

# **ANTI-DISCRIMINATION COMMISSION**

## **NORTHERN TERRITORY**

COMPLAINANT: JENNIFER GEHRIG

RESPONDENT: MCARTHUR RIVER MINING PTY LTD

NUMBER: 4/1996

HEARING COMMISSIONER: DAWN LAWRIE

COUNSEL ASSISTING: DAVID ALDERMAN

COUNSEL FOR THE  
COMPLAINANT: UNREPRESENTED

COUNSEL FOR THE  
RESPONDENT: KRISTINA McFIE

GROUNDS OF  
COMPLAINT: IMPAIRMENT/FAILURE TO  
ACCOMMODATE A SPECIAL NEED  
(SECTION 19(1)(j) AND SECTION 24 OF THE ANTI-  
DISCRIMINATION ACT)

DATE OF FINDING: 24 DECEMBER 1996

## INTRODUCTION

On 23 November 1995 a delegate of the Anti-Discrimination Commissioner accepted a complaint from Ms Jenny Gehrig against McArthur River Mining Pty Ltd (MRM) alleging discrimination in the area of work on the grounds of Irrelevant Medical Record and/or Impairment and Failure to Accommodate a Special Need, contrary to *Section 19(1)(j)* and *Section 24* of the NT *Anti-Discrimination Act* (the "Act").

Following investigation and an unsuccessful attempt to conciliate the matter, the delegate referred the complaint to the NT Anti-Discrimination Commissioner as Hearing Commissioner, pursuant to *Section 83* of the Act.

A copy of the referral report was sent to the parties.

That report relates to an allegation of discrimination on the grounds of Impairment under *Section 19(1)(j)* of the Act and Failure to Accommodate a Special Need under *Section 24* of the Act.

The Hearing was held in Darwin 12-13 June 1996.

The complainant Ms Gehrig was unrepresented, and Ms Kristina McFie appeared on behalf of the respondent company MRM.

At the conclusion of the Hearing a further two weeks was allowed for both the parties and Counsel Assisting to put submissions to me on the question as to whether it was reasonable for the respondent to rely on the medical assessment provided to it.

Submissions on this point were received from Ms McFie and Mr Alderman (Counsel Assisting).

## **FACTUAL BACKGROUND**

Ms Gehrig had worked with St John Ambulance from 1987 to June 1995, during which time her duties ranged from ambulance officer through communications officer, paramedic supervisor, and on occasions she had acted as regional manager.

Having completed the necessary study, Ms Gehrig was classified as a paramedical in 1987, and at the time of her resignation from St Johns (June 1995) was the duty supervisor/paramedic.

In April of 1995 Ms Gehrig applied for the position of occupational nurse at MRM but was unsuccessful.

In July 1995 Ms Gehrig was engaged by Fluor Daniel to attend at the minesite as an occupational nurse on a temporary basis (Fluor Daniel being the construction company that built the mine).

Her temporary contract ran for three weeks. Ms Gehrig worked twelve hour shifts and her duties included:

- treating the sick and injured
- stocktake of drugs
- keeping the clinic clean and tidy
- ensuring the ambulance was operational
- assisting the Safety Officer with inductions for new employees or contractors
- ensuring the first aid kits were stocked and placed in appropriate places around the minesite
- referring patients to the doctor at Borroloola.

On completion of her short term contract with Fluor Daniel, Ms Gehrig returned to Darwin. Ms Gehrig wrote to Hilton Hurst, Employee Services Officer for MRM indicating her interest in working at McArthur River if a position became available.

In September 1995 Mr Hurst phoned Ms Gehrig and asked her to go out to McArthur River on a relieving basis until the permanent occupational nurse was able to start.

Ms Gehrig had not undergone any medical examination prior to going back to McArthur River at the request of Mr Hurst.

The period of temporary employment was to have been five days, but was extended to seven as the day Ms Gehrig arrived the other occupational nurse on site had resigned.

Mr Hurst rang Ms Gehrig at the minesite clinic advising her of the other nurse's resignation and asked if she was interested in the position.

There was a second phone call from Mr Hurst asking Ms Gehrig when she would be available to start work on a permanent basis.

On her return to Darwin Ms Gehrig went to Mr Hurst's office to complete the necessary paperwork and received a letter offering employment as occupational nurse at the MRM minesite. The letter included a reference to a health assessment in the following terms:

"HEALTH ASSESSMENT

As part of our duty of care in respect of Occupational Health and Safety matters, you are required to undertake a Task Specific Health Assessment. Attached please find the necessary forms for completion by your doctor. Please pay your doctor and retain the receipt for reimbursement by the Company; alternatively, please arrange for your doctor to invoice the Company for this Assessment.

Please read the covering note attached to the Health Assessment for instructions on what to do with the completed Health Assessment forms.

This offer is subject to the Company being satisfied with the results of such Assessment."

Ms Gehrig asked Mr Hurst if she could see her own doctor, and was advised that the company would prefer her to attend the Cavenagh Medical Centre for the assessment.

Cavenagh Medical Centre had entered into an agreement with McArthur River Mining Pty Ltd to perform health assessments for them.

Applicants based in Darwin were referred directly to Cavenagh Medical Centre for assessment, applicants in other centres would attend a local medical practitioner and the assessment report would then be referred to Cavenagh Medical Centre.

Ms Gehrig attended the Cavenagh Medical Centre 2 October 1995, where she was examined by Dr Karen Magraith.

Dr Magraith did not have a detailed job description for the position of occupational health nurse at that time and had not visited the minesite.

Dr Magraith asked Ms Gehrig to describe the job and its duties, which she did, outlining the requirements and functions of the position of occupational nurse at the minesite.

Dr Magraith discussed Ms Gehrig's medical history, medication and recent surgery with her, and conducted certain physical movements tests.

Dr Magraith discussed her examination of Ms Gehrig with Dr Diana Symonds, the principal of Cavenagh Medical Centre, and subsequently assessed Ms Gehrig as unfit to carry out the duties of occupational nurse at the minesite.

The "Medical Assessment of Fitness for Employment" report on Cavenagh Medical Centre letterhead referred to Ms Gehrig's medical history, medication, and the tests undertaken at the time of the examination.

The "Medical Recommendation" was as follows:

"Would not recommend employment because of previous history of back pain. This injury could easily be aggravated even without performing heavy lifting."

On 6 October 1995 Hilton Hurst, the Employee Services Officer with MRM, telephoned Ms Gehrig and advised her of the medical assessment and recommendation.

By letter dated 13 October 1995 Ms Gehrig requested a copy of Dr Magraith's report, and clarification of her status, as she wished to challenge the medical assessment.

On 18 October Ms Gehrig received a letter from MRM withdrawing the offer of employment on the basis of the medical assessment.

Ms Gehrig subsequently obtained a copy of the medical assessment which she contested, and requested a second assessment.

Her request was denied.

Ms Gehrig then lodged a complaint of discrimination based on impairment, and failure to accommodate a special need with the NT Anti-Discrimination Commission.

The complaint was received on 2 November 1995 and accepted 23 November 1995.

Ms Gehrig obtained a report on her medical condition from Mr Stephen Baddeley, an orthopaedic surgeon, which she provided to the company on 11 December 1995.

The company then sent Dr Magraith a specific list of duties for the position of occupational nurse, and sought her further opinion as to Ms Gehrig's fitness. Dr Magraith confirmed her recommendation that Ms Gehrig not be employed.

In her complaint Ms Gehrig referred to MRM Company's employment of Judith Beaumont as an Occupational Health Nurse at the minesite.

Ms Beaumont had been examined by Dr Symonds to assess her medical fitness for the work, and Dr Symonds recommended that she be employed as a "group 10 employee".

"Group 10 - Unsuitable for Heavy Material Handling

The following list of prohibited activities is exemplary rather than exhaustive: as always, the safe lifting rule should be applied - if the employee feels unable to lift/push/pull a load they should not attempt to do so. Group 10 employees may not:-

- lift items exceeding 15 kg (less is specified)
- carry items for further than 5 metres
- lift more than one item in any ten minute period
- lift items which are lower than knee height
- lift items to above shoulder height or operate above shoulder height
- operate in a crouched, bent or stooped posture.

If there is any doubt, please refer to the Medical Centre. Back injuries are the main cause of morbidity at MRM and precautions to avoid exacerbating them should be followed at all times. If treated correctly, most employees with back injuries will fully recover; back injuries which are ignored often result in permanent disability.

Group 10 is applied not only to employees with back injuries but also to those, for example, with knee and ankle injuries which may be exacerbated by carrying heavy loads."

In a response to Ms Gehrig's complaint by letter dated 16 January 1996, Mr D M Munro, Secretary and General Counsel, MIM Holdings Limited advised as follows:

**"Complaint Alleging Irrelevant Medical Records/  
Impairment Discrimination and Failure to Accommodate a  
Special Need by McArthur River Mining Pty Ltd "MRM"**

I refer to your letter of 30 December 1995, which I received on 11 January 1996. Taking each of your points in turn:

1. MRM decided not to offer you the position of Occupational Nurse on the basis of Dr Magraith's report which clearly sets out the reasons for her professional opinion that you were not fit for the position. I am not able to comment on the areas in which you disagree with Dr Magraith's report.
2. Dr Magraith's letter of 19 December 1995 makes it clear that she was aware of the duties of an Occupational Nurse at the time of your examination and states that her recommendation was made taking into account the fact that the position would not normally involve heavy lifting or manual work.
3. I do not agree with your assertion that Ms Beaumont's circumstances are relevant to the present situation. Dr Magraith's assessment, upon which MRM relied, was carried out specifically in relation to your own physical health and the particular duties of an Occupational Nurse.

The heavy duties placed on MRM to ensure the health and safety of its employees place it under an obligation to seek and accept competent professional medical advice so as to ensure that its employees are not put at risk in carrying out their duties. As Dr Magraith advised that on the basis of your physical health you were not fit for the work proposed, MRM had no option but to decide not to offer you the position of Occupational Nurse."

In defending the allegation of discrimination the respondent company referred to its obligations under the NT *Mine Management Act 1990*, specifically *Section 15(b)* and the Mine Management Regulations which place a duty on the Respondent "to maintain a working environment at the mine that is, so far as is practicable, safe and without risk to the health of any person at the mine (its "Duty")." It was submitted that as an implicit part of its duty the company must

not employ a person if, having regard to their proposed function and working area, their medical condition may endanger their own health or the health of the company's other employees.

The company further stated that in order to comply with its Duty it was a requirement that prior to commencing full time employment all potential employees had to undergo a medical assessment "conducted on the basis of the potential employee's intended function and working area".

## THE LEGISLATION

Relevant Sections of the NT *Anti-Discrimination Act 1992* are as follows:

### 19. PROHIBITION OF DISCRIMINATION

(1) Subject to subsection (2), a person shall not discriminate against another person on the ground of any of the following attributes:

(a) .....

.....

(j) impairment;

.....

(r) .....

(2) It is not unlawful for a person to discriminate against another person on any of the attributes referred to in subsection (1) if an exemption under Part 4 or 5 applies.

### 24. FAILURE TO ACCOMMODATE SPECIAL NEED

(1) A person shall not fail or refuse to accommodate a special need that another person has because of an attribute.

(2) For the purposes of subsection (1) -

(a) a failure or refusal to accommodate a special need of another person includes making inadequate or inappropriate provision to accommodate the special need; and

(b) a failure to accommodate a special need takes place when a person acts in a way which unreasonably fails to provide for the special need of another person if

that other person has the special need because of an attribute.

- (3) Whether a person has unreasonably failed to provide for the special need of another person depends on all the relevant circumstances of the case including, but not limited to -
- (a) the nature of the special need;
  - (b) the cost of accommodating the special need and the number of people who would benefit or be disadvantaged;
  - (c) the financial circumstances of the person;
  - (d) the disruption that accommodating the special need may cause; and
  - (e) the nature of any benefit or detriment to all persons concerned.

The exemptions referred to in *Section 19(2)* under Part 4 or 5 of the Act are:

#### PART 4

#### 35. EXEMPTIONS - WORK

- (1) A person may discriminate against another person in the area of work -
- (a) by fixing reasonable terms and conditions if that other person, because of age or impairment, has a restricted capacity to do the work; or
  - (b) if the discrimination is based -

- (i) on a genuine occupational qualification which the other person is required to fill;  
or
  - (ii) on the other person's inability to adequately perform the inherent requirements of the work even where the special need of the other person has been or were to be accommodated.
- (2) A person may discriminate in offering work where the work is to be performed in the person's home.

## PART 5

### 53. ACTS DONE IN COMPLIANCE WITH LEGISLATION, &c.

Notwithstanding anything to the contrary in this Act, a person may do an act that is necessary to comply with, or is specifically authorised by -

- (a) an Act or regulation of the Territory;
- (b) an Act or regulation of the Commonwealth;
- (c) an order of a court or tribunal;
- (d) an order or award of a court or tribunal having power to fix minimum wages and other terms and conditions of employment;
- (e) an industrial agreement in existence at the commencement of this Act;
- (f) an order of the Commissioner under this Act;

- (g) a guideline or code of practice prepared and published by the Commissioner under this Act; or
- (h) advice given by the Commissioner under this Act.

The relevant section of the NT *Mine Management Act 1992* as referred to in the defence is as follows:

15. DUTIES OF MANAGER

- (1) The manager of a mine shall -
  - (a) .....
  - (b) provide and maintain a working environment at the mine that is, so far as is practicable, safe and without risk to the health of any person at the mine; and
  - (c) .....

## EVIDENCE

Mr Stephen Baddeley, an orthopaedic surgeon, gave evidence on behalf of Ms Gehrig.

Mr Baddeley's qualifications are:

- Bachelor of Medicine
- Bachelor of Surgery
- Fellow of the Royal Australasian College of Surgeons and
- Fellow of the Australian Orthopaedic Association.

Mr Baddeley's evidence was extensive, and covered, *inter alia*:

- the 'history' of Ms Gehrig's back from an accident in 1971;
- an exacerbation of back pain in 1983;
- x-rays and CT scans;
- a rehabilitation program;
- a knee injury and surgery (1990, 1991, 1995);
- MRI scan;
- lumbar lordosis;
- medication.

Mr Baddeley's evidence also referred to medical statistics and studies relating to the history of back pain in the general population, and to the contemporary clinical management of back pain and its underlying causes.

The physical tests administered to Ms Gehrig by Dr Magraith were addressed in some detail, as Dr Magraith had included Ms Gehrig's difficulty with some of the tests in assessing her as unsuitable for employment as occupational nurse.

Mr Baddeley's evidence was clear - that in his opinion such tests are useful, but the tests can't be correlated into functional capacity - the tests in themselves are not conclusive.

Based on these tests, and his knowledge of Ms Gehrig's medical history, Mr Baddeley did not express particular concern as to Ms Gehrig's ability to perform the functions of occupational nurse.

Mr Baddeley was asked a series of questions regarding back pain as an indicator of future complications by Counsel Assisting (Mr Alderman) and I believe it worthwhile to quote this evidence in full:

Mr Baddeley:

"It is very hard, especially these days to advise on the basis of true fact what people should avoid. Many theories, some theories have demonstrated that in fact the best thing for people with chronic disc degeneration is hard work with the back. That the worst thing for people with back pain is rest. Whereas ten, fifteen years ago we advised people to rest as much as possible. Now we encourage them to be as active as possible. And a study of not too long ago from Denmark showed that in fact, a group of people, three groups of people, one doing minor exercise, one doing moderate, one doing heavy labouring type work, bending, lifting, digging potholes, wheeling wheelbarrows, that group of people in fact had less long term problems with their back than the group, especially the group that rested, So activity is important. I believe that some reason should be applied to that. I wouldn't advise her to go to work where she was lifting repetitive very heavy weights, bending forward at the hips and lifting with her back, like a crane rather than a lift, that sort of thing. And prolonged riding over rough ground, I think would be advisable to avoid. None of those things however, are likely to cause permanent and increased back problems. They are likely to cause a temporary exacerbation of back discomfort."

Mr Alderman:

"If somebody adopted the opinion that, because of a history such as Ms Gehrig's had and an examination such as the slight loss of lumbar lordosis etc, they say that the previous history of back pain causes them to come, causes the particular doctor to come to the opinion that they couldn't recommend employment. What's your opinion of that, that future back pain would be an indicator that there would be further back pain."

Mr Baddeley:

"I think that's the sort of opinion that you would have heard voiced by the majority of spinal surgeons and doctors involved in the care of back problems ten, fifteen years ago. To say that someone who has had previous back problems should not have this sort of work because they're more likely to get back pain in the future really runs against the statistical evidence of good quality back studies as done by Boeing and Volvo. Eighty percent of all adults in Australia will have a period of either many months or years of back pain. So eighty percent of people have a history of back pain, and we know also that the natural history is a tendency towards normal resolution of that back pain. So that as time passes the person who has had their episode of back pain, some prolonged time ago, is less likely to have problems from that level, as the degenerative changes stabilise the spine. So it isn't really logical to say that because someone has a history of back pain, they are therefore more likely to have back pain. That doesn't really follow. There is no good evidence. It sounds logical, and it sounds appealing, but there is no real evidence to suggest that's the case, in the majority of people with this sort of back pain."

Mr Alderman:

"What opinion do you have with respect to the opinion that in fact, even light work could aggravate a back injury."

Mr Baddeley:

"Again - it depends a bit on what you mean by aggravate. Anything can cause a twinge of back pain, prolonged sitting, inappropriate lifting, if you lift improperly maybe even once or twice you may get a twinge of back pain. But this is not likely to cause an episode of prolonged back pain, it's not likely to cause back disability, it's not likely to worsen her overall back problem or cause a period of time off work. There is evidence, and the evidence is increasing that in fact the converse is true. That no activity, that a sedentary life style is the worst thing for someone with a back problem."

In response to questions from Ms McFie on the relevance of the physical tests and the ability - or inability - of a person to perform well, Mr Baddeley attached

some importance as to the reason for the poor performance - eg whether it was due to poor muscle tone or discomfort.

The question of back pain as an indicator of future problems was also raised by Ms McFie, as follows:

"You've said - another thing that you said in this letter here, was that there was no suggestion that Ms Gehrig would be more likely to experience future back pain than any other individual. Now, it seems to me from a lay person's point of view that a person who has had an injury, and has had a number of significant episodes, that have led to taking time off work would seem to suggest that there is a propensity or some kind of likelihood, more than the average person off the street, to suffer recurring back pain. Is that not right."

Mr Baddeley:

"Well, I agree that that would be a perception that (a) that we would have believed in ourselves a number of years ago, and it's a perception that is attractive and you would think that because you've had a back problem in the past, you're more likely to have in the future, but in fact statistically, that is not the case. And also you've got to take into account that eighty percent of us, once we reach thirty, thirty five have had a significant incidence of back pain. Does that mean that eighty plus percent of us are more likely to injure our back if we start taking up this sort of work. If you look at it in that sort of sense, it doesn't make sense to say that someone who's had back pain in the past is going to necessarily have back pain in the future. Other than to say, well - back pain is a normal part of the human condition, and we're all going to have episodes of back pain for the rest of our life, which is probably true too."

Ms McFie:

"Right."

Mr Baddeley:

"But looking at it from the man on the (...) on the omnibus, I don't think she's more likely to have back pain than anybody else."

Ms McFie:  
"Right."

Mr Baddeley:  
"Because I don't think she's got a back problem, that is greatly different to a large number of people in normal society."

Mr Baddeley also responded to questions regarding Valium and its effects - Mr Baddeley indicating differing effects according to the body's tolerance of the drug.

Ms McFie referred to rough terrain at the minesite and the potential for medical problems because of Ms Gehrig's back and knee - Mr Baddeley did not believe there would be any aggravation or worsening of the back problem - in relation to the knee he stated:

"Certainly if she was, if she was required to walk over very rough rubbly areas that were unstable, requiring her to sway and support herself in different positions, this might cause her some back discomfort. Again, I don't think that it would in a prolonged sense, worsen her overall back condition, or the long term prognosis. It may cause her some increased back discomfort. And the same thing would go with regards to the knee. Anything with the knee flexed and loaded, such as in climbing stairs, or climbing over boulders would tend to cause her increased knee problems. Although she really hadn't described much in the way of knee problems following August of last year. But there is a potential with the knee problem that she has, that sort of activity could make for some increased discomfort of the knee."

The examining doctor at Cavenagh Medical Centre was Dr Magraith, who had been employed at the Centre from 1993 (with some short breaks in service).

Dr Magraith's evidence related to:

- her examination of Ms Gehrig;

- her anecdotal knowledge of the minesite and the requirements of the position of occupational nurse;
- Ms Gehrig's use of Valium;
- Ms Gehrig's medical history.

At the time of the examination Dr Magraith did not have a copy of the duty statement. Dr Magraith stated:

"The examination was an examination which we do on all the employees that are sent to us for medicals. Whether they be for underground mining, for administrative work, or whatever. But it's a comprehensive examination which aims to cover most of the range of duties that people would be involved in, whatever their job."

Dr Magraith acknowledged Mr Baddeley as a specialist orthopaedic surgeon, and indicated she would defer to his opinion on reduced lumbosacral flexion and slight loss of lumbar lordosis.

Dr Magraith stated (she) thought Ms Gehrig's history of two operations on her knee was quite significant in that it indicated "quite a strong possibility of on-going knee problems. Not all knee surgery is completely successful and I felt it was too early to, for me to say confidently that her knee was going to be okay, and it wouldn't give her major problems."

Dr Magraith expressed her concern that as the ground at the minesite was likely to be uneven, and that Ms Gehrig may have to rush to an emergency - that factor combined with the combination of the back injury and the knee injury impacted on her assessment as to Ms Gehrig's fitness to carry out the duties of occupational nurse.

Dr Magraith referred to articles on occupational health and safety issues given to her by Dr Symonds (principal medical practitioner at Cavenagh Medical Centre). One such article was the proceedings of a conference in Surrey in 1987 at which a Dr Porter presented a paper giving the opinion that the greatest predicative factor of future back pain was a history of back pain or back injury in the past. Two other papers presented at this conference gave similar opinions.

Dr Magraith summarised her reasons for her recommendation not to employ Ms Gehrig thus:

"My opinion was that she had a significant history of back injury with on-going back pain and in combination with a knee injury, the prognosis of which was a little uncertain at that point. That she had perhaps a higher than average chance of having further injuries which could create problems in terms of an unsafe situation for her. And also perhaps with the Valium usage as well, potentially unable to carry out her duties as a nurse in an emergency. So all of those things combined together influenced my decision."

In further evidence Dr Magraith made it clear that before completing the medical assessment of fitness form she discussed the matter with Dr Symonds, and Dr Symonds agreed with her assessment.

Ms Gehrig's evidence related to

- her employment with St John Ambulance
- the physical demands associated with that employment
- her back injury
- knee problem/surgery
- rehabilitation
- employment by Fluor Daniel as occupational nurse at McArthur River minesite
- offer of employment from Mr Hilton Hurst
- medical examination by Dr Magraith
- subsequent appointment to obtain a second opinion from Mr Baddeley
- correspondence from MRM
- employment since January 1996
- the "special employment category" afforded Ms Beaumont
- her medication (including use of Valium).

During her employment with St John's Ms Gehrig held positions ranging from ambulance officer through to communications officer, paramedic supervisor, and on occasions had acted as regional manager. Ms Gehrig completed her

studies for associate diploma in "Applied Science Emergency Care" in 1987 and was eventually promoted to the position of on-road supervisor/paramedic.

If attending major accidents Ms Gehrig's role would be that of co-ordinator at the accident including liaison with Emergency Services.

In her evidence Ms Gehrig stated that in 95-99% of cases she would have "hands on" involvement with treatment of patients - this would include having to get into vehicles with patients, treating them, and having to extricate them (including lifting them) often in cramped and awkward positions.

In her evidence Ms Gehrig outlined the way in which certain devices were used to minimise physical stress or strain and discomfort to both patients and paramedical staff.

Ms Gehrig's evidence also covered the history of injury to her back and her knee, treatment she had received, and the rehabilitation program she had undertaken.

Ms Gehrig went on to outline her duties and functions while employed by Fluor Daniel as occupational nurse at McArthur River Mine - a period of approximately three weeks, the topography of the area, and the equipment available for use at the minesite.

In September 1995 Hilton Hurst (McArthur River Mine) engaged Ms Gehrig as a temporary relief occupational nurse and she spent a week at the site and Bing Bong Station working in that capacity.

Ms Gehrig did not undergo a medical examination prior to the temporary placement, however Ms Gehrig had previously indicated an interest in working at the minesite and Mr Hurst had received a copy of her Curriculum Vitae (CV).

Ms Gehrig stated that she used Valium as a relaxant on a needs basis, the dosage being 5 mg (one tablet), and that while it did assist her to sleep she would have no ill effects and she would be quite alert if she was to wake up "after a period of four hours or so."

Ms Gehrig did not take Valium (for back pain) during her two temporary placements at the minesite.

Further evidence was as follows:

Mr Alderman:

"If you had been told that you weren't allowed to use Valium or drink alcohol, or marijuana or any drug which affected your mind because of your duties, what would have your response been to that."

Ms Gehrig:

"I take my responsibilities very serious, and I would have agreed wholeheartedly with the decisions."

Mr Alderman:

"So your response would have been that you would have said yes, I won't take any of those substances."

Ms Gehrig:

"That's correct."

Ms Gehrig questioned why her knee and occasional use of Valium were now being raised, when the original assessment referred to her back - Ms Gehrig referred to these issues as "red herrings".

Counsel for the respondent company, Ms McFie, examined Ms Gehrig extensively on her back and knee injuries, their treatment, and her use of Valium.

Ms McFie referred to the company's employment of Ms Beaumont as an occupational nurse under the "category 10" classification, and Ms Gehrig agreed that to the best of her knowledge:

- Ms Beaumont's back injury occurred about twenty-six years ago, and that Ms Beaumont had never been to a doctor or orthopaedic surgeon in regard to the injury;

- Ms Beaumont had never had to take time off work as a result of back pain;
- the only treatment she (Ms Beaumont) had had in the last twenty-six years or so had been approximately three trips to the chiropractor;
- the only pain killers of any form used by Ms Beaumont are Panadol, Aspirin or Nurophen.

Ms McFie submitted that for Darwin based people company practice is that they are assessed by Cavenagh Medical Centre - Ms Gehrig stated that she had raised the question as to whether she could go to her own doctor for assessment, and had been advised by Mr Hurst that Darwin people were encouraged to go to Cavenagh Medical Centre. Mr Hurst had also advised that if Ms Gehrig did go to her own doctor, the report would be sent to Cavenagh Medical Centre anyway.

Ms McFie put it to Ms Gehrig that Mr Baddeley's report was not provided to the company until after Ms Gehrig had lodged a complaint with the Anti-Discrimination Commission - in response Ms Gehrig stated that the company had not returned phone calls, and that at the time she had not been advised whether or not she could seek a second opinion.

Ms Beaumont (now Ms James) is a registered nurse, employed by MRM as an occupational nurse (category 10).

Her evidence related to the condition of the area around the minesite, the role of an occupational nurse at the Mine and her conditions of employment.

There was also evidence as to Ms James's medical assessment including her inability to do "sit ups" and difficulty with another of the tests.

Ms James had been assessed by Dr Symonds, and in response to a question regarding the difficulty with the tests, Ms James stated:

"Oh she just said that you know, we'll put you in a category where you can't lift anything more than fifteen kilos."

Ms James was asked how she would cope with an emergency at the minesite given her "category 10" restrictions - Ms James's evidence was that she has a certain number of occupational first aiders at the minesite, and that she would call on them to help.

Dr Diana Symonds, Cavenagh Medical Centre gave evidence addressing:

- Cavenagh Medical Centre's contract with the Mining Company and pre-employment medicals conducted on behalf of other companies;
- research including musculoskeletal problems (including a report prepared by the Australian College of Occupational Medicine);
- predictors of back injury;
- risk factors/history of back injuries and associated references;
- her understanding of the terrain at the minesite;
- discussions with (Mine) Management;
- the effect of Valium;
- her examination of Ms Beaumont (now Ms James) and subsequent recommendation;
- discussions with Dr Magraith following Dr Magraith's examination for the medical assessment of Ms Gehrig;
- Dr Magraith as an "obsessional and accurate note-taker";
- her (Dr Symonds) understanding of the duties of occupational nurse at the minesite;
- analgesics/drug therapy;

- knee operations/back injuries;
- the risk(s) of further injury.

Dr Symonds graduated from the University of Adelaide with a Bachelor of Medicine and Surgery, has a diploma in Obstetrics and is a fellow of the Royal Australian College of General Practitioners. In 1992/93 she had been a member of a group of general practitioners who arbitrated on worker's compensation cases before the Work Health Authority, when there were conflicting medical opinions.

Dr Symonds stated that in negotiating the contract to perform medical assessments with MRM she undertook to do some research into lower back problems. To this end she approached a Ms Pam Garton, an occupational therapist with NT Rehabilitation Service.

Ms Garton referred Dr Symonds to the Work Health Authority library, who were able to provide her with medical references - Dr Symonds then compiled a "folder" to be used as a resource by doctors within the Centre.

Dr Symonds referred to several studies on back injuries, and their predictors.

Dr Symonds disagreed with Mr Baddeley's evidence in several respects, particularly in relation to the likelihood of Ms Gehrig suffering further back pain because of her past history. It was Dr Symonds view that the history of back pain was an indicator of future back pain.

Dr Symonds also considered the previous back and knee injuries compounded the problem, whereas Mr Baddeley did not.

Dr Symonds had not examined Ms Gehrig, and stated her opinions of Ms Gehrig's problems were based on the health assessment record (referred to by Dr Symonds as the health screening questionnaire).

Dr Symonds stated her other concerns relating to Ms Gehrig were the knee and use of Valium - the evidence to that effect as follows:

Ms McFie:

"And those three things added up to the reasons as to why you decided not to recommend her, and yet you felt that was a different situation to Judy Beaumont."

Dr Symonds:

"Yep."

Ms McFie:

"On the actual medical assessment form which Dr Magraith carried out, completed. I know you didn't complete it. In the recommendation section, she puts, it says there - would not recommend employment because of previous history of back pain. Can you explain to me why that was the only thing, from the best of your knowledge, why you think that would be the only thing that she put down in that recommendation section, just the history of back pain."

Dr Symonds:

"Sorry, I didn't take that in."

Ms McFie:

"Sorry. On the medical assessment of fitness form which Dr Magraith carried out for Ms Gehrig."

Dr Symonds:

"Right, I have it in front of me."

Ms McFie:

"In the recommendation section she said - would not recommend employment because of previous history of back pain. From your evidence and from Dr Magraith's evidence there were other factors which also came in."

Dr Symonds:

"Yes. Yes there certainly were. I don't know, I didn't, she wrote this on 3rd October, so she didn't show this to me or discuss the findings"

of the whole paper. And we certainly discussed that it was the combination factors of the knee and the back and the Valium use that was significant. And I don't know why she didn't write that there."

Ms McFie:

"Just one final question. Would you expect that McArthur River would accept the professional opinion from Dr Magraith or from yourself when you make a recommendation regarding a person."

Dr Symonds:

"Yes. Well, that's what they pay us to do."

In relation to her knowledge of the terrain at the minesite the following evidence was given:

Ms McFie:

"Can you tell me what your knowledge of the surroundings of the McArthur River minesite was at the time when you actually carried out the assessment of Ms Gehrig."

Dr Symonds:

"I guess that I knew that it was a new mine. Just recently been carved out of the wilderness so to speak and so there wasn't a large amount of sealed roads. There was a sealed road in but the rest was just a graded site and that it was a new operation, the buildings were demountables and that's probably all that I can really say about it."

Ms McFie:

"What's the relevance of the buildings being demountables."

Dr Symonds:

"Well, because they're sort of temporary. They're up on stilts, there's a couple of steps to get up. There's a, I didn't know what was between the buildings but I didn't imagine there was an extensive network of footpaths."

Ms McFie:

"And were you aware that the actual environment within the mine would be very rough and likely to be very uneven ground."

Dr Symonds:

"Yes certainly, in the mine itself."

Ms McFie:

"And other areas around the mine also."

Dr Symonds:

"Yes. I was filled in by, the first person I did a medical on for McArthur River Mine was the original mine manager. And we had a long discussion during that about what the conditions were at the site."

Ms McFie:

"And that discussion has subsequently been confirmed by your visit out there."

Dr Symonds:

"Yes."

Ms McFie:

"Do you believe that a medical practitioner could make a proper assessment of a person for a job at McArthur River without knowing about the actual job and about the minesite and the environment."

Dr Symonds:

"Well, we had basic job specifications provided to us."

Ms McFie:

"I'm sorry, I'm talking about someone other than yourselves. Someone that didn't have your knowledge and your familiarity with McArthur River."

Dr Symonds:

"I think a lot of general practitioners do this sort of work, and providing they've had experience doing pre-employment medicals, I don't see that there would be a problem."

Ms McFie:

"But your knowledge of the site and of the particular job were of relevance when you were assessing Ms Gehrig."

Dr Symonds:

"Yes, but anyone else who happened to get the contract with McArthur River Mine could equally have -"

Ms McFie:

"Sorry, the point I'm trying to make is that someone that hadn't got the contract, and someone who hadn't got that knowledge, had the discussions with the Mine Manager, wouldn't know about the job of occupational health nurse."

Dr Symonds:

"Oh, I see what you mean. Yes, yes. It was certainly helpful to have spoken to management about that in the course of negotiating the contract. We spoke at length about the site."

Ms Gehrig questioned Ms Beaumont (James) being assessed by Dr Symonds as suitable for "category 10" employment while Ms Gehrig was assessed by Dr Magraith as unsuitable and suggested it would have been of benefit for Dr Symonds to have personally examined her (Ms Gehrig) after Dr Magraith came to Dr Symonds with her findings. (Dr Hackett had initially carried out an assessment of Ms Beaumont in Katherine).

Dr Symonds responded:

"The difference between what happened with my examination of Judy Beaumont, and your case is that Dr Magraith is in my employment, and she understands the procedure that I had set up. And we had been through it together prior to her undertaking medicals. And knowing Dr Magraith very well I was quite happy with Dr Magraith's,

I'm quite happy knowing that she does those things correctly. Whereas Dr Hackett in Katherine is an unknown quantity to me, and some of the medicals I receive from doctors around Australia are pretty appallingly done. And so I can't, because those people are not within my sphere of influence, I have, I can't rely on them. But in Dr Magraith's case, I could not see any extra benefit in, she'd gone through the same routine that I had gone through, that there was. She's a very obsessional and accurate note taker, and I have no reason to -"

Ms Gehrig:

"How is that Dr Magraith would not be able to remember certain aspects of the medical then."

Dr Symonds:

"Well, I can't remember certain aspects of medicals I did last week. But that's why we take notes."

Mr Hilton Hurst, Employment Services Officer with MRM also gave evidence:

Mr Hurst's evidence covered:

- Employment procedures including pre-employment medical assessments.
- The offer of employment to Ms Gehrig.
- The medical assessment.
- Ms Gehrig's request for a second medical assessment/opinion.
- The reason for the withdrawal of the offer of employment to Ms Gehrig.
- Delays in advising Ms Gehrig of company decisions regarding her medical assessment/employment.
- Informal reports on Ms Gehrig's performance of her duties at the minesite while employed by Fluor Daniel.

Mr Hurst's evidence emphasised the company's complete reliance on the Cavenagh Medical Centre for the medical assessment of prospective employees, as the following exchange illustrates

Ms McFie:

"When you spoke to Mr Lewins' the General Manager of McArthur River in about whether or not to, or what you were going to do in terms of Ms Gehrig's recommendation, what was Mr Lewins' decision."

Mr Hurst:

"Probably the same as mine. I mean we pay Cavenagh Medical Centre to do a job for us. I mean, that's why we have the medicals, that's why we follow the Act, have the medicals and you know, they're the ones that make the decisions for us."

(The Act referred to is the Northern Territory *Mine Management Act*).

It was also clear from Mr Hurst's evidence that although the company took its responsibilities under the Mine Management Act seriously, a number of employees had been engaged without a medical assessment, including casual employees.

On the issue of as to whether a "bad back" would preclude an occupational nurse acting in an emergency at the minesite Mr Hurst responded to questions from Ms McFie and later Mr Alderman as follows:

Ms McFie:

"Mr Hurst, can you tell me, do you believe the ability of an occupational health nurse at McArthur River Mine to perform in an emergency, where an emergency occurs on the mine, is a fundamental part of that job."

Mr Hurst:

"Yes, I'd say so."<sup>1</sup>

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<sup>1</sup> page 182, Transcript)

Mr Alderman:

"Oh sorry, yes I'll try and pick you up on that. So you've got a mines rescue squad, and they would go with the nurse."

Mr Hurst:

"That's right."

Mr Alderman:

"To an emergency. And they would be there to assist. So in fact having a back injury in an emergency, it stops you doing the lifting and all these other things, isn't particularly important."

Mr Hurst:

"Well, you know, at emergency times there would be others around."

Mr Alderman:

"There would be others around to help, yes. If somebody has a restriction on them, to lift and carry things like that, they would be able to get others to come and help them."

Mr Hurst:

"Yes."

Mr Alderman:

"OK. So I'll ask you again. It's not particularly important then, that in an emergency that the occupational nurse be required to lift and carry people and other heavy items."

Mr Hurst:

"Probably not."

Mr Alderman:

"And so it's not really one of the high priorities of MRM that the occupational nurse in an emergency be a person without a bad back."

Mr Hurst:

"If the medical evidence that came back from Jenny's said the same as Judy Beaumont we wouldn't have a problem." <sup>2</sup>

Mr Hurst:

"I don't think - we don't sit down and say OK, this lady here has got, can't lift anything over 15 kg, therefore she's any less important than anyone else. I mean the fact is that if she obviously can't lift 15 kg, she makes, she does the lifting properly, she does everything properly like she was obviously taught to do. It's still, but it is still possible to work in that position under that Group 10 category."

Mr Alderman:

"Group 10 category, and it's possible if you've got a bad back to work for MRM in that position."

Mr Hurst:

"Well, I've got a bad back, I mean lot of people have got a bad back."

Mr Alderman:

"But we're talking about the position of occupational nurse."

Mr Hurst:

"Um."

Mr Alderman:

"All right. In your position of an occupational nurse, it's OK for them to be employed with a bad back."

Mr Hurst:

"That's right."<sup>3</sup>

Throughout his evidence, Mr Hurst referred to the decision not to employ Ms Gehrig being based solely on her medical assessment by Cavenagh Medical Centre. Mr Hurst did not consider it worthwhile to obtain a second medical assessment, as he indicated in responses to questions from Mr Alderman.

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(<sup>2</sup> page 196 Transcript)

(<sup>3</sup>page 197 Transcript)

Mr Alderman:

"I put it to you then, that the reason you didn't employ Jenny Gehrig was you didn't want anybody with disabilities to be employed by MRM."

Mr Hurst:

"That's not true. I mean, the only reason we didn't employ Jenny was because of the recommendation of Cavenagh Medical Centre."

Mr Alderman:

"OK. And you don't make any assessment as to whether that recommendation was flawed or not."

Mr Hurst:

"No. That's why we pay them."

Dr ASHOK SANKARAYYA (known as Dr Ash) gave evidence on behalf of Ms Gehrig.

Dr Ash graduated from the University of Birmingham Medical School in England, and his qualifications are MD, CHB, with a Diploma in Law.

Dr Ash's evidence related to his medical examination of Ms Gehrig. This was carried out at her request following the withdrawal of the job offer by MRM because of the medical assessment of Cavenagh Medical Centre.

Dr Ash's examination was carried out on 27 May 1995 and the examination was in accordance with proforma used for the Company (MRM) assessment.

Dr Ash also examined Ms Gehrig's knee and back. Ms Gehrig was able to perform the tests for "minimal muscle fitness" with the exception of "touching her toes".

It was Dr Ash's conclusion that Ms Gehrig's spine appeared to be in very good condition, and he went on to state:

"I did know that she'd had a quite significant injury to the spine previously. But it appeared to perform almost normally. The only reservation was clearly having no ability to touch her toes, and a slight loss of lumbar lordosis which I've certainly seen in plenty of other people."

Dr Ash was quite unequivocal about Ms Gehrig's knee stating:

"I don't believe the knee disables her at all. No knee that has been operated on can be considered normal, but it seems to function quite well."

Dr Ash was not able to state positively whether or not Ms Gehrig would have a greater risk of back injury because of her medical history, however he did state:

"I don't necessarily think that there's a higher risk in the particular case of Ms Gehrig having severe back problems just because she'd had one before. She may have minor back problems, but not severe ones."

Dr Ash 'outlined' his knowledge of the duties of an ambulance officer and indicated he felt Ms Gehrig would have been able to carry out the duties of occupational nurse at the time he examined her.

The question of Ms Gehrig's use of Valium was raised with Dr Ash, who disagreed with Dr Symonds' opinion that Valium was an unusual drug to take for back pain.

Dr Ash regarded questions as to Valium's effect on Ms Gehrig as speculative and theoretical.

Dr Ash was not concerned that the rough terrain at the minesite would cause any particular problems for Ms Gehrig, and considered

"...if the ground is so uneven, I don't believe that she is any more likely other than being blessed with bad luck, to go over on her knee

or her back than anybody else who is walking over rough terrain at speed, or running over rough terrain."

Dr Ash made it quite clear he was neither commenting on Cavenagh Medical Centre's assessment, nor contradicting other medical conclusions. He was putting forward his conclusions based on his examination of Ms Gehrig on 27 May 1995. Dr Ash stated:

"...I couldn't tell you any more now than I could before I saw her, whether she'd be fit for work at McArthur River. But regarding her back and her knee, I can say".

### The Submissions

Ms Gehrig outlined the grounds on which she believed she had been discriminated against, and her humiliation at having organised a party to celebrate her new employment at the Mine, and then having the offer of employment withdrawn because of being assessed as medically unfit by Dr Magraith (Cavenagh Medical Centre).

Ms McFie, for the respondent Company, conceded that Ms Gehrig had been denied a position with McArthur River Mine's on the basis of an unsatisfactory medical examination, and that the denial was discriminatory in that sense, however Ms McFie submitted that the discrimination was permitted under the legislation because of the following Statutory provisions:

- *Section 53 of the Anti-Discrimination Act* which provides:

*"That a person may do an act that is necessary to comply with an Act or Regulation of the Territory.*

*Section 15 of the Mine Management Act 1990 -*

#### 15. DUTIES OF MANAGER

*(1) The Manager of a mine shall -*

*(a) ....*

(b) provide and maintain a working environment at the mine that is, so far as is practicable, safe and without risk to the health of any person at the mine; and

(c) ....

- Section 35 of the *Anti-Discrimination Act* which provides that:

*a person may discriminate against another person in the area of work if the discrimination is based on (a) a genuine occupational qualification which the other person is required to fill or (b) the other person's ability to adequately perform the inherent requirements of the work even where the special need of the other person has been accommodated.*

- Section 58 of the *Anti-Discrimination Act* which provides that:

*a person may discriminate against another person who has a special need if the other person would require special services and facilities and it is unreasonable for the person to supply those special services or facilities."*

Ms McFie submitted that it had been established that Dr Magraith was more than qualified to make a judgement of Ms Gehrig's abilities to perform the role of occupational health nurse - and that the evidence showed Dr Magraith has based her assessment on a number of criteria:

- A knowledge of the duties of occupational health nurse.
- Ms Gehrig's medical history.
- A comprehensive physical examination including tests for muscular skeletal fitness.
- A knowledge of the rough and uneven ground around the minesite
- Knowledge that occupational nurses at the minesite work a "twelve hour or twelve hours on call shift".

This evidence had been supported by Dr Symonds, with whom Dr Magraith had consulted before forwarding the medical assessment to MRM.

Ms McFie submitted that it had been established that Dr Symonds had considerable qualifications particularly in the area of occupational health.

Ms McFie referred to Mr Baddeley's evidence in some detail, and it was her submission that relevant factors including Ms Gehrig's knee injury, her usage of Valium, the rough terrain, the specific duties of an occupational nurse and the extended shifts had not been properly taken into account by Mr Baddeley.

Ms McFie also referred to the evidence given by Dr Ash in similar terms.

Ms McFie referred to Mr Baddeley's statement that a history of back pain is no longer accepted as a reliable indicator of back pain and pointed out that Dr Magraith and Dr Symonds disagreed with that opinion, with Dr Symonds producing medical papers supporting her view.

Ms McFie submitted that it is not the role of the Commissioner to assess the evidence of Dr Magraith as against the evidence of any other medical practitioner, nor to judge whether Dr Magraith or Mr Baddeley was correct, but rather to consider whether it was reasonable for the company to rely on the opinion of Dr Magraith, who Ms McFie referred to as having provided an expert medical assessment. Ms McFie referred to the case of *Jamal v Secretary of the Department of Health - New South Wales, court appeal 1988*.

Ms McFie referred to the employment by the company of Ms Beaumont (now Ms James) as a "category 10" employee, based on the recommendation of Dr Symonds, and to the obligations imposed on the company by *Section 15* of the *Mines Management Act*.

Ms McFie specifically addressed the role of an occupational nurse in an emergency and the way in which that role should be considered in finding whether, on the balance of probabilities, the respondent company failed to accommodate Ms Gehrig's "special need".

Ms McFie submitted that for the purposes of considering this particular matter the employment of Ms Beaumont was irrelevant, and referred to the decision of the Victorian Equal Opportunity Commissioner in *Cooper v Ford Motor Company of Australia Ltd (1978)*.

Ms McFie referred to the exemption contained in *Section 58* of the *Anti-Discrimination Act* which she submitted would be triggered by the statutory duty of care imposed by *Section 15* of the *Mines Management Act*, and Ms McFie referred at length to the reasonableness of MRM Company relying on the recommendation of Dr Magraith citing several cases and in support of her submission on this point.

Mr Alderman's submission first addressed the issue of discrimination as defined in the *Anti-Discrimination Act*, and the exemptions contained in *Sections 35, 53* and *58* of that Act.

Mr Alderman addressed in some detail the issues of "inherent requirements" and "disability" or ("impairment") in the area of work and tabled a number of cases which addressed these parts together with the issues of whether it is reasonable to rely solely on a medical opinion.

Mr Alderman also referred to a distinction between a medical opinion based on a person's medical condition at the time of the examination and a medical opinion based on what might happen in the future.

The case of *Madafferri v City of Northcote (1994)* was raised, and parties to the complaint were invited to make written submissions on the relevance of the Madafferri decision to the matter of *Gehrig v MRM*.

In *Madafferri* it was held that reliance on the results of a medical examination did not release the respondent from any liability - there was a responsibility for the respondent to ensure the standards applied by the doctor were not discriminatory.

Submissions from Ms McFie and Mr Alderman specifically addressing this issue were received and fully considered.

In particular, Ms McFie submitted that Dr Magraith's assessment of Ms Gehrig took into account her medical, personal and work history - that Dr Magraith used an appropriate and non-discriminatory method of assessing Ms Gehrig and her recommendation was soundly and appropriately based on the full information in the particular case, and accordingly MRM was entitled to rely on Dr Magraith's opinion that Ms Gehrig not be employed as an Occupational Health nurse.

## **FINDING**

Ms Gehrig's complaint is of discrimination on the grounds of employment in the area of work and/or failure to accommodate a special need, contrary to *Section 19(1)(j)* and *Section 24* of the *Anti-Discrimination Act*, by being denied employment as an occupational nurse by MRM.

The offer of employment made to Ms Gehrig was withdrawn on receipt of a medical assessment carried out on the company's behalf by Cavenagh Medical Centre - the examining doctor was Karen Magraith who consulted with her senior partner Dr Diane Symonds prior to signing the assessment report and sending it to Mr Hilton Hurst of MRM.

The recommendation is as follows:

"Would not recommend employment because of previous history of back pain. This injury could easily be aggravated even without performing heavy lifting."

It was Mr Hurst's evidence, which was not disputed, that the company's decision not to employ Ms Gehrig was solely based on that medical assessment and recommendation.

Subsequently Mr Hurst wrote to Dr Karen Magraith:

- outlining the duties of an occupational nurse,

- advising Dr Magraith that Ms Gehrig had lodged a complaint of discrimination on the basis that "she was unfit for the position",
- requesting an explanation of the recommendation not to employ Ms Gehrig "by reference to the results of your examination and the duties which she would have been required to perform".

Dr Magraith Responded by letter dated 19 December 1995, and the relevant passages are as follows:

"I examined Ms Gehrig on 2 October 1995 for the purpose of assessing her medical fitness for employment as an Occupational Health Nurse. When I saw her I was aware that the proposed position would not normally involve heavy lifting or manual work. However, I recommended against her employment on the basis of her history, examination findings, and what is known about the cause of back pain.

Ms Gehrig informed me that while working for St John's Ambulance in 1980 she sustained an injury which was diagnosed as lumbar disc protrusion. Since that time she had had several weeks in total off work as a result, the most recent of which was in approximately February 1992 for about one week. She said that she still experienced some low back pain, for which she took Diazepam (Valium) tablets (5 mg) approximately once or twice a week.

She also gave a history of surgery for realignment of her right patella (part of the right knee) in 1990. This was not work related. In 1991 she was kicked at work and the knee became painful again. She had surgery in mid 1995 on this knee again.

On examination there was reduced lumbar lordosis, and reduced flexion of the lumbosacral spine (she was able to reach as far as her mid shins). There was no tenderness. Straight leg raising was to approximately 70 degrees on both sides, with further lifting resulting in back pain. Ms Gehrig was unable to perform three out of the four

movement tests that we routinely perform to assess the back (for example, lying flat and raising the legs straight up for ten seconds).

Examination of the right knee was normal apart from the scars from recent surgery, and slight tenderness around the joint line....

.....In assessing Ms Gehrig's fitness for employment, I considered she had a significant history of back injury. Even without heavy lifting and manual work it is my opinion that she would have an increased chance of injuring her back at work compared to someone without her past history.

There is epidemiological research which clearly identifies a past history of back pain as a risk factor for future back injury and pain. For example, an orthopaedic surgeon, R.W. Porter, in a conference on musculoskeletal disorders at work concluded that 'One of the most reliable indicators of future back pain, is a history of back pain.' He quoted several sources of research to come to this conclusion.

On the basis of all the information available to me, and after discussing the matter with a senior General Practitioner, I decided that it would not be in MRM's best interest to employ Ms Gehrig and that employing her would entail a risk of future back pain with possible time off work and other associated experiences.

I hope this information helps to clarify the situation."

In its defence the respondent company has relied on three clauses in the *Anti-Discrimination Act* which it claims makes the (admitted) discrimination based on physical impairment not unlawful.

These clauses are:

- *Section 53* of the *Anti-Discrimination Act* which provides:

"That a person may do an act that is necessary to comply with an Act or Regulation of the Territory.

*Section 15 of the Mine Management Act 1990.*

15. DUTIES OF MANAGER

(1) The Manager of a mine shall -

(a) ....

(b) provide and maintain a working environment at the mine that is, so far as is practicable, safe and without risk to the health of any person at the mine.

(c) ....

- *Section 35 of the Anti-Discrimination Act* which provides that:

a person may discriminate against another person in the area of work if the discrimination is based on (a) genuine occupational qualification which the other person is required to fill or (b) the other person's ability to adequately perform the inherent requirements of the work even where the special need of the other person has been accommodated.

- *Section 58 of the Anti-Discrimination Act* which provides that:

a person may discriminate against another person who has a special need if the other person would require services and facilities and it is unreasonable for the person to supply those special services or facilities."

The company also submitted it was entitled to rely on the advice of Dr Karen Magraith of Cavenagh Medical Centre, as Dr Magraith had used an appropriate and non-discriminatory method of assessing Ms Gehrig and her recommendation was soundly and appropriately based on the full information in the particular case.

It was, therefore, reasonable to rely on that assessment and accordingly the company had not unlawfully discriminated against Ms Gehrig.

I shall address these points so far as possible in the sequence they were raised.

- *Section 53 of the Anti-Discrimination Act and Section 15 of the Mine Management Act.*

Evidence was given on the failure of MRM to ensure all staff, including temporary staff, were medically assessed prior to commencing work at the minesite. Notwithstanding that fact, I accept that there is a duty of care imposed on the company by the operation of *Section 15 of the Mine Management Act* - a duty which is not removed by poor management or recruitment practices.

It follows therefore that if *Section 15* of the Act precluded the employment of Ms Gehrig the exemption under *Section 53 of the Anti-Discrimination Act* would apply and the complaint of discrimination based on impairment would fail.

It is important to note that *Section 15 (Mine Management Act)* does not, of itself, bar all people with an impairment from working at a minesite - that fact is accepted by the company with its categorisation of employees with physical impairments, and its admirable policy of employment of such people with suitable arrangements being put in place to accommodate their special need. The employment of Ms James as a category 10 employee is such an example.

*Section 15 (b)* contains the phrase "so far as is practicable" - a necessary qualification as no minesite - indeed any site - could conceivably be absolutely safe and without any risk to the health of any person.

Considerable evidence was directed at Ms Gehrig's ability to negotiate the terrain, given the history of her knee injury, and her ability to respond to an emergency.

Evidence on this point was given by four medical practitioners Doctors Magraith and Symonds (Cavenagh Medical Centre), Dr Ash, a private medical practitioner who examined Ms Gehrig, and Mr Baddeley, an orthopaedic surgeon familiar with Ms Gehrig's medical history, who had operated on her knee.

While there were clear differences of opinion with neither Mr Baddeley nor Dr Ash considering the knee posed a significant risk, I note that at the time of the examinations none of the medical practitioners had visited the site - indeed Dr Magraith's knowledge of the site and the duties of the position of Occupational Nurse came largely from the complainant herself, Ms Gehrig.

I note also that Ms Gehrig had worked at the minesite for some weeks, and was quite familiar with the terrain.

As well, Ms Gehrig as a trained paramedic with years of experience in her field, was able to work in the area of the minesite without incident and on the evidence, without harm to herself or anybody else.

In her submission, with reference to the terrain at the minesite, the knee injury, the use of Valium, the specific duties of an occupational nurse and the requirement to be "twelve hours on twelve hours on call", Ms McFie stated "Mr Baddeley admitted that given the above factors it was reasonably possible for a medical practitioner to reach the opinion that by carrying out the role of occupational nurse Ms Gehrig may be placing the health and safety of herself and other people at the minesite at risk".

What Mr Baddeley actually said was "I think that opinion as voiced, is an understandable opinion to come to. I may not agree with it, but I can understand how that opinion could be held" (page 27 of the transcript).

I find that there is nothing in the duty of care imposed by *Section 15(b)* of the *Mines Management Act* which would of itself preclude the employment of a person such as Ms Gehrig.

It follows that the exemption contained in *Section 53* of the *Anti-Discrimination Act* does not come into effect.

- *Section 35* of the *Anti-Discrimination Act*.

This section is central to the consideration of the complaint of discrimination brought by Ms Gehrig, and it is necessary to first consider what are the "genuine

occupational qualifications" Ms Gehrig would be required to fill and what are the "inherent requirements of the work."

Ms Gehrig's occupational qualifications for the position of "Occupational Health Nurse" were accepted by the company and are not in dispute.

The "inherent requirements" of the work must be gleaned from the duty statement, or job description, as determined by the company.

Those duties are:

- Treating the sick and injured.  
Most treatment is carried out in the medical first aid room. In the event of an emergency the nurse may be required to drive the ambulance to the emergency scene but would enlist any available personnel to assist and do any necessary lifting.
- Cleaning the ambulance inside and out.
- Conducting stock takes of and ordering medical supplies.
- Implementing occupational health and safety policies.
- Cleaning the benches in the medical first aid room.
- Ensuring that all first aid kits are present and stocked.

In attempting to identify the "inherent requirements" of the position (other than the requisite professional qualifications) there appears to be:

- a requirement to live at the minesite while on duty.
- to be available "on call" at all times.
- to be physically able to treat the sick and injured with transport and assistance available for lifting injured patients.

On the evidence before me I have not been able to identify any impediment to a person such as Ms Gehrig fulfilling these essential requirements.

I now turn to the issue of an emergency, and the duty statement is quite clear on this point -

- "Treating the sick and injured.

Most treatment is carried out in the medical first aid room. In the event of an emergency the nurse may be required to drive the ambulance to the emergency scene but would enlist any available personnel to assist and do any necessary lifting."

There is no indication that Ms Gehrig (or any other occupational nurse) would be left to lift and manage the sick and injured without assistance. This is supported by the evidence of Ms James who stated that in an emergency she would be able to call on "occupational first aiders" for assistance.

Ms James is employed as an Occupational Health Nurse, and as a category 10 employee is not allowed to lift weights above 15 kg. It follows that an ability to lift heavy weights is not an inherent requirement of the position of Occupational Health Nurse at the McArthur River minesite (MRM).

I have also noted Dr Magraith and Dr Symonds concern that back pain could recur without lifting, but give greater weight to the evidence of Mr Baddeley on this matter.

There was extensive evidence relating to Ms Gehrig's use of Valium, with clear differences of opinion on its effect and relevance to Ms Gehrig's ability to perform her duties.

Despite the amount of conflicting evidence placed before me on this matter, I note also that the use of Valium was not included in the original recommendation not to employ Ms Gehrig, nor was it given as a reason not to employ Ms Gehrig in the letter of 19 December 1995 from Dr Magraith to Mr Hurst, that letter having been written after receipt of the duty statement.

I note also that during her time at the minesite Ms Gehrig did not take Valium - I accept her statement that she takes her responsibilities as an occupational nurse seriously.

In addressing the conflicting medical opinions given in evidence, Ms McFie submitted that it is not the role of the Commissioner to assess the evidence of Dr Magraith against that of any other medical practitioner - however Ms McFie had called as a witness Dr Symonds, the senior partner of Cavenagh Medical Centre, who gave evidence in support of Dr Magraith.

While I accept Ms McFie's submission that neither the company nor I as Commissioner is medically qualified, it is of relevance that four medical practitioners (two of whom are in partnership) gave conflicting evidence on a history of back pain as an indicator of future back pain and back problems. This is central to the original recommendation not to employ Ms Gehrig.

Ms McFie described Dr Magraith's assessment as an expert medical assessment. While I found Dr Magraith a competent and credible witness, I do not regard her as an expert in the field of back pain and back injury. Similarly, I found her partner, Dr Symonds, who disagreed with the evidence of Mr Baddeley, to be a competent and conscientious medical practitioner and credible witness who has conducted some research in muscular skeletal disorders, but I do not consider her an expert in back pain and back injuries.

I give greater weight to the evidence of Mr Baddeley an orthopaedic surgeon with expertise in this area. Mr Baddeley's prognosis was one of likely improvement, not deterioration, of Ms Gehrig's back pain. I note that while Mr Baddeley shared with the other medical practitioners a lack of first hand knowledge of conditions at the minesite and duty statement he had greater knowledge of Ms Gehrig's past work history and medical treatment in relation to both her back and knee.

In her evidence, Dr Symonds referred to the meticulous way in which Dr Magraith carried out her duties, and referred to her as a compulsive note taker. However Dr Symonds was unable to explain how in light of this evidence, Dr Magraith's recommendation not to employ Ms Gehrig only related to the back problem, and did not refer the knee injury or the Valium.

It is worth restating that Mr Hursts' evidence was that the decision not to employ Ms Gehrig was based solely on the recommendations of Dr Magraith - which related to the back pain and previous back injury.

I turn now to the question - was it reasonable for the respondent company to rely solely on the medical assessment and recommendation from Dr Magraith of Cavenagh Medical Centre - which is contracted to perform medical examinations and assessments for the company.

After careful consideration of all the evidence by way of direct evidence, submissions and cited cases, I find that in all the circumstances of this particular matter it was not reasonable to so rely.

The company MRM is the prospective employer, not Cavenagh Medical Centre and MRM must take into account all matters relevant to a prospective employee's application on a non-discriminatory basis.

In this case I find the respondent company failed to adequately consider Ms Gehrig's immediate past employment as an Occupational nurse at the minesite - including the fact that the company had had the opportunity to assess her work performance "on site", and on that basis had made an (conditional) offer of employment.

The company failed to take into account the fact the original medical assessment was done without any duty statement being provided to the medical practitioner and was not "task specific", a phrase unknown to Dr Symonds, but on Dr Magraith's evidence the medical examination was a comprehensive one used for all employees.

The company failed to seek independent advice when faced with conflicting medical opinions (one of which was from an orthopaedic surgeon), but continued to rely solely on advice from Dr Magraith - at this point I must state that I do not consider the evidence of Dr Symonds to be independent as she was party to the original assessment, that is, she, with Dr Magraith, was the original decision maker.

The company did not take sufficient account of the fact that the letter from Dr Magraith to Mr Hurst dated 19 December 1995, did not explain her recommendations by reference to the results of the examination as against the duty statement contrary to the request from Mr Hurst.

On the evidence before me, the company had not taken steps to assure itself that Cavenagh Medical Centre was aware not only of contemporary occupational health and safety matters, but also of relevant anti-discrimination principles as they relate to pre-employment medical assessments.

Was the medical assessment process conducted in accordance with contemporary Anti-Discrimination law and practice?

I find it was not.

The evidence of the medical practitioners from Cavenagh Medical Centre, Dr Magraith and Dr Symonds indicated they relied heavily on previous back pain as an indicator of future back pain and back problems, and did not take sufficient account of Ms Gehrig's contemporary state of health, her progress through a rehabilitation program, the fact that she had worked without difficulty at the minesite, and her training in the treatment of accident and injury which would assist her in self-management of her impairment.

As they had not visited the minesite their assessment of Ms Gehrig's ability to negotiate the terrain was flawed. Cavenagh Medical Centre did not have a detailed duty statement, but relied on anecdotal evidence from the complainant. The medical assessment was based on a general assessment used for all positions at the minesite and was not task specific. The second assessment by Dr Magraith, although in receipt of a duty statement, was essentially a restatement of the original decision.

Accordingly I find that the respondent Company MRM, discriminated against Ms Gehrig on the basis of her impairment in the area of work, contrary to *Section 19(1)(j)* of the Northern Territory *Anti-Discrimination Act*.

With regard to the complaint of failure to accommodate a special need, I do not consider the employment of Ms James relevant, other than it demonstrates the company is quite able to accommodate a special need if required.

On the evidence before me, with particular regard to the duties outlined in the duty statement and Ms Gehrig's experience as a paramedic I do not find, on the balance of probabilities, that any special need exists, and that part of the complaint from Ms Gehrig is dismissed.

*Section 88. ORDERS AFTER HEARING*

"(1) If, after the hearing of a complaint, the Commissioner finds the prohibited conduct alleged in the complaint is substantiated, the Commissioner may make on or more of the following orders:

- (a) an order requiring the respondent not to repeat or continue the prohibited conduct;
- (b) an order requiring the respondent to pay the complainant or another person, within a specified period, an amount, being an amount not more than that prescribed, that the Commissioner considers appropriate as compensation for loss or damage caused by the prohibited conduct;
- (c) an order requiring the respondent to do specific things to redress loss or damage suffered by the complainant or any other person because of the prohibited conduct;
- (d) an order declaring void all or part of an agreement made in connection with the prohibited conduct, either from the time the agreement was made or subsequently.

(2) In this section, the specified things a respondent may be required to do, include, but are not limited to the following:

- (a) employing, reinstating or re-employing a person;

(b) promoting a person;

(c) moving a person to a specified position within a specified time.

(3) In this section, "damage", in relation to a person, includes the offence, embarrassment, humiliation, and intimidation suffered by the person.

(4) If, after the hearing of a complaint, the Commissioner finds the prohibited conduct alleged in the complaint not substantiated the Commissioner shall make an order dismissing the complaint."

Given the circumstances of this matter, I do not believe it would be in the best interests of the parties to order the respondent company to employ the complainant, and confine my order to one of compensation.

Following the withdrawal of the offer of employment from MRM, Ms Gehrig sought alternative employment. She received unemployment benefits of \$258.00 a fortnight until 7 January 1996, when she obtained a position with Project Plumbing with an initial wage of \$11.50 per hour increasing to \$12.00 per hour after three months.

Her paysheets indicate a net income of (approximately) \$483.00 per week or \$25116 per annum.

The notional salary offered by MRM was \$34560 per annum, which after tax equated to \$26788 plus an allowance of \$11106, totalling \$37894 or \$728.70 per week.

This is a difference of \$245.70 per week, compared to her salary at Project Plumbing and \$600 per week while on unemployment benefits.

Ms Gehrig had been due to commence with MRM 10 October 1995, and I calculate the loss of earnings until the date of the Hearing at approximately \$12470.

In evidence Ms Gehrig allowed to a degree of humiliation at having to advise her friends that she was not to take up the position at MRM, but to her credit stated

she intended to get on with her life, and did not dwell on her preferred option (employment at the minesite).

Accordingly pursuant to Section 88 of the Anti-Discrimination Act I order that the respondent company, McArthur River Mining Company Pty Ltd, pay the complainant Jennifer Gehrig the sum of :

\$12470	loss of earnings
<u>\$1500</u>	hurt, humiliation and distress
\$13970	total

DAWN LAWRIE  
HEARING COMMISSIONER