Practical Considerations for Defendant's Counsel in Hearings before Regulatory Tribunals

Friday, January 30th 2015

Eileen Barrington SC

1. Introduction

There are a number of phases to the disciplinary processes held before Regulatory Tribunals. Counsel will not necessarily be involved in the earliest phase. However, it is undoubtedly the case that the sooner counsel is involved, the better for the purposes of considering the strategy to adopt. Even if counsel is not involved at the earlier phases, then once counsel does become involved they might wish to consider addressing certain of the issues identified below.

A helpful checklist on advice for the defence lawyer in disciplinary proceedings is also set out in Harris "Disciplinary and Regulatory Proceedings" 7th Edition, Chapter 23. The following is simply my personal (and fairly random) selection of issues that can usefully be considered.

2. Observations and Comments

On receipt of a complaint regulators are of course required to seek the observations and comments of the person in respect of whom the complaint is made. Deciding what approach to take to the observations and comments is a critical decision. At that early stage the person in respect of whom the complaint is made ("the registrant") will be expected to broadly admit or deny the allegations. It is important to remember that the registrant will doubtless be cross-examined on whatever he or she states in the observations and comments if the matter is sent forward for hearing before a Fitness to Practice Committee. It is therefore vital when preparing observations and comments to keep the possible inquiry in mind.

In the first instance, the purpose of the observations and comments is of course to seek to avoid the matter being sent forward to an inquiry at all. It may be that there are factual issues that can be usefully clarified in that regard (a patient may be wrong as to which doctor, for example, saw the patient on the relevant date). Points may be taken in relation to delay. On occasion it is necessary to consider clarifying certain medical issues (such as the proper approach to take to an examination). It may even

be necessary to consider submitting an expert report at that early stage. There may be a misunderstanding in relation to communication issues. All of these matters can usefully be addressed.

Of course, the only issue for the Committee dealing with the observations and comments is to determine whether a *prima facie* case is made out. Accordingly, if the complaint is a serious one, it may be necessary to acknowledge the possibility of a hearing before a Fitness to Practice Committee. In this regard, it is essential to consider the extent to which it is in the client's interests to make certain admissions of fact in the observations and comments. In deciding whether to make admissions it is necessary, in my view, to have regard to the following:

- The proceedings before a Fitness to Practice body are less formal than in a court;

- The range of possible outcomes is greater than in civil proceedings;

- A refusal to make any admissions may have costs implications if the relevant body has jurisdiction to award costs (which it may not do);

- If no admissions are made the registrant may look unreasonable or lacking in insight and this may ultimately have a knock on effect on the approach to be taken by the Fitness to Practice Committee;

- There will be cases (relatively rare cases in my view) where the best approach is to say very little.

- However, it is also important not to say too much: what is said must be absolutely correct.

In thinking about the approach to take to the observations and comments it is always necessary to consider how the complainant is going to react to those observations and comments and how the tone of the observations and comments will be viewed by the Fitness to Practice Committee. The observations and comments should avoid an

antagonistic tone towards the complainant. If there is any perception of validity to the complaint, then it will be necessary from the outset to consider the extent to which the registrant should be seen to be demonstrating insight into the issue that has arisen. This is undoubtedly a key issue to be borne in mind at all stages of fitness to practice processes. It may also be necessary to consider the extent to which an apology, or at least a degree of apology, is necessary. An apology can be given for systems errors or a failure to apply otherwise high standards without acknowledging that the actions complained of necessarily constitute poor professional performance or professional misconduct. However, care must be taken with the formulation of the apology. While on the one hand one might wish to mollify the complainant, on the other hand by the time the registrant is being cross-examined he or she may be asked to clarify what exactly he or she was apologising for if not a serious falling short from the standard one might expect of a professional in the relevant field.

Lastly, consideration needs to be given as to whether it is envisaged that if the matter goes forward to a disciplinary hearing the registrant will give evidence (as is usually the case). If ultimately the registrant does not give evidence then he or she may not be able to prove the facts set out in the observations and comments which can therefore in theory be disregarded.

3. Public or Private Hearing

If a decision is made that, notwithstanding the observations and comments (if any), a prima facie case has been made out then the matter will go forward for a hearing. Legislation in recent years governing disciplinary hearings in general provides for the default position of a public hearing. Whether the hearing takes places in public or private is a matter of vital concern to the registrant. A public hearing (depending on the subject matter of the complaint) can attract extensive publicity and be extremely stressful for the registrant[1]. The fact that a hearing takes place in public may result in the Fitness to Practice Committee considering that they have a narrower margin of

1 In this regard it is noteworthy that in *Corbally v. Medical Council* [2013] IEHC 500 Kearns P held that the extent of the adverse publicity surrounding the hearing was a factor to take into account in considering the proportionality of the finding. This perhaps attends an additional basis for seeking a private hearing in cases that are likely to attract significant publicity.

manoeuvre. They may be more reluctant to accept an undertaking from the registrant. They may be more inclined to impose a hefty sanction so they are not the subject of any public criticism. If at all possible then the registrant may wish to consider a private hearing. However, certainly pre-*Corbally* the reality was that unless a health issue was at play it was most unlikely that a private hearing would be granted at the registrant's request. It may, however, be useful to consider prompting the prosecuting body to raise or clarify with the complainant the entitlement to seek a private hearing in the hopes that the complainant will make that application.

4. The Notice of Inquiry

Once it has been determined that the matter should go to a Fitness to Practice hearing, a notice of inquiry will require to be formulated. That Notice of Inquiry should be very carefully scrutinised in advance of the hearing. The prosecuting body often will ask whether it is proposed that any admissions are to be made by reference to the Notice of Inquiry. Before making any admissions (and again costs factors may have to be taken into consideration) it is important to have regard to the following:

(i) Are the allegations legally permissible?

In this regard, the registrant may wish to consider the extent to which the Notice of Inquiry seeks to apply to the registrant standards which were not in existence at the relevant time. This may constitute a breach of fair procedures[2].

(ii) Are the allegations sufficiently particularised?

As a matter of fair procedures the allegations must be adequately particularised[3].

(iii) Are the allegations supported by the evidence?

2 See *Prendiville v. Medical Council* [2008] 3 IR 122. English law views the issue as whether retrospectivity is objectionable or not: *Antonelli v. Secretary of State for Trade & Industry* [1998] QB 948 and Holton v. GRC [2006] EWHC 2690 (Admin.).
3 *Salha v. General Medical Council* [2003 UKPC80 and *Chauhan v. General Medical Council* [2010] EWMC 2093.

The notice of inquiry may plead unfitness to practice by reason of disability or professional misconduct or poor professional performance. However, the expert evidence adduced may not support these allegations. Often an expert will opt for a perceived lower charge such as poor professional performance, while acknowledging that the conduct cannot be professional misconduct. If that is so then the prosecuting body should be asked to withdraw any unsupported allegations in advance of or at the outset the hearing.

(iv) What does the allegation mean?

Consideration should be given to whether it is clear what the allegation is intended to capture or whether sufficient particulars have been given of the allegation. As a matter of fair procedures the registrant must know what the allegation means. If during the course of the inquiry there is debate as to what the allegation means then in and of itself this might be sufficient to apply to strike out the allegation on the basis that it is a breach of the rules of fair procedures for there to be ambiguity as to what the charge is.

(v) Is there duplication in the notice of inquiry?

The English law suggests that a notice of inquiry formulated for a hearing before a regulatory tribunal is not to be considered as a criminal charge and subject to the same rule against duplication. However, it is certainly inappropriate to be sanctioned for the same conduct twice as a matter of fair procedures and this point may have to be emphasised at the appropriate time.

5. Issues in Relation to the Hearing

It is important that the Committee should develop a degree of sympathy for the registrant (and the registrant's legal representative!). This is a critical feature to bear in mind at all stages throughout the hearing. The following are some issues that may also need to be considered:

(i) Joint Hearings

Joint hearings may be problematic for the registrant, although the Fitness to Practice Committee will doubtless be minded to direct a joint hearing where there is a considerable overlap in the evidence. However, where two registrants are involved in the same event, a joint hearing may create problems. It might be necessary to resist the joint hearing being directed on grounds of potential prejudice. If a joint hearing does proceed in relation to common events, the risk is that one registrant starts to criticise the other. It should be clarified therefore with the prosecuting authority in advance the extent to which one registrant's evidence may be relied upon against another registrant. If it is proposed to adopt this course then registrant 1 should be provided with the particulars of evidence of registrant 2.

(ii) Particulars of Evidence

It is necessary to ensure that you have particulars of all of the evidence from the witnesses to be called. Careful consideration should be given to whether any of those witness statements can be admitted. There may be tactical advantages to admitting evidence rather than running the risk of allowing the proposed witness to give *viva voce* evidence which may be more damaging. Any attempt made by the prosecuting authority to turn a factual witness into an expert witness should be objected to[4]

(iii) Consider the Issue of Undertakings

In more recent years certain of the legislative regimes provide for an important "get out of jail" mechanism which is the undertaking[5]. The possibility of the Committee accepting an undertaking may provide a very useful "out" for a registrant. However, in order for the registrant to be afforded the benefit of the Committee accepting an undertaking

4 See *McManus v. Medical Council* [2012] IEHC 350

5 Provided for, for example, by Section 67 of the Medical Practitioners Act 2007 and Section 65 of the Nurses and Midwifery Act 2011

(which in effect aborts the process and obviates the necessity of a finding, therefore avoiding all risk) in my experience it is vital that the Committee should have empathy for the registrant. The possibility of an undertaking being proffered can usefully be raised at a very early stage. The prosecuting authority will often say that the undertaking is premature (or too late). It is useful to try to box the prosecuting authority into a position on an undertaking.

(iv) Do Not Take Useless Points

Before making any technical/legal point, it is essential to consider how the registrant is being perceived by the Committee. The Committee may be antagonised or become disenchanted by an overly legalistic approach on the part of the registrant which achieves very little. It is important not to alienate the Committee. Apologising/acknowledging deficits where appropriate can be more useful than making unsuccessful legal points. The legal assessor will doubtless afford leeway to the prosecuting authority in relation to the manner in which evidence is adduced. The rules of evidence will not be applied in as rigorous a manner as would apply in Court[6].

(v) Check out the Expert

It is often useful to cross-examine the expert for the prosecuting authority as to what exactly he or she considers falls within the relevant definition by reference to which he has criticised the registrant. This may be particularly useful where UK experts are concerned and where they have not necessarily familiarised themselves with the parameters of the Irish legislative provisions. It may be useful to consider asking the prosecuting authority for the instructions provided to the expert in relation to the definitions by reference to which the expert is being asked to express a view.

6 Kiely v. The Minister for Social Welfare [1997] IR 267.

(vi) Whether to call the registrant or not

As alluded to above, the question of whether or not to call the registrant is a difficult one. It is brave not to call the registrant as the Committee invariably will want to hear from the registrant. It is perhaps only in the most serious of cases where strike off is a likelihood that the option of not calling the registrant will be taken. The decision in *McManus v. The Medical Council*[7] increases the pressure on registrants in this regard. In McManus Kearns P held that where a fitness to practice committee rejected a request for a direction at the conclusion of the prosecuting authority's case on the basis that the Committee wishes to hear the registrant, was not an objectionable course for the Committee to take, albeit that it might "transgress the rules of a criminal trial". This did not mean that the registrant was obliged to give evidence but the Committee was entitled to proceed to hear the defence case and not to grant a direction.

(vii) The burden of proof

The application of the criminal burden of proof is of course a significant card that the registrant's legal practitioner can play in making submissions. Never assume that the Committee members are well familiar with the manner in which the criminal burden of proof is supposed to operate. Always make a brief submission on how it applies to the issues in the case, in particular where there is a difference between expert views.

(viii) Calling character evidence

It will often be necessary to consider calling some form of character evidence. The more formal view adopted by certain UK bodies is that character evidence is only ever a matter for mitigation and therefore should be called only in relation to sanction. In this jurisdiction it is unusual for that more formal approach to be taken and is certainly

7 [2012] IEHC 350

worthwhile seeking to ensure that the character evidence is called before any finding is made.

6. Sanctions

If a finding is made, it is important to separately address the question of sanction. It may be useful to consider whether the relevant body had adopted a policy on sanctions and to make submissions as to the role of sanction (emphasising the concern to protect the public rather than to punish the registrant). It is useful to consider public material/rules that may be helpful in this regard. The Medical Council, for example, has adopted rules (SI No. 594/2009) specifying criteria to be considered for applications for restoration to the register. Those regulations set out useful pointers that can be addressed in considering sanction and to emphasise the importance of insight, the steps taken to keep skills knowledge up to date, the steps taken by the registrant to rehabilitate professional or socially etc. The importance of the role of proportionality in selecting a sanction should be emphasised. In this regard, it is useful to suggest that the Committee consider first the lowest possible sanction and work upwards giving reasons as to why lower sanctions are not appropriate and why the selected sanction is recommended.

7. Publication Policy

The client will want to know what the effect of the sanction will be. In particular, the client will be concerned to know the extent to which the imposition of the sanction is publicized. Some regulatory bodies will have a publication policy (not itself always published). It is necessary to know the relevant practice and this can usefully be ascertained by the legal representatives in advance. Certain sanctions will appear automatically once the registrant's name is "googled" as increasingly registers are held electronically. Other regulators will also publish the fact of a finding on their website. That "press release" may remain in place for a number of years, sometimes longer than the sanction. This is of course capable of causing great distress to the client who should know of these matters in advance.