

THE HIGH COURT

The Council of the Pharmaceutical Society of Ireland

Applicant

and

XY

Respondent

Ex tempore judgment of Ms Justice Irvine, President of the High Court, delivered the 26th day July, 2021.

Background

1. This is an application pursuant to s. 52 of the Pharmacy Act 2007, confirming the applicant's decision of the 22nd April 2021 to cancel the respondent's registration on the register of pharmacists. Prior to the hearing of the present application the court was asked, pursuant to s.27 (i) of the Civil Law (Miscellaneous Provisions) Act 2008, to prohibit the publication or broadcast of anything which would be likely to identify the respondent as being addicted to alcohol. Based on the medical evidence advanced in support of that application the court directed that there should be no publication of the respondent's name.
2. On 27th January 2021, an inquiry was held by the applicant's Health Committee into a complaint made against the respondent. The inquiry was held in private and the respondent attended and was legally represented. The Committee found allegations 1(a) and 1(b) as set out in the Notice of Inquiry (relating to working as a pharmacist after consuming alcohol and also consuming alcohol while at work) to be proven beyond a

reasonable doubt and also found that they amounted to professional misconduct. In respect of allegation 2, the Committee found that the respondent's ability to practice as a registered pharmacist was impaired because of her addiction to alcohol and that this had been established beyond reasonable doubt.

3. The Committee thereafter submitted a report to the applicant, dated 15th March 2021, recommending the cancellation of the respondent's registration. The applicant thereafter met on 22nd April 2021 when it considered the evidence, the report of the Health Committee, the submissions of the parties and the advice of the legal assessor. Having done so the applicant decided to cancel the respondent's registration pursuant to s 48(1)(b)(iv) of the Act. In so deciding the Council indicated that it agreed with the reasons provided by the Committee for proposing the sanction which it did.
4. In considering the appropriate sanction, the applicant also had regard to a relapse suffered by the respondent after the inquiry had concluded. She had failed a urine test on 9th March 2021. Before finalising its decision on sanction, the applicant considered whether any lesser sanction would protect the public and, having done so, concluded that the interests of the public could not be protected by any sanction short of cancellation.
5. The respondent was informed of the applicant's decision by letter dated 12th May 2021 and she has not applied to cancel the decision within the period of thirty days referred to in s 51(2) of the Act. In these circumstances the applicant seeks confirmation from the Court of the cancellation of her name from the register.

The Application

6. The within application is grounded on the affidavit of Mr. Niall Byrne who deposes to the fact that the respondent's alleged misconduct first came to light when the managing

director of a pharmacy in the west of Ireland reported that the respondent had been drinking alcohol and been intoxicated while at work on 29th November 2018.

7. Following an initial investigation, the Preliminary Proceedings Committee formed the opinion that there was a prima facie case to warrant further action being taken and it referred the complaint to the Health Committee on the grounds of professional misconduct and/or poor professional performance and/or an impairment of the registered pharmacist's ability to practice because of a physical/mental ailment, an emotional disturbance or an addiction to alcohol or drugs.
8. The Notice of Inquiry sent to the respondent and dated 7th July 2020 contained the following allegations:

1(a) that while she was a registered pharmacist, on or about 29th November 2018, she presented for work in circumstances where she was unfit to do so or under the influence of alcohol; and/or

1(b) on or about 29th November 2018, while on duty consumed alcohol on/about the pharmacy premises; and

2. that she as a registered pharmacist has an impairment of her ability to practice because of an addiction to alcohol or drugs.

The reasons for the cancellation

9. In recommending the cancellation of the respondent's registration, the Committee noted that the sanction proposed should, as a paramount consideration, be one which would protect the public and send an appropriate message to the respondent, the wider profession and the general public as to the seriousness of her misconduct.

10. The committee also acknowledged that the sanction should be as lenient as possible and should be proportionate having regard to the circumstances. It was noted that if, without compromising public safety, a sanction could be identified which would assist a pharmacist who was committed to overcoming an impairment, this should be actively considered. The Committee considered a range of available sanctions as it did all factors in mitigation. These included the fact that this was the first complaint made against the respondent, that she had admitted that her conduct amounted to professional misconduct, that she was willing to submit to the imposition of conditions and that she had taken steps to overcome her alcohol dependence. It was the Committee's ultimate view however that even with careful supervision, monitoring and testing, it wouldn't be possible to formulate conditions which would be clear, realistic and workable. The Committee was of the view that despite her progress, the respondent's insight and trustworthiness were not present to a degree that would justify permitting her to work as a pharmacist at this point. Of relevance was the respondent's repeated breaches of undertakings given in the past (including undertakings not to practice as a pharmacist, which were not honoured), which meant that the attachment of conditions might not, in light of her history, prove sufficient to protect the public. The details of the respondent's repeated breaches of undertakings are set out at para 15 of the grounding affidavit. A recent alcohol relapse was also considered relevant.

The Court's jurisdiction

11. The Court's jurisdiction on the present application is governed by s 50 of the 2007 Act, which provides that a decision of the applicant to impose a disciplinary sanction (other than admonishment or censure) does not take effect unless and until confirmed by the High Court. This section must be read in conjunction with s 51 which provides that the

Court may, on application by a registered pharmacist or pharmacy owner on whom the Council has imposed a disciplinary sanction, order its cancellation and make any order it considers just including an order confirming or modifying the Council's decision. Any such application must be made within 30 days of receipt of notification of the Council's decision. If no application is made within that period, the Council, pursuant to s.52 is required to ask the High Court for an order confirming its decision and the Court on such an application "may but need not confirm the Council's decision."

12. The wording in s.52 is subtly different to that provided for in legislation governing other professions (e.g. the Medical Practitioner's Act 2007 and The Nursing and Midwifery Act) wherein the Court is required to confirm the decision of the professional body unless it sees good reason not to. In such cases, the jurisdiction of the Court is extremely circumscribed. In *Medical Council v MAGA* [2016] IEHC 779, [2016] 12 JIC 1905 Kelly P. held that, on an application under s. 76(3) of the Medical Practitioners Act 2007, the Court was limited in its entitlement to interfere with a decision made by the council. He observed that the Court was not, on such an application, sitting as an appellate body to review the council's decision. He said that the function of the court, when exercising its jurisdiction under s.76 (3), is to intervene only if there is good reason to do so. And in *Medical Council v Lohan-Mannion* [2017] IEHC 40, Kelly P., concerning the same provision, said that "I can only refuse the order sought in this case if I am of opinion that the Medical Council came to such an unreasonable decision that no reasonable medical council could have so done."
13. The legislation governing the pharmacy profession does not restrict the court such that it must confirm the council's in the absence of good reason not to do so and it is therefore not bound by the strictest type of "Wednesbury reasonableness" approach (from the often

cited case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223)) in which the Court will only set aside a decision which is so unreasonable that no reasonable decision maker could have taken it.

14. Equally clear from the statutory provisions is the fact that the hearing before me is not a *de novo* hearing, and the Court is not in this instance the primary decision-maker. The primary decision has clearly been taken by the applicant and it is now for the Court to assess, having regard to all of the relevant facts and circumstances, whether that decision should or should not be confirmed.
15. In making my decision I am guided by what Finlay P. said at p.5 of his judgment in *Medical Council v. Murphy*, (High Court, Unreported 29th June 1984 Finlay P.):

"First, I have to have regard to the element of making it clear by the order [made by the High Court on appeal] to the medical practitioner concerned, the serious view taken of the extent and nature of his misconduct, so as to deter him from being likely, on resuming practice, to be guilty of like or similar misconduct. Secondly, it seems to me to be an ingredient though not necessarily the only one that the order should point out to other members of the medical profession the gravity of the offence of professional misconduct. And thirdly, and this must be to some extent material to all these considerations, there is the specific element of the protection of the public which arises where there is misconduct and which is, what I might describe as the standard of approach in the practice of medicine. I have as well an obligation to assist the medical practitioner with as much leniency as possible in the circumstances."

16. Charleton J. also pointed out in *Hermann v Medical Council* [2010] IEHC 414 (albeit in the context of an appeal against a decision made by the Medical Council) the fact that the regulatory body has specialist knowledge to which the Court should have regard.

Decision

17. Extensive evidence has been provided to the Court relating to the respondent's alcohol addiction and the attempts she has made over the years to engage with treatment programmes. I will refer briefly to the evidence of Dr John O'Connor, consultant psychologist, which appears at page 673 of the court's booklet. On the last page of his report, dated 23rd April 2020, Dr O'Connor says that the respondent fulfils the diagnosis for alcohol dependency and has done so for quite some time and that it was only in the very recent past that she had been able to come to terms with this reality and its implications for her personally and professionally. Concerning the need for ongoing supervision, he said that she should provide random samples for supervised urine analysis at least every one to two weeks and that she should also submit to monthly blood tests for CDT. He also recommended the respondent to attend AA meetings and counselling and advised that if she was to return practice as a pharmacist, appropriate supervision would have to be in place.
18. Responding to a request for clarification of his report, Dr. O'Connor advised that the respondent is currently suffering from alcohol dependence syndrome. And, because she had not been able to abstain from alcohol for a sufficient period, it was his opinion that she was impaired in her ability to practice as a pharmacist. Accordingly, the respondent's return to practice ought, he considered, to be conditional on her demonstrating an appropriate period of sobriety which was verifiable by testing.

- 19.** On 14th January 2021 a supplemental report was compiled by Dr. O'Connor wherein he reported that the respondent felt that she had been doing well since last seen. She had been attending AA meetings and relevant therapy. Dr. O'Connor outlined the results of tests carried out on the respondent to screen for alcohol in the preceding 6-month period. These showed that a July 2020 urine sample had tested positive for benzodiazepines as had a similar test carried out in August 2020. A test for alcohol consumption carried out on the 6th November 2020 was inconclusive but a further test carried out on 9th November 2020 was found to be indicative of alcohol consumption. When advised of this result the respondent agreed that she had had a single slip. Dr. O'Connor reiterated his original position – that any return to work as a pharmacist should be conditional on the respondent's sobriety.
- 20.** The Court, for the purposes of assessing the appropriateness of the sanction sought to be confirmed, must have regard to all of the evidence and the reasons offered in support of that sanction. In weighing the appropriateness of the sanction, the Court must be guided by the principles of fairness and proportionality and is obliged to balance the pharmacist's right to earn a living against the need to protect the public and ensure the profession's standards and reputation are upheld. And, it is the court's obligation to ensure that the most lenient sanction which would achieve all of these goals is imposed allied to the fact that it must remain mindful of alternative sanctions, such as the imposition of conditions on registration, which would allow a pharmacist to work safely and without imposing a threat to public safety.
- 21.** In this case, I note the medical and other evidence concerning respondent's extensive engagement with treatment and therapies with a view to overcoming her alcohol addiction and she should be commended for her efforts in this regard.

- 22.** I am however aware of the fact that numerous undertakings have been given by the respondent in the past which have not been honoured and this is a factor that cannot be overlooked when it comes to considering the effectiveness of any sanction less than that of the cancellation of her registration. In circumstances where the applicant, who is after all best placed because of its specialist knowledge of the industry and pharmaceutical profession to know whether conditions attached to employment would indeed secure public safety, does not believe that a sanction less than cancellation would suffice, I cannot find any reason which would justify a failure to endorse the sanction proposed.
- 23.** Finally, I want to join the applicant in saying that I hope the respondent will be able to re-apply for registration in the future once she is back to full health and has managed put a sufficient distance between herself and alcohol such that she might safely resume practice as a pharmacist.
- 24.** For all of the aforementioned reasons I would confirm the sanction proposed.