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Judgment: approved by the Court for handing down | *Delivered:* **29/08/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN

PHILIP JOHN LAMEY

v

BELFAST HEALTH AND SOCIAL CARE TRUST

_____

DEENEY J

Application

[1] This judgment relates to an interlocutory injunction hearing which took place yesterday 28 August 2013. The plaintiff, Philip John Lamey, currently holds a joint appointment as a Professor at Queen's University, Belfast, and as the Senior Oral Medicine Consultant in the regional specialist dental hospital employed by the defendant to the action and the respondent to this application, the Belfast Health and Social Care Trust.

[2] On 25 July 2013 he issued a Writ of Summons. The claim therein was for the following:

(i) A declaration that the holding of a meeting to determine the termination of the plaintiff's employment with it for the reasons expressed in the defendant's letter to the plaintiff of 3 July 2013 and in advance of the conclusion of the Professional Conduct Committee hearing currently ongoing before the General Dental Council amounts to a breach of contract on the part of the defendant.

(ii) An injunction restraining the defendant from holding a meeting to determine the termination of the plaintiff's employment with it in advance of the receipt of the conclusions of the Professional Conduct Committee currently before the Dental Council.

(iii) Further, or other relief.

(iv) Costs.

[3] On the same date Professor Lamey issued a Notice of Motion with a draft Order seeking an injunction in somewhat wider terms than those set out in the Writ of Summons and the matter was argued before me in those wider terms without objection from the respondent. Indeed, an important part of the argument on behalf of the plaintiff at the hearing yesterday was that the course to be adopted currently by the defendant and respondent of holding a meeting which would consider the termination of his employment was in breach of a document entitled "Maintaining high professional standards in the modern HPSS" and subtitled "A framework for the handling of concerns about doctors and dentists in the HPSS" and I shall refer to it as "the framework document". On foot of this initial application a meeting which had indeed been scheduled for 29 July was postponed to allow this vacation hearing of the interlocutory injunction on 28 August.

[4] I have had the benefit of helpful written and oral submissions from Mr Jonathan Park, counsel for the plaintiff and Mr Conor Hamill, counsel for the Trust. I have taken into account all their submissions even if not all are expressly referred to in this judgment. The factual background to the matter may be summarised as follows. In the year 2010 it apparently emerged that there had been deficiencies in the plaintiff's diagnoses as a consultant of some of his patients, namely some with oral tumours. Furthermore, it appears that in some cases even when diagnosed with tumours patients were not referred or not referred in a timely fashion for surgery by Professor Lamey. This led to his exclusion from work, a variant of suspension, initially on an informal basis, in December 2010. This exclusion from work was formalised in April 2011. For two years and eight months, therefore, he has been paid in full as a consultant joint professor but has been able to devote himself full-time to his private practice. Indeed, he stated on 8 May 2013 at a meeting with a Ms McKernan of the Trust that he had "a full private clinic".

[5] Following these matters the Trust did not commence the "Procedure for dealing with issues of clinic performance" set out in Section 4 of the framework document. I think it is appropriate that I quote from this framework document which as I said forms an important part of the plaintiff's case. Mr Park of counsel referred the court to the introduction and paragraph 1 reads as follows:

> "This document introduces the new framework for handling concerns about the conduct, clinical performance and health of medical and dental employees. It covers action to be taken when a concern first arises about a doctor or dentist, and any subsequent action when deciding whether there

> needs to be any restriction or suspension placed on a doctor's or dentist's practice."

[6] It goes on to consider the matter in detail. The words I have just quoted might lead one to think that it was confined to issues of restriction or suspension. However, if one turns to Section 4 of the document, the section entitled "Procedures for dealing with issues of clinical performance" one finds detailed procedures are set out, at least one of which I will have to refer to later but one finds at page 30 of the document, that is Section 4 paragraph 16, that the panel appointed under the procedure may either issue a written or final warning but it may also "decide on termination of contract".

[7] Mr Park in his submissions also draws attention to the fact if that procedure is followed there is indeed a hearing with a panel and the panel is different from the panel currently established for the meeting which the Trust wishes to hold subject to any order of the court. He points out in particular that there should be an appropriate experienced dental practitioner who is not employed by the Trust and he submits that the meeting currently to be called does not conform with that procedure. Still dealing with this matter historically so to speak, that procedure was not adopted and although there is a reference to it in one of the letters it is not actually being adopted by the Trust now. The Trust accepts that this document, which closely reflects a similar document in England and Wales, is part of the terms of employment of the plaintiff but it says it is not obliged to follow that course. In practice the course chosen by the Trust was to await the outcome of disciplinary hearings before the professors Professional Bodies. He is unusually both a doctor and a dentist and, no doubt unhappily for him in recent times, is therefore subject to the disciplinary proceedings of both the General Medical Council and the General Dental Council. The General Dental Council did commence an investigation of this matter and it determined that it would hold public hearings into the plaintiff's conduct which commenced in the spring of this year and apparently ran for some three weeks. These were reported in the media. It is quite right for the media to report the hearing, subject to any lawful instruction not to do so and there is no criticism of the press for doing so. But the material that was reported in the press was highly critical of the plaintiff in this action.

[8] On 15 April 2013 Mr Brian Barry, Director of Specialist Hospitals and Women's Health with the respondent Trust wrote to the professor at his home address in the following terms:

> "Dear Professor Lamey
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> I write to you in my capacity as the Director for Special hospitals and Women's Health, which embraces responsibility for the dentistry hospital.

> I note that you continue to be excluded from the Trust and University, and that arrangements are being progressed for a performance hearing within the framework of maintaining high professional standards in the modern HPSS. I write to you at this time, separate from that ongoing process. I have been very aware of the recent media coverage regarding your attendance at the General Dental Council Professional Conduct Committee. I am very concerned that the possible impact that this media coverage may have had on the confidence in you, of those patients who are currently attending or may in the future need to attend the dental hospital.
>
> In order that my concerns can be investigated further I have asked Ms Therese McKernan, Associate Consultant, HSC Leadership Development Centre (formerly known as the Beeches) to undertake an investigation into these concerns. Ms McKernan has previously had no role in relation to your case. I would expect that Ms McKernan will make arrangements to meet with you in the course of her investigation. I recognise that these issues are difficult for you and would wish to remind you that the Trust Occupational Health Service and Staff Care Services remain available to you, should you wish to access these.
>
> Yours sincerely
>
> Brian Barry"

[9] It can be seen therefore that the matter that was troubling Mr Barry at that time was the media coverage and the affect it might have on the confidence of patients at the dentistry hospital. Now the plaintiff met Ms McKernan on 8 May. She is not, despite the use of the word consultant in that letter, a medical consultant. I have to gently query whether it is a rather potentially misleading title to be accorded to a human resources practitioner in the health service given that consultant has a very long established and clear meaning in the health profession. But in any event she met with him and the plaintiff and another did go to this meeting but the plaintiff and his counsel in this injunction attack Mr Barry's letter and the proposal to defer their meeting based upon it; this later letter I will come to in some detail. Mr Park points out that the General Dental Council hearing is not finished; on the contrary it has been scheduled for a further four weeks this Autumn. Professor Lamey and the expert witness on his behalf have not yet been heard. The press of course have a duty to report and properly report as I assume they have done

a public hearing. I can understand further that matters critical of Professor Lamey may indeed undermine the trust and confidence of patients but while that might justify an employer, including the Trust, in excluding from work or suspending an employee, if he were not already excluded from work, for my part I cannot see how it would justify in part or in whole a final termination of his contract as the Trust still seems to be contemplating in its letter of 3 July 2013. To do so would be, it appears to me, a breach of one of the two basic rules of natural justice, that a decision maker must hear both sides. To base a final termination on the publicly reported actions of a committee which has only heard one side seems to me potentially a breach of that vital principle.

[10] I turn to that letter of 3 July and I think I will not read it in full, it is again from Mr Barry to Professor Lamey but he refers to the report of Ms McKernan, a copy of which is attached, and he goes on:

> "The report concluded, in summary, that:
>
> - There was a reasonable belief that patients being referred to you for diagnosis and treatment would have issues of trust and confidence in the service to be provided by you as a consultant of oral medicine.
>
> - The coverage in the media has created sensational headlines arising from accounts from patients and relatives which are very powerful and show loss of confidence in you.
>
> - The admission made by you in relation to your record keeping "not always being up to standard" would also lead patients to question confidence in you.
>
> - Any patient who checked your registration status with the GMC would see significant undertakings which have been accepted by you and would not be reassured."

[11] Pausing there the third bullet point refers to a concession made by Professor Lamey's counsel at the hearing before the General Dental Council Professional Conduct Committee. The fourth bullet point is an important one to which I will turn but what counsel points out is that the Trust in this letter of 3 July is still intending to take into account the "sensational headlines" arising from part only of the hearing before the General Dental Council. Later in the letter Professional Lamey was expressly warned as follows:

> "you should be aware that one possible outcome of this meeting is the termination of your contract of employment as a consultant in oral medicine with the Trust."

[12] Mr Parke also prays in aid the comments with which I respectfully agree of Lord Justice Kay in R (Shoesmith) v Ofsted et alia [2011] EWCA Civil 342 but of course the facts here are rather different from that case. It is common case that the decision of the House of Lords in American Cyanamid Co. v Ethicon Ltd [1975] AC 396 applies here. The first hurdle under that landmark decision for the plaintiff on an interlocutory injunction application is to establish that there is a serious question to be tried or that he has an arguable case that might succeed at full trial. Mr Hamill's answer to Mr Parke's submissions is well set out by him but I will summarise it in the following way. The Trust is a public body. It has a duty to perform its statutory functions. It now proposes to do so in a way that he submits is in accord with statute. He relies on the Employment (Northern Ireland) Order 2003 Schedule 1 and briefly that sets out a series of steps called "Standard procedure" for dismissal and disciplinary procedures. The employer must set out in writing the employee's alleged conduct or characteristics or other circumstances which lead the employer to contemplate dismissing or taking disciplinary action against the employee; that is 1.1. That must be sent to the employee. Under 2 a meeting must take place, the employee must take all steps to attend that, which he did here. After the meeting, he attended the preliminary meeting, and after the meeting the employer must inform the employee of his decision and notify of the right to appeal against the decision if he is not satisfied with it and there is indeed an appeal procedure.

[13] Mr Hamill submits that the Trust quite lawfully was following this statutory procedure and he confirms what I had anticipated and said to Mr Power that presumably the Professor can put evidence defending his position before this meeting, for example. He must have statements from himself and from the witness he is proposing to call shortly before the General Dental Council and they could be given to his employer to consider before any decision was arrived at. The employer is not obliged by employment law generally or by this statutory procedure to have a full hearing in the way that the General Dental Council is doing but they are obliged to take into account any submissions on behalf of the employee. Furthermore Mr Hamill relies on Article 196 of the Employment Rights (NI) Order 1996 which deals with reasons for dismissal of an employee and he submits that the circumstances here amount to "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held". He stresses the very senior and responsible nature of the position held by Professor Lamey. These are important points and I have taken those and those other points into account but it does not seem to me that they defeat Mr Parke's submission that there is a serious issue to be tried here. If I might summarise it in this way fusing together Mr Parke's submissions, if it is here a matter of clinical performance it is at least arguable that they must follow the procedures set out for clinical performance

in the framework document and not resort to calling an ad hoc meeting as they have done, especially if the personnel at that ad hoc meeting do not fairly reflect the need to arrive at a just outcome and especially if that meeting is going to take into account mere publicity regarding a part heard matter. For all those reasons it seems to me that the plaintiff has established that there is a serious issue to be tried.

[14] Now pursuant to the decision of the House of Lords in American Cyanamid if I find that, as I do find, I then have to consider whether damages would be an adequate remedy because the interlocutory injunction lasts until the trial of the action but if the plaintiff can be fairly compensated by damages, if an injustice is done to him, then the courts have held that an interlocutory injunction is not appropriate. It seems to me that the plaintiff has not established that the damages would not be an adequate remedy. If the plaintiff is dismissed at the forthcoming meeting and it transpires that that dismissal is either unfair or in breach of his contract he has remedies before a tribunal or at law in this court. There is literally no evidence before me that the statutory limit of damages for unfair dismissal or the notice payment under the contract would be inadequate. There is simply no evidence to that effect before the court. Indeed, not by his own wish, Professor Lamey has found himself in the position of benefiting financially by this unfortunate situation because, by his own admission, he has been able to conduct a "full private clinic" while being paid in full by the public. That circumstance would have to be taken into account I envisage in any subsequent award if he was dismissed and if that dismissal was either unfair in employment law terms or in breach of his contract. So it seems to me that he fails at that hurdle. Now Lord Diplock said in American Cyanamid:

> "If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage." (page 408 C).

[15] However, out of caution, I propose to address the matter further in case it was ever thought that there was doubt as to the adequacy of the remedy of damages. The House of Lords has provided various matters to be taken into account if damages are either proven to be an inadequate remedy or of they are in doubt. I had occasion in McLaughlin and Harvey Ltd v Department of Finance and Personnel [2008] NIQB 122 to consider this point and I hope I may be forgiven for referring to that judgment. As I pointed out in that judgment at paragraph 6:

> "It can be seen that the test laid down by the House of Lords, is sequential.
>
> (i) Has the plaintiff shown there is at least a serious issue to be tried?

(ii) If it has, has it shown the damages would not be an adequate remedy for the plaintiff and would be an adequate remedy for the defendant if an injunction were granted and it ultimately succeeded?

(iii) If there is doubt about the issue of damages the court will then address the balance of convenience between the parties.

(iv) Where other factors are evenly balanced it is prudent to preserve the status quo.

(v) If the relative strength of one party's case is significantly greater than the other that may legitimately be taken into account.

(vi) There may be special factors in individual cases.

I would add seventhly the court has an overall discretion to do what is just and convenient in the circumstances. I would remind parties of the statutory basis for the exercise of the court's power in this regard. Section 91 of the Judicature (NI) Act 1978 empowers the court to grant a mandatory or other injunction "in any case where it appears to the court to be just and convenient to do so for the purpose of any proceeding before it". That again makes clear that the court has an overall discretion to exercise this power when it is "just and convenient to do so".

[16] Now turning to that enumeration, which I, at least, find helpful in addressing the matter fairly and lawfully I only go to the issue of the status quo if the other factors are balanced. In this case I am not satisfied that one party's case is significantly stronger than the other. I say that partly because the potential errors succinctly identified by Mr Park are avoidable by the Trust. They could decide to ignore the issue of publicity and they could consider who should be at the meeting. Otherwise, the balance might be the other way but these are avoidable errors on the part of the Trust. It seems to me one looks firstly at the balance of convenience, whether there is special factors and whether ultimately it is just and convenient to grant the injunction sought. It seems to me that there are powerful factors in favour of the respondent here. This is a public body discharging important public duties. It is pursuing, as its counsel has pointed out, an approach approbated by the legislature in a statutory provision. It seems to me it would be surprising for the

court to stop it from doing that. It may be that it should have commenced the procedure under the framework document a long time ago and not waited for the two professional bodies to report. But that does not ground an attempt now to stop it making up its mind about Professor Lamey's decision, as long as it does that in a fair way, fair both to the Trust and to Professor Lamey. Secondly, it must be a special factor and relevant to the balance of convenience here and the consideration of this matter, that this unhappy situation of the plaintiff's exclusion from work has now been going on for some two years and 8 months and if the injunction was granted it would continue until, on Mr Park's admission, the General Dental Council Professional Conduct Committee reported. I do not know when they are going to report, they are only going to complete their hearing in a few months and I do not know whether there is a right to appeal from them to the General Dental Council itself. But that cannot be an appropriate situation. Presumably other persons are being employed to do Professor Lamey's work, but if so that is at a cost to the public and it might well be thought, as the Trust has now concluded, that it needs to at least consider whether it should properly terminate the plaintiff's contract.

[17] Thirdly, this is an injunction being sought in the employment context. The standard work on injunctions is that of Mr Justice Bean and Miss Parry now in its Eleventh Edition and at page 49 paragraph 4.11 the learned authors deal with injunctions against dismissal. I quote:

> "The court will not usually restrain an employer from terminating an employee's contract but will leave the employee to his remedy in damages (Chappell v Times Newspapers Ltd[1975] 1 W.L.R. 482); in Cresswell v Board of Inland Revenue Walton J. stated that "damages and not an injunction is the proper remedy in virtually every case of breach of contract, especially one relating to master and servant". The basis for this rule is the need for mutual trust and confidence mentioned above."

[18] Now the learned authors then go on to discuss two exceptions to that and Mr Park quoted such exceptions and I take those into account including the decision in Edwards and the Chesterfield Royal Hospital NHS Foundation Trust [2011] UKSC 58. But for my part I fully agree with the comments of Mr Justice Girvan as he then was in Bowers v the Manufacturing Science and Finance Union [2000] NIJB Chancery Division 5 at page 12:

> "The plaintiff faces other obstacles. The court is generally and wisely reluctant in employment disputes to grant injunctions which have the effect of for example, compelling an employer to continue to employ and employee in whom he has lost confidence or requiring an employee to work against his will for

> an employer though in appropriate cases the courts will intervene to grant injunctions in employment contexts."

I agree with the traditional view that the courts should be slow to grant injunctions in the employment situation.

[19] But finally and fourthly, the Trust here is not proposing at this meeting to reach its view solely on the issue of bad publicity given to the plaintiff. They are taking into account that the General Medical Council which considered him in his capacity as a medial practitioner has concluded its investigation. They are taking into account the concession made by his counsel about his record keeping but they are also taking into account the undertakings which he gave to the General Medical Council and it seems to me they are quite right to do so. It seems to me indeed they are obliged to do so and it seems to me as these proceedings have been brought it is necessary for me to refer to these. There are no less than 15 undertakings and they are signed by Professor Philip John Lamey on 19 April 2013 i.e. after Mr Barry's first letter but before his second letter and they relate "to my practice and are disclosable to any person requesting information about my registration status". The first requires him to notify the General Medical Council, the GMC, promptly of any post he accepts for which registration with the GMC is required and provide the GMC with the contact details of my employer. At any time that he is providing medical services which require him to be registered with the GMC he has to agree to the appointment of a work place reporter nominated by the employer contracting body and approved by the GMC. He is to inform the GMC of any disciplinary proceedings against him; he is to inform the GMC if he applies for medical employment outside the United Kingdom. Sixthly, and most strikingly one finds the following:

> "To work with a post graduate Dean (or his/her nominated deputy) to formulate a personal development plan specifically designed to address the deficiencies in the following areas of my practice:
>
> (a) Assessment
> (b) Treatment
> (c) Records
> (d) Maintaining in respect of audit
> (e) Investigation"

[20] Now pausing there counsel said records are important as they are, because one knows that medical negligence not infrequently occurs and medical accidents not infrequently occur because important information was not communicated to the relevant clinician. But the areas in which the Professor is acknowledging deficiencies include assessment and treatment, at the heart of medical practice. These undertakings go on, and I am not going to read them all but No.10 is:

> "At any time that I am employed, or providing medical services, which require me to be registered with the GMC, to place myself and remain under the supervision of an educational supervisor, as agreed by the GMC. My employer or his or her nominated deputy will be asked to assist in identifying a possible supervisor."

[21] So these are very onerous undertakings indeed and they are given and signed by the Professor at the conclusion of the GMC investigation. This seems to me a special factor which in accordance with the decision of the House of Lords I should take into account and it seems to me amply justify the Trust in addressing the position of Professor Lamey without awaiting the outcome of the General Dental Council hearing. Of course it is a matter for them to make a decision fairly in accordance with law but for all these reasons it seems to me it would be quite wrong to prevent them holding a meeting that might lead to the termination of his contract.

[22] In all the circumstances I decline to make any injunction in favour of the plaintiff.