THE HIGH COURT

Judgment on a Discovery Application in Judicial Review Proceedings

2022 No. 167 JR [2024] IEHC 124

BETWEEN:

RAS MEDICAL LTD T/A AURALIA COSMETIC CLINIC & AHMAD SALMAN

APPLICANTS

AND

THE MEDICAL COUNCIL & ORS

RESPONDENTS

Judgment of Ms. Justice Mary Rose Gearty delivered on the 29th of February, 2024

1. Introduction

1.1 The Applicants seek discovery from the Respondent (the "Council") in the course of judicial review proceedings. They seek to review decisions made during an investigation by a Committee of the Council on the grounds of bias and unfairness, but the issues raised do not justify making the orders sought.

1.2 In early August of 2021 a patient attended the Applicants' clinic, where a man described as Dr. Anous carried out a clinical examination. After the patient complained about him, it emerged that this man was not registered to practice as a doctor in Ireland. He had a certificate to practise medicine in California, but this was revoked in a decision which took effect on the 25th of August 2021.

1.3 The Council decided to refer the matter to the Preliminary Proceedings Committee ("the PPC"), the second named Respondent. The third Respondent is the Chairman of the PPC. The Applicants are the clinic and a director of that clinic who appear to have employed Maher Anous. They seek to quash various decisions of the PPC on the basis that their procedures were not fair.

1.4 The Applicants seek three categories of document from the Respondents:

I. All documentation, including all minutes of meetings, records of discussions, copies of policies, reports and records which are relevant to whether any consideration was given to and/or steps taken to ensure that the membership of the Medical Council and the PPC would not overlap in cases where the Medical Council itself was the complainant against a registered medical practitioner.

II. All documentation which records the proportion of Medical Council complaints, as opposed to others, recommended by the PPC to go on to be considered by the Fitness to Practice Committee and those that actually do so, including a breakdown as between "ordinary" and Medical Council complaints.

[This category is unclear as it was set out in pleadings and I have not edited it. As I understand it, the request is intended to discover material relevant to the proportion of complaints initiated by the Council, as distinct from those initiated by members of the public or others, which are referred by the PPC to the FPC and are then considered by the FPC.]

III. All documentation, such as policies, circulars, records, in respect of the manner in which a complaint that has been made against a medical practitioners should be communicated to them.

1.5 The Applicants claim that the documents sought are relevant and necessary for the hearing of the case as their concern is that there is a lack of fair procedures in the composition of the PPC, which comprises members of the Council. Three members of the PPC who later considered the matter had also sat on the Council during the meeting at which the minutes record a decision to refer a complaint about the second named Applicant to the PPC. It is submitted that this means that the Council is the complainant and also has a role in the investigation of the complaint by the PPC. The argument is based on the principle *nemo iudex in causa sua*; one should not be a judge in one's own cause.

1.6 The second concern is related to this overlap in membership. The Applicants seek statistical data to support their argument that there is institutional or systemic bias at play in the work of the PPC and the Council. They contend that the data they seek will show whether complaints generated by the Council are more likely to be referred to the FPC than complaints which come in from members of the public. In other words, such statistics may show that the PPC tends to lend more weight to decisions of the Council in respect of complaints.

1.7 The third concern raised is in relation to the lack of a formal, written complaint, clearly identifiable as such, spelling out the substance of the complaint and identifying the relevant statute or guideline that was breached.

2. Discovery in Judicial Review Proceedings

2.1 The law is well settled in this regard and the only dispute is as to its effect on the facts of this case. This ruling deals with the discovery application, not the substantive matter. The onus is on the Applicants to show that what they seek is both relevant to the issues in the case and necessary to enable them to make their case or to answer the case against them, under the *Peruvian Guano* principles. The Applicant must show that the discovery is probably relevant and necessary. The discovery must be proportionate, a qualification described by Clarke C.J. in *Tobin v. Minister for Defence* [2020] I.R. 211 as a refinement of the principle of necessity. Examples of disproportionate discovery, suggested in *Tobin,* were cases where the potential cost of discovery is very high, cases where there may be equally effective means of discovering the truth and cases where the relevance of the discovery will not be obvious until the trial but the order would involve the immediate disclosure of highly confidential material.

2.2 Discovery in the context of judicial review was discussed by Holland J. in *Marshall v. Electricity Supply Board* [2023] IEHC 173. Holland J. reviewed the authorities and confirmed that discovery is usually granted if it is relevant to facts in issue between the parties but that disputes of fact are rare in judicial review cases, which usually turn on issues of law. If the issue is one of law, purely, the resolution of a dispute of fact is of little or no relevance.

2.3 This Court must consider the pleadings to decide if the documents sought; bear on a matter of fact that is in issue, are probably relevant and necessary, and are

proportionate in terms of the scale of what is sought. Unless the discovery sought is speculative, the application is taken at its height and the applicant's case treated as the true position, even if the respondents' case is more credible. If an application is based on an assertion, a court may require a factual basis for the claim to avoid authorising a fishing expedition, in which an applicant seeks documents to back a speculative claim.

2.4 I will deal with the categories of discovery in chronological order: complaint, overlap of members in the PPC, and alleged systemic bias in the process.

3. <u>The Form of the Complaint</u>

3.1 The Council wrote to the second named Applicant on the 19th October, 2021 sending linked correspondence in a Sharefile folder. The correspondence included documents and a portion of the minutes from a meeting of the Council on 19th August, 2021. The minutes were redacted and the Respondents have confirmed that the minutes of any of the Council's meetings, insofar as they refer to either of these Applicants, have been disclosed to them.

3.2 The minutes show that the primary concern of the Council was Mr. Anous. The decision on 19th August, insofar as it concerns the Applicants, reads: "*Council also decided to refer the matter relating to Dr. Ahmed Ramzi Salman, Director of the Aurelia Clinic, to the Preliminary Proceedings Committee pursuant to section 57 of the Act, for allegedly engaging Dr. Anous whilst Dr. Anous was unregistered*."

3.3 In the accompanying letter, a case officer wrote to the second named Respondent saying "*the Medical Council has decided to make a complaint about you*

to the Preliminary Proceedings Committee". The documents attached in the Sharefile included the minute, quoted above, and a detailed description of the powers and functions of the Council, the PPC and the Case Officers. This minute, accompanying letter and documents, is the communication said to constitute a complaint under s.57 of the Medical Practitioners Act 2007.

3.4 The second named Applicant replied to this correspondence and denied that he had knowingly employed a doctor who was not registered. He attached what he described as an independent report into the circumstances which, he said in his letter, he had immediately directed. He also attached the relevant employment contract of Maher Anous in his reply to the Respondents.

3.5 It is argued that the Applicants are entitled to discovery of the Council's policy as to complaints and the form in which complaints are usually received. The Respondents are asked to identify the subsection of the Medical Practitioners Act 2007, or the specific guideline, the Applicant is said to have breached.

3.6 The Respondents argue that the factual basis of this complaint is spelled out and, even if it is not apparent to the Court, it was to the second named Applicant who replied without seeking clarification as to what the letter was about or what constituted the precise legal basis for the decision.

3.7 It seems to me that if the Respondent is required to identify the relevant sub paragraph of s.57(1), that is a matter for legal argument. Whether or not the Respondents do likewise in other cases is immaterial; they may always do exactly as they have done in this case leading to the result that they are always

wrong, or always right, to do so. Or they may approach other cases differently. A comparative exercise is probably not relevant or necessary to resolve the question as to whether this approach was fair to these Applicants. Moreover, the Respondents have not pleaded that they always process complaints in this way and the issue of their general practice does not arise, directly, in this case.

3.8 The hearing will proceed based on the terms of this correspondence and this is not a process which requires, or would benefit from, a comparative approach. The consequences of finding that this discovery documentation is necessary to resolve this case, if applied in other cases, would pitch the judicial review list into a quagmire of discovery requests so that litigants could endlessly delay a case in efforts to obtain material whereby they might compare their case with those of others affected by decisions made by the same respondent bodies.

3.9 The Council stands over the fact that a complaint was made, the Applicants argue that it was not. Examining complaints made by the Council in different circumstances will not shed light on this issue: either the material sent constituted fair notice of a complaint under s.57 or it did not.

4. <u>The Overlap</u>

4.1 The Applicants seek documentation relevant to whether consideration was given to overlaps between members of the Council and of the PPC where the Council itself was the complainant. The Respondent argues, primarily, that the

role of the PPC is a limited one, not giving rise to the level of fair procedures asserted by the Applicants. However, taking the Applicants' case at its height solely for the purposes of the discovery application, this Court assumes there is a requirement that the procedures be fair, and that this extends to providing that those who investigate complaints received from the Council should be independent of the complainant Council, insofar as that is possible.

4.2 The Respondents submit, if this level of procedural fairness is applicable, that the discovery sought is not relevant or necessary in circumstances where two deponents address the issue fully in that they provide the numbers on both bodies and the volume of work undertaken by them. The Respondents have not put the matter of their previous consideration of the overlap in issue, directly. The pleadings are silent on the question of whether the Respondents ever considered the matter, and their deponents offer data which, they say, answer the point, showing how difficult it would be to eliminate the overlap.

4.3 Notwithstanding this reply, the Respondents have also offered to make discovery of Council minutes insofar as they may refer to consideration of the issue of an overlap of members but limited to 5 years leading to 2021. In oral submissions, they accepted that minutes from 2008 to 2010, and 2020 and 2021, inclusive, would not be unduly burdensome, but the Applicants require more extensive discovery than that offered, pointing to the role of staff this respect. As Counsel asked: *if the Council deals with 80 complaints per meeting, consideration of which must be perfunctory, could they have the capacity to consider composition?*

4.4 The Applicants argue that the Respondents should have arranged a differently constituted PPC to consider how the matter referred to them by the Council should be investigated and whether it should go on to the FPC. The matter, as set out in paragraph 22 of the Statement of Grounds is phrased as follows:

> *"From the minutes enclosed in this correspondence, it is evident that there were at least 6 people on the PPC Committee who are also recorded as being on the Medical Council which made the alleged complaint against the second named Applicant at its meeting on the 19th of August 2021… it is unacceptable in principle and in practice that two* of those who attended the meeting of the Medical Council which made the complaint should sit on the statutory body to which the complaint was made and purport to take steps in that capacity with statutory consequences."* [* It is accepted that the correct number is three].

4.5 The Respondents have not only pleaded statutory necessity, two deponents for the Respondent aver that it is either "*well nigh impossible*" to make those arrangements or that it would be "*unworkable*" to ensure that members of the Council who refer complaints to the PPC do not sit, subsequently, on the PPC which considers those specific complaints. The Respondents submit that they have addressed this issue sufficiently in their affidavits.

4.6 In order for this discovery claim to succeed, the Applicants must show that the information already provided is insufficient to allow them to make their case. The Applicants rely on *Tobin* to argue that if the Respondents resist discovery on the basis of proportionality, it is for the Respondents to make that case.

Recall, the disclosure sought comprises all material relevant to consideration about addressing the overlap. It may be that there were no such discussions but that has not been put in dispute; as noted, the Respondents do not raise it. They reply that the material already available to the Applicants is sufficient to address the issue of whether it is workable or practicable to avoid this overlap.

4.7 The material from the affidavits can be summarised as follows: The Medical Practitioners Act of 2007 requires that one third of the members of the PPC must be members of the Council. There is no mandated quorum for the PPC, but total number of members of the PPC, who were also members of the Council, in 2021 was six, in a Council of sixteen members.

4.8 The PPC usually meets 11 times a year, in every month except August. There are usually 10 to 12 members of the PPC present. One third of those present at meetings must, under the Act, be Council members. The Council and the PPC are both made up of medical practitioners, who are in the majority, and others.

4.9 The PPC opened over 200 complaints each year in 2020 and 2021. In 2019, the last year before the Covid pandemic, the PPC opened over 400 complaints. Over those three years, on average, over 90 complaints were considered per meeting in 2019, over 80 complaints per meeting in 2020 and in 2021, the year with which we are concerned, the average was 68 complaints per meeting.

4.10 In 2021, the average number of complaints referred by the Council to the PPC at each meeting was 10, or 12.8%, of the average number of 68 complaints before the PPC at meetings in 2021. The total number of complaints referred to

the FPC in the year 2021 was 40, and this is 16.2% of the total number of complaints considered that year by the PPC. There is no information about what percentage of these complaints originated with the Council itself.

4.11 The Respondents noted that a group of different specialities must be represented on the PPC in order to deal with the range of complaints received in different areas of practice. While the Applicants argue that no such speciality could be relevant to this claim which appears to relate to registration rather than to a medical issue requiring knowledge of a speciality, that appears to me to be immaterial as the PPC does not necessarily know from one meeting to the next what members might be required in the next month's set of complaints. It is not argued, nor could it be suggested as a sensible proposal, that there be a separate meeting per complaint, depending on its substance.

4.12 The total number of members of the PPC at the relevant time was 16, though it appears they were never all present at any single meeting as the usual number of members present, according to the affidavit evidence, was 10 to 12 members. Six of the members of the PPC are also members of the Council due to the statutory requirement referred to. The Applicants argue that three of the six members who did *not* attend the Council meeting at which the decision was made to refer this case to the PPC should have been selected to attend the PPC meeting of the 17th of November so that the facts of the case were new to every member there and there would be no possible question of pre-judgment in

considering the case. Papers are circulated in advance, including a case plan prepared by full-time staff in the Council's Professional Standards Department.

4.13 The Respondents are obliged to consider complaints in a timely manner. s.59 of the 2007 Act requires the PPC to consider whether there is sufficient cause to warrant further action "as soon as practicable".

4.14 Where there are six members of the PPC who can fulfil that statutory function of sitting also on the Council, the Applicants' proposal would mean that if two or three members of these six people are sitting on the Council when it refers matters (and the evidence is that the average number of referrals in 2021 was 10, every month, of the average 68 complaints considered, including those from other sources) the other three or four of the six must then sit on the PPC which deals with complaints emanating from that Council meeting. The Respondents also argue that the simple step of recusal would remedy this issue.

4.15 These matters – recusal or rearranging the roster - are matters that can be argued on the basis of the information provided by the Respondents. Whether or not the overlap was considered, discussions were recorded or even if a recusal proposal was formally rejected by the Respondents is not necessary to decide the issue of whether it could have been avoided, which can be fully explored at the trial using the information already provided. Whether the Respondents considered this overlap in a formal way is not an issue that requires proof in the case, nor does it help the Applicants to prove their case other than in the most tenuous way. Either the way meetings are planned could

be managed so as to avoid an overlap of members, even considering the overlap required by Statute, or that is impracticable or unworkable.

4.16 What the Respondents may have considered or recorded in this regard is of little relevance considering they have not put their own history of dealing with the overlap in issue. A judge will not need to consider what the Respondent has said, done or recorded in this regard in order to decide if it is practicable to conduct its business as is suggested by the Applicants. It does not appear to me, as a matter of logic, necessary to consider what attempts were made to avoid this overlap in order to determine if it was possible to do so.

4.17 Further, the issue does not justify an examination of the documentation held by the Respondents such as that proposed in the category of discovery sought, which is extremely broad. The material requested would comprise a search through records of the Respondent bodies, including minutes, reports and communications to, from and between full-time employees and various board members, past and present, over a period of 13 years.

4.18 The Applicants have the actual numbers relevant to 2021: the number of meetings, the relevant membership of both the Council and the PPC and the average number of complaints made per year and per meeting. They also have the relevant numbers from the previous two years. This material, together with the details of their own case, can be interrogated and used by the Applicants to assess the volume of business before the PPC, to consider time limits, to cross-examine the deponents if required, and to determine the practicality of a

proposal that there be no overlap in membership of the two bodies for any class of complaints and, by extrapolation, in the Applicants' case. That is the relevant material and not the collateral question of whether any previous member of the Council, the PPC or and of the Council staff ever addressed the issue in writing such that it might be discovered if one was to examine all records of the Respondent bodies and its various members and employees.

4.19 Insofar as *Tobin* confirms that the burden is on a respondent who asserts that material is not necessary, the Respondents have met that burden. The previous discussions of the issue, if any, are of minimal relevance. Records of any such consideration of the issue are unnecessary in light of the material already available to the Applicants and the extensive burden that discovery of staff and Council communications across 13 years would impose.

4.20 Given that finding, the material offered to the Applicants in this regard is sufficient, in my view, and can be confined to minutes of the Council from its inception in July of 2008 until the end of 2009, for 2020 and from January until November of 2021, insofar as these consider or refer to the issue of any overlap between the members of the Council and the members of the PPC.

4.21 If the composition of the various committees was considered, this is likely to appear in minutes of the Council's meetings. It is a matter that is unlikely to be decided by the staff without any reference to the Council itself. If it was referred to in any Council meetings, that reference should be in the minutes. It is hard to disagree with the submission that the consideration of the

various complaints must be perfunctory, as Counsel for the Applicants put it, at Council level due to the volume of complaints received, but this does not inform us as to whether consideration was given to the composition of each committee, particularly at the early stages of the Council's development.

4.22 As already noted, the issue of prior consideration of a potential overlap is far less relevant than the facts which might inform whether a practical solution was possible, given the actual number of Board and Committee members involved in each body, the fact that the majority of the PPC are medical practitioners and not members of the full-time staff, and the number of complaints considered by each body, at each meeting, every year. This decision recognises that the Respondents offered to voluntarily discover 5 years of minutes. This material is tangentially relevant and, while not strictly necessary, at least if limited to the terms offered it is a proportionate burden.

4.23 It is not an answer to a claim that discovery is unnecessary or disproportionate to say that if it is relevant, it must be necessary. A fact that is logically relevant might be only tenuously so, as this appears to be on the facts as pleaded. In logic, many facts can be marginally relevant in the sense that they might have a slight bearing on the matters at issue between two parties and it is always arguable that many other facts are relevant. Numerous facts might assist in assessing credibility, for instance. No such peripheral facts should be the focus of a discovery application in judicial review, only those facts which are directly relevant to a material fact in issue between the parties,

taking the applicant's case at its height. That appears to me to be the effect of the law governing discovery in the context of judicial review.

4.24 Finally, there are sections, examined in more detail below, which may inform the trial of the substantive hearing. Under ss. 61 and 63 of the 2007 Act, there are two ways in which a matter can be referred to the FPC: The PPC can refer a case to the FPC or the Council can direct the PPC to refer a matter to the FPC. This latter direction has not, or not yet, been made in the instant case and was not mentioned in submissions to me, but the sections might inform future consideration as to why an overlap might or might not be problematic, if the Council can, as these sections appear to suggest, overrule the PPC in any event.

5. <u>Systemic or Institutional Bias?</u>

5.1 This is the category of discovery in which the Applicants seek to substantiate an allegation of objective bias on the part of the Respondents. Thus phrased, the category is apparently speculative in that there is no evidential basis on which the Applicants make the assertion, but they submit that there is objective bias on the part of the PPC due to the overlap in membership with the Council. The logic, as expressed in submissions, is this: if a member of the Council is one of those making a complaint to the PPC, then the same member of the Council sits on the PPC who considers and investigates that complaint, she is more likely to refer the complaint on to the FPC in due course rather than consider it on its merits. As a matter of logic, this may not be a strong argument given the

volume of work done by each body but I will take the Applicant's case, as to the procedural fairness required from the Council and the PPC, at its height.

5.2 The only line in the Statement of Grounds which refers to this reads as follows:

> *"The fact that two of these Medical Council members attended the Preliminary Proceedings Committee meeting of 17 November 2021 in breach of the requirements and principles of natural justice and arising from this decision to continue to issue the Statutory Notices issued pursuant to the Orders is unreasonable in law and objectively biased."*

5.3 This argument is based firmly on the facts of this case, the membership of the PPC as it considered this case and the decision to continue Statutory Notices. What is sought relates to decisions to refer a matter to the FPC, not decisions to issue statutory notices. It is very difficult to see any direct relevance in the category of discovery sought in circumstances where there has been no decision to refer this case to the FPC.

5.4 As the Respondents point out, this matter has not been referred to the FPC, it remains before the PPC at the investigative stage only. They have already averred to the breakdown in the number of complaints made by the Council to the PPC (about 10% of the total number considered by the PPC). They have also provided the proportion of the total which go on to be considered by the FPC, which is 40% of those received by the PPC. There is no evidence addressing whether the 10% referred to the PPC by the Council go on, every one of them, to be considered by the FPC. If this is the case, it could theoretically be argued

that the PPC is biased in that it tends to support complaints referred to it by the Council but that has not been pleaded and is a speculative argument.

5.5 If the PPC does tend to refer cases to the FPC in greater numbers when they originate with the Council, this could be a result of the issue raised by Counsel for the Respondents but not referred to in any affidavit, namely, that complaints received from the public may include frivolous or vexatious complaints but complaints from the Council are rarely in that category. This is not a matter about which I have any evidence nor is it a matter in issue given what is pleaded. I have considered the Applicants' case at its height and looked at the discovery that has been offered in this regard.

5.6 The Respondents, notwithstanding their primary case that this is not relevant to the matters pleaded, have offered to give the following information to the Applicants: the proportion of complaints initiated by the Medical Council that are referred to the Fitness to Practice Committee and the proportion of complaints made by other persons which are referred to the Fitness to Practice Committee. Even taking the case at its height, if a trial judge decides that the Applicants' case includes a claim of systemic objective bias against the PPC, this offer means that the wider discovery requested is not necessary.

5.7 The information offered meets the case made by the Applicants. They have argued that it does not include those complaints made by the Council which are recommended by the PPC to go to the FPC, in other words, it does not specifically interrogate the PPC data. This logic was hard to follow initially, as

it was not clear what complaint can travel to the FPC without going through the PPC. I was told that ss.65 to 68 require, as a matter of law, that PPC recommendations must be considered by FPC. In fact, s.63(b) appears to render this discovery meaningless if sought to uphold a finding of bias. This reads: "*Where— (a) the Preliminary Proceedings Committee is of the opinion that there is a prima facie case to warrant further action being taken in relation to a complaint, or (b) the Council directs under section 61 (2)(e) that further action be taken under this section in relation to a complaint, the Preliminary Proceedings Committee shall refer the complaint to the Fitness to Practise Committee*."

5.8 Section 61 provides that the Council, even if the PPC are of the opinion that there is not sufficient cause to warrant further action, can direct that further action be taken. In other words, no matter what the PPC recommends, the Council can direct that the PPC refer the matter to the FPC. That is the answer to a request for discovery on this basis, it seems to me, as the Council can overrule the PPC if it considers that further action is necessary. The 2007 Act, which is not challenged, provides for a mechanism whereby the Council can direct that a matter be referred to the FPC.

6. **Costs**

6.1 My provisional view is that costs of this application follow the event and will be awarded to the Respondents. If a hearing is required, the parties should notify the Registrar on or before 4pm on the 7th of March.