
Examining the Legal Implications of Being Fit for Work

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1 Introduction

The concept of 'being fit for work' and how fitness is to be determined has many dimensions and components.[1] At one view, it can refer to the process of pre-employment screening that is used for determining physical suitability of job applicants. In another context, it can encapsulate drug testing, fatigue policies and return to work assessments undertaken on behalf of the existing employee, all in the interests of workplace health and safety.

In the extreme it covers periodic compulsory and not necessarily random psychological and emotional quotient (EQ) testing. This is happening in the USA and has been observed here in Queensland where elements of our own Explosives Act 1999, require testing beyond physical fitness.[2]

From whatever angle the issue is considered, it appears abundantly clear that as more fine tuning of the regulatory arrangements in the mining industry takes place, the reaction to such developments will cause both positive and negative responses.

One reason for this is that the practical consequences of the application of any fitness for work consideration are so impacting. In the case of a mine worker, the administration of fitness for work policies and procedures can in certain circumstances be viewed as prejudicial, determinative and life impacting. In the case of the mine operator, the process can be seen as mandatory, logical, protective and economic. This paper seeks to explore some of the legal issues through the eyes of the stakeholders.

2 Identifying the concept

2.1 Earliest beginnings

The earliest known practices of physical examination are attributed to the ancient Egyptians, but it was not until the onset of the industrial revolution in the 19th century, that some rudimentary form of occupational medicine was recognised as having taken place.[3] The emergence of workers compensation laws in Germany, followed by its introduction in the United Kingdom (1897) and later adoption in Australia and the majority of the industrialised world in the early 20th Century, created the vehicle by which workers obtained financial recompense for injuries and illnesses sustained out of or in connection with their work environment.[4] In response to the costs being borne from these new arrangements, employers began to ponder the importance of health and safety at work, causing one commentator to write in 1920:

> *"every applicant for work should be thoroughly examined by medical staff in order to prevent the introduction of contagious diseases into the plant and to provide for the proper selection of work for every man according to his physical and mental qualifications."*[5]

2.2 Meaning of fitness for work

Yet there is little evidence that the concept of fitness for work has been judicially considered often since that time. One attempt was made in 1973, when the New South Wales Court of Appeal gave a meaning to the word 'fit' for the purposes of interpreting the provisions of the New South Wales Workers Compensation Act 1926. On that occasion, the Court determined that the word 'fit' should mean sufficiently fit to resume or engage in the relevant employment".[6] The court held that the term did not have to mean "absolutely fit for all forms of employment" or "absolutely fit for the employment which the worker had at the time of the injury". Thus, there was a recognition that a person may be fit for work, even though they may be suffering from some disability arising from an injury.

Some thirty years on, this question of 'being fit for what?" and the meaning given to the term 'fit' still cause much consternation. Certainly, the simple response to the issue is that each case needs to be considered in light of the duties that the employee needs to perform and the injury, impairment or disability that they may suffer from. But that approach tends to oversimplify the other influences that may also affect the analysis .

2.3 Current motivators

Some of these influences have also been identified as 'motivators' for employers, such as :-

- economic incentives for the employer relating to workers compensation, worker productivity and health insurance costs;
- regulatory requirements or guidelines issued from government agencies to minimise the risk to workers or the public;
- epidemiologic surveillance of workers for scientific and regulatory purposes; and
- employers genuine interest in their employee's welfare.[7]

Logically, there are also relevant issues that may influence the behaviour of workers and these include:-

- the right to work;
- economic needs of the worker and/or family;
- social needs of the worker; and
- other industrial and political influences.

Let us now consider the interrelationship of some of these issues further.

3 Four aspects of fitness for work

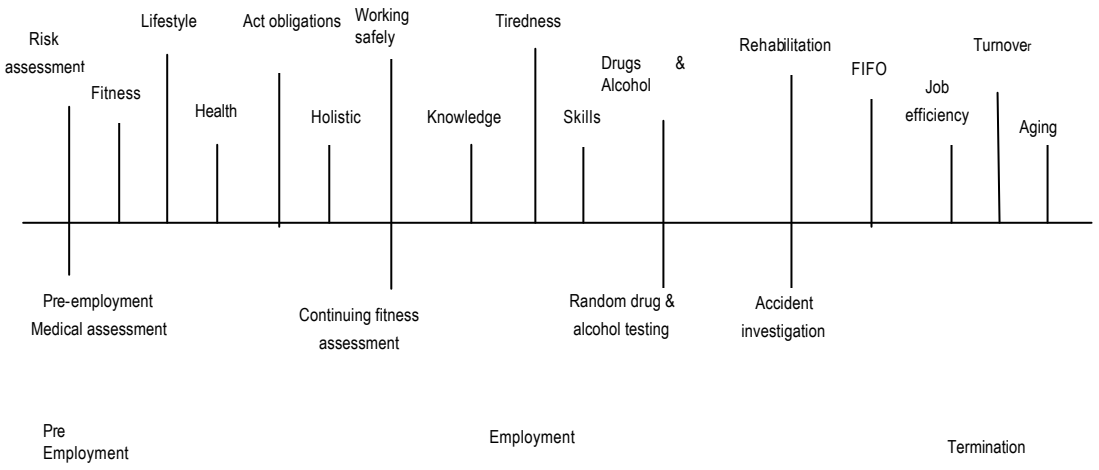
3.1 Introduction

For the purposes of this analysis, the concept of 'fitness for work' has been broken down into four general categories of case:-

- pre-employment screening;
- arising out of and in the course of employment;
- assessment as a consequence of accident or injury; and
- random health testing.

At this point it is too early to consider compulsory continuous fitness testing regimes, as in the USA. It is beginning here already in special types of employment (defence forces, defence intelligence) and may become more prevalent in police and emergency recruits in the coming years. The categories of case are not mutually exclusive or exhaustive. As Figure 1 illustrates there are many aspects that make up fitness for work.

Figure 1 – Issues identified within the fitness for work continuum



Source: MISHC. ACARP Scoping Study 2001

The principal purpose for categorising into four general types of case, is to isolate some of the unique aspects pertaining to the various aspects of fitness for work. These are now addressed in turn.

3.2 Pre-employment screening

The first category of case that we examine is that of pre-employment screening. The preparedness to participate and successfully undertake a medical examination can be a pre-

requisite to the making of the employment contract. In cases of this type, the rights and obligations of the parties under the contract are suspended until the employee is successfully screened.[8] The failure of an applicant to pass a 'medical' in normal circumstances, typically results in the contract either coming to an end or not being consummated. Where no binding offer of employment is in place, no contract is made.

As a result, many recruitment policies are framed along the following lines.

Pre-employment medical examination
All applicants will be required to take a pre-employment medical examination to assess the prospective employee's fitness for work. All offers of work are conditional on an applicant satisfactorily undertaking the pre-employment medical examination and being assessed as fully fit for the work required.

To that end, a prospective employer is permitted to ask medical and psychological questions (including seeking information about an applicant's compensation history) only if those questions relate to the essential requirements of the particular job and the applicant's ability to do that job. It is unlawful to ask any other medical or related questions at this stage. If a question is asked that does not relate to the requirements of the position that the prospective employee has applied for, an unsuccessful applicant may then claim that the answer to that question was a ground for discrimination.

The converse situation also applies in the case where an employer uses extraneous information to assist in the making of an appointment decision.

O'Neill v Burton Cables Pty Ltd

In O'Neill v Burton Cables Pty Ltd[9], Burton Cables Pty Ltd was found to have refused to have employed O'Neill as a purchasing officer, on the basis that he had provided information to the examining medical officer that he had been suffering from back problems. As it transpired on presentation to the examining medical officer, O'Neill had indicated that he was stiff and sore as a result of digging in his garden. The examining medical officer had made the comments that O'Neill should have "been home in bed" and on that basis the company formed the view that O'Neill should not be employed as there was a risk that he would injure himself lifting goods. However it was held that there was little information on which such a judgment could be made. No attempt was made to obtain additional information from the doctor as to why these comments were included in the report and the previous employer had actually indicated to Burton Cables that O'Neill had no time away from work with back problems. In this case, the Victorian Equal Opportunity Board found that the company had treated O'Neill less favourably than it would have treated an applicant who did not have a stiff back. The company was found to be in breach of the equal opportunity legislation.

Pre-employment screening should take place only after it has been determined which applicants will be offered a job, with the offer of employment made conditional upon the successful completion of the medical examination. This is subject to the overriding qualification that any disqualifying conditions discovered as a result of the examination relate to the essential requirements of the job.

In ordinary circumstances, prospective employees should sign a consent form before any testing is undertaken. That form should also advise them, in detail, about the nature of the test that they are undertaking and explain the criteria for the successful completion of the test. The form should confirm that the testing is being undertaken by an independent medical expert and that the results of the tests will remain confidential.

3.3 Testing in the general course of employment

The **second category of case** that can be identified within the fitness for work continuum, places importance on the role of the employee at work. In the case of the existing employee, it is an essential requirement of the contract of employment that the worker be ready, willing and able to perform the inherent requirements of the position. State health and safety laws add to that common law obligation.

In the case of mining, the capacity of the worker is often assessed within the following impairment dichotomy:-

(1) **cognitive impairment –** (eg alcohol, personal fatigue or improper use of drugs); and
(2) **physical impairment** (eg musculoskeletal injuries, sprains and strains, major injuries etc).

The question as to whether it is reasonable or not to expect that a worker must submit to ongoing health assessments so that an employer may interrogate for signs of cognitive and physical impairment was addressed recently in the case of *Blackadder v Ramsey Butchering Services Pty Ltd*[10]. In that case, Madgwick J stated that there should be implied by law into contracts of employment where necessary, that an employer be able to require an employee to furnish particulars and/or medical evidence affirming the employee's continuing fitness to undertake duties. In *Blackadder*, the requirement to submit to a health test, came about because of a shift in work requirement and the precautionary step the employer was taking to ensure that the employee was capable of undertaking the alternate duties, having regard to a previous injury that the employee had claimed to have suffered.

In *Blackadder*, the employee had agreed to the following:-

> "if hired my continued employment may be contingent upon satisfactorily passing a physical examination at any time to establish my capability to properly or safely perform my duties."

Yet even in the absence of contract, the employer's justification for pursuing this right can be traced back to the decision in *Hamilton v Nuroof (WA) Pty Ltd*[11]. In that case, the High Court held that an employer has an obligation to take reasonable care for the safety of the employee in all the circumstances. These obligations are now well established under statute. An illustration of this is in the case of the safety and health obligations set out in Part 3 of the Mining and Quarrying Safety and Health Act 1999.

Against that back drop there seems to be little doubt that the right to test an employee in the general contract of employment, in certain circumstances, will be justified.

The major developing issue is not so much a union challenge to that right, but the dispute over the appropriate medical examination. Unions are challenging the employer's right to nominate their doctor of choice. They often claim that the employee has the right to nominate their own doctors and the employer is bound by that doctor's report.

There have been a significant number of dispute hearings over this issue in the past 12 months. Unfortunately there is no definitive case law yet. The closest we have to the Courts' view on disputed medical opinion, is the decision of the Full Bench of the Australian Industrial Relations Commission (AIRC) in *Lewis v Mobil Oil*[12].

3.4 Assessment as a consequence of accident or injury

The **third discrete category of case**, focuses on processes that ordinarily flow from workplace specific accident or injury. There are several issues that emerge here.

Firstly, aside from the moral obligation that employers may have to take responsibility for workers suffering injury or illness as a result of their work, all workers compensation systems require employers to take responsibility to rehabilitate workers suffering from work related injury or illness. To this end, medical and treatment providers become involved in all aspects of assessment and treatment of an injured worker so as to:

- establish diagnosis;
- determine current treatment regimes and requirements to maximise recovery;
- establish prognosis and timeframes for recovery and return to work if not at work;
- provide the doctor with information regarding the workers' current work status and progress; and
- provide details regarding pre-injury duties, hours and job demands.

There are a myriad of potential outcomes that may result from this form of assessment, these include:

- return to same employer/same job;

- return to same employer/modified job;
- return to same employer/different job;
- return to different employer/same job;
- return to different employer/modified job;
- return to different employer/different job;
- retirement on ill health.[13]

Given this fact, it is perhaps unsurprising that the AIRC has required some checks and balances in the assessment process.

(a) Right for a worker to obtain a second medical opinion

One case that has highlighted the degree of procedural fairness that is expected from the parties by the AIRC is that of *Hobbs v Capricorn Coal Mining Management Pty Ltd (CapCoal)*.[14] The relevant facts are as follows.

Hobbs' Case

Hobbs had been employed by CapCoal as a mine deputy in its Southern Colliery in August 1996. On 20 November 1997 he injured his left knee, while undertaking an inspection underground. He eventually underwent arthroscopic surgery on his knee and because of complications was then unable to continue rehabilitation. Hobbs was deemed unfit for work by the Nominated Medical Adviser (NMA) and his employment was terminated. Hobbs then applied and was granted reinstatement by the AIRC.

However, Hobbs required a medical clearance before being allowed to return to work. After some dispute, an arrangement was reached between the parties that Hobbs would see the NMA and that the NMA's report would be forwarded on to another doctor for assessment. Hobbs did not attend the appointment with the second practitioner and based solely on the NMA's assessment, CapCoal attempted to find Hobbs a position which would be suitable, given that his activities, as a result of his injuries, was now restricted. Alternative duties were unable to be found and again, CapCoal terminated Hobb's employment.

Hobbs again applied and was reinstated by AIRC. The AIRC found that this dismissal of Hobbs was harsh, unjust and unreasonable as CapCoal did not comply with the arrangement that had been reached. The tribunal found that CapCoal had made their decision unilaterally based on one medical opinion contrary to the parties arrangements.

In order to return to work, Hobbs again was required to undergo the agreed medical assessments. The procedures this time were adhered to and again Hobbs was found to be restricted in the activities he performed. Again, no suitable duties were found for Hobbs and his employment was terminated. Again Hobbs applied for reinstatement but this time, it was found that the reinstatement was not harsh unjust or unreasonable. On appeal, the Full Bench of the AIRC found that having regard to the duty of care imposed on mine operators and the role of the NMA, the NMA relied on all relevant material and compliance of directions of the earlier agreement. The termination was genuine and thus, not harsh unjust or unreasonable.

This decision highlights several factors. Firstly that in the interests of natural justice and procedural fairness both parties need to clearly understand the nature of the process and the procedural steps that are to be followed along the way. Secondly and perhaps more fundamentally is the expectation that no decision will be made to terminate one's employment without having regard to all possible relevant information that may assist the NMA and subsequently the employer, coming to an ultimate conclusion as to the ongoing capacity of the worker to continue in their role. It is interesting to note, that following this decision, the relevant legislation was amended in order to enshrine within the law the right of a worker to seek the second opinion of a medical specialist or NMA, in such cases where an employer was considering terminating or redeploying an injured or impaired worker.

3.5 Random health testing

The **fourth and final category of case** that we deal with relates to random health testing.

The right of employers to institute random testing, can also be claimed to arise from an implied term of the employee's contract of employment. It has been argued that this implied term relates to the right of the employer to direct an employee to carry out all lawful and reasonable commands. Naturally, there is a limit as to the directions that an employer can give and certainly

in the case of low risk industries, one would question in the absence of any other material issues, whether such a right would in fact exist.

In *BHP Iron Ore -v- CFMEU*[15], the Western Australian Industrial Relations Commission in Court Session acknowledged the right of a company to introduce a policy of random drug and alcohol testing into the workplace, where there was otherwise no contractual right to allow employers to test. Although the Commission emphasised in its decision that it had been concerned to only review the industrial principles in the context of the mining industry.

BHP Iron Ore Pty Ltd v Construction, Mining, Energy and Other

At issue was the desire of the company to introduce a drug and alcohol program for all of its employees at each of its workplaces. The most controversial aspect of the proposed policy was that it required that an employee as a condition of employment submitted to random testing of a sample of the employee's urine. The Union's objection to the proposal was that the drug testing element of the program constituted an unreasonable intrusion into the privacy of the employees and that the urine testing for drugs is not a reliable indicator of actual impairment or intoxication.
In addition the Union argued that there was little or no evidence of prevalence of drug use by employees within the workplace or immediately before commencing work.

However the company argued that it was necessary to enable it to satisfy its obligations under the Mines Safety and Health Regulation. The company also acknowledged the privacy concerns raised by the Union and indicated that there were strict security measures designed to avoid any publication of test result and any other information given as part of the program.

Having regard to the expert evidence put forward by the company, the Court in Session considered that the testing process under the scheme was not unreasonable.

Logically, in the case of the employer, the primary obligation is to fulfil its statutory obligations in the workplace. In its decision the Commission noted that there was little or no direct evidence as to the extent, if at all, that the consumption of drugs was a problem at the workplace. Although having said that in the three years prior to the decision:-

- an employee was killed at work, when the haul truck she was driving overturned. She was found to have a significant level of cannabis in her blood at the time of death and cannabis and a smoking pipe were found in the cab of the vehicle at that time;
- employees were caught smoking cannabis in the workplace;
- cannabis was found hidden in company equipment at various worksites; and

There are a myriad of obvious legal issues that arise in the case of random testing procedures. With respect to drug and alcohol testing, the greatest concerns articulated at the time of this decision were the potential for breach of confidentiality and the fact that records generated by the employer were not privileged from production in civil or criminal proceedings.

Less obvious issues of concern are likely to be raised in the case of fatigue testing, although like all issues that flow from the employment relationship, if handled poorly can lead to significant unrest. This could easily be manifested where screening processes caused supervisory intervention in an arbitrary fashion, with resultant claims of discrimination being levelled at those involved. Given the complex set of work and non-work factors that impact on employee fatigue, developments in this area should be watched with interest.

4 Is Mining Unique?

4.1 Health assessments in mining

So is the framework of 'Fitness for work' testing so different in the case of mining?

Undoubtedly, mining is a unique industry. This is evident by the types of hazards that have caused specific health and safety regulations to be created. And there is good reason for this. In Queensland, there have been approximately 140 fatalities in the metalliferous mining industry[16] and approximately 320 fatalities in the coal mining industry over the past 140 years.[17]

Figure 2

Source: ABS 2000 Work Related Injuries Survey.

As Figure 2 illustrates, in the Year 2000, mining recorded the highest number of workplace accidents in Australia. It is perhaps for this reason that the mining industry conducts more testing of fitness for duty than any other industry[18]. And it is largely as a consequence of the uniqueness of the industry and its hazards, that a separate regulatory scheme has evolved. The distinction between general industry occupational health and safety regulation and mining safety regulation, is very much borne from a recognition that on occasions the industry is viewed as having catastrophic and unique hazards and greater risks than that of general industry.[19] For these reasons, the role of the assessment process in mining, is viewed as a critical one.

4.2 Critical aspects of the fitness screening process

One of the most critical aspects to the fitness screening process is ensuring that the medical examiner or health assessor well understands the context and actual job requirements that may be required of the individual. For example, in the case of a worker submitting to a medical examination in accordance with Section 87 of the Mining and Quarrying Safety and Health Regulation 2001, the adequacy of the background data supplied (such as functional demands of the job) provides the context in which the medical assessment is made. The validity of this information setting the context of the job, is viewed as critical and weaknesses in the quality of the information supplied, can be quite prejudicial to the accuracy of the assessment and the individual.

Legge has identified 5 key attributes of work related assessments.[20]

Table 1 - Key attributes of work related assessments

Safety	Is the test safe to administer
Reliability	Are the test results reproducible on any occasion between evaluators and participants
Validity	Does the test measure what it reports to measure and is it predictive of performance
Practicality	Is the test easy to administer with reasonable/minimal cost
Utility	Does the function al test relate to job performance and does it meet the needs of the involved parties

Let us look at some of these attributes in the context of some of the fitness for work methodologies presently employed within the industry.

4.3 Testing methodologies in mining

In the case of coal mining in Queensland, the majority of fitness for work testing is conducted by way of health assessments undertaken in accordance with Section 46 of the Coal Mining Safety and Health Regulation 2001 (Qld). The scope of the assessment is prescribed by way of an approved form that serves to standardise the assessment regime through a panel of nominated medical advisers. This process seeks to achieve consistency in approach and recognition of the need to involve industry specific medical specialists working in this area.

By way of computerised test instruments, this conference has previously heard of the experience of Callide B utilising the FIT 2000 system, that enables quick automatic testing of significant impairment at work.[21] Another approach that we have already briefly mentioned is that of the functional capacity evaluations. Functional Capacity Evaluations (FCE's) can be relied on to predict the nature and extent of 'match' between on the one hand, a particular individual's capacities and limitations and on the other hand, the capacities demanded by a job or other activity.[22] In the case of the FCE's, there appears to be much discussion continuing on issues of reliability and validity of the assessments undertaken [23]. It may be for this reason that newer methods of testing are beginning to be reported. One example of this is in the case of Cadia Valley in New South Wales, who have considered the feasibility of equipment simulators (eg haul trucks and loaders) in order to develop more appropriate performance indicators for assessing the impact of fatigue or stress.[24]

4.4 Contentious Issues

Against the above backdrop lies a potential battleground for litigation. So why does something which on its face seems so logical and worthwhile, become such a contentious issue? At the level of the individual, there are very real issues at law in terms of rights of the employee insofar as they pertain to discrimination, privacy, confidentiality, the inherent requirements of a position and the capacity of the employer to make reasonable adjustments where disability or impairment is not in itself a barrier to performance. For the employee, existing fitness for work testing procedures can be the stimulus for claims of intimidation and unfair treatment.

In addition, there is anecdotal evidence that issues do become industrial, whether legitimate or not. Some of the apparent hostility manifests itself on the basis of a difference in views as to what are the legal entitlements of the parties having regard to the employment relationship. For example, one circular sent out within a mining district stated that the relevant Union had been advised by a statutory appointee that companies had a common law right to send any mineworker to a nominated medical adviser. It went on further to indicate that this advice is totally inconsistent with the Union's interpretation of the intent of the relevant Mining Act and will be rigorously opposed by the Union. In that context, where consent to a process is not forthcoming, issues of medical assault and claims of acts against your will, also emerge.

The situation can be compounded further where disputation over which medical adviser is appropriate, also takes place. We see a worrying trend where the unions allege one doctor is pro-employer and the employers allege one doctor is pro-employee. This seems to go beyond the usual and understandable debate that different doctors genuinely can interpret the same results with different outcomes.

5 Issues of discrimination and unfair dismissal

5.1 General principles of anti-discrimination law

Anti-discrimination law impacts on all four categories of a case. At both the state and federal level, there is legislation prohibiting discrimination in an employment situation. For example the Disability Discrimination Act 1992 *(Cth)* prohibits discrimination on the basis of a disability which is defined at Section 4 of the Act to include :-

(a) total or partial loss of a person's bodily or mental functions; or...
(c) the presence in the body of organisms capable of causing disease or illness; or...
(g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour.

Section 15 of that Act provides that it is unlawful for an employer to discriminate in determining who should be offered employment, deny an employee access to promotion transfer and training,

dismiss an employee, or subject the employee to any other detriment because of discrimination on the ground of a person's disability.

At the State level, the Anti Discrimination Act 1991 (Qld) prohibits discrimination on the basis of physical impairment. 'Impairment' is defined in that Act in similar terms to the definition of 'disability' in the Disability Discrimination Act 1992 (Cth).

5.2 When discrimination is permitted

Discrimination is permitted in certain circumstances. Under the Federal Act, discrimination is permitted where:

(a) the disability prevents a person from carrying out the inherent requirements of the particular employment; or
(b) in order to carry out those requirements, facilities would need to be provided which would impose an unjustifiable hardship on the employer (section 15(4)).

In the case of the Queensland Act, discrimination is lawful where:

(a) the circumstances of the impairment are such that they would impose unjustifiable hardship on the employer (section 36); or
(b) the discriminating act is done to protect the health and safety of people at work (section 108); or
(c) if the discriminating act is done because of a genuine occupational requirement for a position (section 25).

Additionally, some anti-discrimination legislation, for example section 106 of the Anti-Discrimination Act 1991 (Qld) exempts discrimination in circumstances where it is necessary to comply with other relevant state or federal laws.

Earlier on in the context of pre-employment screening, the issue of discrimination was briefly canvassed. The objectives of the anti-discrimination and industrial relations laws appear largely the same. By far the majority of complaints in this area are likely to arise where a worker is deemed to be no longer physically capable of performing his or her duties. In cases of this type, termination is invariably a consequence of the incapacity of a worker to physically continue within the role or the workplace. The importance of determining objectively what are the occupational requirements of a position and whether or not there can be some modification of duties (for example) so as to accommodate the impaired worker within the workplace, therefore become critical, as tribunals are asked to assess whether a worker has been treated fairly as a consequence of fitness for duty testing.

5.3 Termination of employment

In the case of statutory protections given to workers under termination law, the general considerations for the parties are largely the same. There are several ways by which a contract of employment can come to an end. These include by:-

- mutual agreement;
- serious breach of an essential term;
- inability of one party to perform their duties within the contract; or
- by way of a supervening or frustrating event.

But against these basic common law rights, statutory provisions have been created and for the past decade now, the potential remedies that are available to employees under statute, have become quite important in the way to proceed with the outcomes of a fitness for work testing procedure.

(a) Remedies available in the federal jurisdiction

At the Federal level, section 170CE(1) of the Workplace Relations Act 1996 (Cth) sets out the grounds by which an employee whose employment has been terminated by an employer may apply for the relief of the Australian Industrial Relations Commission. (AIRC) These include:-

- on the ground that the termination was harsh, unjust or unreasonable [Section 170CE(1)(a)]
- temporary absence from work because of illness or injury within the meaning of the Regulation 30C [Section 170CK(2)(a)] and
- physical and mental disability [Section 170CK(2)(f)].

The case of *Ian Hobbs v Capricorn Coal Management*, has already been raised where the unilateral decision to terminate an employee on the grounds of incapacity, was seen as a violation of an approved process the result of which amounted to an action that was harsh, unjust or unreasonable. What is becoming abundantly clear is that new battlelines are being drawn and

battles fought in cases where there is a lack of consistency in opinion among medical practitioners. At issue are competing views as to the longer term prognosis of the worker and often allegations of premature decisions taken by employers to terminate workers in cases where ongoing rehabilitation or alternate duties should have or could have been provided.

The second potential ground available for the employee, is to make an application on the basis of the physical disability arising from the injury, in contravention of Section 170CK(2)(f) of the Act. In cases of this type, the application can be pursued through either the Federal Court or the Australian Industrial Relations Commission. Again reinstatement in these cases may be harder to secure than initially thought. One of the traditional tests that the AIRC must consider is the 'practicability' of the reinstatement having regard to all of the stakeholders.

The tension between the disability of the worker and the right of the employer to secure and maintain a safe workplace environment can be illustrated in the decision of Marshall J in *Patterson v Newcrest Mining Ltd* [25], where he stated:

> *I am most reluctant to order the reinstatement of a employee to her or his former position if so doing involved a real and substantial risk of the employee being seriously injured upon her or his return to the position occupied prior to the termination of employment.*

It is for this reason that workers pleading termination on the combined grounds of harsh, unjust and unreasonable as well as based on discrimination, must now elect whether they pursue their claim in the Australian Industrial Relations Commission or the Federal Court, on the basis that the difference in remedies available, appears to be in part in recognition of the complexities associated with disability claims.

(b) Remedies available at the state level

With some minor exceptions, the provisions of the *Industrial Relations Act* 1999 (Qld) are set out in fairly similar terms to that of the Federal legislation. However there are two relevant provisions within Part 5, Chapter 3 of the Act that deserve comment. Section 93 of the Act provides that it is unlawful to terminate an employee who becomes injured within the first 6 months of that injury and under Section 95(2) an injured employee who was terminated because of that injury, may apply to the employer within 12 months after the injury for reinstatement to his or her former position. For the later situation to occur, the employee must give the employer a doctor's certificate that certifies the employee's fitness to return to work and in the event that the employee is not immediately reinstated by the employer, the employee may apply to the Queensland Industrial Relations Commission for reinstatement. One wonders the implications of these provisions where competing views of medical practitioners prevail and where for example, an NMA under the Coal Mining laws has declared a person permanently unfit to work in mining..

6 Roles and Rights of parties in a fitness for work environment

6.1 Recent experiences within the coal industry

(a) Role of industry safety and health representatives

Given the various legal issues that impact on the parties, it is natural enough that the development of fitness for work policies at workplaces often creates significant industrial unrest. This was recently observed in relation to the revision of the fatigue management policy at Oaky Creek Mine. [26] At issue was the role of the industry safety and health representative and whether an automatic right existed for the representative to be become involved in the consultation processes imposed on a site senior executive. Section 10 of the *Coal Mining Safety and Health Regulation* 1991, sets outs the steps that must be taken in developing standard operating procedures for managing and controlling hazards at a mine. Section 42(6) of the Regulation sets out the consultation requirements imposed on a site senior executive when developing fitness provisions, such as a fatigue management policy. These requirements include consulting with a cross section of workers involved in carrying out a task under the proposed procedure and providing those workers with a copy of the draft standard operating procedure, or in this case the proposed draft policy.

The Oaky Creek Case
In this case, it was the submission of the employer, that Sections 10 and 42 of the Regulation had no bearing on the issue in dispute. The company argued that those sections only relate to the creation of new health and safety procedures and have no bearing on the requirements of the parties where they wish to revise existing procedures. This argument was rejected by the court. The court held "nothing in Reg 42 suggests that to "develop" a procedure, means only to "create" one out of nothing. Fryberg J makes clear that the capacity of a representative to participate in a review of the fatigue management policy is likely to reside in at least one of the paragraphs within Section 118(1) of the Act, where the functions of the representative are set out. However his Honour, concluded that the mere fact that participation would have been within the ambit of the functions of a representative, does not mean that the representative had an automatic right to participate in the process. Within the judgment his Honour illustrates this by giving an example of circumstances where a representative may not be invited to attend, or where the workers specifically seek to exclude the representatives from the process.

This issue is likely to be one where much more industrial negotiation shall take place.

(b) Role of negotiating agents in the coal industry

The second issue that remains largely unexplored is whether an industry representative (or a lawyer for that matter) can assume the role of agent for workers where such agency is sought to be established. His Honour declined to express a view in relation to this issue, although on the basis that there is no expressed function of agency set out within Section 118 of the Coal Mine Safety and Health Act 1999, it would seem fairly unlikely that such a role would be consistent with the statutory one for a representative that is already quite clearly defined. This issue is also most likely to surface again.

6.2 Rights of lawyers to monitor health assessments

Finally and on a lighter note, one wonders how much more sophisticated or legalistic, the concept of fitness for work will become. In the United States, for example, there exists the right for a defendant in a personal injuries proceeding to have a medical examination videotaped and to allow counsel to monitor the examination from an adjoining room. In *Freeman v Latherow & Ors*, it was the defendants who sought to preclude the plaintiff from undertaking this taping, presumably in an attempt to spoil the validity of the medical assessment.[27] Hopefully, this will not be illustrative of the future Australian way.

6.3 General rights of the worker

Finally, we briefly consider the rights of the worker. It is well established that persons do not by virtue of their status as employees lose their right to privacy and integrity of the person. An employer could not at common law assert any inherent right to subject an employee to a physical examination without consent. Indeed, an employer or a doctor who forces a medical examination on a person may be liable to assault or battery. Section 245 Criminal Code 1889 (Qld) defines assault in wide terms to include striking, touching, applying force or threatening to apply force without that person's consent. For example, the taking of blood against a person's will and in the absence of any statutory duty, will likely constitute assault under the Criminal Code.

However, while the employer cannot force an examination in that sense, an employees refusal to comply with a lawful and reasonable request can still be grounds for termination of the employment. That is, the laws will not protect an unreasonable refusal to have a medical examination.

One final issue that is important to consider is the way in which the employer undertakes personal information management. It is imperative that an employer has an appropriate understanding of the privacy issues involved from the initial occasion that employee information is collected through to processes for information disposal.[28] Employee medical records will need to be kept confidentially to ensure that the employer does not breach any fundamental principles. Employers should also be mindful of the 'need to know' principle that logically discourages medical information to be circulated freely within HR departments during injury management processes.

7 Conclusions

Undoubtedly, fitness for work is an important issue confronting both employers and past, present and future employees. This is especially so in the mining industry where the risks are higher, and the legislation tougher. Complex issues abound in all categories of case. Consequently, employers and employees should be aware of the rights, roles and responsibilities that each hold when approaching the subject.

Advances in technology, medical specialisation and the greater capacity of individuals to articulate their rights, will all be phenomena that assist in helping improve the policies and processes for ascertaining one's fitness for work. Like most workplace issues, addressed fairly and objectively, appropriate outcomes are achievable. What remains clear though is that "fitness for work" is a very complex issue. Given that medical examinations have been undertaken since ancient Egyptian times, there must be much that can be learnt from what has gone on to date. Clearly all stakeholders need to be put on notice that the processes are quite complex and that no easy answers lie in the administration and aftermath of the testing procedure.

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