

Employment case review: Irish Supreme Court rules that the HSE acted fairly in suspending doctor

Insights - 14/06/2023

Summary

The Irish Supreme Court has ruled that the HSE acted fairly and reasonably as an employer in suspending a consultant doctor after he had performed experiments on a number of patients without their consent. This ruling overturns the Court of Appeal's earlier decision which previously found the suspension to be unlawful, as the consultant did not represent an immediate threat to the health of patients.

Background

This case concerned a consultant obstetrician and gynaecologist who worked at St. Luke's Hospital in Kilkenny since 2006. In September 2018, five women attended the hospital to undergo hysterectomy procedures. During these procedures, the consultant also conducted a "feasibility study" using personally purchased equipment. This involved measuring the internal pressure of the vaginal wall. None of the women had consented to the procedure nor had they been told that it would occur.

Shortly after the procedures took place, the hospital became aware of what had happened and conducted an external investigation of the unauthorised procedures in October 2018. Expert opinions were obtained as part of the review, which found that while the feasibility study had not been carried out in accordance with sound ethics, the consultant did not pose a risk to patient safety. However, it did find that the consultant did not present any remorse or insight for his actions.

The hospital disclosed the experiments to the women involved and although none suffered any physical harm, they each reported feelings of violation and psychological problems after learning of the incidents.

The disciplinary procedure

The consultant's employment contract contained the HSE's disciplinary procedure. Under the procedure, the HSE's CEO was permitted to place the consultant on administrative leave where they expressed a concern of conduct which may pose an "*immediate and serious risk to the safety, health or welfare of patients*" for such time as may be reasonably necessary to conclude the investigation.

In August 2019, the CEO wrote to the consultant expressing his concerns for patient safety and welfare, placing him on administrative leave pending the completion of the investigation. The CEO also stated that he believed the consultant's actions amounted to misconduct and that he proposed terminating his employment with the HSE.

The High Court and Court of Appeal

The consultant initiated judicial review proceedings which the High Court dismissed. However, the Court of Appeal overturned part of the decision (to suspend the consultant on the basis that he posed an immediate and serious risk to the safety, health or welfare of patients, as there was no evidence to support this claim).

The Court of Appeal held that the CEO was obliged to review the consultant's suspension periodically in line with his contract, stating that the decision to suspend him was "*an entirely flawed conclusion arrived at in the teeth of the actual evidence.*" Accordingly, the Court of Appeal ordered that the consultant be reinstated.

Supreme Court proceedings

The HSE appealed the decision to the Supreme Court and although the parties had resolved the matter by the time of the appeal, it was agreed that the Supreme Court should adjudicate on the issues at hand.

1. **Holding vs punitive suspension:** The court first assessed whether the decision to place the consultant on administrative leave was lawful. The Court considered the judgement delivered in *Bank of Ireland v Reilly [2015]* noting that placing an individual on administrative leave did not impose the same level of fair procedure requirements as a full disciplinary hearing. Accordingly, the court accepted that the suspension was of a holding nature, rather than a punitive one imposed as a sanction for misconduct.
2. **Standard of review:** The court then considered whether the CEO's decision to place the consultant on administrative leave met the test set out in *Braganza v BP Shipping Limited & Anor [2015]*. In that case, the court held that the decision maker's discretion would be limited "*by concepts of good faith, honesty and genuineness and the need for absence of arbitrariness, capriciousness, perversity and irrationality.*"

In this case, the court was satisfied that the CEO was clearly concerned about the Consultant's behaviour and his lack of remorse or insight into his actions. The court also noted that the consultant's employment contract permitted a suspension where "*it appears to the CEO*" that there "*may*" be such risk to the health and welfare of the patients.

Accordingly, the court held that based on the Braganza test, the expert evidence at hand was not enough to invalidate the CEO's decision to place the consultant on administrative leave, provided the decision was made bona fide. Therefore, the CEO was justified in his decision to place the consultant on administrative leave.

Dissenting judgment

In a dissenting judgment, Mr Justice Seamus Woulfe held that the CEO was not entitled to require the consultant to take administrative leave. He was of the opinion that the CEO had failed to take into account certain relevant matters when forming the view that the consultant posed a risk to patient safety, namely the fact that a report issued concerning the allegations did not identify any ongoing risk to patients.

Mr Justice Woulfe also found that the CEO came to a conclusion that was so unreasonable that no other decision-maker could ever have come. He stated that the decision was "*bizarre and irrational.*"

Conclusion

In relying on the principles set out in the Braganza case, the Irish courts have reinforced the right of a decision-maker in an employment context to have discretionary power when implementing a suspension and that any decision to do so, must be done honestly and in good faith.

As always, it is strongly advisable for employers to obtain legal advice when considering whether to suspend an employee in any circumstance.

Should you require assistance with workplace investigations, disciplinary procedures and/or suspensions, please contact Bláthnaid Evans or Marianne Norton of our Employment and Corporate Immigration team on 01 639 3000.

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