify the plaintiff of the CCTV footage in accordance with Para. 1 of Appendix IV, although it may be a breach of contract, is not such as to render the entire process in breach of constitutional justice such that it should be stopped in its tracks.

82. Incidentally, I observe that the HSE argues that the Investigator has made it clear that he will furnish to the plaintiff transcripts of the interviews with the relevant witnesses. Therefore, although the Terms of Reference lack detail in certain respects, the procedure put in place by the Investigator ought to be sufficient to give the plaintiff a full picture of the allegations against him. There is currently a dispute between the parties as to whether the Investigator has placed a precondition on the release of the statements and will only do so once the plaintiff agrees a timetable for the Investigation. If so, this is insufficient. As a basic right of fair procedures in the conduct of the Investigation, the Investigator ought to furnish the plaintiff with such details of the allegations as are in his possession. If the allegations are detailed in the transcripts, these must be furnished to the plaintiff irrespective of whether or not he agrees to attend the Investigation hearing. Provided this is done, I see no reason to suggest that the plaintiff is not in a position to effectively present his evidence or argument to the Investigation, were same to proceed.

83. Overall, therefore, when the higher *Rowland v. An Post* criteria are factored into the “*fair question*” test, the plaintiff has not met the relevant standard in respect of the Para. 1 argument. The plaintiff has not established a fair question be tried, taking into account the requirement to prove at trial that the process has gone irremediably wrong.

First aspect of issue 2 (a): Has the plaintiff raised a fair question to be tried that the appointment of the Investigator is not a permitted “further examination” into the matter in accordance with Para. 4 of Appendix IV?

84. The HSE’s position is that the appointment of the Investigator is a valid exercise of the CEO’s power under Para. 4 to carry out such further examinations into the matter as he considers necessary before exercising one of the three options set out at Paras. 4 (a), (b) or (c).

85. The plaintiff advances two core arguments that this is unlawful. The first argument (which I will consider now) is that the CEO’s power to carry out further examination is spent. The second argument (which I will consider in due course) is that the CEO has unlawfully delegated his decision making function to the Investigator.

86. The plaintiff maintains, correctly in my view, that the clear objective of the “*further examination*” provision of Appendix IV is to inform the CEO’s decision making as to whether to proceed under Paras. 4 (a), (b) or (c). He goes on to argue that as the CEO’s correspondence demonstrates that he has already decided that it is appropriate to remove the plaintiff (in accordance with Para. 4 (c)), that the power of further investigation is now spent.

87. This argument does not raise a fair question to be tried.

88. The Para. 1 letter of 21st October, 2022 and the subsequent correspondence informs the plaintiff that the allegations cannot be resolved on the basis of the information provided to date and seek his responses. This correspondence is consistent with a continued inquiring mind and does not suggest a concluded decision by the CEO to activate Para. 4 (c).

89. In a slightly less audacious argument, the plaintiff emphasises that the CEO's letter of 2nd December, 2022 communicates "*very serious concerns*" from the clinical director and informs the plaintiff that "*the matters at issue here are extremely serious*". The plaintiff also emphasises the CEO's statement in letters of both 7th and 23rd December, 2022 that the matters raised "*suggest a "very serious situation"*". The plaintiff also observes that in his letter of 27th January, 2023, the CEO states that the assault allegation and the prescription allegation were "*potentially serious*" and "*could not be resolved on the basis of the information provided to date.*" The plaintiff argues that the CEO's references to "*very serious concerns*", "*extremely serious*" matters, a "*very serious situation*" and "*potentially serious*" allegations, necessarily mean the CEO is already satisfied that the allegations are not "*trivial or without foundation*" (Para. 4(a) or such as to warrant only a "*warning or other like communication*" (Para. 4(b)) and that this deprives him of power to carry out any further examination into these matters.

90. This cannot be correct. An allegation which is considered by the CEO to be potentially serious may after further examination ultimately be found to be trivial or without foundation in accordance with Para. 4 (a). Alternatively, the CEO might find that misconduct is made out but merits only a warning in accordance with Para. 4 (b). Then the mere notification of an allegation which, if made out would be serious cannot inevitably rule out a subsequent conclusion in accordance with Para. 4 (a) or 2 (b) and forestall any "further examination".

Issue 2 (b): Has the plaintiff raised a fair question to be tried that the CEO has improperly failed to refer the matter to a statutory enquiry?

91. In an argument somewhat linked to that just considered, the plaintiff maintains that the CEO has improperly failed to refer this matter to statutory enquiry in accordance with Para. 4 (c).

92. This argument is advanced in several ways.

93. First, the plaintiff relies on *Traynor v. Ryan*, in which Fennelly J. quoted with approval the following passage of Hederman J., giving judgment for the Supreme Court in *O’Flynn and another v Mid-Western Health Board and others* [1991] 1 I.R. 223 concerning an investigation by the CEO of a health board into an allegation made against two medical practitioners, of fraudulent practices in relation to prescriptions presented to a pharmacy for reimbursement pursuant to the General Medical Services Scheme.

“His duty was to make a judgment not on the truth or falsity of the complaint; nor, it need hardly be said, on the guilt or innocence of the doctors; nor even should he have reached a conclusion that there was a prima facie case against them. His sole function, to which he had to apply himself honestly and fairly, was to decide whether he had a complaint of substance, which he could not resolve in any summary fashion, worthy to be referred to the committee.”

Fennelly J. continued:

“In my opinion, that passage accurately describes the function to be performed by the Respondent in this case. If the complaints or any of them were without merit, he could dismiss it pursuant to paragraph 4(a). If any complaints were made out, but were relatively minor, he might warn or admonish the consultant pursuant to paragraph 4(b). To that extent, he would have to reach a conclusion. However, if he decides that it is appropriate to refer the matter to the Minister, that is all he has to do. The matter or matters of concern will be investigated by a committee appointed by the Minister. In that situation, it is of prime importance that the committee be in a position to approach the matter in an entirely independent way and unaffected by the views of any other person. Having regard to the extent and nature of the matters in dispute in the course of his investigation and to his own conclusion that the case was not an appropriate one for a warning pursuant to paragraph 4 (b), it was clearly incumbent on him to refer the matter to the Minister pursuant to paragraph 4 (d).

94. In the case before him, therefore, Fennelly J. held that once the appropriate person - in that instance the Acting Secretary and General Manager of a voluntary hospital - found that the complaint was of substance and could not resolve in a summary fashion, he should refer the matter to the Minister pursuant to Para. 4 (d) for the appointment of a contractual committee under Para 5.

95. The plaintiff submits that as it is evident from the CEO's correspondence that he considers that the allegations are of substance and cannot be resolved in a summary fashion the reasoning of Fennelly J. applies here.

96. However, the plaintiff's reliance upon *Traynor v. Ryan* is misplaced. *Traynor v. Ryan* concerned the establishment of a contractual committee pursuant to the provisions of Para. 4(d) and Para 5. As explained at para 41 above, the appointment of a contractual committee is not dependant on a prior proposal to dismiss the consultant. This analysis is not appropriate to the decision of a CEO acting under Para. 4 (c). Before referring the matter to a statutory committee, a CEO is required to satisfy himself not only as to the non-applicability of Para. 4 (a) or the non-suitability of Para. 4 (b), but also that he ought to propose the removal of the relevant consultant. This, by definition, requires the CEO to carry out such further examination as he considers necessary and, indeed, as is objectively necessary, to establish whether or not the alleged misconduct is established and, if so, whether it is sufficiently serious to merit dismissal. Where the allegations of misconduct are disputed this will necessarily require a reasonably in depth investigation.

97. By definition, therefore it would be premature for the CEO to send the present matter forward to a statutory inquiry. This is one of the grounds upon which Kearns J. found that the defendant had erred in the earlier case involving the same plaintiff, *Rajpal v. Robinson*.

98. Indeed, this aspect of the plaintiff's submission is wholly discordant with his submissions in this earlier case in which he positively argued that the CEO had to be satisfied that the consultant had misconducted himself before referring the matter to a statutory committee and that it was not acceptable to, so to speak, "pass the chalice on".

99. *Rajpal v. Robinson* also does not support the plaintiff's present argument that because he maintains that the correspondence from the CEO is consistent with his having reached a decision in accordance with Para. 4 (c), he is now *functus officio*. This would imply that the

matter can and indeed must be sent forward to a statutory committee without a clear finding by the CEO of misconduct provided that one can infer such a finding. Yet, this very argument was advanced by the HSE in the earlier litigation and rejected by the plaintiff, the High Court and the Supreme Court. Hardiman J. stated:

“I would not be willing to deduce or infer the existence of a proposal on the part of the Chief Executive to remove Mr. Rajpal from the fact that the Minister was asked to appoint a committee under s.24. To do so would fly in the face of the Chief Executive's own evidence. It is not the case, as a matter of fact, that he proposed the removal of the consultant: on the contrary, he thought that he did not have to do so in order to have a committee appointed. He reached this conclusion on the erroneous basis that the decision in Traynor v. Ryan governed the case”

100. A finding that misconduct is made out and that it is appropriate to initiate Para 4 (c) and request the appointment of a statutory committee is requires an active decision which must then be notified to the consultant in question pursuant to 1971 Regulations giving him seven days in which to make representations. There is no question in this case but that that stage of the process has not yet been reached and I cannot accept the plaintiff’s argument to the contrary.

Second aspect of issue 2 (a): Has the plaintiff raised a fair question to be tried that the CEO has engaged in an unlawful delegation of his functions?

101. The HSE argues that in the present case the CEO “considers” that “further examination” in the form of the Investigation is “necessary” to inform the decisions he must make under Para. 4. The HSE argues that in establishing the Investigation, the CEO is exercising, a statutory discretion which, in accordance with the *Braganza* test, may only be set aside by reference to concepts of lack of honesty or good faith, arbitrariness, capriciousness, perversity, or irrationality.

102. However, this misses a step in the analysis. Before analysing whether the CEO has exercised his discretion in a manner consistent with the *Braganza* standard, one must first

consider whether Appendix IV confers the discretionary power in question. In the present instance, this requires the HSE to establish that Appendix IV confers upon the CEO the power to conduct further examinations in the manner presently proposed - i.e. by the appointment of an independent external investigator to carry out the Investigation as per the Terms of Reference. If so, then the *Braganza* test comes into play and potentially creates another layer of protection for the plaintiff. Crucially however the *Braganza* test does not curtail an argument that the CEO's decision to appoint the Investigator on the terms set out in the Terms of Reference is in breach of Appendix IV. In short, in order for the plaintiff to succeed in this aspect of the case, he need not demonstrate that the CEO's actions in appointing the Investigator fail to meet the *Braganza* standard.

103. Despite the wording of issue 3 I do not understand the plaintiff to argue that the decision to establish the Investigator as per the Terms of Reference is necessarily unreasonable in the *Braganza* sense. Whilst there are undoubtedly elements of public law at play in relation to Appendix IV and the consultant's contract in general, the plaintiff's primary case is that the proposed Investigation is a breach of the express and implied terms thereof by reference to ordinary principles of contract law - as he terms it, it breaches his "black letter" contractual rights.

104. The plaintiff submits that *O'Donoghue v. South Eastern Health Board* [2001] IEHC 165 supports his argument that the Investigation cannot proceed. In *O'Donoghue v South Eastern Health Board* the applicant sought leave to apply for judicial review in respect of a decision of the CEO to set up an investigation team to look into allegations of bullying. In that case, the terms of reference required the investigation team to make findings of fact but not to make statements of opinion, draw conclusions or make recommendations. The respondent claimed to act on foot of an anti-bullying policy which did not expressly apply to consultants

such as the applicant in that case. In a short judgment, Carroll J. first determined that the allegations did not fall to be dealt with under the anti-bullying policy. She continued:

“The other point put forward by the Respondent is whether the investigating committee could be regarded as merely an exercise of the CEO's executive duty to ascertain facts as a preliminary to invoking the disciplinary procedure. I could not accept this proposition. The committee has been asked to find facts, which of necessity requires the committee to form opinions as to the truth of the evidence they hear. The finding of facts has the potential to affect the rights of the applicant.

Under the disciplinary procedure in Appendix IV it is the CEO who makes an assessment of the situation and if the matter goes beyond the necessity for a warning, the statutory procedure has to be invoked by the CEO which involves the Minister setting up a committee to investigate the question of removal. In my opinion the applicant is entitled to require that any preliminary investigation is carried out in accordance with the disciplinary procedure under the common contract.”

105. The plaintiff argues, correctly in my view, that this passage suggests that a CEO may not in compliance with Appendix IV set up an investigation team to make findings of fact. On the other hand, certain of the observations of Carroll J. in the second para. above no longer pertain in light of the subsequent Supreme Court decision in *Rajpal v Robinson*. This part of Carroll J.'s analysis is now more consistent with the role of an “*appropriate person*” prior to the convening of a contractual committee under the analogous provisions at Para. 4 (d) and Para. 5 of Appendix IV such as occurred in *Traynor v Ryan*. By contrast, at risk of repetition, it is now clear that under Para. 4 (c) the CEO must do more than make “*an assessment of the situation*” before requesting the Minister to appoint a statutory committee; he must make a specific finding of misconduct and propose removal. It is not therefore clear that Carroll J. had in contemplation circumstances such as the present where responsibility for making findings of facts rested with the CEO and not solely with the statutory committee.

106. Furthermore, *O'Donoghue v South Eastern Health Board* was, as the HSE points out primarily concerned with whether there was a sufficient public law element to make the matter justiciable by way of judicial review. To answer this question, it was necessary to decide only

whether the disciplinary procedures were engaged and were potentially breached. In that context, the above passages do not represent a final analysis of the legal issues arising in the present case.

107. The HSE's head of corporate affairs avers that there are 227 consultants still employed by it on the same contract as the plaintiff. It also correctly observes that the determination of disputed allegations of misconduct in accordance with the disciplinary procedure in such cases will often require in depth investigation. The HSE argues that it is not practicable to expect the CEO to personally inquire into and make findings of fact in each such case, particularly when the plaintiff insists that such investigation must import the full panoply of procedural protections effectively approximating a court hearing. Where such an investigation is warranted, it is therefore the HSE's practice to retain an appropriately qualified independent third party to conduct the investigation and present a report to the CEO who must then decide what, if any action to take in accordance with Para. 4. It is averred that this practice has not been the subject of any legal challenge to date and that the decision in this case is likely to be of significant precedential impact for the HSE.

108. Notwithstanding these considerations, the crucial question remains whether the contract between the parties - Appendix IV - provides for such an approach. It is common case that, pursuant to Appendix IV, any finding of misconduct and any proposal to remove a consultant can only be made by the CEO. The parties are agreed that these decision making functions are non-delegable. The CEO may not delegate to any other person the decision as to whether the plaintiff has failed to comply with the terms of his appointment or has otherwise misconducted himself. If he so finds, the CEO may not delegate to any other person the decision as to whether it is appropriate to proceed in accordance with Para. 4 (a), 4 (b) or 4 (c) of Appendix IV. In short, the decision as to whether or not misconduct is made out and the decision as to what might be the appropriate sanction are matters within the sole purview of the CEO.

109. I interpret the Terms of Reference as preserving to the CEO the power to decide whether, on the facts as found by the Investigator, the matter is trivial or without foundation (Para 4 (a)), or whether those facts demonstrate that the plaintiff has misconducted himself. In the latter case, I also interpret the Terms of Reference as preserving to the CEO the power to decide whether or not any such misconduct may suitably be remedied by way of a warning or like communication to the plaintiff (Para 4 (b)). If not, it will clearly be for the CEO and the CEO only to decide whether or not to make a proposal to remove the plaintiff in accordance with Para 4. (c).

110. So far, so uncontroversial. However, the key questions remain: first whether the CEO may delegate to any other person the task of making findings on the truth or falsity of the facts alleged to constitute misconduct; and second whether, in providing that the Investigator may make findings on the balance of probabilities, the CEO is delegating this aspect of his decision making function.

First question

111. In a case in which the underlying facts alleged to constitute the misconduct are not in dispute (such as, it appears, *O'Sullivan v HSE*), the CEO may obviously decide whether or not misconduct is made out without determining the truth or falsity of the allegations. However, in a case in which the underlying facts alleged to constitute the misconduct are in dispute, a finding of misconduct is a two stage process. The first and unavoidable stage is a decision on the truth or falsity of the allegations and the second stage is a decision as to whether those facts constitute misconduct. The magnetic north of the scheme set out under the contract is that the CEO must make the decision on whether the consultant has misconducted himself. Where, as in the second instance this is a two stage process, the CEO must make the relevant decision at both stages of the process. In other words, where the allegation of misconduct turns upon disputed issues of fact, it is in my view, incumbent upon the

CEO to reach a decision in relation thereto - in other words to make findings in respect of those key facts and thereafter to decide whether the facts as proven amount to misconduct.

Second question

112. This does not in my view mean that the CEO may not validly form the opinion that it is necessary for certain aspects of the allegation to be the subject of external examination or investigation. I reject the plaintiff's argument that the CEO, and only the CEO, must himself carry out all steps of such further examination (or investigation) into the matter. The "*further examination*" contemplated by Para. 4 is wider and more flexible than contended for by the plaintiff and the CEO must be afforded a margin of appreciation in that regard.

113. In *O'Sullivan v HSE*, O'Donnell CJ. observed that the decision to suspend or not suspend was solely a matter for the CEO but also stated as follows:

"Those matters (the decision to suspend) were matters solely for the CEO. It is apparent to me at least that each report was required to ascertain facts and assess defaults, but that disciplinary consequences were a matter for a separate procedure and a separate decisionmaker."

114. In the context of the *O'Sullivan* case the relevant reports were from medically qualified experts as to whether the feasibility study carried out by Professor O'Sullivan had been carried out ethically and in accordance with good practice, as to whether significant ongoing patient safety issues arose and as to whether his conduct had fallen below the standard of conduct expected of consultants. I appreciate that the plaintiff in *O'Sullivan* does not appear to have raised the argument that the commissioning of these expert reports was an impermissible delegation of the CEO's decision-making functions. There is, however, no suggestion of disapproval of this aspect of the process in the judgments of the High Court, the Court of Appeal or the Supreme Court.

115. One can safely say that the discretion of the CEO in relation to the carrying out of such further examination as he considers necessary extends, in an appropriate case to commissioning

independent medical experts to assist him. In my view, it is also acceptable for the CEO's further examination to include the examination of relevant material presented to him by other appropriately qualified external examiners or investigators-such as lawyers. There is unlikely to be a difficulty with an external examiner ascertaining certain basic facts - particularly if non-contentious or not central to the allegation of misconduct. Further, such external investigator may also validly collect, record, collate, distil and present the essential facts to the CEO for his adjudication.

116. I also accept that it would be impractical to expect the CEO to carry out an in depth investigation and hearing into disputed issues of fact without expert assistance. The CEO is not legally qualified, and it is difficult to see how he could validly carry out such an inquiry. At the very least, one would assume that the CEO would require the assistance of a legal assessor.

117. The question however is how far such external examinations or investigations may go in terms of making findings on disputed matters of fact. I agree with the plaintiff that there is a world of difference between a lay CEO commissioning reports from medically qualified experts to better understand the medical matters in issue as occurred in *O'Sullivan* and the Investigator's role here.

118. Para. 5 of the Terms of Reference requires that the Investigator will consider the concerns and allegations identified (*i.e.*, the assault allegation, the prescription allegation and the CCTV allegation) and make "findings" on the balance of probabilities, which I interpret as being findings of fact. It appears, therefore that the Investigator is charged with making findings on disputed issues of fact which are themselves central to the decision as to whether misconduct has occurred. Indeed, I do not understand this as being in dispute.

119. The plaintiff points out, not unreasonably, that given the nature of the task conferred on the Investigator in this case, there will be nothing left for the CEO to decide. He maintains that if, for example, the Investigator finds that the sexual assault occurred as alleged, then this will

inevitably result in a finding of misconduct. It will effectively be a finding of fact which when made self-executes as a finding of misconduct.

120. The HSE disagrees and argues that it will be a matter for the CEO to decide whether or not he accepts those findings of fact and, if so, whether they do or do not establish that the plaintiff has misconducted himself. The HSE emphasises that the plaintiff will be given an opportunity to make submissions in relation to the report of the Investigator before the CEO considers same. The plaintiff will therefore have a full opportunity to place arguments before the CEO as to why the findings of the Investigator are unreliable or ought to be departed from.

121. It is apparent that the Investigator will be conducting a detailed inquiry involving, at the very least, the taking of witness statements, the sharing of transcripts of such statements with the plaintiff, the taking of a subsequent statement from the plaintiff and the making of findings of fact on the balance of probabilities. In the context of the assault allegation the Investigator's findings of fact will in all likelihood be consequent upon an oral hearing, with cross examination, which it is not apparently envisaged the CEO will attend. In such circumstances, one could legitimately question the basis upon which the CEO could decide not to accept these findings of fact.

122. Any decision by the CEO not to accept the facts as found by the Investigator would have to be reached in a manner which is *bona fide*, reasonable and factually sustainable. One might question how the CEO could provide clear and cogent reasons for departing from findings of fact arrived at in such a manner.

123. Even if the CEO were in a position to formulate *bona fide*, reasonable, factually sustainable, clear and cogent reasons for departing from the Investigators findings, this is still an assessment of a different quality to that involved in the making of primary findings of fact. Essentially, the CEO would be reviewing the findings of fact made by the Investigator in respect of the key facts alleged

to constitute misconduct - whilst in my view, the plaintiff is entitled to nothing less than that the CEO make such findings of fact himself.

124. It is clear that there will be a significant conflict of fact in respect of the assault allegation. It follows therefore that the exercise envisaged by the Terms of Reference would, at least in so far as concerns that allegation⁴, result in a failure by the CEO to perform his decision making function under Appendix IV. I accept the plaintiff's argument that this suggests that a crucial aspect of his decision making function would thereby be delegated to the Investigator.

125. This is not, however, the end of the matter because in establishing a "fair question to be tried", in the context of disciplinary proceedings, it is not sufficient for the plaintiff to show that there are aspects of the procedure thus far, that may breach Appendix IV. The plaintiff must go further and show that he has raised issues which suggest that the process has gone irretrievably wrong, and that any conclusion ultimately reached against him will be legally unsustainable.

126. In the present case, the HSE relies upon *Traynor v. Ryan* in which Fennelly J. determined that the defendant had exceeded his functions in making positive findings against the plaintiff, but that this merely demonstrated a "*superfluidity of justification*" and did not vitiate the decision to refer the matter to the contractual committee under Para. 5 of Appendix IV. The HSE accordingly argues that even if the Investigation were an unlawful delegation of the CEO's decision making function, this would not invalidate any subsequent actions. It is said that the process ought to be permitted to continue, particularly as any statutory committee convened will have full *de novo* jurisdiction to inquire into the misconduct alleged.

127. However, the potential legal error comprised by the unlawful delegation is incapable of rectification later in the process. Once the Investigation proceeds, that potential invalidity will be hard wired into the process and could not be easily rectified. As Butler J. points out in *Lally*

⁴ The same may or may not be the case in respect of the other allegations.

v Board of Management of Rosmini Community School, the identity of the decision maker is not really something that can be altered once a process has commenced without starting the process from scratch. Therefore, it is not in my view premature for the plaintiff to request that the present Investigation is halted.

128. I fully accept that a court should be reluctant to intervene, particularly at an interlocutory stage in an incomplete disciplinary process. However, this is in my view a case where in the words of Clarke J. in *Rowland v. An Post*, the practicalities point to stopping the process and saving all concerned from engaging in what would, if the plaintiff is correct, turn out to be a fruitless exercise.

129. Naturally, the plaintiff could not of course preclude the HSE from taking disciplinary action in compliance with Appendix IV in respect of these potentially serious allegations. However, I am fully satisfied that if the plaintiff succeeds at trial on the “unlawful delegation ground”, he is likely to be granted a permanent injunction as against the continuation, not of the Appendix IV disciplinary process as a whole, but of the Investigation as presently formulated.

Issue 2 (e): Has the plaintiff raised a fair question to be tried that the Terms of Reference do not accord him the full rights to which he ought to be entitled?

130. The plaintiff maintains that the Terms of Reference fail to respect his right to fair procedures and natural justice in several respects.

The civil standard of proof

131. The plaintiff submits that as the allegation against him of sexual assault is most serious, and indeed constitutes a criminal offence, any investigation thereof ought to apply the criminal standard of proof.

132. In *Banco Ambrosiano SPA v Ansbacher & Co. Ltd* [1987] ILRM 669, the Supreme

Court rejected a similar argument that a higher standard should be required because of the moral condemnation and serious consequences which would accompany a finding of fraud. Henchy J. observed that similar condemnation and consequences could follow a finding against a defendant in other civil proceedings which only required proof on the balance of probabilities. Although therefore the consequences of a finding of fraud should be taken into account in deciding whether it had been established, a higher degree of proof than for other civil claims was not merited.

133. As pointed out by Delaney and McGrath the position is, perhaps, best summarised by O'Flaherty J. in *O'Laoire v Medical Council* [1997] 7 JIC 2502 where, after a survey of the authorities, he stated:

"The common law panorama at this time gives the impression that there is but one standard of proof in civil cases though, of necessity, it is a flexible one. This flexibility will ensure that the graver the allegation the higher will be the degree of probability that is required to bring home the case against the person whose conduct is impugned."

134. This flexibility is evident in the authority cited by the HSE *Georgopoulos v Beaumont Hospital Board* [1998] 3 IR 132, in which Beaumont Hospital held an oral hearing inquiring into complaints that the plaintiff, a consultant neurosurgeon, was uncooperative with medical, paramedical and nursing staff and thereby placed the management and care of patients at risk. After completion of the inquiry the defendant notified the plaintiff of its decision to dismiss him from his post. The plaintiff issued proceedings claiming, *inter alia* that his right to natural justice had been breached by the committee reaching its decision on the civil standard. Hamilton CJ. observed that the proceedings before the defendants were in the nature of civil proceedings and did not involve any allegations of a criminal offence. The standard of proving a case beyond reasonable doubt was confined to criminal trials and had no application to proceedings of a civil nature. Hamilton CJ. quoted with approval the following passage from the judgment of Lord Scarman in *Redge v Home Secretary, ex parte Khawaja* [1984] 1 AC 74:

“My Lords, I have come to the conclusion that the choice between the two standards is not one of any great moment. It is largely a matter of words. There is no need to import into this branch of the civil law the formula used for the guidance of juries in criminal cases. The civil standard as interpreted and applied by the civil courts will meet the ends of justice.”

135. The Investigation takes place in the context of an employment relationship. It is not a criminal trial and nor is it a hearing before the Medical Council. The fact that a particular workplace complaint can amount both to a breach of a contract of employment, to a civil wrong and possibly to a criminal wrong does not mean that the criminal standard must apply. This would, in my view be to place upon employers and indeed on complainants in assault and sexual harassment workplace complaints, an unacceptable burden.

136. In the present case, the sexual assault allegation against the plaintiff is a charge of great seriousness with grave implications for the plaintiff's livelihood and reputation. However, this does not require that the facts upon which the allegations are based should be established beyond all reasonable doubt. Rather, they can be dealt with on the balance of probabilities bearing in mind that the degree of probability required should always be proportionate to the nature and gravity of the issue to be investigated.

137. I note that the plaintiff objected to the imposition of the civil standard of proof in correspondence to the Investigator. The Investigator replied that the Terms of Reference provided for the civil standard and that it was not open to him to vary that standard to the criminal standard. However, this does not in any way foreclose an application of the civil standard in a manner consistent with the above case law.

138. I therefore find that a fair question to be tried has not been established on this ground.

Cross examination

139. The plaintiff maintains that a right to cross examine the complainant in the assault allegation, and the witnesses relevant to the other allegations, is an essential component of a

fair hearing. He argues, that, as the Terms of Reference do not provide for same, his right to fair procedures has been breached.

140. A decision maker in a disciplinary process has a significant margin of appreciation as to how the process is to be conducted subject to the contractual or legal terms governing the particular process and of course to fair procedures. The question in each case will be whether the procedures adopted impairs the effectiveness of the exercise of the rights concerned to an impermissible extent.

141. It is correct to say that the Terms of Reference do not expressly provide for cross examination. They do provide that the Investigator will be the ultimate arbiter of the procedures to be adopted during the course of the process and that the Investigator will have regard to the requirements of natural justice and fair procedures.

142. It is clear from the correspondence that the Investigator is of the general opinion that gathering evidence by conducting interviews is appropriate but that he will hear argument as to the procedures which should be adopted in respect of the assault allegation. As it appears that there will be a very significant conflict of fact in respect of this allegation, a right to cross examination is vital.

143. The same may or may not apply in respect of the prescription allegation or the CCTV allegation. An oral hearing and cross examination is not necessary in every case. The need for same will depend upon whether there are key factual disputes. Once the process has established that there is factual conflict which requires to be resolved, then the right to cross examine can be determined. There is no reason in principle why the Investigation process may not evolve. In short, provided that the entitlement to test evidence is not afforded at a stage which is so late that the plaintiff suffers an irremediable detriment in his ability to defend the allegations, then the matter falls within the margin of appreciation in these kinds of investigative processes.

144. Furthermore, it seems to me that the plaintiff's challenge based on a failure to afford him a right to cross examine is premature. He had raised this issue only in the most general and theoretical terms and has not yet requested a right to cross examine a specific witness or witnesses. If and when such conflict of fact arises and if and when a request for cross examination is made, that issue will crystallise and it will be for the Investigator in the first instance to determine the precise process. There is no reason to assume that the Investigator will put in place a process that is procedurally unfair.

Issue 2 (f): Has the plaintiff raised a fair question to be tried that the Investigation results in an impermissible interference with the investigation being undertaken by An Garda Síochána?

145. The plaintiff maintains that the Investigation will deprive him of certain rights to which he is entitled in the context of the garda investigation. There is no doubt that in the context of the garda investigation the plaintiff has a right to silence, benefits from the presumption of innocence and has a right to deploy exculpatory evidence at a time of his choosing.

146. On the other hand, as pointed out in *Rogers v. An Post*, [2014] IEHC 412, although the privilege against self-incrimination and the right to silence are constitutionally protected rights, they are not absolute.

147. In order to demonstrate that he is entitled to an order restraining the Investigation, the plaintiff must show more than merely that there is a criminal trial pending arising out of the same events. If that was enough, there would be a virtually immutable rule that disciplinary proceedings must remain at a standstill to await the outcome of a criminal investigation in every case.

148. This court has entirely insufficient evidence on foot of which it could conclude that the Investigation will in any way infringe the plaintiff's rights. Whilst it has been intimated that the complainant made a complaint to An Garda Síochána, the plaintiff has provided no

information for the court to assess on a practical basis whether the proposed Investigation is likely to infringe his rights in the context of any such garda investigation. It is not even clear whether the criminal investigation is continuing, whether the plaintiff has given a statement or whether any prosecution has been intimated or is ongoing.

Issue 2 (g): Has the plaintiff raised a fair question to be tried that the Investigation results in an impermissible interference with the investigation being undertaken by the Medical Council?

149. It appears that in January 2023 the plaintiff was notified of a complaint made to the Medical Council concerning his practice. It appears that this complaint has been referred to the Fitness to Practice Committee of the Medical Council. The plaintiff avers that the allegations referred include the assault allegation and the prescription allegation and that the Investigation ought therefore to be stayed pending the Fitness to Practice Inquiry.

150. Much of the above analysis regarding the interaction between the disciplinary process and the garda investigation applies with equal force to the Fitness to Practice Inquiry. The plaintiff must demonstrate that proceeding with the Investigation will result in some specific unfairness or prejudice to him in the context of the Fitness to Practice Inquiry. No real argument to this effect was made in the case before me.

151. The Appendix IV procedure is the appropriate process by which to determine whether the plaintiff has misconducted himself and, if so, what appropriate sanction arises. The Fitness to Practice Inquiry on the other hand will consider whether the plaintiff has been guilty of poor professional performance or professional misconduct as defined in the Medical Practitioners Act 2007. Even though there may be overlap between the factual allegations forming the subject matter of both investigations, a finding of misconduct in the context of the disciplinary process does not imply that the plaintiff is guilty of poor professional performance or professional misconduct. Not only are the concepts in issue different, but the burden of proof

differs, such that a finding by the Investigator - on the balance of probabilities would be in no way binding upon the Medical Council.

152. Furthermore, it appears that the present disciplinary process commenced in advance of the complaints to the Medical Council. The plaintiff has already delayed very substantially in bringing forward this application for interlocutory relief and there is no doubt that the Fitness to Practice Inquiry will not conclude for a further significant period of time too. It is not appropriate for a disciplinary process such as the present to be stayed for an indeterminate period of time, save in exceptional circumstances, which have not been made out.

Issue 2 (h): Has the plaintiff raised a fair question to be tried that the GM has interfered with and contaminated the process to an impermissible extent?

153. The plaintiff maintains that the actions of the GM in pressing the CEO to place the plaintiff on administrative leave, in obtaining statements from the complainant and the NCHDs, in pressing and in failing to disclose the circumstances in which the statements were procured has contaminated the disciplinary process to an impermissible extent.

154. I find it somewhat difficult to understand how these actions can be said to contaminate the process before the CEO. The GM is not in the CEO's office and does not report to the CEO's office. When the GM communicated her concerns to the CEO, the CEO declined to take the course urged upon him until the plaintiff had been given an opportunity to respond to the allegations made. There is also no basis for suggesting that the decision making process of the CEO (or in so far as relevant, the Investigator) has been contaminated by the actions of the GM.

155. It is in my view legitimate for the GM to be concerned about the matters which came to her attention and to set about gathering the facts. The complainant in the assault allegation appears to have made a spontaneous statement to the GM and also to An Garda Síochána.

Whilst it is true that the GM met with the complainant to take her statement and also approached the two NCHDs for statements and thereafter met with them, there is no reason to assume that any improper pressure was applied in relation to the contents of their statements or that their evidence is contaminated in any way by any actions of the GM.

156. If the plaintiff has a concern about any of the above, it is open to him to so submit to the Investigator or indeed to the CEO. It is also open to him to request the Investigator to permit him to cross examine the complainant or the NCHDs.

157. I cannot conclude that the plaintiff has made a fair question to be tried in this regard.

Balance of convenience and balance of justice

Issue 4. Where does the balance of convenience lie, or what course of action entails the risk of least injustice?

Issue 5. Whether the Plaintiff is entitled to an injunction restraining the HSE from taking any further steps in respect of the Investigation.

158. It follows that the court must now consider the balance of convenience or the balance of justice of which the adequacy of damages is an important but not necessarily a defining element. The parties made only brief submissions on this issue, as the focus of the argument was very much on the prior issue of whether a fair question had been established.

159. Regard must, of course be had to the understandable desirability from the HSE's point of view of proceeding with the disciplinary process and bringing it to a conclusion as soon as possible. However, this court's order will not restrain the disciplinary process *in toto*, but rather the Investigation as currently convened. It is notable that the plaintiff continues to work in Cavan General Hospital and that the CEO has not instigated the Para. 3 administrative leave provisions. One can only conclude therefore that the CEO is of the view that there is no unacceptable risk to patients or

staff that requires any such action. Therefore, the grant of an injunction will not impact on the practical relationship between the parties, but only on the disciplinary process itself.

160. I am troubled by the plaintiff's delay in bringing forward the present application which in my view somewhat undermines his entitlement to an injunction. However, it cannot be gainsaid that the continuation of the present Investigation might result in a finding causing irreparable harm to the plaintiff's reputation and livelihood. The plaintiff, in my view ought not be put at the jeopardy of any adverse findings on the assault allegation in particular save in accordance with the agreed disciplinary procedures.

161. Overall, therefore this potential damage to the plaintiff's reputation and livelihood outweighs the importance of progressing the disciplinary process into matters capable of constituting serious misconduct. The balance of justice, in this case therefore favours the determination of the litigation before the Investigation is allowed to proceed in its current form.

Conclusion

162. In light of the foregoing, I will grant the plaintiff an interlocutory injunction to restrain the Investigation as presently convened. I will hear the parties on what formal orders this court should now make to give effect to this judgment.

Appendix IV

Disciplinary Procedure:

Preamble:

The purpose of the disciplinary procedure is to ensure that complaints concerning the competence, capability or conduct of consultants will be dealt with in a matter which has due regard to the rights and obligations of the parties. Where a complaint concerning a consultant is considered under this procedure it shall be dealt with expeditiously while affording the consultant adequate opportunity to reply to any complaint or allegation made against him. The consultant shall be entitled to be represented at all stages of the procedure should he so desire.

1. Where:
 - a. The Chief Executive Officer of a Health Board
 - or
 - b. The Chief Executive Officer, Secretary/Manager of a hospital or some other person authorised by him of a hospital not being a Health Board hospital
- hereinafter called "the appropriate person",
- is concerned that a consultant may have failed to comply with any of the terms of his appointment or may have otherwise misconducted himself in relation to his appointment, he shall notify the consultant in writing of the reasons for such concerns and inform him that any representations in regard to the matter may be received by the Chief Executive Officer or the appropriate person, as the case may be, from the consultant within two weeks of the issue of the notification and will be considered.
2. A complaint relating to an individual living patient shall not be considered except where:-
 - a. It is made by the patient, by a member of his family or by the employer, colleagues, statutory authorities or, by another person with the written consent of, the patient or where the patient is a child, of his parent or guardian and it is in writing and signed by the person making it, and
 - b. It is made within six weeks of the alleged event in relation to which the complaint is made or within such longer period as appears reasonable to the Chief Executive Officer or the appropriate person.

3. Where it appears to the Chief Executive Officer of a Health Board, the Chief Executive Officer, Secretary/Manager of a hospital or other health agency or his authorised representative, that by reason of the conduct of a consultant there may be an immediate and serious risk to the safety, health or welfare of patients or staff the consultant may 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 hereof. This investigation should take place with all practicable speed. In taking such action the Chief Executive Officer of a Health Board, the Chief Executive Officer, Secretary/Manager of a hospital or other health agency or his authorised representative shall consult with the Chairman or Secretary of the Medical Board or equivalent structure.
4. The Chief Executive Officer of a Health Board, Chief Executive Officer, 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,

or
 - d. where he is not the Chief Executive Officer of a Health Board, decide to act by way of the following analogous provisions.
5.
 1. Where the appropriate person decides to proceed under the provisions of paragraph 4(d), he may request the Minister to appoint a committee under this paragraph to inquire into the matter and the Minister shall thereupon appoint such a committee.
 2. A panel shall be established for the purpose of providing members for the aforesaid committee.

3. Membership of a committee referred to in sub-paragraph (1) shall consist of:-
 - a. one person (to be a Chairman of the Committee) to be selected by the Minister in agreement with the Irish Medical Organisation and the Irish Hospital Consultants Association and the appropriate person,
 - b. two persons selected by the Minister from lists of names of persons supplied by the Irish Medical Organisation and the Irish Hospital Consultants Association, and
 - c. two persons selected by the Minister following consultation with the employing body concerned.
4. The quorum for a committee under this paragraph shall be three, at least one member of the quorum being a person referred to in sub-paragraph (3)(b) and at least one being a person referred to in sub-paragraph (3)(c).
5. Any question arising before the committee under this paragraph shall be decided by the majority of the members of the committee who are present and vote and in the case of the equality of votes on any question the chairman shall have a second or casting vote.
6. A committee under this paragraph may act notwithstanding any vacancy among its members.
7. The chairman of a committee shall convene the first meeting of the committee not less than ten days after the committee is established.
8. During the conduct of the committee's proceedings, which shall be held in private, 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 consultant and the appropriate person to appear in person or to be represented or assisted by another person or persons or to make written submissions to the committee, and
 - c. hear, if he thinks fit, any person who is not a party to the proceedings.
9. Where, before a committee has made a recommendation, a member of the committee for any reason becomes unable to continue to act as such, the Minister may, at the request of the consultant concerned, or if the Minister considers it desirable so to do, appoint another committee.
10. The committee shall complete its examination of a complaint with all practicable speed and shall make its recommendations in writing to the appropriate person and shall also send a copy of the recommendations to the consultant concerned.

11. A committee having inquired into the matter may recommend:
 - a. the termination of the consultant's appointment, or
 - b. a period of unpaid suspension, or
 - c. deduction of a specified sum of money from the consultant's remuneration, or
 - d. that the consultant concerned should be admonished.
12. Where a committee recommends the termination of a consultant's appointment, the appointment may be terminated after the expiration of a period of 21 days from the communication to the consultant concerned of such recommendation, unless a request has been made to the Minister under sub-paragraph (13).
13. A consultant in relation to whom a recommendation for termination of his appointment or for unpaid suspension or for the deduction of a specified sum of money has been made under sub-paragraph (11) may request the Minister to issue a direction to the appropriate person in relation to that recommendation.
14. A request under sub-paragraph (13) shall be submitted in writing to the Minister either by the consultant concerned or on his behalf and shall specify the grounds on which the consultant requests the Minister to issue a direction to the appropriate person and the Minister shall notify the appropriate person of the receipt of such request.
15. Where a request is made to the Minister under sub-paragraph (13), the Minister may give to the appropriate person a direction (being a direction to comply with the recommendation of the Committee or such other direction as the Minister considers appropriate) and the appropriate person shall comply with such direction.