

JURISDICTION : EQUAL OPPORTUNITY TRIBUNAL OF WESTERN AUSTRALIA

LOCATION : PERTH

CORAM : MRS N JOHNSON QC, PRESIDENT
DR C GILLGREN and MS L MCGRATH, MEMBERS

HEARD : 8 NOVEMBER 2001

DELIVERED : 17 APRIL 2002

FILE NO/S : ET/2001-00010

BETWEEN : ARUN GOYAL
Complainant

and

: AIRFLITE PTY LTD
Respondent

Catchwords:

Equal Opportunity – discrimination in employment on the ground of impairment.

Legislation:

Equal Opportunity Act 1984, s3, s4, s66B(1)(b), s66A(1), s66Q, s123

Result:

Complaint proved

Representation:

Counsel:

Applicant : In person
Respondent : Mr G Bull

Solicitors:

Applicant : In person
Respondent : Chamber of Commerce and Industry of WA

Case(s) referred to in determination:

Alone v State Housing Commission (1992) EOC 92-392
Australian Iron and Steel Pty Ltd v Banovic and Anor (1989) EOC 92 271
Jamal v Secretary Department of Health and Anor (1988) EOC 92-234
Madaferri v City of Northcote (1993) EOC 92-512
Waters and Ors v Public Transport Corporation (1991) EOC 92-390

Cases(s) also cited:

Eyden v Commonwealth of Australia (1999) EOC 93-000
Hurley v Electricity Commission of NSW (1994) EOC 92-624
Gehrig v McArthur River Mining Pty Ltd (1997) EOC 92-872
Boldra v Metropolitan (Perth) Passenger Transport Trust (1992) EOC 92-445

JUDGMENT OF THE TRIBUNAL:

1. The Complainant, Arun Goyal, claims that the Respondent, Airflite Pty Ltd, unlawfully discriminated against him on the ground of impairment, contrary to section 66B(1)(b) of the *Equal Opportunity Act 1984* ("the Act"). The complaint arises from the Complainant's application for employment as an aircraft handler with the Respondent.
2. It is not in dispute between the parties that on 3 September 1999 the Complainant was offered a position with the Respondent as an aircraft handler commencing on 6 September 1999. The offer was subject, relevantly, to a condition that the Complainant pass a standard medical examination conducted by a registered medical organization chosen by the Respondent.
3. A medical examination was conducted on 4 September 2001 by Dr Crawford from Joondalup Industrial Health. Prior to the examination the Complainant was asked to complete a medical questionnaire. Question 1 of Section 2 of the questionnaire requires the patient to indicate whether he suffers or has ever suffered from any of the problems subsequently listed. The Complainant ticked "yes" in relation to the following items:

"1.19 Backpain, treatment on the spine?

1.21 Any bone, joint, muscle or tendon trouble?

1.24 Eye trouble, blurred vision?"

Question 3 required the patient to give details of any "yes" answer. The complainant wrote "*occasional back pain*". Question 7 asked the patient to list types of regular/sport/exercise undertaken. The Complainant listed walking and gardening.

4. In his report of the examination Dr Crawford has noted under the heading "*Thoracolumbar Spine*" that the findings were not normal and that neither the flexion nor extension of the spine were pain free. The following handwritten note appears UNDER THE FURTHER HEADING "*If Abnormal Specify*":
Unable to go below 20 cm from toe. Stiff lumbar spine – loss of lordosis". Straight leg raising is recorded in the report as 70 degrees bilaterally.
5. Under the heading "Muscle Wasting" Dr Crawford has indicated a positive finding in relation to the Complainant's legs. Under the heading "*History of Back Trouble or Back Problems*" Dr Crawford has simply written "Yes". The report records no history of the nature or extent of the problem.
6. Under the heading "*Further Comment*" Dr Crawford wrote the following:

"POOR MUSCLE TONE – STIFF THORACO-LUMBAR SPINE - ?VENTRAL HERNIA – POSSIBLE ASCITES

INCREASED RISK.”

There is a further notation which is difficult to decipher which may read “*?CHRONIC PROBLEM*”. In relation to “*Posture*”, Dr Crawford has written “*poor abdominal tone*”. In dealing with the gastro-intestinal tract Dr Crawford has noted “*distended abdomen/ventral hernia? tender liver edge*”. No other factors are noted as being abnormal including blood pressure or lung function.

7. The relevant categories in the fitness certification are as follows:

“(b) having regard to my understanding of the duties that it may be necessary for the person to perform in the position for which the person is applying, in my professional opinion, the person is:

- *IS FIT FOR THE JOB AT NO INCREASED RISK; or*
- *IS AT INCREASED RISK FOR THE POSITION: and*

(c) I also believe he/she:

- *WOULD*
- *WOULD NOT be able to perform all of the duties of the position.”*

In both categories Dr Crawford ticked the second option.

8. Following the examination, and on the same day, Dr Crawford contacted Mr Constantinides, the Respondent’s Director of Engineering, by phone to advise him of the outcome. When the Complainant attended for work on 6 September 1999 he was told by the Respondent’s employees, Mr MacDonald and Mr Dobson that he would not be employed. The decision not to employ the Complainant was based on the opinion provided by Dr Crawford.

9. Dr Crawford subsequently prepared a report to the Complainant’s general practitioner, Dr Sam, dated 8 September 1999. In that report he advised that the Complainant had failed his medical for the following reasons:

- “1. *Stiff thoracolumbar spine, he is unable to bend below 20cm from his toes with loss of lumbar lordosis. Straight leg raising was limited to 70 [degrees].*
2. *A ventral hernia (or divarication of rectii).*
3. *Possible abdominal ascites, he had a slightly distended abdomen and was concerned that he may have shifting dullness on examination.*
4. *Other factors that also effected this was reduced visual acuity at 6/12 on the right eye and 6/9/ on the left.”*

Dr Crawford further commented that he felt that the Complainant was physically unable to perform his duties effectively.

Evidence for the Complainant

10. The Complainant is a qualified mechanical fitter by trade but is precluded from working in that field due to an injury to his right hand. At the time of his application for employment with the Respondent, the Complainant was working for the Department of Immigration and Centrelink as an on-call interpreter. At the time of the hearing the Complainant was also working on a casual basis as a taxi driver and as a gardener for the Australian Asian Association of Western Australia which provides gardening services to the elderly. According to the Complainant he is able to carry out his gardening work without difficulty and without any back pain.
11. The Complainant stated that at the time of the employment interview he informed the Respondent of the injury to his right hand. During the interview he was sent to the hangar with the workshop manager and shown all the duties involved in the position and asked to carry out some of those duties, including climbing on to one of the wings of the aircraft and leaning into the cockpit, and also fixing the chocks on the wheel and checking the oil. He was told that the workshop manager considered him capable of performing the duties required of the position. He was asked to attend Joondalup Industrial Health on the following day for a medical examination and asked to report for work on the 6 September 1999 at 8.30 am.
12. The Complainant was questioned in regard to the positive responses to a number of the physical problems listed in the questionnaire. He indicated that the positive response to item 1.19 was because he occasionally suffered from minor backache. He denied that he had ever taken medication for his backache or had any treatment to his spine. There was no indication that he considered himself to suffer from any spinal pathology. To the contrary, he stated: *"Everyone does have back ache. It's normal, you know....but that doesn't mean that I cannot work."* In relation to item 1.24 it seems that the Complainant's positive response was due to the fact that he wore glasses. The positive response to item 1.24 related to the right hand injury.
13. The Complainant gave a brief account of the examination by Dr Crawford. He indicated that he was asked to bend but neither felt pain nor showed any signs of pain. This evidence conflicts with the examination report of Dr Crawford in which he records that neither the flexion nor extension of the spine were pain free. The Complainant stated that Dr Crawford commented on a bulge in the Complainant's abdominal area. With respect to the history taken from the Complainant, the Complainant stated that Dr Crawford asked him about the nature of the proposed employment, his current employment including what languages he spoke and his smoking and drinking habits. The Complainant was

not cross-examined and gave no evidence in relation to questions from Dr Crawford concerning his back. According to the Complainant, the examination lasted approximately 20-25 minutes at the conclusion of which he was given no indication that he was not fit for the position of aircraft handler.

14. When he attended for work on 6 September 1999 the Complainant was directed to report to the Manager, Mr MacDonald and the Occupational Health and Safety Manager, Mr Dobson. He was advised that he had failed the medical and could not be employed. The only other comments made were that he could not be employed because of the insurance problem if anything happened to him and that Dr Crawford would be sending a report to the Complainant's general practitioner.
15. According to the Complainant, he was advised that the result of the medical examination had been faxed to the Respondent. Whilst it is not completely clear, as no document from Dr Crawford were tendered other than the Medical Questionnaire and Examination Report and his reports of 8 September 1999 and 31 January 2000, it seems that if any document were faxed to the Respondent prior to 6 September 1999 it must have been the Medical Questionnaire and Examination Report of 4 September 1999.
16. The Complainant stated that when he was told he could not be employed he had tears in his eyes and that he told the Respondent's representatives that he really needed the job because he had a newborn child. He also disputed that he was suffering from any medical problem.
17. It was not until approximately 4 days later and after the Complainant personally attended at Dr Crawford's surgery was he given any indication of the nature of the medical problems which led to the adverse report. The Complainant recalls being told by Dr Crawford that he had a back problem which restricted his bending. Of the problems identified in Dr Crawford's report of 8 September 1999, it is only the back problem of which the Complainant recalls being advised although he did state that there was mention of some medical terms which he was unable to understand. The Complainant was also advised to attend his general practitioner as soon as possible.
18. It is apparent from the evidence of the Complainant that the delay in advising the Complainant of the nature of the medical conditions said to preclude him from employment substantially contributed to his distress. In particular, the somewhat cryptic nature of the communication from Dr Crawford caused him understandable concern that he was suffering from a serious illness. In the Tribunal's view, the delay and the failure to give a frank and comprehensible explanation was unnecessary. While responsibility in that regard lies predominantly with Dr Crawford, the Tribunal considers that, if the Respondent was in fact in possession of a facsimile copy of Dr Crawford's report and a verbal explanation from him and relied on that information in making its

decision, the Respondent's representatives should have provided the Complainant with a more adequate explanation for the decision reached. Indeed, if poor spinal flexibility was a determinative factor, it is difficult to see any reasonable explanation for not so advising the Complainant.

19. The Complainant gave evidence that following his conversation with Dr Crawford he attended on his general practitioner, was referred to a specialist and underwent tests to determine his state of health and his fitness to work as an aircraft handler. That process took some time and it was not until 26 October 1999 that the Complainant, armed with specialist opinion to the effect that he was fit to work as an aircraft handler and was not suffering from any illness or incapacity, spoke with Mr Dobson, advised him of the medical opinion obtained and requested consideration of that material and a reconsideration of the decision not to employ him. According to the Complainant, Mr Dobson indicated that he was unable to do anything but the Respondent had his file and would contact him "*if anything comes up*". To date no offer of employment has been forthcoming.
20. The Complainant presented to the Tribunal as a man with a good work ethic, who clearly wanted to work as an aircraft handler and was bitterly disappointed at having the possibility of full time work taken from him in such an unexpected and inadequately explained manner. The Complainant's credibility was tested under cross-examination. In the Tribunal's view, the only significant issue arose from the fact that the Complainant had provided to two of the medical specialists he subsequently consulted inaccurate information as to the purpose of the consultation. The Complainant's explanation was that he did so on advice and with a view to removing any concern which the specialist might have about providing an opinion in conflict with that of another practitioner. The Tribunal does not support such an approach to obtaining specialist opinion. Neither does it consider that either of the specialists involved would have had any difficulty in providing an objective opinion if made aware of Dr Crawford's opinion. However, in the circumstances the Tribunal considers the Complainant's conduct to be understandable and without consequence to his credibility in this matter. The Complainant gave his evidence in an honest and forthright fashion and without prevarication. The Tribunal accepts the accuracy of his account as to the circumstances surrounding this incident.
21. A medical specialist, Dr John Hayes, was called to give evidence in support of the Complainant's assertion that he suffers from no medical condition which would preclude him from working as an aircraft handler. Dr Hayes has over 20 years practice as a specialist rheumatologist which is a sub-branch of the practice of a specialist physician. Dr Hayes stated in evidence that the Complainant presented in October 1999 requesting a "*check-up*" as he wanted a medical clearance for work as an aircraft handler. Dr Hayes was not advised that the Complainant had previously failed a medical examination to work as

an aircraft handler. The Complainant was noted to have a previous injury to his right hand but on examination he was found to have satisfactory grip strength. He was also noted to have a rather protuberant abdomen resulting from a divarication of the recti muscles in the abdomen, later confirmed by ultrasound. Dr Hayes described the divarication of the recti as a symptomatic abnormality. He stated that, whilst there was a slight weakness of the recti muscles, the other abdominal muscles functioned normally and the divarication certainly wouldn't affect the Complainant's capacity to lift things and perform light manual work. In his evidence before the Tribunal Dr Hayes stated that the remainder of the Complainant's general physical examination, including his lumbo-sacral spine, appeared normal.

22. In his report of 22 October 1999, prepared after receipt of a number of test results, Dr Hayes describes the divarication of the recti as "*mild*" and "*by no means severe*". He also states that "*no definite intra-abdominal pathology was demonstrated and no ascites was shown on the ultrasound.*" Dr Hayes expressed no concerns about the Complainant's stated intention to work as an aircraft handler but considered that he should avoid working as a mechanical fitter.
23. Notwithstanding his oral evidence to the effect that the Complainant's lumbo-sacral spine appeared normal at the initial consultation, Dr Hayes' report of 22 October 1999 makes no reference to this fact. Dr Hayes explained that the Complainant denied that he had any spinal symptoms and in those circumstances he would not normally in the course of a standard consultation test the spine. Dr Hayes added that, notwithstanding the reference in the letter of referral to consideration of stiffness of the lumbar spine, Dr Hayes presumed that the Complainant was attending primarily as a result of his hand injury and concentrated more on his hand and his abdomen although he did conduct a general physical examination.
24. Dr Hayes gave evidence that the Complainant presented again in August 2000, again requesting an opinion as to his fitness for work. According to Dr Hayes, the Complainant's clinical presentation hadn't changed. At this second consultation Dr Hayes was advised that the Complainant had failed his pre-employment medical and Dr Hayes concentrated on his spine and the divarication of the recti. He found the Complainant's thoraco-lumbar spine to be normal with a normal range of movement.
25. In his report of 11 August 2000 to the Complainant's general practitioner, Dr Hayes noted that the Complainant "*had no symptoms of back pain and, clinically, he has excellent mobility in the thoraco-lumbar spine with no pain at all*". He expressed the opinion that the Complainant is capable of working as an aircraft handler on a full time basis, a view also expressed in Dr Hayes' brief handwritten reports of 8 August 2000 and 28 August 2000. At the time those opinions were expressed, Dr Hayes had not been provided with any

documentation regarding the duties of an aircraft handler. However, the Complainant verbally outlined to him the duties involved based on the knowledge gained from the employment interview.

26. In his report on a subsequent consultation on the 22nd of October 2001 Dr Hayes again describes the Complainant's thoraco-lumbar spine as normal. He notes that the Complainant was able to forward flex to his feet, that his range of lumbar flexion was well within normal limits and that he claimed to rarely have any back symptoms. He again concluded that the Complainant was fit to work as an aircraft handler.
27. Under cross-examination Dr Hayes disagreed with Dr Crawford's diagnosis that the Complainant suffered from any disability of the thoraco-lumbar spine. Whilst he conceded that it is possible for a person to improve their flexibility over time and that he was not in a position to disagree with Dr Crawford's findings that on 4 September 1999 the Complainant could not touch his toes and did not have full flexibility in his back, Dr Hayes considered two aspects of Dr Crawford's findings to be of no clinical significance. Dr Hayes stated that 70 degrees was a normal straight leg raise and that a 20 centimetre forward flexion was approximately to mid-shin level which was within normal limits. In the absence of any significant back pain those findings would not be consistent with a back disability.
28. Dr Hayes was shown a series of photographs tendered on behalf of the Respondent setting out the various activities required of an aircraft handler. Dr Hayes considered the Complainant to be fully capable of performing all those activities.
29. Dr Hayes was cross-examined with a view to establishing that Dr Crawford had greater expertise in assessing the Complainant's ability to perform the duties of an aircraft handler. Dr Hayes disputed that he primarily treated mainly elderly people with arthritic conditions and stated that rheumatologists dealt with patients of all ages with spinal, neck problems and soft tissue injuries. He agreed that he did not carry out workplace medical examinations and that he was not an occupational physician. However, it should be noted that neither does Dr Crawford hold such a qualification. The Tribunal considers Dr Hayes to be well qualified to express expert medical opinion on the matters relevant to the Complainant's claim. While Dr Crawford may have greater experience in carrying out workplace medical examinations, and a more detailed knowledge of the duties of an aircraft handler, it does not follow that he has greater expertise in diagnosing spinal disability and the consequent impact on work capacity. In circumstances where there is conflict between the two practitioners on such issues, the Tribunal prefers the evidence of Dr Hayes.
30. The Tribunal also received into evidence on behalf of the Complainant, a report from Dr Tandon, a specialist thoracic physician expressing the opinion

that the Complainant suffered from no impairment of the lungs and did not require any treatment. The issue of lung function arises from a report provided by Dr Crawford following commencement of proceedings in the Equal Opportunity Commission which commented that the Complainant had a lung age equivalent to a 60 year old.

Evidence for the Respondent

31. Mr MacDonald, an aeronautical engineer employed by the Respondent as Manager, gave evidence as to the duties of an aircraft handler. According to Mr MacDonald, the position doesn't require any pre-requisite skills; all training is provided "*on the job*". A document containing a series of eleven photographs depicting the typical tasks performed by an aircraft handler was identified by Mr MacDonald and tendered into evidence. Mr MacDonald described and commented on the photographs in the following terms:

- Photograph 1 shows the carports covering the aircraft. The length of the carports is the line that the aircraft handler would be expected to walk in attending to aircraft. The photograph also depicts a tow motor that the aircraft handler would be expected to drive.
- Photograph 2 shows an aircraft handler in a position where the pilot is already strapped into the aircraft and the handler is waiting for the pilot to give the signal to start. According to Mr MacDonald, the handler would have to stand in position for a period of up to 20 minutes before performing his next task.
- Photograph 3 shows the typical 70 centimetre step up onto a wing which would be expected of a handler. The wing has a non-slip surface and the aircraft has a handhold point on the side.
- Photograph 4 shows the external power cable which the handler would be required to insert and remove. Mr MacDonald described this as a heavy-duty power cable.
- Photograph 5 shows a handler hitching the external power cart. Mr MacDonald stated that the towing arm of the power cart had "*a fair bit of weight*".
- Photograph 6 shows the handler straddling the fuselage. The handlers are expected to get into the cockpit in order to ride the brakes when the aircraft is under tow.
- Photograph 7 shows the handler reaching inside the cockpit to configure the cockpit; the ejection seats, the webbing, and strapping. According to Mr MacDonald, that task cannot be performed whilst sitting in the seat.

- Photograph 8 shows the handler removing the wheel chocks; both a lightweight chock and a heavier, 14 kilogram, chock. Mr MacDonald stated that at times it is necessary for the handler to *“crawl around a bit more to get underneath”*.
 - Photograph 9 shows the handler refueling through the aircraft wing with a heavy duty hose. The hose is a trigger type and the handler is required to hold it open with his fingers.
 - Photograph 10 shows the handler cleaning the canopy.
 - Photograph 11 shows the handler carrying out an oil replenishment. A step is available for the use of the aircraft handler where necessary.
 - Photograph 12 shows the handler couriering maintenance documentation between the lines and where the documentation is stored.
32. Mr MacDonald described the Respondent’s recruitment process for aircraft handlers. Applicants are selected for interview from resumes received following advertising of the position or from those already in the Respondent’s possession. According to Mr MacDonald, a first interview is conducted with a view to determining whether the applicant’s motivation and personality is *“conducive to the job”*. Mr MacDonald emphasized that the first interview is *“in no way an attempt to, sort of, conduct a real assessment of their functionality in doing the work”*; that task is left to Joondalup Industrial Health. If an applicant passes the medical and the security clearance a second interview may be conducted or an offer of employment made.
33. In the case of the Complainant, he was assessed as an applicant based on a resume that he had previously provided following an inquiry as to the availability of work. At the interview, the Complainant’s background and qualifications were discussed and the duties of a flight line handler and the typical tasks required were explained to him. The Complainant advised of the disability with his hand maintaining that it didn’t restrict him in tasks. As a result, the Complainant was taken through a number of tasks because the interviewers were concerned about the effect of the hand injury on the Complainant’s dexterity. Mr MacDonald stated that one such task was whether he could tighten the manual override release pin, the activity depicted in photograph 7. According to Mr MacDonald, the Complainant *“struggled with it but he got the pin in”*. Mr MacDonald emphasized that in asking the Complainant to carry out the task the Respondent was focusing on the dexterity of his fingers rather than whether he could bend over. However, it remains a fact that the Complainant was observed to be capable of bending over sufficiently to perform that task. Further, it can be inferred from the fact that the Complainant struggled with the placement of the pin that he remained in the flexed position longer than a person who did not suffer from restricted dexterity of the hand. Mr

MacDonald was asked by the Tribunal: *"So there was nothing about the performance of that activity the precluded you as an employer from deciding to take him on? ---Not that - - not that one"*.

34. According to Mr MacDonald, following the medical examination, Dr Crawford rang Mr Constantinides who instructed Mr MacDonald and Mr Dobson to advise the Complainant of the decision not to employ him. Mr MacDonald confirmed that the Complainant was not advised of the exact medical reasons for the decision to retract the offer of employment. He further confirmed that the Complainant was distraught by the retraction of the offer of employment and added that the Complainant even offered to work for nothing.
35. Whilst it is apparent that Mr MacDonald was well aware that the decision was based on an adverse result from the medical examination, it was not entirely clear from Mr MacDonald's evidence what information, if any, he was given at that time as to the nature of problem. At some point, however, Mr MacDonald was made aware that the problem was a condition of the Complainant's spine and abdomen and some other factors which were not detailed to Mr MacDonald.
36. What it was about the existence of these problems which led to the decision not to employ the Complainant was similarly unclear. At one point Mr MacDonald said that although he didn't know the precise nature of the condition he did know that as a result of the condition the Complainant *"wasn't suitable to perform the functions of an aircraft handler"*. At another point in his evidence Mr MacDonald said that Complainant wasn't *"suitable for the aircraft handler position"*. At yet another point he stated that *"...he couldn't do the functionality and it would be irresponsible of Airflite to put him in that position and put him at risk of injury."* Mr MacDonald also said that *"...it was concluded that his condition was of a state that would put him at risk with the aircraft handler job."* The reference to the issue of risk recurred in the evidence of Mr Constantinides and Dr Crawford.
37. On a number of occasions Mr MacDonald gave evidence as to the basis of the decision not to employ the Complainant when it was apparent from his evidence that he was not party to the making of the decision and was simply directed to relay the result to the Complainant. For example, it was put to Mr MacDonald in cross-examination that it was not appropriate to simply rely on the opinion of the medical practitioner without making further inquiries. Mr MacDonald's response was to state that, not having any medical expertise, the officers of the company use Dr Crawford to make the judgment. He went on to add that the decision was based on the fact that because of his condition, the Complainant was restricted from performing the functionality of an aircraft handler. The following exchange took place between the Tribunal and Mr MacDonald:

"Were you just relying on Dr Crawford's opinion"?---Well, we considered Dr Crawford to be the specialist. We had no reason to doubt and he was, sort of -

- there was no indecision, I suppose, in Dr Crawford's assessment that his condition was that significant that it prevented him from becoming an aircraft handler. So we didn't necessarily have a need to question Dr Crawford's assessment. We took Dr Crawford as being the specialist that we consulted."

38. It is apparent from the evidence of Mr MacDonald that the circumstances of the Complainant's offer of employment made at the initial interview, but conditioned, inter alia, on a medical clearance, varied slightly from the normal practice. Certainly the timing of the process of interview, medical assessment and commencement of employment was significantly truncated. No explanation was provided by Mr MacDonald, or any other witness for the Respondent, as to why this was the case. Further, because of the Complainant's hand injury his interview involved some attempt to identify whether he was capable of performing the duties. Having taken that step, the Respondent was in possession of direct information concerning the Complainant's physical capabilities.

39. Mr MacDonald gave evidence that the Complainant had not been considered for any of the positions of aircraft handler subsequently filled. One explanation offered by Mr MacDonald was that the Respondent never received an application for re-employment from the Respondent. The Tribunal considers this response to be somewhat disingenuous in circumstances where it is not disputed that the Complainant had contacted the Respondent requesting, in light of additional medical evidence, to reconsider the decision not to employ him. The other explanation provided was that the Respondent stood by its judgment that in the eyes of the company doctor the Complainant wasn't suitable for the aircraft handler position. In the Tribunal's view, in light of the opinion of Dr Hayes, maintaining such a position becomes increasingly less reasonable.

40. Mr Constantinides also gave evidence on behalf of the Respondent. He stated that he received a phone call from Dr Crawford on the Saturday following the examination at which time Dr Crawford advised him that he had some concerns with the Complainant and considered him unsuitable for the position of aircraft handler. Mr Constantinides was not entirely clear in his evidence about what he had been told by Dr Crawford during the phone conversation on 4 September 2001. It would seem that no note was taken of the conversation as a result of which Mr Constantinides was forced to rely on his memory. Mr Constantinides did recall that Dr Crawford was concerned about the Complainant's general health but that the Complainant's spine and the muscles of the abdomen were of particular concern. There being no note of the conversation it is unclear whether, when Mr Constantinides recounts the areas of concern, he is identifying those communicated by Dr Crawford on 4 September 1999 or all those of which he subsequently became aware. When pressed, Mr Constantinides identified the areas of concern as follows:

(1) Problem with the lower back, including difficulties in bending and limited;

- (2) A muscular weakness in the abdomen which was distended;
- (3) Lung capacity;
- (4) Eyesight;
- (5) Hand disability

The latter three problems were described by Mr Constantinides as "*minor*".

41. The existence of the hand disability was known on the day that the conditional offer of employment was made and was not considered to be an impediment to employment. Accordingly, that factor must be disregarded as playing any part in the subsequent decision not to employ the Complainant. The issue of the lung capacity is not mentioned in Dr Crawford's initial report and Mr Constantinides was unable to recall whether that information was communicated to him by Dr Crawford during their telephone conversation. Mr Constantinides conceded that, taken in isolation, the Complainant's eyesight would not have been a problem. However, he insisted that these minor areas would have made a difference because "[t]hey all add up to a bigger problem". There is no suggestion that these minor factors would have prevented the Complainant from being able to carry out the work of an aircraft handler. Consequently, that assertion creates concerns as to whether the Respondent applied appropriate criteria when making the decision to retract the conditional offer of employment. In relation to the two areas of primary concern, the back and the abdominal muscles, Mr Constantinides stated that Dr Crawford explained to him that as the work required a lot of bending and stooping, "*we were opening ourselves to possibly causing some injury to the individual who we were taking on*".
42. Mr Constantinides gave evidence that on the Monday following Dr Crawford's call he contacted Mr Dobson and asked him to have another discussion with Dr Crawford to find out whether he had changed his mind about the condition of the Complainant. He stated that he advised Mr Dobson "*that should the condition be the same that was described to me then obviously we had to be a bit cautious about the condition that was displayed and we perhaps couldn't employ him*". Mr Constantinides said that he had not received the facsimile report at the time the decision was made or by the time it was communicated to the Complainant. He gave no evidence as to whether Mr Dobson advised him of the content of the further discussion with Dr Crawford. It can be seen that there is some conflict between the evidence of Mr MacDonald and Mr Constantinides as to the circumstances surrounding the decision not to employ the Complainant. Mr Dobson was not called to give evidence on behalf of the Respondent and no explanation was given for the failure to do so.
43. In the course of his evidence Mr Constantinides volunteered the fact that a recent reconsideration of the available evidence led the Respondent to reach the same conclusion not to employ the Complainant. Mr Constantinides expressed the basis of that conclusion in the following way: "*...perhaps with all the evidence that we still had we were still putting ourselves at a risk*". Mr

Constantinides then retreated from the proposition that the criteria applied was risk to the Respondent. He said that the risk considered was the risk to the individual. He did not at that point in his evidence identify an inability to carry out the duties of an aircraft handler to be the relevant criteria. Mr Constantinides gave other evidence which tends to suggest that risk of injury was a central consideration. He referred to an employee who had commenced in the week prior to the interview with the Complainant who suffered a problem with her back as a result of her work in the flight line only two days into her employment and was unable to continue in the position. He stated: *"We do have quite a number of injuries from time to time and we're fighting both the duty of care, occupational health, as well as making sure that we are fair and reasonable"*.

44. At another point in his evidence Mr Constantinides maintained the position that the Complainant, because of his back problem, *"couldn't do the job on the day"*. He described his concern as follows: *"First of all, he couldn't perform the task, he couldn't possibly perform the task that we would ask him to do, with a flow-on effect if he did continue that he would probably injure himself as well."* However, as noted above, at the relevant time other employees of the Respondent were well aware that the Complainant could, in fact, perform the specific activity identified by Dr Crawford as being beyond the Complainant's capabilities.
45. It was suggested to Mr Constantinides in cross-examination that he could have delayed the decision to retract the employment offer until the issue of the Complainant's condition could be further investigated. Mr Constantinides response was substantially to the effect that he relied on Dr Crawford's opinion. According to Mr Constantinides, if there were only a singular condition the Respondent might obtain a second opinion or a specialist opinion but in the case of the Complainant the number of conditions was essentially the reason that course was not adopted.
46. The Tribunal has some difficulty with that explanation in view of the fact that only two of the conditions could potentially have impacted on the Complainant's ability to perform the duties of an aircraft handler and both could be adequately assessed by a single specialist; as they subsequently were by Dr Hayes. Again, Mr Constantinides comments suggest that the approach taken by the Respondent was to consider the overall state of the Complainant's health with a view to assessing the risks of employing him.
47. Dr Crawford gave evidence on behalf of the Respondent. He described himself as a medical practitioner with a special interest in workers' compensation. He is familiar with the tasks of an aircraft handler having personally observed the activities on a number of occasions. His involvement with the Respondent arose from an approach from Mr Constantinides with respect to pre-employment medicals *"because he had concerns about the number of injuries*

that were occurring at Airflite". The emphasis on workers compensation and the potential for work related injury is evident from Dr Crawford's comment that "*identification of a back problem by the patient doesn't necessarily preclude somebody from getting work but it can be identified that it's a pre-existing problem so that if problems arise subsequently it can't be deemed to be a work place problem*".

48. In relation to the examination of the Complainant, Dr Crawford identified the possibility of abdominal ascites as his greatest concern although he indicated that this issue fell outside the Complainant's fitness for work. In his evidence regarding the findings of the examination, Dr Crawford confirmed the findings set out in his examination report. He stated that the Complainant "*documented a history of back problems, back trouble*". However it seems that this observation was almost entirely based on the fact that the Complainant has ticked the box in relation to back pain and written "*occasional backpain*" by way of further details. It seems that Dr Crawford discussed this issue with the Complainant in, at best, a cursory fashion. He said in his evidence that he could not recall exactly what he said but stated that "*there were minor problems, I think that was his comment at that time*". However, he went on to say that "*it was not anything he addressed*". Neither did he question the Complainant about his gardening activity even though the information was contained on the medical questionnaire and requires the same type of bending and stooping activities involved in the duties of an aircraft handler. At no point did Dr Crawford make a diagnosis of any spinal pathology.
49. Dr Crawford described his concerns as "*many fold*" but stated that he had documented the following six reasons:
- (1) The Complainant wasn't work hardened.
 - (2) Difficulties with the lumbar spine.
 - (3) Divarication of the recti.
 - (4) Lung function was at the lower limit of normal.
 - (5) Blood pressure was at the upper limit of normal.
 - (6) Eyesight.
50. As noted above, it is only items (2), (3) and (6) of those reasons that were included in Dr Crawford's report to the Complainant's general practitioner. In relation to the issue of lung function and blood pressure it must be noted that, irrespective of precise placement, both were within the normal range. Neither of those factors, the Complainant's eyesight nor the fact that he was not work hardened could, in the Tribunal's view, provide the basis for a conclusion that the Complainant was not capable of carrying out the duties of an aircraft handler.
51. In his evidence Dr Crawford stated that the opinion he communicated to Mr Constantinides was that the Complainant would not be able to perform all the functions of the position of aircraft handler. He could not recall the exact

details of that conversation but he said that he noted two issues: the weaknesses in abdominal musculature and the stiffness in the lumbar spine. Dr Crawford said that he considered the lumbar spine to be the key area of concern in relation to the risk but that the abdomen was also an area of concern. There was no evidence given of the nature of any tests conducted to determine the Complainant's abdominal strength or, more importantly, to determine whether the abdominal strength was adequate to perform the tasks.

52. Dr Crawford explained the basis of his opinion to the Tribunal in this way: *"It's a constellation of things that made me have concerns and my recommendation merely was that I had concerns about this man working in the job that we have had detailed because I felt he was at greater risk and I had a duty of care to him and I subsequently wrote to his doctor"*. Further, he said: *"I believed he was an increased risk and I believed that he was not suitable for this position"*. In his report of 31 January 2000 provided in rebuttal of the complaint made by the Complainant to the Equal Opportunity Commission. Dr Crawford states:

"I still believe he is unemployable as an Aircraft Handler based on my examination. The position requires a lot of stooping, bending, climbing, stretching and walking. Things that I found would potentially affect Mr Goyal's health in a deleterious way.... I have a duty of care on the people I examine and I stand by my opinion that this man's health could have suffered should he have been employed by Airflite because of the taxing physical nature of the position he was employed for."

53. However, Dr Crawford conceded that a person may be able to perform the duties of the position but could be at risk because of some physical problem which could present a workers' compensation problem for the employer. It was apparent from other evidence given by Dr Crawford that his concern was that if the Complainant carried out these activities on a regular basis he could injure himself. As with the evidence of Mr Constantinides, it is apparent that significant emphasis was placed on the issue of the risk of employing the Complainant as an aircraft handler.

54. Dr Crawford emphasized the Complainant's inability to straight leg raise beyond 70 degrees. In his report of 31 January 2000 Dr Crawford suggests that this limitation indicates pathology in the thoracolumbar spine. That opinion is in direct conflict with the evidence of Dr Hayes and is rejected by the Tribunal.

55. According to Dr Crawford the difficulty posed by the limitation on straight leg raising was in relation to the activity depicted in photograph 7 where the handler has to bend over into the cockpit of an aircraft. Dr Crawford stated that the Complainant would not be able to get into the cockpit because to do so he would be required to flex to at least 90 degrees. He was not made aware that on the day of the Complainant's interview he was in fact able to carry out the activity depicted in photograph 7. Dr Crawford also considered that the

Complainant would not be able to bend and stoop underneath the aircraft to remove the chocks, another activity carried out by the Complainant at the time of the interview.

56. Leith Hoffman, an occupational therapist employed by CRS Australia, was called on behalf of the Respondent to give evidence and adduce a Job Analysis Report on the position of aircraft handler. The report identifies in some detail the requirements of the position and identifies the key risk areas. The Tribunal did not consider the material in the report to be of use in determining the relevant issues in this case. Indeed, the material reinforces the Tribunal's concern that the emphasis of the Respondent was on risk of injury rather than actual capacity to carry out the duties.

Legal Principles

57. Part IVA of the Act prohibits discrimination on the ground of impairment. Division 2 of Part IVA addresses discrimination in relation to work. Section 66B(1) of the Act is in the following terms:

"It is unlawful for an employer to discriminate against a person on the ground of the person's impairment –

- (a) in the arrangements made for the purpose of determining who should be offered employment;*
- (b) in determining who should be offered employment; or*
- (c) in the terms of conditions on which employment is offered."*

58. Discrimination on the ground of impairment is relevantly defined in section 66A(1) as follows:

"For the purposes of this Act, a person (in this subsection referred to as the "discriminator") discriminates against another person (in this subsection referred to as the "aggrieved person") on the ground of impairment if, on the ground of –

- (a) the impairment of the aggrieved person;*
- (b) a characteristic that appertains generally to persons having the same impairment as the aggrieved person;*
- (c) a characteristic that is generally imputed to persons having the same impairment as the aggrieved person; or*

(d) *a requirement that the aggrieved person be accompanied by or in possession of any palliative device in respect of that person's impairment.*

the discriminator treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person who does not have such an impairment."

59. It is not necessary to show that the alleged discriminator intended to discriminate. However, the act which amounts to discrimination must be deliberate; that is, advertent and done with the knowledge of the characteristic of the complainant said to be the ground on which the discriminatory act is performed: *Jamal v Secretary Department of Health and Anor* (1988) EOC 92-234 at 77 196 per Kirby P, at 77 200 per Samuels JA; *Australian Iron and Steel Pty Ltd v Banovic and Anor* (1989) EOC 92 271 at 77 732-77 733 per Gaudron and Deanne JJ, at 77 737 per Dawson J; *Waters and Ors v Public Transport Corporation* (1991) EOC 92-390 at 78 674 per Mason CJ and Gaudron JJ, Deane J agreeing, cf *McHugh J* at 78 698.

60. The term "**impairment**" is further defined in section 4 of the Act as meaning one or more of the following conditions:

"(a) *any defect or disturbance in the normal structure or functioning of a person's body;*

(b) *any defect or disturbance in the normal structure or functioning of a person's brain; or*

(c) *any illness or condition which impairs a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour,*

whether arising from a condition subsisting at birth or from an illness or injury and includes an impairment –

(d) *which presently exists or existed in the past but has now ceased to exist; or*

(e) *which is imputed to the person."*

61. The Complainant maintains that he did not at the relevant time suffer from an impairment which would preclude him from working as an aircraft handler. Indeed, in relation to the alleged back condition, the Complainant maintains that he did not suffer from any impairment at all. The Tribunal accepts the evidence of Dr Hayes that the complainant does not suffer from any impairment of the spine. However, it accepts that the Respondent was advised

by Dr Crawford at the relevant time that, on examination, the Complainant was found to have a degree of restricted spinal movement and had suffered from some back pain.

62. The Complainant does not dispute that he suffers from a divarication of the recti. He does dispute that, as a result, he suffers from abdominal muscle weakness. The terms of section 4 of the Act are sufficiently broad to include the restricted spinal movement, the divarication of the recti and any consequential abdominal weakness in the definition of an impairment.
63. It is pleaded on behalf of the Respondent that the Act does not prohibit treating a person less favourably on the ground of impairment if there is, in fact, no impairment. Consequently, it is submitted that as the Complainant does not plead that he actually suffers impairment, he cannot succeed. The Tribunal considers this submission to be flawed in two respects. Firstly, the submission, based as it is on reference to the wording of section 66A(1)(c), fails to take into account the definition of the term "impairment" in section 4. Secondly, while the Complainant does not expressly plead the existence of an impairment, it is apparent from the evidence, and the Tribunal so finds, that the Complainant did suffer from a divarication of the recti, that this condition constitutes an impairment for the purposes of Part IVA of the Act and that this condition was relied upon by the Respondent in making its decision to retract the offer of employment. The existence of the condition and its implications were dealt with in evidence and there can be no prejudice to the Respondent in taking this condition into account in resolving the Complainant's claim.
64. The Tribunal accepts the Complainant's submission that the effect of section 4 and section 66A is that the absence of any impairment is not fatal to an impairment discrimination claim if the discriminator believes the aggrieved person suffers from an impairment. Such a construction is consistent with the beneficial intent of the Act. Conduct of this type is equally reprehensible whether the impairment exists in fact or only in the mind of the discriminator. It would create an inappropriate anomaly, inconsistent with the clear legislative intent, if an employer was prohibited from discriminating against a person who suffered an impairment but could discriminate against a person the employer assumes to have an impairment, or to whom the employer chooses to ascribe an impairment.
65. The Complainant bears the onus of proof and must prove his case on the balance of probabilities: *Alone v State Housing Commission* (1992) EOC 92-392 at 78,788. Therefore, in order for the Complainant to succeed it is necessary for him to establish that on the ground of an impairment, or an impairment imputed to him, the Respondent treated him less favourably than it would have treated a person who does not have such an impairment in circumstances that are the same or not materially different.

66. The Tribunal is satisfied to the necessary degree that the Respondent declined to employ the Complainant on the ground of impairment both real and imputed. Had he not suffered an impairment, or had he not been considered to suffer from an impairment, the offer of employment would have become unconditional and he would have commenced as an employee of the Respondent on 6 September 1999. He was accordingly treated less favourably on the ground of impairment in breach of section 66B(1)(b) of the Act. The discriminatory act was the notification of the Complainant by the Respondent on 6 September 1999 that he would not be employed because of the result of his medical examination.

67. That finding is not an end to the matter. Not all discriminatory acts are unlawful. The Act does not preclude prospective employers from taking into account a person's impairment when determining whether it is appropriate to offer that person employment. However the circumstances in which decisions based on impairment will not be in breach of the Act are confined by section 66Q. Relevantly, section 66Q (1) provides:

"Nothing in section 66B(1)(b)...renders unlawful discrimination by an employer, principal or person against a person³⁸ on the ground of the impairment of that person if it is reasonable for the employer, principal or person to conclude, on such grounds as having regard to the circumstances of the case and having taken reasonable steps to obtain relevant and necessary information concerning the impairment it is reasonable for the employer, principal or person to rely on, that the person with the impairment because of that impairment –

(a) would be unable to carry out work reasonably required to be performed in the course of the employment or engagement concerned..."

68. The Respondent submits that any discrimination against the Complainant was not unlawful because it was done in circumstances in which section 66Q of the Act render such acts lawful. The Respondent bears the onus of establishing that it's conduct falls within the parameters of section 66Q: *section 123 of the Act*. The Complainant alleges that the Respondent did not exercise its discretion reasonably but rather abdicated its responsibility to make the assessment by delegating the function to Dr Crawford.

69. It is apparent from the plain wording of section 66Q that the decision of the employer must relate to the ability to carry out the work required and must be reasonably based which in turn includes taking reasonable steps to obtain the relevant and necessary information concerning the impairment.

70. As indicated above, the Act is beneficial legislation and must be construed so as to promote its object or purpose: section 18 *Interpretation Act 1984*. The objects of the Act include the elimination of discrimination against persons on

the ground of impairment in the area of work and to promote recognition and acceptance within the community of the equality of all persons regardless of their impairments: section 3 (a) and (d) of the Act. Having regard to those objects, statutory exceptions or exemptions contained within the Act and which render some forms of discrimination lawful in some circumstances are not to be given a wider construction than the words of the relevant provisions necessitate. In view of the nature of the evidence adduced from the Respondent's witnesses it is important to note that section 66Q(1)(b) does not read "*unable to carry out the work without risk of injury*". In the Tribunal's view, the operation of section 66Q should not be extended to include those persons who are able to perform the duties but are considered to be at risk of injury or at a comparatively greater risk of injury than a person who does not suffer an impairment. Of course, there may be cases in which the risk of injury to the impaired person is so great that it can be reasonably concluded that, whilst he may be able to carry out the work on isolated occasions, he would be unable to carry out the work on a regular basis over time. However, in the Tribunal's view, this case does not fall into that category.

71. Of the conditions identified by Dr Crawford in his examination of 4 September 1999 the only conditions relevant to actual ability to carry out the work are the back and abdominal problems. The other conditions would not, of themselves or collectively, reasonably preclude the Complainant from carrying out the work reasonably required of an aircraft handler. However, it is apparent from the evidence of both Dr Crawford and Mr Constantinides that these other factors were taken into account and that what was actually being identified was the overall state of the Complainant's health with a view to assessing the risks of employing him. The Tribunal considers that the focus of the medical examination and the Respondent's decision making process was on risk minimization rather than making an assessment of the ability of the person to carry out the work. The way in which the Respondent's witnesses describe the basis for the decision not to employ the Complainant clearly supports such a conclusion, as does other evidence. For example, it was said in evidence that the relationship between the Respondent and Dr Crawford arose from concerns about the Respondent's level of workplace injuries. Further, Mr Constantinides expressly referred in his evidence to a recent case of work related back injury and made other comments in relation to the Respondent's duty of care. The willingness of the Respondent's witnesses to maintain the position that the Complainant is unable to carry out the work even in the face of specialist opinion to the contrary, supports a conclusion that the determination being made by the Respondent is whether it is in its best interests to employ the Complainant, not whether he can perform the work. On the evidence available to it, the conclusion of the Tribunal is that the Respondent applied a different criteria than that provided for in section 66Q.

72. If the Tribunal is wrong in that conclusion, it further considers that the evidence available to the Respondent did not justify a conclusion that the Complainant suffered from an impairment which would preclude him from carrying out the duties of an aircraft handler. Mere reliance on the opinion of a medical practitioner to the effect that a person is not fit or not capable of carrying out the duties of a particular occupation is not, of itself, enough to discharge the burden imposed by section 123. That is particularly so where no attempt has been made to ensure that the medical practitioner is applying appropriate and non-discriminatory methods of assessing the applicants who attend for pre-employment medicals: *Madaferri v City of Northcote* (1993) EOC 92-512. As indicated above, before a discriminatory decision is rendered lawful by the operation of section 66B(1)(b) the decision must be reasonably based which includes taking reasonable steps to obtain relevant and necessary information concerning the impairment. Such reasonable steps would include identifying the nature of the alleged impairment and ascertaining the basis of a medical practitioner's opinion that such an impairment renders the person unable to carry out the duties. Further, for the decision to be reasonably based, consideration should also have been given to all other information in the employer's possession, in particular any information which conflicts with the medical opinion obtained.
73. Because of the Complainant's hand injury his interview involved some attempt to identify whether he was capable of performing the duties. Having taken that step, the Respondent was in possession of direct information concerning the Complainant's physical capabilities including evidence that he was able to perform a function involving significant spinal flexion without any apparent difficulty. In the Tribunal's view, in order to act reasonably, the Respondent should have taken this information into account when determining the appropriate response to the receipt of Dr Crawford's medical opinion. It is apparent from the evidence of the Respondent's witnesses that they did not do so. In view of the conflict between the opinion of Dr Crawford and the observations of the Complainant during the interview, it was not reasonable for the Respondent to conclude at that time based only on Dr Crawford's opinion that the Complainant was unable to carry out the work required of an aircraft handler. The suggestion that a prompt decision had to be made because the Complainant was due to commence work is without substance. The employer created that situation and gave no evidence as to why the decision could not be delayed for further evaluation and/or investigation of the nature and effect of any impairment suffered by the Complainant. The preferred option would have been to delay the commencement of employment and ensure that there was sufficient information available to make a reasonable decision which would render the otherwise discriminatory conduct, lawful.
74. For the above reasons the Tribunal is satisfied that the Complainant was discriminated against by the Respondent on the ground of impairment and that,

as the circumstances do not fall within section 66Q of the Act, the discrimination was unlawful. We find the complaint proved.