Neutral Citation No. [2010] NIQB 42 | *Ref:* **TRE7815**

Judgment: approved by the Court for handing down | *Delivered:* **26/03/2010**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

2008 No.131589

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BETWEEN:

SUSAN COLTON

APPELLANT

- AND -

THE NURSING AND MIDWIFERY COUNCIL

RESPONDENT

_____

No.2

_____

TREACY J

Introduction

[1] This No.2 judgment must be read with my first judgment in the case delivered on 26 February 2010 **[2010] NIQB 28** in which I had sought clarification from the appellant as to whether her non-attendance before the disciplinary panel was as a result of or despite the legal advice she received. Specifically at paras.33 and 35 of my judgment I stated as follows:

> **"[33] As far as the absence of the appellant is concerned it is clear that this was *elective*. It is self evident that had this election not been made the matters of which she complains would not have arisen. The appellant's legal representatives were aware at the time the letter of 7 March was sent that**

there was no listing of the case on Monday 10 March. I do not therefore understand why the Committee was told otherwise nor is it clear why the letter contemplates a leave hearing of two days "and onwards". At most any leave hearing, in respect of the issue being canvassed, was not likely to take more than a couple of hours. Moreover, such a leave hearing would not have required the presence of the appellant or of Junior Counsel who had been representing the appellant before the Committee. In fact, it was Senior Counsel, Mr John O'Hara QC, who moved the leave hearing on the morning of Tuesday 11 March 2008. The Court records indicate that the leave hearing lasted 40 minutes. Judgment was reserved until the following day, 12 March. There would have been no need for any Counsel, let alone both Senior and Junior, to be in attendance for the judgment. Therefore between 10 - 12 March (during which all the evidence was called) the appellant elected to be absent thereby denying herself the safeguards to which she is entitled.

35. It has not been suggested by anyone that the appellant's legal representatives *advised* the appellant to take the course of being absent. Indeed, had that been the case, *it would have been their duty to inform the Court* that that was the basis for the appellant's non-attendance. If (erroneous) legal advice had been the reason for her non-attendance it might well have a bearing, as a matter of overall fairness, on the Court's decision on this aspect of the appeal. Accordingly, it is vital for the Court to know whether the *election* was as a result of or despite the legal advice the appellant had received. There are transcript references which suggest the latter but I have a lurking doubt about the substantive reality from the appellant's point of view. This can only be clarified, as a matter of fairness, by the receipt of evidence from the appellant." [Emphasis added]

[2] At para.37 of the judgment the Court indicated that until the matters which were concerning the Court were clarified it would not be possible to definitively rule on Grounds 1 and 2[1].

[3] In the light of that judgment and pursuant to the Court's directions the appellant and Patrick Mallon, Senior Partner in Mallon & Mallon Solicitors (the firm on record for the appellant) both swore affidavits.

[4] The affidavits sworn on 4 March 2010 are confined to the events of 7 March 2008. So far as material the affidavit of the appellant states:

> **"3. I was told that an application was being made for an adjournment of the hearing and that judicial review was applied for at the High Court.**
>
> **4. As far as I remember I was told *I didn't need to attend on Monday or until the judicial review was completed.***

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[1] Grounds 1 and 2 were expressed in the following terms:

1. The Appellant contends that the [Conduct & Competence] Committee of the NMC acted in breach of … Article 6 and Article 1 of the First Protocol … when it found certain charges against her to be proven despite the fact that when it found such facts the aware;

(i) *Having received medical evidence* as to same, the Appellant was in extreme mental ill health and was *too unwell to participate in the proceedings*; and

(ii) That the Appellant was insolvent and did not have the financial means to engage legal representation to contest the charges against her [by way of cross-examination of the witnesses who gave evidence in support of the charges against her]; and

(iii) The Appellant sought a stay of the proceedings … until the outcome of her application for leave to bring a Judicial Review of the Committee's decision that there had not been an abuse of process in convening the Committee; and

(iv) That it proceeded to make findings of fact that certain charges against the Appellant were proved, despite the fact that that the Appellant and her legal representative were absent when such findings were made.

2. The Appellant contends that the Committee acted in breach of Article 6 and Article 1 of the First Protocol of the European Convention when it determined;

(v) Having received medical evidence adduced on 18 November 2008 that the Appellant was now well enough to engage in the proceedings, and having been informed that the Appellant had secured funding to contest the charges against her, denied the Appellant's applications;

(a) That it should set aside its primary findings of fact and recuse itself; and

(b) That it should remit the matter to a freshly-constituted Conduct & Competence Committee.

(vi) Having received medical evidence on 18 November 2008 that the Appellant was then well enough to engage in the proceedings, the Competence & Conduct Committee failed to give sufficient consideration to all the medical evidence in determining that the Appellant's case should not be referred to the Health Committee of the Nursing & Midwifery Council, pursuant to Rule 14 of the Nursing & Midwifery Council (Fitness to Practise) Rules Order of Council 2004.

> **5. I was in *very poor state mentally. I was in despair.*"**

[5] Patrick Mallon, in his affidavit averred:

> **"6. On Friday 7 March as a result of speaking with Counsel I wrote to NMC advising [sic] client would not and could not be present at the NMC hearing.**
>
> **7. In addition I also consulted with the client on the same day and was concerned to note that she was quite literally 'falling apart'. She was *tearful and expressed despair and alluded to possible self-harm!***
>
> **8. I counselled my client as best as I could and *quite probably* advised her, in all the circumstances, that she did *not* have to attend at either the NMC hearing or the judicial review proceedings at the High Court."**

[6] In my earlier judgment I rejected the case being made by the appellant in respect of Grounds 1 and 2 for the reasons set out in detail therein. Notwithstanding that rejection the judgment nonetheless left open a possible, alternative route by which relief might be obtained. As I explained at para.35 [see para.1 above] this was because of my lurking doubt as to the substantive reality.

[7] I am therefore very conscious that the scenario created by the Court's judgment could be exploited by tailoring affidavit evidence to try and permit the appellant to go through a door which the Court had itself unlocked if not opened.

[8] The fresh evidence in relation to the advice she was "quite probably" given is inconsistent with the case made by the appellant at every relevant stage of the proceedings – until *after* my judgment.

[9] As I pointed out in the earlier judgment the appellant's medical fitness had only ever been raised in the context of the abuse of process application – namely that the ongoing delay was affecting her health.

[10] It is now asserted that when she was seen on Friday 7 March that her medical condition had deteriorated so much that her solicitor advised her that she didn't have to attend.

[11] What I can't understand is why, if that was the case, the solicitor did not alert the panel by phone, fax or email as to her medical condition, obtain medical evidence of same and turn up on the Monday and ask for an adjournment based on that medical evidence. [This is to be contrasted with how they swung into action on 12 March – see below]. I have no doubt that had such an application been made, supported by appropriate medical evidence, the panel would in all probability have adjourned. *No explanation* has been furnished to the Court for the failure to take these straightforward steps. Another striking feature is that in the letter which was sent on 7 March there is *no reference* to her medical condition. The reason for this, Counsel informed the Court on instruction, was because Mr Mallon's description of the appellant related to a consultation which took place with her *after* the letter had been emailed and faxed. But as was pointed out in the earlier judgment the letter was emailed and faxed after 4.00pm on the Friday. One of these communications was after close of business. That means therefore that any consultation must have taken place very late on the Friday. If the consultation occurred that late it certainly explains the absence of any reference to her medical condition in the letter which was sent out on 7 March 2008. But it still does not explain why none of the other steps referred to above were taken. What is equally puzzling is why this information was never communicated to Counsel or indeed to the Court at any time until after the first judgment in this case had been delivered.

[12] The Court was also informed that the consultation was not short. Given the importance of the consultation [in relation to her medical condition and the important legal advice she received] I was confident that there would be an attendance note. The appellant waived privilege in respect of any such note, the Court rose for a short time while this matter was looked into and when the Court resumed it was informed that there was *no* attendance note. This consultation is therefore undocumented. Given the importance of the advice and the significance of the observations of Mr Mallon as to his client's medical condition this appears surprising. It is not only *undocumented* but it was not *disclosed* even to the appellant's own Counsel or the Court until *after* my earlier judgment was promulgated in February 2010. Given the protracted history of this case and at least three days of hearing it is incomprehensible that the appellant's health (and the consequent legal advice) during the late Friday 7 March consultation was never disclosed. *No explanation* has been furnished as to why these crucial matters were not previously disclosed.

[13] The evidence that the appellant was "quite probably" advised not to attend is, as I have already mentioned, inconsistent with the case previously advanced. This rather vague averment is inextricably linked to his claim about the appellant's medical condition. Since (1) there is no attendance note , (2) no explanation for the failure to disclose these matters to the panel, the appellant's own Counsel or the court and (3) the averment is inconsistent with contemporaneous documents (see below) the court is not persuaded that it would be appropriate to rely on the recent affidavits. I reach this conclusion notwithstanding that the respondent did not seek to cross-examine the deponents. Furthermore I fail to understand why her representatives did not swing into action in same manner as they had done on 12 March. I consider that if her medical condition was as alleged that:

- There would and ought to have been a record of the consultation and the solicitor's observations;

- These would have been communicated in some form or other to the panel at the time or certainly at the latest by Monday morning -

- This information would have been communicated to Counsel for the appellant at some point prior to or during the hearing of this case [given the nature of the points that were being advanced on behalf of the appellant in order to try and set aside the panel's ruling];

No explanation whatsoever has been furnished to the Court as to why these simple and obvious steps were not taken.

[14] The Court has the benefit of contemporaneous evidence that is materially inconsistent with the recent averments. For example the transcript records junior counsels submissions to the disciplinary panel on the 13th March in the following terms:

> **"… It was not as if we in a cavalier fashion decided, let us all troop off to the High Court and ignore these proceedings on Tuesday and yesterday.** ***Again and again*** **it was put to the Registrant the seriousness of not attending here, much less not challenging the prosecution witnesses. And again and again in tears she told me that she was not in a position to provide any instructions to us because she had exhausted our charity and our pro Bono reserve and that of her family.[**not because of her health] **Her family has been supporting her for the**

> **best part of two years and buying her food, so there was no other quarter from which funding for her legal defence could be found and Mr Millard says that we selected or opted not to attend, we had no instructions to attend and I can understand a frail Registrant's unwillingness to come around and appear in person even where there was *sufficient reserves of health* to do that because an unqualified lay defendant appears here in front of the skills and aptitudes of Mr Millard and his legal background and the Panel with the benefit of a Legal Assessor…"**

[15] If, as is recently claimed, the applicant was *advised* that she need not attend because of her medical condition the respondent has posed the following questions:

- **"Why did Mallon & Mallon allow Mr O'Brien to inadvertently mislead the Panel on 13 March 2008 when he clearly informed them of the advice (to contrary effect) given to Miss Colton?**

- **Why did Mallon & Mallon lodge a Notice of Appeal asserting that the reason for non-attendance was due to ill health and funding without revealing their advice to not attend?**

- **Why did Mallon & Mallon – and, indeed, the appellant who was present for the majority of the hearings – never communicate this advice to Senior Counsel?**

- **Why did Mallon & Mallon allow Senior Counsel to inadvertently mislead the court by not revealing this significant reason behind the appellant's non-attendance?**

- **Why did Mallon & Mallon fail in their professional duty by allowing their client to be subjected to personal criticism over her choice not to attend when, in fact, she was following their advice?**

- **Why did Mallon & Mallon fail in their professional duty to inform the Court of the basis for the appellant's non-attendance at any stage hitherto during these proceedings, especially during 3 days of submissions, and not until specifically directed?**

[16] I therefore accept that the proper course is for this Court to determine the appeal on the basis of the contemporary transcripts, correspondence and submissions that have been made. The affidavits which have now been furnished I regard as insufficiently reliable to justify a determination in favour of the appellant on Grounds 1 and 2. Accordingly, I am not prepared to act upon the *unsubstantiated*, *undocumented* and *previously undisclosed* averments of the appellant and her solicitor.

[17] This conclusion is reached against the background of previous assertions by the appellant's representatives which have proved to be inaccurate. For example, in earlier affidavits sworn by Messrs Mallon and O'Brien they have claimed that they had not known that the hearing before the panel had commenced on 11 March 2008. However these averments were inconsistent with para [1] of Weatherup J's judgment **[2008] NIQB 36** in which he refers to the substantive hearing having "commenced on 11 March". The only source of this information could have been the appellant's legal representatives. In light of the contradiction between the averment of Messrs Mallon and O'Brien and para [1] of the judgment of the Court, the audio tapes of the hearing before Weatherup J were listened to and they showed conclusively that the affidavits sworn by Messrs Mallon and O'Brien were incorrect in their claims that they had not known that the hearing before the panel had commenced on 11 March. After Weatherup J had indicated on 11 March that he would give judgment on the leave application the following morning at 10.00am Senior Counsel for the appellant asked for interim relief until the following morning. This request would have been completely unnecessary if they had not known that the hearing before the panel had commenced on 11 March.