



Dr Keith Adam and Dr Ian Hadwen

Fit for Duty

FIT FOR DUTY

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1. INTRODUCTION

There are a number of aspects in considering whether an individual is "fit for duty":

- Whether the individual has the capacity to do the job
- Whether the individual is temporarily (or permanently) impaired

While there is an obligation on an employer to ensure the health and safety of workers, there are also requirements under industrial law and anti-discrimination legislation not to exclude an individual unnecessarily from the workplace. The obligation remains on an employer to balance demands of workplace health and safety, and requirement not to discriminate unlawfully

There are now several cases where various courts and tribunals have addressed these apparently competing demands.

We report a case where the Anti-Discrimination Tribunal (ADT) has upheld an employer's right not to employ an individual where it has been clearly demonstrated that an applicant is "not physically fit to perform the necessary physical activities inherent in carrying out the duties of a ticket inspector without an unacceptable risk of personal injury to himself."

We discuss the steps taken in this case to ensure that Mr Cambey's disability was carefully assessed against the genuine occupational requirements of his proposed position.

2. BACKGROUND

There has always been a common law duty of care, reinforced by the provisions of the Workplace health and Safety Act, to ensure the health and safety of employees. As a part of this duty, employers are expected to be aware of, and take into account any particular disabilities which an individual may have. In other words, it is an individual duty.

More recently, the Anti-Discrimination Act (ADA) was gazetted in 1991, and we have seen a number of cases where decisions about suitability for employment have been found to be discriminatory. The opinion has also been expressed (by a lawyer) that pre-employment examinations cannot be justified.

2.1 Discrimination

Part 3 of the ADA prohibits both direct and indirect discrimination

Direct Discrimination means treating or proposing to treat a person with a disability / impairment less favourably than a person who does not have that disability / impairment, in the same or similar circumstances.

Indirect Discrimination means imposing or proposing to impose an unreasonable requirement condition or practice that someone with a disability / impairment does not or cannot comply with and that a higher proportion of people without the disability do or can comply with.

Impairment in relation to a person means:
(b) the malfunction, malformation or disfigurement of a part of a person's body whether or not arising from an illness, disease or injury or from a condition subsisting at birth, and includes an impairment that:-
(g) presently exists; or
(h) previously existed but no longer exists

3. OUTLINE OF EVENTS

On the 20th February 1998 Dr Ian Hadwen, assessed Mr Brett Cambey regarding fitness to perform the duties safely of a Ticket Inspector for Queensland Rail. Pre-employment Medical Examinations on Ticket Inspectors are performed by the Occupational Health Nurses at Mayne Clinic.

There have been several cases determined since 1991 which have tested pre-employment medical standards^{1,2,3}. In each case, the employer was found to have discriminated against the applicant or employee. One case was upheld on appeal to the Supreme Court.⁴

- it relates specifically to genuine and reasonable requirements of the job;
- the specific physical capacities required for the job are accurately identified and are reasonable in all circumstances;
- reasonable ways of accommodating people with disabilities / impairments have been considered; any facilities or services reasonably required by applicants with disabilities / impairments are provided, if reasonable;
- any assessment of the person's ability to perform the inherent requirements of the job is made in conjunction with these facilities or services;
- the test only assesses current health status and does not attempt to predict any future deterioration unless the employer can demonstrate that it is reasonable to do so. (it is this last feature that most relates to the Cambey case.)

The guidelines list a number of features of a "non-discriminatory pre-employment medical test". The main features are:

The guidelines emphasize that pre-employment should relate exclusively and directly to the genuine and reasonable requirements of the job. Any employer cannot refuse to employ a person with a disability / impairment on the basis of a medical examination that discloses a disability / impairment unrelated to adequate performance of the job. What is more, employers are obliged to be make **reasonable adjustments** for persons with such disabilities / impairments.

The only authority either State or Federal that has published any guidelines for pre-employment medical testing is the Equal Opportunity Commission of Victoria. The guidelines clearly defined direct and indirect discrimination, both of which are prohibited under the respective acts. The Commission adds that motive and intention are irrelevant to both direct and indirect discrimination.

2.4 Comparative Legislation

The onus is on the applicant to prove, on the balance of probabilities, that the respondents contravened the ADA. If the respondent relies on an exemption, then the respondent must raise the issue and prove, on the balance of probabilities that it applies.

2.3 Burden of Proof

- s25. A person may impose genuine occupational requirements for a position
- s36.1 It is not unlawful for a person to discriminate against another person ... if the circumstances of the impairment would impose unjustifiable hardship on the first person.
- s106(1) A person may do an act that is necessary to comply with, or is specifically authorised by –
 - a) An existing provision of another act
 - b) An order of a court
 - c) An existing provision of an order or award
 - d) An existing provision of an industrial agreement
 - e) An order of the ADT
- s107. A person may do an act that is reasonably necessary to protect public health
- s108. A person may do an act that is reasonably necessary to protect the health and safety of people at a place of work

2.2 Exemptions

The following exemptions which were considered relevant to this case are contemplated in sections 3 and 4 of the ADA:

Mr Cambey then lodged a complaint with the Anti Discrimination Commission Queensland and this was subsequently passed on to Ian and me. The respondents in the case were to be myself, Dr Ian Hadwen and Queensland Rail.

Ian spoke to Mr Cambey at length by phone, at his instigation, after he heard of this decision and said that he was to get an "independent" opinion from another Orthopaedic Surgeon at Royal Brisbane Hospital (Dr Brett Halliday). Sometime in late March 1998, we received a report from Dr Halliday. He stated, "he is aware that eventually his knee will require further surgery either to remove loose bodies or a complete synovectomy for treatment on his chondromatosis. He also is aware that the long term outcome for this is an arthritic knee". He finishes his report "I hope this has been of some use to you and I hope you do not feel we are stepping on any toes". We felt that this report, couched in very apologetic terms, in no way altered our previous decision.

"Mr Cambey has a condition affecting his knees and ankles. He has already had two arthroscopies on his left knee and surgery may be required in the future. It is our opinion that he is unfit for the duties of a Ticket Inspector. The risk of injury to his knees when restraining individuals or when jumping from carriages and running over unstable, uneven ground (rail lines and ballast) would be unacceptable."

Mr Cambey was clearly single minded in his opinion that he was fit to do the job. He based his opinion on the fact that he played top grade netball; that also six months previously he had passed a pre-employment medical examination for the Customs, and also the fact that he had very few symptoms at the present time. However, after receiving the hospital notes and after consultation with me as Chief Medical Adviser for QR, Ian forwarded his opinion to Queensland Rail saying:

Synovial chondromatosis
•Metaplasia of the synovial membrane lining the knee joint
•Synovium forms multiple small pieces of tissue or bone which may break off to form loose bodies
•These may cause mechanical interference or cause osteo-arthritis

The Royal Brisbane Hospital notes were obtained. The diagnosis was eventually confirmed by Dr Pincus as synovial chondromatosis

Physical examination of his left knee revealed mild crepitus and very mild swelling but no evidence of a significant effusion, no instability and a full free range of movement.

At the assessment, Dr Hadwen was provided with a copy of the job description for Ticket Inspectors with Queensland Rail illustrated with photographs. Dr Hadwen was familiar with the majority of their duties anyway and had examined, for rehabilitation purposes, a number of injured Ticket Inspectors previously. His concern was that a significant problem could be aggravated by the running over track and ballast, jumping over fences, jumping down from platforms, and possible injury in restraining individuals.

The Occupational Health Nurse was concerned about a history of knee problems with Mr Cambey. The candidate gave a history of having had two arthroscopic examinations of his left knee, the first in 1995 and the last in 1997. He insisted that, after both arthroscopies, he had been fine for a period. He also informed Dr Hadwen that there was the possibility of a future operation on the left knee. He also hinted at an "underlying problem" but at the end of the assessment he was not aware of the full diagnosis. Dr Hadwen sought Mr Cambey's consent to obtain copies of his Royal Brisbane Hospital notes and he consented to this.

Candidates whom the occupational health nurse considers may have a medical problem are then referred to a Railway Medical Officer for further opinion. Most Ticket Inspectors, in fact, never see a Doctor as part of their pre-employment assessment.

affecting his left knee.

2. Mr Cambey disclosed that he had seen another orthopaedic surgeon prior to his attendance to Dr Pincus at the Royal Brisbane Hospital. Dr Peter McMullen had discovered that he had patella laxity and actually managed to dislocate his patella during his physical examination. This orthopaedic surgeon told Mr Cambey that he should have a lateral release operation performed and, because he was not insured, was referred to the Orthopaedic Outpatients at Royal Brisbane Hospital where he saw Dr Pincus. Therefore, it would appear that he had a third condition

1. That the claimant had failed an induction course involving a role play situation and therefore was unlikely to be appointed as a Ticket Inspector anyway. This raises a situation that is not uncommon in Occupational Medical Practice, where employers prefer to use medical grounds for dismissal or failure to employ rather than their own assessments or other tests or factors which may be challenged in the Anti Discrimination Tribunal or Industrial Court.

At the early stages of the hearing, two interesting pieces of information were uncovered.

His claim against Queensland Rail was basically that they discriminated against him by not allowing him to go on the pre-work course. He also argued that the employer cannot take into account whether or not the person may be able to perform those duties in the future ("not even the next day") only as to whether he is fit at the time that he is assessed.

The claimant decided to continue with the case and the hearing in the Anti Discrimination Tribunal was set down for 23rd - 25th August 1999.

4. THE CASE

Following the conciliation conference, Queensland Rail asked me whether or not my opinion as to Mr Cambey's fitness had altered. My opinion was that, although the significance of the arthritic changes has been lessened, the sudden unpredictable risk of a knee locking in a potentially very dangerous environment e.g. on a track near a busy suburban railway station such as Central or Roma Street, did not alter the initial decision. There was merely a change in emphasis.

1. that the operation notes may have been inaccurate and that the diagnosis should have read gross synovial chondromatosis and not gross arthritis;

2. that Mr Cambey could develop loose bodies at any time without warning and with no preceding symptoms;

3. that as a result, his left knee could lock painfully and he would fall and be immobilised on the ground;

4. there were no routine investigations such as x-rays that could determine when this was going to happen.

Prior to the conciliation conference held at the Tribunal stage in May 1999, the Barrister and Solicitor for Ian Hadwen and me went to Dr Pincus to obtain a statement. He agreed to give evidence via phone at that particular conciliation conference. Contrary to the statement from Dr Pincus that I have just read to you, Dr Pincus, in his evidence at the conference stated:

Precedent
It is the first recorded case in Australia and New Zealand where a Doctor, or Doctors, has been named as respondents in such a case. In all previous cases, the respondent has been the potential employer.

In this case, the ADT has upheld the right of employers to impose genuine occupational requirements on any applicant for a position. These genuine occupational requirements must be carefully justified on the basis of the demands of the job. Previous cases have demonstrated that for a requirement to be a genuine occupational requirement, it must be imposed equally on all occupants of the job. They cannot be applied only to applicants.

6. LESSONS / CONCLUSIONS

3. Mr Cambey has not substantiated his complaint of unlawful discrimination against either Dr Adam, Dr Hadwen or Queensland Rail.
Because of this finding, further consideration of the other exemptions was not undertaken
2. It follows and I so find that, in acting as it did on Dr Hadwen's report to Sr Cather dated February 1998 that Mr Cambey was unfit for the duties of ticket inspector, QR imposed a genuine occupational requirement for the position within the language of s.25 of the ADA
1. physical activities inherent in carrying out the duties of a ticket inspector without an unacceptable risk of personal injury to himself.
1. because of a medical condition, Mr Cambey is not physically fit to perform the necessary physical activities inherent in carrying out the duties of the position without an unacceptable risk of personal injury to himself or others who might be present in the workplace." He found that:-
1. necessary physical activity inherent in carrying out the duties of the position without an unacceptable risk of personal injury to himself or others who might be present in the workplace." He found that:-
1. before employing Mr Cambey, QR was bound to ensure that he was physically fit to perform the necessary physical activity inherent in carrying out the duties of the position without an unacceptable risk of personal injury to himself or others who might be present in the workplace." He found that:-
1. In considering the defences, Mr L F Wyvill, QC, the Member of the Anti-Discrimination Tribunal hearing the case observed "It is well settled law that an employer owes an overriding managerial responsibility to safeguard its employees from unreasonable risks" He stated that "In my opinion, before employing Mr Cambey, QR was bound to ensure that he was physically fit to perform the necessary physical activity inherent in carrying out the duties of the position without an unacceptable risk of personal injury to himself or others who might be present in the workplace." He found that:-

5.3 Do any of the exemptions set out in parts 4 and 5 of the ADA apply?

1. I am satisfied that because of the condition of his knee QR treated Mr Cambey less favourably than it would have treated another person without that condition... Accordingly, I find that a case of direct discrimination has been made out against QR by Mr Cambey.

5.2 Did QR discriminate against Mr Cambey on the grounds of his impairment?

1. "it suffices to say that the proposition that the ADA may be contravened by the mere forming of an opinion is untenable"
2. "the making of the report and the communication of it to Sr Cather (QR Occupational Health Nurse) are not within the discriminatory acts that are proscribed in the ADA"
3. "Neither Dr Adam nor Dr Hadwen determined the terms upon which Mr Cambey might be employed or considered for employment by QR."

5.1 Cambey's allegations against Drs Adam and Hadwen

The final hearing was on 29th October 1999. We received the decision in June 2000. While the summary of findings includes ten items, I believe the following represent the major outcomes :

5. THE JUDGEMENT AND ORDER

During the Tribunal hearing, Dr Hadwen was questioned at length about the tasks which he considered that would place Mr Cambey at risk. At the end of that day, Dr Hadwen was asked to prepare a report detailing those tasks which Mr Cambey could not safely perform in each section of the Job Analysis prepared by Carmen Mitchell, occupational therapist. This was submitted as an exhibit on the following day, without Dr Hadwen having to undergo further cross-examination on its contents. Mr Wyvill extracted extensively from this exhibit in his judgement.

The comments of the Member have also reinforced the longstanding common law duty of an employer to ensure that an employee or prospective employee has the capacity to perform the activities inherent in the job.

"In my opinion, before employing Mr Cambey, QR was bound to ensure that he was physically fit to perform the necessary physical activity inherent in carrying out the duties of the position without an unacceptable risk of personal injury to himself or others who might be present in the workplace."

In the "Pre-Employment Medical Testing Guideline" produced by the Equal Opportunity Commission of Victoria⁵ it states that employers should ensure that the Medical Officer conducting the pre-employment medical understands the genuine and reasonable job requirements and capacities required to perform them. It is also incumbent upon the employer that they ensure that the Medical Officer is aware of the Anti Discrimination laws and understands that the test must relate to the job requirements. Further, it warns employers to be aware that not all doctors are experienced in conducting non-discriminatory pre-employment medical tests and choose an appropriately experienced doctor wherever possible. These recommendations are supported by this decision.

In this case, it was clear that the advice offered by Drs Adam and Hadwen, and the decision made by QR was the result of a careful consideration of the individual circumstances, rather than a broad decision about, for example all knee injuries. Further, the job demands had previously been evaluated by an occupational therapist to identify those jobs and tasks which could be utilised in providing suitable duties for rehabilitation. If the decision had not been based on a consideration of the specific medical condition, and related specifically to the documented demands of the job, the outcome of the Complaint may have been different.

In considering fitness for the tasks, it is appropriate to consider not only current ability, but also the reasonably foreseeable risks and consequences of a disease or condition. At the time of his application, Mr Cambey was playing competitive netball despite the condition of his knee. However, implicit in this judgement is acceptance that it was not his current state, but the foreseeable risk of injury at some future time which rendered Mr Cambey unfit for the duties of a ticket inspector.

In summary, I believe that this judgement confirms that standards can be imposed, provided that they are clearly related to job demands.

¹ Flannery -v- O'Sullivan (QADT 27/4/93)

² Seaton -v- Qld Fire Service (QADT 15/9/95)

³ MacDonald and Others -v- Queensland Rail

⁴ The Commissioner of Fire Services -vs- Seaton (Old Sup Ct 23.3.96)

⁵ Equal Opportunity Commission Victoria "Pre-Employment Medical Testing Guidelines"