

THE HIGH COURT

[2024] IEHC 411

[Record No. 2023/62 MCA]

IN THE MATTER OF SECTION 80(3) OF THE VETERINARY PRACTICE ACT

2005

AND

IN THE MATTER OF AN APPLICATION BROUGHT BY WILLIAM McCARTNEY,

A REGISTERED VETERINARY PRACTITIONER

BETWEEN

WILLIAM McCARTNEY

APPELLANT

AND

THE VETERINARY COUNCIL OF IRELAND

RESPONDENT

JUDGMENT of Mr. Justice Mícheál P. O’Higgins delivered on the 6th day of June 2024

Introduction

1. This is a sanction-only appeal brought by a veterinarian under s. 80 (3) of the Veterinary Practice Act 2005. The appellant was the subject of an Inquiry before the Fitness to Practice Committee (FTPC) of the Veterinary Council of Ireland (VCI) on 29th and 30th August 2022. The disciplinary charges arose out of the appellant’s care of a golden retriever,

Alfie, who had been referred to his practice. A finding of professional misconduct was made by the Committee and the matter came before the Veterinary Council to hear submissions and decide on sanction. The Council made a decision to suspend the appellant from practice for two months. The appellant has a statutory right of appeal under the 2005 Act, hence this appeal. He contends that the sanction of two months suspension is disproportionate and unduly severe. He does not appeal the finding of misconduct.

Factual background

2. The factual background is set out in the affidavits exchanged between the parties. The facts are not in issue. By way of summary, the appellant qualified from UCD in 1987 and has been registered as a vet in this jurisdiction since then. He owns a referral practice called North Dublin Animal Hospital (“NOAH”), which employs 18 people in its associated clinics, including four vets. The appellant is very highly qualified and is a fellow of the Royal College of Veterinary Surgeons. He is one of a few recognised specialists in Ireland specialising in small animal surgery.

3. This appeal arises out of the treatment by the appellant of Alfie on 5th August 2020. Alfie was referred to the practice from another veterinary practitioner for assessment and surgical stabilisation of his right hind stifle due to right degenerative cruciate disease. The appellant was provided with the dog’s clinical records from the referral practice and was also given a copy of a radiograph of the right hind stifle taken by the referring GP vet. Alfie was admitted at reception in the appellant’s practice on 5th August 2020 and a consent form was signed by his owner for “*CCR right hind*”. The consent form also provided for “*the performance of such surgical procedure as may prove necessary*”. The appellant assessed the dog and diagnosed bilateral cruciate disease. In other words, there was cruciate disease not just in the right stifle (for which he had been referred for surgery), but also in the left stifle.

Based on his clinical assessment, he says that, in fact, Alfie's left leg was the more painful of the two, so he decided to carry out a procedure on the left leg, with a view to carrying out a further procedure on Alfie's right leg at a later date.

4. For reasons that remain unclear, the appellant did not contact the owner of the dog to discuss his advice that surgery should be performed on the left stifle initially, with a further procedure for the right stifle at a later date. The appellant's affidavits indicate that he decided on the change of plan *prior to*, rather than during, the surgery. This is important because it is not part of the appellant's case that the necessity to change the management plan only arose midway during the surgery. Rather, the appellant contends that, due to the results of a number of tests that he carried out, he intended to operate on the left leg as opposed to the right leg. He understood that, whilst the right leg was the subject of the referral, he knew before operating that he was going to actually repair the left.

5. The appellant says that he very much regrets that he did not contact Alfie's owner to discuss his advice that surgery should be performed on the left stifle initially, with a further procedure for the right stifle at some later stage. However, it was always his intention to discharge Alfie himself that evening, as is his routine following surgery of this type, at which point he says he would have discussed the change of plan and the need for further surgery later.

6. However, when Alfie's owner arrived at the surgery that evening to collect her dog, the appellant was unfortunately not on site. He says that he had to leave the surgery earlier on that day due to a COVID-related family emergency involving his elderly mother. Unfortunately, the appellant did not contact the dog's owner to explain what had happened, prior to her arriving at the surgery to collect her dog. Nor did he make arrangements for a colleague in the practice to meet with the owner, or at least ring her to explain what happened.

7. According to the complaint filed by Alfie's owner, she arrived at the practice with her son and daughter at 6:30pm to collect her dog. She met the receptionist and settled up the bill for the surgery. She spoke with an assistant vet in the practice who explained Alfie's post-operative care from a report. As they were leaving the practice, her daughter noticed that Alfie's left leg was bandaged, rather than his right leg which had the problem. They immediately went back into the receptionist to ask for an explanation. The receptionist called the assistant who had gone through the post-operative procedures and, according to the owner, he was at a loss to understand what happened. The owner asked to speak with the appellant, but he was not there. The owner says she and her two children were left traumatised in the reception area finding it difficult to process what had happened. The assistant vet communicated the appellant's instruction over the telephone for Alfie to stay overnight in the practice. The owner was very unhappy with the entire situation and took Alfie home. She was convinced he had operated on the wrong leg.

8. The appellant acknowledges that it was understandable for the owner to become concerned that he had in fact operated on the wrong leg. In view of the upset caused, the appellant spoke to the owner that evening and agreed to reimburse his fee for surgery on the left leg and he offered further surgery on the right hind, without further charge. He says in his affidavit that the offer of a refund and further surgery was a goodwill gesture and an attempt to defuse the situation.

9. The owner did not agree to this as she had lost all faith with the appellant. She later made arrangements to have the surgery carried out on Alfie's right leg by another veterinary practice. That surgery went well, and Alfie went on to have a good outcome. The owner made a complaint to the Veterinary Council. An investigation duly commenced, hence the hearing before the Fitness to Practice Committee.

10. The appellant accepts that he made mistakes in this case, particularly as regards communication with the owner and in failing to obtain informed consent in advance of carrying out the procedure. However, he remains convinced that he made the correct clinical decision, in Alfie's best interests, to perform the particular procedure on the dog's left hind first.

Notice of Inquiry

11. The allegations contained within the Notice of Inquiry were as follows:

“That you, being a registered veterinary practitioner, in the context of surgery you performed on a dog named ‘Alfie’ on or around 5 August 2020:

(1) Following the referral of Alfie from [] veterinary clinic for surgery on Alfie's right hind leg, and in advance of performing surgery on him:

(a) failed to arrange in consultation with Alfie's owner [] for the purpose of obtaining her account of Alfie's history and condition; and/or

(b) failed to carry out an adequate physical examination of Alfie to include gait observation; and/or

[the following are in the alternative allegations – i.e. allegation 2 is in the alternative to allegations 3 and 4]

(2) Having, in error, performed surgery on Alfie's left hind leg in circumstances where Alfie was referred to you for surgery on his right hind leg, in a discussion by phone with [Alfie's owner] on the evening of 5 August 2020, did not admit the error.

Or in the alternative to 2 above:

(3) Failed to inform Alfie's owner [name of owner] that you had decided to carry out surgery on Alfie's left hind leg in advance of carrying out the surgery, in

circumstances where Alfie was referred to you for surgery on his right hind leg, and/or where Alfie's owner [name of owner] had consented to surgery being carried out his right hind leg; and/or

(4) *Failed to obtain informed consent for the surgery of the left hind leg*".

12. The Fitness to Practice Committee found that allegations 1(a), 3 and 4 had been proven beyond a reasonable doubt. These allegations related to the:

- (i) failure to arrange a consultation with the owner for the purpose of obtaining her account of Alfie's history and condition (allegation 1(a));
- (ii) failure to inform the owner that the appellant had decided to carry out surgery on Alfie's left hind leg in advance of carrying out the surgery, in circumstances where Alfie was referred to surgery on his right leg (allegation 3);
- (iii) failure to obtain informed consent for the surgery of the left hind leg (allegation 4).

13. The appellant admitted the facts alleged in relation to all of the allegations in which findings were made but disputed that his conduct amounted to "*professional misconduct*" at law, relying on expert evidence in that regard from his veterinary expert. Professional misconduct was not found in relation to allegation 1(b) (failure to adequately examine Alfie) or allegation 2 (that he carried out the surgery in error and failing to admit that error). This is important because the two counts of which he was acquitted involved allegations of clinical shortcomings and, in the case of allegation 2, a deliberate cover-up of a clinical error.

14. As was his entitlement, the appellant did not give evidence before the FTPC. The Committee heard evidence from Alfie's owner who made the complaint to the Council, Professor John Innes, an independent veterinary expert retained on behalf of the Registrar to the Committee, and Dr. Andrew Robinson, an independent veterinary expert retained on

behalf of the appellant. The appellant was represented at the hearing by solicitors and senior and junior counsel.

15. I will now summarise the FTPC’s decision on each of the counts.

Count 1 (a) – Failure to arrange a consultation with the dog’s owner

This was factually admitted by the appellant. However, his expert Dr. Robinson characterised the error as a “*falling short*” of the required professional standards, not a “*serious*” falling short and therefore, he contended, was not sufficient to amount to professional misconduct. The Committee preferred the evidence of Professor Innes over Dr. Robinson on this issue and stated the following:

“The entirety of the evidence shows the absolute importance of a specialist veterinary surgeon, to whom an animal has been referred for surgery, arranging to meet with and take a history from the owner prior to the surgery taking place. [The Committee] is satisfied beyond a reasonable doubt that this is a bedrock of veterinary practice and the failure of Dr. McCartney to do so for whatever reason is simply not acceptable and is an act or omission connected with the practice of veterinary medicine which represents a serious falling short of the standard that could reasonably be expected of a registered person.”

Count 1(b) – Failing to carry out an adequate physical examination

16. This allegation was fully contested by the appellant. Professor Innes for the CEO criticised the appellant’s examination notes. However, the FTPC held that inadequate notes did not prove beyond reasonable doubt that there was an inadequate physical examination. Accordingly, the appellant was held entitled to the benefit of the doubt on this count.

Count 2 – Having, in error, performed surgery on the wrong leg, not admitting the error

17. This was by far the most serious allegation facing the appellant. He disputed it in full. The agreed veterinary opinion was that the dog suffered from bilateral cruciate disease and that surgery was warranted on both legs. This was an important pillar of the appellant's entire case. He contended that, since surgery was needed on both legs, he had not made any error. It therefore followed that there was nothing to admit to the owner. The main evidence against Dr. McCartney on this issue was the paucity of information in the examination notes concerning the change in the management plan, coupled with the indirect evidence concerning the absence of any briefing to a colleague or a receptionist as to what was to be said to the owner when she collected the dog. The Committee ruled that this allegation was not proved to the required standard and that the appellant was entitled to the benefit of the doubt.

Count 3 – Failing to inform the owner that he had decided to carry out surgery on the left leg, in circumstances where the referral and the signed consent was for the right leg

18. This allegation was admitted by the appellant. Professor Innes gave evidence that if a vet cannot contact an owner in circumstances where he had decided, upon examination, to perform surgery on a different part of the animal, one should stop the proposed surgery and halt the taking of any further steps until such time as the owner has been consulted and given their consent. This was not an emergency situation and instead involved an elective surgery. Dr. Robinson did not dispute these findings but felt that the error amounted to a "falling short" rather than a "serious falling short". The Committee did not agree and held that the omission amounted to professional misconduct and that this had been proved to the required standard.

Count 4 – Failing to obtain informed consent

19. The appellant ran a rather ambitious defence to this count. He argued that the consent forms as signed by the owner included the wording “*such further surgery as may be necessary*”, and that this obviated the necessity to obtain further consent from the owner to perform surgery on the right leg. Professor Innes regarded this as a “*ridiculous stretch of that clause*”. He noted that the decision to not perform surgery on the left leg and instead to perform surgery on the right involved a very significant change of plan. The clause relied upon by the appellant is intended for situations where one is going into an uncertain surgical situation such as opening up an abdomen, not knowing exactly what the cause is, needing to deal with it in an emergency and not having time to contact the client. In this case, a receptionist had taken the consent. There had been no exchange of information; therefore there was no informed consent. Dr. Robinson for the appellant did not disagree and acknowledged that moving from the right, as expected by the client, to the left leg because of Alfie’s condition was a failure to maintain the original consent and therefore the client should have been informed. Not surprisingly, since this was the agreed position of both experts, the Committee found this count proven and decided that it amounted to a “serious falling short” and therefore met the threshold for misconduct.

20. In summary, therefore, counts 1 (a), 3 and 4 were found to be proven beyond reasonable doubt and amounted to professional misconduct. The appellant was given the benefit of the doubt on count 1(b) (failure to carry out an adequate physical examination) and on count 2, the most serious count (having in error performed surgery on the wrong leg, did not admit the error).

21. The FTPC concluded that the findings were “*very serious*”; that there were no mitigating factors going in the appellant’s favour and recommended that a three-month

suspension was warranted. In its report dated 7th December 2022, the FTPC stated the following:

“Whilst Dr. McCartney may have some mitigating factors such as the personal difficulties he was encountering on the date of Alfie’s surgery, there is no evidence to suggest that these difficulties impinged on his conduct prior to carrying out the surgery. If they were doing so, he should not have proceeded with the surgery, which was not an emergency, in all the circumstances. In deciding to proceed as he did there was absolutely no excuse for not communicating with [name of owner] or for not ensuring that he had informed consent. Accordingly, the Committee considers that there should be no mitigating factors going in Dr. McCartney’s favour when considering sanction.”

The findings of professional negligence (sic) against Dr. McCartney are very serious and certainly do merit, in the Committee’s view, a suspension from practice and that for a period of 3 months the registration of Dr. McCartney in all parts of the Register of Veterinary Practitioners shall not have effect”.

22. The underlined portion of the FTPC ruling was plainly erroneous. There were, in fact, mitigating factors present in the appellant’s favour. I will come back to this issue later.

23. The Veterinary Council decided to depart from the FTPC recommendation slightly and reduced the proposed three-month suspension to a two-month suspension. The ruling given by the Council was quite brief. It can be quoted in full:

“Having considered the report, including the Committee’s recommendations as to sanction, documentation and submissions, the Council takes the view that the misconduct found by the Committee is of a serious nature.

Mr. McCartney’s communications with his client were wholly inadequate and his failure to obtain consent for a procedure for which her animal had not been referred

was unacceptable. Very understandably it totally undermined the confidence she had in him.

Having said that, the Council has identified mitigating features in the case, including the fact that the professional misconduct all took place on one day. Mr. McCartney apologised for his professional misconduct and offered to waive his fee and to carry out the necessary procedure on Alfie's other leg without charge. He is a highly regarded practitioner as evidenced by the testimonials submitted; and he has shown a degree of insight into what happened, including some change to husband protocols. Mr. McCartney's public reputation may have suffered based on submissions made on his behalf, and the Council accepts that he is entitled to have this treated as a lesser mitigating feature.

Taking everything into consideration, the Council has decided that the fair, appropriate and proportionate sanction is that for a period of two months Mr. McCartney's registration should not have effect.

The Council considered all available sanctions starting with the least restrictive. This was the most lenient, appropriate sanction and any greater sanction was not considered necessary or proportionate”.

Summary of the submissions of the parties

24. For reasons of brevity, I will summarise the submissions made by counsel for the respective sides. The appellant submits that the sanction imposed by the Veterinary Council was grossly disproportionate. Counsel accepts that the appellant made mistakes as regards communication and informed consent. However, this was a once off incident, which did not involve any harm being caused to Alfie. The appellant had shown insight from the outset of the process. No question arises that the surgery on Alfie's left leg was not clinically required.

The surgery was carried out properly and skilfully. Whilst the appellant did not inform the owner in advance of his plan to operate on Alfie's left leg, and that failure was to be regretted, this is not the type of conduct that ought to warrant such a serious sanction as suspension, particularly when all the other mitigating features are considered.

25. The suspension order was a disproportionate response to the relative gravity, nature and extent of the appellant's failings in this case. The failings were isolated in nature and did not involve any element of dishonesty or *mala fides*. The sanction of suspension is not necessary to protect the public and is, in all the circumstances, unnecessarily and unreasonably punitive. It lacks moderation and fails to recognise the mitigating factors at play in the case. In truth, while no findings were made that the appellant operated on Alfie's wrong leg, or that there was a want of clinical care on his part, the appellant had been sanctioned as if that had been the case.

26. Reliance was placed upon the very limited number of referral veterinary surgeons who practice and deal with this type of small animal referral surgery. It was urged that the reputational and financial consequences of a suspension order were significant. The suspension order will impact on the appellant's clients and the animals that come into his care. The pool of veterinary practitioners with the necessary experience and qualifications is very shallow. It was urged that there was no public interest necessity to effectively suspend the appellant's registration for a number of months.

27. As regards the principle of curial deference, it was urged that there should be no undue deference to the decision of the Veterinary Council on sanction. The starting point must be s. 80 (4) of the Veterinary Practice Act 2005. Under that section, the High Court on appeal is vested with a broad and overarching power to cancel the decision of the Council on sanction which is equivalent to that power which arises under the Medical Practitioners Act 2007.

28. The issues in this particular case are straight forward and no question of particular expertise arises that would warrant paying a high level of deference to the ruling of the Council. The High Court is in as good a position as the respondent to apply the relevant sanction to the facts of the case. The High Court has significant knowledge of the sanctions which are routinely imposed on regulated professionals across the broad field of professional regulation. Most particularly, the court is very well placed to assess and weigh the mitigating factors in the case, which were many. Cases such as *Hermann v. Medical Council* [2010] IEHC 414 made it clear that the court is required to exercise its own analysis of whatever evidence as to sanction is put before it.

29. The appellant submitted there were essentially two errors in the approach taken by the Council. Firstly, the Council mischaracterised the seriousness of the conduct at issue. Secondly, the Council failed to give appropriate weight to the many mitigating factors that arose in the case.

30. The appellant also criticised certain errors that appeared on the face of the record of the FTPC decision. I will pass from these, as they weren't pressed by counsel in oral submissions and in my view were not germane. In addition, counsel noted that while the Veterinary Council acknowledged it was an error by the Committee to declare there were no mitigating factors, it only gave a one-month reduction in the sanction. It was submitted that this fell well short of reflecting the number and extent of the mitigating factors.

Submissions by the Veterinary Council

31. Counsel for the respondent emphasised that while the facts may have been admitted by the appellant during the FTPC hearing, the appellant had not in fact made any admissions concerning the charges of misconduct as set out in the Notice of Inquiry. In fact, the appellant ran an ambitious defence – not supported by his own expert – that the signed consent form

permitted him to operate on a different leg to that for which the animal had been referred and for which the owner had consented. This line of defence was strongly rejected by the FTPC and, says the respondent, tends to reinforce the impression that the appellant had limited insight into the nature of the offending and the extent of his errors. It was submitted that the appellant's characterisation of the breaches as "*failures in communication*" also served to highlight that the appellant did not understand that this was not a communications deficit; rather, the failure to consult with the owner and obtain informed consent were issues that related to the "*bedrock*" of any relationship between a vet and an animal's owner. They go to the heart of any professional relationship and the necessary trust that is required, particularly where a surgical procedure is involved.

32. Counsel submitted that the court should accord a considerable degree of deference to the decision of the Veterinary Council. Citing Charleton J. in *Hermann v. Medical Council* [2010] IEHC 414, counsel submitted that the Veterinary Council has particular expertise in imposing sanctions and in deciding where in the severity scale particular offending may fall. Emphasising the specialist knowledge of the Council members, counsel submitted that the court would need to identify a specific reason or flaw in the Council's approach to justify a departure from the Council's decision to impose a suspension order.

33. Turning to the specifics of the decision under review, the respondent submits that the findings made by the Committee involve the foundation and bedrock of trust upon which an owner entrusts their animal into the charge of a veterinary practitioner. The consent process is central to any treatment, particularly so with an elective surgical procedure. The owner had not entrusted Alfie into the appellant's care for an examination, an x-ray or some form of minor assessment. Rather, she had entrusted Alfie into his care for an identified surgical procedure – surgical stabilisation of the right hind stifle due to right degenerative cruciate

disease, a procedure which necessitated the dog being sedated and surgically operated on.

The owner provided her consent to Alfie being operated on his right hind leg only.

34. It cannot be viewed as anything other than conduct of a serious nature for the owner to entrust Alfie into the care of the appellant for a particular surgical operation which required several weeks of rehabilitative care, only for Alfie to be returned to the owner with the surgery having been performed on the opposite leg to that for which she had provided consent, and all of this to occur without explanation or consultation. The operation that was performed completely altered the post operative care required for Alfie. As far as the owner was concerned, Alfie now had two bad legs to contend with.

35. The significant change in plan required a discussion with the owner, such that the risks and benefits of proceeding on the alternative leg should have been appropriately explained and explored with her to include all available options. Had this been done, the owner would then have had an opportunity to decline to agree to the proposed change of plan. She may also have wished to discuss it with her own vet (who had made the referral to the appellant) whom she knew and who also knew Alfie very well. Ultimately, the owner was denied her crucial and central role in Alfie's care.

36. It was submitted that the appellant had complete disregard for the central and crucial role of an owner in their animal's care. As the facts played out on the particular evening, it was in fact the owner and her family who, while leaving the practice, identified that a different leg had been operated on and sought clarification as a result. Nobody at the practice could explain to the family what had happened to Alfie and why a different procedure to that which had been consented for had taken place. It was only several hours later, after Alfie was discharged, that the owner was told by the appellant what procedure had in fact been performed.

37. Counsel emphasises that there were greater sanctions available to the Veterinary Council than that which was imposed:

- (1) A suspension of greater length; or
- (2) A suspension followed by a period of conditions; or
- (3) Cancellation.

The Council clearly had regard to the relevant scale in selecting what they regarded as the appropriate sanction.

38. The conduct at issue was appropriately characterised by the Veterinary Council. Their report sets out clearly why the conduct in question was viewed seriously by the FTPC and subsequently by Council. It was not accepted that the Council had mischaracterised the situation. Nor was it accepted that there had been a failure to afford leniency or to give appropriate weight to the mitigating factors. The Council had been appropriately advised on mitigating factors and how they were to be taken into account, affording the appellant as much leniency as possible in the circumstances of the case.

39. The Veterinary Council disputed the level of insight shown by the appellant. In that regard, counsel pointed to the defence decision to run the point concerning the wording of the consent form and the absence of a plea to any of the charges. In these circumstances, the Veterinary Council was entitled to form the view that the level of insight shown by the appellant was limited. It was submitted that this was properly a matter that the respondent could, and did, take into account.

40. As to the appellant's complaint about the mitigating factors, counsel submitted that a reading of the Veterinary Council's decision made it clear that all relevant mitigation had been taken into account and appropriate credit given. While the ruling may have been concise, it was impressive in its reasoning and, says the Veterinary Council, was more than enough to justify the decision ultimately arrived at. The Council had listed all of the

mitigating features in turn. These included the fact that the conduct all occurred in one day, that the appellant had apologised, that the appellant had offered to waive his fee and perform the original surgery planned on Alfie's leg without charge, the testimonials that were provided, the fact that the appellant displayed a *degree* of insight and that his reputation may have been impacted, while also noting that the appellant had made some changes to protocols at his practice to improve the consenting procedure and minimise the likelihood of future error.

41. Counsel emphasised that the decision made by the Veterinary Council was arrived at after the Council members had listened to the submissions made by counsel on behalf of the appellant. The Council had determined that a two-month period of suspension was appropriate in the circumstances of the case, as opposed to the three month period recommended by the FTPC. The wording of the ruling also showed that the Council had regard to all other sanctions available to it when determining what was appropriate. In other words, the Veterinary Council had applied the necessary "*stepwise*" process when deciding on the question of sanction.

42. In all the circumstances, it was urged that the decision reached by the Council was well reasoned, justified on the facts, and plainly open to the Council on the evidence that it heard. On this basis, the court was invited to refuse the appellant's appeal.

Principle of curial deference

43. I will start my analysis by addressing briefly the principle of curial deference. The principles governing this issue are well set out in the caselaw, so I won't dwell on this element of the case. The leading case relied upon by both sides is *Hermann v. Medical Council* [2010] IEHC 414 wherein Charleton J. emphasises the need for the High Court to

form its own view of the matter, whilst at the same time paying respect to the decision of the Council, particularly on matters within its own zone of specialist expertise and experience.

44. In *Lannon v. Council of the Pharmaceutical Society of Ireland* [2022] IEHC 80 Egan J., having conducted an analysis of the case law on this issue, stated the following:

“... in harmony with the approach in the Hermann and Dowling decisions, in approaching such a hybrid appeal, the court must ... afford considerable respect to the regulator’s decision. Although the court will take an independent view of the appropriate level of sanction, it remains incumbent upon the applicant to identify an error in approach by the Council or a specific reason for altering a level of sanction justified by the material before the PSI.”

45. In the present case, the Veterinary Council took the view that the professional misconduct as found by the FTPC was of a “*serious nature*”. The ruling of the Council stated that “*Mr. McCartney’s communications with his client were wholly inadequate and his failure to obtain consent for a procedure for which an animal had not been referred was unacceptable. Very understandably it totally undermined the confidence she had in him.*” The Veterinary Council clearly felt that, in light of the appellant’s “*unacceptable behaviour*” and the understandable collapse in the owner’s confidence in him, a suspension order was necessary to mark the offending and restore confidence in the profession. In my view, applying the caselaw that I have just referenced, a judge should be slow to interfere with a professional regulator’s reasoned view on sanction, particularly in circumstances where the regulator has extensive experience of knowing what other types of misconduct are routinely dealt with in disciplinary processes, and where on the severity scale different types of professional conduct may fall. At the same time, however, it is clear from the authorities that even in a sanction-only appeal, it is necessary for the High Court to form its own view of the case and exercise its own analysis of whatever evidence on sanction is put before it.

Moreover, the Veterinary Council retains the burden of proving that the sanction imposed was appropriate.

46. In the present case, during the sanctions hearing before the Council, the primary area of dispute centred around the question as to whether a suspension order was warranted in the circumstances. Senior counsel for the appellant suggested that the appellant had already suffered enough from the finding of professional misconduct, and he urged that one of the lesser sanctions of advice, warning or censure would be sufficient to meet the case. Counsel urged that a suspension order would be disproportionate and “*over the top*” in circumstances where the offending involved a once off event, unusual circumstances, including the fact that the error arose during a period of COVID restrictions, and involved offending that was towards the minor end of the scale. Counsel queried what purpose would be served by a lengthy suspension, particularly in circumstances where it was unlikely there would be a similar reoccurrence.

47. In a short rebuttal submission, Mr. Fagan, solicitor to the CEO, disagreed that the offending was at the very minor end of the scale and submitted that, on the evidence, there was a conscious decision by the appellant to operate on the other leg to that for which the animal had been referred, together with the decision by the appellant “*not to bother to contact*” the owner in order to consult with her about the proposed change of management plan. Mr. Fagan also queried the level of insight by the appellant, in view of the defence that was run concerning the wording of the written consent form.

Sanctions Guidance Document

48. The VCI has produced a Sanctions Guidance document which provides clear and helpful guidance on the imposition of veterinary disciplinary sanctions. The April 2023

Guidance was referenced by counsel during the sanctions hearing. The following points *inter alia* are made in the document:

“Sanctions are imposed in order to:

(a) Protect and promote the health and welfare of animals and to protect public health.

(b) Promote and maintain public confidence in veterinary provision and the delivery of veterinary services.

(c) Promote and maintain proper professional standards and conduct for the members of the provision”.

49. Then under the heading of Proportionality and Leniency, the Guidelines state as follows:

“The Council must have regard to the principle of proportionality in deciding which sanction to impose. In this regard, it must consider the interests of animals and the public, as well as those of the registrant. Therefore, the Council must choose a sanction that protects animals and the public interest and maintains public confidence in the veterinary profession but does not go further than is necessary to achieve this objective. This will also normally involve the Council considering and weighing up any aggravating and/or mitigating factors presented to it”.

50. Under the heading of “Mitigating Factors” the following is stated:

“The Council needs to balance any mitigating factors presented by the registrant against the aim of imposing the appropriate sanction. Mitigating factors carry less weight in fitness to practise proceedings than in criminal proceedings because the primary purpose of sanction is to protect the public and the standing of the profession, rather than to be punitive.

Mitigating factors that may be taken into account include, but are not limited to:

- *The circumstances of the incident, including the promotion of the health or welfare of an animal*
- *No actual harm or any risk of harm to an animal*
- *Immediate admission of wrongdoing when discovered*
- *Appropriate insight into the wrongdoing*
- *Remorse*
- *Previous unblemished record as a registrant*
- *Positive reference and/or testimonials*
- *No harm and/or risk of harm to animals*
- *Demonstrated commitment to high standards of professionalism in all aspects of veterinary practice going forward*
- *A single and isolated incident*
- *Personal and professional matters such as ill-health, stress or lack of adequate supervision”.*

51. The Guidelines say that the more minor sanctions of advice/warn/censure may be appropriate where the registrant’s practice does not need to be restricted but there is a need to demonstrate to the registrant and the profession and the public that the conduct or behaviour of the registrant has fallen below acceptable standards. These sanctions are appropriate for conduct at the lower end of the spectrum of concern and the Council will consider whether the sanction provides adequate protection to the public, as none of them restrict practice.

52. Counsel for the appellant emphasised in his submission that the sanctions of advice, warning or censure may be appropriate where the lapse concerned is isolated, there is a low risk of reoccurrence, or the registrant has shown insight and taken remedial action (p. 6 of the Guidelines). The Guidelines go on to say that advice, warn or censure are unlikely to be

appropriate where the registrant lacks insight. In such circumstances, conditions, suspension or removal from the registrar should be considered.

53. The document also provides guidance on the sanction of suspension. The following *inter alia* is stated:

“Suspension prevents a registrant from practising by the Council. It has a deterrent effect and can be used to send out a signal to the registrant, the profession and the public about what is regarded as inappropriate behaviour. Suspension will be an appropriate response to misconduct that is so serious that action must be taken in order to protect members of the public and to maintain public confidence in the provision. It will be appropriate where a lesser sanction would not adequately protect the public interest and would fail to act as a sufficient deterrent for the registrant or wider profession.

A period of suspension will be appropriate for conduct that is serious but falls short of being fundamentally incompatible with continued registration.

Suspension may be appropriate in relation to conduct which, while not presenting a risk to patients, undermines confidence in the profession”.

54. Having carefully considered the evidence in this case and having reviewed relevant portions of the guidance document, it seems to me that the offending in this case straddles the space between the advice/warn/censure bracket and the suspension bracket. That is to say, the offending has some of the characteristics of the lower bracket and some of the characteristics of the higher bracket. It seems to me that the high point of the appellant’s case is that the guidance specifically says that the lesser sanctions of advice, warn or censure may be the appropriate sanction where the lapse concerned is isolated, there is a low risk of recurrence or the registrant has shown insight and has taken remedial action.

55. However, there are three indicators in the Guidelines that in my view tip the scales in favour of a suspension order in this case. These are firstly, the indication on p. 5 that the sanctions of advice, warn and censure are appropriate for conduct at the lower end of the spectrum of concern. For reasons that I will presently outline, I do not accept that the appellant's offending was at the lowest end of the scale. Secondly, the wording on p. 6 that says suspension may be appropriate in relation to conduct which, while not presenting a risk to patients, "*undermines confidence in the profession*". Thirdly, the wording at the top of p. 7 that says suspension may be appropriate "*where it is necessary to send a message to the profession and the public that the conduct complained of is unacceptable*".

56. It is clear from the VCI ruling that the Council strongly disapproved of the appellant's conduct and was very concerned that it had totally undermined the confidence which the dog's owner had in the practitioner. The Council clearly found that the appellant's communications with his client were wholly inadequate and furthermore that his failure to obtain consent for a procedure for which Alfie had not been referred was unacceptable. In my view, it is implicit in the Council's ruling - though not expressly stated - that the Council concluded that the appellant's conduct had undermined confidence in the profession.

57. Even if one strips out of the case the more serious charges in respect of which the appellant was acquitted before the FTPC, (which is the required approach because that was the Committee's decision), the charges that are left are still quite significant, and cannot be regarded as residing at the very minor end of the scale. The offending damaged public confidence in the profession and certainly undermined the relationship between the practitioner and the dog's owner. It remains difficult to understand why the appellant excluded the owner from the decision-making process and failed to contact her once he had made the decision to operate on the other leg. It is also a mystery why he did not make sure to

brief a colleague to explain to the owner when collecting the dog that a change of plan had been necessary.

58. Having said that, I don't think it would be correct to categorise the appellant's offending as falling at the most serious end of the scale of potential misconduct. If the Council's ruling, correctly interpreted, intended to convey that the offending fell at the most serious end of the spectrum, then such a view would be erroneous because these were not "top end" offences. Viewed objectively, the acquitted counts may have been at the most serious end, but the convicted counts were not. There was no element here of dishonesty, fraud, impropriety, or deficiencies in care or clinical skill. Indeed, on one view, the offending was not even at the top end of potential breaches for failing to obtain consent for an operation, in that arguably a complete failure to address the risks of an operation, or seriously understating the risks to an owner, would be considered worse and may, unlike the situation here, have consequential effect. In the present case, it is agreed that the appellant's actions did not cause any harm to Alfie. On the contrary, the surgery performed was clinically appropriate and justifiable.

59. In my view, it would have been better if the Council had expressly identified where the offending fell within the overall spectrum of offending, and on what basis. For the reasons that I have endeavoured to set out, I take the view that the appellant's offending fell no higher than the mid-range of potential offending – the breaches were not at the lowest end of the spectrum, but equally they were not at the top end.

60. That is not in any sense to minimise or condone the appellant's misconduct. By definition, as noted by the Veterinary Council, the appellant's misconduct was of a serious nature and the Council was fully entitled to take a dim view of what occurred. The Council was also correct to deem the appellant's communications with his client wholly inadequate and his failure to obtain appropriate consent unacceptable. However, that does not mean that

the offending was at the most serious end of the overall scale, and I do not interpret the ruling of the Council in that way. The ruling says that the misconduct found by the Committee was “of a serious nature”, not that it was at the serious or top end of the overall scale of misconduct.

61. In the light of my finding that the offending was not at the lowest end of the potential spectrum of concern, and that the offending carried a number of the characteristics identified by the Guidelines as being appropriate for a suspension order, whilst also bearing in mind the principle of curial deference to which I must have regard, I take the view that the VCI has discharged the onus of demonstrating that the decision to impose a suspension order was reasonable in the circumstances. A decision to impose suspension was within the VCI’s ordnance and was in my view justifiable. That then leaves the separate question as to whether the length of the suspension was appropriate, having regard to the principle of leniency and the ample mitigation.

Complaint that insufficient weight was given to mitigating factors

62. Turning to the second part of the applicant’s submission, it is urged that the VCI failed to give sufficient credit for the mitigating factors in the case. In my view, this point has some validity. The FTPC undoubtedly erred in concluding that there were no mitigating factors. With the benefit of Mr. Butler’s S.C. appropriate legal advice, the Council corrected this error at the sanctions hearing and acknowledged that there were, in fact, mitigating factors in the appellant’s favour. This may explain the Council’s decision to reduce the suspension from three to two months. However, the question still arises as to whether a two-month suspension period was necessary or appropriate, having regard to the requirement in the Guidelines that the chosen sanction should not go further than is necessary to achieve the core objectives of protecting animals in the public interest, and maintaining public confidence

in the profession. Counsel for the VCI points to two matters in support of the contention that the Council had due regard to the mitigating factors: Firstly, the fact that the Council in the ruling lists out a number of mitigating factors that were expressly taken into account. Secondly, the fact that the Council clearly felt that the appellant was due some credit for the level of insight shown, but not “*full credit*” because the ruling pointedly refers to the appellant having shown “*a degree of insight*” into what happened.

Momentum of denial

63. In relation to the disputed issue as to the level of insight shown, it is important not to lose sight of the situation in which the appellant found himself during the FTPC hearing. He was facing a range of charges, the most serious of which involved allegations of clinical shortcomings and an element of deception or dishonesty. As far as the dog’s owner was concerned, the appellant had operated on the wrong leg and had failed to admit that basic fact. This was at all times fully contested by the appellant who stood over his clinical handling of the procedure and insisted that no error had occurred. At the end of the day, it must be remembered that the Committee found that these allegations were not proven. That conclusion requires all traces of the acquitted allegations to be stripped out of the case when it comes to the question of sanctioning.

64. Experience as practitioners and judges tells us that sometimes if a Notice of Inquiry includes a multiplicity of charges, some more egregious than others, a “momentum of denial” can build up, such that a registrant may elect to fight all charges, even in circumstances where a more measured and selective approach may be more appropriate. Here, in light of the seriousness of the original charges, the appellant was facing the possibility of extremely serious sanctions, including the possibility of erasure from the register. Undoubtedly, it would have been better if the appellant had not run the defence concerning the wording of the

consent form giving him a *carte blanche* to operate on the other leg. However, it would be wrong in my view to read too much into that decision. While the appellant did not concede professional misconduct before the Committee, he did admit the facts upon which the findings were made. This undoubtedly assisted the smooth running of the hearing, made life easier for the owner and shortened the hearing. The main areas of dispute before the FTPC were whether the errors made by the appellant amounted to a “falling short” or a “serious falling short” of the required standard. Broadly speaking, at a level of principle and generality, that will often be a legitimate line to pursue, particularly where it is a position supported by an acknowledged veterinary expert.

65. It should also be borne in mind that when the process reached the Council stage, the appellant accepted the findings of professional misconduct, and that position has carried through to this appeal. For all these reasons, I think it would be unfair to criticise the appellant unduly for the position adopted during the FTPC hearing. Having said that, the absence of a plea to the misconduct charges at the Committee stage does mean that the level of credit or discount to be given for acknowledging guilt will of necessity be reduced.

66. Returning to the VCI Guidance, it seems to me that virtually all of the mitigating factors identified in the Guidelines had application in the appellant’s case. Of itself, that is an important consideration. In my view, the Council’s decision to reduce the recommended sanction by one month failed to give sufficient weight to the nature and extent of the mitigating circumstances. If we omit the disputed question as to the level of insight shown, the following mitigating factors (following the sequence within the Guidance) were present:

- The circumstances of the incident, including the agreed fact that surgery on the dog’s right leg was necessary;
- The FTPC finding that there was no actual harm to Alfie;
- The immediate admissions made by Dr. McCartney;

- The remorse shown by the registrant;
- Dr. McCartney's previous unblemished record as a registrant;
- The positive references and testimonials;
- The agreed veterinary opinion that there was no harm caused to any animals;
- Dr. McCartney's demonstrated commitment to high standards of professionalism, including the changes in protocols in his practice that he introduced post this event;
- The fact that this was a single and isolated incident;
- The impact of the COVID-related family emergency on the afternoon/evening of the incident.

67. In relation to the last-mentioned factor, it seems somewhat harsh that the FTPC excluded from consideration the impact of the appellant's family emergency on the whole situation. Whilst the information as to precisely what happened in the emergency was a little sparse, it was accepted by the Committee that the appellant was called away due to his mother becoming ill. As things transpired, the appellant's mother unfortunately died at some point afterwards. This can only have been very distressing for the appellant and his family. The Committee had, correctly, concluded that the fact the appellant was called away in the afternoon at a point in time *after* the operation on Alfie had been performed, did not explain or justify the appellant's failure to consult with the owner in advance of the procedure and obtain the necessary consent. While that may be so, the COVID emergency point was still relevant in my view because it explains why Dr. McCartney was not on site when Alfie was being collected and it also contextualises the less-than-wonderful communications with the dog's owner that evening and again the following morning. It would have been better if greater allowance was made for this factor in the overall complaints process.

68. After all, had the appellant been available in the surgery on the evening when Alfie was collected, he could have explained the situation to the owner and put her mind at rest. Had that occurred, there might never have been a complaint made in the first place. Therefore, while none of this explained or justified the failure to consult the owner about the change in the management plan or the failure to obtain informed and valid consent, it does reduce the culpability of the appellant's errors *post* procedure. All told, I think this issue was worthy of greater consideration.

69. In my view, the VCI erred in not according sufficient weight to the nature and extent of the mitigating factors and also in failing to take into account the complete absence of aggravating factors, as listed in the VCI Guidance. As serious as the appellant's errors in not obtaining informed consent and arranging a consultation were, the following factors were completely absent from the case (again following the sequence in the Guidelines):

- Actual injury to an animal;
- Risk of injury to an animal;
- Fraud;
- Dishonesty;
- Recklessness;
- Premeditated conduct;
- Financial gain;
- The involvement of a vulnerable client;
- Discriminatory behaviour
- Abuse of professional position;
- Conduct exacerbated by drug or alcohol misuse;
- Misconduct sustained or repeated over a period of time;
- Lack of remorse;

- Denial of the facts of the case;
- Attempts to cover up the wrongdoing;
- Attempts to unjustly place the blame on other parties;
- Previous convictions;
- Previous adverse findings from the Veterinary Council or any registered body.

While on one view there was a breach of client trust (which is also a listed factor), this should not outweigh the accumulation of mitigating factors that were undoubtedly present.

Greater leeway for the High Court in applying Mitigation

70. In *Veterinary Council of Ireland v. Brennan* [2020] IEHC 655 Irvine P. stated that while the court must show deference to the specialist knowledge of the Veterinary Council “*there are areas in which the Council may conceivably err, and which are within the court’s specific expertise to assess. These include, for example, the proper approach to mitigation and the question of causality between circumstances of personal hardship and professional misconduct”.*

71. Applying this dictum, therefore, when it comes to assessing the second part of the appellant’s case concerning the suggested failure of the Council to give sufficient weight to the mitigating factors, it seems to me that a lower level of curial deference will be permissible. Of course, this does not mean that the court should approach the issue as if it were a criminal case; regulatory cases occupy their own space in the legal arena. As the VCI Guidelines make clear, mitigating factors carry less weight in Fitness to Practice proceedings than in criminal proceedings because the primary purpose of sanction is to protect the public and the standing of the profession, rather than to be punitive. In *Walker v. The Royal College of Veterinary Surgeons* [2007] UKPC 64, 2007 WL 3389531, Lord Mance said that, while in principle mitigation has less effect in a disciplinary jurisdiction than in ordinary sentencing,

caselaw nonetheless shows that disciplinary committees give significant weight to mitigation in comparable situations.

72. In *Walker*, the Privy Council set aside a decision to cancel the appellant's registration. The facts are of course completely different and therefore the case is of only limited assistance as a comparator. Nonetheless, it is of note that the principal basis upon which the Privy Council reduced the sanction was the failure of the Royal College of Veterinary Surgeons to accord sufficient weight to the mitigating factors present in that case. Lord Mance stated the following at para. 27:

"The relevant decisions were taken very quickly without full reflection, in circumstances where he had already given booster injections before realising that the horses should strictly start a new course and where he had wanted to be helpful and had had in mind the risk of reaction that exists with any vaccinations in not wishing to restart a fresh course which Jockey Club rules required but which had no medical need and some possible medical disbenefit. It is true that there are various themes, or possibly cross-currents, in this evidence which might have been, but were not, further explored in cross-examination; but the picture is not on any view one of the most serious offending. It is rather of relatively unthinking ante-dating on two isolated occasions, in the course of a long and otherwise unblemished and excellent career. There was no threat to animal or human health and Dr Walker made no financial gain. He was frank and remorseful throughout, and the likelihood of any recurrence of such conduct was and is remote".

69. As the quotation shows, *Walker* was an erasure appeal, in respect of which special considerations apply and none of which have relevance here. Nonetheless, the judgment highlights the importance of a fitness hearing not losing sight of the context and "tramlines" of a case, the presence of mitigating factors and the absence of aggravating factors. This is

reflected in the VCI's own Guidance where at p. 4 it states that "*the Council needs to balance any mitigating factors presented by the registrant against the aim of imposing the appropriate sanction*"; where the principles of Proportionality and Leniency are emphasised; and where the Guidelines say the sanction chosen should "*not go further than is necessary*" to achieve the objectives of protecting animals and the public interest, and maintaining public confidence in the veterinary profession.

73. During the hearing before me, both sides referenced the decision of Egan J. in *Lannon v. PSI* [2022] IEHC 80 as a useful comparator. In *Lannon*, a supervising pharmacist was suspended from practice for two months, and additional restrictions imposed for dispensing a high-tech drug to two children, in circumstances where the prescriptions for the drugs had long since expired. The invalid dispensing occurred over a period of 8 months. In upholding the two months suspension, Egan J. noted that the Professional Conduct Committee (PCC) was not persuaded that the applicant had insight into his behaviour and expressed concern with the approach he had adopted at the Inquiry, including trenchant attacks on third parties such as HSE personnel and Crumlin Hospital. In contrast with the present case, in *Lannon* the PCC report as adopted by the Council of the Pharmaceutical Society set out in full each of the applicant's submissions on mitigation, dealt fully with each of the mitigating factors and explained their relevance in the context of the ultimate sanction. Egan J. concluded that it could not be said there was a generalised approach to mitigation or a failure to engage with Mr. Lannon's submissions.

74. While comparisons between regulatory cases are not always helpful, particularly where they cross disciplinary regimes and statutory codes, it is instructive that Egan J. felt that any longer a period of suspension would have warranted court intervention in that case. This was in a situation of repeat failings over an 8 month period, as opposed to a once off event here; a very clear case of a "late journey to insight"; a failure by the applicant to even

turn up for part of the hearing before the PCC; and a finding that the applicant's poor professional performance was at, or very close to, the most serious end of the spectrum for a pharmacist. The other point of distinction with *Lannon* is that the present appellant was charged with more serious breaches which were ultimately dismissed, apologised fully from the outset for the failings that were found proven, and made a real and practical offer of amends to the owner long before disciplinary proceedings came into being.

75. In the present case, the appellant's failures did not relate to deficiencies in the practitioner's standard of care or clinical skill. The surgery performed on the dog was clinically appropriate and justifiable. Moreover, this was a once off event which appeared to have involved the relevant decisions being taken quickly without full reflection. While there was a lack of respect shown to the owner in not involving her in the process, this does appear to have involved thoughtlessness and oversight rather than any question of a planned strategy or impropriety.

76. As accepted by the FTPC, Alfie needed the surgery on his left leg. Therefore, he was ultimately caused no actual unnecessary harm. As well as expressing regret at his decision not to contact the owner, the appellant had backed this up with reasonable and appropriate gestures. When told by the owner that she was unhappy with Alfie's care, he offered her a full refund and offered to do the other leg for free. Very importantly, in light of the VCI's own remit, since admitting to the facts amounting to misconduct, Dr. McCartney, in his supplemental affidavit, outlined that his practice has taken a number of practical steps to implement safeguarding measures which would prevent or minimise the risk of a similar scenario occurring in the future.

77. In my view, there is merit in the appellant's complaint that all of this mitigation lead to no more than a one-month reduction in the recommended sanction of the FTPC, in circumstances where the Committee had incorrectly found that there was no mitigation. In the

circumstances, it is difficult to avoid the conclusion that the Committee's recommendation on sanction continued to operate as an implicit reference point for the ultimate decision on sanction. The somewhat sparse nature of the Veterinary Council's reasoning makes it difficult to properly scrutinise what mitigating and aggravating factors were weighed by the Council and how they were balanced. The reasons why the Council felt a two-month suspension was warranted are not spelt out. The Guidelines specifically require that reasons should be given for the specified period of suspension.

Conclusion

78. All told, having regard to the nature of the offending as seen in the overall context of the case, the fact that the offending fell no higher than the mid range, the principle of leniency, the absence of aggravating factors and the abundance of mitigating factors, I am inclined to the view that the decision to suspend the appellant's registration for two months was, in the particular circumstances of this case, unduly severe. I do not think it would be in the parties' interests to remit the matter to the Council for further deliberation. Instead, I think the justice of the case will be met by the court upholding the decision to impose a suspension order but halving the suspension period to a period of one month. I will allow the appeal to that limited extent.

79. I will hear the parties on the terms of the court's final order and on the issue of costs.

Mícheál P. O'Higgins.

Appearances:

For the appellant: James Doherty S.C. and Nathan Reilly B.L. instructed by Hayes Solicitors

For the respondent: Eileen Barrington S.C. and Caoimhe Daly B.L. instructed by Fieldfisher
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