

BARRY v SOUTH

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THE HIGH COURT

BETWEEN:

4987P/1985

THOMAS F. BARRY

.v.

SOUTH EASTERN HEALTH BOARD

Judgment of Mr. Justice MacKenzie delivered on the 18th day of  
December 1986.

Pursuant to regulations the Minister of Health set up a Committee to investigate a complaint against the Plaintiff in this action.

Certain findings which will be detailed hereinafter were made by the Committee. Having furnished to the Plaintiff their report on the 7th of March 1985 neither the Plaintiff nor the Defendant were satisfied with the findings and in effect this case is an appeal and cross-appeal against the decisions of the Committee.

Briefly the history of the case is as follows:

The Plaintiff is a Medical Doctor and a native of Callan, County Kilkenny.

Pursuant to the provisions of the Health Act 1970 and to regulations made thereunder (particularly S.I. No.88 of 1972) the Defendant provides general medical practitioners assistance

amongst other things for the benefit of those who are eligible under the Health Act Schemes. In 1980 the Plaintiff was appointed as a general practitioner to provide medical and surgical services at, what were previously known as dispensaries, at Ballyhale and Stoneyford, Co. Kilkenny.

By agreement the Plaintiff particularly undertook to provide services on the days and hours which were set out in the agreement in which he undertook to be normally available for the discharge of his duties.

He agreed to be in attendance at Ballyhale, mid-day and on Tuesdays and Thursdays from 9.30 to 11.00 a.m. and at Stoneyford on Tuesdays and Thursdays from 11.30 to 1.00 p.m.

He undertook in the agreement not to change his place of attendance or the hours of attendance so as to materially affect the convenience of his patients.

Terms and conditions were annexed to this agreement and from time to time afterwards following consultations between the Plaintiff's governing medical body and the Minister, variations or additions to that original agreement were made. These followed proper and authorised negotiations and the results were from time to time sent to each and every medical practitioner including the Plaintiff by circular letter and they are I think without any doubt part of the terms of the Plaintiff's employment.

It should be noted, that it is of importance that the Plaintiff should not change the days or hours of attendance as to materially affect the convenience of his patients.

Further by Clause 11 of his agreement it was of importance that the medical practitioner should not make surgery arrangements which discriminated between eligible persons and

private patients.

In a circular letter of August 1975 at paragraph 15 it is clear that the acceptance of the Plaintiff's appointment was to apply only to his premises at Ballyhale and Stoneyford. If he desired to open another premises he should in accordance with the terms of the agreement entered into by all doctors participating in the scheme seek the agreement of the Chief Executive Office to do so.

This was clarified by a circular letter in September 1981 which I quote

"A doctor who holds a contract from a Health Board may not open another centre of practice in the General Medical Service without the consent of the Health Board."

Doctor Barry had previously in the year 1970 practised as a veterinary Surgeon in his native town of Callan. He switched to medicine and qualified as a Medical Doctor in 1975. He was appointed in May 1980 to the G.M.S. Scheme for the Villages of Ballyhale and Stoneyford, respectively, being six and seven miles from Callan. A house was provided at Ballyhale in poor condition and it would appear that the surgeries and amenities were mediocre to say the least.

His mother resided in Callan and he found that, when he went to visit her, people would come to him in that house and ask him to see them as patients, private of course. A similar situation arose when he went to visit his sister who had a public house in that town. People used to call to him there and he found that he had to see people sometimes in her house and at other times in his mother's house. Eventually in 1981 he bought a broken down premises which he refurbished and opened a clinic for private patients where he now has a good

practice, as he maintains, for private patients only.

He concedes that there are three patients in the G.M.S. Scheme whom he sees at Callan. They are said to be "difficult" patients whom another doctor to whom they were assigned or allocated in the scheme did not wish to treat, this was with the agreement of the Health Board.

He admits if a G.M.S. patient came to him in an emergency he would on ethical grounds render treatment. He said he had never sent away a patient under such circumstances but this happened he maintains only in the beginning of his career in Callan. It was explained to patients that they could not be treated there but they would have to go to either Ballyhale or Stoneyford. He says this does not happen now, the people who attempted to see him in Callan as G.M.S. patients, were patients who ordinarily were allocated to either Stoneyford or Ballyhale.

There were some people who had been private patients in Callan and because of changing circumstances became G.M.S. patients. The doctor says that he now treats those in the G.M.S. surgeries at Ballyhale or Stoneyford. He tells all such patients who having been patients in a private capacity because of advancing age or retirement or some such circumstances became G.M.S. patients they are to be seen in Ballyhale or Stoneyford. It was put to him and the names of patients were given that he had treated them in Callan, they being G.M.S. patients and in the whole he denied that he had done so. He insisted that any patient whose name was put to him either had not been seen in Callan or if they called to Callan had been told that the centre of G.M.S. medicine was the two surgeries mentioned before. In particular he had one American patient

who suffered from hay fever who had been treated in Callan. When she became a public patient she was seen in the G.M.S. surgeries.

He said, and I accept this as there was no evidence otherwise, that no such patient objected to be seen at either Ballyhale or Stoneyford and they fully understood and accepted his position. Instances of discrimination against G.M.S. patients were put to him and repudiated. I accept in entirety what the Plaintiff had said about each and every case.

It appears that his practice flourished but complaints were made about him to the Health Board by other practitioners. I feel these complaints were mainly directed to the acquisition by the Plaintiff of a good private practice. As he said himself it is an everyday part of medical life that private patients transfer themselves in some measure from one doctor to another.

When Mr. Gleeson suggested to him that both private and G.M.S. patients were treated in Callan he maintained that he did not see G.M.S. patients in Callan except in exceptional circumstances.

He agreed that he had amongst his patients farmers in Callan and it was suggested that when they, retired and having entered the G.M.S. scheme, would therefore be seen in Callan. He maintained that he was not permitted to do so and would see them in either Ballyhale or Stoneyford.

He maintained that a note of his hours of surgery at the G.M.S. centres were given to all patients and there was no complaint of any discrimination or unfavourable treatment from any of them ever to him, nor was there any complaint as far as this case is concerned by these patients to the Health Board,

nor was any such patient produced. There was one particular patient, an illeterate, suffering from chest problems which he said he had to see at his sisters. Although the names and addresses of several patients were put to him and it was suggested it would be more convenient for him to see them in Callan particularly because of the presence of a chemist's shop. No such person gave evidence.

Before the Committee the Health Board made the case that he was in breach of his contract as contained in the circular letter of September 1981, Paragraph 4

"A doctor who holds a contract from a Health Board may not open another centre of practice in the G.M.S. without the consent of the Health Board."

It is clear from this and I can see no other interpretation of this paragraph that a doctor requires the consent of the Health Board to open another centre of practice where is is to treat G.M.S. patients as well as private patients, he cannot do this without the consent of the Health Board. A combination of G.M.S. and private patients is in fact a practice in the G.M.S.

I hold on the interpretation of that documents that it is not necessary for a doctor to seek the consent of the Health Board to open a private clinic or surgery anywhere he wishes provided it is not a G.M.S. centre.

The Committee held with the interpretation put on Paragraph 4 by the Health Board and notwithstanding that there was no evidence before them of a G.M.S. practice, they said and I quote

"It is not unreasonable therefore that the Health Board should require that their permission be sought before

even a private centre be established in order that they may evaluate the position."

And further

"It is our task to decide whether Dr. Barry in all the circumstances of the case behaved reasonably and fairly in the light of his contractual obligations and it is for that reason that we must consider the actual circumstances in little more detail."

In further consideration of the matter the Committee continued to maintain

"In the circumstances one would have expected that he would have sought the permission of the Health Board before he purchased the property and placed his medical centre there. It was not sufficient in our view that he had grounds for an interpretation other than that of the Health Board."

And further

"While we recognise of course the right of doctors to develop private practices where they wish, once they enter into the G.M.S. scheme they inevitably must accept certain limitations on what they can do in a word Dr. Barry did not act in accordance with the spirit of the scheme of which in our view he was aware. The complaint therefore in relation to opening a centre of Callan is upheld."

In my opinion this interpretation of the contract is totally incorrect.

As Mr. Cooke submitted a doctor has a constitutional right to earn his living and I see here an attempt by the hand of the State to squeeze the freedom of the medical profession.

I was reinforced in this view by the evidence of Mr. Vincent Millet who was the Community Care Programme Manager for the area and responsible for the day to day maintenance of the G.M.S. service.

I feel that the Health Board would not have acted were it not for the complaints received by the three practitioners to whom I have already referred. Generally from Mr. Millet's evidence I felt that the Health Board not only endeavoured to regulate the G.M.S. service but to regulate competition between private doctors. It is clear from his evidence that a doctor is quite entitled to carry on both public and private practices in an area to which he is designated and this can be so opened if the private centre does not interfere with the contract. He said the Health Board would have no objection to that.

I find in this case there was no interference with the Plaintiff's obligation and performance of his duties to the G.M.S. patients. It appeared to me that the Health Board felt that they had a function to regulate competition between doctors in private practice as suggested by Mr. Cooke which of course they have no such right.

I consider that the Plaintiff's claim for a declaration that he is not obliged to seek of the consent of the Defendant to the opening or operation of the medical surgery in Callan must be granted with the consequent ancilliary Orders setting aside the conclusion and recommendation of the Committee. It seems unnecessary to give relief by way of injunction in these circumstances.



## The Counterclaim

It is provided in Clause 11 of the Schedule to the G.M.S. agreement

"The medical practitioner shall not make surgery arrangements which discriminate between eligible persons and private patients."

The Committee had to deal with a complaint of discrimination under that Clause. The argument against Doctor Barry before the Committee was that the Doctor would inevitably receive callers who are G.M.S. patients at his Callan Medical Centre.

Being unable to treat them at Callan there was said then to be discrimination against them. The Committee went on to say that Doctor Barry had taken advice from the Irish Medical Organisation and was informed that he should not refuse to see these patients but should encourage them to come to Ballyhale or Stoneyford. This was in fact what Doctor Barry in effect said in these proceedings and I have referred earlier to his evidence. Before the Committee his testimony was accepted that he encouraged his patients to come to him at Ballyhale or Stoneyford but it was contended before the Committee that because of his practice at Callan his attendances at Ballyhale and Stoneyford would be inadequate.

The Committee refused to uphold this charge of discrimination between public and private patients and to them there was no breach of Clause 11 of the Plaintiff's agreement.

I agree with their finding.

Mr. Gleeson argued that discrimination as far as patients are concerned is not a subjective thing but must be looked at objectively. This line he has to take because not one single

person was called to say that he ever felt the Doctor had discriminated against him in any way.

Obvious examples of discrimination would be that while waiting in a surgery, were a private patient to be called out of turn such action would be discriminatory and offensive to those waiting to see the Doctor who were G.M.S. patients.

Other possible examples of inevitable discrimination were cited by Mr. Gleeson, for example, families who formerly attended Callan as private patients when through changing circumstances they become G.M.S. patients they would be required to attend a less convenient centre by reason of their change of status. In the event, for example, of retirement or old age or some other happening which would entitle them to medical cards having previously been patients at Callan they would be no longer able to attend that more convenient quarter. This Mr. Gleeson urged is compounded where a person is one of a family in the G.M.S. whose other members are private patients. A forceful point was made that when persons cease to be private, if not seen at Callan there is obvious objective discrimination against such patients. Mr. Gleeson argues that the absence of any subjective complaint from a patient who felt discrimination is irrelevant to these proceedings. He asks therefore in effect that the findings of the Committee that there was no discrimination of patients be set aside and that this Court should find Doctor Barry to be in breach of Clause 11 of his agreement.

Having considered all the evidence in these proceedings and having noted the absence of evidence of discrimination from any patient I hold that the counterclaim has failed. -

There was a further complaint against Doctor Barry that he changed his place or places of attendance or the hours of

attendance so as to materially affect the convenience of his patients in the area in which he was practising. This charge was not upheld by the Committee and they found in his favour as far as that complaint was concerned and I agree that that charge was rightly not upheld.

The Order therefore will be to give the Plaintiff the relief claimed in paragraphs 1 and 2 of the Statement of Claim and to dismiss the counterclaim.

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