SUPREME COURT OF QUEENSLAND

CITATION:	*Medical Board of Queensland v Freeman* [2010] QCA 93
PARTIES:	**MEDICAL BOARD OF QUEENSLAND** (registrant's board/respondent) **v** **ADRIENNE ELIZABETH FREEMAN** (registrant/appellant)
FILE NO/S:	Appeal No 7426 of 2009 Appeal No 6092 of 2009 DC No of 3186 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Health Practitioners Tribunal at Brisbane
DELIVERED ON:	23 April 2010
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2010
JUDGES:	Holmes, Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal No 7426/09 is dismissed** **2. Appeal No 6092/09 is dismissed** **3. The appellant is to pay the respondent's costs of both appeals**
CATCHWORDS:	PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – MEDICAL PRACTITIONERS – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT AND UNPROFESSIONAL CONDUCT – DEPARTURE FROM ACCEPTED STANDARDS – where registrant carried out a mid-trimester abortion on a patient and did not seek to have the patient admitted – where Tribunal found that an out-patient mid-trimester abortion could not be carried out safely – where Tribunal found that the appellant did not provide adequate health care and advice to the patient – where tribunal found that the appellant had failed to properly investigate the patient's condition and history prior to the abortion – whether Tribunal erred in finding that the carrying out of an out-patient mid-trimester abortion amounted to unsatisfactory professional conduct APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL

LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERROR OF LAW – FAILURE TO GIVE REASONS FOR DECISION – ADEQUACY OF REASONS – where Tribunal found that the carrying out of an out-patient mid-trimester abortion amounted to unsatisfactory professional conduct – whether the charges amounting to unsatisfactory professional conduct and their particulars were properly made out and substantiated in the Tribunal's reasons

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERROR OF LAW – DENIAL OF NATURAL JUSTICE – where a document prejudicial to the interests of the appellant relating to earlier proceedings was located within the tribunal file as received by the Court of Appeal – where the document made reference to matters which were not in evidence before the Tribunal and were not disclosed to either party during the disciplinary hearing – where there was no evidence that the document actually came before the Tribunal – whether the decision of the Tribunal was vitiated by a potential lack of procedural fairness

PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – MEDICAL PRACTITIONERS – DISCIPLINARY PROCEEDINGS – OTHER MATTERS – where Tribunal found that the carrying out of an out-patient mid-trimester abortion amounted to unsatisfactory professional conduct – where appellant's registration suspended for four months – where suspension was itself suspended for two years – where the appellant's registration conditional upon the Board having access to the records of any patients dealt with by the appellant for the purposes of undergoing an abortion – whether penalties imposed by the Tribunal were excessive

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – NATURE OF RIGHT – SCOPE AND EFFECT OF APPEAL – where appellant sought to appeal the Tribunal's costs order – where appellant otherwise unsuccessful in the appeal – whether the costs order was appealable under the Act

Health Practitioners (Professional Standards) Act 1999 (Qld), s 123, s 124(1), s 346, s 348, s 353

AGL Sales (Qld) P/L v Dawson Sales P/L & Ors [2009] QCA 262, considered
Bromby v Offenders' Review Board [1990] ALD 249, applied
Di Carlo v Dubois & Ors [2004] QSC 41, cited
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22, cited

COUNSEL: K Mellifont with P Feeney for the appellant
K McMillan SC for the respondent

SOLICITORS: Creevey Russell Lawyers for the appellant
Minter Ellison for the respondent

[1] **HOLMES JA:** The appellant is an obstetrician and gynaecologist. She appeals against two decisions of the Health Practitioners Tribunal: the first found that she had behaved in a way constituting unsatisfactory professional conduct and the second made orders suspending her registration for four months (that order in turn suspended for a period of two years), and imposing conditions on her registration. She was also required to pay the respondent Board's costs of its investigation, of an earlier hearing and of the hearing which gave rise to the decisions now under appeal.

The complaint and the findings

[2] The grounds for disciplinary action prescribed by s 124(1) of the *Health Practitioners (Professional Standards) Act* 1999 (Qld)[1] include:

> "(a) The registrant has behaved in a way that constitutes unsatisfactory professional conduct ..."

"Unsatisfactory professional conduct" is defined in a schedule to the Act as including:

> "professional conduct that is of a lesser standard than that which might reasonably be expected of the registrant by the public or the registrant's professional peers."

(A registrant is anyone registered under a health practitioner registration Act.)

[3] The complaint made and sustained against the appellant was that she had engaged in professional conduct of a lesser standard than that which might reasonably be expected of her by the public or her professional peers in relation to her treatment of a patient who had sought a termination of her pregnancy. The findings made by the Tribunal which supported that ultimate finding were in terms of, and corresponded numerically with, charges brought by the respondent. They were that the appellant:

> "1. ... failed to provide adequate and proper health care to the patient on 12 September 2003;
>
> 2. ... failed to adequately investigate the patient's condition and history prior to the provision of misoprostol;
>
> 3. ... failed to provide adequate advice to the patient regarding the risks associated with inducing a miscarriage at 19 weeks of pregnancy in an out-patient setting;
>
> 4. ... failed to adequately monitor the patient following the administration of misoprostol when at 19 weeks pregnancy;

---

[1] References to the *Health Practitioners' (Professional Standards) Act* 1999 are to that Act prior to its amendment by the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act* 2009 (Qld) assented to on 26 June 2009.

> 5. ... failed to arrange appropriate hospital care for the patient following the administration of misoprostol when at 19 weeks pregnancy;
>
> 6. ... permitted the administration of misoprostol at 19 weeks pregnancy in circumstances where she knew that it would occur in an out-patient setting;
>
> 7. ... failed to provide adequate instruction and information to the patient regarding:
>
> …
>
> (e) a management plan in the event of potential complications arising;
>
> (f) an appropriate hospital to attend in the event of the potential complications arising."[2]

The evidence

[4] On 12 September 2003, the appellant attended a patient who sought the termination of her pregnancy. She had been referred by a general practitioner. The appellant conducted an ultrasound which showed that the foetus was 19 weeks into gestation. According to her evidence, she formed the view that there was a risk that the patient would kill herself or harm her five year old daughter if she could not obtain a termination. A psychiatrist called by the appellant, Dr George, gave evidence of his conclusion, based on the appellant's observations of the patient, that the latter was suffering from depression which would have been worsened had her pregnancy continued.

[5] The appellant explained to the patient a procedure by which labour could be induced using misoprostol, a prostaglandin; the patient expressed her desire to undertake the procedure. The appellant administered a dose of misoprostol vaginally and sent the patient home with a number of misoprostol tablets and instructions as to how they were to be administered. On her account, she advised the patient that if there were complications she should attend the Royal Brisbane and Women's Hospital. In fact, the patient presented at the Mater Hospital. Because of that hospital's philosophical objection to abortion, its medical staff took no steps to advance the termination, but they removed the foetus when it died, the patient having continued to self-administer the misoprostol. Dr Watson, an obstetrician and gynaecologist who treated the patient at the Mater Hospital, made the complaint against the appellant which resulted in the proceedings before the Health Practitioners Tribunal.

[6] At the hearing before the Tribunal, five specialists in obstetrics and gynaecology gave evidence. The respondent called Dr Watson, Dr Edwards, who practised in Melbourne, and Dr Portmann, the clinical director of maternal-foetal medicine at the Royal Brisbane and Women's Hospital. Their evidence was that it was unsafe for medical termination in the mid-trimester of pregnancy to be performed outside a hospital environment. The appellant gave evidence on her own behalf, as did Dr Keeping, to the effect that that course of action was acceptable practice.

[7] This was not the first hearing of the complaint against the appellant. She successfully appealed an earlier decision made against her by a differently

---

[2] *Medical Board of Queensland v Freeman* [2009] QHPT 7 at [2] and [56].

constituted Tribunal, and the matter was remitted for re-hearing. Dr Edwards, Dr Keeping and the appellant were the only witnesses at the earlier hearing; their evidence was broadly consistent with what they said at the hearing the subject of this appeal. The transcript of it was tendered at the second hearing and became part of the evidence before the Tribunal.

The grounds of appeal

[8] It is convenient now to turn to the grounds of this appeal and the evidence relevant to them, noting first that an appeal to this court may be brought only on a question of law.[3] The appeal grounds fall within five groups: grounds 1 to 5 concerning the tribunal's approach to the issue of whether the procedure could safely be performed in an out-patient setting (the subject of charges 1, 4, 5 and 6); ground 6 concerning a specific question of procedural fairness; grounds 7 to 22 concerning whether particulars of charges 1, 2, 3 and 7 were properly made out and substantiated in the tribunal's reasons; grounds 23 to 26 concerning the penalties imposed on the appellant; and ground 27 concerning the costs orders made against her.

Treatment of the patient as an out-patient

Ground 1:

(a) The Tribunal erred in law by applying the test for unsatisfactory professional conduct on the premise of a finding that in-patient treatment was an available choice. It was in error in doing so because there was no evidence that the patient would have been accepted into hospital for a termination.

(b) It was unreasonable for the Tribunal to apply the test for unsatisfactory professional conduct on the premise of a finding that in-patient treatment was an available choice. It was in error in doing so because such a finding would have required the rejection of the evidence of Dr Keeping on the issue of the difficulty of securing in-patient treatment for mid-trimester terminations in Brisbane and his was the only geographic and experience specific evidence on the point.

[9] The relevance of the availability of hospitalisation for the patient was that the appellant gave evidence that she had no choice but to treat her as an out-patient because she believed no hospital, including the Royal Brisbane and Women's Hospital, would assist a patient seeking a mid-trimester termination. Dr Keeping supported that evidence by saying that it had not been possible in Queensland to obtain mid-trimester terminations based on

> "... socio-psychological reasons, which is that someone's pregnant who really doesn't want to be so whose social circumstances make it difficult, and who is bitterly upset, distraught, depressed because they don't want to be pregnant ...."

Indeed, he said,

> "… those sorts of terminations were difficult, nigh on impossible to get through the Royal [Brisbane and Women's Hospital]."

In cross-examination, Dr Keeping made the following concession:

---

3 *Health Practitioners (Professional Standards) Act* 1999 (Qld), s 348.

> "If I seriously thought that someone was suicidal, then yes, you might then get it through the Royal,"

that is to say, the Royal Brisbane and Women's Hospital might agree to undertake a termination in such a case.

[10] Other evidence on the point came from Dr Portmann, who said that the policy of the Royal Brisbane and Women's Hospital was to perform mid-trimester termination of pregnancy in three circumstances: where there was a foetal abnormality, where the pregnancy constituted a risk to the mother's physical health or where the pregnancy constituted a risk to the mother's psychiatric health. If the last were involved, the practice was to obtain agreement from two psychiatrists that the termination was necessary and appropriate. In addition, the patient would be required to see a social worker, an obstetrician/gynaecologist would have to agree to perform the termination, and the case would have to be reviewed by the medical superintendent of the hospital. That process could take anywhere up to 10 days.

[11] On the basis of the evidence of Dr Portmann as to her hospital's policy and of Dr George as to the patient's depression, the Tribunal made two findings relevant to this ground. The first was in these terms:

> "There seems no reason to doubt that this patient's mental state was such that she was eligible for admission to hospital for a termination procedure."[4]

The second was that the appellant had made no effort to minimise the risks of the procedure by attempting to arrange admission to the Royal Brisbane and Women's Hospital.[5]

[12] The appellant's argument here was that there was no evidence that the patient would have been accepted for termination at the Royal Brisbane and Women's Hospital. The Tribunal could not reasonably proceed on the basis that hospitalisation was a realistic option: Dr Keeping was the only witness, other than the appellant, who had actual experience of what occurred in such cases, and his evidence was to the contrary. In the absence of such an option, it could not be said that the appellant's conduct fell short of the stipulated standard.

[13] But the Tribunal did not find, nor was it necessary for it to find, that the patient would certainly have been provided with a termination at the Royal Brisbane and Women's Hospital. Accepting that the patient was (as the appellant said) suicidal, Dr Portmann's evidence was that she fell within a category of patient for whom a termination would be provided at that hospital, while Dr Keeping at least agreed that the hospital might accept the case in that event. The finding that the patient was eligible for admission to hospital for a termination procedure was open on that evidence, together with that of Dr George as to the patient's mental state. It did not involve a rejection of what Dr Keeping said; indeed, it was in accordance with his view that a suicidal patient might well be accepted. That finding gave context to the significant further finding, that the appellant had not even attempted to have the patient admitted.

(Ground 2 was abandoned.)

---

4 At [32].

5 At [34].

Ground 3:

(a) That the Tribunal misdirected itself as to what was required to make a finding of unsatisfactory professional conduct under the Act, namely, the Tribunal erred in law in finding unsatisfactory professional conduct proved because it merely preferred the evidence of respondent's expert witnesses to those of the appellant as to whether a mid-trimester termination can properly occur in a non-in-patient setting. In order to find that the appellant had engaged in unsatisfactory professional conduct, more was required: what was required was a rejection of the evidence of Dr Keeping.

Alternatively

(b) If it is found that the Tribunal did reject the evidence of Dr Keeping, the Tribunal failed to provide adequate reasons for doing so.

[14] The appellant suggested that there was not a clear rejection of Dr Keeping's evidence, in the absence of which it could not be found that what the appellant had done was outside the bounds of acceptable practice. The tribunal's reasons were inadequate: the evidentiary basis for the finding that the other doctors displayed greater objectivity and balance than Dr Keeping was not stated. Nor did the Tribunal state the basis for its preference of the evidence of the respondent's experts in respect of each and every particular on which it made an adverse finding.

[15] Dr Keeping had expressed the view that Dr Freeman's practice of using misoprostol to induce labour in the mid-trimester on an out-patient was not ideal; it involved an "unpleasant mini-labour", bleeding, and (although rarely) the risk of trauma to the cervix; but it was an "acceptable practice" provided an "acceptable protocol" were adopted. In cross-examination, he reiterated that the practice was acceptable if no other option were available and provided a proper protocol was in place. He went on to describe it as: "… not quite the gold standard, it's a few millimetres below it …"; the gold standard being performance of the procedure in hospital. Dr Keeping did not consider Dr Freeman's conduct to be unsatisfactory professional conduct, or anything approaching it. On the other hand, Drs Watson, Edwards and Portmann said that it was not safe to perform a mid-trimester termination outside a hospital setting because of the potential complications of infection, heavy bleeding, and retained placenta and the likelihood of pain to a degree requiring intramuscular narcotic pain relief.

[16] The Tribunal accepted Dr Portmann's reasons for regarding an in-patient setting for the procedure as essential, describing them as "compelling". It explicitly preferred the evidence of Drs Edwards and Portmann to that of Dr Keeping, because of what it regarded as their greater objectivity and balance. It enlarged on that view, observing that Dr Keeping's description of the procedure as merely "a few millimetres below (the gold standard)" was at odds with his acknowledgment of the risks attendant on the procedure.[6] It is difficult to see how one could draw anything from those statements but a clear rejection of Dr Keeping's evidence, or be left in doubt as to why it was rejected.

[17] The proposition that it was necessary for the Tribunal to give separate reasons for its preference of the respondent's experts' evidence in relation to every finding it made

---

6 At [31].

[7] the decision in the appellant's successful appeal from the first hearing of the charges against her. But the first passage cited goes to an entirely different point: that the Tribunal on that hearing, having failed to identify whether it accepted the appellant's evidence and failed to identify the evidentiary basis for a broad conclusion that every particular advanced was satisfied, left the appellant without an adequate explanation of the reasons for the Tribunal's decision[8].

[18] The second passage concerned the need to give reasons for preferring the evidence of one witness to that of another. It was prefaced by an observation which lends no support to the appellant's argument that the reasons for the rejection of Dr Keeping's evidence in the present case were insufficiently explained:

> "In explaining why one witness is to be preferred over another the circumstances may be such that no elaborate reasons are called for. It has been said that in such a case the question is often 'a matter not of reasoning but of judgment.'"[9]

Muir JA went on to say that if the opinion evidence of Dr Keeping and the appellant as to the impossibility of the procedure being conducted in a hospital were to be rejected in circumstances where it was (at that hearing) uncontested, it was incumbent on the Tribunal to explain its conclusions. A failure to inform the appellant's counsel of the prospective adverse finding on such an uncontested point also constituted a denial of natural justice.

[19] Here the evidence, very clearly, was contested and the Tribunal gave reasons for its approach in preferring the respondent's evidence. More to the point, neither of the passages cited supports the notion that the Tribunal had to state the basis of its preference in relation to every particular on which it made an adverse finding.

Ground 4:

In finding that the Tribunal accepted the evidence of Drs Portmann, Watson and Edwards over that of Dr Keeping as to whether mid-trimester terminations can be conducted in a non-in-patient setting, the Tribunal has failed to take into account a relevant consideration, namely the evidence of Dr Portmann which contemplated that such terminations occur in the community setting.

[20] The ground was based on a paragraph in Dr Portmann's affidavit:

> "The RBWH would also rarely assist with mid-trimester termination of pregnancy for 'social' reasons if the performance of the termination in the community would have been unsafe. This would include circumstances where the mother was suffering from a bleeding disorder or had had a previous reaction to general anaesthetic."[10]

It was argued that the statement showed that mid-trimester terminations occurred in the community and were regarded as unsafe only in particular circumstances. But it

---

7 [2008] QCA 152.
8 At [14].
9 At [71].
10 *Medical Board of Queensland v Freeman* [2009] QHPT 7 at [34].

is not clear whether, when Dr Portmann referred to "termination in the community", she meant performance of the procedure in private homes or in clinics. She was not asked to clarify the statement when she was cross-examined, although when asked about the use of home settings "as part of the termination process", she said that it was applicable to "primarily under 12 weeks, medical terminations" (as opposed to mid-trimester terminations). The Tribunal was not obliged to construe the relevant paragraph so as to extract the meaning which the appellant now advances; indeed, given Dr Portmann's unequivocal evidence that mid-trimester terminations performed outside the hospital setting were unsafe, it would have been perverse to regard this statement as indicating something to the contrary.

Ground 5:

In accepting and acting on the evidence of Drs Portmann, Edwards and Watson, the Tribunal failed to take into account a relevant consideration, namely the article referred to in paragraph 44 of the decision, which contemplated a combination of hospital and home setting termination, with the implicit acknowledgment that sometimes the termination will in fact occur at home.

[21] The article in question dealt with an American trial of administration of misoprostol in home settings. Having referred to some points of distinction identified by Dr Edwards between the circumstances of that trial and the present case, the Tribunal said that nothing in that article, or others tendered, caused it to have any reservations about the opinions expressed by Drs Watson, Edwards and Portmann. It is plain, then, that the article was considered by the Tribunal but not regarded as relevant. It is not hard to see why. The trial was directed at commencement of the termination process in the participants' homes, where they were to apply and take the necessary tablets. They were directed to go to the hospital conducting the trial if they experienced bleeding or after 24 hours in any event, arrangements having been made for their immediate and direct admission. It was not the intention that any patient deliver the foetus at home; indeed, out-of-hospital delivery was described as "the most serious potential complication" of the procedure. The Tribunal was entitled to regard the trial described in the article as involving a different procedure, with different aims, from that with which it was dealing.

Procedural fairness

Ground 6:

That procedural fairness was not accorded to the appellant, namely, a document was located within the tribunal file as received by the Court of Appeal registry which contains reference to matters which were not in evidence and not disclosed to the appellant.

[22] This ground concerned a document apparently produced by one of the assessors assisting the Tribunal at the earlier hearing. It was a set of notes summarising and commenting on the evidence. It was contained in the Tribunal file forwarded to the Court of Appeal registry; its existence had previously been unknown to either party. The situation bears some similarities to that with which the New South Wales Court of Appeal was presented in *Bromby v Offenders' Review Board.*[11] The circumstances there, though, were more apt to cause concern: two members of the

---

11 [1990] 22 ALD 249.

parole board had files containing material not disclosed to the appellant's solicitor, but it was not clear whether those files had been consulted before or during the hearing. To a submission that it should be inferred that the board might have been influenced by the undisclosed material, the majority said this:

> "In every case it is theoretically possible that a decision maker has referred to or relied upon information which was not disclosed to the party affected. In our opinion courts are not entitled to act on such theoretical possibilities and speculations in proceedings for judicial review. The presumption of regularity and the onus of proof on the party applying for judicial review requires that such a party establish that a denial of natural justice has occurred either in fact or as a matter of reasonable inference from proved facts."[12]

The majority went on to express its opinion that the mere presence of files containing undisclosed material would not suffice to establish "either the reality or the appearance of a denial of natural justice".[13]

[23] The appellant, however, urged us to follow instead the minority judgment of Kirby P in *Bromby*; he would have quashed the Board's decision. It was, he said, a risk inherent in a system in which some members of the board had access to undisclosed material, that the material could have been considered, and could have influenced the board's decision. It was essential that the appearance as well as the actuality of procedural fairness be observed.

[24] In the present case, the Tribunal commenced the hearing by receiving the list of documents on which the respondent relied. Counsel for the respondent at that stage noted that the court already had before it "… the bundle of documents from ... the last occasion …". The bundle of documents became Exhibit 7; it was indexed as consisting of the curriculum vitae of Dr Edwards, a transcript of Dr Watson's clinical notes, two named documents from the Royal Brisbane and Women's Hospital policy and the transcript of the hearing on the previous occasion. Although the appellant here suggested that that bundle might have included the document in question, there is no reason to suppose that it did; that it would have gone unrecorded; or that the learned judge constituting the Tribunal would have failed to mention its existence had it somehow been placed before him, not tendered by either party.

[25] This Court should not depart from the decision of another intermediate appellate court unless convinced that it is "plainly wrong".[14] In any event, common sense militates against acting on the hypothesis advanced by the appellant, that the contentious document might have somehow made its way unnoticed from the file to the tendered evidence. It falls at the outer reaches of the "theoretical possibilities and speculations"[15] abjured by the majority in *Bromby*.

The particulars of charges 1, 2, 3 and 7

[26] The Tribunal found charges 5 and 6, which concerned the appellant's failure to arrange hospital care and permitting the administration of misoprostal in an out-

---

12 At 267.
13 At 267.
14 *Farah Constructions Pty Ltd and Ors v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151-152.
15 At 267.

patient setting, made out, and described them as "the most significant of the allegations …". It went onto say that it was not necessary for the respondent board to make out all the particulars on the remaining charges, but it nevertheless proceeded to deal with them.

[27] Appeal grounds 7 and 9 – 15 concerned findings that certain particulars of charge 1 were made out. Charge 1 was that:

> "The registrant failed to provide adequate and proper health care and advice to the patient on 12 September 2003."

Ground 7:

In upholding particular (b) of charge 1, the Tribunal erred in law by acting on the premise that the expectation was that the termination would occur at the home of the patient on the basis:

(a) That there was no evidence that the termination would occur at the home;

Alternatively

(b) The Tribunal failed to take into account the expectation that the termination may occur at home, but that also, in certain stated circumstances, it may occur in part only at home but may occur in hospital.

The relevant particular was:

> 1(b) "It was not medically appropriate for the patient to undergo the termination, in the expectation that it would occur at the home of the patient."

[28] The appellant's point is that it was expected, not that the entire process of administration of the medication, expulsion of the foetus and removal of the placenta would necessarily occur at home, but merely that it might. The appellant gave evidence that she thought there was a 10 to 15 per cent chance that the patient would have to go to hospital. An 85 to 90 per cent chance that the entire process would occur at the patient's home seems to me a sufficient basis for finding the particularised expectation, that it would occur at the patient's home, made out. The existence of the residuary 10 to 15 per cent chance of its concluding in hospital was beside the point.

[29] Ground 8, a more general ground, will be dealt with later. Grounds 9 and 10 concerned the appellant's provision of information to the patient.

Ground 9:

(a) The Tribunal erred in law in finding particular (e) of charge 1 made out because there was no evidence of a failure to provide information orally.

(b) The Tribunal's finding that particular (e) of charge 1 was established was unreasonable.

Particular 1(e) was:

> "The registrant failed to provide the patient with information, either orally or in writing, for her to be fully informed and comprehend the subsequent course of events involved in the termination."

[30] The appellant's submission was that she had given evidence that she gave the patient the information orally and there was no evidence to the contrary; nor was there evidence that the information the patient had been given was not sufficient to enable her to be fully informed and comprehend the course of events. The Tribunal had said in its judgment that it was not prepared to find that the appellant had understated the experience or the effects of the termination procedure, a view which could not reasonably sit with the finding that particular 1(e) was made out.

[31] The Tribunal made the following observations comparing the information which Dr Portmann would have given the patient with that which the appellant, on her own account, provided:

> "Had this patient presented at the RBWH, Dr Portman (sic) would have discussed with her the material contained within the documents that are exhibits 1 and 2 to Dr Portman's (sic) affidavit of 5 September 2008. Those documents are entitled, respectively, "Termination of Pregnancy – Second Trimester" and "Misoprostol Information and Consent Form". They are much more detailed than any information – oral or written – provided by the registrant to the patient on 12 September 2003. Moreover, the Royal College of Obstetricians and Gynaecologists in their clinical guidelines (Exhibit 3) recognise the importance of ensuring that all information shared in the initial consultation 'is backed up by good quality, accurate, impartial, written information that is well presented and easy to understand'. No such information was provided to this patient."[16]

[32] In the context of a different particular, that "the registrant understated the physical, and psychological experience of the termination to the patient including any subsequent effects", the Tribunal observed that the appellant's notes contained little of what was discussed. Nonetheless, the learned judge constituting the Tribunal said,

> "Although I do not accept the evidence of the registrant in its entirety, in the absence of any direct evidence to the contrary, I am not prepared to find that she had 'understated' the experience or the effects of the termination procedure."[17]

[33] Particular 1(e) did not allege that the appellant failed to provide the patient with oral information; rather, it concerned a failure to provide the patient with information sufficient for her to be "… fully informed and comprehend the subsequent course of events involved in the termination". The first of the passages cited from the Tribunal's judgment makes it clear that it accepted the level of detail described by Dr Portmann as necessary to ensure that the patient was sufficiently informed, and that it did not consider the appellant had provided that level of detail. The Tribunal's unwillingness to find a different particular made out, as to the appellant's having understated the effects of the procedure, did not equate to a positive finding that she had provided adequate information about it, and there is no inconsistency between the two. There was evidence on which the Tribunal could find that particular 1(e) was made out; the finding was not unreasonable.

---

16 At [49].

17 At [48]

Ground 10:

The Tribunal erred in law in finding that no good quality, accurate, impartial, written information that is well presented and easy to understand was provided by the appellant to the patient.

[34] The appellant's counsel submitted that the appellant had provided the patient with a copy of the Aberdeen Protocol, a print-out from MIMS (a compendium of pharmaceutical products), handwritten instructions as to how to administer the misoprostol and a handwritten letter to the hospital to which the patient might be admitted. These, it was suggested, constituted "good quality, accurate, impartial written information that is well presented and easy to understand".

[35] The Aberdeen Protocol is headed "Clinical Protocol for Management of Midtrimester TOP" and is produced, according to its heading, by the Department of Obstetrics and Gynaecology at the University of Aberdeen. It sets out a series of instructions for practitioners with the headings, "Drug Regimen" and "Clinical Notes". It plainly is not designed for comprehension by a lay person. The handwritten instructions as to how to administer the misoprostol, however accurate or impartial they might have been, provided information on one limited aspect of the procedure. The letter to a prospective admitting hospital, plainly enough, was not intended for the patient's information. The Tribunal was entitled to assess those documents and conclude that collectively they did not amount to "good quality, accurate, impartial, written information that is well presented and easy to understand". No error of law is identified in its having done so.

Ground 11:

The tribunal erred in law in finding particular (j) of charge 1 made out because:

(a) There was no evidence of a failure to provide clear, concise and precise instructions to the patient about the circumstances in which medical intervention would be indicated; and

(b) There was no evidence that a failure to provide clear, concise and precise instructions to the support person about the circumstances in which medical intervention would be indicated was professional conduct of a lesser standard than that which might reasonably be expected of the registrant by the public or the registrant's professional peers.

Particular 1(j) was:

> "The registrant failed to provide clear, concise and precise instructions to the patient and/or the support person about the circumstances in which medical intervention would be indicated".

[36] The appellant deposed in an affidavit that she informed the patient that she should expect pain and bleeding and that if the pain was not relieved by the medication supplied to her, she, the appellant, would arrange her admission to hospital. She told her that if the bleeding was any heavier than that of a "heavy day" of the patient's period she should contact the appellant, and in that event she should take two more misoprostol tablets and prepare to go to hospital. In a later affidavit

sworn in advance of the second hearing, the appellant said she told the patient that there were three circumstances which would require her admission to hospital. They were:

> "… if the pain was too great, if she was bleeding more than the heaviest day of her normal period, or if the placenta or birth products did not come away naturally and assistance was required with their removal."

[37] The Tribunal found that:

> "… no effort was made to provide any guidelines or instructions, whether to the patient or the so-called support person, concerning the precise circumstances in which medical intervention would be required."[18]

[38] Even on the appellant's own evidence, the explanation given to the patient was in the most general terms. The Tribunal was entitled to form the judgment on that evidence that the patient had not been informed as to the precise circumstances in which she would require medical assistance and that the instructions given her were not "…clear, concise and precise …".

[39] As to the role of the support person, the appellant had said in her first affidavit that she had "reinforced with the patient that she would need a support person throughout the process"; although in giving evidence on the second hearing, she said that the support person was merely an "optional extra". The Tribunal observed that Drs Watson, Edwards and Portmann had all emphasised the importance of appropriate monitoring of the patient during the procedure. Dr Keeping had said that a proper protocol should spell out that the patient must have a support person, a competent person who could follow the protocol to be observed for a mid-trimester termination conducted as an out-patient, and would take the patient to hospital as soon as necessary. It was not disputed that no instructions had been provided to the support person, a failure which was clearly relevant, in light of that evidence, to whether the appellant had provided adequate care.

[40] In any event, the appellant's assertion that there was no evidence that a failure to provide such instructions to the support person amounted to professional conduct of a lesser standard than might reasonably be expected is beside the point. The allegation was a particular of such conduct; it was not said to constitute *per se* such conduct. As the Tribunal observed:

> "Indeed, certain of the particulars standing alone, even if made out, would not justify a finding of professional misconduct against the registrant or even a finding that the particular charge to which they relate has been established. The issue is whether such particulars as are established, whether standing alone or in conjunction with others, are sufficient to establish any of the charges forming the basis of the grounds for disciplinary action."[19]

[41] It is convenient to deal with grounds 12 and 13 together.

---

18 At [49].

19 At [54].

Ground 12:

The Tribunal erred in upholding particular (k)(i) of charge 1 because there was no evidence that the registrant placed a burden on the patient to assess her own blood loss and physical condition, in circumstances where the patient was unlikely to know the volume of usual blood loss in a termination of pregnancy in the mid-trimester.

Ground 13:

The Tribunal erred in upholding particular (k)(iii) of charge 1 because there was no evidence that the registrant placed a burden on the patient to assess her own blood loss and physical condition, in circumstances where the patient was required to self-administer and self-assess the administration of the drug misoprostol.

Particular 1(k) was:

> "The registrant placed an unacceptable burden on the patient to assess her own blood loss and physical condition, in the circumstances where:
>
> (i) The patient was unlikely to know the volume of usual blood loss in a termination of pregnancy in the mid trimester; and
>
> ...
>
> (iii) The patient was required to self-administer and self-assess the administration of the drug misoprostol".

[42] The Tribunal accepted the evidence of Dr Portmann that the performance of the procedure in the patient's home placed a heavy burden on her "… to assess her condition in circumstances where her judgment might be clouded by the emotional nature of the procedure and by the analgesics".[20]

[43] The particular did not allege that the patient was required to assess whether her blood loss was greater than the usual blood loss for a mid-trimester termination; rather, it alleged, correctly as the Tribunal found, that it placed a burden on the patient to assess her own blood loss and physical condition in circumstances where she was unlikely to know what blood loss to expect from the termination and where she had to administer the drug herself. (It is not clear what is meant by the assertion that the patient was required to "self-assess" the administration of the drug; assuming it to refer to assessment of her physical response to it, the particular has a somewhat circular quality.) Neither ground is correct in asserting that there was no evidence of those matters.

[44] The appellant's point was really that the patient had been told to seek her assistance if her bleeding was worse than that of a "heavy day" of her menstrual period, rather than requiring her to focus on whether her blood loss was unusual in the circumstances. Accepting that to be so, it still could not be said that the patient's level of knowledge of what to expect by way of blood loss was irrelevant; she was left to manage the administration of the drug herself in circumstances where she had no experience or knowledge of what to expect; and that went, in, turn to the adequacy of the care provided.

---

20 At [49].

Ground 14:

The Tribunal erred in upholding particular (l) of charge 1 in that there was no evidence that the registrant placed an unacceptable burden on an untrained support person to assess blood loss, the need for analgesics and the administration of and effects of misoprostol.

Particular 1(l) was:

> "The registrant placed an unacceptable burden on any untrained support person … to assess:
>
> (i) The acceptable blood loss and physical condition of the patient, in that the support person was unlikely to know the volume of usual blood loss in a termination of pregnancy in the mid trimester;
>
> (ii) The need for analgesics, in that the support person was not skilled to prescribe or assess the need for analgesics;
>
> (iii) The administration of, and the assessment of the effects of the drug misoprostol".

[45] The appellant contended that there was no evidence of any burden placed on the support person in those respects. But the evidence about the proper role of the support person, particularly in relation to monitoring the patient's condition has already been outlined. It was evidence from which the Tribunal could conclude that the support person was placed in a position of needing to be able to assess the matters identified in the particular.

Ground 15:

The Tribunal erred in upholding particular (o) of charge 1 because there was no evidence that the failure to meet the support person and explain to the support person their role was conduct of a lesser standard than may be expected of the appellant.

The relevant particular is:

> 1(o) "The registrant failed to meet the patient's support person and to explain the support person's role in observing the patient and transporting the patient to a hospital, if the need arose".

[46] The particular was made out on the appellant's own evidence. The support person's role involved, according to Dr Keeping, following the protocol for a mid-trimester termination involving an out-patient and taking the patient to hospital as soon as necessary. That was a proper basis for the Tribunal's conclusion that the failure to meet the support person or explain that role was relevant to the adequacy of the care provided. Again, it was not necessary that the particular of itself exemplified conduct of a lesser standard than that expected.

[47] (Grounds 16 and 17 concerned charge 2, and will be dealt with later; Ground 18 was abandoned.)

Ground 19:

(a) In upholding particular (y) of charge 1, the Tribunal failed to take into account a relevant consideration, namely, the appellant's belief, based on experience, that making enquiries as to whether the procedure could be undertaken as an in-patient would be, in effect, futile;

Alternatively

(b) In respect of particular (y) of charge 1, the Tribunal did not provide adequate reasons for dismissing as irrelevant the reasoning of the appellant for not attempting to arrange admission to the RBWH.

This ground concerned the following particular:

> 1(y) "The registrant failed to make enquiries as to whether the procedure could be undertaken in a hospital as an in-patient, in circumstances where the registrant had concluded a termination was lawfully justified on mental health grounds."

[48] This statement appears in the judgment:

> "Whatever her [the appellant's] reasoning, the reality is that the registrant made no effort to minimise the risks associated with this procedure by event attempting to arrange admission to the RBWH."[21]

The appellant's argument was that the use of the words "whatever her reason" indicated either that the appellant's belief was not taken into account or was taken into account but dismissed as irrelevant.

[49] Although in her evidence the appellant said that she was unable to obtain a bed in a Brisbane hospital, so that there was no choice but to undertake the procedure on an out-patient basis, she also said, when asked whether she would wish to continue with mid-trimester terminations in a non-hospital setting,

> "Definitely, hospitals are very dangerous. Keep patients out where you can. That's the current thinking. Hospital in the home is the latest philosophy in health care ..."

She went on to say that she had changed her previously-held view and now regarded it as best practice to perform such terminations in the home setting.

[50] The Tribunal's observation that "whatever her reasoning", the appellant had not attempted to arrange admission, was, clearly enough, a reference to the two different rationales offered by the appellant for preferring a home setting for the procedure: that she believed an attempt to have the procedure undertaken as an in-patient would be futile and that she thought it better that a patient have the treatment out of hospital for health reasons. Plainly, the Tribunal did take into account her explanations, but did not consider that they justified the failure to "minimise the risks … by even attempting to arrange admission".

[51] The next grounds concerned charge 2, which was that:

---

21 At [35].

> "The registrant failed to adequately investigate the patient's condition and history prior to the provision of the misoprostol."

Ground 16:

The Tribunal erred in upholding particular (e) of charge 2 because there was no evidence that the failure to assess the suitability of the support person was conduct of a lesser standard than may be expected of the appellant.

The relevant particular was:

> 2(e) "The registrant failed to adequately, or at all, assess the suitability of the patient's support person."

[52] The evidence supported the particular. There was no suggestion that the appellant had met or had anything to do with the support person. The evidence as to the relevance of her failure to do so has already been discussed. And again, the allegation was a particular of "conduct of a lesser standard"; it was not said to constitute of itself such conduct.

Ground 17:

The Tribunal erred in upholding particular (g) of charge 2 because there was no evidence that the failure to obtain an opinion of a psychiatrist as to the patient's mental state was conduct of a lesser standard than may be expected of the appellant.

The particular in question was in these terms:

> 2(g) "The registrant failed to obtain the opinion of a psychiatrist as to the patient's mental state."

[53] The appellant said that although the respondent's experts gave evidence that they adopted a protocol involving the obtaining of reports of psychiatrists, this was not to say that proceeding without one was unacceptable practice. This submission ignores the fact that the appellant had asserted that she believed the patient to have a mental illness, and, in particular, to be suicidal. Dr George, a psychiatrist, had said on the information given to him, she was depressed. The evidence was that had she presented at the Royal Brisbane and Women's Hospital, she would have been assessed by two psychiatrists if there were no existing, adequate psychiatric opinion. In that context, the Tribunal was entitled to have regard to the failure to seek any psychiatric opinion as relevant to whether there had been an adequate investigation of the patient's condition, and, in turn, whether that failure was a manifestation of "conduct of a lesser standard". Again, it was not necessary to show that the failure to obtain psychiatric opinion of itself amounted to such conduct.

Ground 20:

In upholding particulars (a) and (b) of charge 2, the tribunal erred by failing to take into account a relevant consideration, namely the fact that the patient had already seen medical practitioners about the requested termination.

Those particulars were:

> 2(a) "The registrant had only had a single consultation with the patient on 12 September 2003 at which time the registrant administered 800mg of misoprostol vaginally;

2(b) "A single consultation was insufficient for the registrant to make an adequate assessment of the medical and/or social necessity for the termination."

[54] The Tribunal's finding in relation to the single consultation was as follows:

> "The registrant had only the one consultation with the patient prior to commencing the termination procedure. As Dr Edwards observes, the history there obtained rests on the patient's apparent desperation for a pregnancy termination. The registrant herself has said that 'one cannot necessarily believe the facts given by a patient who is in severe anxiety and desperate for an abortion' ... Doctor Edwards considers that the history obtained at such a single consultation was deficient in making an adequate assessment of the medical and/or social necessity for the termination of the pregnancy. Doctor Portman (sic) has said … that it is not her practice to perform a termination on the same day as she first sees a patient. Doctor Portman (sic) holds the belief that a patient requires time to understand the nature of the procedure and its ramifications and 'to ensure that they are sure' about their decision. Doctor Portman's (sic) reasons for attaching such importance to the assessment and evaluation process are set out above. Those are reasons which the Tribunal finds compelling ... The Tribunal accepts the evidence of Doctors Portman (sic) and Edwards in preference to that given by the registrant in relation to the adequacy of a single consultation on 12 September 2003."[22]

[55] The appellant argued that it was not apparent that the Tribunal had taken into account the fact that the patient had been referred by a general practitioner, had already seen practitioners at the Mater Hospital and had time to reflect on the prospect of termination. But the content of any consultation with a general practitioner was unknown and the patient had seen practitioners at the Mater Hospital in connection with adoption, not abortion. In any event, the point of the particular, and the finding, was not that the patient might have had time to reflect on whether termination was advisable but that the appellant had not sufficient time or information to undertake a proper assessment of her. There was no evidence that anything which had occurred in the patient's previous contact with medical practitioners had any bearing on whether the appellant had met her responsibilities in that regard.

[56] The following grounds concern charge 3 and the single particular of it which was upheld by the Tribunal:

> "The registrant failed to provide adequate advice to the patient regarding the risks associated with inducing a miscarriage at 19 weeks of pregnancy in an out-patient setting."

3(a) "The registrant failed to advise the patient of the common side effects of misoprostol, namely nausea, vomiting, diarrhoea, hot flushes and low grade temperatures."

---

22 At [53].

Ground 21:

The Tribunal erred in upholding particular (a) of charge 3 because there was no evidence that the registrant failed to advise the patient of the common side effects of misoprostol, namely nausea, vomiting, diarrhoea, hot flushes and low grade temperatures.

Ground 22:

The Tribunal did not provide adequate reasons for upholding particular (a) of charge 3.

[57] There is substance in these grounds. The appellant did, in her affidavit, depose that she had told the patient of the side effects of misoprostol, nausea, diarrhoea, fever. Cross-examined on the point, she was somewhat breezier:

> "Oh, of course, I told her what was going to happen. You might feel a bit sick, you feel a bit hot and cold, don't worry".

She expanded:

> "I told her what was going to happen, 'You'll take the tablets; a little while you'll get cramps; you might feel a bit sick. If you take more of the tablets you might feel a bit feverish'".

She accepted that she did not make any note of having given that information.

[58] Counsel for the respondent Board here relied on the less precise description given in cross-examination and the absence of notes to suggest that the Tribunal could properly find the particular made out. That submission ignores the fact that the appellant deposed to having advised the patient of the side effects, in evidence which was neither contradicted nor found unreliable by the Tribunal.

[59] In fact, the reference to particular 3(a) being established may have been an unintended mistake, when one takes into account the Tribunal's express statement that it was "not prepared to find that [the appellant] had 'understated' the experience or the effects of the termination procedure". However that may be, the Tribunal erred in upholding charge 3. I will return subsequently to the significance of that error.

[60] Ground 8 concerned particulars of the three charges just discussed, as well as Charge 7.

Ground 8:

The Tribunal did not state adequate reasons for upholding various of the particulars to the charges.

[61] The tribunal expressed its findings in relation to particulars of the first, second, third and seventh charges as follows:

> "In addition, having regard to those matters discussed above, I am satisfied that particulars 1(a), (b), (c), (e), (j), (k)(i), (k)(iii), (l), (o), (u), (y), 2(a), (b), (c), (e), (f), (g), 3(a), 9 and 10 of the Board's Notice of Further and Better Particulars have been established to the

> requisite standard. It follows that, in addition to charges 4, 5 and 6, the Tribunal is satisfied that charges 1, 2, 3, 7(e) and 7(f) have been established."[23]

The appellant complained that the Tribunal had not stated its reasons for making that finding in respect of particulars 1(c), 1(j), 1(k)(i) and 1(k)(iii), 1(l), 1(o), 2(e), 2(f), 2(g), 7(e) and 7(f); nor had it stated a causal connection between each particular and the charge to which it related. Of these, the Tribunal's reasons for upholding 1(j), 1(k)(i) and 1(k)(iii), 1(l), 1(o), 2(e) and 2(g) have already been discussed. The connection between the particular and the relevant charge was, in my view, self-evident in each case, and it was not incumbent on the Tribunal to state the obvious and unnecessary.

[62] Not yet dealt with are particulars 1(c), 2(f) and 7(e) and (f). The first was in these terms:

> 1(c) "The termination was modelled on the 'Aberdeen Protocol' and the Aberdeen Protocol contemplates such termination being performed in whole or in part as an in-patient."

The reasons for the Tribunal's finding that the particular was made out are not hard to discern. The appellant had herself furnished a copy of the Aberdeen Protocol to the Medical Board. In the earlier hearing, the transcript of which was in evidence before the Tribunal, she had said that she relied on that protocol and she did not depart from that position in giving evidence at the hearing now the subject of this appeal. The protocol was in evidence. It said nothing as to application of misoprostol at home; to the contrary, it identified periods for which patients should be made to "remain in ward" after abortion or surgical removal of pregnancy-related material.

[63] It is arguable that what is contained in 1(c) is not a particular of the charge so much as evidence to support it, but the point is obvious: that if the appellant had adhered to the protocol, she would have ensured the admission of the patient to hospital. While finding the particular made out, the learned judge constituting the Tribunal made its limited significance clear: it, with the other articles to which he was referred, did not cause him to have any reservation about the opinions of Drs Portmann, Edwards or Watson.

[64] Particular 2(f) was that:

> "The registrant failed to obtain a full psychiatric history of the patient."

Again, the finding that this particular was made out did not require elaboration. The appellant gave no account of steps taken to establish the patient's psychiatric history, and she was unaware of her previous suicide attempt. The connection between the finding and the charge of failing to investigate the patient's condition and history was so obvious as to require no articulation.

[65] Charge 7, so far as the Tribunal found it made out, was in these terms:

> "The registrant failed to provide adequate instruction and information to the patient regarding:
> …

---

23 At [56].

(e) a management plan in the event of potential complications arising;

(f) an appropriate hospital to attend in the event of the potential complications arising.":

Paragraph (e) was further particularised:

(a) The registrant failed to provide the patient with a referral letter addressed to a hospital that does not have a philosophical objection to termination of pregnancy;

(b) The registrant provided the patient with an open "dear doctor" letter in circumstances where she knew that the patient had previously attended the Mater Hospital;

(c) The registrant failed to make arrangements with an appropriate hospital for the patient to be admitted in the case of complications;

(d) The registrant failed to provide the address and phone number of an appropriate hospital to attend in the event of complications arising;

(e) The registrant failed to advise the patient to stay within the Brisbane metropolitan region during the termination procedure; and

(f) The registrant failed to ensure that arrangements had been made for an appropriate support person to stay with the patient for the entire termination procedure and to be available to take the patient to an appropriate hospital, if required.

The particulars of paragraph (f) were:

(a) The registrant failed to advise the patient of an appropriate hospital to attend in the event of potential complications arising, in circumstances where the Registrant knew the patient had previously attended the Mater Hospital;

(b) The patient attended the Mater Hospital with pain and vaginal bleeding on 12 September 2003;

(c) The Mater Hospital has a philosophical objection to terminations of pregnancy and its staff were unable to assist the patient in continuing the procedure;

(d) The registrant should have been aware of the Mater Hospital's philosophical objection to the performance of the termination of pregnancy; and

(e) The foetal heartbeat was present until 15 September 2003."

[66] None of the particulars in 7(e) was contentious. Of those in 7(f), the appellant disputed (a). She gave evidence that she advised the patient that she should attend the Royal Brisbane and Women's Hospital if problems developed. The Tribunal found that particular made out as a matter of inference from three identified circumstances:

> "In the letter from her then solicitors to the Board on 5 April 2005 however, it is indicated that the patient 'was told she would be given a letter of admission to the nearest public hospital' in the event that admission was required. The letter given to the patient did not

> designate any particular hospital and the patient in fact attended at the Mater."[24]

[67] The reasons for finding that that particular was made out were, accordingly, explained. It was unnecessary in the case of the remaining particulars, which were not the subject of contest, to formally state reasons for finding them made out. Once again the connection between the particulars and the charge of failing to provide adequate instruction and information was so obvious as not to require further explication.

The finding of unprofessional conduct

[68] One error has been demonstrated, in the Tribunal's finding that charge 3 was made out. It is patent, however, from the Tribunal's reasons that at the heart of its finding of unprofessional conduct was the carrying out of the procedure outside a hospital setting, which was the subject of charges and findings 5 and 6. There is no doubt that those findings alone could properly support a finding of unprofessional conduct. As will become clear, it is also apparent from the judgment on penalty that they were the basis of the disciplinary orders made. The error identified does not warrant the setting aside of the finding of unprofessional conduct, nor does it affect the appropriateness of the penalties imposed.

The disciplinary action against the appellant

Ground 23:

The Tribunal erred in finding that there is an apparent failure of the registrant to properly acknowledge the risks associated with this particular procedure.

[69] The appellant had given the answer already set out[25] in relation to what she would do if there were no restrictions imposed by the Tribunal; that is, continue with mid-trimester terminations in an out-patient setting. It is difficult to see how that could be understood as anything but a statement that she would repeat with other patients the procedure she had undertaken with the patient here, and, by inference, that she did not acknowledge the risks associated with it.

Ground 24:

The imposition of a suspension of the appellant's registration (albeit suspended) was excessive in all the circumstances and was not required to achieve the objects of the Act.

Ground 25:

The imposition of conditions was not required and was, in all the circumstances, excessive.

Ground 26:

The imposition of a condition which permits the Board to inspect and take copies of the records and notes of any patient who consulted with the appellant for the

---

[24] At [52].
[25] At [49].

purposes of undergoing a termination for the purposes of monitoring compliance with the condition that the registrant only perform mid-trimester terminations in a public hospital or in private health facilities was too wide for its purpose.

[70] In its judgment on penalty, the Tribunal reprised the significant finding on which the conclusion of unprofessional conduct was based:

> "The evidence accepted by the Tribunal established clearly that a mid-trimester medical termination of pregnancy should be performed only on an inpatient (sic) basis in a hospital."[26]

It noted the factors in the appellant's favour: she was an experienced practitioner, well-regarded by her professional peers. References were tendered which spoke of her knowledge, ability, competence and willingness to care for the disadvantaged. The Tribunal accepted that she had acted in a genuine attempt to assist a patient whom she saw as being in need. On the other hand, it was possible that her strong views in relation to the right to access to termination of pregnancy caused a lack of perspective, creating a risk of unsafe practice.

[71] The Tribunal identified as a real concern the appellant's answer as to her preference for out-patient treatment, which appeared to it to be a failure to properly acknowledge the risks associated with the procedure. The conditions imposed on the appellant's registration were, the Tribunal explained, designed to ensure that she did not repeat the errors made in the treatment of the patient. The penalties imposed were those necessary to achieve the objects set out in s 123 of the *Health Practitioners (Professional Standards) Act* 1999:

> "(a) to protect the public;
>
> (b) to uphold standards of practice within the health professions;
>
> (c) to maintain public confidence in the health professions."

[72] There plainly was, in the appellant's response, cause for concern that she would treat as out-patients other patients seeking a termination in similar circumstances. The conditions imposed were, as the Tribunal described them, designed to ensure that that did not occur and were within the objects of the Act. No error of law is shown.

The costs orders

Ground 27:

The Tribunal erred in its decision to award the respondent all of its costs of the first and second hearings in that:

(a) Several of the particulars of the charges were not upheld or no findings made in respect of them and the Tribunal ought to have made allowance for same;

(b) The Tribunal ordered the costs of the second hearing in circumstances where there were inadequacies in the evidence adduced by the respondent in that hearing.

[73] When the earlier decision of the Tribunal was set aside on appeal, this Court ordered that the costs of that hearing be reserved for determination by the Tribunal, if not agreed between the parties. The Tribunal as reconstituted for the purposes of the

---

26 *Medical Board of Queensland v Freeman* [2009] QHPT 12.

hearing the subject of the present appeal ordered that the appellant pay the respondent Board's costs of both hearings.

[74] Section 346 of the *Health Practitioners (Professional Standards) Act* prescribes which Tribunal decisions are appealable:

> "Each of the following decisions of the tribunal is an appealable decision for this division—
>
> (a) a decision under section 240(1) about whether a ground for disciplinary action against a registrant is established;
>
> (b) a decision under section 241(2) or 243(2) to take disciplinary action against a registrant;
>
> (c) a decision under section 345."
>
> (Section 345 which concerns review by the Tribunal of reviewable decisions had no application in this case.)

The Tribunal's power to award costs in relation to disciplinary proceedings is conferred by s 255 of the Act.

[75] Section 353 of the Act sets out the powers of this court on an appeal:

> "(1) In deciding the appeal, the Court of Appeal may –
>
> (a) confirm the appealable decision; or
>
> (b) set aside the appealable decision; or
>
> (c) change the appealable decision in the way the court considers appropriate; or
>
> (d) send the matter back to the tribunal and give the directions the court considers appropriate; or
>
> (e) set aside the appealable decision and replace it with a decision the court considers appropriate."

[76] If the court had set aside an "appealable decision" by the tribunal – that a grant for disciplinary action had been made out or that disciplinary action should be taken against the appellant – it could properly have set aside any consequential orders, including those as to costs. That was the discretion described by Fraser JA in *AGL Sales (Qld) P/L v Dawson Sales P/L & Ors*[27], in circumstances where s 253 of the Supreme Court Act required leave for an appeal against a costs order:

> "Where an appeal against a substantive order succeeds leave is not required for this Court to exercise its own discretion as to any appropriate, consequential revision of the costs order, but such leave is required where the substantive appeal fails."[28]

But, of course, the *Health Practitioners (Professional Standards) Act* does not provide for any appeal against a costs order, by leave or otherwise. And in the present case, the appeal against the costs order is brought on entirely separate grounds from the decisions capable of appeal under s 346. No jurisdiction is given by the Act to this court to entertain such an appeal; it must be dismissed.

---

27 [2009] QCA 262.

28 At [51]. See also *Di Carlo v Dubois* [2004] QSC 41 at [3]-[4].

[77] I would dismiss both the appeal in No. 6092/09 against the judgment of the Health Practitioners Tribunal delivered on 11 May 2009 and the appeal in No. 7426/09, against the judgment of the Tribunal delivered on 19 June 2009 in relation to penalty and costs. The appellant should pay the respondent's costs of both appeals.

[78] **MUIR JA:** I agree that the appeals should be dismissed with costs for the reasons given by Holmes JA.

[79] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with those reasons and with the orders proposed by her Honour.