

Fitness For Duty – Recent Legal Developments

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1. INTRODUCTION

[1.1] Fitness for duty is emerging as a new legal challenge to employers and employees. Whereas medical examinations as a pre-requisite to the commencement of employment have long been a feature of employment arrangements, peremptory testing for a variety of conditions throughout a workers career often without any manifest signs of unfitness are steadily becoming a feature of many workplaces. The most notable and controversial of these is random drug testing – particularly in the mining industry. Many regard this kind of testing as the precursor of genetic screening and more controversial interventions in the workplace.

[1.2] Workplace testing raises issues which are at the intersection of legal, medical and employee relations disciplines. The legal rules which touch these issues are in flux. The legal rules – superficially at least - point in opposite directions. Employers are required on the one hand, to ensure that a safe system of work is provided, and that employees' capacity to perform their duties do not present a risk to their fellow employees. On the other hand, employers cannot discriminate against an employee and must accommodate employees with disabilities – subject to conditions which are discussed in detail below.

[1.3] The legal pressures are such that there will inevitably be increasing demands for employee screening and a countervailing reaction as these methods become increasingly intrusive. This range of concerns is conveniently described under the rubric of 'fitness for duty'.

[1.4] How intrusive can requirements for 'fitness for duty' become before the reaction sets in, and what exactly are such requirements directed to remedy? For example, random drug testing is designed to eradicate risks presented by employee drug use. Yet such testing (by general agreement) detects not impairment – the present ability to perform at work – but the presence of a drug which may have been ingested days or even weeks, before. Many contend a system of fatigue testing would be more to the point. However the trend toward longer shifts may provide a commercial disincentive against fatigue testing - where random drug testing may provide a dramatic symbolic gesture against dangerous behaviour without disturbing the immediate pressure of production quotas.

[1.5] The recent decision of Kaufman SDP in *Aggenbach v TXU Networks Pty Ltd* [PR902343 March 27, 2001] illustrates one of the perils for an employer who fails to adopt a system of work which will prevent fatigue. Mr Aggenbach had been dismissed for a negligent failure to check the safety of electric wiring repairs which he had made to a domestic dwelling but his mistakes had occurred after an excessive period of work. He had certainly failed to perform the check and his failure could have led to a tragedy. There was a valid reason – on the face of it - for his dismissal.

[1.6] But the judge said that the 'matter didn't end there'. There was the issue of the excessive hours which he had been required to work prior to the incident. The dismissal was in the circumstances, harsh. Kaufman SDP said;

[26] It is clear that on the night in question Mr Aggenbach had been working unconscionably long hours with the approval of his employer. He started work at around 7.00am on Monday morning and didn't finish work until after 1.00am the next day. The failure to conduct the test occurred just prior to his finishing work. Dr Sutcliffe, who was called on behalf of Mr Aggenbach, confirmed the obvious - the hours that Mr Aggenbach worked on that day,

coming hard on the heels of a late finish the night before, impaired his skills, judgment making abilities and concentration

Mr Aggenbach was returned to employment but suffered a demotion – by agreement. The case is a timely reminder that long shift patterns will have consequences for employers and that these may include industrial relations litigation as well as (in some jurisdictions) occupational health and safety prosecutions.

[1.7] Fitness for duty may take a variety of forms. The Australian Transport Safety Bureau ['ATSB'] has only this year had occasion to consider the effects of stress on an air traffic controller whose errors at work arguably presented a major air safety incident. Recently [See *Stress Test for Controllers* Australian May 18 2001 & Australian Transport Safety Bureau *Air Safety Occurrence Report 200002379*]. As a consequence of this investigation, the ATSB recommended that Airservices Australia develop risk management protocols that improve its ability to recognise and track controllers' fitness for operational duty. There was no recommendation regarding the content of those protocols. The timely health assessment of a disturbed employee is perhaps not surprising in an area such as air traffic control. What is noteworthy however is the contemporary emphasis upon systems designed to identify and eliminate risk - rather than ad hoc measures.

[1.8] Genetic testing is also emerging as a weapon to employers to exclude 'risks' presented by employees who have particular predispositions. A recent US publication has provided a useful reminder about the potential for abuse of genetic testing in the employment setting. [American Civil Liberties Union *Genetic Discrimination in the Workplace Fact Sheet* ACLU website 2001] the publication states that a survey conducted by the American Management Association in 1997, showed that 6-10% of US employers were found to be conducting genetic testing. Surveys had also discovered cases of genetic discrimination notwithstanding the American Medical Association policy

statement that "there is insufficient evidence to justify the use of any existing test for genetic susceptibility as a basis for employment decisions." The AMA states that there is no empirical data showing that "the genetic abnormality results in an unusually elevated susceptibility to occupational injury".

[1.9] The ACLU has warned that disability discrimination laws may be inadequate to protect workers against genetic based discrimination since the mere presence of a genetic predisposition may not be sufficient to attract these laws. The issue of the reach of these laws in Australia is discussed below. In Australia – like the USA - there is currently no federal law which prohibits an employer from requesting genetic information or testing employees, and no law protecting the privacy of genetic information. In the US, only twelve states have enacted laws that protect employees from genetic discrimination in the workplace (including California, New York, and even Texas!). No doubt that pattern will be followed in Australia if genetic based discrimination becomes an issue.

[1.10] This paper will discuss some of the legal aspects of the competing demands upon employers which arise from the intersection of the occupational health and safety, workplace relations and discrimination laws. Emerging requirements placed upon employees to achieve and remain 'fit for duty' will in some cases, be an unsurprising response to those demands.

2. THE EMPLOYER'S DUTY OF CARE – LEGAL OBLIGATIONS

[2.1] Employees facing the emerging issues discussed in this paper have much about which they can be reasonably concerned. Equally, the modern legal system often places employers between the devil and deep blue sea. Legal obligations often give the appearance of imposing apparently contradictory demands. Pure self interest will often collide with the interests of employees. A careful balancing process will often be required and in many

cases this balance is difficult to achieve. Such difficulties are, however, no excuse for inaction.

[2.2] Every employer has a legal duty to its workforce to provide a safe system of work in addition to a common law duty of care. Under the various modern statutory occupational health and safety regimes which operate to similar effect in the various states, the potential legal liability is significant. In addition, common law systems also operate to attach legal liability. The modern occupational health and safety regimes place the onus on employers to take the initiative and remain vigilant to occupational health and safety concerns.

[2.3] Section 15 of the *Occupational Health and Safety Act, 1983 (NSW)* states:

“15 Employers to ensure health, safety and welfare of their employees

(1) Every employer shall ensure the health, safety and welfare at work of all the employer's employees.

(2) Without prejudice to the generality of subsection (1), an employer contravenes that subsection if the employer fails:

(a) to provide or maintain plant and systems of work that are safe and without risks to health,

(b) to make arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage or transport of plant and substances,

(c) to provide such information, instruction, training and supervision as may be necessary to ensure the health and safety at work of the employer's employees,

(d) as regards any place of work under the employer's control:

(i) to maintain it in a condition that is safe and without risks to health, or

- (ii) to provide or maintain means of access to and egress from it that are safe and without any such risks,*
- (e) to provide or maintain a working environment for the employer's employees that is safe and without risks to health and adequate as regards facilities for their welfare at work, or*
- (f) to take such steps as are necessary to make available in connection with the use of any plant or substance at the place of work adequate information:*
- (i) about the use for which the plant is designed and about any conditions necessary to ensure that, when put to that use, the plant will be safe and without risks to health, or*
- (ii) about any research, or the results of any relevant tests which have been carried out, on or in connection with the substance and about any conditions necessary to ensure that the substance will be safe and without risks to health when properly used.*
- (3) For the purposes of this section, any plant or substance is not to be regarded as properly used by a person where it is used without regard to any relevant information or advice relating to its use which has been made available by the person's employer.*
- (4) If in proceedings against a person for an offence against this section the court is not satisfied that the person contravened this section but is satisfied that the act or omission concerned constituted a contravention of [section 16](#), the court may convict the person of an offence against that section.*

Maximum penalty: 5,000 penalty units in the case of a corporation or penalty units in any other case.

[2.4] The effect of Section 15 is that an employer has a non-delegable duty of care to provide a safe working environment for all of its employees. Moreover, the way in which section 15 has been interpreted is that an employer is bound to not only ensure safety by avoiding injuries, their duty is

to avoid the very risk of injury. So when the court comes to determine whether an employer has breached section 15 by having in place a certain system of work, it is not necessary to show that a worker has actually been injured, it is only necessary to show that there is an unreasonable risk of injury flowing from the system of work.

[2.5] In *Workcover Authority of NSW (Inspector Mansell) –v- Air Express International (Australia) Pty Limited* (unreported, Glynn J, 18 June, 1996), the Commission held that it was important to look at three issues in making a determination under section 15:

- The gravity of the potential risk flowing from the breach;
- The foreseeability of the risk;
- The measure of gravity of the breach itself

[2.5] Therefore, an employer can rely on its duty of care pursuant to section 15 of the Act to put in place a system of work which addresses the gravity of the risk to be avoided. That is, the more serious the consequences from an “unsafe” system of work, the greater the duty of care the employer must take to avoid the risk of injury. For example, if there is a danger of death or serious injury from a particular system of work (or an aspect of that system of work) then the employer must take every reasonable precaution to avoid that danger. If, on the other hand, the danger to be avoided is in relation to minor injuries, then the actions to be taken by the employer’s duty of care ought only be commensurate to that level of risk.

[2.6] The foreseeability of the risk of injury is also important. If an accident occurs which was reasonably unforeseeable, then the employer may not have breached its duty of care. For example, if a worker has a weak heart but this is unknown to the employer and the stresses of the system of work induce a heart attack, then the employer will probably not have breached its duty of care to provide a safe workplace. However, if the employer is on notice that the worker has a weak heart, then that changes matters entirely and the

employer's duty of care expands to take into account the worker's pre-existing medical condition.

[2.7] Lastly, the Commission in determining the duty of care under section 15 of the Act looks at the steps which could have been taken to avoid the injury. The Commission is bound to look at what is reasonable in the circumstances. For example, if a waste bin is placed on one side of a thoroughfare which is used by forklifts (where the driver has limited vision if it is carrying a load) and a worker is required to cross that thoroughfare to throw waste into the bin, then the risk of that worker being hit by a forklift is present and foreseeable. More importantly the risk of injury could be easily avoided by moving the waste bin to the other side of the thoroughfare.

[2.8] The Commission will be more critical of the employer because a simple measure could have been taken to avoid the risk of injury. On the other hand, if the measure to be taken by the employer would require unreasonable expense and effort to avoid a minimal risk of injury, then it is less likely that the employer will be taken to have breached its duty of care. Each case has to be considered on its own facts and circumstances. What may be reasonable for a small employer with a small workplace may not be reasonable for a large employer with greater resources.

[2.9] Because these modern occupational health and safety regimes are not prescriptive, the exact scope of employer responsibilities in areas like drug testing of the workforce (and other fitness testing regimes) is uncertain. What is certain is the real likelihood that a tragedy at work will concentrate attention upon the preventive measures employed at a given workplace. An employer's failure to implement preventative systems might be regarded by a court as prima facie evidence of culpability in an occupational health and safety prosecution. Where for example, an employer had some knowledge of employee drug use, and where those employees had responsibility for the operation of dangerous production processes, the question why no steps had

been taken to address the problem would inevitably be asked. Where an accident led to the death of a worker, issues like this would inevitably be raised in a coroner's inquiry.

[2.10] The critical issue for present purposes will be the obligation upon an employer to remove from the workplace an employee whose conduct and or health represents an identifiable risk to his or her fellow employees. There is no doubt that in some cases, an employer could be criticised *and* penalised for failing to take the initiative by removing an impaired worker from the workplace - where that worker represents a real and tangible threat to safety.

[2.11] The often unenviable task for employers is to strike a careful balance between their legal obligations and concern for their employees rights and dignity. Legal obligations too dogmatically defined and thoughtlessly applied can easily clash with industrial relations concerns. Transparency and certainty in the application of work procedures will ensure that competing concerns can be addressed in a way which can secure employee commitment and underscore employee awareness of the importance of a safe workplace.

3. REHABILITATION, ALTERNATIVE AND LIGHT DUTIES

[3.1] Ordinarily, when an employee has been injured at work the aim will be for him or her to resume duty as quickly as practicable. The employer will be obliged to provide light duties and rehabilitation to secure a return to employment at the earliest date. A difficulty arises where the opportunities for light duties are restricted or non-existent because of the nature of the enterprise. The employer is not required to create work where none exists, however where it is practicable to do so, the employer will be obliged to make arrangements to provide such work.

[3.2] It is impossible to lay down any generalisation about the duty to provide light duties and rehabilitation. Considerations such as the

availability of work, the medical assessment of the capacities of the employee concerned make it impossible to generalise. The various state jurisdictions also provide different remedies. [For an extended discussion of the issues under New South Wales law see: *Betty Bouchub Silaphet and South Western Area Health Service* [1998] NSWIRComm 124 (17 March 1998)].

4. IMPACT OF DISCRIMINATION LEGISLATION

[4.1] Fitness for duty requirements will often collide with countervailing obligations upon employers under the various discrimination statutes. A worker with a pre-existing condition or some work related injury, may call in aid the provisions of the *Anti-Discrimination Act, 1977 (NSW)* and the *Disability Discrimination Act, 1985 (Cth)*. The pre-existing medical condition or work related injury may be characterized as a disability. The employer is then prohibited from discriminating against a worker on the grounds of that disability in the arrangements it makes for the way in which work is carried out or in the arrangements it makes for employment, promotion and transfer.

[4.2] The scope of the *Disability Discrimination Act* is wide. Section 4(1) of the Act defines "disability" to include "the presence in the body of organisms causing disease or illness"; and "the presence in the body of organisms capable of causing disease or illness". It includes latent conditions such as HIV positive status. As mentioned above, this expansive definition may fall far short of providing protection against discriminatory acts which arise from genetic testing. New legislation should be enacted to put this matter beyond doubt.

[4.3] In such proceedings, the worker is required to prove that he or she has a disability within the meaning of the Act. Since this is defined quite widely, this threshold requirement will probably not present a hurdle in most cases. Once that is proved, the determination to be made by the Tribunal is whether or not the employer treated the worker less favourably in the same

circumstances or in circumstances which are not materially different than the employer would have treated an employee who did not have that disability. Then the worker must prove that the conduct of the employer in treating him/her less favourably than other workers was because of that disability. It is usually this causative link which provides the most problematic hurdle for applicants.

[4.4] Even if the worker establishes that the employer is discriminating against him or her because of his or her medical condition (or perceived medical condition), the employer has two “defences” open to it. The first is to claim that the condition being imposed is an inherent requirement of the job and that therefore, even if the system of work is discriminatory it is part and parcel of the job. The most recent High Court decision on this area was in *Christie v QANTAS Airways Limited* (1998) 193 CLR 280 where it was held that being under 60 years of age was an inherent requirement of the job of being a pilot because the regulations in some overseas airports prohibited pilots over the age of 60 years operating planes in those airports. The High Court made a number of comments about the factors to be taken into account in determining what is and is not an inherent requirement of the job but again, this will be determined on a case by case basis. The law relating to inherent requirement of the job is discussed in more detail below.

[4.5] The second “defence” is to be found in the general exceptions to the legislation. Section 54(1) of the *Anti-Discrimination Act, 1977 (NSW)* has the effect of rendering what would otherwise be a discriminatory act lawful if that conduct was done because it was necessary to comply with the provisions of another Act, Regulation, ordinance, by-law and the like. By virtue of other co-existing legislative requirements, an employer is required to balance the requirement to comply with the anti-discrimination legislation with the requirements to comply with the relevant sections of, for example, the *Occupational Health and Safety Act, 1983 (NSW)*.

[4.6] The onus is on the respondent to establish that this exception or “defence” applies - the question will be whether the actions taken by the employer (and complained of by the worker) were necessary for the employer to comply with the *Occupational Health and Safety Act, 1983 (NSW)*. Once a worker has notified an employer of his/her incapacity to perform certain duties associated with his/her job, or of a medical condition which may be exacerbated or aggravated by the conditions of work, then it is mandatory for the employer to ensure the worker’s health and safety at work taking into account those limitations.

[4.7] In relation to the application of s. 54(1) of the Act and s. 15(1) of the *Occupational Health and Safety Act, 1983*, the Anti Discrimination Tribunal in *Kitt v Tourism Commission and Ors* (1987) EOC 92-196, held that:

“There is no concept of reasonableness imported here. The question is not one of what the employer believed, nor of whether any such belief was reasonably held or based upon adequate grounds. The sole question is whether, from an objective point of view, Mr. Kitt’s employment constituted a risk to the safety of other persons with the meaning of section 15(1) and 16(1) of the Occupational Health and Safety Act”

[4.8] A determination will be made on a case by case basis - from an objective point of view, whether the requirements imposed and the work undertaken were objectively reasonable and to do otherwise would have constituted a risk to the health and safety of the worker within the meaning of section 15(1) of the *Occupational Health and Safety Act, 1983 (NSW)*.

[4.9] These issues have been examined by the Courts in various cases: e.g. *Duggan v Shore Inn Pty Limited* (1992) EOC 92-457 and *Willis v State Rail Authority of NSW* (1992) EOC 92-455. In *Duggan* the Tribunal found that it was not satisfied that the workplace was unsafe for a pregnant woman. Ms.

Duggan was of the view that she could carry out all of the requirements of the job and the medical evidence that she presented to the Tribunal confirmed that view.

[4.10] In *Willis*, the Tribunal found the requirement for the worker to have “unaided” hearing (ie not to wear a hearing aid) to be objectively unreasonable and the termination of the worker’s employment on that ground was held to be discriminatory and therefore unlawful.

[4.11] In *Bugden v State Rail Authority* (1991) EOC 92-360, the Tribunal again declined to accept that the section 54(1) exception applied for a colour blind employee on the basis of the *Occupational Health and Safety Act*. In that case the Tribunal had evidence before it that the worker was able to distinguish colours in 90% of cases and in any event, it was the fixing of the flag to the train rather than its colour which was indicative and significant to the worker in carrying out his job.

[4.12] These cases are indicative of the approach taken by anti-discrimination tribunals in determining the appropriate balance between discriminatory conduct and an employer’s duty of care under occupational health and safety legislation. That approach suggests that the employer has a heavy onus of proof in avoiding the discrimination provisions. It seems that the tribunals require employers to prove (both on lay and medical evidence) that the restrictions being imposed are commensurate to the risk of injury to be avoided and reasonable in the circumstances. On one view, it may be said that the employer may also have to show that there is no other reasonable method of protecting the employee’s safety than to impose the said restrictions.

5. INHERENT REQUIREMENTS OF THE JOB

[5.1] The employer will not have committed an act of discrimination where the 'inherent requirements of the job' mean that the employee cannot perform the job due to his or her impairment. The inherent requirements of a particular employment include requirements linked to health and safety considerations. In many if not most employment situations, the inherent requirements of the employment will *also* require the employee to be able to work in a way that does not pose a risk to the health or safety of fellow employees.

[5.2] A summary of the principles which apply to a determination of what is an inherent requirement of the job is found in *Crombie v The Commonwealth of Australia* (unreported, Human Rights and Equal Opportunity Commission 20 November 1998):

- (a) "Inherent requirements" should not be given a narrow reading, rather it should be given its natural and ordinary meaning: *Commonwealth v Human Rights and Equal Opportunity Commission* [1998] 3 FCA (13 January (1998) per Burchett J at [188-190]; *QANTAS Airways Ltd v Christie* (1998) 193 CLR 280 per McHugh J at 305, 307.
- (b) The inherent requirements primarily are those which are essential and indispensable to carrying out the particular employment *QANTAS v Christie* (ibid per Gaudron J at 294-5; Gummow J at 310) but are not confined to the essential functions of that employment situation: *Jamal v Secretary of Department of Health* (1988) 14 NSWLR 252.
- (c) Whether a requirement is inherent must be determined not just by reference to the terms of appointment but also to the performance of the functions of the employment: *QANTAS v Christie* (op cit. per Brennan CJ at 284).

- (d) Tasks which may be remote and peripheral, as against directly entailed in carrying out the duties and functions of that employment, may be discounted: *Commonwealth of Australia v The Human Rights and Equal Opportunity Commission* (op cit. per Drummond J at [15]).
- (e) The fact that a particular requirement may only rarely or perhaps never be performed by a particular employee does not mean it ceases to be an inherent requirement: See *Commonwealth of Australia v The Human Rights and Equal Opportunity Commission* per Mansfield J at [31-33].
- (f) The requirements of particular employment are not confined to those an employee might be performing at a particular location and in a particular situation. See *Commonwealth of Australia v The Human Rights and Equal Opportunity Commission* per Burchett J at [7]. Just as in the case of the soldier in the HIV case, if an employer requires the particular employee to move location and undertake different kinds of tasks, these may still fall within the inherent requirements of the particular employment so long as they are within the range of duties reasonably required by the terms of the particular employment.
- (g) Stipulating a general standard that is disproportionately higher than is reasonable for the performance by an individual of a particular required task may constitute discrimination on the ground of disability: *QANTAS v Christie* (op cit. per Gaudron J at 294-5). There has to be a reasonably close correlation between the possession of a qualification, skill or capacity and the ability to perform a required task or function: *Commonwealth of Australia v The Human Rights and Equal Opportunity Commission and Bradley* ("Bradley") (1998) 158 ALR 568.

[5.3] The *Christie* case is authority for the proposition that a determination of inherent requirements generally demands an examination of the way in

which the employer has arranged their business. In that decision Brennan CJ (at 284) said:

"The question of whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract. It must also refer to the function that the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis that discriminates impermissibly against the employee, by reference to that organisation."

[5.4] The other important High Court decision on this issue is *X v The Commonwealth* 14 [1999] HCA 63 (2 December 1999). X held that it was not enough that a soldier diagnosed HIV positive be physically capable of performing all the tasks of the position, he must be able also to perform the same in a safe manner. His Honour Justice McHugh said (at para. 11):

"The inherent requirements" of a "particular employment" are not confined to the physical ability or skill of the employee to perform the "characteristic" task or skill of the employment. In most employment situations, the inherent requirements of the employment will also require the employee to be able to work in a way that does not pose a risk to the health or safety of fellow employees."

[5.5] In the earlier Federal Court proceedings, Mansfield J, (at p31) said:

"If the person, through some medical reason - whether physical or psychological - cannot perform the work safely, then that will mean that the person cannot meet the inherent requirements of the particular employment."

However, His Honour also warned (at p31) that employers must not abuse the safety defence:

“That is not intended as a mandate to drive a horse and cart through the operation of [the Act] by permitting the exception such a wide area of operation that the proscription is of little practical import. The umbrella of safety will not automatically provide shelter from the operation of s 15. Its provisions, and the provisions of the Disability Discrimination Act generally, will often be the final refuge of the disadvantaged in our society. As the last protection of the more vulnerable members of society to the whims or caprices of others, such legislation should be construed, if anything, somewhat aggressively and any limitations upon its operation construed narrowly. ”

[5.6] In making a determination of the medical condition of the employee(s) and then assessing what is an inherent requirement of the job, the courts are bound to consider both lay and expert medical evidence. In *X v Commonwealth*, (*supra*) Gummow and Hayne JJ (at 101) discussed the assessment of an inability to perform the inherent requirements of a position and found that inability must be assessed in a practical way, but it is *inability*, not difficulty that must be demonstrated.

[5.7] In order to rely on the defence of “inherent requirement”, an employer needs to be able to show that the restrictions that it has imposed are necessary because in the absence of those restrictions, the worker would be *unable* to carry out his or her duties in a safe manner. The terms “unable” and “safe” are to be determined on the evidence (both lay and medical) and the outcome will be on a case by case basis.

6. COUNTERVAILING LEGISLATIVE REQUIREMENT

[6.1] The second “defence” open to employers who discriminate against employees on the grounds of disability is that they are bound by some other legislative requirement to act in the discriminatory way. This defence has been considered most often in relation to the medical requirements provisions for employment in the public sector and in relation to the provisions of relevant occupational health and safety legislation. It is informative to consider the approach taken in relation to both areas.

[6.2] In *Kitt v Tourism Commission* (1987) 11 NSWLR 686 it was held that the defence operated and the provisions of the *Anti-Discrimination Act* did not apply. Mr. Kitt, suffered from epilepsy and did not meet the medical standard imposed for public sector employment as a guide at Jenolan Caves.

[6.3] The court had to consider the effect of s 66 of the *Public Service Act* (the predecessor of the *Public Sector Management Act*). Section 66 provided that “a person is not eligible for permanent appointment to the Public Service unless he satisfies a medical examination as to his health as provided by the regulations”. Since the medical examination had rendered Mr. Kitt unfit, the Court held that those provisions were reasonable and applied so that it had the effect of overriding the relevant provisions of the *Anti Discrimination Act*.

[6.4] As stated above, the employer bears the onus of establishing the defence and it is a difficult one. Although it was made out in *Kitt’s* case, the courts have not been overly willing to put to one side the provisions of anti discrimination legislation. The test set down in *X v The Commonwealth* [1999] HCA 63. requires the tribunal to determine what level of risk is acceptable and the authorities are clear that each case must be assessed on its merits. However, in summary the authorities require an assessment to be made of whether the worker can carry out safely and satisfactorily *all* of the requirements of the position.

[6.5] This matter was most recently considered in *Maxwell v Commissioner of Corrective Services* [2000] ADT 22 (13 March 2000). In that case, Mr. Maxwell applied for the position of Assistant Superintendent Industrial ("ASI") - Upholstery with the Department of Corrective Services (the "Department"). However, the Department declined to appoint Mr. Maxwell on the grounds that he failed the eyesight component of a pre-employment medical examination. It was held that Mr. Maxwell's past training, qualifications, performance and experience must be taken into consideration as well as the medical evidence. The employer argued that HealthQuest (the NSW public sector health assessment agency) had conducted a thorough audit of the duties of correctional officers in their 1993 survey and determined that the standard of 6/12 in the weaker eye was the minimum eyesight standard necessary for all classes of correctional officers to perform the inherent requirements of the position.

[6.6] The Tribunal held:

"The superior courts' general approach to this area is that arbitrary standards are to be avoided. This is not to say that standards may never be set. However they must bear a reasonable relationship to the inherent requirements of the position. This may be particularly the case where safety is a major issue. It might be entirely reasonable, for example, to exclude persons prone to epileptic fits from working on scaffolding, or asthmatics from the fire service.

In such cases, disqualification of an applicant on the grounds that they did not meet a prescribed minimum medical standard may be reasonable irrespective of what might be revealed by an examination of the applicant's past training, experience, qualifications and other matters that would normally be considered relevant for the purpose of Section 49D of the Act."

[6.7] The Tribunal examined the medical and other evidence as it related to the relevant standard and how it was applied in the workplace. First, the Tribunal looked at the level of visual acuity which, in the opinion of HealthQuest, is the level at which a person with uncorrected vision is unable to perform the tasks demanded by the position. The Tribunal said that this was properly an issue for expert medical determination. However, the Tribunal then went on to look at the risk sought to be avoided – that is the likelihood of spectacles being dislodged in the workplace.

[6.8] Although the medical opinion was (of course) that the risk of dislodgment was not negligible, the lay evidence as to what had actually taken place in the prison system was more persuasive.

[6.9] One-fifth of serving officers wore glasses and yet no steps had been taken by the Department in relation to those employees. Further, there was no evidence of any examples where officers were unable to safely and satisfactorily carry out the inherent requirements of the position because they wore glasses. The only way in which the Department sought to enforce the Standard (in relation to visual acuity) was by means of pre-employment testing. Moreover, the Tribunal went on to say that even if the overwhelming number of serving officers wearing glasses met the standard this would not mean that instances of dislodgment would not come to the attention of senior departmental officers. Such officers may not be effectively "blinded" (as was submitted by the department) if the glasses of a person with Mr. Maxwell's level of visual disability were removed.

[6.10] The Tribunal then said that the dislodgment of the glasses may have safety and performance ramifications. For example, an officer may suffer an injury if their glasses were smashed as a result of a confrontation with inmates.

[6.11] Looking at these matters, the Tribunal was bound to engage in the same balancing process as occurred in the *Crombie* case. The Tribunal in *Maxwell* found that despite the risks involved with a correctional officer's glasses being dislodged, the more persuasive evidence was "the uncontested evidence of a number of highly experienced correctional officers, that it is such a rare event for glasses to be dislodged from an officer's face that they had never in their collective experience encountered such a problem." Further, the Tribunal considered that the position of ASI did not involve frequent or sustained front-line correctional duties, even though it was a formal requirement of the position. That is, the Tribunal took into account the practical realities of the situation. The Tribunal concluded:

"It seems to us that an arbitrary standard has been imposed upon Mr. Maxwell; that the standard relates to correctional officers in general, but does not take into account or does not adequately take into account the job description of the position for which Mr. Maxwell has applied; and that, in any event, by equipping himself with a spare pair of glasses Mr. Maxwell is able to perform the essential and fundamental duties of the position with negligible risk. Accordingly we find that the Respondent has not discharged the onus to satisfy the Tribunal that the s49D(4) defence is available."

7. COMMUNITY STANDARDS – CUMNOCK

[7.1] A recent decision of the Full Bench of the Australian Industrial Relations Commission considered the competing demands and expectations of the community and those of an employer concerned about an employee whose medical condition required on going drug treatment. The case concerned the dismissal of a miner on medical grounds (*Kennedy v Cumnock No 1 Colliery Pty Ltd* [Print PR901496], March 5th 2001 Giudice P, Harrison SDP & Jones C). The Full Bench upheld an appeal from the decision of a single Commissioner who had refused to reinstate Kennedy to his

employment. He had been dismissed because he had been away from work for a considerable time – having been diagnosed with serious depression.

[7.2] Mr Kennedy had reached the point where his treating consulting psychiatrist pronounce him fit to resume duty and that opinion was agreed in by the chief medical officer of the Joint Coal Board of New South Wales, the latter recommending not only that Mr. Kennedy continue to take his medication and see his specialist regularly, as recommended by the specialist, but also that Mr Kennedy be required to report any emotional or mental problems which he encountered to his supervisor.

[7.3] Not content with the medical opinion, the company then referred Kennedy to an occupational psychologist who reported that he was unsuitable for underground work

[7.4] In the proceedings before the Commission the psychologist was not called despite Kennedy's protests, although the Commissioner did not appear to rely on the psychologist's report. The employer argued that it was exposed to an unacceptable risk of injury both to Kennedy and to others if Kennedy was allowed to resume duty. It would be in breach or potential breach of the duties imposed upon it under the occupational health and safety legislation and the coal mines regulations if Mr. Kennedy was permitted to return to underground work. The company said that it was in no position to ascertain whether Mr. Kennedy was adhering to his medical treatment and the Commissioner upheld the dismissal.

[7.5] On appeal, the Full Bench disagreed, saying that if the company was unhappy with the medical opinions of the treating specialist and the chief medical officer of the Joint Coal Board it could have called for further specialist medical opinion.

[7.6] Significantly, the Full Bench mentioned in the course of its decision that a requirement to take regular medication and to seek regular medical attention is a requirement borne by many citizens in regular employment. They pointed to the fact that insulin dependent diabetics and epileptics are examples of people in this category. In most cases the scope for employers to supervise the employee's taking medication is limited. However there are risks to injury to these employees and their co-workers if the medication is not taken. It would be unusual to suggest that employees with illnesses like that should be excluded from the work force as a matter of principle simply because the employer had difficulty in monitoring compliance with the relevant regime of medical treatment.

[7.7] The Full Bench took the view that the medical evidence – that is to say that Mr. Kennedy was fit to resume work – and the fact that the psychologist's report was not tested in the proceedings below, was such as to leave the expert medical opinion unchallenged. In these circumstances, and in the circumstances where the company had written to Mr. Kennedy and promised in his job back if he was pronounced fit for duty by the Joint Coal Board, it was unreasonable for the company to turn around and dismiss him.

[7.8] Whilst this decision (like all of the others considered here) principally turns on its own facts and circumstances, it serves to make clear as a general proposition the necessity in each case for employers to undertake a thorough medical assessment of the employee concerned. Where an employer makes assumptions about an employee's likely behaviour and those assumptions are not soundly based – that is to say in a case like this based upon sound medical opinion – the employer runs the risk of being criticised.

[7.9] The comments by the Full Bench regarding other illnesses such as diabetes and epilepsy, although to be regarded as obiter dicta, are nevertheless important. The Commission appears to be sounding a careful warning to employers about taking an overzealous approach to the issue of

employee fitness. There will always be a balancing exercise which needs to be undertaken to balance on the one hand, the desirability of work being made available for people with a range of health ailments normally found within the community with reasonable and well founded risks to health at the workplace. Employees are not to be excluded simply because of some misplaced or ill-founded fear of the consequences in an extreme case.

[7.10] Only where the medical opinion clearly poses a risk in a practical sense to the employee's well-being of that of his or her fellow employees and/or the enterprise, will it be defensible to remove the employee from the workplace.

[7.11] If this were not the case, it would be relatively easy to imagine situations where employers were eager to screen out a wide range of employees so as to minimise to the greatest degree practicable, the employer's protection against sick leave and perhaps, industrial workers compensation claims. In the normal run of employment in areas such as the mining industry – this will be treated as overzealous.

[7.12] In the event that employees are dismissed because of an overzealous approach, it may be expected that the Commission will take the same view as the Full Bench in the *Cumnock* case. The Commission will regard any dismissal in the absence of clear and satisfactory medical evidence that the continuation of the employee at work is a real and tangible threat as unjustified.

8. FITNESS FOR DUTY – A CASE OF OBESITY

[8.1] Issues will arise from time the time where an employee's fitness for duty will be a matter for controversy notwithstanding there is no clearly definable injury or illness which has been suffered by the employee.

[8.2] One example of this dilemma arises in the case of employee obesity. Whereas obesity is not an illness in and of itself, it is reasonable to suggest that a certain level of obesity would be inconsistent with the ordinary expectations regarding the mobility of a person employed in a particular occupation. For example, miners are expected to be able to remove themselves from the mine in the case of emergency. Implicit in such an expectation is a level of fitness consistent with the need to be able to move swiftly, and ordinarily, move without the assistance from others in the event of a mine calamity – when one is not injured as a result of the accident.

[8.3] There is no doubt that a certain level of obesity will give rise to real concerns that the employee will be unable to exit the mine in the event of an emergency. The new requirements in the coal mining regulations in Queensland of fitness for duty may introduce broader considerations like this – considerations which have formerly not been regarded as relevant to the assessment of an employee's fit for duty.

[8.4] This issue of employee obesity was a significant factor in the recent decision in *Ian Hobbs v Capricorn Coal Management Pty Ltd* ([Print PR903643] Full Bench, McIntyre VP Cartwright SDP & Harrison C April 30th 2001). Hobbs was classified as unfit for duty by a nominated medical adviser to Capricorn Coal Management [*Capcoal*] due to a range of maladies but importantly, because his obesity added a significant risk factor to his fitness for duty.

[8.5] Hobbs was passed as fit for duty when originally employed as a miner by Capcoal, some years before notwithstanding that he was at that time quite obese. He later was promoted to the position of mine deputy. However the combination of his obesity and a knee injury sustained at work led the medical practitioner concerned to declare him permanently unfit for underground work.

[8.6] Hobbs injured his knee at work and, as a result was absent from work for an extended period. Prior to his return to work, his employer required him to submit to a medical assessment. A periodic assessment can be required by an employer in circumstances such as this. Mr Hobbs was pronounced as 'indefinitely' unfit for duty. His challenge to this decision succeeded because the AIRC determined that the prognosis in terms was insufficiently precise to permit a conclusion that Hobbs unfitness was 'permanent' as claimed by Capcoal. One area of controversy was the refusal of the 'nominated medical adviser' [NMA – appointed under the Coal Mining Regulations] to accept a clearance from Hobbs' (then) treating orthopod.

[8.7] An agreement was then made between the CFMEU and Capcoal for Hobbs subsequent medical assessment including importantly, an agreed orthopaedic surgeon (not being Hobbs original surgeon or the surgeon preferred by Capcoal). Arrangments for an appointment with this orthopod became difficult for various reasons and the NMA declared Hobbs unfit without the benefit of the agreed consultation. That dismissal was held to be valid but the decision was quashed on appeal and Hobbs once again reinstated.

[8.8] When restored to work by the first appeal decision, Hobbs was duly sent to the orthopaedic surgeon for assessment. The orthopaedic surgeon pronounced him 'orthopaedically fit' yet the NMA failed him. The NMA contended that the combination of Hobbs' obesity and the state of his knee – notwithstanding the orthopod's report- led him to conclude that the likelihood of his knee giving way under his weight at some time in the indefinite future was such that it justified the declaration of permanent unfitness.

[8.9] In the time between the hearing of the first appeal and the decision of the Full Bench, Hobbs applied for a position as a miner and underwent a separate 'new entrants' medical performed by a doctor who knew nothing

about his disputed employment history. Upon a thorough examination, that doctor concluded that Hobbs was fit for employment as a miner.

[8.10] There was plainly a significant clash of medical opinion which the Commission resolved by concluding that the NMA's opinion that Hobbs was unfit could not be criticised notwithstanding the alternative medical opinion to the contrary. On appeal, the Full Bench agreed, placing great weight upon the opinion of the NMA:

[30] That Dr Smyth was the NMA for the Southern Colliery is we think a matter of some significance in considering whether Capcoal was entitled to rely on his assessment. The State of Queensland has established the Coal Industry Employees' Health Scheme to which we have earlier referred. This Scheme provides for NMAs nominated by a mine manager and approved by the relevant government department. Dr Smyth had been nominated and approved as the NMA for the Southern Colliery; none of the other doctors had.

[31] Under the Queensland Coal Mining Act and rules made under it (to both of which we have earlier referred) onerous obligations are placed on the manager of a coal mine. In these circumstances, it is our view that for the manager (or the employer) to employ in an underground mine a person who that mine's NMA had assessed as medically unfit for underground work, would be to expose the manager (and employer) to considerable risk. This circumstance, in our view, supports Raffaelli C's view that Capcoal had a valid reason for terminating Mr Hobbs' employment. In this respect, we agree with the comments of Raffaelli C in his paragraph [23].

[8.11] The decision should not be taken to establish any general principle. All such cases turn on their specific facts. However, the decision is sufficient to illustrate the fact that in a given case, obesity may well lead to a bona fide

medical conclusion that the employee is unfit for duty. The assessment of the NMA in this regard will be difficult to challenge.

[8.12] How is obesity to be addressed as a practical concern? *Hobbs* illustrates that obesity will be a factor in the medical assessment of an employee's fitness to resume duty. If employees believe that they are being targeted because of their weight or that their weight is being used as a pretext for some other reason to exclude them, there will be disputes. Once again – as with drug testing policies considered below – consistency and transparency is the answer. Where there is a dispute, or likely to be one, a properly qualified occupational therapist can be retained to 'walk' the employee concerned throughout the site. The report produced can be discussed with the employee and his or her medical advisers and, if relevant, the union.

[8.13] As long as there is satisfactory evidence that supports the conclusion that the employee cannot be safely returned to duty, and there are no other suitable alternatives, a decision to dismiss can be justified. If the employee has been a long serving loyal employee, measures short of dismissal may well merit consideration by a sensible employer [e.g. counselling and a time frame within which the employee's weight is to be managed]. Otherwise, *Hobbs* shows that a decision supported by the legislatively sanctioned NMA will in all probability, prevail – even where there is a clash of medical opinion.

9. FITNESS FOR DUTY - RANDOM DRUG TESTING

[9.1] Random drug testing as a part of the armory of fitness for duty requirements in employment is now a permanent feature of some industries – most notably in unionised and non unionised sections of the mining industry. So well entrenched has drug testing become that it has now been officially recognised in the new mine safety regulations in Queensland. Those regulations now require an employer to consult with its employees regarding the introduction of a drug testing program. Where the consent of the majority

of employees has been obtained an employer will be able readily to introduce a program of random drug testing. *Coal Mining Safety and Health Regulation 2001 (Qld) cls10, 42 [cl10]*.

[9.2] The issue of drug testing first arose in an arbitration setting in *BHP Iron Ore Pty Ltd v Construction, Mining, Energy, Timberyards Sawmills and Woodworkers Union of Australia Western Australian Branch* [1998] Western Australian Industrial Relations Commission 130 [WAIRC] (19 June 1998) [Commission in Court Session Fielding, Snr Cmr Cawley, & Beech CC] [1998] 82 IR 162. BHP's proposed programme was developed after extensive discussion with unions and employees but it met with the strident opposition of one of the significant unions at the site, the Construction Forestry, Mining and Energy Union [CFMEU]. In the absence of agreement with all unions, BHP submitted its programme to the Western Australian Industrial Relations Commission [WAIRC] for its approval.

[9.3] Random drug testing was the controversial component of the scheme. This was summarised by the WAIRC as follows:

The most controversial aspect of the Programme is that part which involves testing for drugs. In essence, the Programme requires that an employee, as a condition of employment, submit to random testing of a sample of the employee's urine. If such a test proves positive the employee concerned, on the first occasion, is liable to be sent home on paid special leave; on a second occasion within a period of two years, is liable to be sent home on unpaid special leave; and on the third occasion within the same period, further employment of the employee with the Company will be the subject of discussions.

[9.4] BHP insisted that the scheme was not designed to 'weed out' and sack workers who had used drugs. A 'three step warning' approach was designed to provide a carefully graduated response to successive positive tests. A

single positive result would result in nothing more than a record of that fact. Only a second and subsequent test would lead to discipline and possible dismissal. BHP made it clear that counselling services would be available throughout. Drug testing records would be kept for only two years and then destroyed in a further attempt to acknowledge employee privacy concerns.

[9.5] It is worth noting that BHP was also prepared to depart from the Australian Standard in its own drug testing programme. It prescribed a level of cannabinoid metabolites necessary to record a positive test result at twice the level recommended in the Australian standard. This departure was directed to address concerns about the exposure via drug testing of occasional or 'social' marijuana users. The evidence was to the effect that traces of marijuana use remained in the users body for extended periods – yet there would be no chance that the person tested well after the drug use would be impaired. [As to the status of these Standards see: Standards Australia website [www.standards.org.au] and *Wright v Edgell Birdseye, A Division of Petersville*, Wright J Supreme Court of Tasmania, [7 Nov 1995 No 535 of 1992]]

[9.6] BHP argued that the programme was necessary to enable it to satisfy its obligations under the *Mines Safety and Inspection Act 1994* and regulations and to enable it to satisfy its common law duty to provide its employees with a safe workplace. *The Mines Safety and Inspection Regulations 1995* prohibit anyone from being in or on a mine while the person is adversely affected by intoxicating liquor or drugs. They entitle a mine manager or supervisor to direct any employee reporting for duty who, in their opinion, is adversely affected by intoxicating liquor or drugs to leave the mine immediately (Regulation 4.7).

[9.7] The Full Bench ruled that the proposed drug testing programme was reasonable, given the high degree of consensus reached at the workplace, the safeguards against abuse of a positive result, and the commitment to review

the policy where new developments introduced less intrusive testing methods.

[9.8] While the decision establishes no binding precedent it is a good guide to the approach likely to be taken by an industrial tribunal to this issue. It is important to note that the tribunal looked very carefully at the safeguards adopted in the programme and that it regarded these as vital evidence of the employers good faith in addressing legitimate privacy concerns.

[9.9] A second drug testing arbitration in the same vein in Western Australia was *Australian Railway Union of Workers, West Australian Branch and Ors v West Australian Government Railways Commission* WAIRC Beech C, 20 January 1999. In this case, Westrail the railway authority in Western Australia, sought Commission approval for aspects of its random drug testing policy. The Rail Tram and Bus Union complained about the extent and nature of the drug testing regime.

[9.10] Commissioner Beech, (who was a member of the Full Bench in the *BHP* case), approved the Westrail scheme for random drug testing even though it departed in some respects from the test employed by BHP. He was careful, however, to warn that his decision did not amount to a general precedent for the use of random drug testing in the workplace. Once again the statutory obligations upon Westrail and its general duty to provide duty of care to ensure a safe working environment were important considerations in the Commission's approval of the drug testing scheme.

[9.11] The Westrail programme also contained safeguards for employees who returned a positive test. Employees who returned a positive test would not be automatically dismissed, although any employee who attended work and who was obviously impaired would have always run the risk of being dealt with for misconduct.

10. DRUG TESTING IN PRACTICE – UNFAIR DISMISSALS

[10.1] Two recent decisions of the Australian Industrial Relations Commission indicate that the Commission's approach is likely to be sympathetic to employees who may have transgressed but in circumstances where the testing policies were not clearly understood and/or consistently enforced.. They illustrate the fact that it is one thing to introduce a drug testing regime, but an entirely different thing to implement it in a satisfactory and fair manner. The first of the cases considered is the decision of Commissioner Raffaelli in *James Charles Debono v TransAdelaide* [Print R8699 September 7, 1999].

[10.2] Mr Debono was involved in a fatal accident involving a pedestrian at or near a level crossing in Adelaide in October 1998. It was accepted by his employer, TransAdelaide that the accident was not caused in any way by any fault or carelessness on the part of Mr Debono. Following the accident Mr Debono was required to undertake drug and alcohol testing which he did. Mr Debono tested negative to alcohol but the result of a urine test returned a positive result for marijuana. Mr Debono offered no explanation for the presence in his urine of marijuana. He later suggested that he may have ingested some marijuana after finishing work at a post Grand Final party. TransAdelaide decided dismissed Mr Debono.

[10.3] Under the version of the drug testing policy said to be applicable by TransAdelaide, a positive test result for marijuana was "deemed" to be impairment in accordance with draft alcohol and drug policy. The employer (a significant public authority) argued that it had been brought into public disrepute by the publicity associated with the accident.

[10.4] The Commissioner found that there was a degree of confusion and uncertainty regarding the status of the drug testing policy. The policy containing the 'deeming provisions' had not achieved the status of finality.

The draft policy was not applicable policy at time of incident. Debono also argued that he was unaware of the "deeming" policy.

[10.5] The Commissioner held that it was *not* reasonable to suggest that the drug and alcohol policy should have been known to all TransAdelaide employees. He was satisfied that Mr Debono was not aware of the "deeming" policy. The "deeming" aspect of the policy represented a radical change to the drug policy. In these circumstances, the mere display of the policy on the employer's notice board was an insufficient means of bringing it to the notice of all TransAdelaide employees.

[10.6] In the circumstances of the case, the Commissioner held that there was no valid reason for the dismissal of Mr Debono: [*Selvechandram v Peteron Plastics Pty Ltd* (1995-6) 62 IR 371]. He observed that Mr Debono was not responsible for the adverse public reaction to the accident. Mr Debono was reinstated, however he was awarded a lesser amount of back pay because he had not been fully frank with his employer in the disciplinary interview immediately after the incident. (Mr Debono received \$15,000.00 back pay.)

[10.7] It should be noted that the positive test was consistent not with the driver's actual impairment, but only with the fact that he had apparently consumed marijuana some days prior to the accident.

[10.8] Another recent decision in a similar vein was that of *Worden v Diamond Offshore General Company*, [Print S0242, 18th October 1999]. In this case Commissioner Eames held that the dismissal of the employee concerned was unfair. Worden was dismissed from his employment on an oil rig when he returned a positive test upon resumption of work after a period off the job.

[10.9] Mr Worden had been on duty for the three weeks prior to the test, working on the mobile offshore drilling rig, "Ocean Epoch". At that time the rig was located in the Timor Sea. The test was performed at Truscott Base, an

onshore support facility on the coast of north west Western Australia. He was one of 64 persons engaged on the Respondents facilities in the Timor Sea and Northern Territory that were tested on 8 June 1999. Of seven employees who had tested positive to illicit drugs as a result of the tests performed on that day, all had either resigned or had their contracts of employment terminated.

[10.10] The Commissioner observed that over some years, in spite of the employer's stated attitude about its drug policy, there was no evidence that it had in fact conducted *any* random drug testing. There was also evidence that some persons (including the applicant), who had tested positive in pre-employment medicals, were nevertheless employed, and worked on the oil rigs. The Commissioner found that the policy was rarely enforced.

[10.11] Ironically, Mr Worden's admitted chronic marijuana use came to his aid. Long term marijuana users yield positive results long after use. The expert called by the employer could not state that the test results were sufficiently certain to permit the conclusion that Mr Worden had consumed marijuana on duty.

[10.12] The case was further complicated by the fact that the employer's policy did not state that a positive test (as against proof of impairment) could lead to dismissal. Because the oil rig had closed operations by the time the decision was given, the Commissioner awarded Mr Worden compensation of almost four months pay.

[10.13] The lessons which may be learned from these case are perhaps, these:

- Any drug testing policy should be simple and clear, and expressed in plain English (and community languages where the composition of the workforce suggests this);
- Employees should be required to indicate their acknowledgment, and understanding of the policy – preferably in writing upon induction;

- Employees should be reminded of the policy in a timely fashion and regularly;
- The policy should be applied consistently, and without discrimination.

[10.14] Where an employee returns a positive drug test, the dilemma posed for the employer is the appropriateness and fairness of the response. What steps are reasonable to deal with the results of the test? Most schemes will not involve severe disciplinary consequences upon the return of an initial positive result. It will only be where the employee has failed in presenting and producing a clear result or where the employee subsequently produces a result which indicates the continuing presence of drugs that the employer will have a human resources management problem. So long as the policy has clearly articulated steps which have the support of the workforce generally, any employee who failed to comply with requirements would ordinarily have little redress if in the end, he or she was dismissed.

11. FITNESS FOR DUTY - TRENDS

[11.1] It may be expected that the increasing and sometimes apparently contradictory pressures presented by the laws under discussion will lead to more aggressive initiatives by employers endeavour to 'screen' out troublesome employees. Pre-employment screening may be supplemented by more regular and aggressive on the job screening. Random drug testing is only one of these measures. More extensive fitness for duty measures such as regular health checks, genetic screening and 'lifestyle' screening may emerge as a common feature of employment. Just as surely, excessive measures will produce a community backlash – as the emerging US laws against discrimination in the workplace arising from genetic testing illustrate.

[11.2] Unions and employees are right to be suspicious about such potentially draconian measures. Yet there is an indisputable benefit which extends to all employees from the existence of a (relatively speaking) fit work force.

Impaired workers can present a very real risk to their fellow employees – not just to the employer’s plant and equipment. This explains perhaps, the grudging acceptance of random drug testing by unionised coal miners. Unions will need to consider carefully the directions taken by fitness for duty requirements.

[11.3] The example given above of fatigue being a matter of increasing concern as the demands of efficiency require longer shifts raises the desirability for another kind of fitness for duty testing. So far the technologies for reliable fatigue testing – real impairment testing – are in their infancy. In the mining industry some technologies are being introduced which measure employees reaction times and alertness. As far as the authors are aware, no significant studies comparing the effectiveness of these technologies are yet available – no doubt because of their relative novelty.

[11.4] Balancing the demands of efficiency and costs reduction on the one hand and the protection of disabled employees on the other will always present difficulties. As so often in workplace relations matters, the law will be particularly ill suited to fashioning a solution – but a necessary backstop if needed. The cases discussed above show that so long as fairness is the overriding criterion of treatment – of placing injured workers in suitable employment, of disciplining those who exhibit genuine (and agreed) fitness problems and of accommodating – and not excluding - those with disabilities these are all problems which can be managed without recourse to legal remedies. The actions of employers, faced with these competing challenges, will in the longer term determine whether a more prescriptive legislative response is required.

[11.5] In the meantime, employers and employees alike can be reassured by the Full Bench decision in *Cumnock* – which enshrines what might be fairly described as a test of common sense and ordinary and reasonable community standards. If this approach is to be adopted by industrial tribunals, employees

who suffer the gamut of health problems common throughout the community can expect to be treated with dignity, and can expect to be secure in their employment - at least from exclusion of health grounds. In a world of emerging pressures upon employers to test for all imaginable kinds of exclusionary criteria simply because the scientific means to do so exists, this must provide a measure of reassurance.

Tuesday, 26 June 2001