

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SLUHCV2015/0562

BETWEEN:

DR. SHAELLE DURAND

Claimant

and

THE MEDICAL AND DENTAL COUNCIL

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mrs. Lydia Faisal of Counsel for the Claimant

Mrs. Wauneen Louis-Harris for the Defendant

Claimant present

Dr. Sherry Ephraim Le-Compte and Ms. Shereen Chery, Chairperson and
Executive Director, respectively of the Defendant present

2017: July 7;
2018: March 27.

JUDGMENT

[1] **CENAC-PHULGENCE J:** Dr. Shaelle Durand, (“Dr. Durand”) filed a fixed date claim against the Medical and Dental Council (“the Council”) on 1st October 2015 which was amended on 7th October 2015. In the amended claim, Dr. Durand claims the following relief:

- (a) “An order of Certiorari to quash the decision of the Medical and Dental Council to refuse the claimant’s application for the renewal of her practising certificate, communicated to the claimant on the 27th day of

June 2015, whereby the Council refused to renew the claimant's practising certificate on the basis of:

- (1) Unethical behaviour
- (2) Improper management of patient
- (3) Clinical incompetence
- (4) Breach of confidentiality

- (b) Declarations that the Council arrived at the decision on the basis of illegality, irrationality and procedural impropriety.
- (c) A declaration that the Council's directive to the claimant in August 2014 to desist from practice whilst her application for renewal was under consideration was ultra vires section 50 of the **Health Practitioners Act**¹ ("the Act").
- (d) Damages in respect of the unlawful order by the Council preventing the claimant from practising and earning an income between August 2014 and 27th June 2015; or alternatively for keeping the claimant out of practice for more than one year, which period is unreasonably long for the purpose of a renewal application.
- (e) Interest on the sums awarded at the rate of 6% per annum.
- (f) A declaration that the claimant's right to work is:
 - (i) Protected by the **Universal Declaration of Human Rights** (UDHR) which provides that: 'Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
 - (ii) Akin to a fundamental right, according to the **Saint Lucia Constitutional Review Commission**, which has recommended that such a right be included as a specific right in the Bill of Rights in the Constitution."

Background Facts

- [2] Dr. Durand, a national of Haiti, was registered as a specialist practitioner in Obstetrics & Gynecology in Saint Lucia on 18th February 2011. She was issued a practising certificate for the period 23rd June 2012 - 22nd June 2014 by the Council. Dr. Durand was employed as a gynecologist and obstetrician at the St. Jude's Hospital ("St. Jude's") from 14th June 2011 for a period of one year and thereafter her contract was renewed on an annual basis, the last renewal being effective

¹ Cap. 11.06, Revised Laws of Saint Lucia, 2013.

from 14th June 2013. Dr. Durand's employment with St. Jude's Hospital was terminated on 28th March 2014.

- [3] Following her termination from St. Jude's, Dr. Durand claimed that she engaged in private practice as her registration had been previously adjusted to include private practice. That was not disputed by the defendant. Dr. Durand's private practice was operated from St. Anthony's Medical Centre in Vieux Fort.
- [4] On 28th May 2014, Dr. Durand made an application to the Council for renewal of her practising certificate which would have expired on 22nd June 2014. On 15th August 2015, the Council wrote to Dr. Durand regarding her application for renewal of her practising certificate. There are two aspects of that letter which are relevant to this matter. Firstly, the letter requested pursuant to section 47(4)(b) of the **Health Practitioners Act**² 'a comprehensive report of the adverse event which resulted in Dr. Durand's dismissal from the St. Jude Hospital on 25th March 2014'. Secondly, the letter stated that Dr. Durand was not entitled to practice medicine at present or until her practising certificate had been renewed.
- [5] Dr. Durand through her lawyer wrote to the Council in September 2014 explaining that she found the request for the comprehensive report to be unfair as she could not speak to what was in St. Jude's contemplation when they terminated her from their employ.
- [6] In October 2014, Dr. Durand through her lawyer wrote to the Council explaining that the directive given that she was not entitled to practice medicine until her practising certificate had been renewed was incorrect based on the provisions of section 50 of the Act. The Council did not respond to these letters until February 2015 when a letter dated 22nd January 2015 was received by Dr. Durand's lawyer. That letter reaffirmed the position of the Council and the requests which it had made of Dr. Durand.

² No. 33 of 2006.

- [7] Dr. Durand in an effort to move the processing of her application along agreed to obtain her personal file from St. Jude's for submission to the Council. On receipt of the file, Dr. Durand alleged that there were several documents missing and it contained documents which she had never seen and which were not known to her or were not the same as what she had known. She claimed that some of the documents were edited and different to the copies in her possession. It was therefore her contention that the bundle of documents provided by St. Jude's was not her personal file. Dr. Durand compiled a separate "bundle" comprising documents which had been excluded and which had been altered or edited, along with a covering letter which detailed the objections and documents which were being discredited and the two sets of documents were provided to the Council in March 2015.
- [8] In April 2015, the Council by letter invited Dr. Durand to attend a meeting with its panel which she attended with her two legal practitioners. The Chairperson indicated that the role of the legal practitioners was limited to providing legal advice if necessary. Dr. Durand said that she was asked general questions and some specific questions about the content of the file which St. Jude's had provided.
- [9] By letter dated 26th June 2015, the Council advised of its decision to refuse to renew Dr. Durand's practising certificate, the basis for the refusal being stated in that letter.

Issues

- [10] The issues to be determined on this claim can be summarized as follows:
- (a) Whether Dr. Durand is entitled to a declaration in relation to the right to work (the right to work issue);
 - (b) Whether the instruction issued by the Council that Dr. Durand is not entitled to practice medicine until her practising certificate had been renewed was ultra vires section 50 of the Act (the section 50 issue);

- (c) Whether the decision of the Council to refuse to renew Dr. Durand's practising certificate was tainted by illegally, irrationality or procedural impropriety (the refusal to renew issue); and
- (d) Whether Dr. Durand is entitled to damages (the damages issue).

The Right to Work Issue

- [11] Dr. Durand claims a declaration that her right to work is (a) protected by the **Universal Declaration of Human Rights** (UDHR) which provides that 'Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment and (b) akin to a fundamental right, according to the **Saint Lucia Constitutional Review Commission**, which has recommended that such a right be included as a specific right in the Bill of Rights in the Constitution.
- [12] Counsel for the Dr. Durand, Mrs. Lydia Faisal ("Mrs. Faisal") submitted that the fact that Dr. Durand was directed to cease work without the opportunity to be heard gives rise to an entitlement to damages in respect of which she could have sued pursuant to the **International Convention on Human Rights** and upon the common law principles in **Nagle v Fielden**.³
- [13] Counsel for the Council, Mrs. Wauneen Louis-Harris ("Mrs. Harris") submitted that the claimant failed to establish that Saint Lucia is a signatory to the **Universal Declaration of Human Rights**. Mrs. Harris argued further that the right to work would have to be incorporated into local law in Saint Lucia by an act of Parliament in order for such a declaration to be granted.
- [14] This issue can be dealt with very briefly. **The Universal Declaration of Human Rights** adopted by the United Nations Assembly on 10th December 1948 is a non-binding international instrument which provides inspiration for subsequent international human rights instruments binding on States Parties thereto as well as

³ (1967) 2 WLR 1027.

for domestic human rights of several States. There is no evidence that Saint Lucia is a signatory to this instrument.

- [15] In the case of **The Attorney General v Jeffrey Joseph et al**,⁴ the Caribbean Court of Justice spoke to the situation where treaties had been ratified but were not incorporated into domestic law. The Court said:

“The classic view is that, even if ratified by the Executive, international treaties form no part of domestic law unless they have been specifically incorporated by the legislature. In order to be binding in municipal law, the terms of a treaty must be enacted by the local Parliament. Ratification of a treaty cannot ipso facto add to or amend the Constitution and laws of a State because that is a function reserved strictly for the domestic Parliament. Treaty-making on the other hand is a power that lies in the hands of the Executive. See: *JH Rayner (Mincing Lane) Ltd v Dept of Trade & Industry*[FN31]. Municipal courts, therefore, will not interpret or enforce the terms of an unincorporated treaty. If domestic legislation conflicts with the treaty, the courts will ignore the treaty and apply the local law. See: *The Parlement Belge*[FN32].”

- [16] International conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. In effect, unless an unincorporated human rights treaty has entered into force by signature, ratification, or some other agreed procedure, or is being provisionally applied by prospective parties, it cannot affect the rights of a private person.⁵

- [17] The Constitution contains fundamental rights and freedoms. The right to work is not one of these. The fact that a recommendation has been made for its inclusion in the Constitution does not raise it to the level of any of the fundamental rights now stated in the Constitution and breach of which would entitle a party aggrieved to apply to the High Court for a declaration that the particular right has been infringed.

⁴ Para 55 of the joint judgment of the Hon. Mr. Justice de la Bastide and Mr. Justice Saunders.

⁵ Para 18 of the Judgment of the Hon. Mr. Justice Pollard.

[18] The case of **Nagle** establishes the principle that the court will do everything to ensure that a person's right to work is not arbitrarily interfered with. Lord Denning was careful to point out that even in the absence of a contract the court would seek to find a way to protect a person's right to earn a livelihood. In that case, the court granted an injunction against the Jockey Club preventing them from denying Mrs. Nagle a licence because she was female. The court was however very clear that damages would not be available unless the claimant could maintain an action in tort or contract against the Jockey Club. The case does not establish a right to work, but rather how the court would treat attempts to deprive a person of his livelihood and right to work in his chosen field.

[19] There is therefore no basis for the grant of the declaration sought by Dr. Durand in relation to the right to work.

The Applicable Law

[20] Dr. Durand argued that the decision of the Council to refuse to renew Dr. Durand's certificate and to issue a directive to her that she was not entitled to practice medicine at present or until her practising certificate was renewed were tainted by illegality, irrationality or procedural impropriety.

[21] In **Council of Civil Service Unions v Minister for the Civil Service**,⁶ the Court identified three grounds upon which a decision of a public authority may be found to be invalid. These are: illegality, irrationality and procedural impropriety.

A. Illegality

[22] Illegality arises where a decision-maker who must understand correctly the law that regulates his or her decision-making power and must give effect to it fails to do so. Illegality also includes ultra vires acts and errors of law. An action or decision is said to be tainted with illegality if:

⁶ [1985] AC 374.

- (a) It was purportedly taken under legislation which does not contain the requisite power; or
- (b) It was purportedly taken under legislation which contains precise limits on the circumstances in which a power or duty can be used, and the action or decision in question either exceeds these limits or fails to perform the power or duty in a proper way.⁷

[23] In **Blackstone's Civil Practice 2004**, the learned authors state that an alternative way of analyzing illegality is as an error of law. This is where a public body makes a decision based upon an incorrect interpretation of the law.

[24] Counsel Mrs. Faisal submitted that the Council misinterpreted sections 50 and 53 of the Act and acted in excess of those sections by (a) ignoring the express provisions of section 50 that a licence was deemed to continue in force until the decision on its renewal had been taken, (b) ignoring the express reasons set out in section 53 and refusing the renewal of the licence for reasons extraneous to section 53; and (c) misinterpreting and misapplying the limits of the Act and considering extraneous matters such as documents from St. Jude's Hospital which then formed the basis for the decisions made by the Council.

[25] Mrs. Faisal relied on the case of **Digicel Limited v The Telecommunications Regulatory Commission**⁸ in which reference was made to **De Smith's Judicial Review**⁹ where the learned authors said:

"The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the power in order to determine whether the decision falls within its "four corners". In so doing the courts enforce the rule of law, requiring administrative bodies to act within the bounds of the powers they have been given. They also act as guardians of Parliament's will – seeking to ensure that the exercise of power is what Parliament intended."

⁷ Blackstone's Civil Practice 2004 at para 74.7.

⁸ BVIHCV2007/0095.

⁹ 7th Edition at para5-002 to 5-003.

[26] Mrs. Harris on behalf of the Council argued that there was no illegality. Mrs. Harris argued that section 53 did not restrict or confine the Council to the reasons particularized therein. She argued further that section 8 of the Act was in mandatory terms and required the Council to monitor and assess whether a medical practitioner complied with the provisions of the Act and to promote high standards in the practice of medicine and dentistry. Therefore, when combined with the use of the word 'may' in section 53 of the Act, it was clear that Parliament's intention was to confer the responsibility on the Council to safeguard the interest of the public.

B. Irrationality

[27] A decision may be tainted by irrationality where the decision-making body allegedly:

- (a) acted for an improper purpose;
- (b) acted with bad faith;
- (c) fettered its discretion;
- (d) improperly delegated its functions;
- (e) reached a conclusion which no body properly directing itself on the relevant law and acting reasonably could have reached;
- (f) failed to take into account relevant matters or took into account irrelevant matters;
- (g) abused its powers; or possibly;
- (h) acted in a disproportionate manner.

[28] In looking at the area of a failure to take into account relevant factors or taking into account irrelevant factors, it is the case that the legislation may expressly or impliedly make clear considerations to which regard must be had or must not be had. The Court may infer this by looking at the surrounding circumstances of the case. It does not have to be proven that the influence of irrelevant factors was the

chief or main influence upon the decision made or action taken. It is enough to prove that the influence was material or substantial.¹⁰

[29] Counsel, Mrs. Faisal submitted that the Council had acted irrationally in coming to the decisions which it made. Particularly, counsel argued that the Council acted in bad faith by directing Dr. Durand not to practice until renewal of her certificate and then took just over one year to render a decision. Counsel pointed to the many efforts made by Dr. Durand through her counsel to engage the Council and the very dilatory communication from the Council without even offering an explanation for the delay. Counsel went further that the Council would have known that when it directed Dr. Durand not to engage in practice that she would have suffered financial loss, loss of her clientele and loss in relation to her reputation as a medical practitioner.

[30] Counsel also pointed to the fact that the Council purported to conduct a hearing on inadmissible evidence and took into consideration matters which were irrelevant to the matter which was before it to support her contention that the decision was irrational. Counsel submitted that the grounds for refusal being illegal they could not form any rational basis for the decision arrived at by the Council.

[31] In response, Mrs. Harris again relied on sections 8 and 10 of the Act to suggest that the Council did not act irrationally in deciding to refuse to renew Dr. Durand's practising certificate. Mrs. Harris suggested that based on the abundance of cogent evidence which the Council possessed, its decision to refuse the renewal was not irrational.

C. Procedural Impropriety

[32] Procedural impropriety is said to be concerned with the procedure by which a decision is reached, not the ultimate outcome. In order to prove procedural impropriety, the applicant must show that the decision was reached in an unfair

¹⁰ R v Inner London Education Authority, ex parte Westminster City Council [1986] 1 WLR 28.

manner. If there is no statutory framework which expressly stipulates the relevant procedural requirements, there are two applicable common law rules under this head, namely:

- (a) The rule against bias; and
- (b) The right to a fair hearing whereby those affected by a decision of a public body are entitled to know what the case is against them and to have a proper opportunity to put their case forward.

[33] Mrs. Faisal argued that the Act does not envisage or empower the Council to conduct a trial, and in these circumstances, the procedure employed by the Council was flawed. Mrs. Faisal relied on the following passage from **Blackstone's Civil Practice 2003** at paragraph 74.24 which states:

“the right to a fair hearing embodies the idea of evenhandedness between the parties in relation to obtaining information which is available and the provisions of an opportunity to make representations. The concept of a fair hearing varies from case to case; for example there may be an entitlement to an oral hearing in a case where the livelihood or liberty of the Claimant is at stake, whereas such an entitlement may not be deemed necessary in relation to more minor matters with less potentially adverse consequences ...”

[34] Counsel argued that the fact that Dr. Durand's legal counsel was present at the hearing does not legitimize the procedure adopted by the Council. Mrs. Faisal pointed out that the questions posed to Dr. Durand at the hearing were based solely on the bundle of documents from St. Jude's, the content of which had been challenged by Dr. Durand and which challenge was ignored by the Council.

[35] Mrs. Harris argued that there was no procedural impropriety, as Dr. Durand had been afforded a fair hearing where she was allowed to make representations, and she did not challenge the procedure and submitted to same. Counsel argued that Dr. Durand availed herself of the right to make representations at the hearing on 30th April 2015, she was accorded due notice that the St. Jude's Hospital had referred to numerous issues which had called her performance as head of the Obstetrics and Gynecology Unit into question and she was adequately

represented by legal counsel at the hearing. She went further to argue that from inception the Council made it clear to Dr. Durand that the reasons for the termination of her employment was a consideration and the information which came to the Council's attention came from Dr. Durand herself.

The Section 50 Issue

[36] Section 49 of the Act deals with applications for renewal of practising certificates.

Section 49 (1) provides as follows:

“(1) Subject to subsections (2) and (3), a medical practitioner or dental practitioner **shall** apply to the Council for the renewal of his or her practicing certificate.” (my emphasis)

[37] Subsection (2) provides that:

‘An application under subsection (1) shall only be decided by the Council if it is received within the period starting 60 days before the expiry of the practising certificate and ending immediately before the expiry of the practising certificate.’

[38] Based on this section, Dr. Durand would have had to have made her application for renewal of her practising certificate between 22nd April and 21st June 2014. Dr. Durand's application was made to the Council on 28th May 2014.

[39] Section 50 of the Act provides as follows:

(1) If an application for renewal is made under section 49, the applicant's practicing certificate is taken to continue in force from the day it would, apart from this section, have expired until—

(a) If the Council decides to renew the practicing certificate, the day the renewal is issued to the applicant under section 52;

(b) **if the Council decides to refuse to renew the practicing certificate, the day the notice of the decision to refuse the application for renewal is given to the applicant under section 52;** or

(c) If the application is taken to have been withdrawn under section 51(3), the day it is taken to have been withdrawn.

(2) Subsection (1) shall not apply if the practicing certificate has been suspended in accordance with the provisions of this Act.” (my emphasis)

[40] Mrs. Faisal argued that by virtue of section 50(1), Dr. Durand should not have been given the directive which was stated in the Council’s letter of 15th August 2014. In that letter the Council stated:

“The SLMDC further advises that pursuant to section 36(2) of the Act, which reads:

“A person shall not practice medicine or hold himself or herself out to be a medical practitioner or dental practitioner in Saint Lucia unless that person holds a valid practising certificate for that purpose issued pursuant to Section 47 and complies with this Act, the regulations and his or her practising Certificate.” –36(2)

You are not entitled to practice medicine at present or until your practising certificate has been renewed.” (my emphasis)

[41] The Council did not address this point in its submissions. By letter dated 23rd October 2014, counsel for Dr. Durand, Mrs. Faisal wrote to the Council seeking clarification as to the reason for the directive given in the August 2014 letter in light of the clear provisions of sections 49 and 50 of the Act. By letter dated 22nd January 2015, Mrs. Harris, counsel for the Council responded and suggested that the fact that Dr. Durand had observed the directive issued to her in the 15th August 2014 letter stopped her from impugning the legality of the directive based on the erroneous quotation of the legislative provision, and that the directive was made in light of the clear, unambiguous and equivocal provisions of sections 49, 50 and 51 of the Act. In a letter dated 24th February 2015, counsel, Mrs. Harris for the Council responded to Dr. Durand’s counsel and stated that section 50 did not apply to Dr. Durand due to the ongoing inquiry being conducted by the Council in determining the application for renewal and therefore the legal justification for the Council’s directive was blatantly apparent.

[42] It is instructive to note that if one does not possess a valid practising certificate then one cannot practice medicine. The medical profession is an extremely important one and it is important that when they perform their functions, they are

duly authorized and competent so to do. Section 50 of the Act which has been set out above makes provision so that where a medical practitioner applies for the renewal of his/her practising certificate within the stipulated time, the acts performed by the medical practitioner between the date of expiry of the certificate and the date of renewal or refusal to renew would not be illegal. If the application is considered prior to the expiration of the certificate, then there is no need for application of section 50. The section aims at protecting a medical practitioner who at the time of his application has a valid practising certificate, but which expires in the period when the application for renewal is being considered. Section 50 does not apply where a practising certificate has been suspended pursuant to section 111. There is nothing in section 50 which delimits its application, as Mrs. Harris for the Council suggested in the letter of 24th February 2015 if there is an ongoing inquiry. Further, on the evidence before the Court, there was no proper inquiry being conducted.

- [43] Section 50 is aimed at bridging the time gap between application for renewal, expiry and renewal or refusal to renew. This is necessary so that a medical practitioner is able to exercise his functions without fear of criminal sanction in circumstances where he has complied with section 49. Regulation of professions is important to promote public trust and confidence as well as certainty.
- [44] The Council therefore was wrong when it directed Dr. Durand that she should not practice medicine 'at present' or until her practising certificate was renewed. This was in clear contravention of section 50(1). Dr. Durand having made her application for renewal of her practising certificate within the time stipulated in that section was therefore entitled to the privilege afforded by the section which would have allowed her to continue to practice medicine until her application for renewal had been either granted or refused.
- [45] I therefore find that the Council's directive issued in its letter of 15th August 2014 was ultra vires section 50(1) of the Act and therefore illegal. The Council clearly

made an error of law when it interpreted section 50 as being not applicable to Dr. Durand.

The Refusal to Renew Issue

- [46] Dr. Durand contends that the decision of the Council to refuse to renew her practising certificate was arrived at on the basis of illegality, irrationality and procedural impropriety and therefore an order of certiorari should issue to quash the said decision.
- [47] The background facts which led up to the final decision are necessary to put this matter into proper perspective.
- [48] By its letter of 15th August 2014, the Council requested of Dr. Durand that she provide a comprehensive report of the adverse event which resulted in her dismissal from St. Jude's. That request was stated to be made pursuant to section 47(4)(b).
- [49] Dr. Durand did not feel that she was in a position to provide the report requested, but agreed to have her personal file from St. Jude's made available to the Council. However, when that file was received from St. Jude's, Dr. Durand said she observed that there were missing documents, edited documents and did not feel that the file was a true reflection of her personal file. She then compiled a separate "bundle" of documents comprising those which she said were missing but had previously formed part of her file and other documents which varied from those contained in the St. Jude's file.
- [50] Counsel for Dr. Durand, Mrs. Faisal questioned the basis of the request of the Council for the comprehensive report and in a letter dated 22nd January 2015. Mrs. Harris who represented the Council stated in response that the request had been made pursuant to section 51(1)(b) of the Act and that the Council had the right to demand the information which in the circumstances was reasonably

required to determine the application for renewal of Dr. Durand's licence. It is to be noted that the section quoted in the 15th August 2014 letter was section 47(4)(b) which is identical in its terms to section 51(1)(b). In fact, the reference to section 47(4)(b) was an incorrect reference as that section does not apply to renewal of practising certificate applications.

[51] The letter also made reference to the letter of termination from St. Jude's to Dr. Durand dated 28th March 2014 which had stated that "the Board had determined that it has become unreasonable to continue an employment relationship with you due to the numerous issues that bring your performance as head of the Obstetrics and Gynecology Department into question." Thus, the Council said it was entitled to request the particulars of the information surrounding the numerous issues spoken of in the termination letter 'in light of the sensitive and delicate issues which pervade this area of medical expertise.'

[52] At paragraph 15 of the said letter, counsel, Mrs. Harris further stated:

"Your client ought to have due cognizance of the fact that the dismissal of a Medical Practitioner from an Institution is a grave and draconian process with severely adverse consequences. Irrespective of whether your client is of the opinion that the dismissal was unfair, that does not relieve my client of the responsibilities conferred thereon by section of the Act. It is mandatory that your client proffer the information demanded. The delivery of the termination letter by your client is inadequate in the circumstances and fails to satisfy the demand by my client in pursuance of section 51 of the Act."

The letter also stated that section 51 confers the power on the Council to require the information and/or document which the Council may reasonably require to determine the application for renewal. It is clear from that letter that there was an ongoing inquiry being undertaken by the Council even if Dr. Durand may not have understood that to be the case.

[53] After the St. Jude's file and the bundle of documents were submitted to counsel Mrs. Harris with cover letter dated 9th March 2015, counsel, Mrs. Harris wrote to Dr. Durand by letter dated 20th April 2015. That letter was in the following terms:

"RE: APPLICATION FOR RENEWAL OF LICENCE BY DR. SHAELLE DURAND

Dear Mrs. Faisal;

...

My client has decided to afford your client with an opportunity to make representations, prior to a decision being made appertaining to the said application in light of the following:-

(1) The nature of the application; and

(2) The issues canvassed in the documents contained in the File for your client emanating from St. Jude Hospital which was submitted by you to the undersigned on the 9th day of March, 2015.

Accordingly request is hereby made that your client attend a hearing for the purpose of making representations on Thursday the 30th day of April 2015 at 4:00 p.m. at the Conference Room of the Ministry of Health, Waterfront, Castries.

..." (my emphasis)

[54] In a subsequent letter dated 29th April 2015, one (1) day before the scheduled hearing, counsel Mrs. Harris advised counsel for Dr. Durand, Mrs. Faisal that the Council had conceded for Dr. Durand to be accompanied by one (1) individual of her choice at the hearing for advisory purposes only and that such individual could be her legal representative or a colleague who should be identified prior to the hearing.

[55] The 'hearing' took place as scheduled on 30th April 2015. I will return to the hearing later.

[56] On 26th June 2015, the Council issued a letter to Dr. Durand in which it notified her of its decision to refuse to renew her practising certificate 'on the basis of the concerns highlighted in the documents submitted on the 11th day of March 2015 and which arose at the Hearing which took place on the 30th day of April 2015.' The areas of concern were particularized as unethical behaviour, improper

management of the patient, clinical incompetence and breach in patient confidentiality.

- [57] The 26th June 2015 letter also stated that the decision to refuse to renew was made in conformity with the duties conferred on the Council in accordance with sections 8(e) and (f) of the Act and reminded Dr. Durand that she could not practice medicine without a practising certificate and of her right to appeal the decision.

Discussion - Refusal to Renew Issue

- [58] Section 8 outlines the functions of the Council some of which are:
- (a) "To assess applications for the registration of medical practitioners and dental practitioners;
 - (b) To register persons who satisfy the requirements for registration under the provisions of this Act as medical practitioners and dental practitioners;
 - (c) To assess applications for practicing certificates for medical practitioners and dental practitioners;
 - (d) To issue practicing certificates to persons who satisfy the requirements for practicing as a medical practitioner or dental practitioner under the provisions of this Act;
 - (e) To monitor and assess whether a medical practitioner or dental practitioner complies with the provisions of this Act;
 - (f) To promote high standards in the practice of medicine and dentistry;
 - (m) To investigate complaints made against a medical practitioner or dental practitioner referred to it by the Commission or of its own motion;
 - (p) To ensure compliance with this Act."

[59] Section 51(1) (similar to section 47(4)) of the Act provides as follows:

(1) Before determining an application for renewal, the Council—

- a. May investigate the applicant;**
- b. May, by notice in writing given to the applicant, require the applicant to give the Council, within reasonable time of at least 30 days as stated in the notice, further information or document which the Council may reasonably require to determine the application for renewal; and**
- c. May, if the Council is not satisfied that the applicant has satisfied any recency of practice requirements, by notice given to the applicant, state conditions under which an application may be reconsidered.” (my emphasis)**

[60] Sections 51(1)(a) and 47(4)(a) state that in determining an application for the renewal or issue of a practising certificate, respectively, the Council may investigate an applicant. When one examines the provisions of the Act, the power to investigate is contained in many sections. For example, section 41 of the Act provides that in determining an application for registration of an individual as a medical or dental practitioner, the Council may investigate the applicant. Sections 51(1)(b) and 47(4)(b) give the Council the power to request further information or a document, but restricts it to information or a document which is reasonably required to decide the application for renewal or issue of a practising certificate. I think that this clearly shows that the power to investigate does not relate to any and everything, but is confined to matters which are relevant to assessing whether a medical practitioner's practising certificate should be renewed. In my opinion, the Act does not give the Council a carte blanche power to investigate. Sections 51(1)(c) and 47(4)(c) of the Act make provision for the Council to require an applicant to undergo a written practical and oral exam in cases where it is not satisfied that an applicant has satisfied recency of practice requirements.

[61] Sections 52(1) and (2) and 47(2) and (3) of the Act provide that the Council shall consider an application for renewal/issue of a practising certificate and subject to the respective provisions decide to renew/issue or refuse to renew/refuse a

practising certificate. It also provides that in making its decision, the Council shall have regard to the extent to which an applicant has satisfied recency of practice requirements.

[62] The salient question at this juncture is whether section 51(1)(a) and (b) empowered the Council to request a comprehensive report on the adverse events which had led to Dr. Durand's termination from St. Jude's and further whether such report was reasonably required to determine the application for renewal.

[63] The request for a comprehensive report on the adverse events which led to Dr. Durand's dismissal from St. Jude's has nothing to do with recency of practice requirements. The fact that a person has been terminated is not conclusive of the fact that they are guilty of the allegations made. In deciding the application for renewal or issue of a practising certificate, the Council must at all times act within the confines of the legislation and in accordance with the rules of natural justice.

[64] Mrs. Harris for the Council submitted that Dr. Durand was afforded a fair hearing. Counsel argued that Dr. Durand had been given more than one opportunity to comment and contradict the information about which complaint was made, was permitted to comment and make representations on the information at the hearing on 30th April 2015. Counsel referred to the ingredients of a fair hearing as identified by Dr. Albert Fiadjoe¹¹ as being (a) the right to make representations; (b) notice of a charge and full particulars and (c) the right to legal representation. Mrs. Harris therefore submitted that Dr. Durand had availed herself of the right to make representations at the hearing on 30th April 2015, was accorded notice that St. Jude's Hospital had referred to numerous issues which called her performance as Head of the Obstetrics and Gynecology Department into question and was adequately represented by legal counsel at the hearing. Counsel submitted that from the onset, Dr. Durand was aware that the reasons for termination of her employment were a consideration in relation to her application for renewal of her

¹¹ Albert Fiadjoe, Commonwealth Caribbean Public Law-Text, Cases and Materials at page 183.

practising certificate. Mrs. Harris urged the Court that the Council therefore did not act irrationally or unreasonably in taking these matters and what transpired at the hearing into account.

- [65] The transcript of the hearing of 30th April 2015 assists in understanding how the Council perceived its role in relation to the application which was before it. The Chair of the Council Dr. Ephraim said the following at the commencement of the hearing:

“I would like to confirm that Dr. Durand was given an invitation to come to this meeting to make representations on her application for renewal of her licence, we received documentation and we thought it fitting to give her the opportunity to be heard.

...

We just wanted to ensure that before we go through our deliberations that we have all the information that is necessary so that we can consider the renewal of your license.

Council thought it fitting because we noted from the documentation that you submitted that there was some allegations made as it pertains to unethical behaviour, poor clinical judgment, etc...So this is why we gave you the opportunity to come this afternoon to speak to us. So the floor is open for you to go ahead and speak.

...”

- [66] It is to be noted that from a perusal of the several pieces of correspondence between counsel for the respective parties, there is none which states the specific matters on which Dr. Durand was to make representation. Even at the commencement of the ‘hearing’, the specific issues appeared to be at large but yet Dr. Durand was expected to make representation. In fact, Dr. Durand started off by indicating that she was not aware of any ethical issues. The Council referred to the documentation and asked Dr. Durand for her take on them and what she had to say. It must be remembered that Dr. Durand had previously stated that she did not agree that the file submitted by St. Jude’s represented her complete file but yet

the hearing continued in relation to the said same documentation which was being challenged by Dr. Durand.

- [67] Was the Council permitted to take these matters into consideration and convene a hearing to address these on a renewal of practising certificate application? The sections dealing with the renewal or issue of a practising certificate do not speak to allowing an applicant the opportunity to make representations without more. The sections specifically refer to making submissions in relation to the proposed conditions for the issue or renewal of a practising certificate on recency of practice requirements.
- [68] The Council made a determination on Dr. Durand's application for renewal of her practising certificate based on the information which was contained in the personnel file of Dr. Durand, albeit Dr. Durand had raised questions as to the reliability of the file which had been obtained from St. Jude's. The Council also based its decision on a termination letter which alluded to numerous issues which brought into question Dr. Durand's performance as head of the Obstetrics and Gynecology Department and which issues were not detailed in the letter.
- [69] The Act makes provision for the making of complaints which is where the Council should have directed its energies if it thought that Dr. Durand's conduct as a medical practitioner merited some attention. Section 104 of the Act makes provision for the Commission or the relevant Council to lodge a complaint with respect to the conduct of a medical practitioner. Section 105 provides the specific matters in respect of which a complaint may be made and includes where a health practitioner commits an act of professional misconduct. The section defines what professional misconduct is by identifying specific acts, but is not limited to only the acts listed. Specifically, the Act lists these as acts of professional misconduct-contravenes any of the provisions of this Act; contravenes a provision of a prescribed code of conduct relevant to his or her category of health care practice; and performs his or her duties in a negligent or incompetent manner.

- [70] Section 106 deals with the complaints procedure and sets out how the complaint is made and the role of the Commission on receiving a complaint. The section also details the role of the Council on receiving a complaint or where it initiates a complaint of its own motion. Importantly, section 106(6) states that the rules of procedural fairness shall be observed in determining a complaint.
- [71] Section 109 deals with the complaints procedure and provides for the notification of a complaint to the health practitioner. This section gives a very detailed procedure for the hearing of a complaint and importantly provides that the health practitioner is entitled to make submissions when appearing before the relevant Council and to be assisted by another person including an attorney-at-law for advisory purposes only. Only if the relevant Council after conducting the investigation and considering the explanation and submissions of health practitioner thinks that he/she has a case to answer can it take further action. Subsection (9) details the actions which the Council may take and includes imposing on the health practitioner a condition subject to which he or she may continue to practice, caution or reprimand, suspension or revocation of a practising certificate in accordance with section 111 and 112 of the Act.
- [72] It was clear from Dr. Durand in cross-examination that she did not consider what transpired on 30th April 2015 as a hearing. She also in cross-examination stated that she had attempted to bring a witness to the hearing but was not allowed to. Counsel Mrs. Harris attempted to ask Dr. Durand why she had not informed the Council of this witness and had not filed a witness statement. Dr. Durand indicated that she did let the secretary know before the hearing started that she had brought a witness. It must be remembered that the notice that Dr. Durand could be accompanied by one person was only given to Dr. Durand a day prior to the scheduled hearing so that it would be highly impossible to have a witness statement produced in that time. In any event, no such directions were given in relation to the conduct of the 'hearing'.

[73] In a letter dated 29th September 2014,¹² written to the Council by St. Jude's Hospital in response to a request by the Council for information on the numerous issues that brought the performance of Dr. Shaelle Durand as head of Obstetrics and Gynecology into question, St. Jude's gave some very fitting advice to the Council. They reminded the Council that it is for them after having had a written complaint or being aware of certain information with respect to the professional conduct on the part of its registered practitioners to commence inquiries on its own motion or where the Commission has asked it to do so. The letter went on to state that as it related to the request by the Council for witness statements or accounts by three staff members to be submitted to the Council, they strongly advised against it. They said the Council must summon the witnesses and seek statements from them in relation to the incident and the physician must be given a statement informing him that the specific witnesses would be summoned. The letter stated further that the **Health Services (Complaints and Conciliation) Act**¹³ gives wide powers to the Commission established under that Act, whereas the **Health Practitioners Act** did not give such wide powers to the Council, and it was therefore their view that the Council should seek legal advice as to the manner in which such investigations should be conducted. That letter is very instructive and encapsulates the essence of this matter.

[74] The Council in its attempt to fulfil its functions and mandate of the Act has conflated its roles relating to the issue/renewal of practising certificates and that of complaints. It is clear that the conduct of a health practitioner is an important factor or component in relation to assessing the fitness of an individual to continue to practice as a health practitioner. However, the rules of natural justice and the provisions of the Act must always be adhered to.

[75] The Council on receipt of the information regarding Dr. Durand's dismissal from St. Jude's was entitled to carry out its own investigation into the matter of her

¹² Exhibit MDC7 of Certificate of Exhibits filed 13th April 2017.

¹³ Cap 11.19, Revised Laws of Saint Lucia 2008.

dismissal, but it could not do things which the Act never gave authority to do and was confined to issues which touched and concerned the renewal of a practising certificate. The Act did not give the Council the authority to undertake a hearing for the purpose of assessing an application for renewal except in the circumstances defined as where recency of practice conditions were being imposed. If the Council wished to address its concerns regarding Dr. Durand's alleged issues which it thought brought her professional conduct into question, then it was obliged to follow the correct procedure, not deal with it in a renewal application where the legislation gave them no power so to do. It had to make clear to Dr. Durand the complaints against her and not simply say that the matters were raised in documents in her personal file. The Council was clearly guided by irrelevant considerations in the determination of Dr. Durand's application for renewal of her practising certificate.

[76] The Council engaged in a hearing at the end of which it made determinations as regards Dr. Durand's professional conduct. This is the same Council who had to determine her application for renewal.

[77] At the end of the process, the Council issued a letter to Dr. Durand advising that it had decided to refuse her application for renewal of her practising certificate, the basis being the areas of concern highlighted in the documents submitted and which arose at the hearing on 30th April 2015. These areas of concern were particularized as unethical behaviour, improper management of the patient, clinical incompetence and breach in patient confidentiality. It would appear to me that in order for these to form the basis of the Council's decision not to renew Dr. Durand's practising certificate, the Council would have had to have made a determination that Dr. Durand was guilty of all of the things particularized. The letter does not specifically detail the Council's findings. Rather, the four areas are listed as areas of concern upon which the decision rests.

- [78] This is a frightening proposition; that a doctor could be stripped of the ability to pursue his/her chosen profession without there being objective assessment of whether he/she is guilty of the things alleged. Throughout the transcript of the proceedings at the hearing, there is constant pointing out by Dr. Durand and her legal representatives that there were issues with the authenticity of some of the documents referred to as the authors were unknown, they were undated and Dr. Durand had no opportunity to question the makers of these documents.
- [79] Another very interesting feature of the hearing was the discussion on whether Dr. Durand had submitted her original certificate showing her degree in medicine. Dr. Durand said that a copy was on her file at St. Jude's. The Council suggested that there had been an indication at the time the application for registration was made that Dr. Durand's certificate had been lost in the earthquake in Haiti in 2010. There was much discussion about this. However, it must be noted that Dr. Durand was registered by the same Council as a medical practitioner since 2012 and all that was before the Council for determination was the renewal of a practising certificate which had been issued by them.
- [80] It is clear that the Council acted outside of the provisions of the Act, it took irrelevant matters into consideration in considering Dr. Durand's application for renewal, and that what purported to be a hearing was conducted in a wholly unfair manner. The Council could not on the application for renewal embark upon a hearing on matters which were at large and were not specified to Dr. Durand. Therefore, any decision taken by the Council in the circumstances of this case was tainted with illegality, irrationality and procedural impropriety. I must point out in light of submissions made by counsel Mrs. Faisal that proceedings before a body such as the Council are not akin to a civil trial and so the strict procedural requirements such as cross-examination do not have to be observed. What is necessary is that the requirement of fairness is observed. It is safe to say that a decision by the Council to have a hearing in circumstances not permitted by the

Act and in relation to matters which were not specifically known to Dr. Durand could not be said to satisfy the requirements of fairness.

Section 53-Reasons for Refusal

[81] Counsel for Dr. Durand, Mrs. Faisal submitted that the Council could not have refused the application for renewal of Dr. Durand's practising certificate on the basis that they did as the Council was limited to the matters listed in section 53 as the bases upon which an application could be refused.

[82] Counsel Mrs. Harris submitted in response that section 53 provides guidelines to the Council as to the basis for the refusal of the application, without restricting the Council to confine its reasons within those particularized in the section.

[83] Section 53 of the Act provides as follows:

"53. Discretion to refuse to renew practicing certificate

(1) The Council may refuse to renew a practicing certificate—

(a) If the medical practitioner or dental practitioner fails to pay the prescribed practicing certificate fee;

(b) If the medical practitioner or dental practitioner fails to provide any information required by the Council by a date specified by the Council;

(c) If the medical practitioner or dental practitioner has not practiced for a period of time as specified by the Council unless the Council is satisfied that he or she complies with the requirements of section 40; or

(d) If the medical practitioner or dental practitioner fails to meet the recency of practice requirements.

(2) The Council shall, as soon as is practicable after it makes a decision to refuse to renew a practicing certificate to an applicant, give notice in writing to the applicant of the refusal to renew the practicing certificate, the reasons for refusal and the applicant's right to appeal under this Act.

[84] The section is very clear. It prescribes the reasons why a practising certificate may be refused. It is not worded in such a manner which suggests that a

practising certificate could be refused by the Council for any other reasons. Were Mrs. Harris correct in her interpretation of section 53, the section would have had to have said that “a certificate could be refused for the following reasons including ...”. This would mean that the reasons for refusal could be extended beyond that stated in the section. The tenor of section 53 is in keeping with the process for renewal of a practising certificate. The process of renewal of practising certificates is intended to be an administrative process with as little delay as possible. None of the reasons for refusing the application for renewal of Dr. Durand’s practising certificate outlined in the Council’s letter of 26th June 2015 are specified as reasons for refusal under section 53 of the Act.

[85] Dr. Durand has asked for an order of certiorari to quash the decision of the Council to refuse to renew Dr. Durand’s practising certificate contained in its letter dated 26th June 2015. Counsel for Dr. Durand submitted that the Court has the power to remit the matter to the Council for reconsideration of the application in light of the findings of the Court. Alternatively, Mrs. Faisal suggests that the Court by virtue of section 11 of the **Eastern Caribbean Supreme Court Act**¹⁴ (“the **Supreme Court Act**”) has the power to replace the decision of the Council with its own decision by applying section 141 of the **Tribunals, Courts and Enforcement Act 2007**.

[86] I must point out that Sir Vincent Floissac, QC in **Panacom International Limited v Sunset Investments Limited et al**¹⁵ was very clear on the intent of section 11 and said this:

“Section 11 of the Supreme Court Act relates solely to the manner of the exercise of the jurisdiction of the High Court. It is therefore an intrinsically procedural provision. The words “provision”, “provisions”, “law” and “law and practice” appearing in section 11 are evidently intended to be references to procedural (as distinct from substantive) law.

The English law intended to be imported by section 11 is the procedural law administered in the High Court of Justice in England. In enacting section 11, the legislature of Saint Vincent and the Grenadines could not

¹⁴ Cap. 2:01, Revised Laws of Saint Lucia 2013.

¹⁵ St. Vincent & the Grenadines Civil Appeal No. 14 of 1992, delivered

have intended to import English substantive law or English procedural law which is adjectival and purely ancillary to English substantive law. ...”

[87] The **Tribunals, Courts and Enforcement Act 2007** of England is therefore not applicable in Saint Lucia as it is substantive law which cannot be imported by virtue of section 11 of the **Supreme Court Act**.

[88] The effect of an order of certiorari is to establish that a decision is ultra vires and to set it aside. The decision is retrospectively invalidated and is deprived of legal effect since its inception.¹⁶ As judicial review is a supervisory and not an appellate jurisdiction, the court can only ensure that a decision has been reached lawfully, and if not, quash the unlawful decision. The court cannot substitute an alternative decision for that of the decision-maker. A decision-maker will be free to reconsider the matter and to make a fresh decision providing that it has regard to the matters which have been brought to its attention by the Court as a result of this decision.

[89] In light of the above, the Court declares that the decision of the Council to refuse to renew Dr. Durand’s practising certificate was tainted with illegality, irrationality and procedural impropriety and cannot be allowed to stand. An order of certiorari is granted quashing the decision of the Council to refuse the renewal of Dr. Durand’s practising certificate for the reasons stated in the Council’s letter of 26th June 2015.

The Damages Issue

[90] Having made the determinations above the question naturally follows as to whether Dr. Durand is entitled to damages. At the conclusion of the trial, the parties were asked to file submissions on damages which I will now consider.

[91] Dr. Durand stated in her affidavit in support of her claim filed on 1st October 2015 that following her termination from St. Jude’s Hospital, she operated her private

¹⁶ See *McLaughlin v Governor of the Cayman Islands* [2007] 1 WLR 2839 at [14].

practice from St. Anthony's Medical Centre in Vieux Fort and earned a net sum of \$10,800.00 per month, seeing a minimum of five to six patients per day at a cost of \$150.00 each and working a five-day week. She said she paid 30% of her earnings to the Medical Centre and was left with \$10,800.00 at a minimum. Dr. Durand said she had no other source of income and medicine was her sole area of expertise.

[92] In her subsequent affidavit filed 20th April 2016, Dr. Durand stated that although she had made reference to her earnings in her previous affidavit, she did not have the supporting documentation to attach as an exhibit as that information had to be verified by an accountant. Dr. Durand asked the Court to disregard the figure stated in her previous affidavit as her earnings and have regard to a statement which she said now contained her actual earnings for the months March to June 2015 which totalled \$8,505.00. According to counsel Mrs. Faisal, the number of days worked was 30 and therefore the average daily earnings was \$283.50. She spoke of the number of working days in a month being 24 (inclusive of Saturdays) and came up with a figure of \$6,804.00 per month.

[93] Counsel Mrs. Harris in her submissions argued that the supplemental affidavit filed by Dr. Durand should not be admitted as it was filed without leave. The Court had addressed the issue of the affidavit in a previous hearing indicating that there was a duty on the claimant to disclose all facts relevant to the claim even where it was not in that party's favour. I was of the view that given that the monthly sums actually earned were far less than that which had been claimed in the affidavit in support of the claim, there could be no prejudice suffered by the defendant by its admission.

[94] Dr. Durand stated that the actions of the Council had affected her to the extent that all her savings had been exhausted because she was not able to practice medicine which is her sole source of income and further she was unable to obtain employment otherwise than in her profession.

[95] Rule 56.8 (1) of the **Civil Procedure Rules 2000** (“CPR”) provides basis for a claim for damages. It states:

“Joinder of claims for other relief

56.8

(1) The general rule is that, where permitted by the substantive law, an applicant may include in an application for an administrative order a claim for any other relief or remedy that –

- (a) Arises out of; or
- (b) Is related or connected to; the subject matter of an application for an administrative order.

(2) In particular the court may, on a claim for judicial review or for relief under the Constitution award –

- (a) Damages;
- (b) Restitution; or
- (c) An order for return of property to the claimant;

if the –

- i. Claimant has included in the claim form a claim for any such remedy arising out of any matter to which the claim for an administrative order relates; or
- ii. Facts set out in the claimant’s affidavit or statement of case justify the granting of such remedy or relief; and
- iii. Court is satisfied that, at the time when the application was made the claimant could have issued a claim for such remedy.”

[96] Dr. Durand’s claim for damages is rooted in a breach of her common law right to work. I have already established that this is not a right which in and of itself leads to an award of damages. **Nagle** is clear that in order to get damages, the claimant must show that they have an action in tort or contract. Mrs. Faisal referred to the case of **The Honourable Attorney General et al v E. Ann Henry Goodwin**¹⁷ to support her contention that the right to work is an established common law right. However, a read of that case will show that that court did not state that there was such a right as to give rise to damages, but simply reiterated what **Nagle** said which is that the common law will always seek to protect a man’s right to work and earn a living.

¹⁷ ANUHCVP1997/0010, delivered 25th October 1999, (unreported).

- [97] Mrs. Faisal submitted that her pleadings had established a cause of action being a breach of statutory duty by the Council in directing her to cease practice in the face of section 50 of the Act which was designed to allow her to continue in practice until a decision had been rendered on her application. Mrs. Faisal argued that in light of this, Dr. Durand had shown that she had a sustainable cause of action against the Council as at the date of her claim.
- [98] Mrs. Harris in her submissions argued that the general principle of law is that where a duty imposed on an authority necessarily involves the exercise of the authority's discretion, any action for breach of that statutory duty may have to proceed by way of an application for judicial review and not an action commenced by writ. However, this case is different in that the statutory duty referred to does not involve the exercise of a discretion. It is a privilege which automatically attaches once the applicant has made his/her application within the period prescribed in section 50. There must be recourse if the Council denies someone the benefit of working because of its failure to apply the section properly and in the face of the issue being raised by the applicant prior to the adjudication of the claim.
- [99] The Council's directive to Dr. Durand that she was not entitled to practice until her practising certificate had been renewed would have meant that Dr. Durand could not have earned any income from the practice of medicine for a total period of 10 months, from September 2014 to June 2015.
- [100] Counsel Mrs. Harris submitted that Dr. Durand was working during the period and referred to a request by Sagicor Insurance Company for verification as to whether Dr. Durand had a practising certificate in the month of November 2014 after the Council's directive had been issued. Counsel also pointed to a letter dated 7th July 2014 written by Dr. Durand to the Council in which she indicated that she operated a private office and was uncomfortable working without proper registration to show that Dr. Durand had not ceased working.

- [101] It must be noted that the enquiry from Sagicor does not prove that Dr. Durand was working as the Court had no information or evidence as to the date of the visit to which the claim related. Also, the Council's directive to cease practice came in August 2014. Therefore, even in July 2014, Dr. Durand would have been well within the confines of the law to operate her private clinic without fear that she was in breach given the clear provisions of section 50 of the Act. I therefore do not accept the arguments of Mrs. Harris.
- [102] Dr. Durand did claim damages in the relief sought on her claim and although the basis for her claim is flawed, I am satisfied that given the Council's breach of section 50 of the Act, Dr. Durand could have maintained a cause of action against the Council for damages in tort.
- [103] I have determined that the evidence provided by Dr. Durand as regards her earnings will be used as a guide to enable the Court to make a fair assessment of any damages to be awarded. Having reviewed Mrs. Faisal's submissions in this regard, I agree with Mrs. Harris that the amount claimed is exaggerated and this is so because whereas Mrs. Faisal used a 24-day month, Dr. Durand's evidence suggested that she worked a 5-day week and the actual evidence of her earnings does not reveal that she ever worked 24 days a month in the four-month period. In fact, on the evidence provided, the average number of days worked is between 8-10 days a month.
- [104] Based on the data provided and Dr. Durand's evidence and applying the 30% payment of earnings to the Medical Centre (which Dr. Durand indicated she paid to the Medical Centre), the net total earnings for March to June 2014 (four months) would be \$5,953.50. That would be an average of \$1,488.36 per month. The total damages for the period September 2014 to June 2015, (ten months) would therefore be \$14,883.60.

Conclusion

[105] The Council in its attempt to fulfil its functions and mandate of the Act has conflated its roles relating to the issue/renewal of practising certificates and that of complaints. It is clear that the conduct of a health practitioner is an important factor or component in relation to assessing the fitness of an individual to continue to practice as a health practitioner. However, the rules of natural justice and the provisions of the Act must always be adhered to. It is my hope that as a result of this decision the Council would consider its powers under the various provisions of the Act and ensure that its actions fall within the scope and ambit of the provisions at all times. If it is that the Council is of the view that the practising certificate application/renewal process requires some enhancing, then that is a matter for legislative amendment to the Act.

[106] I wish to thank Counsel for their very comprehensive submissions. I apologize for the delay in the delivery of the judgment and thank counsel and the parties for their patience.

Order

[107] The Court makes the following orders on this claim:

- (a) The Court grants a declaration that the directive of the Council that Dr. Durand was not entitled to practice medicine until renewal of her practising certificate was tainted with illegality and was ultra vires section 50(1) of the Act.
- (b) The Court grants a declaration that the decision of the Council to refuse to renew Dr. Durand's practising certificate is tainted with illegality, irrationality and procedural impropriety and in such circumstances cannot stand.
- (c) An order of certiorari is granted quashing the decision of the Council to refuse to renew Dr. Durand's practising certificate.
- (d) The matter of the application for renewal of practising certificate in relation to Dr. Durand is remitted to the Council for re-consideration in light of the findings of this Court.

- (e) The Council is to pay damages to Dr. Durand in the sum of \$14,883.60 with interest thereon at 6% per annum from the date of judgment to the date of payment.
- (f) Costs to be prescribed costs pursuant to CPR 65.5.

**Kimberly Cenac-Phulgence
High Court Judge**

By The Court

Registrar