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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | ***Delivered:*** **12/03/2008**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY SUSAN COLTON McALISTER FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an application for leave to apply for judicial review of three decisions of the Conduct and Competence Committee of the Nursing and Midwifery Council made on 28 February 2008. In the first place the Committee refused a stay of disciplinary proceedings against the applicant on an abuse of process application based on delay. Secondly, the Committee refused to adjourn the substantive hearing which was scheduled to take place on 10 March and in the event commenced on 11 March. Thirdly, the Committee refused to recuse itself from the substantive hearing, having heard and refused the application to stay proceedings on 28 February.

[2] The background to the matter, as set out in the applicant's affidavit, indicates that she is a registered nurse and she was employed for a number of years by Care Circle Ltd. She worked on night duty, latterly in Kingsway Private Nursing Home in Dunmurry. In August 2005 she was informed by her employer that a number of anonymous complaints had been made against her, mainly by care assistants. As a result she resigned from her employment on 18 August 2005. By letter from the Council on 28 November 2005 the applicant was advised that her employer had referred the complaints to the Council's Investigating Committee. On 3 January 2006 the employer referred the matter to the Department of Health, Social Services and Public Safety under the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003. On 3 March 2006 the Department informed the applicant that she had been included, provisionally, on the Disqualification from Working with Vulnerable Adults List.

[3] The applicant's solicitors made detailed submissions to the Investigating Committee of the Council and to the Department during the early part of 2006. On 10 October 2006 the Council informed the applicant that the Investigating Committee had referred her case to the Conduct and Competence Committee on the basis that there was a prima facie case established against the applicant. There was further correspondence between the applicant, the Council and the Department and in May 2007 the applicant was included on the Disqualification from Working with

Children List. Thus the applicant was no longer capable of being employed as a nurse. Later she was forced to sell her home and she is now a tenant in her former home and in receipt of Income Support. The applicant therefore contends that an expeditious resolution of all proceedings against her is of paramount importance.

[4] The Council arranged a preliminary meeting of the Committee on 20 April 2007 in the Stormont Hotel, Belfast. By reason of confusion about the arrangements the meeting did not take place, although the applicant and her solicitor and Counsel attended at that time and there was no appearance by any representatives of the Council. There followed some correspondence about the abortive meeting and on 13 June 2007 the Council notified the applicant of a further preliminary meeting of the Committee which was to be held in the Wellington Park Hotel on 28 June 2007. That meeting did take place and a number of directions were issued for the forthcoming hearing. It was agreed that the hearing would take place at the end of November 2007. The administrative arrangements were not settled with the result that the hearing was put back into December and then into January and February 2008 and finally into March 2008.

[5] In the meantime, the applicant wrote to the Committee indicating the desire to make an application for abuse of process because of the delay that had occurred in the proceedings and ultimately it was arranged that the hearing of that application would take place on 25 February 2008. The Committee dismissed the application for abuse of process in a decision delivered on 28 February 2008.

[6] The transcript of 28 February indicates that the Committee began by seeking to identify the start date of the relevant period to be considered and they concluded that the date was 10 October 2006 when the applicant was notified of the charges that had been preferred. The Committee considered that the sixteen months that elapsed between October 2006 and February 2008 did not amount to unreasonable delay. In so deciding the Committee considered the case was not especially complex, took into account the effect on the applicant, the time required to investigate the allegations, the necessary administrative arrangements that had to be made and the absence of any evidence that suggested there was any period of undue activity by the Committee.

[7] Having reached the decision that there was no unreasonable delay, the Committee considered, in the alternative, whether or not the earlier start date for the relevant period might be 28 November 2005, being the date on which the Council first notified the applicant. The Committee decided that that period, which was two years and three months, did not constitute a period of unreasonable delay either.

[8] The Committee considered what would have been the position had they found there was unreasonable delay for any period and asked what would have been the appropriate remedy for the applicant. The Committee considered whether a stay of proceedings would have been appropriate and decided that a stay would not have been an appropriate remedy. The Committee took into account that there

was no indication that the applicant was not able to call witnesses on her behalf and no evidence that the passage of time meant that the applicant could no longer participate in the proceedings or follow the proceedings. Medical evidence submitted on behalf of the applicant was considered and it was concluded that the contents would not make it unfair to proceed to a full hearing. Having considered all the circumstances the Committee did not accept that they were dealing with an exceptional case and that, regardless of which starting date was the correct date for considering the issue of delay, the applicant could still receive a fair hearing.

[9] The proceedings against the applicant are undertaken under the Nursing and Midwifery Order 2001. In Part V of the Order, which deals with fitness to practice, the process set out involves allegations being referred to the investigating bodies, investigations taking place and various Committees having to consider what steps should be taken. There are general time restraints imposed in the Order. Some measures have to be taken as soon as reasonably practicable, other measures have to be taken without delay and elsewhere steps have to be taken expeditiously. In particular, in Article 32(3), it is provided that each stage in the proceedings shall be dealt with expeditiously. It is said on behalf of the applicant that in the present case there has been a lack of expedition in proceeding against the applicant. There is more broadly a reasonable time requirement in relation to criminal and disciplinary proceedings arising under common law and potentially arising under the European Convention so that in proceedings where there is inordinate delay or an absence of expedition in the process this may give rise to an abuse of process such as may render the proceedings unfair or render it unfair to proceed against an applicant.

[10] In the present case, the proceedings involve two broad periods, the first being from November 2005, when the matter was first notified to the applicant by the Council, to October 2006, when the charges were first notified to the applicant, that is a period of eleven months during which the investigation was underway. There is a further period from October 2006 to February 2008, a period of sixteen months between the charges being preferred and the hearing taking place. There is a detailed chronology in the papers, which was before the Committee on the application for abuse of process and it sets out the steps that were taken from time to time from November 2005. Letters were exchanged between the employers, the Committee and the Department exchanging views in relation to the applicant's position and leading to the charges being preferred against her in October 2006. Further correspondence was exchanged up to 20 April 2007 when there was the unfortunate misunderstanding about the convening of the preliminary hearing. I do not propose to investigate the circumstances in which that occurred, but it resulted in a postponement of the matter to a later date in June 2007.

[11] At the hearing in June 2007 it was agreed that the matter would proceed to a substantive hearing in November 2007. That did not materialise and the hearing did not occur until March 2008. In the meantime, the applicant had been declared insolvent by the High Court on 19 November 2007. There was obviously a period of delay from April 2007 because of the confusion about the preliminary meeting. It

may be that had that meeting taken place it would have been possible to convene a substantive hearing date by the summer of 2007.

[12] All consideration of expedition and reasonable time has to be subject to reasonable administrative arrangements being put in place, the reasonable convenience of all parties, the reasonable arrangements for witnesses and parties and representatives and Committee members and administrative staff to attend and inevitably there are difficulties about finding suitable dates and venues for this to occur. I do not doubt that there was some difficulty in the early part of 2007 when the arrangements did not run as smoothly as they might have done and that seems to have led to a delay, possibly of some months, occurring during that period. Thereafter there were further difficulties in securing a date for the substantive hearing.

[13] I have been referred to a recent hearing in the High Court in London in Selvarajan v The General Medical Council [2008] EWHC 182 (Admin). This case involved a doctor who had appealed against a decision of the Panel of the General Medical Council that his name be erased from the Medical Register and it dealt with the issue of delay, not in terms of an abuse of process but in terms of whether or not the delay that had occurred might impact on the sanction that would otherwise be imposed upon him were he to be found guilty of the misconduct that was alleged. There had been a three-year period when the doctor had embarked on a dishonest course of conduct with a chemist where they were defrauding the Local Health Authority and splitting the proceeds. It was four years after the dishonest period had expired that the doctor was acquitted of a charge of conspiracy to defraud. Two years after his acquittal he was informed that the information would be referred to the GMC. Two years after that he was informed that he would face misconduct charges. Two years after that he admitted serious professional misconduct. There appears to have been a period of about ten years elapsing from the offending conduct to the conclusion of the process.

[14] The issue of delay was raised as a mitigating factor and the Panel was advised by its legal observer that delay was not relevant to sanction. The Court stated that there was a misdirection in the approach that the Panel took to mitigation. The delay was a matter impacting on mitigation and should have been taken into account. The Court stated that for the proceedings to take nearly four years, as it did from charge to penalty, as well as a further two years for final determination, was unacceptable and unreasonable. However, the headnote to the case digest states the conclusion of the Court as follows -

> "However much weight is given to the mitigation based on delay in the particular facts of the instant case, it cannot have the consequence of displacing the otherwise clearly appropriate penalty of erasure. The instant case was not one on the borderline of erasure and suspension where mitigation based on delay might well have been

> compelling as to the outcome. S's conduct totally undermined the trust and respect that should be accorded to medical professionals and demanded severe sanction to vindicate the standing of the profession in public esteem."

[15] In the present case it is necessary, first of all, to look at the appropriate commencement date for the period of delay. I believe the appropriate date is November 2005 when the applicant was informed of the complaints and there was the prospect of disciplinary action. This case required the Committee to undertake an overall assessment of any unreasonable delay or lack of expedition in proceeding with the matter from the commencement in November 2005 to the application in February 2008.The period in question is therefore the twenty-seven months that elapsed from November 2005 to February 2008, when the abuse of process application was heard. Further, it is necessary to look at the complexity of the case which, as the Committee has stated and the applicant agrees, is not complex. Further, it is necessary to look at the conduct of the Council and the Committee. They spent eleven months investigating the matter. They spent six months proceeding to a preliminary hearing. It is clear there were shortcomings in relation to the arrangements that were made for the preliminary hearing and those shortcomings must be attributed to the Council and the Committee as the organisers. It is clear that there was delay arising out of those shortcomings in that the proceedings were not progressed as might otherwise have been the case. It then proved difficult to complete the arrangements for the substantive hearing. It is further necessary to look at the conduct of the applicant and in this case there is no criticism of the applicant in relation to the period that has elapsed. It is necessary to consider the impact on the applicant of such delays as occurred. Medical evidence has been furnished and was considered by the Committee. There has been further impact of a financial character because the applicant has been without employment. She has been declared insolvent and has been in receipt of State benefit. She has also been put on the Department's exclusion list for vulnerable adults and children. It is necessary to consider the impact on the proceedings. It is not suggested that there are witnesses who are unavailable, evidence that cannot be provided or that the applicant could not attend the proceedings.

[16] I raised the issue with Mr O'Hara QC, on behalf of the applicant, as to the appropriateness of the application for leave to apply for judicial review, being a form of satellite litigation to the disciplinary proceedings against the applicant. Mr O'Hara responded that the application for judicial review is not of the character of those applications to the Court where the challenge is to interim orders that might be made in the course of disciplinary proceedings, but rather it is of itself a substantive application which would have the effect of concluding the disciplinary proceedings, were it to be successful. Therefore it is contended that it is appropriate that judicial review might lie in those circumstances. I accept this approach in the circumstances and do not propose to treat this application as being of the character of such satellite litigation as ought not to be permitted to interrupt disciplinary proceedings.

[17] The Committee's initial decision was to the effect that there was no unreasonable delay. The Committee did consider that the time began in October 2006, but in the alternative the Committee did consider the position if time had commenced in November 2005 and also concluded that in that event there was also no unreasonable delay. In any event the Committee found that if there had been unreasonable delay it would have concluded that a stay of proceedings would not have been the appropriate remedy. The Committee may yet take account of such delay as it may decide has occurred, if and when it is necessary to consider any penalty that might be imposed, in the event of a finding against the applicant on any of the charges.

[18] In looking at the ultimate decision that was made by the Committee I am satisfied that the Committee was correct to conclude that all the circumstances did not amount to an abuse of process. Time began in November 2005 and ran for twenty-seven months; there was a period of delay in 2007 occasioned by confusion in the administrative arrangements that were made for the initial preliminary hearing; as a result there were some months of hold-up in the proceedings. I am satisfied that neither such delay nor the overall arrangements in the proceedings during the period in question constitute such lack of expedition or unreasonable delay as would render the proceedings unfair or render it unfair to proceed against the applicant and amount to an abuse of process. I am satisfied, therefore, that there is not an arguable case in relation to the application for leave to apply for judicial review of the Committee's first decision in refusing the stay of proceedings for abuse of process on the basis of delay.

[19] The application in respect of the further two decisions also falls. The refusal to adjourn the hearing obviously follows from the decision that there was not an abuse of process and as I am upholding the first decision there is no basis on which to interfere with the progress of the substantive hearing. The Committee refused to recuse itself from the substantive hearing, having refused the stay application. I am satisfied that the Committee were entitled to refuse to stay the proceedings. Having heard that application I am satisfied that there are no grounds on which the Committee ought to have recused itself from hearing the substantive hearing.

[20] The result is that I am against the applicant in respect of the three decisions of which she complains. Accordingly, the application for leave to apply for judicial review is dismissed.