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## **EXPERT COMMITTEE ON ETHICAL ISSUES AND PROFESSIONAL STANDARDS**

### **Ethical considerations in connection with drug testing in the workplace**

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## I. Introduction

Before beginning any ethical reflexion on drug testing prior to employment or in the workplace, it seems worth drawing attention to the key principles upheld by our European democracies.

### a. Right to respect for private and family life

The respect of Human Rights as defined in the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950 is safeguarded by Article 1 of this Convention. In Article 8, the Convention states that "*there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society (...) for the protection of health or morals, or for the protection of the rights and freedoms of others.*"

Article 5 of the Convention stipulates in paragraph 1 that "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law" and specifies in sub-paragraph (e) that deprivation of liberty may be justified in the following case: "lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants". It is for the Contracting States to equip themselves with laws enabling them to establish the legal frameworks within which such persons could be deprived of their liberty. We know that these laws vary over time and from one country to another. Some countries, such as Belgium, have abolished their vagrancy laws. Others have made improvements to the laws permitting compulsory hospitalisation of some mentally ill persons. Within these legal frameworks, practices also vary over time and from one region to another. For example, while some alcoholics were routinely hospitalised in Belgium up to the 1980s, the medical profession has opposed this for the past two decades on the grounds that any treatment of addiction to a substance calls for motivation, and hence co-operation, on the part of the person concerned.

General principle 5.13 adopted by the ILO at its 267<sup>th</sup> session, in November 1996, states that "*workers may not waive their privacy rights.*" Respect for the right to private and family life is, moreover, expressly recognised in most of Europe's Constitutions.

### b. Right to work

The European Social Charter, adopted on 18 October 1961, clearly states that "*everyone shall have the opportunity to earn his living in an occupation freely entered upon*" and that "*all workers have the right to safe and healthy working conditions*".

ILO Convention No. 159 of 20 June 1983 provides for equal opportunities for disabled workers and other workers and is designed to enable people with disabilities to obtain and keep a suitable job.

Lastly, European Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation prohibits, throughout the European Union, "*any direct or indirect discrimination*" based, inter alia, on "*disability*". Discrimination is taken to occur where one person is treated less favourably than another in a comparable situation on grounds, inter alia, of disability or age. A first exception provides that, in certain unspecified circumstances "*a difference of treatment may be justified where a characteristic related to (...) disability (...) constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate*". A second exception may be made to the principle of non-discrimination where national law lays down measures necessary "*for the protection of health*", particularly in the workplace, and "***for the protection of the rights and freedoms of others***".

c. Principle of non-discrimination

Article 2 of ILO Convention No. 111 of 25 June 1958 provides: “*Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination*”. Article 1 specifies that the term “discrimination” includes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin or any such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

d. Right to autonomy and right to dignity

As it is stated in the technical report P-PG/Ethics(2005)3 by A.Lourenço Martins, individual autonomy in our European societies as an ethical value is growing stronger<; the respect of this value implies not exploiting others as well as the right to non-interference by the State and fellow citizens, **so long as there is no harm to others**.

Let’s also remind that the founding ethical value of our societies is the right to dignity accordingly to humanity.

While it would be wrong to claim that these two values conflict, it is nevertheless true that, from an ethical standpoint, there are tensions between them. The definition of dignity is far from universal since it depends on a number of factors, such as religious, philosophical and/or cultural beliefs. In Europe, certain countries have for some time now had legislation permitting euthanasia in the name of the indignity that some people with terminal conditions refuse to suffer, while other countries prohibit it in the name of human dignity.

As regards the issue of concern to us here, the debate is far from closed. Some may consider it an indignity to subject any individual to drug testing, while others may consider it an indignity to consume illicit substances or abuse alcohol and might advocate testing to prevent the state of indignity in which some people might put themselves.

It should be said straight away that the rights of non discrimination and of respect of private life do not appear to be respected in all circumstances. For instance, in most Council of Europe countries, it seems to be the done thing to require a certificate of good character before someone is recruited. This clearly introduces discrimination, infringes respect for privacy and leads to inequality of treatment among job applicants. There is, however, every reason to believe that this requirement, which manifestly discriminates against those with a criminal record, is justified for the sake of protecting colleagues whose lives or property could be endangered by the presence of a criminal in their midst.

## II. Drug testing

First of all, it seems worth making a few general preliminary comments on drug-screening tests and the way in which they are marketed. One need only key in “drug testing” on the Internet to call up a large number of laboratories advertising their kits. Clearly, the development of equipment making it possible to detect the presence of drugs or some of their metabolites in the urine, blood or mucous membranes of certain people has allowed laboratories to glimpse the prospect of large profits (cf document P-PG/Ethics(2006)6 by Claire Ambroselli).

From an ethical standpoint, use of a drug testing kit outside a legal or medical context seems problematical, whether in the case of parents wanting to make sure that their children stay off drugs or in the case of a couple where one partner suspects the other of illicit substance use, or indeed any instance of use by one person in respect another. In the research field, some tests can be carried out on the express condition that they are totally anonymous.

These tests can be carried out only on human material and are therefore medical acts. This means that only a doctor or other health care professional working under a doctor's supervision is authorised to carry out such a test and, in the area that concerns us, only the occupational physician or his or her assistant may do so. Given that no human material may be removed without the express consent of the person concerned (except in a medical emergency), there can be no question of testing for legal or illegal drugs prior to recruitment or in the workplace without the consent of the (prospective) employee.

Two ethical issues arise straight away. Can we, in connection with recruitment or checks in the workplace, talk of informed consent, freely given by the employee, in view of the hierarchical nature of the latter's relationship with the occupational physician? When the doctor insists, rightly or wrongly, on testing for drugs, employees who refuse are liable to be sacked, while job applicants who do not consent are liable to be turned down. It is therefore difficult to consider that their consent is "freely given" and, as Behrouz Shahandeh (1) points out, in his contribution to the seminar on ethics, professional standards and drug addiction held in Strasbourg on 6 and 7 February 2003, a refusal is very likely to be interpreted as an indirect admission, which is contrary to the principle, generally respected in Europe, that every suspect is innocent until proven guilty. Moreover, in agreeing to be tested, are workers not disregarding ILO general principle 5.13, whereby workers may not waive their privacy rights?

There is also cause for concern from the data protection angle. As drug testing is a medical act, the result of the test may be obtained only by the occupational physician, who is bound by confidentiality in this as in any other matter and must ensure that the relevant data are protected. It is highly advisable, moreover, to check the reliability of the equipment used to carry out the test and, when the result is positive, to confirm it with a second test before drawing any conclusions.

It should therefore be stressed from the outset that, ethically speaking, while there may be justification for drug testing, such testing is justified only in so far as it is ordered by the occupational physician and carried out by a health professional, and on the express condition that the test is carried out with the worker's consent and that the physician ensures that the result is confidential and the relevant data are protected. In Europe, national legislations (see report P-PG/Ethics(2006)4rev2 by L. Martins and J. Rodriguez) do not guarantee that, in all circumstances, it is indeed the occupational physician, and not the employer, who takes the initiative of testing and that the results remain confidential.

### **III. Pre-employment drug testing**

In his February 2003 contribution, B. Shahandeh said, "around 80 per cent of [workplace drug testing] conducted in the world is carried out as part of the recruitment process". It should be said straight away that these drug tests do not, as indeed B. Shahandeh points out, make it possible to distinguish between recreational/occasional drug use and drug addiction/abuse. All that the test does is reveal the presence of a drug or one of its metabolites in the body of the person undergoing the test. What is being looked for is not therefore so much drug addiction as drug use. Furthermore, it is impossible to determine, on the basis of the figure quoted, whether these tests were ordered by the employer or employer's representative before/during the recruitment process or whether the request

actually came from the occupational physician asked to confirm that the person in question was fit to do the job for which he or she had applied.

In its Opinion no. 15 of 16.10.89, the CCNE (*Comité consultatif national d'éthique* – National Consultative Ethics Committee) draws a parallel between pre-recruitment HIV screening and screening for drug addiction. The committee proposes a ban on systematic pre-recruitment HIV screening, whatever the post applied for, and says that the same should apply to screening for drug addiction.

It adds that “the use of drugs is only considered to be an ailment if drug dependence is severe”. In the committee’s view, “biological investigation requested by the occupational physician is only conceivable in exceptional circumstances when the specific constraints of the occupation are such that the use of drugs would make the incumbent unfit”. In the same opinion the CCNE concedes that it is difficult to determine which jobs carry risks, and for whom. It says that responsibility for drawing up the list of risky occupations should lie not with the employers but with bodies specifically set up for that purpose and/or with ethics committees.

B. Shahandeh points out that there is usually no clear definition of posts that carry a risk and observes, moreover, that in some countries, even in Europe, “*the safety argument has been extended from the traditional question of health-related safety to ‘business-related safety’*”, ie to the question of employee performance.

While not calling this argument into question, Mr Shahandeh, quoting a director of a human resources department whose words were reported in *Personnel Today 2001*, contradicts the myth that drug abuse leads to deteriorating performance, explaining that one of the main reasons why drug abuse is difficult to spot is that “*some abusers can perform consistently well over long periods*”.

While it would appear essential to determine which posts carry a risk, and why, even if the post carries indeed a risk it seems to us that there is not necessarily a justification, even when a post carries a risk, for carrying out a drug test in addition to a fitness examination. A detailed clinical examination of the applicant by the occupational physician makes it possible to decide whether he or she is fit for the job. The clinical examination may be accompanied by a psychometric test to determine the speed of the applicant’s reflexes. If, when sitting the test, the applicant is under the influence of certain medicines or of a drug, legal or illegal, there is every likelihood that the clinical examination will reveal this. If the person shows no sign of slowness or confusion and seems to be perfectly physically and mentally fit, there is no reason not to recruit him or her. Refusal to acknowledge that applicants are fit for a job because, during a drug test, THC metabolites are found in the body, is unfair and constitutes an invasion of privacy, since there is no reason to suppose, in the absence of proof to the contrary, that their recreational use of drugs will one day impair their fitness for work.

Indeed, testing for drugs taken prior to the appointment with the doctor does not provide any additional information about the job applicant’s short-term fitness. The idea that such drug use might, one day, lead to drug abuse or addiction is merely an extrapolation, and should not be taken into account at the time of recruitment.

Applicants who abuse drugs are very likely to have symptoms related to chronic abuse. An ordinary clinical examination should therefore make it possible to diagnose the abuse and, if necessary, turn down applicants for posts for which they are not suited on account of their state of health. Respect for the principle of non-discrimination requires, however, that such applicants be channelled towards services that can help them or towards employment better suited to their condition. If the transferase level in a job applicant who has been unemployed on a long-term basis provides evidence of alcohol abuse, that cannot be used as an

argument for rejecting the person's application because his/her alcoholism might be a consequence of unemployment and might disappear once he/she gets back to work.

If a job applicant arriving in the occupational physician's office is visibly under the influence of a legal or illegal drug, it goes without saying that the doctor will try to establish as detailed a case history as possible in order to grasp the situation as clearly as possible. Is it a question of an isolated incident, involving a medicine for example – an overdose of cough medicine for acute bronchitis, for instance – or it is simply the result of an inability to handle drugs? Is it a question of drug addiction, or perhaps a disability? Must it be inferred that the applicant is unfit for all work and should receive medical help, or is there a case for reorienting him or her towards work where the inability to handle drugs is a risk neither to the applicant nor to other people? Simply by virtue of the precautionary principle, the doctor will have to take the view that the prospective worker is unfit, in the immediate future, to do a job carrying a risk, but that is no excuse for ignoring the principle of non-discrimination, and the doctor must therefore reorient the job applicant.

When the post to be filled does not carry a risk, screening for drug use raises an even greater number of ethical issues. Either the occupational physician is carrying out an epidemiological survey of the consumption of certain products, and the result of the tests can in no way interfere with the choice of job applicant, particularly as the samples taken will necessarily have to be rendered anonymous, or the physician, for reasons of his or her own, or because the employer so wishes, wants to avoid recruiting a drug user, on moral grounds. Testing job applicants for drug use in this case is an undeniable infringement of their privacy and freedom. Turning them down for a job is discriminatory and at variance with their right to work. Its aim is not to preserve general security.

There are those who consider that such discrimination is justified, taking the view that any drug use may eventually lead to drug abuse. The introduction of pre-employment drug testing would deter prospective job applicants from taking drugs, particularly as the metabolites of certain drugs, in particular the most commonly used illegal drug, THC, can be detected several weeks after use. As they are unable to foresee when they are likely to apply for a job, prospective applicants will refrain from using drugs.

Those in favour of pre-employment drug testing therefore justify their views on public health grounds and consider that they are helping to combat drugs, a cause which they see as their main concern without caring about others' freedom.

While, from the health point of view, it cannot be denied that any drug use may one day lead to abuse, from the ethical point of view it is difficult to argue that a government and, through it, an employer or occupational physician are entitled to impose respect for a moral choice on citizens by restricting their autonomy in this way or, as the case may be, punishing them indirectly when they make choices that are not in keeping with those of their employer. This kind of preventive testing is even more unthinkable in those European countries where drug consumption is not prohibited by law.

The occupational physician has the possibility, in order to assess the fitness of a applicant for a post, even a high-risk post, of carrying out a detailed clinical examination and, where appropriate, additional psychomotor tests, which should make it possible to assess the fitness of the applicant for the post. Testing the applicant for drugs or their metabolites is nothing short of an invasion of privacy and reveals nothing about the risk the potential user would pose to third parties. It discriminates against any drug user as regards employment.

## **IV. Testing in the workplace**

### **1. Fitness for work**

It is generally accepted that an employer has the right, and indeed the duty, to ensure that employees are fit for work: the right, insofar as it is morally acceptable in our societies to ensure that employees are productive. The employer has this right inasmuch as an employee who is unfit for work could do himself or herself harm, endanger colleagues or, worse, present a threat to third parties (3)

Depending on the type of job done by the worker, the employer must be more or less vigilant.

It would therefore seem indisputable, ethically speaking, that employers should be able to detect impaired health and/or concentration among their employees in order to guarantee the well-being of all and sundry. Depending on the potential consequences of impaired health in an employee, it may be necessary to organise the work in such a way that it is possible to ascertain visually whether an employee is unfit for work. In the case of work on a building site, the workers themselves or the foreman are supposed to intervene if they observe that one of their colleagues is unfit for work. In any job that is likely to endanger the lives of third parties, it would seem appropriate to provide for the presence of someone who can replace a colleague who is no longer fit to do his or her job. For instance, it is desirable that every coach driver be accompanied by a second driver, and the same goes for train drivers and airline pilots. In a hospital, an impaired surgeon should also be replaced without delay by another surgeon.

### **2. Unfitness for work from an aetiological point of view**

- a. Unfitness for work in a professional whose job does not entail particular risks for third parties

Office workers, gardeners, dressmakers may, for various reasons, go through periods when their productivity is severely affected. They may, for instance, suffer from a chronic illness, a low-level infection, a metabolic disorder, a hormonal problem, a psychiatric disorder, a progressive neurological complaint, an unhealthy lifestyle or interpersonal conflicts (at home or in the workplace) – all of which can lead to a decline in performance. It is in their interests, and possibly in the interests of their colleagues and employer, to ascertain this decline in performance, and it goes without saying that the employer is authorised to ask the occupational physician to examine the employee concerned and, if necessary, declare him or her unfit for work and refer the employee to his or her general practitioner, preferably explaining to the employee the reasons for this decision. Ethically speaking, it is actually preferable for the employer to refer the employee to the occupational physician, so as to give him or her the chance of obtaining treatment and subsequently returning to the job, rather than dismissing him or her on the spot on account of the decline in performance, which is usually temporary.

- b. Unfitness for work in a professional whose job entails risks to third parties, be they colleagues, users or other people

When a professional who handles potentially dangerous tools arrives at work in what seems to be less than perfect health, his colleagues and employer have a duty to stop him or her working that day. There are various possible reasons for such unfitness for work. As stated above, the cause may be an infection that is likely to worsen in the course of the working day; it may be a metabolic disorder that could seriously impair the employee's concentration in the hours that follow; it may be a cardiovascular problem likely to worsen during working

hours. It may also be a question of fatigue due to persistent insomnia, an unhealthy lifestyle, depression, alcohol abuse or the use of legal or illegal drugs.

It should first be pointed out that in professions where the consequences of the professional's unfitness for work may be tragic (as in the case of a train driver, an airline pilot, a doctor or any team leader), it is desirable that staff should be very regularly required to undergo a thorough medical examination to detect the slightest medical problem, in order to prevent its worsening and triggering major incidents. It is therefore advisable to monitor blood pressure, heart and lung function and the employee's general state of health.

Even if there is regular medical supervision, however, there is nothing to prevent people from suddenly finding themselves in a state of unfitness for work without realising it or in a state of unfitness that they refuse to acknowledge. This applies to some people suffering from masked depression, someone who has been unable to get over a broken relationship, someone who has consumed a large amount of alcohol or someone who has used an illegal drug.

Needless to say, therefore, the employer, who is responsible for lives that could be endangered by an employee, must ensure that every employee is able, on any particular day and at any particular time, to do his or her job. In the vast majority of cases, unfitness for work on a particular day is easily ascertainable with the naked eye. In that case, it is only right that the person in question should be referred direct to the occupational physician and barred from doing his or her job. If there is any doubt and the employer merely suspects that the employee is unfit for work, there can be no question of running the risk of letting the employee endanger the lives of others. In that case, too, the employee should be referred to the occupational medicine department, where a health professional will examine the worker to assess his or her fitness. Depending on the results of this assessment, the occupational physician may or may not bar the worker from working.

The occupational physician alone is entitled to make a diagnosis concerning the worker, and it is compulsory for the diagnosis to remain confidential. If the employee's unfitness for work is the result of an excessive intake of alcohol, the occupational physician must bar him or her from working that day but, as a matter of general and professional ethics, the physician is not authorised to inform the employer of the reason. Needless to say, when the occupational physician suspects chronic alcoholism, he or she will arrange to monitor the evolution of the employee's condition before allowing him or her to return to work. It is also his responsibility to determine if the drunkenness observed on this worker is not the result of an excessive intake of alcohol but rather the result of a moderate consumption by a deeply depressed person.

Ethically speaking, it seems difficult to prohibit the occupational physician outright from carrying out a test that will make it possible to obtain an accurate assessment of the condition of the professional he or she is supposed to examine. Yet an increasing number of countries in Europe have introduced legislation or codes of ethics recognising the right of patients to refuse to undergo certain tests. There is no reason to suggest that occupational medicine is any exception. If the employee refuses to give a urine or blood sample, the occupational physician is not allowed to override that refusal. The physician does, on the other hand, have a duty to try to persuade the person in question to undergo a clinical examination so that his or her fitness for work can be assessed. If the patient refuses, it is important that the occupational physician should declare him or her unfit for work on that day. If the patient agrees to be tested for drugs, legal or illegal, and the occupational physician carries out such tests as part of the medical examination, it is to be hoped that, quite apart from the question of the confidentiality of the results, he or she has the expertise needed to draw the appropriate conclusions.

The presence of metabolites of certain drugs in the urine does not necessarily mean that the person is under the influence; nor, indeed, does the opposite prove the contrary. It is also to be hoped that the health professional is able to set aside his or her own moral principles and deal with the employee in an unprejudiced way. More specifically, it is to be hoped that, if cannabis metabolites are present but the person examined is ascertained to be perfectly vigilant, the occupational physician will not extrapolate and take the view that the person's lifestyle is incompatible with his or her remaining at work.

Be that as it may, given that a medical incident can never be ruled out completely – an example being a ruptured aneurysm – it is advisable to make arrangements for certain professionals always to be accompanied by a colleague who can take over if they are unexpectedly taken ill.

### **3. Drug testing and the illusion of security**

In practice, certain professionals are currently subjected to tests for a number of drugs. Employers pride themselves in organising spot checks, on the grounds that this obliges their employees to refrain completely from using drugs and therefore ensures that they perform well. As we have just seen, nothing could be further from the truth: serious medical incidents that impair the concentration of certain professionals may have many other causes. Such testing, although it salves the employer's conscience, does nothing at all to ensure the well-being of users or of the colleagues of the worker who is tested. On the contrary, the illusion of security that it generates is liable to impair the vigilance of teams and employers as regards employees' general fitness for work. The view might be taken that, since we test pilots for drugs, there is no point in having them examined regularly by the occupational physician. Nothing could be further from the truth. Stating that a pilot has not drunk any alcohol the moment when he enters his plane does not guarantee that he will not take any psychotrope substance during the flight.

Moreover, as drug testing is a medical or judicial act, it does not seem acceptable for just any employer to be able to order such tests. The practice is therefore contrary to the most elementary rules of professional ethics and raises two ethical issues. For an employer to insist that employees be tested for drugs is an invasion of their privacy and undermines their dignity. The autonomy of an employee who voluntarily undergoes such testing is an illusion, as the employer is in a hierarchical relationship with the employee which very often obliges the latter to do as the employer wants. Refusal to do so entails a risk that the employee will lose his or her job.

### **4. Interference by the employer in the private lives of employees**

Quite apart from the illusion of security that prevails as a result of such practices, it is of course obvious that they allow employers to require their employees to abide by certain moral rules, which is contrary to respect for their privacy and their right to exercise their autonomy.

While there seems to be no denying that, despite the existence in Europe of legislation prohibiting discrimination on recruitment, employers are allowed in certain cases to ascertain the philosophical or religious beliefs of staff they take on, such situations are exceptional. It seems only logical that representatives of bishoprics who recruit teachers of the Catholic religion should assure themselves, as far as possible, of their recruits' religious beliefs. It seems equally logical that the management of a secular support centre should avoid recruiting convinced Muslims to provide secular support to prisoners. Save in exceptional situations of this kind, however, it is forbidden to discriminate against people on recruitment on the grounds of their philosophical or religious beliefs or lifestyle.

In this area, as in others, such as security for example, the issues raised by the use of screening tests have political overtones. The marketing and possible widespread use of tests represent a windfall for their producers. They are promoted in the name of the "war on drugs and drug addicts", which masks numerous societal problems with which we are faced and exacerbates the risk of exclusion to which some of us, often the weakest, are exposed. While their use may constitute a quick and effective means of "separating the wheat from the chaff", they offer no response to the reasons why some people use or abuse drugs. Yet it is indeed the issue of drug "abuse" with which we should be concerned. By the same token, while the growing feeling of insecurity in some European countries helps to sell armoured doors, alarm systems and surveillance cameras, all this arsenal provides no answer to the fundamental question we should be asking ourselves, which concerns the possible reasons for rising insecurity. Given the excellence of our protection equipment and in the absence of any social response to the malaise and disaffection felt by some people, an escalation of violence is to be feared. Given the use that is made of drug screening and the exclusion which some people are likely to suffer as a result, the risk is that the doors to abuse will be opened wide.

Above and beyond these considerations, it should be noted that several European countries have no legislation against misuse of drug screening. There would seem to be an urgent need for national parliaments all over Europe to establish a precise legal framework regulating drug screening both prior to employment and in the workplace. The same applies to the laws governing occupational medicine. From an ethical point of view, these rules or laws, when set up, must take into account the principle of proportionality which claims that the aim justifies the means used to reach it.

These rules should also apply to foreign firms operating in a country's territory.

## **5. Occupational medicine and confidentiality of results**

In some European countries, the occupational physician is clearly independent of the employer. Even if the physician is paid by the employer, he or she is not accountable to the latter. On the contrary, the physician is bound by professional secrecy and may not divulge the reasons for declaring someone unfit for work. If an occupational physician is not bound by professional secrecy vis-à-vis the employer, it would seem logical, from an ethical point of view, to oblige the physician to restrict his or her investigations to a clinical assessment of the person's fitness for work, resorting if necessary to psychometric tests as well, but he or she should refrain from further aetiological investigations. When an employee is examined by an occupational physician, it is inconceivable from an ethical standpoint that an employer or head of human resources should obtain any information about that person's state of health other than his/her fitness or unfitness for work.

## **V. Conclusions**

There seems no denying that certain jobs entail a risk to the life or health of the worker, or to the lives or health of third parties, whereas others present no such risk, or very little. There is, however, no proof that testing for legal or illegal drug use, either on recruitment or in the course of employment, makes it possible to determine whether the worker is fit to perform such a job. As Tom Mellish said in his contribution to the February 2003 seminar "*Studies are lacking on whether testing programmes reduce possible work difficulties resulting from alcohol and drug use.*" (4)

In the case of jobs that present a risk to the employee or third parties, it is worth introducing safeguards, drug use being only one of the many factors liable to impair a worker's concentration.

Since such testing runs counter to fundamental principles upheld by the Human Rights Convention and a number of other Conventions that safeguard the right to work, it is necessary to determine whether efforts to combat the use of legal or illegal drugs justify, in ethical terms, certain exceptions to our fundamental values.

In Europe, opinions probably differ over the answer to this question, since it introduces a hierarchy in the values to be upheld. While everyone agrees that an infringement of fundamental values is justified only when necessary for the protection of health or of the rights and freedoms of others, there are those who consider that combating drug use or alcohol does not help to reduce the number of problem users or protect the rights and freedoms of users, any more than it protects those of non-users. They believe, moreover, that discriminating against drug users in the area of employment entails a serious risk of relegating them to the fringes of society, and that their marginalisation may help to transform recreational drug use into abuse.

Others take the view that drug use is an intrinsic danger to the health of the user and a danger to others. They believe that it might be legitimate to combat this use and that from a political point of view there may be justification for disregarding certain fundamental freedoms to that end. This is problematic from the ethical point of view.

Whatever the state's political approach, it is essential that it realises that reliability of tests is limited and guarantees that results are confidential. In any case it should establish a legal framework outside which all pre-employment and workplace drug screening is prohibited.

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- (1) SHAHANDEH, Behrouz., "Ethical issues in workplace drug testing in Europe" in "Ethics and drug use, Pompidou Group, Strasbourg, 6-7 February 2003, pp. 25-32
  - (2) Ibidem
  - (3) Certain national laws, as in Belgium, take into account only the harm an employee can do to his colleagues. From an ethical point of view, the threat to third parties seems however also worrying to us.
  - (4) MELLISH, Tom, *op.cit.* pp 33-36