TASMANIA

TASMANIAN INDUSTRIAL COMMISSION

CITATION: Duggan v Minister administering the *S*tate Service Act 2000 – Department of Health – Ambulance Tasmania [2024] TASIC 6

PARTIES: Bryce Duggan (Applicant)

Minister administering the State Service Act 2000/Department of Health – Ambulance Tasmania (Respondent)

SUBJECT: Industrial Relations Act 1984, s 29(1A) application for hearing of an industrial dispute

FILE NO: T14949 of 2022

HEARING DATE(S): 13 December 2022

HEARING LOCATION: Tasmanian Industrial Commission, Hobart

DATE REASONS ISSUED: 11 April 2024

COMMISSIONER: President D J Barclay

CATCHWORDS: Termination of employment – paramedic – alleged breach of code of conduct – undertaking duties alleged to be outside scope of practice

REPRESENTATION:

Lucas Digney for the Applicant

Gretel Chen and Erin Lim for the Respondent

BRYCE DUGGAN v MINISTER ADMINISTERING THE STATE SERVICE ACT 2000 - DEPARTMENT OF HEALTH - AMBULANCE TASMANIA

REASONS FOR DECISION **11 APRIL 2024**

[1] This is an application for reinstatement arising from the termination of the Applicant's employment as an ambulance officer as a result of an incident which occurred on 13 December 2020.

Background

[2] The Applicant was employed in April 1977 and his employment was terminated on 6 June 2022. He was employed in a permanent position based out of the New Norfolk Station.

[3] The incident in question occurred on the nightshift of 13 December 2020. The Applicant was dispatched to an incident at approximately 4:40 am together with Volunteer Ambulance Officer Kim Boxall. They were tasked to provide assistance to a patient Ms Smith.[1]

[4] Ms Smith called for assistance after unsuccessfully attempting to remove a foreign object from her vaginal cavity, namely a table tennis ball. Upon attendance the Applicant undertook an examination of the patient. The dispute relates to whether the Applicant attempted to remove the object or whether he merely undertook an examination to determine whether the object could be removed. Further, the Applicant used Magill forceps to undertake that examination. The Respondent asserts that it was inappropriate to do so. As I understand it the Respondent's position is that an examination of the nature undertaken was improper and not conduct which a paramedic should have undertaken.

[5] It is the Respondent's position that what in fact occurred is that the Applicant attempted to remove the object with the Magill forceps which was conduct outside his authority of practice. The Respondent asserts that this is a significant breach and a valid reason for termination.

[6] The Applicant asserts that he at no time attempted to remove the object, that he was carrying out an examination which it was appropriate to do and that he did nothing wrong, and certainly nothing wrong which would justify termination of his employment.

The Law

[7] The *Industrial Relations Act 1984* (the Act) provides[2] (relevantly to this matter):

[1] Ms Smith is not the name of the patient. In light of the nature of the incident and the fact she was not called to give evidence, I have determined it is unnecessary to identify her.
[2] The Act s 30.

> "(3) the employment of an employee who has a reasonable expectation of continuing employment must not be terminated unless there is a valid reason for the termination connected with –
>
> (a) the capacity, performance or conduct of the employee.
>
> …"

and that the termination of that employment is not otherwise unfair. The onus of establishing a valid reason is on the Respondent. The onus of establishing unfairness is on the Applicant.

[8] The Applicant had a reasonable expectation of ongoing employment, so he is an employee protected from unfair termination of employment.

The Evidence

[9] There was quite a lot of evidence led at the hearing and significant documentation tendered. In writing this decision, while I have regard to all of the evidence, I only specifically refer to the evidence relevant to the issues that I have determined are necessary to understand this decision and why I have come to the determination I have. I should also add that I had the benefit of seeing the witnesses in the witness box which has helped me reach my conclusions about what evidence I should accept.

[10] The Respondent, in its submissions, sets out the uncontroversial evidence relating to the matter, and I venture to repeat it here:[3]

> "Uncontroversial evidence before the Commission establishes the following:
>
> (a) At 22:56 hrs on 13 December 2020 a female patient called '000' and was transferred to AT's State Operations Centre (SOC) complaining of a ping pong ball stuck in her vagina;
>
> (b) The patient was located at Old Beach and was allocated a priority 5 i.e. non-life-threatening injuries and low priority;
>
> (c) At 23:54 hrs on 13 December 2020 there was further communication between the SOC and the patient who advised she was 'pretty good' and 'just laying there'. The patient was advised of further likely delays;
>
> (d) At 01:09 hrs on 14 December 2020 further telephone contact was made with the patient by the SOC. The patient was again described as 'pretty good' and advised that she had been sleeping, would continue to sleep and there was no need for any further call-backs prior to an ambulance arriving;
>
> (e) At 04:30 hrs on 14 December 2020 the applicant and volunteer ambulance officer (VAO) Kim Boxall were assigned to the incident;

[3] Respondent's closing submissions [24]

(f) At 04:40 hrs on 14 December 2020 the applicant and VAO Boxall arrived at the scene;

(g) Some discussion occurred;

(h) The patient took off her pants and lay on the couch, VAO Boxall parted the labia and the applicant inserted a pair of Magill's forceps into the vagina to a sufficient depth to make contact with the ping pong ball;

(i) It was determined that the ping pong ball would not be easily removed and the patient would be transported to the Royal Hobart Hospital (RHH);

(j) At 05:11 hrs on 14 December 2020 the applicant, VAO Boxall and the patient departed for the RHH;

(k) At the time of departure the applicant radioed the SOC and advised as follows:

Item unable to be retrieved. We're heading to the Royal.

(l) At 05:29 hrs on 14 December 2020 the applicant, VAO Boxall and the patient arrived at the RHH – the journey having taken approximately 18 minutes;

(m) The applicant documented AT's attendance on the patient for inclusion in the medical records and noted inter alia:

…On arrival PT met crew at @ door. In nil obvious distress…Removal attempted w forceps @ PTS request.

(n) At no time was the patient's condition life-threatening."

[11] What is contentious is whether the Applicant should have undertaken an examination of the nature he did at all and whether he was attempting to remove the object. The Respondent asserts that in doing those things (if he did) he acted outside his scope of practice and was thereby guilty of serious misconduct justifying termination.

[12] In order to consider those matters it is necessary to determine whether the Applicant was conducting an examination only or whether he was trying to remove the object as it is common ground that he did undertake an examination.

The Applicant's evidence – valid reason

[13] The Applicant made written statements for the purposes of the Respondent's investigation,[4] made a witness statement for the hearing[5] and gave evidence.

[4] Dated 13 May 2021 and 14 September 2021.
[5] Dated 9 September 2022.

[14] In his statement to the investigator of May 2021[6] the Applicant noted that Ms Smith was adamant that she did not want to go to hospital and that she wanted the Applicant to remove the object. In that context, the Applicant decided to undertake an examination to see if he could remove the object. His statement is in the following terms:

> "16. The patient said to me that she wanted me to have a look at where the object was to ascertain where I could remove the object. I said to her that I would have a look, however if I formed the view that I could not visualise the object, she would need to come to hospital.
>
> 17. The patient laid down on the couch. The patient removed her trousers and underwear. Ms Boxall was always with me while this was occurring.
>
> 18. I obtained the McGill forceps and warmed them up under water. The McGill forceps were the only piece of equipment that was available to me. […] appeared to be relaxed and Ms Boxall was right beside me. Ms Boxall parted […] labia. I could feel the 'ping pong ball' with the forceps. I estimate that the forceps were about an inch inside of […]. I tapped the object with the forceps, and it was evident that it was not be easily removed. I then finished the examination.
>
> 19. I informed […] that I could not remove the object and she really needed to come to hospital. On that basis, […] walked herself to the ambulance and sat on the chair. Ms Boxall was always with […]."

[15] His statement made for these proceedings is in similar terms, albeit more detailed in respect to pre-examination discussions. It is clear from that statement that discussions took place about the fact the patient may have to go to the hospital and that she was adamant that the Applicant attempt removal of the object before she would consider going to hospital.

[16] In relation to the question of whether an attempt was made to remove the object the statement reads as follows:[7]

> "c. Removal attempt – what was intended by the comment was to inform hospital medical staff what was used, and the patients attempts to remove in the 5.5 hours prior to crew arrival, crude removal efforts (by patient) and that she was examined using medically approved Magill forceps at patients repeated request."

[17] The reference to what was "intended by the comment" was a comment in the Patient Care Record which reads "Removal attempted with forcepts [sic] at patients [sic] request". I note that record was created at the time (or shortly after) the events occurring.

[18] In his evidence in chief the Applicant maintained that he was not attempting to remove the object and that he used the Magill forceps for examination purposes only.

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[6] Exhibit R3 att 3.
[7] Exhibit A3.

[19] In cross-examination an excerpt of a recording between the Applicant and the Operations Centre was played and the Applicant confirmed that he said that the "item was unable to be retrieved".

[20] The following other matters in his statements were put to the Applicant in cross-examination:

> "MS CHEN: (Resuming) If I could just take you back to the 13th of May 2021 statement that I gave to you a short time ago. If I could take you to paragraph – have you still got that document in front of you, Mr Duggan?.....Yes.
>
> If I could take you to paragraph 16 of that document, you say:
>
> *The patient said to me that she wanted me to have a look at where the object was to ascertain where I could remove the object. I said to her that I would have a look, however, if I formed the view that I could not visualise the object, she would need to come to hospital.*
>
> You maintain – ?.....That's correct. Yeah.
>
> – that that's an accurate statement?.....Yes.
>
> If I could take you to paragraph 18, you say:
>
> *I obtained the Magill forceps and warmed them up underwater. The Magill forceps were the only piece of equipment that was available to me. The patient appeared to be relaxed and Ms Boxall was right beside me. Ms Boxall parted the patient's labia.*
>
> *I could feel the ping pong ball with the forceps. I estimate that the forceps were about an inch inside of the patient. I tapped the object with the forceps and it was evident that it was not to be easily removed. I then finished the examination.*
>
> And you accept that that's an accurate statement, Mr Duggan?.....That's fairly close to it, yes.
>
> Well, it's close to it or it is accurate?.....Well, I couldn't visualise anything, so it had to be the object, I would imagine, or it would – could have been a pelvic bone. Who knows. I could feel something when I pressed on her gut.
>
> But at the time you made that statement, you said you believed it was true and accurate, are you now changing your view on that paragraph?.....Well, it could have been. I mean, there was a lot of swelling in the area due to the previous attempts – the crude attempts by the patient to remove it herself over five and a half hours.

So, your evidence today is different to that set out in paragraph 18 of your statement?.....Well, it all depends how you look at – look at it. I mean, I couldn't visualise it, so I couldn't attempt to remove it.

We'll move on. At paragraph 19, you say:

I informed the patient that I could not remove the object and she really needed to come to hospital. On that basis, the patient walked herself to the ambulance and sat on the chair. Ms Boxall was always with the patient.

Is that an accurate statement?.....That's accurate, yes.

All right?.....I couldn't remove it.

You couldn't remove it?.....It wouldn't remove itself."[8]

…

"MS CHEN: Yes. (Resuming) At paragraph 21 of that statement, you say:

The patient, on receiving the advice provided through the VIRCA process about potential risks, insisted that an assessment be undertaken here to just see if it can be removed. "If you can't get it, I'll agree to go to hospital."

And you maintain that that's an accurate statement?.....Where is this at?"[9]

…

"You agree that that's an accurate statement?.....Yes, that's –

Thank you. And then at paragraph 23 you say:

I explained that it's not likely it will be retrievable but I consented to comply with her request in her interest regarding her triggers, as discussed with her.

And, again, you accept that that's an accurate statement?.....Yes.

At paragraph 24, you continue:

I explained to the patient what could be done in this setting – that if the object was immediately visible, it may be possible to retrieve it but, if not, or too deep, a trip to the hospital would be necessary.

[8] Transcript 25 l 18 – 26 l 33.

[9] Ibid 26 l 44 – 27 l 8.

And that's an accurate statement?.....Yes. Correct."[10]

…

"If we can move on to paragraph 32 of that statement where you say:

I inserted the forceps to a depth of approximately 2.5 centimetres or one inch and I could feel an obstruction – the object.

Then at subparagraph (a), you say:

It was not visible. There was no way to remove the object with the equipment at hand.

And you accept that that's an accurate statement?.....At what point was that, please?

32 subparagraph (a)?.....Yep. Yep.

Yes, you maintain that that's an accurate statement?.....Yep.

Then at paragraph 33, you go on:

I quickly removed the forceps and informed the patient that it would not be possible to remove the foreign object and that to make an attempt would be beyond my role and would risk causing the patient further damage.

?.....That's correct.

You accept that that's an accurate statement?.....Yep."[11]

[21] Before moving on to consider the evidence I should say something generally about the Applicant's evidence. I formed the opinion that he attempted to minimise any aspects of his evidence which were not in his favour and that he was prone to exaggeration in respect to any matters that he thought were in his favour.

[22] For example, the Applicant was cross-examined about the patient's presentation, no doubt with a view to demonstrate that the case was not urgent so there was no need to undertake an examination and particularly to try to remove the object. The Applicant however gave evidence, for the first time as I can ascertain, that Ms Smith was in some form of physical distress. This is contrary to his witness statement prepared for the hearing where he said[12] that she was "in no obvious physical distress". There is also no record of the patient suffering any physical distress and there is no mention of abdominal pain in the patient Care Record. Indeed, that record repeats the Applicant's statement that she was in no obvious physical distress.

[10] Ibid 27 l 27 – l 44.
[11] Transcript 28–29.
[12] Exhibit A3 [42](a).

In my opinion the Applicant was not being truthful when he said in evidence on oath that the patient was in some form of physical distress.

[23] Further, the Applicant claimed that Old Beach, where the patient was seen, was in a rural area and that, as such, it was not easy for her to attend the hospital in Hobart.[13] Objectively that is simply not the case. The journey is about 20 minutes and potentially, at that early hour, quicker. To suggest that Old Beach is rural is simply not true. It is as close as Blackmans Bay to the south of Hobart, and it is simply not the case that Blackmans Bay is in a rural area.

[24] In cross-examination the following exchange occurred:

> "So, travel distance wasn't a factor here, was it?.....The timing – the time factor was a – was a factor. So, you could – she's already experienced – five and a half-hour delay which would put her, most likely, in an area of Ouse and further, so she would come under the classification of a rural patient. She's – she's experienced her dilemma for that amount of time –
>
> Sorry, can I just stop you there. Can you just explain what you mean by that? That a person – that she was considered to be a rural patient because she'd waited five hours?.....She would be a remote-located patient, yes.
>
> At Old Beach?.....No, due to the time that she had experienced this – this trauma that she'd inflicted upon herself.
>
> But you don't calculate that upon the period of time that a patient's waited, do you?.....You may not as a lawyer but I do as a paramedic.
>
> Well, I suggest to you that Ambulance Tasmania doesn't either?.....No, well, they probably will operate under a different set of rules. I believe from the patient –
>
> Well, yes, they certainly do, on that point. Thank you. You make a similar point at paragraph 8 of your statement made on the 14th of September 2021 that was prepared by Stuart Wright of Bold Lawyers. You say at paragraph 8:
>
> *I think it's important to also understand that the approach to treatment of patients in rural settings is very different compared to a patient being treated in an urban environment to proximity to hospitals. Often, in urban environments, it is an easy decision to transport a patient to hospital because of the proximity to hospital.*
>
> *In a rural setting, hospitals are often, from the time of call, two hours or greater away. At times, the type of treatment that's provided in a rural setting involves making a judgement call which would not be necessary to make in an urban setting.*

[13] Statement of 13 May 2021 [15].

> Do you stand by the view expressed in paragraph 8, Mr Duggan?.....I think so, from reflection of this. You're outlying treatment does vary from someone that's around the corner from the hospital.
>
> But being at Old Beach isn't the same as being from Ouse, is it, in relation to proximity to the Royal Hobart Hospital?.....No, but the time endured by this patient would be similar in distance. So, she's – whether we were called immediately upon this – this insertion, like, she called us five and a half hours before we got to her. If we had of responded straight away, it could have been different and the other factor was that she didn't have any treatment – transport.
>
> Mr Duggan, just stop. One of the factors here in relation to time, though, wasn't it, was the triage process? That this was not something that was a category 1 event that needed immediate response – she was, in fact, category 5, wasn't she?.....Most – she was probably category 6. We should not have been dispatched to that case whatsoever. She should have been given alternative forms of transport and was never given that option, as according to her statement at the time.
>
> So, it wasn't really an urgent case, was it?.....No one's implied that it was of any urgency. It's – and it was, in fact, not a – not an ambulance case. We –
>
> But you're suggesting – ?.....– transported her because she had no transport. We should not have –
>
> But you're suggesting that the passage of time and the distance from the hospital was a relevant factor here. I suggest to you that just was not a factor in this case?.....You can suggest that if you like but I took – I took the patient as she presented to me, in the distressed state, not wanting to have hospital attention, and that was only going to cause her more grief in her presentation."[14]

[25] In my view, seeking to suggest that the patient was to be treated as if she was in a rural setting because of the time lapse has an air of unreality. It is an attempt by the Applicant to justify undertaking the examination and attempting to remove the object. Yet the patient was not in obvious physical distress and fell within the lowest category of seriousness. Indeed, the Applicant notes that this was not a case for an ambulance at all.[15]

[26] In my opinion, attempting to engage with the fact the patient was to be treated as a rural patient as he did is an exaggeration at best and disingenuous at worst.

[27] As a result of these matters I treat the Applicant's evidence with caution.

Ms Boxall

[28] Ms Boxall was a volunteer ambulance officer who attended the patient with the Applicant. In her witness statement prepared for the hearing she said the Applicant

[14] Transcript 30 l 10 – 31 l 36.
[15] Ibid 31 l 24 – l 29.

eventually conceded that he would take a look "but if he was unable to remove the item" the patient had to agree to go to hospital.[16]

[29] In cross-examination, after attempting to limit the effect of that statement being to just having a look but not attempting to remove the object if that could be done, Ms Boxall eventually agreed that at the time the examination commenced, it was intended to remove the object if that could be done, otherwise, the patient would have to go to hospital.[17]

The Applicant attempted to remove the object

[30] The only reasonable conclusion to draw from the evidence of those who were there on the day is that the Applicant was undertaking an examination of Ms Smith with a view to attempting to remove the object and that he would remove the object if he could. The Patient Care Report and the comment to the Operations Centre suggest that what the Applicant was doing was attempting to remove the object.

[31] It is also to be inferred that the only reason that the Applicant would need to undertake anything other than an external examination (and even that would not be likely necessary) was to attempt to remove the object. I infer this from the following:

(a) Ms Smith was in no obvious physical distress;

(b) The object (a table tennis ball) is essentially benign and there is nothing additionally dangerous about it,[18] and

(c) The evidence from the Applicant that an ambulance should not have been dispatched and that Ms Smith should have been given alternative forms of transport.

[32] If it was unnecessary for an ambulance to be dispatched at all, it can hardly be argued that an examination by a paramedic was necessary.

[33] I find therefore that the Applicant was attempting to remove that object.

Should the Applicant have attempted to remove the object?

[34] The Respondent's case is that in undertaking the examination and attempting to remove the object the Applicant acted outside his Authority to Practice (ATP). The effect of a paramedic acting outside his or her ATP is that they are not endorsed to undertake the procedure. Endorsement ensures that a practitioner has undergone training to use the relevant equipment, medications, and interventions such that they are competent to undertake the procedure.

[35] Additionally, there are Clinical Practice Guidelines (CPG) which are the specific policies and procedures that dictate the appropriate care to be provided in certain

[16] Exhibit A1 [36].
[17] Transcript 62 l 41 – 63 l 8.
[18] There was evidence led by the Respondent that in the circumstances of the patient's presentation, there was no risk to her by the object remaining in situ while being transported to and seen at the hospital.

clinical presentations. They formulate the guidelines for accepted care for each presentation and if there is to be deviation from the CPG approval from a relevant doctor is necessary.

[36] At the hearing, Erica Kreismann, the Executive Medical Director of Ambulance Tasmania, made a statement and gave evidence. She noted that the CPG does not authorise a paramedic to remove a foreign object from the vagina and is not within the scope of practice of a paramedic.[19]

[37] She also notes that the Applicant's ATP and the CPG did not permit him to attempt to remove the object. Further, she noted that introducing instrumentation into any orifice must be done with caution and awareness of complications such as introduction of bacteria leading to infection, to pain and to possible bleeding, hematoma, or perforation.

[38] Joseph Acker, Chief Executive of Ambulance Tasmania also gave evidence and made a statement in the proceedings.

[39] He is extremely qualified in paramedicine. He has been a registered paramedic for 32 years. Because his evidence is of particular import, I set out his qualifications[20]:

> "2. I am a:
>
> a. Fellow of the Australasian College of Paramedicine (FACP)
> b. Registered paramedic, Australia health Practitioners Regulation Agency
> c. Registered Critical Care Paramedic, British Columbia Emergency Medical Assistants Licensing Board (EMALB)#144050
> d. Adjunct Professor, Emergency Medicine, University of British Columbia, Vancouver Canada
> e. Adjunct Senior Lecturer, Paramedicine, Charles Sturt University, Bathurst, New South Wales
> f. Board Member, Council of Ambulance Authorities (CAA), Australia
> g. Site Surveyor, Critical Care Paramedicine Accreditation, Canadian Medical Association
> h. Past Vice President, Paramedics Australasia
> i. Past Board Member, Emergency Medical Services Chiefs of Canada
> j. Past Chair, Canadian Patient Safety Institute Emergency Medical Services Advisor
> k. Past Board Member, National Association of Paramedicine Academics (Australasia)
>
> 3. I hold a Graduate Certificate in University Learning and Teaching, Charles Sturt University; Master of Arts in Leadership, Royal Roads University; Executive Certificate in Management, University of Alberta; Certificates in Emergency Management, Justice Institute of British Columbia; Advanced Diploma in Paramedicine, Northern Alberta Institute of Technology and Certificate, Emergency Medical Technician, Alberta Vocational College.

[19] Exhibit R59 [6].
[20] Statement R61.

4. I have been a registered paramedic for 32 years - continuous since 1990 – in Canada and Australia (remote, rural, First Nations, urban). I have ten years' experience as a critical care helicopter flight paramedic (Shock Trauma Air Rescue Society); three years' experience as an Intensive Care Paramedic, New South Wales Ambulance Service; 12 years' experience as a Senior Lecturer in Paramedicine at Charles Sturt University (full time 2010-2016, adjunct since then); and three 3 years' experience as Lead Paramedic Instructor, Northern Alberta Institute of Technology (1997-2000).

5. I have 17 years' management and executive leadership experience including:

    - Chief Executive, Ambulance Tasmania
    - Provincial Director Clinical and Professional Practice, British Columbia Emergency Health Services
    - Director of Patient Care Delivery (Director of Operations, Vancouver), British Columbia Emergency Health Services
    - Executive Director of Emergency Medical Services, Alberta Health Services
    - Chief of Emergency Medical Services, Edmonton, Alberta
    - Deputy Chief of Emergency Medical Services, Alberta
    - General Manager, Shock Trauma Air Rescue Society, Alberta

6. I have international consultancy experience in Mongolia, Brunei, United Arab Emirates, China, England, Canada and the United States of America."

[40] Mr Acker undertook a review of the case including the investigator's report and Mr Duggan's responses. In his statement, he reviews the case and provides his opinions regarding the events. Again, because the evidence is of significance I take the liberty of setting out lengthy parts of his statement:[21]

"7. Having reviewed the documentation regarding Bryce Duggan's termination of employment, including the investigator's report and the response from Mr Duggan, it is my understanding that:

a. On 14 December 2020 Mr Duggan, while employed as an intensive care paramedic with Ambulance Tasmania, responded to a patient with a foreign body (ping pong ball) in her vagina;

b. Mr Duggan attempted the removal of the foreign body, a ping pong ball, using Magill Forceps;

[21] Ibid.

c. When the procedure was unsuccessful, the patient was transported to the Royal Hobart Hospital;

d. Mr Duggan's written statement to the investigator, dated 13 May 2021, describes his actions to use Magill forceps to attempt removal of the foreign body from the patient's vagina;

e. Mr Duggan's response to the investigation, dated 9 September 2022, states "At the time I was aware that Magill forceps are appropriate for use in the vagina and the throat, as it's the same type of tissue" (27);

f. Mr Duggan's response further states "Magill forceps are not contraindicated for use in a vagina as per manufacturer's advice and numerous research papers, a summary of the research was provided to the decision maker before my termination, but they have not given this any weight" (27b);

g. Mr Duggan's statement includes "My female colleague parted the labia and I gently inserted the forceps and used a torch for illumination" (30), "As I inserted the forceps I felt the mons pubis and lower abdomen for the foreign object" (31), "I inserted the forceps to a depth of approximately 2.5cm or 1 inch and I could feel an obstruction, the object" (32);

h. Mr Duggan's written statement does not include any reflections that the use of Magill forceps to remove a foreign body from the vagina was inappropriate and in fact, justifies this act by suggesting that the national regulator, AHPRA, expects practitioners to "modify and adapt" (44f)."

8. The use of Magill forceps is only indicated for the removal of a foreign body from the airway (Clinical Practice Guide (CPG) A0305).

9. A search of the online AT CPGs reveals one mention of Magill forceps and that is for Foreign Body Choking (CPG A0305)

10. There is no CPG for the removal of a foreign body from any other part of the body except the airway.

11. There is no CPG for the insertion of any instrument into the vagina.

12. Paramedics are not trained to, nor authorised to, nor do they have access to any form of forceps, speculum, or instrument to be inserted into the vagina.

13. The Ambulance Tasmania scope of practice does not specifically mention the removal of any foreign body, including from the airway.

ATP, Scope of Practice and CPGs

14. Since 2018 paramedics have been required to be nationally registered by the Paramedicine Board of Australia, under AHPRA.

15. The Paramedicine Board of Australia does not prescribe a specific scope of practice for paramedics but instead sets *Professional capabilities for registered paramedics* across five domains.

16. The scope of practice is established by the employer of the paramedic, in this case Ambulance Tasmania, through the employer's clinical governance framework.

17. The authority to practice (ATP) is granted to the paramedic by the Chief Executive of Ambulance Tasmania, as delegate as the Commissioner of Ambulance Services, under the *Ambulance Services Act* 1982. When a paramedic is granted authority to practice the organisation sets the scope of practice that the paramedic is authorised to independently engage in. The ATP ranges from graduate paramedic to intensive care flight paramedic.

18. The scope of practice defines the skills, procedures, equipment, medications and treatments that a paramedic can perform independently.

19. The Clinical Practice Guidelines (CPGs) are the clinical policies and procedures that a paramedic must follow when working independently.

20. Because CPGs do not, and cannot, cover every possible clinical situation, Ambulance Tasmania employs consultant physicians to be available via telephone at all times of the day and night consult with paramedics and authorise some practices that may be outside the scope of the CPGs or not defined in the CPGs.

Mr Duggan's conduct

21. It is outside of my clinical expertise to know all of the possible complications associated with the insertion of an inappropriate device into the vagina by a clinician not trained to perform that skill, however, I would expect that soft tissue damage, bleeding, haematoma formation, penetration of soft tissue and infection are possible clinical impacts of these actions. In addition, performance of this procedure could have psychological impacts on the patient.

22. Although the investigation report into Mr Duggan's conduct found that the patient consented to the procedure, several significant concerns remain.

23. The patient was not properly informed of the risks to her prior to Mr Duggan inserting the device. In those circumstances her genuine consent could not be established. In addition to the risk this posed to the patient it also posed a significant risk of criminal liability on the part of Mr Duggan. It also raises significant reputational risks for Ambulance Tasmania.

24. I have been a paramedic for 32 years and worked for several ambulance services across two continents. I have taught hundreds of college level and university paramedic students. It is a cardinal rule known by all paramedics that we are not authorised to insert any devices or instruments into a patient's vagina. Furthermore, paramedics do not touch a patient's vagina, except for two specific obstetric related treatments, specifically:

a. Inserting a finger into the vagina to prevent collapse of a prolapsed umbilical cord; and

b. Bimanual compression of the uterus for life-threatening post-partum haemorrhage.

The patient in this case did not have either of these conditions.

25. I cannot comprehend of a situation where Mr Duggan would not know that inserting an instrument into a patient's vagina is absolutely outside of a paramedic's scope of practice.

…

31. Mr Duggan is currently the subject of investigation by AHPRA.

32. On 24 May 2021 AHPRA imposed a number of restrictions on Mr Duggan's registration. Those restrictions include that Mr Duggan may practise only in places approved by AHPRA. No places have been approved. AHPRA has also imposed a restriction that Mr Duggan must not practise in any role requiring direct or indirect clinical patient contact (including supervision of others). As a result of these conditions Mr Duggan is incapable of carrying out his duties with Ambulance Tasmania."

[41] The Applicant does not assert that there is specific endorsement to carry out removal of foreign object from the vagina. However, he says that the CPG allows for some discretion and that this coupled with the consent of the patient and the fact he says he had done it before justified his undertaking the examination he did.

[42] The Applicant notes that there are no clinical instructions for removal of foreign objects for most cases attended by paramedics, and that it is quite common to assist in the removal of objects such as Lego, marbles, insects, and sex toys.[22] He submits that he took a full history, that the patient was insistent that she would not go to hospital, that he quickly realised that the object could not be removed by him and that the patient was then transported to the hospital. He says the use of the Magill forceps was appropriate. He asserts that paramedics often work outside their ATP. He also submits that there are no CPG for such things as assisting in the delivery of babies, rapid atrial fibrillation management or envenomation from spider and snake bites.

[22] Applicant's submissions [21].

[43] Those things may be correct. However, there is one significant point of difference. That is, the presentation in those cases would usually be urgent. The case of Ms Smith was not.

[44] While I have some sympathy for the position the Applicant found himself in, in that Ms Smith was adamant she would not go to hospital, it is incumbent on the paramedic attending to make it clear what he is or is not permitted to do, and to persuade the patient to receive appropriate and safe treatment at the hospital.

[45] Two further issues need to be specifically addressed. The first is the use of the Magill forceps. It is common ground that there were no instruments specifically designed for removing foreign object from the vaginal cavity. The Applicant, however, asserted that the Magill forceps were suitable. The evidence however is that the forceps are designed for removal of solid body obstructions from the lower pharynx or larynx and to assist in the placement of orogastric tubes.[23] The literature made available by the wholesalers of the product describes the forceps as Magill Catheter Forceps. Their use is described for grasping endotracheal tubes during intubation and removing foreign bodies from the airway.[24] While there was no specific evidence regarding the manner of their use, R50 shows a hand holding the forceps in the manner they would usually be used. That does not seem to lend itself to removing an object from the vagina where one would expect, to assist with line of sight and operating the forceps, that they would be straight.

[46] The Applicant asserted that there was written information to the effect that the forceps were suitable for the use to which the Applicant put them. However, that evidence is not before me. Based on the evidence before me, I find that the Magill forceps were not suitable for the use to which the Applicant put them.

[47] The second issue is that of consent. It is clear that the patient wanted the examination and attempted removal to take place. It is common ground that such an examination would require informed consent. The evidence on that is as follows:

(a) The Applicant's May statement[25] in which he said:

> "7. My response to [redacted] was to inform her that I was not a gynaecologist and I told her that it would be better for her to come to hospital so that she could be treated by a doctor. I explained that there was more appropriate equipment to deal with the issue at hospital. [Redacted] was quite adamant that she did not wish to attend hospital because she was embarrassed about what had happened.
>
> 8. I again explained to [redacted] that hospital would be a better place for her as a hospital had all the necessary equipment and staff to deal with the issue."

(b) The statement made for the purposes of the proceedings:[26]

[23] Exhibit R50.
[24] Exhibit R51.
[25] Exhibit R3 att 3.
[26] Exhibit A3.

"20. Initially the patient refused transport to the RHH, which lead to a discussion about refusal to transport policy. a. This discussion was running through the VIRCA process.

b. The VIRCA requires the crew to inform the patient of the risks which could occur if they remained at home and didn't seek timely intervention.

c. The patient expressed concerns about her previous mental health issues, including anxiety and depression, previously triggered by the hospital setting.

d. The patient was very concerned about more people knowing about this misadventure than would be required, in my view she was embarrassed.

21. The patient on receiving the advice provided through the VIRCA process about potential risks insisted that an "assessment be undertaken here" to "just see if it can be removed, if you can't get it, I'll agree to go to hospital"."

(c) Evidence in chief, in response to an unhelpfully leading question:[27]

"Now, you say that after you spoke to the patient about all the risks that – what a foreign object, you know, being stuck in the way that it was – all of the risks that that involved, why she needed to be transported – she was still adamant that you examined her, is that right?.....That's correct, yep. It seemed to hold no weight at all that – the possibility of ongoing infection, swelling, pain, urinary retention, necrosis. All these – all these things do occur, even though it does take – the longer than the five and a half hours that she was waiting for an ambulance."

(d) Cross examination[28]

"Yes, and you agree that it is vitally important prior to providing lawful healthcare that you get informed consent from the patient?.....Yes.

Yes, because without getting informed consent, you're at risk of a claim of civil assault, aren't you?.....Yes.

Yes, and you're exposing Ambulance Tasmania to risk also?.....Yes.

Your employer – thank you. Do you agree that informed consent is the patient's voluntary agreement to the treatment after the patient has been informed of the possible risks?.....I do.

You agree that's what informed consent means, don't you?.....I do, yes.

[27] Transcript 13 l 40 – 14 l 2.
[28] Transcript 36 l 44 – 38 l 39.

> Yes. So, in this case, did you inform the patient that you planned to use Magill forceps on her?.....I most certainly did.
>
> And did you inform her that the supplier of Magill forceps refers to them being used for two purposes; that is, the grasping on endotracheal tubes during incubation, and removing foreign bodies from the airway. Did you inform her of that?.....No.
>
> Did you inform her that the supplier of Magill forceps makes no mention of their use in the vagina?.....No.
>
> Did you mention to her that Ambulance Tasmania's clinical work instruction 312, which deals directly with the use of Magill forceps, indicates that they're to be used in two circumstances only, and they are solid foreign body obstruction of the airway, and to assist with the placement of orogastric tubes. Did you tell her that?.....No – it's furthest from our mind.
>
> Right?.....It's the other end of the body.
>
> Did you – did you mention to her that the clinical work instruction that governs the use of Magill forceps makes no mention of their use in vaginas?.....No, I only know them as – I did explain to her that this was the only piece of equipment I have –
>
> Yes?.....– and I knew that they – Magill forceps formed the batch of forceps that are known as grasping forceps –"

[48] I note that the evidence as to consent moved from the general - that the patient should go to the hospital and that the Applicant was not a gynaecologist - to the much more specific answers given in cross-examination.

[49] I note the statement of Ms Boxall that was consistent with the Applicant's first statement that the instrument he proposed to use was not suitable and that he was not a gynaecologist. In her cross-examination she initially asserted that the Applicant had given more detailed information regarding scope of practice and the fitness of the Magill forceps for the task. However, when her statement was put to her and it was noted she did not say those things in that statement, I distinctly got the impression from her demeanour and the way she answered the questions that she gave the evidence to support her colleague and that she was not, in fact, sure that her evidence was correct.

[50] In respect to the Applicant's evidence, I approach it, in this regard, with caution for the reasons outlined above. I think the reality is as reflected in his May statement and in the written statement of Ms Boxall. The May statement was much closer to the time of the incident. I find it difficult to accept that that there was such a detailed discussion in the circumstances as they were that morning as the Applicant would have me believe from his evidence at the hearing. Again, my impression was that the Applicant was exaggerating those discussions about consent.

[51] I find that insufficient information was given to the patient such that while she wanted the removal to take place, she was unable to properly consent to the procedure given that she was not armed with all the information necessary to make that decision.

[52] Considering this evidence, given that the Applicant was not trained to undertake the attempted removal, that he was acting outside his ATP and that he did not have informed consent, I find that it was not appropriate for the Applicant to attempt to remove the object and that what he should have done is simply take the patient to hospital. I also have regard to the evidence from the doctors called by the Respondent as set out above regarding the risks and appropriateness of a paramedic to undertake the examination and attempted removal.

[53] I find there was a valid reason for termination. The conduct was, at the very least, a breach of s 9(2) of the *State Service Act* 2000 which required him to act with care and diligence in the course of his employment.

Unfairness

Was the termination unfair?

[54] The Applicant submits the following in support of the proposition that the termination is unfair:

(a) The Applicant has not been the subject of previous warnings and there is no history of poor performance or disciplinary events;

(b) The termination was disproportionate to the severity of the conduct;

(c) The consequences to the Applicant have been severe financially and in respect to his person life;

(d) The Applicant having been stood down for 18 months is a penalty in itself;

(e) The Applicant has vast experience;

(f) The Applicant did not act recklessly;

(g) The examination was carried out at the express wish of the patient;

(h) There was no patient complaint;

(i) The Applicant acted professionally and without danger to the patient; and
(j) There was a denial of procedural fairness.

The Applicant has not been the subject of previous warnings and there is no history of poor performance or disciplinary events

[55] While it is the case that the Applicant has not been subject to previous warning, there is a history of conduct matters recorded on the Applicant's file. They are as follows:[29]

> "38. Mr Duggan has a history of inappropriate or questionable conduct with Ambulance Tasmania. Ambulance Tasmania's human resources file in relation to Mr Duggan discloses the following matters.
>
> 39. In March 1994 Mr Duggan had a period away from work in circumstances of workplace conflict in which he was involved. Documents relating to that matter note that Mr Duggan had a tendency to "bend the rules" which rendered him prone to conflict with management. Following a period away from work Mr Duggan met with his rehabilitation counsellor and supervisors on 30 March 1994. A file note of that meeting records that Mr Duggan was advised that it was expected that he would obey all rules and standing orders.
>
> 40. On 19 February 1997 Mr Duggan was counselled about attending work suffering the effects of excessive alcohol consumption on 7 December 1996.
>
> 41. During his performance review on 10 October 1997 it was noted that Mr Duggan's behaviour demonstrated to staff that it was *quite acceptable to bend the rules*.
>
> 42. On 24 March 1998 Mr Duggan was reprimanded for carrying his children in the front seat of an Ambulance Tasmania vehicle whilst he was transporting a patient.
>
> 43. On around 1 March 2002 Ambulance Tasmania received a complaint from a female of sexual harassment by Mr Duggan. I believe he underwent counselling in relation to that matter.
>
> 44. On 29 July 2003 Mr Duggan underwent formal independent counselling with Newport & Wildman in relation to harassment and discrimination and workplace codes.
>
> 45. On 28 May 2005 Mr Duggan was given a formal instruction not to carry capsicum spray whilst carrying out his duties when he was found to have been unlawfully carrying that product whilst on duty.
>
> 46. On 14 November 2005 Mr Duggan was reprimanded for twice using an Ambulance Tasmania vehicle to spread horse manure on his property.

[29] Statement R61.

47. On 5 October 2010 Mr Duggan lodged a workers compensation claim when he was the subject of an allegation of inappropriate conduct by a female patient. He denied the conduct alleged.

48. In January 2015 Mr Duggan's performance was the subject of a Clinical Review by the Southern Training Unit of Ambulance Tasmania. The review related to Mr Duggan's professional performance in relation to an incident on 9 January 2015 involving a traumatic injury with serous bleeding. The review found significant deviation from CPG's by Mr Duggan. It was recommended that Mr Duggan attend the next available Clinical Development Program.

49. On 11 April 2015 Ambulance Tasmania received a complaint about Mr Duggan's unsympathetic treatment of a child.

50. On 1 August 2016 Ambulance Tasmania received complaint about Mr Duggan driving recklessly towards New Norfolk.

51. On 24 March 2017 Ambulance Tasmania received a complaint about Mr Duggan being rude to a patient and his family.

52. On 19 May 2017 Ambulance Tasmania received a complaint about a crew, of which Mr Duggan was the senior member, being rude to a patient and his family at Westerway.

53. Treatment provided by Mr Duggan on 11 February 2018 was the subject of a Clinical Review by the Southern Region Training Unit on 20 April 2018. Various recommendations were made in relation to Mr Duggan's performance as a result of that review.

54. Treatment provided by Mr Duggan on 8 January 2020 was the subject of a Clinical Review by the Southern Region Training Unit on 12 October 2022. Multiple recommendations were made in relation to Mr Duggan's performance as a result of that review.

55. In January 2021 Mr Duggan was the subject of a further allegation of inappropriate conduct towards a female patient. He again denied the conduct alleged. It was the investigation of that allegation that uncovered the incident on 14 December 2020 that resulted in the termination of employment."

[56] I note that some matters are very old, dating back to 1994. No weight is given to the very old matters. However, matters of complaint about behaviour continued until into and after 2017 with one (denied by the Applicant) in 2021. Additionally, there were clinical reviews of his performance in 2015, 2018 and 2020. Recommendations were made to the Applicant as a result of each clinical review.

[57] While these matters are not disciplinary, and most are old, in the three and a half years prior to the present matter, two complaints were made relating to behaviour towards patients and two clinical reviews into his performance were undertaken.

[58] While none of these matters could, of themselves play a decisive role in imposing a sanction, they may be relevant in a case where one sanction or another is in the balance such that the previous matters may tip that balance towards one rather than another (usually less serious) sanction.

The termination was disproportionate to the severity of the conduct

[59] This submission engages the matters referred to in paragraphs (f) to (i) above. It is submitted on all the circumstances the conduct did not justify termination of employment. In my opinion the conduct was serious.

[60] The Applicant notes that the Respondent regarded the conduct as serious but did not summarily dismiss him. While that is the case, I do not regard it as significant. It may be that the Respondent was content to pay the Applicant his accrued entitlements rather than forfeit them for serious and wilful misconduct. It may be that strategically, if the Applicant was to challenge the termination the Respondent elected not to summarily dismiss the Applicant so that it did not have to face a higher hurdle of proving serious and wilful misconduct in distinction to establishing a valid reason.

[61] In my opinion that Applicant ought not have undertaken an examination (other than a visual examination) because the case was not urgent, noting the Applicant said it would be a category 6 case and that an ambulance should not have been dispatched in the first place. The Applicant was not trained to undertake the removal of an object from the vagina. The Applicant did not have equipment suitable to attempt removal of the object. The risks associated with the insertion of the Magill forceps have been referred to above.

[62] While the Applicant has sought to minimise what he was doing, he was undertaking a procedure where he would attempt to remove a foreign object with inappropriate equipment and no training, requiring the insertion of an instrument unsuited for the task into the vagina of the patient in circumstances where there was no urgency and no present risk to the patient. Additional risk was created by the insertion of the Magill forceps.

The consequences to the Applicant have been severe financially and in respect to his personal life

[63] While I accept that the consequences of the termination will be severe I do not have any specific evidence in respect to what those consequences are.

The Applicant having been stood down for 18 months is a penalty in itself

[64] While it is true that the Applicant was stood down this is not to be regarded as a sanction. He was stood down with pay. The financial consequences of the stand down were thereby mitigated.

The Applicant has vast experience

[65] This fact is no doubt correct, but it is neutral in significance in respect to termination, save that it suggests that the Applicant has been in employment for a long time. Long standing employees often gain "credit" for good conduct such that conduct deserving of the sanction of termination of employment is usually required to be clear and demonstrably proved by the employer. In my opinion the employer has established a clear valid reason for termination.

There was a denial of procedural fairness

[66] The denial of procedural fairness is said to have been a failure to provide details of the matters referred to under the heading of previous warnings and poor performance before imposing the sanction of termination. The chronology for the investigation and imposition of sanctions is as follows:

(a) 9 April 2021 – letter to Applicant from Secretary advising of complaint, particulars and process for investigation;

(b) 7 October 2021 – letter to Applicant with investigation report and seeking a response;

(c) 28 October 2021 – Applicant's response

(d) 24 March 2022 – letter of Determination into findings of beach, proposed sanction and seeking a response as to proposed sanction;

(e) 14 April 2022 – Applicant's response;

(f) 30 May 2022 – sanction letter.

[67] It may be seen that the Applicant was given an opportunity (which he took up on each occasion) to respond at each step of the investigation. It is true, however, that the matters of previous performance were not raised. That is because they did not play any role in the determination of sanction. Indeed, Mr Acker said he was provided with those documents "for the purposes of what we're doing today"[30]. There was therefore no relevant denial of procedural fairness.

[68] The Respondent submits that the termination was not unfair. In its written submissions it says this:

[30] Transcript 115.

"40. Considerations of fairness involve the assessment of various factors including the applicant's employment history, the nature of the breaches, nature of the work and the applicant's personal qualities.

Employment history

41. Despite his assertions to the contrary, the applicant has an extensive history of behavioural and clinical performance issues that have resulted in counselling and reprimands.

42. He accepted under cross examination that:

(a) he was reprimanded for carrying his children in the front seat of an ambulance whilst carrying a patient in March 199857

(b) he had been counselled for sexual harassment in July 2003 58

(c) he had been counselled for sexual harassment in June 201059

(d) he was the subject of a complaint of inappropriate conduct towards another female patient in September 2021 that resulted in the discovery of the incident that is the subject of the current application.

43. Documents tendered at hearing also include:

(a) a written instruction issued to the applicant in May 2005 by the Superintendent of Southern Operations not to possess, carry or use capsicum spray whilst carrying out his duties;

(b) a written conduct reprimand issued to the applicant on 14 November 2005 in relation to using a government asset for personal benefit on private property from the Chief Executive of AT, Grant Lennox.

44. As to clinical matters, the applicant accepted at hearing that:

(a) in January 2015 his professional conduct was the subject of clinical review which found he had engaged in significant deviations from the clinical guide.

(b) Clinical review in February 2018 found that the applicant had given excessive pain relief and increments were not compliant with Clinical Practice Guidelines.

(c) Clinical review in March 2020 criticised him for failing to transport a child, to whom medication had been administered, to hospital. The Applicant had, contrary to accepted AT Practice left the child in the care of parents, one of whom was a pharmacist, to take the child to hospital.

(d) A further clinical review was commenced in March 2020 as a result of allegations that the applicant had actively discouraged transporting an elderly patient to hospital, failed to advocate in the interests of the patient,

distressed the patient's family and communicated in an unprofessional and disrespectful manner with nurses and engaged in unprofessional behaviour66. The applicant was given notice of the allegations in writing on 15 May 2020 and invited to respond. He was again communicated with on 17 May 2020 and 25 May 2020 but did not provide a response. Despite these invitations he claims he was not afforded the opportunity to respond to the allegations. The review was not completed.

AHPRA

45. In May 2021 and October 2022 the Australian Health Practitioner Regulation Agency (AHPRA) imposed conditions on the applicant's registration in connection with the subject conduct. Its findings are consistent with the Secretary's. It found the applicant's conduct unsatisfactory in that he failed to recognise that the vaginal examination of the patient was inappropriate. It further found that irrespective of whether the applicant was attempting to remove the object or not, the conduct was inappropriate in a non-life threatening situation and outside the scope of his practice.

46. The regulator's view accords with that of AT's expert witnesses and the Secretary.

Nature of the work and personal qualities

47. Patient safety and the protection of the Tasmanian public are at the heart of this matter. Paramedics must be able to work without supervision, often in remote and isolated locations. This is particularly so for Branch Station Managers, such as the applicant. The autonomous nature of the work means that the employer must have absolute trust and confidence that the paramedic will demonstrate the highest level of professional judgment and integrity and will comply with directions and procedures.

48. It is evident that the employer can have no such confidence in the applicant.

49. His conduct throughout the ED5 process and his evidence at hearing make it clear that caution should be exercised in assessing his credit. Further, it is submitted that the applicant has demonstrated that he has no insight into his behaviour and still fails to understand the bounds of his scope of practice and the need to act within them. For example, the following exchange took place at hearing:

    Mr Digney: So, you're saying that the more experienced you are, the wider the scope of practice allowable under the same CPG?

    Mr Duggan: That's right, and your interpretation of that CPG. You know, if you come from different walks of life and you're accredited in – in obstetrics, you're accredited in – in wilderness rescue, you're accredited in vehicle rescue, you can employ all that, you know. I can tell people –

advise people how to wreck a car at a scene to get a patient out with a less – without inflicting trauma. Now, they've got their set of protocols but it may not suit them. I've got my set of protocols that say, well, "We need to do an A, B, C, D and E", which is expose, examine, and evacuate, which is what we did in this case, but you didn't have to do the rest of the flowery stuff that just makes – makes the treatment look good. It's all being done subconsciously. You know that you're doing it.

50. Most recently, in his submission to the Commission on 7 February 2023, the applicant maintains that he did nothing wrong and that the vaginal examination was 'safely and successfully undertaken in the best interest of intended patient care':

    The Patient at all times was properly cared for, consulted and clearly negotiated with where she obviously felt safe, supported, non-judged and with total respect and dignity. Her expectations were discussed analytically when appropriately discharging our Duty of Care we owed to her, all aspects were professionally and very safely undertaken at all times…There was never any breach or any heightened risk to this patient, the Service, or the crew- nor any diminished health or safety standards.

51. It is obvious that nothing that has been said over the course of the last two years by his superiors, the expert witnesses, AHPRA or the Secretary has registered with the applicant. To resort to the vernacular, he still does not 'get it'.

52. Instead, the applicant suggests that he is the victim of a 'targeted, taxpayer funded, malicious persecution…by unknown persons…71'. His lack of insight is further illustrated by his gratuitous description of the Chief Executive of AT as 'a fledgling CEO, who self presents with a heightened form of excellence in academia, yet in my view, he lacks basic people managerial skills, along with suitable understanding what his staff are presented with in times of public distress'.

53. It is submitted that the Commission may conclude that the applicant cannot be trusted in the field, is effectively unmanageable and poses a serious threat to patients of AT.

54. The above matters are relied on as to fairness and remedy."

[69] In my view the Applicant "does not get it". He embarked upon a procedure which he was not trained in, with an unsuitable instrument when the procedure was never going to be successful when the patient was in no physical distress and there was no other clinical circumstance of urgency. He sought to invoke the fact that the patient should be treated as a rural patient when she was only 20 minutes from the hospital. His evidence was unsatisfactory in the ways I have outlined above.

[70] I regard the Respondent's submissions which I have set out above regarding employment history are a fair assessment of the evidence before me. They are consistent with my independent findings of the credit of the Applicant. He has no

insight into the significance of him acting outside his scope of authority. Overall, I accept that he does not think he did anything wrong even though he was not trained to remove the object, he did not have the tools to remove the object, and that there was no urgency and therefore no need for him to undertake the attempted removal of the object. His failure to accept that he did anything wrong is particularly concerning.

[71] The conduct was, in the circumstances serious. There are no circumstances which persuade me that the termination of employment was otherwise unfair. The only real matter in favour of the Applicant is his long employment with the Respondent. However, that one factor does not justify a finding that the termination was unfair or unjust.

[72] For the reasons which I have set out I do not regard the termination as unjust.

Outcome

[73] The Application is dismissed.