

## **TASMANIAN INDUSTRIAL COMMISSION**

### **Industrial Relations Act 1974**

Section 29(1A) application for hearing of an industrial dispute

**Ana Maria Nicolau**

(T14708 of 2019)

and

**Minister administering the State Service Act 2000/Tasmanian Health Service**

PRESIDENT D J BARCLAY

HOBART, 23 DECEMBER 2020

**Industrial dispute – application for an unfair dismissal remedy – termination on basis Applicant unable to efficiently and effectively fulfil the requirements of her role - application dismissed**

### **DECISION**

[1] The Applicant has made application for reinstatement arising out of the termination of her employment with the Respondent.

[2] The Applicant was employed as a medical physicist from 15 July 2002 until the termination which took effect on 14 October 2019.

[3] The Applicants employment was terminated on the basis that the Applicant was unable to efficiently and effectively perform the duties of a medical physicist based on performance grounds.

[4] In reaching my decision I have had regard to the whole of the evidence and the submissions of the parties. However in this decision I focus on the matters of significance as I see them. Even though I may not refer to all of the evidence or submission I have had regard to them.

### **Background**

[5] The Applicant was employed as a medical physicist at the Holman Clinic. Her duties related to use of equipment to treat cancer patients. As indicated she was in this role for some 17 years. During that period from time to time she acted as the physicist in charge.

[6] The Applicant performed her duties without incident until about May 2012 when a Performance and Development Plan was put in place. That plan had noted that the Applicant, over the last 10 years had developed a view that she regarded the position as being one more akin to a technician rather than a physicist. The Plan noted that the Applicants task was to expand her skills beyond prescribed well defined tasks. The evidence does not disclose what occurred in respect to the Performance and Development Plan.

**[7]** In June 2013 the Applicant was placed on a Performance Improvement Plan (PIP). The Plan included the provision of a mentor. Initially the mentor was a Dr Stephen Howlett who ceased in that role in the latter part of 2013. In February 2014 Ms Anne Perkins was substituted as an assessor.

**[8]** A letter regarding the PIP was prepared by the Respondent on 3 March 2016 and forwarded to the Applicant. The letter was also the commencement of a process under Employment Direction 6 (ED6). The letter contains a summary of the steps undertaken during the PIP.

**[9]** Of significance for this case is that the PIP was essentially to undertake the competencies as outlined in the Australasian College of Physical Scientists and Engineers in Medicine (ACPSEM) Clinical Training Guide.

**[10]** The 3 March 2016 letter summarised the PIP process and concluded that the Applicant had failed to meet the expectations of the PIP. She was asked for submissions and told that thereafter the Respondent would determine whether to seek the commencement of an ED6 process.

**[11]** There was an exchange of correspondence which followed. The Applicant made submissions that she was, in essence, competent and provided reasons. Some matters to which the Applicant referred were forwarded to the Applicants manager and the Deputy Chief Radiation Oncology Medical Physicist for input.

**[12]** By letter of 11 July 2016 the Respondent advised the Applicant that it was making a recommendation to the Head of Agency to commence the ED6 process. On 12 December 2016 the Respondent retained an investigator to undertake an investigation into the matter.

**[13]** The investigator reported on 17 July 2018. The Applicant was provided with the Report and made submissions. Thereafter the Respondent reached a preliminary view that termination of the Applicants employment was appropriate because she could not efficiently and effectively perform her duties. The Applicant made submissions as to why termination was not appropriate. Ultimately on 14 October 2019 the Respondent determined to terminate the Applicants employment on the basis she could not efficiently and effectively perform her duties, and did so.

**[14]** It must be said that the whole process took a very long time. The chronology can be seen from the following lifted from the Respondent submissions:<sup>1</sup>

“12. In May 2013, the Chief Radiation Oncology Medical Physicist, Dr Steven Wallace, advised the Applicant that a Performance Improvement Plan (PIP) would be established.

13. The PIP underwent multiple iterations over the span of 18 months however, at the culmination of the process in November 2014 the Applicant was assessed to have failed to achieve the competency levels outlined in the PIP.

14. On 3 March 2016, 17 May 2016 and 11 July 2016, Mr Bruce Edwards, Group Manager, Complex Chronic & Community Services, issued correspondence to the Applicant identifying key areas in which it had been identified that she may lack the ability to perform her duties and advising of his intention to recommend to the Head of Agency that an ED6 investigation be undertaken.

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<sup>1</sup> Respondent's submissions dated 31 January 2020 paragraphs 12 – 20.

15. On 12 December 2016, the investigation process formally commenced under the authority of ED6 with approval from Dr David Alcorn, former Chief Executive Officer. Mr James Cumming of James Cumming Investigation Services Pty Ltd (the investigator) was appointed to investigate.

16. On 17 July 2018, the investigator concluded the investigation process with the provision of a formal report to the Head of Agency.

17. On 25 August 2018, the Applicant provided a response to the report.

18. On 23 July 2019, the Applicant was provided with the Head of Agency's formal determination and proposed action.

19. On 9 August 2019, the Applicant provided a response to the determination and proposed action.

20. On 14 October 2019, taking into account all preceding material, Mr Ross Smith, Acting Head of Agency terminated the employment of the Applicant in writing."

**[15]** There was also a lack of adequate explanation for some of the delay, although the Applicant made little of the delay. It is incumbent upon departments of the State Service to deal with issues such as these in a timely way. I expect the Applicant did not make much of the delays in her case because she was still at work carrying out (albeit restricted) duties.

### **The Law**

**[16]** The relevant law is contained in the *Industrial Relations Act 1984* (the Act). The section is section 30 which relevantly provides:

"...

(2) In considering an application in respect of termination of employment, the Commission must ensure that fair consideration is accorded to both the employer and employee concerned and that all of the circumstances of the case are fully taken into account.

(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; or

(b) the operational requirements of the employer's business.

...

(5) Where an employer terminates an employee's employment, the onus of proving the existence of a valid reason for the termination rests with the employer.

(6) Where an applicant alleges that his or her employment has been unfairly terminated, the onus of proving that the termination was unfair rests with the applicant.

(7) The employment of an employee must not be terminated for reasons related to the employee's conduct, capacity or performance unless he or she is informed of those reasons and given an opportunity to respond to them, unless in all the circumstances the employer cannot reasonably be expected to provide such an opportunity."

[17] It can be seen that the test to be applied is (where a valid reason has been established) whether the termination was unfair. This Commission has however found it useful to use the criteria applied in the Fair Work Commission as a guide as to whether a termination is unfair. The criteria used by the Fair Work Commission is whether the termination was unjust (because the employee was not guilty of the alleged misconduct), unreasonable (because the evidence or material before the employer did not support the conclusion) or harsh on the employee (due to the economic and personal consequences resulting from being dismissed or because the outcome is disproportionate to the gravity of the misconduct). While these concepts are not captured in the Act they are a useful guide as to whether a termination is unfair. However these considerations should not replace the concept of unfairness and are a guide only to what may be unfair.

[18] It may be that the concept of unfairness is wider than considerations of harshness, unjustness and unreasonableness. Obviously each case will turn on its particular facts.

[19] In the present case the termination was due to the capacity and performance of the Applicant. As such there must be a valid reason for the termination. The onus is on the Respondent to establish valid reason. If there is no valid reason the termination will be unfair.

*A preliminary matter*

[20] By the time the matter came on for hearing the Applicant had in fact completed the units required for registration with ACPSEM. She however was required to undergo a final interview process before she could be registered. That interview process was completed after the hearing had concluded and the Applicant became eligible for registration.

[21] I sought submissions as to whether I could take that evidence into account noting that the circumstances arose after the decision to terminate was made. Both parties made written submissions. I have regard to them.

[22] In this case the circumstances of completion of the ACPSEM requirements occurred well after the termination of the employment. I accept the Respondents submissions as to the use of facts discovered after the dismissal. I venture to set them out:<sup>2</sup>

"4. Section 20(1) of the *Industrial Relations Act 2000* (the Act) states that the Commission is not bound by any rules of evidence but may inform itself on any matter in such a way as it thinks just. Notwithstanding, we submit that the rules of evidence are relevant and cannot be ignored to the extent that it causes unfairness between the parties (*Construction, Forestry, Mining and Energy Union*, PR935310 (AIRC, Ross VP, 25 July 2003) at para. 36.)

5. It is well established that both employers and employees, in unfair termination cases, may produce facts which are only discovered after the dismissal, so long as they existed at the time of the dismissal. Those facts must be relevant to the question of whether there was a valid reason for dismissal. That is, the Commission is bound to determine whether, on the evidence provided, facts existed at the time

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<sup>2</sup> Respondent's Further Submissions dated 3 July 2020 paragraphs 4 - 10.

of termination that justified the dismissal (*Lane v Arrowcrest* (1990) 27 FCR 427, 456; cited with approval in *Byrne v Australian Airlines Ltd* [1995] HCA 24 (11 October 1995) at paras 131, 136 (McHugh and Gummow J), (1995) 185 CLR 410 at pp. 467).

6. This will be the case even if the employer was unaware of those facts (which existed at the time), and did not rely on them at the time of dismissal (*Shepherd v Felt & Textiles of Australia Ltd* [1931] HCA 21 (4 June 1931), [(1931) 45 CLR 359 at pp. 373, 377-378]).

7. Whilst the respondent agrees that facts which existed at the time of the dismissal, but came to light after the dismissal, may serve to both justify the dismissal when it would otherwise be harsh, unjust or unreasonable, or render the dismissal harsh, unjust or unreasonable (*Dundovich v P & O Ports*, PR923358 (AIRCFCB, Ross VP, Hamilton DP, Eames C, 8 October 2002); we submit that this is not the case here.

8. This is because, the applicant seeks to have facts considered by the Commission, which were not in existence at any time during employment, most notably at the time of dismissal.

9. The fact that the information was not in existence at the time of dismissal is not in dispute.

10. Accordingly, the information discovered after the dismissal does not pertain to the employee's capacity as at the date of dismissal. Further, in this case, the respondent has previously submitted that the reason for dismissal was not because the applicant did not have registration at the relevant time."

**[23]** The Applicant sought to rely on authorities to the effect that the Commission should have regard to materials before it, effectively without limitation so long as the material was before the Commission at the time of making its decision. The difficulty I have with that proposition is that s 30(2) of the Act requires me to give fair consideration to both parties. Matters which eventuate after the termination and which could not be taken into account at the time of the dismissal would result in an unfairness and a lack of fair consideration to the Respondent.

**[24]** I note that prior to the termination of employment the Applicant had completed some of the competencies for registration and has some outstanding competencies to complete. The theoretical competencies were completed by December 2019, after the Applicants employment was terminated. The Applicant submitted that as the Respondent had knowledge that the Applicant was part way through completing the competencies prior to dismissal that I can take account of the completion of the competencies some five months later. It was submitted that the Respondent had failed to make any enquiries of the progress with completion of the ACPSEM competencies prior to termination and as such I could take into account the events post termination. The difficulty with that submission is that further enquires at about the time of dismissal would not have advanced the Applicants case. All she could have said is that she had submitted further work and was waiting to hear from ACPSEM. That would have made very little difference to her case.

**[25]** The Applicant also submits that it was appropriate for the Respondent to wait to hear the outcome of the submission of further work before proceeding to termination. The problem with that submission is that there was no evidence as to when such a decision would be made.

[26] Whilst I have regard to the fact that the Applicant was pursuing registration with ACPSEM and was well advanced in that process I cannot take into account that the Applicant became eligible for registration some five months after termination.

[27] Unlike facts in existence at the time of dismissal which only come to light later, the evidence sought to be relied on was not in existence at the time of the dismissal and did not come into existence for some months.

### **Valid Reason**

[28] The Respondent relies on the fact that the Applicant is unable to efficiently and effectively perform her duties. It asserts that for a very long time the Applicant regarded the position as more of a technician than a physicist.

[29] The PIP required the Applicant to obtain skills which were essentially the competencies required for registration with ACPSEM although the PIP did not require the Applicant to obtain registration.

[30] It may be seen that the Applicants case is essentially that the PIP required the Applicant to obtain the competencies required for ACPSEM registration albeit that she did not have to become registered. The Applicant relies on the fact that she was well advanced in obtaining the competencies by the time of the dismissal. The Applicant notes that by the hearing the theoretical components were complete. As such it is submitted it was unfair to dismiss her.

[31] However, in my view, the Applicant has failed to grapple with the most significant part of the case against her, and that is that she was unable to carry out her duties efficiently and effectively. The Applicants case is that the PIP required her to complete ACPSEM competencies and that she had nearly done so at the time of the dismissal. Her case is that she took so long because she was hampered by the restrictions on her employment. She also complains that she was not given sufficient support in completing the competencies. She claims that it was therefore unfair to dismiss her from her employment.

[32] What the Applicant has not sought to do in any meaningful way is challenge the evidence that the Applicant was, notwithstanding the progress she had made with accreditation, still not able to fulfil her duties efficiently and competently.

[33] The letter from the Respondent to the Applicant on 3 March 2016 sets out in detail the progress under the PIP and the assessor's opinion of the abilities of the Applicant. The Applicant did not seek to challenge in any meaningful way the matters set out in the letter.

[34] I set out parts of that letter which summarise the deficiencies and progress apparent as at that date:<sup>3</sup>

#### **"Report June 2014**

...

The assessor indicated that "although she understands that you have twelve years of experience working as a radiotherapy physicist, it appears that you have very limited experience in some areas of practice, leading to gaps in your skills and knowledge. This was particularly noticeable in Module 5 (treatment planning) and Module 4 (the practicalities of day to day patient treatment)."The report indicates

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<sup>3</sup> Exhibit A1, Annexure H.

that you were "surprisingly unfamiliar with routine operations of the treatment planning computer, the record and verify system and the practice of image guided radiotherapy."

The assessor makes the comment that "it appears that you have worked primarily under the direction of others on routine quality assurance tasks and dosimetric measurements. My (Ms Perkins) impression is that you are accustomed to carrying out assigned tasks following established procedures, but not accustomed to taking responsibility for managing tasks, making independent decisions or applying scientific reasoning to deal with problems." Ms Perkins notes that "these attributes will become increasingly important as you seek to achieve Level 2 and Level 3 competency as set out in the PIP."

...

#### **Report 19 August 2014**

...

Ms Perkins makes the following observations in the assessment report, indicating that you have "very limited experience in some areas of radiotherapy medical physics practice, and are surprisingly unfamiliar with some of the routine operations of the department, particularly in relation to treatment planning. You are able to identify relevant references for a particular topic, but appear to have difficulty in interpreting the information in those references. This is exemplified in many of your written submissions where you rely too much on the reference material rather than providing your own interpretation of the topic. During questioning, you had difficulty in explaining physics concepts and describing how they apply in practice. You also had difficulty in applying scientific reasoning to solve some problems."

...

#### **Report 18 September 2014**

...

Ms Perkins makes the following observations in the assessment report; indicating that you are "able to identify relevant references for a particular topic, but often have difficulty in interpreting the information in those references or synthesising material collated from different references. To a large extent you rely on the wording used in references rather than being able to provide explanations in your own words. You had difficulty in explaining how theoretical concepts relate to your own clinical practice as a medical physicist and in applying scientific reasoning to solve problems." Ms Perkins notes however that the referencing in your "written submissions has improved since her last report, with better acknowledgement of the source material."

...

#### **Report November 2014**

...

The assessor has reported that in her opinion you "operate more as a technician than a scientist", indicating that "from observations at her site visit that you take care with your experimental work are capable of performing routine work according

to established protocols, however you often seemed to be unaware of the significance of what you were doing, focussing more on excessive repetitive checks of minor elements of the task than on the critical elements."

The assessor notes that you had "difficulty in explaining how theoretical concepts relate to your clinical practice as a medical physicist and in applying scientific reasoning to solve problems'. Ms Perkins also reported that you "also had difficulty in retaining knowledge previously learnt, and in applying it in practical situations." The report states that "there are obvious gaps in your knowledge of the basic physics of photon and electron beams, which should be the core underpinning knowledge for a radiation oncology medical physicist. Your current skill set suggests that you are more suited to work as a physics technician than as a qualified medical physicist."

The assessor has indicated in conclusion that "based on her observations you were not ready for assessment at Level 2" and that depending on your "wishes and the needs of the department, it may more appropriate for the PIP to be revised to focus on a physics technician role rather than aiming for ACPSEM certification". The report indicates that "should you wish to continue work towards recognition as a qualified radiation oncology medical physicist, that you would benefit from participation in a structured training program such as the ACPSEM TEAP."

**[35]** The letter concludes that the Applicant had not been able to demonstrate the level of competence required for her substantive role. Further correspondence followed in which the Applicant sought to persuade the Respondent that she had the necessary competencies. As noted above ultimately a formal ED6 process commenced which led to the termination of the Applicants employment.

**[36]** The evidence at the hearing was that the deficiencies identified in the 3 March 2016 letter continued.

**[37]** Mr Timothy Williams gave evidence. He essentially gave evidence as an expert Medical Physicist. Mr Williams holds a Master's degree in Applied Science (Medical and Health Physics) from the University of South Australia. He has been employed as a Medical Physicist since 2001. From 2009 until 2012 he was employed at the Royal Adelaide Hospital as Principal Medical Physicist. He had duties including supervising junior level physicists. The Applicant did not challenge Mr Williams' expertise.

**[38]** Mr Williams provided a witness statement. In it he sets out the problems he sees with the Applicants performance. I venture to set those passages out:<sup>4</sup>

"13. In my interactions with Ms Nicolau she appeared to be very limited in the duties she was able to perform due to her inability to efficiently and effectively carry out her duties without direct supervision. This was considerably evident in the performance of both technical and scientific duties.

14. In May of 2018 I made the decision to restrict the scientific duties that Ms Nicolau would perform due to her inability.

15. The restriction of Ms Nicolau's duties limited her to perform mainly clerical and technical tasks such as organising the clinics Neutron Monitors and sending electrometers away for calibration.

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<sup>4</sup> Witness Statement of Mr Timothy John Williams.



16. In my experience Ms Nicolau was not able to perform to the standard required of a Medical Physicist within the department. Ms Nicolau did not communicate issues or problems efficiently or effectively which is imperative in a health setting.

17. Ms Nicolau was unable to be given any projects involving independent thought.

18. In my experience difficulties were encountered when attempts were made to guide Ms Nicolau in her work often resulting in lengthy emails being received by supervisors, the content within was often extremely convoluted and difficult to interpret.

19. Ms Nicolau did perform some limited quality assurance tasks that were simple in nature and did perform regular patient specific Quality Assurance measurements. The results of which would be reviewed by a senior physicist. Although not needing direct supervision for these tasks they did take Ms Nicolau an extended amount of time to perform and on a couple of occasions she sought to change a patient's treatment unnecessarily which was prevented by supervising physicists.

20. When Ms Nicolau was restricted from performing Quality Assurance on the linear accelerators this work was taken on by the other physicists within the department.

21. At this time Ms Nicolau's workload was reduced to what I would estimate could be done in 8 hours per week. Other physicists within the department then took up all developmental and consulting work within the department.

22. The Radiation Oncology Cancer Services (the Department) is a comparatively small department and Ms Nicolau's inability to perform the duties expected of her role placed increased pressure on the other physicists within the department reducing the effective staffing numbers from 4 FTE to effectively 3.2 FTE.

23. In my experience working with Ms Nicolau I have seen no progression of her ability to both perform duties as a medical physicist or to communicate effectively within the medical setting."

**[39]** In his evidence in chief, Mr Williams was asked what his concerns would be if the Applicant returned to the oncology unit. He said that he was concerned about being able to allocate medical physics tasks to the Applicant and also that he had concerns regarding patient safety as a result of increased work load on the other physicists and in respect to supervision requirements of the Applicant.

**[40]** Mr Williams was cross-examined. He maintained his position that the Applicant was unable to carry out the duties as a medical physicist. He was cross-examined essentially on the basis that the Applicant passing the ACPSEM requirements for registration would give confidence that the Applicant would be able to carry out her duties to the required level of competency.

**[41]** He had the following exchange with the cross examiner:<sup>5</sup>

"MR EDMONDSON: Okay. She has been assessed as meeting all competencies under the ACPSEM accreditation levels 1, 2 and 3. From a practical perspective, does that instil confidence in the level of knowledge that she has to perform her duties?"

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<sup>5</sup> Transcript dated 11 February 2020 at page 68.

MR WILLIAMS: Not from what I've seen demonstrated within the department. No."

**[42]** A little later the following exchange occurred:<sup>6</sup>

"MR EDMONDSON: Okay. So if she's passed all the modules, from your perspective, what else does she have to do?"

MR WILLIAMS: Well, my judgement is not based on modules, it's based on performance within the clinic, and clear and concise communication, and relaying issues and – I've got the bigger picture, but the ACPSEM is a very small part of competency within the department."

**[43]** Finally in respect to Mr Williams' evidence in an exchange with me he identified that the Applicants difficulty was in the area of professional judgment and a deeper understanding of the theoretical aspects of the role and that she was lacking in that judgment and understanding.

**[44]** It was Mr Williams' evidence that the Applicant would be unable to achieve the requisite level of judgement and understanding.

**[45]** The question for me therefore is whether the Applicant was able to efficiently and effectively carry out her duties as a medical physicist.

**[46]** It is clear that the Applicant was limited in the duties she was permitted to carry out as a result of difficulties experienced from 2014. The Respondent implemented a PIP to assist the Applicant in achieving a satisfactory level of competence. While the Applicant was in employment she had not completed all the requirements of the ACPSEM competencies.

**[47]** It may be seen that the Applicant had difficulties in performing her role since 2014. It is suggested by the Applicant that she was performing essentially as a technician for some 10 years prior to the implementation of the PIP. She continued to demonstrate difficulties as identified by Ms Perkins, the assessor summarised in the 3 March 2016 letter. These difficulties were present up until the time of that letter in 2016. Difficulties with performance however continued. In May 2018, Mr Williams further restricted the Applicants scientific duties because he was of the opinion that the Applicant was unable to carry out other than clerical and technical duties.

**[48]** It can be seen therefore that the Applicant was unable to efficiently and effectively able to carry out her duties as a Medical Physicist (as opposed to a technician) from at least 2014 through until her termination.

**[49]** As I have referred to, the Applicant chose to focus her attack on the Respondent by relying on her almost having successfully completed the theoretical component of the ACPSEM registration process and therefore completion of the PIP. She did not chose to actively challenge Mr Williams opinion that the Applicant was nevertheless unable to carry out her duties safely, efficiency and effectively.

**[50]** I accept the evidence of Mr Williams. I find that the Applicant was unable to carry out her duties as a Medical Physicist efficiently and effectively. In regard to the duties required of her position,<sup>7</sup> I find the Applicant was unable to:

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<sup>6</sup> Ibid p.70.

<sup>7</sup> Statement of Duties Annexure A to Statement of Applicant (Exhibit A1).

- (a) Provide, at a professional level (as opposed to a technical or administrative level) to senior medical physicists services relating to physical sciences;
- (b) Provide support without direct supervision; and
- (c) Be proficient in the practice of medical physics.

[51] More generally I find that Applicant lacked the requisite understanding of the scientific parts of her role without direct supervision.

[52] I find there was a valid reason for the termination of her employment.

**Was the termination otherwise unfair?**

[53] The Applicant submitted that the termination was unfair because she was not given adequate support to improve sufficiently to be able to fulfil the requirements of the role. She submits that her performance improved as evidenced by her progress with completing the ACPSEM competencies.

[54] The Applicant also submits that she was not prevented from performing her role up to termination. She also submits that the Respondent used, as the reason for termination, deficiencies in her performance as far back as 2014 and that was unfair.

[55] For the following reasons I find that the termination of the Applicants employment was not unfair.

[56] Firstly, as I referred to previously the Applicant seems to conflate successful completion of the APSEM competencies with possessing the ability to efficiently and effectively fulfil all the requirements of her role. Being able to complete the theoretical component of any training may or may not indicate competency to carry out the practical aspect of one's employment. Just because one holds a qualification does not automatically result in the person being good at their job. Here the evidence is that as late as 2018 the Applicants duties were further restricted because of her inability to carry out the practical aspect of her role. As Mr Williams put it, the Applicant was unable to demonstrate capacity to carry out the requirements of her role.

[57] Secondly, the amount of time the Applicant was spending on her duties was in the order of eight hours per week.<sup>8</sup> As such she would have had time to complete her training requirements. The Applicant submits that she was not provided with support to improve. However Mr Williams gave evidence of help having been offered to assist in the completion of the ACPSEM competencies but the help was rejected. He was not challenged on that assertion. Also relevant is that the Applicant had five years within which to improve but she was not able to do so. During the hearing it was suggested that the inability to improve was due to the Applicants restricted duties. However evidence was given that the Applicant had opportunities to advance her training just as Registrars did who did further training outside their usual hours albeit that the Applicant had time to do so during work hours<sup>9</sup> and was doing so. I find that the Applicant was not inhibited in her ability to advance her training and complete the ACPSEM competencies had she wished to do so during the five years from 2014.

[58] Thirdly I do not find that the Respondent only used deficiencies identified in 2014. Those deficiencies continued as is evidenced by the further restrictions imposed in May

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<sup>8</sup> Witness Statement of Mr Timothy John Williams, paragraph 21.

<sup>9</sup> Evidence of Mr Bruce Edwards, transcript page 13.

2018. Even if it had the evidence shows that the Applicant was still unable to efficiently and effectively fulfil her duties as a medical physicist at the date of the termination of her employment.

**[59]** I also have regard to the Applicants personal circumstances and the difficulties she may face in obtaining alternative employment. However such matters are outweighed by the fact that the Applicants role is one where, if not carried out efficiently and effectively could expose patients to the risk of injury or inadequate treatment.

**[60]** Having regard to the evidence overall I do not find that the termination of the Applicants employment as unfair. I note that the oncology unit is small. It is unable to provide a technicians position for the Applicant. It is also not able to provide continuous direct supervision which the Applicant require to fulfil all her duties.

### **Outcome**

**[61]** Having regard to all the circumstances I find that the Applicant is unable to efficiently and effectively fulfil her role as a Medial Physicist. As such there is a valid reason for the Applicants dismissal. I do not find that the dismissal was otherwise unfair. Whilst it is regrettable that the process took so long, the Applicant was unable to complete the ACPSEM competencies and therefore failed to complete the PIP. Much more importantly however the Applicant was not able to efficiently and effectively carry out her duties without continuing direct supervision. The essentially unchallenged evidence of Mr Williams inevitably leads to that conclusion that the Applicant was not equipped to fulfil the requirements of her role.

**[62]** Accordingly the Application is dismissed.



### **Appearances**

Mr Nicholas Edmondson with Ms Ana Nicolau the Applicant  
Ms Debby Crespan and Mr Matthew Wilson for the Respondent

### **Date and place of hearing**

11 February 2020 and 12 March 2020  
HOBART