

**THE
TERMINATION OF THE EMPLOYMENT RELATIONSHIP
ON THE GROUNDS OF THE EMPLOYEE'S HIV STATUS**

by

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SUMMARY

A substantial number of employees in South Africa may soon be out of work as the result of their HIV-positive status. The dismissal of an infected employee may be motivated by the fact that he is considered to be incompetent or incapable of doing the work for which he was employed. Customers and fellow employees may refuse to deal with an infected employee, with the result that the employee is dismissed for economic reasons. The nature of the undertaking's activities may be such that the presence of an infected employee constitutes a health risk. For the purposes of carrying out his duty to create and maintain safe working conditions, the employer dismisses the employee. The employer may even force the infected employee to resign.

Measures should be taken to improve the situation of infected employees. They include educating employers and employees about the transmission of the human immunodeficiency virus.

KEY WORDS

HIV epidemic; Employer-employee relationship; HIV testing; Incapacity dismissal; Commercial rationale; Social prejudice; Dishonesty; Constructive dismissal; Unfair labour practice; Measures to alleviate unfair treatment.

(ii)

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DECLARATION

I declare that 'The Termination of the Employment Relationship on the Grounds of the Employee's HIV Status' is my own work and that all the sources that I have used or quoted have been indicated by means of complete references.


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CHAPTER 1: GENERAL INTRODUCTION

The Acquired Immunodeficiency Syndrome (AIDS) pandemic is undoubtedly a serious problem facing and challenging every one of us today. The Human Immunodeficiency virus (HIV), which finally may lead to AIDS is primarily, so it is generally understood, transmitted through sexual intercourse and contact with infected blood.¹ Because of the manner in which it is transmitted a substantial fraction of our population will sooner or later be infected with this virus² and the ability to limit the spread of this pandemic will be impaired by the prejudice and discrimination which infected persons encounter. At the workplace, the prejudice may cover a broad spectrum: an employer may, as a point of departure, require all prospective employees to submit to be tested for HIV antibodies; he may even seek information about an employee's sexual activities with the view of establishing whether a particular employee is at risk of contracting this deadly virus; an infected employee may be transferred to another job or demoted. An employer may be reluctant to invest in retraining and upgrading the infected employees. Even worse, he may see the dismissal of the infected employee as the only solution.

Despite the prejudice accompanying this disease, which prejudice is compounded by the public perception that HIV infection and AIDS threaten all people, South Africa has no legislation³ expressly to protect HIV infected employees from dismissal, and the industrial court has not as yet been confronted with the issue of exclusion from employment on the ground of HIV positivity.

Sanctioning the dismissal of an infected person has serious implications. Because of the prejudice which society has against HIV-positive persons, a dismissed employee may struggle to find employment elsewhere; and this may mean an end to a career which has taken much to build. He and his dependants are affected economically. Many of the people with HIV are actually socio-economically disadvantaged and may have not worked long to meet outstanding financial obligations: HIV infects mainly young and middle-aged people.

In this dissertation I will consider potentially fair reasons on which an employer may rely to justify the dismissal of an employee who is HIV positive.⁴ These reasons relate to capacity of the employee to perform work of the kind which he was employed to do and those relating to operational requirements of the undertaking. The employer may, of course, also advance some other ground for the termination of an employment relationship such as that the employee was dishonest in not disclosing that he was HIV-positive, or he had of his own accord resigned.

CHAPTER 2 : DISMISSAL ON THE BASIS OF INCAPACITY

An employer may dismiss an employee by reason of incapacity where the employee is incompetent to do the work for which he is employed or is incapable because of illness to do so. The basis for this assertion is the well-established principle of our law that the contract of employment, like any other contract, may be terminated if it becomes impossible for either party to perform its obligations under the contract.⁵

An HIV-positive person is susceptible to a number of diseases, such as dementia and tuberculosis. As a result, he may often have to absent himself from work. His work performance may also, as a result of such illness, be adversely affected.

While termination of the employment contract for physical incapacity where the HIV-positive employee absents himself and for incompetence where his work performance is poor, may be lawful, such termination will not be upheld where it is not substantively and procedurally fair: there must be a valid and fair reason for the termination, and a fair procedure must be followed prior to such termination.

2.1 Dismissal for incompetence

Incompetence is usually shown with reference to the skill required of an employee holding a certain position. The employer's claim that the employee lacks a certain skill must be based on the employee's objective abilities. Consideration will necessarily be given to the

employer's judgement as to the required standard of work.⁶ The employer's judgement will surely be set aside where it is clearly unreasonable in the circumstances existing in a particular industry and work situation,⁷ where his judgement is based on speculations about what may happen in the future, or where it is shown that his judgement is the result of his prejudice against HIV-positive employees generally. An HIV-positive employee is usually a fit person capable of doing his work as before his infection. The employer therefore cannot on the mere ground of infection dismiss such employee for incompetence unless incompetence is actually proved.⁸ It will be difficult for the employer to argue or let alone prove that the HIV-positive employee is incompetent: put simply, he does not lose his competence or skill⁹ merely because he happens to carry the virus. And the more experienced the employee, the more difficult will be the employer's task of proving incompetence.

The employer can dismiss the HIV-positive employee only where his work suffers as the result of his infection. This will be the case where, for example, he suffers from severe (disabling) depression. An HIV-positive employee also may lack self-motivation, which lack has profound repercussions in terms of job satisfaction. A single incident of incompetence should, however, rarely¹⁰ be a ground for dismissal: I will return to this issue below when discussing the requirements for procedural fairness.

It is the responsibility of the employer to ensure that the manner in which he dismisses the employee is fair. The employer should make a proper assessment of the position or status of the employee. He must find out whether lack of proper performance is attributable to low

morale or HIV-related illness. It is only after a fair appraisal of the situation that the employer can rectify the cause of the employee's incompetence. It may of course, be difficult for an employer to establish the true HIV status of the employee: because of the prejudice against HIV-positive people generally, an HIV-positive employee will not readily admit his infection with HIV; as a result the employer will not know that he is dealing with an HIV-positive person who should be treated in the manner similar to the one normally applied to employees with life-threatening conditions. In such circumstances, all an employer should do is to follow the appropriate procedure, relating to substandard work by a healthy employee. This entails appraising the employee's work performance, warning the employee of possible dismissal, granting the employee a reasonable opportunity to improve his performance, and, of course, holding a hearing before dismissal. Discussions and consultations with the incompetent employee will however often bring to light facts and circumstances of which the employer was unaware.

The employer should bring complaints to the employee's attention. A mere dissatisfaction with the employee's performance should not be sufficient to justify dismissal. He must communicate and indicate his expectations and standards relating to acceptable work performance in clear and simple terms.¹¹ He must endeavour to assist the employee to improve his performance.¹² Where the cause of incompetence is the employee's low morale counselling may be required. Proper training should be afforded where consultations reveal that the incompetence of the infected employee is due to lack of training.

The problem that may arise in the above regard is that the employee may have, because of the nature of the job, to undergo a lengthy period of training, say, of five years or even longer at the expense of the employer. The employer may well argue that the employee's incompetence under these circumstances cannot be rectified profitably: the employee's dismissal may well be regarded as fair where no other alternative job can be provided. This problem will normally not arise in respect of an employee who has been with the employer over a long period: incompetence due to lack of training rarely occurs in respect of such employee, unless new skills are demanded as a result of changes in the employee's job. As regards a newly appointed HIV-positive employee in respect of whom it transpires that extensive training is required, the court¹³ may, considering the period of infection, the exact period of the required training and the very high probability that the employee will develop AIDS and die, hold that the dismissal is fair where there are no alternative positions available.¹⁴

Sight should, of course, not be lost of the fact that the development of AIDS in a HIV-positive person is not always certain.¹⁵ It is quite possible for an HIV-infected person not to develop AIDS at all. A dismissed employee who for the projected period of training does not develop AIDS would have been treated unjustly. The employer is normally able to make available time in which the employee undergoing training is able to render services to him profitably. The employee should, therefore, be allowed to remain in the employer's employ rendering his improved services rather than to be dismissed on speculation that he will develop AIDS during the period of training,

the result of which will be that his incompetence will not be successfully and profitably rectified. Also, new drugs are now being available effectively to suppress the advancement of the HIV infection and to boost the body's immune system so that the employer cannot convincingly rely on this ground for the termination of the employment relationship.¹⁶

The incompetence of the employee may be attributable to the employer's failure to create conditions which may enable the employee to carry out his duties satisfactorily. Harassment by ill-informed employees, for example, can render the work environment so unpleasant that the victim's performance is adversely affected. For satisfactory performance, it will be necessary for the employer to give the affected employee proper support.

After assessing the situation and consulting the employee about the fact that his performance does not meet the required standard, the employer should warn the infected employee of the consequences of a failure to improve.¹⁷ The employer will be acting unfairly if in his warnings he was to remark adversely about the fact that the employee has been infected with the virus as this may make the employee feel rejected and may exacerbate his incompetence. It must be made clear to the employee that the ultimate sanction of dismissal will be applied not because of the fact that he is infected with HIV but solely as the result of his incompetence. This may motivate the employee to improve and trust that all the employer requires of him is his skill and labour.

The requirement of warning has been held to apply to all affected employees irrespective of seniority. A senior HIV-positive employee is also a sick man. He may be mentally affected. He, too, may feel that he no longer has any purpose in life despite of his senior position. The same sensible approach that is accorded a junior employee should be accorded a senior employee. Such an employee, faced with a life-threatening condition, cannot be said, as it is normally argued,¹⁸ to be capable of fully judging and monitoring his incompetence. An employer should be excused from complying with the requirements of warning only where the incompetence is gross or the employee is incapable of change as where he has developed full-blown AIDS.

If there is an alternative employment the employer is required to offer it to the infected employee. An employer who fails to consider job alternatives may be regarded as having dismissed the employee unfairly. The employer's offer should be genuine. It will be unfair of the employer to offer an incompetent HIV-positive employee a job which, considering his status in the work place, is simply seen as an insult where other work is available for the employee which it might be reasonable for him to accept. To reassign an infected employee to a position which injures the employee psychologically, even if such a position is at the same rate of pay as the employee's original position, may be regarded as an unfair labour practice where other less onerous alternatives exist. Care should be taken, as far as possible, to keep the employee in the path of his usual skill.

2.2 Dismissals due to physical incapacity

An employee who is infected with HIV and who has not developed AIDS is not ill and is able to work normally. It is just that he is susceptible to several diseases which may necessitate long periods of absence with limited space of good health between them; as a result, his employer dismisses him. Or it may be that because of HIV-related illness an infected employee is simply unable to do the job for which he was employed.

Almost the same considerations of fairness as apply to dismissals on the ground of incompetence will apply to dismissals for incapability due to illness of an infected employee. An employer will need to weigh factors such as -19

2.3.1 The nature of the incapability

The nature of the incapability must be such that it will have serious consequences for the employer if the employee was to remain in the particular job. One may think of a pilot who becomes affected with dementia after being infected with HIV. Since a high mental agility is required for a job of a pilot one cannot reasonably expect the employer to keep the relevant employee on as a pilot in view of the disastrous consequences that may follow.²⁰ It has, however, been held that a situation of actual and imminent danger must exist as the result of the employee's incapability before the decision to dismiss may be regarded as fair.²¹ In Dlokweni²² the dismissal of a driver who developed a cataract while so employed was held to be unfair because,

amongst others, of lack of conclusive medical evidence about the existence of actual and imminent danger. The mere fact that an HIV-positive employee, who otherwise poses no danger to fellow employees, will in future develop AIDS and be unfit for his job cannot therefore justify his dismissal. The determination of the fitness of the employee should be based on conditions of the employee at the time of the employer's decision, not on the possibility that the employee will become unfit in the future.

Once the employee begins to demonstrate signs which show that he will in the near future be unfit for his job, the employer should, instead of dismissal, explore the possibility of finding a suitable alternative area of employment for the infected employee.²³

Where the employee's nature of incapacity is such that he is still able to perform the major functions necessary to do the job for which he was employed, his dismissal will be regarded as unfair where the other functions are of no serious consequence. It is required by the industrial court that the incapacity be of a material or serious nature.²⁴

The reasonableness of the employer's decision to dismiss will also depend on whether the employee's incapability is of a temporary or permanent nature. Where it is of a temporary nature in the sense that the employee can improve or recover from the HIV-related disease from which he is suffering, the employer should seriously consider replacing temporarily the suffering employee. The fact that the incapability is of a permanent nature should not simply mean that the

employer can without further ado, terminate the employment relationship. It must be shown that the employer has considered or done everything reasonable to keep the ill employee on his payroll as a prudent employer should do.

2.3.2 The need of the employee's work by the employer²⁵

The approach of the industrial court to assessing the fairness of the employer's decision will be to consider, amongst other factors, the position and nature of the work of the employee. If the employee has to absent himself for a long period and he is in a key position and/or the interests of the business are such that the employer cannot be expected to tolerate long absences, the dismissal should be regarded as justifiable where there are no job alternatives where absences in the future might be more easily tolerated by the employer. The employer should replace the employee where he expects him to be absent for a very short period. The size of the undertaking and its staff are an important factor to be considered in this regard. The size of the staff in relation to the size of the business may be such that an employee may absent himself for a particular period without any major prejudice to the employer's business.²⁶

The employee's job may be a very specialised one which requires special training and which cannot be filled by a temporary worker or any of the employer's staff. The mere fact that the employee's job is specialised and cannot be filled should not sanction his dismissal without further enquiry. The question should always be asked

whether the employer is prejudiced or placed at a disadvantage as a result of the absence of the employee. The prejudice should be, it is submitted, of a serious nature.

2.3.3 The employee's interests

Importantly, the employer must take into account the potential injustice the employee will or may suffer as the result of his dismissal.²⁷ In determining the injustice, the employer will have to look at factors such as the length of period for which the employee has been employed by him, the financial implications to the employee of the decision to terminate employment,²⁸ the performance of the employee and the difficulties which he may face in obtaining other employment.

The court should be reluctant to allow the dismissal of an HIV-positive employee who has a long and an unblemished record of service. A long period of service by the employee implies 'devotion, fidelity and it would just be unfair that an infected employee with these qualities be dismissed without regard to his past loyal record'.²⁹ The employee's job security needs to be protected, especially in view of the fact that an HIV-positive employee may not be employed elsewhere given the level of society's prejudice against HIV-positive persons.

As in dismissals for incompetence, the employer should apprise himself of the situation and consult with the employee. The ailment of the employee may however not be obvious to the employer. As a result, consultation with medical advisers of the employer may be necessary. It is important for an employer to note that he has to

adduce evidence of incapability, as the industrial court will not find lack of incapability, merely because the employee is HIV-positive. A medical report on the condition of an HIV-positive employee should be reliable evidence to sustain the employer's argument that the dismissal was appropriate. The report should state that the employee is unfit for work and that there are no prospects that he may be fit again.

Obtaining medical evidence may of course be difficult for the employer, in that he cannot force the employee to submit to a medical examination. Also if, to the knowledge of the employer, the employee has consulted his own doctor, the employer cannot simply demand a report from the employee's doctor. This is so, because of the medical confidentiality between the doctor and the employee. Nevertheless, the fact that the employee refuses his medical report to be released to the employer, or that he refuses to submit himself to medical examination on the request of his employer and at his employer's expense, may help the employer to show that he acted fairly in the circumstances by dismissing the employee.³⁰

It may occur, though rarely, that an employer hires an employee, well knowing that he is HIV-positive, who later has to absent himself as the result of the usual HIV-related diseases. The employee should be able to argue in such a situation that it was within the expectation of both the employer and himself that he may have to take long periods of leave of absence. Considerations of fairness should, however, always apply.

Where the infected employee has exhausted his sick leave period³¹ the employer should always consider allowing the employee to take unpaid sick leave. The employee who has taken virtually no sick leave for a number of years and who has to take a concentrated number of days of sick leave against the employer's policy should not be automatically be penalised by the employer. All should depend on whether it was reasonable for the employer to act as he did in the circumstances. The court should require the employer always to act with understanding and sympathy within the context of the economic consideration of the business.

In conclusion, it must be stated that the employer must be consistent in his dismissal for incapacity. The dismissal of an HIV-positive employee on the grounds of incapacity should be consistent with dismissal for incapacity of an employee suffering from a terminal disease such as cancer. Considerations of consistency may, where incompetence is alleged, require a comparative assessment of the employee's performance in relation to that of others and an ascertainment whether other employees experienced similar difficulties in meeting the employer's requirements. An employer who is inconsistent in his approach may expose himself to allegations of being prejudiced against HIV persons as such and the industrial court may on this ground hold the dismissal of an HIV-positive employee as unfair labour practice.³²

CHAPTER 3 : DISMISSAL ON THE BASIS OF THE OPERATIONAL REQUIREMENTS OF THE UNDERTAKING

The employer may try to justify the dismissal of an HIV-positive employee on the ground that the dismissal corresponds to a real need on the part of the undertaking, and that it is appropriate or necessary for achieving the objectives or interests pursued by the business. The rationale for the dismissal of the employee is, in other words, economic and not based on any fault on the part of the employee, or any inherent inability on his part to do the job.

HIV is much feared and misunderstood in our society, with the result that customers and co-employees may refuse to co-operate, deal or work with an infected employee. Faced with the pressure to dismiss, the employer may decide to terminate the infected employee's employment in the interest of his business. It may also be that the nature of the employer's business is such that it is considered a 'high risk area'³³ with the result that he dismisses such an employee for reasons of creating and maintaining safe working conditions for his other employees. The employer may even argue that keeping such an employee on is costly in the sense that medical-aid contributions are too high, especially where the employer is experiencing some economic problems with his undertaking.

3.1 Dismissal due to co-employees and customer pressure

Dealing with an HIV-positive infected person face to face on a daily basis might be a problem to both co-employees and the public should it come to their knowledge that a particular employee is so infected.

3.1.1 Co-employees pressure

Out of fear of being infected, employees may victimise, harass, intimidate, or otherwise so treat a fellow employee that he is forced to resign from the work. They may demand that their employer dismiss the infected or believed-to-be infected employee, and threaten walk-outs and strikes should the employer fail to comply with their demand.

The demand by a third party that an employee must be dismissed is a problem which employers have been faced with in the past.³⁴ Demands of this nature give rise to a conflict between the employer's need to protect the economic viability of his business and the need to accord just treatment to all his employees. The problem is that the employer will find it quite difficult to dismiss the whole workforce at the expense of a single or few infected employees, who may not take kindly to being dismissed where they are not at fault.

The employer may justify the dismissal of the infected employee on the basis that his presence in the workplace disrupts the business of the employer or create labour unrest where the other employees go on strike. Where they do not go on strike, the dismissal may be justified

on the basis of difficult work relationship between himself and the co-employees. This position is illustrated by the case of Mazibuko v Mooi River Textiles Ltd³⁵ where twelve members of a minority union were dismissed on the insistence of other employees who were members of a majority rival union. In defending the dismissal of the twelve employees the company argued that the dismissals had been necessary to ensure continued productivity and industrial peace. The court agreed that there was a commercial rationale for the employer's decision to dismiss but held the dismissals to be unfair because of the provision of the Labour Relations Act³⁶ relating to freedom of association. In another case, Erasmus v BB Bread Ltd,³⁷ the court stated that an employer was entitled to insist on a reasonably harmonious personal relationship in the work-place.

Where an employee is dismissed at the demand of a third party, the reason for the demand is an important factor that should be taken into account in determining the fairness of the dismissal.³⁸ The reason to be commonly adduced for the dismissal of an HIV-positive employee will be fear of contamination.

The fear may be rational or irrational. The employees' fear will be irrational where it is based on a suspicion that a particular employee is HIV-positive or that the social group in which he belongs may tend to be HIV-positive in the near future. It will also be irrational if circumstances in the workplace are such that no transmission of the virus can take place. The employees' fear, although irrational, might however be genuine: one may cite the example of employees who had to clean everything touched by an employee who had cut himself at work and who was exposed to the risk of contracting the virus

because of his life style.³⁹ There was no evidence that the employee concerned was HIV-positive. His colleagues' fears were based on a suspicion on the ground that he was a homosexual who frequented a particular place which is notoriously known as a meeting place of homosexuals looking for others with whom to have sex.

The question now becomes whether, for the employee's dismissal to be regarded as fair, his co-employees' fear must be subjectively or objectively based. The answer must be in favour of an objectively based fear. To require a subjectively based fear will be to allow an individual or individual groups of employees to rely on their own view of the existence in their work-place of the danger that they may be infected with HIV, no matter how unreasonable the basis of their view. A subjective approach will mean that a mere belief that a person is HIV-positive, even when there is no evidence to that effect, can be relied on as the basis for the demand that he be dismissed, provided that such belief is honestly held. This approach is also susceptible to abuse. It is quite easy for employees to allege that they honestly believe that a particular employee who is not popular amongst them is HIV-positive.

The subjective standard is unacceptable and the industrial court will not, one hopes, uphold it despite the social status that HIV at this stage has achieved in our society.⁴⁰ A trend has to be followed which casts aside irrational fear and prejudice in favour of sound public policy based on competent medical evidence.

The industrial court has actually once held that for the dismissal of the employee to be fair the demand of the third party must be

legitimate.⁴¹ If the demand is illegitimate, to accede to that demand has been held to be itself illegitimate despite the commercial rationale behind the decision to dismiss: the mere fact that the dismissal would ensure smooth ongoing operation is not sufficient in the view of the industrial court to justify termination of employment.⁴² The facts on which the employees rely for their demand must be existent.⁴³

The approach in Mazibuko⁴⁴ that the demand must be legitimate should, as a point of departure, extend to cases where the irrational reactions are from the entire workforce. The employer should try to deal with the irrational responses of the workforce through discipline. Once the employees realise that they are threatened with disciplinary measures, including dismissal, some of them may withdraw their demand, especially where they are not as organised as where they were to act through a trade union. The employer may even approach the industrial court for urgent interim relief,⁴⁵ in suitable cases to interdict the employees from harassing or interfering with services of the HIV-positive employee or the employees' union from inciting or supporting any form of industrial action by the employees relating to the demand of the dismissal of an HIV-positive employee. The employer should also consider employing temporary workers where the workforce is on strike. The idea is that the employer should not be allowed to obtain for himself greater protection than was reasonable and fair.

The risk of HIV transmission in most work settings does not exist or is extremely small.⁴⁶ It should, therefore, be extremely difficult for an employer to present a convincing case that the HIV-positive employee had to be dismissed due to the risk of infecting others and that, for

this reason, the demand of the employees was legitimate or reasonable.⁴⁷ Where the demand is legitimate or reasonable, as may be the case with health employees involved in invasive procedures, reasonable steps should be taken to find a solution. Protective measures such as the wearing of double gloves should be taken. The employer may take disciplinary actions against employees who persist in not working or co-operating even after he had tried to allay their fears by showing that in their work setting or circumstances of work there is no risk of transmission, or that such risk no longer exists after the taking of protective measures. An accurate assessment of the real risk⁴⁸ of transmission, which assessment has to be objectively made with the help of medical advice, is therefore necessary. The accuracy of the assessment will definitely be the focus of the industrial court.

The mere fact that the employer thinks that the other employees will out of fear demand that the infected employee be dismissed once they realise that he is HIV-positive, cannot justify the employer's decision to dismiss. Co-employees may actually support their fellow employee's desire to remain on the job.⁴⁹

Apart from fear, the employees' demand for dismissal may be based on the effect of the presence or absence of an HIV-positive employee on them. Co-employees may argue that their colleague's presence dampens their morale or that his absence necessitates working overtime. These are by themselves not all that strong reasons for sanctioning the dismissal of an infected employee. An HIV-positive employee is himself a fit and active person who cannot be held to be responsible for the laziness or low morale of his colleagues.

Where the employees have to work overtime because of the infected employee's absence, they will be bound to work such overtime where they have contracted to do so expressly or tacitly. Where the employees are not contractually bound to work overtime, the mere fact that the employer has difficulties in compelling the employees to work overtime cannot by itself justify the dismissal of an infected employee in order to employ someone else in his stead. Naturally, it will be easy for an employer to make alternative arrangements such as re-organising his workforce. The employer may even approach the industrial court to declare the co-employees' refusal to work overtime to be an unfair labour practice,⁵⁰ in the sense that the relationship between himself and the employee is detrimentally affected by the co-employees' refusal, or that labour unrest is unfairly created or promoted by it. The employer must be seen to be protecting the HIV-positive employee as long as he is able to work and wants to do so.

3.1.2 Customers pressure

Where the dismissal of the infected employee arises as a result of the threat by a customer to withdraw his business with the employer, the dismissal may be justified on the ground that the HIV-positive employee's presence impairs the profitability of the business. The employer who has to dismiss an infected employee as the result of customers' pressure finds himself in a more difficult position than where the demand to dismiss is from his other employees. Where the demand to dismiss is from customers, the employer has no control over the situation, with the result that he may be forced to accede to demands based on irrational fear. The industrial court should be

reluctant to allow an employer to accede to demands based on suspicions or irrational fears of customers, for the very reason that it is inequitable that an infected employee should suffer because of irrational prejudice of others, particularly where the customer pressure can be resisted, for example where such pressure is from an individual or a very small number of customers, or where the knowledge of the employee's HIV infection can be traced to his employer: an employer who himself perpetuates the prejudice against HIV-positive persons cannot be heard to complain of a resultant loss of customers.⁵¹

There must be a serious concern on the part of customers for an HIV-positive employee to be dismissed. A mere hint that he should be dismissed should not be entertained.

The employer should have discussed the situation with his customers, tried to allay their fears and looked for alternative jobs or positions where conflict with customers will be avoided: if not, 'the mere fact that a valued customer insists upon the dismissal will not per se make the dismissal fair'.⁵²

3.2 Dismissal due to the employer's duty to create and maintain safe working conditions.

The common law and legislation⁵³ require an employer to care for the safety of his employees. The employer may therefore decide to dismiss an infected employee in order to create and maintain safe working conditions for his other employees.⁵⁴ Because HIV is not casually transmissible in the workplace the presence of an HIV-positive

employee does not seem to violate this general duty, unless the employer's workplace is of such a nature that it is considered a 'high risk area' as may be the position with the work settings of health workers. A health worker may also be a danger to the public he treats with the result that he is dismissed by his employer to avoid possible delictual action that may be instituted against his employer where a patient is infected by the health worker.⁵⁵

The employer is required only to take reasonable care. He should escape liability by showing that reasonable steps or precautions have been taken, such as educating employees about how HIV is transmitted, providing aid kits with plastic gloves and aprons where direct contact with blood or body fluids may occur, ensuring that any person attending to an injured employee who is bleeding wears these gloves and aprons et cetera. Thus, where the employer's workplace may be regarded as a 'high risk area' but the employer can take reasonable precautions to prevent transmission, there is no reason for him to dismiss an infected employee. After all, absolute safety is not guaranteed to an employee by his contract of employment unless this is expressly stated.⁵⁶

Before the dismissal of an HIV-positive employee on the ground that his presence is a risk to the safety of others, the employer should have considered alternatives. The employer may be required to refrain from undertaking procedures which expose co-employees and the public to risk. He will definitely face legal problems if an HIV-positive employee is dismissed in a situation where his area of employment requires no participation in activities during which the virus can be transmitted.

3.3 Dismissal due to the employee's refusal to undergo HIV testing

An employer may want to compel his employees to undergo HIV testing to enable him to comply with the duty to create and maintain a safe workplace. No difficulty will arise where the employer and employee mutually agree that the latter will have to submit himself to testing on a periodical basis. Where the requirement that the employee should undergo HIV testing is unilaterally introduced by the employer as a term and condition of employment, the industrial court may regard such introduction as an unfair labour practice⁵⁷ and set aside the dismissal following the employee's refusal to submit himself to such testing.

May the employer compel the employee to undergo HIV testing where his contract of employment is silent on this aspect ? The question must be answered in the negative. Any attempt to force an employee to submit to a medical test without his informed consent could constitute a criminal assault on the employee and should be regarded as an unfair labour practice. Subjecting a person to medical treatment or testing involves the application of force. Consent by an employee to submit to HIV screening because he is threatened with dismissal in case he does not submit himself to testing cannot be regarded as a valid consent.

Testing as such rarely serves a useful purpose.⁵⁸ It cannot ensure a HIV-free workplace⁵⁹ and it is a waste of time and money where transmission cannot take place. Screening could also be costly and

employers may be tempted to reduce expenditures by 'selectively' choosing those employees who they think fall within a high risk group, thereby unfairly discriminating against certain employees.

Furthermore a series of tests may be required before it can be said with absolute certainty that infection is present and this is burdensome to an unwilling employee. Only where the employee is involved in activities during which transmission of the virus can easily occur and where no reasonable precautions can be taken to prevent the risk of transmission can the employer compel the employee to undergo testing with a view of excluding him from employment in the event of testing HIV positive. The industrial court should here weigh the employee's interests not to be forced to undergo HIV testing and the importance of the other employees' health

3.3 Selection for retrenchment

An employer cannot select an employee for retrenchment simply because he is HIV-positive. A selection criterion which is shown to be objective is required for fair retrenchment.⁶⁰ The employee's efficiency, productivity and capacity for work are examples of objective criteria. An HIV-positive person is normally a fit and capable employee. He may actually be more productive and efficient than his uninfected colleagues. His HIV status should surely be irrelevant when it comes to selection for purposes of retrenchment.

The employer cannot select for retrenchment an HIV-positive employee simply because the medical-aid contributions he has to make are too high. The mere fact that he finds it difficult to make such

contributions should not simply mean that the infected employee who is otherwise capable, productive and efficient should be the first to go. This will be too personalized an approach to be regarded as fair.⁶¹

3.4 Other substantial reasons for dismissal

The employer may even try to justify the dismissal of an infected employee on some other grounds such as dishonesty - in the sense that the employee failed to disclose his HIV status to him. He may also argue that the infected employee has on his own resigned.

3.4.1 Dishonesty

An employee has a common-law duty to serve his employer in good faith. Dishonesty in the course of employment is a just ground of terminating a contract of service. This duty reflects the moral responsibilities and ethical standards expected of employees. The question now becomes whether an employee who is HIV-positive is obliged to inform his employer of his condition. The existence of this duty should depend, it is submitted, on the circumstances of a particular case. Where the employer, for example, indicates his intentions to make long-term investments in the employee, the industrial court may find it to be irresponsible and unethical of the employee not to disclose that he is HIV-positive. Otherwise, as a basic premiss, there should be no duty to disclose simply because the employee is HIV-positive.

An employee who is involved in activities that render his condition a risk to others such as where blood-to-blood contact is possible may

not be acting in good faith if he remains silent about his condition. The employer may not be able, so it may be argued, to comply with his common law duty of creating and maintaining safe working conditions, unless he knows that someone in his employ stands as a risk to other employees' health. The employer need not necessarily, it is submitted, have to establish or know whether a particular employee is HIV-positive or not to protect the health of his other employees. As long as the nature of the activities in which his employees are engaged are such that a real risk of transmission exists, the employer should be required to take the necessary precautions to prevent the spread of this pandemic.

3.4.2 The infected employee's resignation

The employer may embark on actions which are aimed at driving the infected employee to leave his job. An employer may impose, for example, a series of unjustified disciplinary warnings on an infected employee hoping that such action might prompt the employee to resign. He may transfer the infected employee to another job with such transfer aimed at setting the stage for a future charge of inefficiency and consequent dismissal. Constructive dismissal of an employee is not inherently unlawful.⁶² Depending on the circumstances, it may or not be so. Spinning webs, however, for an otherwise capable employee because of the prejudice that an employer has against HIV-positive persons, is unfair. An enthusiastic and capable employee may be led to believe that he is incapable to perform his work. This may frustrate him, which frustration then becomes the cause of his poor performance.

An employer who leads a HIV-positive employee to believe that he is unwanted by his colleagues and obtains his resignation as the result of the pressure he puts on his employee will be acting unjustifiably. In the Jonker⁶³ decision, the applicant's constructive dismissal was regarded as unfair where he was led to believe that he was to be targeted by FAWU who would strive to cause him to be dismissed, and that he had become an embarrassment to his employer. The poor bargaining position in which the resigning employee usually finds himself will be a relevant factor to take into account when the fairness of the employer's conduct is determined. The employer will have, however, to prove that he has been constructively dismissed.⁶⁴

CHAPTER 4 : GENERAL CONCLUSION

The problem of how an HIV-positive employee should be treated at the workplace is not simply one of the employer and employee but of broader social concern. Society should express its concern in legislation. The need for statutory intervention is great and urgent. Aspects relating to the screening for HIV, confidentiality, and the like should be fully regulated. Legislation should render any discriminatory treatment, by the employer or co-employees, on the ground of an employee's HIV status unlawful and perhaps even a punishable offence.⁶⁵

Beside legislation, other efforts have to be made to improve the situation of HIV-positive employees and the following measures may help:

4.1 Education

Much has been said about how HIV is transmitted and the type of people at the risk of infection. To avoid uninformed reactions employees should be educated on the subject. All categories of personnel in the workforce must be informed of the essential facts: how the virus is spread, and how to prevent getting the disease, who may get it and how the disease is not spread. Consultation with representatives of the workforce will be necessary for the smooth running and the implementation of the education programmes.⁶⁶

Social organisations may be established to campaign against unfair treatment of HIV-positive people and educate people and employers harbouring stereotypical notions about the disease.

4.2 Policy statement

A strong policy statement demonstrates commitment by the employer to wipe out discrimination in the workplace. A set of administrative guidelines may be drawn up by both the employer and employees to regulate the way in which HIV-positive employees are dealt with. A typical policy statement will include statements to the effect that there will be no discrimination against HIV-positive employees; that no employee will be required to be tested for HIV; and that if it is known that an employee is HIV-positive strict confidentiality will be maintained.

The responsibility of developing and implementing the statement or code should preferably be assigned to managers and supervisors as people who deal with employees daily and make regular decisions about promotions, performance appraisals, and discharges. They should receive special training on the subject of HIV and how to deal with infected employees.

4.3 Contract compliance

Trade unions should make concerted efforts to incorporate rights regarding HIV-positive employees into individual service contracts, industrial council and recognition agreements. The trade unions' efforts to improve the treatment of HIV-positive employees are likely to succeed as, in the words of Kahn Freud,⁶⁷ 'in labour relations norms

cannot often be effective unless they are backed by social sanctions, by the countervailing power of trade unions and organised workers to withhold their labour as a power countervailing management's.'

4.4 Monitoring

An agency may be established by the state or social organisations with the task of collecting statistics and qualitative data that can reveal the true situation regarding HIV infection. It is with proper analysis of the position of infected employees in the workplace that their position may be improved. Relatively speaking employers', co-employees' and the public's prejudices towards HIV-positive people are still fairly prevalent. Some serious efforts to eliminate these prejudices are likely to meet with success.

NOTES

1. The virus can also be passed from infected mothers to their children during pregnancy and childbirth. On how HIV is transmitted see RJ Craig Aids: Corporate Awareness and Response (1991) 1 et seq; C Evian , Aids in the Workplace in Southern Africa (1991) 26; M Gunderson AIDS: Testing and Privacy (1989) 24 et seq; D Harris & R Haigh Aids: A guide to the Law (1990) 1 et seq.
2. The Sowetan, 4 October 1995 reports that between 1,2 and 1,8 million South Africans are already infected with HIV.
3. The South African Law Commission has recently, however, prepared for public comment a draft HIV and AIDS Bill and a working paper on aspects of law relating to the disease. W Henegan, Secretary of the Commission, discusses the recommendations of the Commission in 'Is AIDS-Special Legislation the Answer?' 1995 De Rebus 539.
4. The Labour Relations Act of 1995 deals explicitly and in some detail with the basic requirements of unfair dismissal. Chapter XVIII of the Act.
5. A Rycroft & B Jordaan A Guide to South African Labour Law (1992) 91.
6. Similarly the employee's version that he is competent will also be considered and maybe accepted instead of that of the employer.

Kheswa v Gem Store Shoe Repair (1992) (1) LCD 188 is an example of where the court interfered with the employer's judgement as to the required standard: the court found that the probabilities favoured the employee's version.

7. Van Aarde v Suid Afrikaanse Nasionale Lewens Assuransie Maatskappy (1994) 10 BLLR 167. The industrial court here emphasised that caution should be taken against interfering with the standards of ability and skill set by the employer. The setting of this standard is, according to the court, the management's prerogative which should be interfered with only where it is clearly unreasonable.
8. E Cameron 'Aids - Some Problems in Employment Law' (1991) Employment Law 193 at 194. The dismissal of an employee merely because he is HIV-positive may be seen as a dismissal by reason of the employee's disability. This is an invalid reason for dismissal in terms of section 187 (i) (f) of the 1995 Act and constitutes unfair discrimination prohibited by section 8(2) of the Republic of South Africa Constitution Act 200 of 1993.

In the USA an HIV-positive person is seen as a disabled person in terms of the American with Disabilities Act of 1990 which defines a person with a disability as an individual with a physical or mental impairment that limits one or more of the major life activities of that individual.

9. Unless there are changes in the job in which the employee was engaged, which changes demand new skill: in this event different

considerations will apply, such as whether the employee was given the opportunity to acquire the new skills.

10. A single incident of incompetence may, depending on the nature of the position, be a justifiable ground for dismissal: in Taylor v Alidair Ltd (1978) IRLR 82, where a pilot was dismissed after making a faulty landing and causing considerable damage to the aircraft, the court stated that 'there are activities in which the degree of professional skill which must be required is so high, and the potential consequences of the smallest departure from that high standard are so serious, that one failure to perform in accordance with those standards is enough to justify dismissal'.
11. Whether or not the employee was aware or could reasonably be expected to have been aware of the required standard will be a very relevant question to take into account in determining the fairness of the dismissal: section 9(b)(i) of schedule 8 of the 1995 Act.
12. And he will have to give the employee a fair opportunity to improve to the required standard: section 9(b)(ii) of schedule 8 of the 1995 Act.
13. The Commissioner under the new labour legislation to whom all disputes relating to the employee's capacity are to be referred: section 191(5). The labour court as established in terms of section 151 will only hear a dispute relating to incapacity if the Director of the Commission for Conciliation, Mediation and

Arbitration, on application by any party to the dispute, finds it appropriate that the dispute be heard by the court: section 191(6).

14. That is, if medical indications are that the infected employee's incompetence will be irreparable because he will very soon develop AIDS and become unfit whilst extensive training is still required of him.
15. The revised medical view is that the disease does not necessarily develop in a predictable manner: JA Mello 'Prevalant Employer Discriminatory Behaviour towards Employees with HIV and the Likely Impact of the ADA' (1994) 45 LLJ 323 at 335.
16. TE Temple III 'Employers Prepare: Hope for Aids Victims Means Conflict in your Workplace' (1990) 41 LLJ 694 at 695. The author explains that the ability of these drugs to control the debilitating and deadly effects of the disease will mean that millions of individuals will remain in the workforce with a contagious, but controllable disease.
17. In Rhodes v SA Bias Binding Manufacturers (1989) 6 ILJ 106 the industrial court found that the company's failure to issue warnings for alleged incompetence was an element which contributed to the unfairness of the dismissal.
18. In Blue Circle Materials (Pty) Ltd v Haskings (1991) 2(6) SALLR 7 (LAC), the LAC adopted the view that the dismissal of an employee who was dismissed without warnings was substantively and procedurally fair in that the position of a 'head office accountant'

made her sufficiently senior to allow management to adopt a highly informal procedure. De Klerk v Del Ingenieurswerke (Edms) Bpk (1991) 2(7) SALLR 44 (IC) for example, supports the view that senior employees must procedurally be treated like other employees. English jurisprudence also appears to support this view : WA McPhail v TMcR Gibson (1976) ILRLR 254 (EAT) where the decision by the industrial tribunal that the dismissal of a farm manager without prior warning was unfair, was upheld.

19. These factors are embodied as guidelines in the Code of Good Practice contained in Schedule 8 of the 1995 Act,
20. Taylor v Alidair Ltd (supra).
21. Dlokweni v A (1984) ILD (1) 16.
22. Dlokweni v A (1984) (supra).
23. S Albertyn & D Rosengarten 'HIV and Aids: Some Critical Issues in Employment Law' (1993) 9 SAJHR 77 at 88 suggest that there should be consultation between the employee and the employer's medical advisors to assess any changes in the employee's health. This will enable the employer to determine what alternative tasks the employee can perform at a particular stage of the disease.
24. In Madayi v Timpson Bata (Pty) Ltd (1987) ILJ 494 (IC) at 496, a case of dismissal on the ground of incompetence, the court stated

that the employee's incompetence ought to be of a relatively serious degree.

25. Randall v Progress knitting Textiles Ltd (1992) 13 ILJ 200 (IC).
26. In Randall v Progress knitting Textiles Ltd (supra) the question was said to be whether the company would have been prejudiced had it found itself in circumstances where a senior employee was on leave for a period of three months, and whether such a period of leave would have affected the operations at the plant in a negative way.
27. Jonker v Amalgamated Beverage Industries (1993) 14 ILJ 199 (IC).
28. In SA Vereniging van Munisipale Werknemers (Nie-Politiek) en 'n ander v Ventersdorp Munisipaliteit (1990) 11 ILJ 1155 (IC) the employee's services were terminated just two years before she could qualify for full pension benefits had she remained in the employ of the employer. The industrial court took this into account in holding that the employee's dismissal was unfair.
29. Paper Printing Wood and Allied Workers Union and others v Performing Arts Council (Tvl) (1) (1992) 13 ILJ 189(IC) at 197.
30. In NUM & another v Vryheid (Natal) Railway Coal & Iron Co Ltd (Hlobane Colliery) (1986) 7 ILJ 587 (IC) the court took into account the unreasonable attitude of an employee who had been partially deaf due to an ear infection but who had rejected

remedial treatment offered by the employer and made no attempt to arrange treatment for himself.

31. In accordance with the provisions of section 13 of the Basic Conditions of Employment Act 3 of 1983.
32. Where the employee shows that the employer has no honest and genuine reason for dismissal and that the actual reason for the termination of the employment relationship is his HIV status: Simelale v Audell Metal Products (Pty) Ltd (1987) 8 ILJ 438 (IC) where the court found that a drop in the sale of the company's product was not the real reason for the closing down of the company. It appeared that the real reason was a desire by the company to get rid of a particular union and its own employees who were actively involved in union activities.
33. An employer's workplace will be considered a high risk area where blood-to-blood contact is possible amongst his employees.
34. This fact is recognised by the industrial court in Jonker v Amalgamated Beverage Industries (supra) at 208.
35. (1989) 10 ILJ 875 (1C).
36. 28 of 1956.
37. (1987) 8 ILJ 537 (1C).
38. Mazibuko v Mooi River Textiles Ltd (supra).

39. Buck v The Letchworth Palace Ltd (IT) 36488/86, (EAT) 388/87, an unreported case quoted by PA Watt in 'HIV, Discrimination, Unfair Dismissal and Pressure to Dismiss' (1992) 21 ILJ (UK) 280 at 283.
40. HIV appears to have achieved a status of a monster, hence the irrational behaviours of some people. The court in McGeary v Kruger & another (WLD (case no 2531/90) unreported), quoted by S Mellows 'AIDS and Medical Confidentiality' (1993) 1 JBL 58 at 59, had to comment that the disease 'is the greatest public health threat of this century ... possibly that mankind has had to face'.
41. Mazibuko v Mooi River Textiles Ltd (supra).
42. Mazibuko v Mooi River Textiles Ltd (supra).
43. In Metal and Allied Workers Union v Hendler & Hendler (Pty) Ltd (1985) 6 ILJ 363 (IC), the industrial court held that a dismissal on the grounds of drunkenness and assault was unfair because the employer had failed to establish that such drunkenness or assault had occurred.
44. Mazibuko v Mooi River Textiles Ltd (supra).
45. Presently in terms of section 17(11)(a) of the 1956 Act. RS Berger & SL Lewis 'AIDS and Employment: Judicial and Arbitral Responses' (1992) 43 ILJ at 275 submit that the court

should readily grant interim relief where the job involves no more than casual contact between the HIV-positive individual and others. On the guidelines as when the relief may be granted, see M Oliver 'Urgent Interim Relief in the Industrial Court' 1991 De Rebus 469; PAK le Roux & AA Landman 'Urgent Interim Relief in the Industrial Court: A review of Section 17 (11)(a) Orders' (1989) 1 SA Merc LJ 208.

46. And this fact, according to E Cameron 'AIDS in Employment: Facts, Fantasies and Fairness' (1991) 7 Employment Law 102 at 103 makes it relatively easy for employers to take precautionary measures against the risk.
47. Unless the HIV-positive employee himself acts in a threatening manner: E Cameron 'Working with AIDS' (1991) 7 Employment Law 2 at 4.
48. Where the likelihood of transmission is remote the employer should not be justified in dismissing the infected employee. He should rather be encouraged to take preventative measures.
49. J Kelly 'HIV-AIDS at the Workplace' (1992) 42 ILJ 759 at 759 cites an instance where teachers, parents and students rallied behind a popular teacher when he disclosed his HIV status.
50. Against which every employer and employee is protected even by the Constitution: sections 26(2) & 27(1).

51. Weight should be given to circumstances arising because of the employer's own actions: T Poolman Principles of Unfair Labour Practice (1985) 322.
52. Jonker v Amalgamated Beverage Industries (supra) at 206.
53. Occupational Health and Safety Act 85 of 1993.
54. The dismissal would not be in response to fluctuating marketing conditions; the rationale would not, in other words, be economic.
55. S Eisenstat 'The HIV Infected Health Care Worker: The New AIDS Scapegoat' (1992) 44 RLR 301 at 306 where the author recognises that health employee-to-patient transmission is a viable means of HIV infection.
56. CC de Witt Aids and Employment - Essential Legal and Industrial Relations Perspectives (1993) 69; Barker v Union Government (1930) TPD 129.
57. Unilateral introduction of a term and condition of employment by the employer was disapproved in NUM v Gold Fields of SA Ltd & others (1989) 10 ILJ 86 (IC) and BCAWU & others v Thorpe Timber Co (Pty) Ltd (1991) 12 ILJ 843 (IC).
58. SW Johnston 'Coping with AIDS: Today's Major Workplace Issue' (1989) 40 LLJ 302 at 304.

59. There could be no assurance that an employee who tested negative had not subsequently become infected.
60. Shezi & others v Consolidated Frame Cotton Corporation Ltd (1) (1984) 5 ILJ 3 (IC), for instance, where the court required a criterion which could, as far as possible, be checked objectively and not dependent solely on the opinion of the person making the selection. Section 189(7)(b) of the 1995 Act also requires a fair and objective criteria.
61. Discharging the employee can simply not be the appropriate measure. The employer should perhaps consider altering or revoking the benefits of the infected employee.
62. McMillan v ARP and Noordhoek Development Trust (1991) (2) SALLR 1 (IC).
63. Jonker v Amalgamated Beverage Industries (supra).
64. Fourie v Booyens t/a HB Makelaars (1995) 7 BLLR 55 (IC) where the court held that the applicant who resigned and claimed that she had been constructively dismissed bore the onus of proving that she was constructively dismissed. In terms of section 192 of the 1995 Act the employee must establish the existence of the dismissal.
65. The intended HIV and AIDS legislation is therefore a positive step to be welcomed.

66. Disciplinary measures should be taken against those who refuse to participate in these programmes and yet continue with irrational responses: CW van Wyk Aspekte van die Resgsproblematiek Rakende Vigs (1991) 328.
67. Quoted by DM Davis 'The Functions of Labour Law' 1980 CILSA 212 at 213.

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ABBREVIATIONS

<u>BLLR</u>	<u>Butterworth Labour Law Report</u>
<u>CILSA</u>	<u>Comparative and International Law Journal of Southern Africa</u>
<u>CLL</u>	<u>Contemporary Labour Law</u>
<u>EL</u>	<u>Employment Law</u>
<u>ILJ</u>	<u>Industrial Law Journal</u>
<u>IRLR</u>	<u>Industrial Relations Law Report</u>
<u>JBL</u>	<u>Juta's Business Law</u>
<u>LLJ</u>	<u>Labor Law Journal</u>
<u>RLR</u>	<u>Rutgers Law Review</u>
<u>SALLR</u>	<u>South African Labour Law Report</u>
<u>SA MERC LJ</u>	<u>South African Mercantile Law Journal</u>

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