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How to use pre-employment medical examinations and comply with Anti-Discrimination Legislation

D Scholz¹

INTRODUCTION

The law including legislation such as the Occupational Health & Safety Act 1983 imposes stringent obligations on employers to ensure the health and safety of their employees. The use of pre-employment medical examinations is one tool that employers can use to assess the suitability of a job applicant for a particular position and protect themselves from prosecution or claims for compensation or damages.

At the same time, however, legislation such as The Disability Discrimination Act 1992 (Commonwealth) ("DDA") and The Anti-Discrimination Act 1977 (New South Wales) ("ADA") affords protection to individuals against discrimination.

This legislation is intended to ensure, as far as is practicable, that people with disabilities are treated equally to other members of the community and are brought into the mainstream of our society as far as possible. It makes it unlawful for employers to discriminate against prospective employees because of their disability.

In the context of pre-employment medicals, the protection from discrimination is designed to ensure that job applicants with disabilities have as much opportunity to obtain employment as able bodied applicants.

Employers must ensure that they use pre-employment medical examinations in a way that is both relevant for their workplace and complies with the requirements of Anti-Discrimination legislation.

The definition of discrimination in the Federal and State Acts is virtually identical except for variations in the type and extent of various exceptions.

Complainants are free to choose between State and Federal jurisdiction in situations which are covered by both. While the Equal Opportunity Tribunal (State) cannot order damages in excess of \$40,000.00 there is no limit on the amount of damages the Human Rights and Equal Opportunity Commission (Federal) can award.

RANGE OF DISABILITIES COVERED BY THE ANTI-DISCRIMINATION LEGISLATION

Section 4 of the DDA and Section 4 of the ADA define disability as:

- Total or partial loss of a person's bodily or mental functions (eg being paraplegic, having epilepsy);
- Total or partial loss of a body part (eg. by amputation);
- The presence of organisms causing disease or illness in the body (eg. hepatitis, HIV positive);
- Malfunction, malformation, or disfigurement of a part of a person's body (eg. hearing loss, loss of sight);
- A disorder or malfunction resulting in a person learning differently from a person who does not have the disorder or malfunction (eg dyslexia), (DDA);
- A disorder, illness or disease that affects a person's thought process, perception of reality, emotions or judgments

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or that results in disturbed behaviour (eg. schizophrenia, psychiatric conditions).

The ADA also forbids discrimination against a job applicant because of the existence of disability in a friend, relative or associate of the applicant.

Must the disability be present? Under the legislation, disability includes past, future and presumed disability. Section 49A of the DDA defines "disability" as including disability which:

- previously existed but no longer exists;
- may exist in the future; or
- is imputed to a person.

The ADA forbids discrimination on the basis of a disability which a person has;

- is thought to have;
- is thought to have had or;
- will have in the future
- whether or not the person in fact has; had or will have the disability in the future.

Example:

Barry v State of Victoria (1994) EOC 92/598

The complainant was a 27 year old man who had been diagnosed with Hodgkins Disease. He applied for a job as a prison officer with the Department of Corrective Services. The medical officer who conducted the pre-employment medical examination stated that he was physically fit to perform the duties required of a prison officer but because he had recently suffered from cancer, he was not eligible for employment until he had been free from recurrence for 2 years.

The Equal Opportunity Board found that Mr Barry had been unlawfully discriminated against on the basis of his past illness. The decision not to employ him was not based on medical grounds as such but on the basis of the future risk to his prospective employer that Mr Barry's past medical condition would recur.

FORMS OF DISCRIMINATION - DIRECT AND INDIRECT

Under Section 49B of the ADA and Sections 5 & 6 of the DDA discrimination can be both direct and indirect.

Direct discrimination

This refers to discrimination on the grounds of disability taken to have occurred because of the aggrieved persons disability. For instance an employer refuses employment to an applicant simply because he has a disability, for example, hearing impairment or hypertension.

Indirect discrimination

This will occur if the discriminator requires the aggrieved person to comply with a requirement or condition:-
with which a substantially higher proportion of persons without the disability comply or are able to comply but
which is not reasonable having regard to the circumstances of the case and
with which the aggrieved person does not or is not able to comply.

Indirect discrimination will occur, for example, where a company has a blanket policy governing employment which people who fall into the group defined as having a disability cannot satisfy.

DISABILITY DISCRIMINATION IN THE WORKPLACE

Under Section 15 DDA and Section 49D to 49K of the ADA, it is unlawful for an employer to discriminate against a person on the grounds of that person's disability or disability of that person's associates in relation to;

- The arrangements made for the purpose of determining who should be offered employment.
- Determining who should be offered employment.
- Terms on which employment is offered.
- Denying the employee access or limiting the employee's access to opportunities for promotion, transfer or training or to any other benefits associated with employment.
- Terminating employment.
- Subjecting the employee to any other detriment.

EXCEPTIONS TO THE DISABILITY DISCRIMINATION PROVISIONS

There are three major exceptions to the disability discrimination provisions namely;

- inability to perform the inherent requirements of the job;
- unjustifiable hardship;
 1. if it is necessary for the employer to "discriminate" in order to comply with any other act e.g. to ensure compliance with the Occupational Health and Safety Act (1983) New South Wales. (Section 15(4) of the DDA and Sections 49D(4) [which replaces the former Section 49I(2)] and 54 of the ADA,).
- Inherent requirements of the job
 1. If an individual is not able to perform the inherent requirements of the job because of their disability, it is not a breach of the legislation to refuse to employ that person. Care should be taken to note that the inherent requirements of a job are those which are necessary for the goals of the job to be achieved. Such inherent requirements should not be confused with the manner in which a job, function or task is to be carried out.
 2. It is not appropriate for an employer to apply a blanket exclusion to employment for a particular type of disability. An exclusion must specifically relate to the requirements of the particular job for which the person applies.

What are Inherent Requirements?

Inherent requirements are the essential duties and responsibilities of a job. Any duties which are not essential should not be taken into account when considering the suitability for the job of an applicant with or without a disability.

Why should the emphasis be on inherent requirements and no other requirement?

The reason is that because non-essential duties can be removed from the job description; can be performed by someone else or can be altered to suit the person's disabilities.

Necessary adjustments, services and facilities

Employers must be able to demonstrate that they have provided any services or facilities which are needed by persons with a disability to carry out the essential duties of a job unless they can prove that to provide such services or facilities or adjustments would cause unjustifiable hardship.. For example they must:

- Make facilities which are already existing and used by employees readily accessible to individuals with disabilities and also useable by them;
- Purchase equipment or devices;
- Modify equipment or devices;
- Modify training materials or policies; and even
- Reorganise the job.

Example:

Bugden v State Rail Authority (1991) EOC 92/360

Mr Bugden was a carriage trimmer in the employ of State Rail Authority. He requested transfer to a running depot, a more lucrative area of employment than that in which he was employed, on three separate occasions. His application had been refused on the grounds that he was colour blind in accordance with State Rail policy that people working at running depots have perfect vision.

State Rail argued that it was not possible to allow Mr Bugden to be employed at a running depot because it was a necessary component of the job that he be able to give and take colour signals.

The Tribunal found that, in some cases trains were immobilised by flags of certain colours but that it was not the colour but the fact of fixing a flag which denoted that a train was immobilised. Therefore the Tribunal found that it was not an inherent requirement of the job to be able to read a green/blue signal.

Unjustifiable hardship

In determining what constitutes unjustifiable hardship, all the relevant circumstances of each case are to be taken into account including:

- The nature of the benefit or detriment likely to accrue or be suffered by any persons concerned.
- The effect of the disability of the person concerned.
- The financial circumstances and the estimated amount of expenditure required to be made by the employer.
- The only way to determine whether an action or adjustment needed to allow the employee to carry out the essential duties of the job would cause an employer unjustifiable hardship to provided is to consider:
- The type and range of adjustment, change or additional services or facilities which are required by the person with the disability.
- The cost which the employer would need to expend to make the adjustment.
- The financial position of the person claiming unjustifiable hardship.
- Whether the modifications/adjustments etc also could be used for the benefit of other employees or clients.

- Whether any additional resources are required.
- The likely benefits and disadvantages to the organisation.
- The likely financial cost to the organisation.

Compliance with other legislation

Care must be taken with this defence. The occupational health and safety argument can only be used if the employer can demonstrate:

- A real objective risk to the health and safety of employees.
- That it is not open to the employer to take any steps which can be reasonably taken to eliminate such risks.

Most employers who have argued these before the Equal Opportunity Tribunal have failed.

OHS Requirements must be specific

Again, any occupational health and safety requirements in the workplace must be stipulated on an individual basis and not on the basis of "blanket" exclusions. Employers must be able to demonstrate objectively and by means of specific evidence, the capacity of the individual, at the time of testing, to carry out the essential requirements of a position safely.

For example, when an applicant suffers from "epilepsy" the applicant must not be ruled out on this basis as being one of class of persons who has epilepsy and therefore not fit to operate machinery. The employer must look at the individual specific medical history, past experience, work history and the specific job requirements. Relevant factors will include:

- Type of job.
- Degree of control of seizure.
- Type of seizure.
- Whether the applicant has any warnings that seizures will come ("aura"),
- Medication taken.
- Reliability in taking medication.
- Side effects of medication.

The view of the relevant Tribunals is that some epileptics may not pose a threat to workplace safety if they experience sufficient warning signs of an attack or have their condition sufficiently under control.

Example:

Hurley v The Electricity Commission of New South Wales (1994) EOC 92/624

The complainant, Mr Hurley, suffered from mild to moderate hypertension. Following the respondent's refusal to employ him in the position of cleaner/labourer, Mr Hurley wrote to the Anti-Discrimination Board. A report from the respondent's medical officer referred to Mr Hurley's hypertension stating that it was not controlled at one of the examinations and that Mr Hurley was therefore considered to be unfit for a job where moderate to severe physical effort could be detrimental to his health.

The Tribunal found that Mr Hurley's hypertension did not provide the employer with sufficient reason to assume that he

would be unable to carry out the full duties of the position without a serious risk to his health. It rejected the submission put by the respondent that because Mr Hurley's hypertension was uncontrolled he would have been unable to carry out the full duties required without unreasonable risk to his health.

The Tribunal was not satisfied that the respondent had been able to identify any grounds on which it formed this view and even if the respondent had established such grounds, it would not have been reasonable to rely on them without taking into account the complainant's individual circumstances, especially his medical, personal and work history.

It was also noted by the Tribunal that no routine checks of hypertension were conducted in persons currently employed by the respondent. Given this, the Tribunal concluded that "the respondent may have overstated the degree of risk posed by hypertensive cleaners/labourers".

Bugden v State Rail Authority

In this case State Rail also argued that their actions were justified in order to comply with the Section 15(1) of the Occupational Health and Safety Act which states: "Every employer shall ensure the health, safety and welfare of all his employees." This argument failed. The Tribunal found that although the complainant did have a colour vision deficiency which prevented him from complying with State Rail's policy, the policy was not reasonable in that it was not necessary for trimmers to be able to give and take colour signals in order to work safely at a running depot. Various signals were used to denote when it was safe to cross and in no instance was it necessary to be able to take a colour signal in order to cross safely.

PRACTICAL IMPLICATIONS FOR EMPLOYERS

What do these Restrictions mean to Employers?

The thrust of the Legislation is that it is the responsibility of an employer to select the best person for the job and in so doing not to exclude an applicant just because they have a disability.

Before an employer uses the results of a pre-employment medical examination to exclude a prospective employee from employment it must have evaluated:

- what are the essential requirements of the particular job
- whether any of those requirements are unable to be performed safely by someone with a particular disability and if so;
- whether anything can be reasonably done to modify the tasks or the manner in which they are conducted to suit the applicant's disability.

The examination must be used only to elicit information which is relevant to the person's capacity to perform the essential functions of the job and the employer's compliance with legislation such as the Occupational Health and Safety Act.

When should pre-employment medical tests be used?

If the job requires some particular physical or psychological capacity such tests should be an intrinsic part of the selection process. However, they are only allowable if the attributes tested are attributes or characteristics that are reasonable in all the circumstances.

Therefore, employers must take extreme care to ensure that pre-employment tests are linked directly to the particular duties of the job and do not relate to other factors. A company policy which prevents hiring an applicant who has a history of back problems regardless of the duties of a position will constitute unlawful discrimination.

Example:

McQuillen v The University of Melbourne (1994) EOC 92/574

Mr McQuillen applied for a position of grounds person with the University of Melbourne. He attended two interviews and was offered the position subject to a satisfactory medical examination. It was not explained prior to this that the job necessitated any particular level of physical capacity.

Mr McQuillen was found to have a longstanding back problem and he was refused employment on this basis.

The Equal Opportunity board found that the job description was misleading but even though the employer had been not been sufficiently clear in expressing the need for the applicant to be able to perform physical labour it accepted the employer's evidence that this was in fact a requirement of the position. It accepted that the complainant's inability to perform heavy manual labour meant that he could not reasonably perform the job or was at risk of injuring himself or exacerbating his existing injury. Hence the employer's actions were not unlawful.

Holdaway v Qantas (1992) EOC 92/295; 92/430

The complainant was a flight attendant whose employment was terminated after he was diagnosed as an insulin dependent diabetic. The claim by Qantas that the complainant was unable to carry out the work required of him because of this condition was rejected on the basis that Qantas had not made any inquiry as to whether the complainant was able to perform the work.

Qantas did not call evidence from the examining doctors and it was therefore not clear whether they held the view that the use of drugs to control diabetes made the complainant incapable of carrying out the duties of a flight attendant or whether they had merely adopted the inflexible requirements of Qantas' policy and applied it to the complainant.

What an employer must do to develop a non-discriminatory medical test

- Avoid or remove any blanket employment policy relating to disabilities unless they can be justified as reasonable or arise from specific legislative requirements.
- Analyse what tasks the job entails carefully and thoroughly and classify these into:
 1. Essential requirements; and
 2. Non-essential requirements.
- Identify accurately the necessary skills and physical attributes for the job in so far as they relate to the essential versus non-essential duties - make sure there is a direct link.
- Identify the type and level of physical attributes required to perform the essential duties of the job versus the non-essential duties of the job.
- Carefully investigate whether there are any other ways the job can be designed or performed so that people who do not have the physical attributes required for the essential duties of the job, can perform these duties.
- Identify the types of services or facilities that could be used to assist people with disabilities to carry out the essential requirements of the job and ensure that these are provided unless they cause the employer unjustifiable hardship.
- Identify the medical tests which are relevant and appropriate for assessing the required physical attributes.
- Constantly review and reassess the job requirements so as to take account of any changes in the way the job is to be carried out since such changes may affect the type of skill and physical attributes required for the job.

It is prudent to have in place procedures for ongoing medical testing of employees in order that it may be established that:

- They continue to meet the requirements of the position and

- They are not at risk of injury.

Example:

Cinch v Commissioner of Police (1987) EOC 92/202 & (1989) EOC 92/262

A police force instruction required potential applicants to have vision in both eyes. Consequently, a one eyed applicant was told he was not suitable for the position.

The Police Commissioner relied on the defence that the complainant could not perform the duties required. The Tribunal found that this defence was based on a generalised assumption about losses of vision and was therefore not reasonable. It held that the respondent had not considered the application on its merits but on the basis of general assumptions as to Mr Clinch's ability to do the job. The Tribunal did however, note that it could not substitute its opinion as to the employers work requirements for that of the employer and the employer was asked to review the application.

The complainant completed a fresh application and was taken through each of the steps involved in considering his application, even though they informed the Tribunal that under normal circumstances the application would have been rejected in the early stages. Once again, Mr Clinch was unsuccessful in his application and once again, he complained alleging that he had been discriminated against on the basis of his impairment in two respects, that he only had sight in one eye and also that he suffered from a colour vision deficiency.

The members of the police selection panel stated in their evidence that the reason for their failure to appoint Mr Clinch related to such matters as his educational qualifications, his traffic convictions and his lack of commitment to the position. i.e. on aspects in addition to his visual impairment as well as the high standard of many of the other applicants.

The respondent also led evidence as to the relevance of its requirements for vision in both eyes and no colour deficiency. The evidence included evidence of that distinguishing colour could be critical to determining the guilt or innocence of an accused person; evidence of the effect of loss of one eye on ability to judge distance and that colour vision could be significant to police officers both in carrying out their active duties and in subsequently giving evidence in court.

This time, the Tribunal dismissed the employee's application holding that proper consideration had been given by the employer to the question of whether the complainant could perform the required tasks.

MEDICAL RECORDS

The Human Rights and Equal Opportunity Act makes it unlawful to discriminate on the grounds of medical records (Section 31(b)).

In practical terms this means that if a worker is currently healthy but has a medical history which suggests that he has had to take time off work for a particular medical condition it is unlawful to refuse him a position because of his medical history unless the medical condition is directly relevant to the job.

For example, epilepsy may preclude an applicant from becoming an air pilot but not preclude him/her from performing the position of a clerk.

HIV/AIDS TESTING

HIV and Aids are listed as notifiable diseases under schedules of the New South Wales Diseases Public Health Act 1991. This requires that, where there are found to be present by a medical practitioner, the medical practitioner must notify the Director - General of Health.

However, people who fall into the AIDS/HIV category must have their identity protected and applicants are not under any duty to disclose the HIV status to prospective employers. Nor are there grounds for routine testing where the HIV status of the applicant is not directly relevant to the job. Direct relevance only occurs in a limited number of instances such as where the inherent job requirements involve procedures which require skin penetration such as acupuncture, podiatry or ear piercing.

If employers do not opt for routine testing without the required grounds, they are liable to a claim under Anti-Discrimination legislation as well as actions claiming assault and battery if testing is done without the consent of the job applicant.

CONCLUSION

In the context of positions which could expose employees to injury, a pre-employment medical assessment plays a crucial part in the employer discharging its obligations under legislation and at common law to provide a safe workplace.

Employers can make a job offer conditional on the applicant passing a pre-employment medical examination as long as care is taken that any conditions which are taken to be "disqualifying conditions" relate directly to the essential requirements of the job and cannot be overcome by reasonable modifications.

The assessment must be subjectively based on the particular job and the particular applicant. Any risk factors relating to the employment of a disabled person must be:

- Real;
- Specific; and
- Current.

Incapable of reduction through reasonable adjustments to the workplace or the way in which the job is performed. Employers can use the occupational health and safety defence if they can demonstrate that there is a real risk attached to the applicant's condition and not simply a chance which is merely remote.