

**PROTECTION AGAINST UNFAIR DISMISSAL OF EMPLOYEES  
LIVING WITH HIV/AIDS IN THE WORKPLACE: A COMPARATIVE  
STUDY**

by

**ABEL JERU MBILINYI**

submitted in part fulfilment of requirements for the degree of

**MASTER OF LAWS  
WITH SPECIALISATION IN THE LEGAL ASPECTS OF HIV/AIDS**

at the

**UNIVERSITY OF SOUTH AFRICA**

**SUPERVISOR: PROF M N SLABBERT  
JOINT SUPERVISOR: PROF A H DEKKER**

**February 2008**

**Student number: 34506500**

I declare that my limited dissertation entitled **PROTECTION AGAINST THE UNFAIR DISMISSAL OF EMPLOYEES LIVING WITH HIV/AIDS IN THE WORKPLACE: A COMPARATIVE STUDY** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete reference.

---

**SIGNATURE**  
(Mr A.J.Mbilinyi)

---

**DATE**

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
CHAPTER 1 .....	4
INTRODUCTION AND PURPOSE STATEMENT .....	4
1 Terminology.....	5
1.1 Employees with HIV.....	5
1.2 Unfair dismissal .....	5
1.3 Equality clause .....	5
2 What is HIV/AIDS?.....	6
3 Problem Statement.....	8
4 Methodology .....	9
CHAPTER 2 .....	10
RELEVANT SOUTH AFRICAN LEGISLATION PERTAINING TO EMPLOYEES WITH HIV/AIDS.....	10
1 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996.....	10
1.1 Equality: Unfair discrimination .....	10
1.2 Right to privacy.....	11
1.3 The right to dignity .....	13
1.4 The right to fair labour practices.....	14
1.5 Limitation of fundamental rights under the Constitution .....	14
2 LABOUR LEGISLATION PERTAINING TO HIV/AIDS .....	15
2.1 Employment Equity Act .....	15
2.1.1 Scope of Application.....	15
2.1.2 Discrimination.....	15
2.1.2.1 Case law .....	17
2.1.3 Testing for HIV status.....	20
2.1.3.1 Case law .....	22
2.2 The Labour Relations Act.....	24
2.2.1 Introduction.....	24
2.2.2 Automatic unfair dismissal .....	24
2.2.3 Unfair dismissal .....	25
2.2.3.1 Definition of employee .....	27
2.2.3.2 Burden of proof.....	27
2.2.3.3 Remedies.....	28
2.2.3.4 Incapacity .....	29
2.2.3.5 Operational requirements.....	29
2.3 Basic Conditions of Employment Act .....	30
2.3.1 Working hours .....	30
2.3.2 Sick leave .....	31
2.3.3 Termination of employment .....	31
2.3.3.1 Operational requirements.....	31
2.3.4 Other rights .....	31
2.4 Other Legislation .....	32

2.4.1	The Promotion of Equality and Prevention of Unfair Discrimination Act..	32
2.4.1.1	Objectives .....	32
2.4.1.2	Discrimination.....	33
2.4.2	Occupational Health and Safety Act .....	34
2.4.3	Medical Schemes Act .....	35
2.5	Conclusion .....	35
CHAPTER 3	.....	37
THE IMPACT OF INTERNATIONAL INSTRUMENTS ON HIV	.....	37
3	Introduction.....	37
3.1	Universal Declaration of Human Rights (UDHR).....	37
3.2	International Covenant on Civil and Political Rights (ICCPR).....	39
3.3	International Covenant on Economic, Cultural and Social Rights (ICESCR).....	42
3.4	The International Labour Organisation (ILO) .....	44
3.4.1	ILO Treaties .....	44
3.4.2	International Guidelines.....	45
3.4.3	The ILO Code of Practice on HIV and the World of Work.....	46
3.5	Conclusion .....	47
CHAPTER 4	.....	48
THE RELEVANCE OF FOREIGN LAW ON PROTECTION OF EMPLOYEES WITH HIV IN SOUTH AFRICA	.....	48
4 .1	Introduction.....	48
4.1	Discrimination.....	48
4.1.1	Case law .....	50
4.1.2	Relevance to South Africa .....	53
4.2	The right to privacy and confidentiality.....	54
4.2.1	Relevance to South Africa .....	55
4.3	Limitation of Fundamental Rights under the Charter .....	56
4.3.1	Relevance to South Africa .....	56
4.4	International treaties.....	57
4.4.1	Relevance to South Africa .....	57
CHAPTER 5	.....	59
CONCLUSION	.....	59
BIBLIOGRAPHY	.....	62
LIST OF CASES CITED	.....	64
LIST OF STATUTES	.....	65
LIST OF CODES OF GOOD PRACTICE AND GUIDELINES	.....	66
LIST OF TREATIES	.....	67
LIST OF ABBREVIATIONS	.....	68
INDEX	.....	70

# CHAPTER 1

## INTRODUCTION AND PURPOSE STATEMENT

People living with HIV/AIDS suffer great psychological and social stress, which includes fear of the unknown and feelings of hopelessness. In addition, AIDS infection carries with it a social stigma and can lead victims to suffer serious discrimination.<sup>1</sup> Both stigmatisation and discrimination infringe upon an individual's human rights under international law, the South African constitutional law and the common law. Specific to employees, the impact of the infection at the workplace is devastating.

Without a known cure, AIDS leads to deaths of employees, frequent absenteeism due to illness, high medical insurance premiums, and the loss of the income to the affected families. Employers are also affected adversely by loss of profits due to increased labour costs and high turnover of staff. Consequently employers may adopt policies that limit employment of people living with HIV. According to the ILO, HIV/AIDS impacts negatively on the social and economic lives of employees in poor developing countries where such persons are pushed deeper into poverty due to the high cost of the disease. UNAIDS, the United Nations programme on HIV/AIDS, estimates that there are some 25 million people who live with the HIV infection in sub-Saharan Africa.<sup>2</sup> The number of new infections is increasing everyday.

There is no specific treaty dealing with discrimination on grounds of HIV/AIDS. The International Bill of Rights prohibits discrimination on many other grounds.<sup>3</sup> The International Labour Organisation (ILO) has provided useful guidelines to states, employers and trade unions on how to deal with HIV/AIDS at the workplace. In spite of these guidelines and prohibition on discrimination, employers deny employees with HIV opportunities for training and promotion and other benefits. In many cases, employers unfairly dismiss employees with HIV/AIDS.

---

<sup>1</sup> Ngcobo J "People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They have been stigmatised and marginalized". *Hoffmann V South African Airways* 2000(1) SA 1(CC) Par 28.

<sup>2</sup> UNAIDS Human Rights and HIV <http://www.unaids.org/en/PolicyAndPractice/HumanRights/default.asp> (Date of Use 1 September 2007).

<sup>3</sup> The relevant provisions of the International Bill of Rights are discussed in detail in chapter 3 of the study.

The ILO recognises that the protection of human rights and dignity of HIV infected persons including persons with AIDS is essential to control the spread of HIV/AIDS. Workers with HIV infection but who are healthy should be treated as any other healthy worker. Similarly, workers with HIV who are sick should be treated the same way as any other worker with an illness.<sup>4</sup>

This study has a limited scope. It examines the rights of and protection afforded to employees living with HIV/AIDS. It also examines the impact of international instruments on HIV provisions in South Africa and the relevance of foreign law (in this case Canada) to the protection of employees with HIV in South Africa.

## **1 Terminology**

In this study, phrases below will denote the explanations set out below.

### **1.1 Employees with HIV**

This term will refer to any employee who is infected with or who perceived to be infected with the Human Immunodeficiency Virus (HIV), including employees who suffer from AIDS related diseases. AIDS is explained in details under Par. 2 below.

### **1.2 Unfair dismissal**

This term refers to the refusal by an employer to enter into an employment contract or the termination of the contract of employment by the employer on any arbitrary ground, including the worker's real or perceived HIV status.

### **1.3 Equality clause**

This term refers to section 9 of the Constitution of the Republic of South Africa, 1996 and includes clauses in other labour legislation that gives effect to the equality clause. In

---

<sup>4</sup> See in general Gostin L & Porter L International Law and AIDS: International Response, Current Issues and Future Directions (American Bar Association 1992).

relation to Canada is refers to section 15 of the Charter of Rights and Freedoms under the Constitution of Canada 1982.

## 2 What is HIV/AIDS?

The Human-Immunodeficiency Virus (HIV) is the virus which attacks the human immune system by destroying the important cells, which protect the body from diseases. The virus attacks the human CD4 positive T cells, which are key components of the cellular immune system.<sup>5</sup> The virus infects such cells and eventually and destroys them or impairs their function.<sup>6</sup> Infection with this virus results in the progressive depletion of the immune system, leading to immune deficiency. Alta van Dyk explains that the virus hijacks the CD4 or T helper cells and slowly reduces the number of healthy CD4 cells in the body and in so doing progressively weakens the ability of the human immune system to defend itself against attack from outside.<sup>7</sup>

The virus is not inherited. It is acquired and is transmitted primarily in three ways:

- (a) Unprotected penetrative (anal or vaginal and oral sex)
- (b) Blood transfusions or the sharing or reusing of contaminated needles and syringes
- (c) Between mother and infant during pregnancy, labour, childbirth, or as result of breastfeeding.

The primary method of transmission is through unprotected sexual intercourse. Precautions imposed in the health care settings have substantially reduced the risk of transmission in such settings. The risk of transmission from mother to child has now been reduced through the provision of anti-retroviral treatment.

---

<sup>5</sup> <http://www.unaids.org/en/mediaCentre/References/default.asp> (Date of Use 13 October 2007).

<sup>6</sup> See Department of Labour *HIV/AIDS Technical Assistance Guidelines* Appendix A: *HIV/AIDS - Epidemic in perspective* 2003.

<sup>7</sup> Van Dyk A *HIV/Aids: Care & Counseling A Multidisciplinary Approach* 3<sup>rd</sup> Ed (2005) 3, 11.

The acronym AIDS refers to the Acquired Immunodeficiency Syndrome.<sup>8</sup> It is the collection of symptoms and infections associated with acquired deficiency of the immune system. These opportunistic diseases can be treated. However, with severely weakened human immunity, HIV infected persons would eventually die of AIDS related complications.

Available medical information indicates that a person infected with HIV undergoes four main stages.<sup>9</sup>

- (1) The initial stage, the primary infection phase, lasts for about four to twelve weeks. It is also called the acute sero-conversion phase. During this phase, the virus attacks the immune systems but the body fights back and is able to regain its strength. However, the infected person's HIV status changes from HIV negative to HIV positive. The phase includes the window period when a HIV test may give false negative results. Once the sero-conversion has taken place, the person becomes HIV positive for the rest of his or her life. At this stage the person may not feel sick and appears health and may not even know that he or she is infected.
- (2) The second stage is the silent or latent or the asymptomatic, immune competent phase. The infected person remains healthy, and leads a normal working life. This phase may last from ten to fifteen years depending on many factors including the life style of the concerned individual.
- (3) The third stage is the symptomatic immune suppression phase. The infected person's immune system is severely weakened and opportunistic infections attack the immune system frequently. The most common opportunistic infection in sub-Saharan Africa is tuberculosis. Up to 50 per cent of people infected with HIV are

---

<sup>8</sup> Footnote 1 supra.

<sup>9</sup> South African Law Reform Commission: Fifth Interim Report of the Law Relating to AIDS: The Need for a Statutory Offence Aimed at Harmful HIV- Related Behaviour (2001) 24-25. Gernholtz L, Heywood M & Hassan F Your Victory is Our Victory (AIDS Law Project 2000), See also *Hoffmann v South African Airways* 2001(1) SA 1 (CC) par 11. See Van Dyk 41- 43.



co-infected with tuberculosis.<sup>10</sup> The treatment of opportunistic diseases can delay the early onset of AIDS for many years. For example, the Hyper Active Anti-Retro Treatment (HAART) boosts the immune system by increasing the important CD4 cells.

- (4) The last stage of infection is the severe symptomatic or clinical AIDS phase. The infected person exhibits symptoms of multiple syndromes, which are indicated for HIV infected persons. Specifically, the important CD4 cell count drops to below 200 cells/mm. A normal healthy and uninfected person's CD4 cells count is approximately 800- 1200 cells/mm.<sup>11</sup> AIDS patients normally would die within two years after they enter this last phase.

### **3 Problem Statement**

Employees living with HIV/AIDS and those who are perceived to be infected with HIV suffer unfair discrimination at the workplace and in the communities in which they live. They are often isolated, stigmatised and denied right to employment in spite of their qualifications and ability to work. They are also denied such benefits as further training and promotion. The absence of a specific treaty to deal with HIV/AIDS and lack of awareness on the way the HIV infection is transmitted reinforces discrimination of such employees.

International human rights law protects rights of individuals generally. The International Bill of Human Rights provides for standards of treatment of human beings which include protection of the right to equality, dignity and privacy. Employees with HIV are rights holders against employers. Their human rights must be respected and fulfilled. States also have responsibilities to protect, promote and fulfil the rights of such employees. South Africa can learn from other countries including Canada which protects employees from discrimination based on disability, which includes the HIV status.

---

<sup>10</sup> Van Dyk 41.

<sup>11</sup> Van Dyk 41, 43.

The purpose of this study is to conduct a critical comparative study of the protection of employees living with HIV /AIDS in South Africa and to analyse the impact of international human rights instruments on labour laws in South Africa. The study also compares how employees with disabilities (which include HIV status) are protected under the Canadian Charter of Freedoms and Human Rights. The study further examines the relevance of the protection provided in Canada for South Africa.

#### **4 Methodology**

The main method of the study is the compilatory and analytical review of literature relating to HIV/AIDS in health context, the rights of employees under the Constitution and various labour laws in South Africa and the case law related to protection of employees living with HIV. The study also examines the international position and its relevance to South Africa. The study used case law from South Africa and Canada as well as articles in journals and books. Various websites were visited to extract relevant information on HIV/AIDS.

## **CHAPTER 2**

### **RELEVANT SOUTH AFRICAN LEGISLATION PERTAINING TO EMPLOYEES WITH HIV/AIDS**

#### **1 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996<sup>12</sup>**

The Constitution of the Republic of South Africa, 1996 hereafter the “Constitution” entrenches the Bill of Rights. The Bill of Rights provides for the fundamental human rights, and their limitations. The human rights entrenched in the Constitution are consistent with rights under the International Bill of Human Rights. Employees enjoy the human rights of all South Africans under the Constitution. In addition, there are specific provisions, relevant to employees with HIV/AIDS which protect the rights of employees. The Constitution is the supreme law of the Republic and any conduct inconsistent with it is invalid and obligations imposed by it must be fulfilled.<sup>13</sup> The Constitution has core values which include human dignity, the achievement of equality and the advancement of human rights and freedoms.<sup>14</sup>

In this section, the equality clause, the right to privacy, the right to dignity, the right to fair labour practices and the limitation of such rights under the Constitution, are briefly examined.

##### **1.1 Equality: Unfair discrimination**

Section 9 of the Constitution contains the equality clause. This section provides for equality for everyone before the law and the right to equal protection and benefit of the law. Equality is defined to include the full and equal enjoyment of all rights and freedoms. The sub-section (3) contains a non-discrimination clause which reads as follows:

---

<sup>12</sup> Act 108 of 1996.

<sup>13</sup> Sec 2.

<sup>14</sup> Sec 1(a) & s 7(1) of the Constitution.

The state may not unfairly discriminate directly or indirectly against any person on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The Bill of Rights does not define the term discrimination. Furthermore, the Bill of Rights prohibits only discrimination which is unfair. By prohibiting only the discrimination that is unfair, the Constitution leaves room for employers to prove in certain cases, that their discriminatory policies or practices based on HIV status could be justified. A cursory look at the equality clause shows that HIV status is not listed as one of the prohibited grounds under section 9(3) of the Bill of Rights. However, one of the enumerated prohibited grounds is disability. In terms sections 9 read with section 5 of the *Social Assistance Act*,<sup>15</sup> people living with HIV/AIDS are entitled to disability grants under certain circumstances.<sup>16</sup> Section 9 of the Constitution enables Parliament to enact legislation and take other measures to promote equality and prohibit unfair discrimination.<sup>17</sup> The relevant laws passed by Parliament, relating to employment equity and labour relations are discussed in detail in this chapter.

## 1.2 Right to privacy

The Constitution provides for the right to privacy, which includes inter alia the right not to have the privacy of one's communications infringed.<sup>18</sup> The Constitution does not elaborate on the nature of this right. Under the South African common law, the right to privacy protects the individual against forced acquaintances by strangers. It also protects the individual's sensitive and private information.<sup>19</sup> The Constitution allows courts, forums or

---

<sup>15</sup> 13 of 2004.

<sup>16</sup> Sec 9(b) A person, subject to section 5, eligible for disability grant, if he or she- is owing to a physical or mental disability unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance. See also *HIV/AIDS and the Law* 3<sup>rd</sup> Ed (AIDS Law Project 2003 and AIDS Legal Network) People who are at advanced stage of AIDS related complications may qualify for disability grants under this section.

<sup>17</sup> Sec 9(2).

<sup>18</sup> Sec 14 Everyone has the right to privacy, which includes the right not to have (a) their personal homes searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed.

<sup>19</sup> Blackbeard M "HIV/AIDS: The Right to Privacy v the Right to Life" 2002 (65) *THRHR* 232 ( par 5.2 ).

tribunals to promote the spirit, purport and objectives of the Bill of Rights when developing common law.<sup>20</sup>

Employers may often inadvertently violate this right to privacy through unwarranted disclosure of the health status of employees to third parties without the consent of the employees. For example, Employer discloses to Y that his friend, employee X has AIDS. This disclosure may either lead to Y makes further disclosures that could lead to X being discriminated at the work place by a wider cycle of friends of X and Y. There is no empirical social research available on this particular point. However, it is conceivable that multiple disclosures within the workplace could lead to discrimination of employees with HIV. Such disclosures often lead to stigmatization and discrimination in the workplace. The disclosures may also lead to unfair dismissals.

Although the right to privacy in the context of employment is generally governed by terms of employment contract, labour laws have reinforced this right by providing for protection of confidentiality of information relating to health status of employees. In the context of health care, guidelines issued by the Department of Health relating to HIV testing protect the right of privacy and dignity. Health care workers may not disclose information on the HIV status of an individual to third parties without the informed consent of the patient.<sup>21</sup>

The case on this point is that of *Jansen Van Vuuren and NNO v Kruger*.<sup>22</sup> This case involved the violation of the right to privacy by unwarranted disclosure of HIV status of a patient by one doctor to two other doctors who were not treating the patient. In upholding the right to privacy, the Supreme Court ruled that doctors have the ethical and legal duty to preserve the confidentiality of the HIV status of their patients.<sup>23</sup>

---

<sup>20</sup> Sec 39(2).

<sup>21</sup> HIV/AIDS Policy Guideline: Testing for HIV (Department of Health August 2000).

<sup>22</sup> 1993(4) SA 842 (A).

<sup>23</sup> 1993 (4) SA 842 at 850E.

Courts have taken the right to privacy of employees with HIV seriously. In *C v Minister of Correctional Services*<sup>24</sup> the Court prohibited the press and media from mentioning the plaintiff's name, before and after judgment, in order to preserve his privacy and not jeopardize his employment. This is a case that involved the dispute about informed consent to HIV testing of prisoners.

Some authors have criticised the doctor's duty to preserve confidentiality in HIV cases. They argue that the right to privacy is not absolute and that it can be limited by the equally important right to life of others such as the known sexual partner of the HIV positive person. McLean argues that disclosure of HIV status is justified in such cases in order to save the lives of spouses and partners.<sup>25</sup> Blackbeard points out that the right to privacy and autonomy of the HIV infected must be weighed against the other interests such as the interest in the life and physical integrity of victims.<sup>26</sup> Blackbeard advocates that a case by case approach should be adopted due to the fact that disclosure usually results in stigmatisation and ostracism of the patient.<sup>27</sup> Gutto argues that given the widespread public prejudices and stereotypes against people who are living with HIV/AIDS, the protection of the right to privacy remains very important.<sup>28</sup>

As pointed out in the following chapters of this study, employers have a statutory duty not to disclose the HIV status of their employees without the employees consent or without court orders.

### **1.3 The right to dignity**

Section 10 of the Constitution protects the right to dignity. This right is also one of the core values of the Constitution. The Constitutional Court has repeatedly emphasised that dignity is at the heart of the prohibition against unfair discrimination. For example, in *S v Makwanyane*<sup>29</sup> Judge O'Regan stated that

---

<sup>24</sup> 1996 (4) SA 292 at 295.

<sup>25</sup> MacLean GR "HIV Infection and a Limit to Confidentiality" 1996 *SALHR* 452.

<sup>26</sup> Blackbeard M HIV/AIDS the Right to Privacy v the Right to Life 2002(65) *THRHR* 232.

<sup>27</sup> (65) *THRHR* 232 at 241.

<sup>28</sup> Gutto S *Equality and Non-Discrimination in South Africa* (New Africa Books 2001) p 227.

<sup>29</sup> 1995(3) SA 391 (CC).

The importance of dignity as a founding value of the new Constitution cannot be overemphasized. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern. The right therefore is the foundation of many other rights that are specifically entrenched in Chapter 3.<sup>30</sup>

The right to dignity is important to employees with HIV. It protects them against stigmatization and other degrading treatment based on their status. Devenish points out that, all things considered, human dignity is in all probability the most important right in the Constitution.<sup>31</sup> Cathi Albertyn and Berth Goldblatt underline the fact that equality, dignity and freedom are values in the Constitution that underpin the new South African society. These values must be used to interpret the Bill of Rights.<sup>32</sup>

#### **1.4 The right to fair labour practices**

Section 23(1) of the Constitution provides that everyone has the right to fair labour practices. The Constitution allows Parliament to enact legislation to protect this right.<sup>33</sup> The right to fair labour practices is elaborated upon and discussed in detail later in this chapter.

#### **1.5 Limitation of fundamental rights under the Constitution**

The Constitution recognises that human rights are not absolute. In terms of section 36 rights may be limited in terms of a law of general application and only to the extent that such limitation is reasonable and justifiable in a democratic and open society based on human dignity, equality, taking into account relevant factors which include five listed factors:

- (i) The nature of the right;
- (ii) The importance of the purpose of the limitation;

---

<sup>30</sup> 1995(3) SA 391 (CC). This case was decided on basis of sec 8 of the Interim Constitution, 200 of 1993. The equality clause under the 1996 Constitution has similar provisions related to the right to dignity.

<sup>31</sup> Devenish G *The South African Constitution* (Lexis Nexis Butterworths 2005) par 45 p 61.

<sup>32</sup> Albertyn C & Goldblatt B *Facing the Challenge of Transformation: Difficulties in Development of Indigenous Jurisprudence of Equality* (1998) 14 *SALHR* 248 at 258.

<sup>33</sup> Sec 23(6).

- (iii) The nature and extent of the limitation;
- (iv) The relation between the limitation and its purpose;
- (v) Less restrictive means to achieve the purpose.

In interpreting the equality clause and the Bill of Rights, the Constitutional Court has adopted a three-stage inquiry as set out in the case of *Harksen v Lane NO*.<sup>34</sup> The inquiry is commonly referred to as the “Harksen test”. As indicated in Paragraph 2.1.3.1 below, the Constitutional Court has used the test to determine whether exclusion of employees with HIV from employment violated the equality clause.<sup>35</sup>

## **2 LABOUR LEGISLATION PERTAINING TO HIV/AIDS**

### **2.1 Employment Equity Act<sup>36</sup>**

#### **2.1.1 Scope of Application**

The Employment Equity Act hereafter the “EEA” gives effect to sections 9 and 23 of the Constitution of the Republic of South Africa, 1996.<sup>37</sup> The EEA seeks to achieve equality in the workplace and promote fair treatment in employment by eliminating unfair discrimination and implementation of affirmative action.<sup>38</sup> The Act does not apply to members of the Defence Force, the National Intelligence Agency, and the South African Secret Service, and to the unpaid volunteers working for non-profit organisations.<sup>39</sup>

#### **2.1.2 Discrimination**

The EEA is the only labour legislation in South Africa which expressly prohibits unfair discrimination based on HIV status. Other grounds prohibited under the EEA are the same

---

<sup>34</sup> 1998 (1) SA 300 (CC).

<sup>35</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

<sup>36</sup> 55 of 1998.

<sup>37</sup> Sec 3.

<sup>38</sup> Sec 2.

<sup>39</sup> Sec 3(a) & (b).



as those under section 9 of the Constitution.<sup>40</sup> However, the Act makes it clear in section 6(2) that unfair discrimination does not include any distinction, exclusion or preference that is necessary for the performance of a particular job.<sup>41</sup> Furthermore, affirmative action measures aimed at addressing imbalances in society may not amount to unfair discrimination.<sup>42</sup> Both, the affirmative action measures and the inherent requirement of a job, are possible defences open to employers against actions by employees based on unfair discrimination. The inherent requirement of a particular job is defence which is in line with the ILO Convention (discussed in Chapter 3).<sup>43</sup>

It is generally difficult to see types of employment that would specifically require employees to be HIV negative. People living with HIV infection during the first two phases normally show no signs of illness and can perform their jobs without any problem. It is therefore not reasonable and unfair to exclude such persons from employment solely on the basis of their HIV status. In the same manner it may be difficult to see what types of jobs would be given to HIV negative persons as affirmative action measures. However, in the last phase of AIDS, employees with HIV may fail to meet specific requirements of a job due to opportunistic diseases which affect their capacity to work. In such cases they should be treated as any other employee who is incapable of performing his work due to illness or other incapacities.

The Labour Court has powers to determine all matters related to the interpretation of the EEA.<sup>44</sup> Employees can approach the Labour Court whenever disputes arise. Employees specifically can bring to the Court disputes relating to HIV issues.

---

<sup>40</sup> Sec 6(1). No person may unfairly discriminate directly or indirectly against any employee in any employment policy, on one or more of the following grounds including gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

<sup>41</sup> Sec 6(2)(b).

<sup>42</sup> Sec 6(2)(a).

<sup>43</sup> Art 1(2) of ILO Convention C 111. Any distinction, exclusion, preference in respect of a particular job based on inherent requirements thereof shall not be deemed to be discrimination.

<sup>44</sup> Sec 50 of EEA.

### 2.1.2.1 Case law

The landmark case on employees with HIV is the case of *Hoffmann v South African Airways*, which arose before the EEA came into force.<sup>45</sup> In the Court *a quo*,<sup>46</sup> Mr Jacques Hoffmann applied for a job as cabin attendant in the South African Airways (SAA). He passed the selection examinations for the job but SAA did not employ him because he failed a medical examination when he tested positive for HIV status. He filed an application in the High Court alleging that he was discriminated against on grounds of his HIV status. He also submitted that his constitutional rights to dignity, privacy, and to fair labour practices were infringed. In the court *a quo*, the applicant sought relief in the form of an order of reinstatement.

It was not disputed in the High Court that Mr. Hoffmann was not at the most advanced stage of the HIV infection, which would have prevented him from engaging in cabin crew activities. In his judgment Judge Hussain, ruled that the violations of Mr. Hoffmann rights to privacy, unfair labour practices, and right to dignity would not on their own entitle the applicant to any relief.<sup>47</sup> This is clearly wrong as the three rights are separate and distinct rights under the Constitution. The right to privacy is also known under South African common law.<sup>48</sup>

Judge Hussain dismissed the application based on evidence before him. The Judge ruled that SAA did not directly discriminate against the applicant.<sup>49</sup> The judge also ruled that the SAA's exclusionary policy was justified on the following grounds:

- (a) The policy was aimed at combating the spread of the disease.<sup>50</sup>

---

<sup>45</sup> *Hoffmann v. South African Airways* (2) 2000 SA 628 (W).

<sup>46</sup> (2) 2000 SA 628 (W) Par 3.

<sup>47</sup> Par 6 p 633.

<sup>48</sup> *Jansen Van Vuuren NNO v Kruger* 1993 (4) SA 842 (A). In this case the Supreme Court reaffirmed the right to privacy and the legal and ethical duty of medical practitioners to maintain confidentiality on HIV status of patients.

<sup>49</sup> Par 8.

<sup>50</sup> Par 9.

- (b) Flying personnel must be fit for worldwide duty and must be vaccinated against yellow fever. Vaccination against yellow fever for HIV positive persons posed risks to such persons and third parties.<sup>51</sup>
- (c) HIV positive persons could not meet the expectations of serving SAA for ten years after undergoing training which costs R 30,000.<sup>52</sup>
- (d) The policy was not directed at people with disabilities.<sup>53</sup>
- (e) The policy does not exclude applicants from all employment with SAA.<sup>54</sup>
- (f) The policy was in line with practice of other airlines and international guidelines.<sup>55</sup>
- (g) The policy was justified on medical grounds and on the inherent requirements of the job of cabin crew.<sup>56</sup>

The judgment of the High Court has been criticised on grounds that it was based on certain unwarranted assumptions and a flawed constitutional analysis, and for the inadequate manner in which it dealt with HIV discrimination. Rycroft and Louw argue that the High Court based its judgment on the commercial interests of SAA. The judgement largely ignored the human rights of the employee.<sup>57</sup> The judgement was also based on an insufficient analysis of the equality clause in terms of the Constitution. It is also important to note that issues related to HIV testing were decided by the High Court at the time when the Employment Equity Act was not in force.<sup>58</sup>

---

<sup>51</sup> Par 13.

<sup>52</sup> Par 17.

<sup>53</sup> Par 26.

<sup>54</sup> Par 29.

<sup>55</sup> Par 29.

<sup>56</sup> Par 20.

<sup>57</sup> See Rycroft A & Louw R “Discrimination on basis of HIV: Lessons from the Hoffman Case” (2000) 21 *ILJ* 856. The authors argue that the Court a quo assumed wrongly that all persons with HIV should be treated the same, irrespective of the stage of the disease. The Court also assumed that the employers have the prerogative to exclude employees with HIV on safety grounds. The authors also argue that it is a wrong assumption that employers are entitled to 10 year service from employees once they invest in training of employees. The Court also assumed that public perceptions can justify discrimination. And lastly, the Court assumed that where there is a commercial rationale, discrimination was justified.

<sup>58</sup> The Employment Equity Act 55 of 1998 came into force in August 1999.

On appeal, the Constitutional Court admitted additional medical evidence on HIV.<sup>59</sup> The evidence excluded the likelihood of cabin attendants transmitting the virus to passengers and other crew members. The evidence affirmed that persons with HIV could be safely vaccinated against yellow fever. In general, medical evidence concluded that exclusion from employment of a person because of HIV status alone could not be justified on medical grounds.<sup>60</sup>

The SAA admitted during the hearing in the Constitutional Court that its exclusionary policy was unfair. In spite of the admission, Judge Ngcobo of the Constitutional Court embarked on a three -stage inquiry in analyzing the equality clause.<sup>61</sup> During the first stage, the Court inquired whether the policy under attack had a rational connection to a legitimate government purpose. The second inquiry was whether the SAA policy amounted to unfair discrimination. The last inquiry is whether the policy can be justified under the limitation provision. The Constitutional Court ruled that in view of the unfairness of the discrimination involved in the case, the first inquiry was not necessary.<sup>62</sup> However, on the second inquiry, the Court concluded that the exclusion of Mr. Hoffmann based on his HIV positive status, was unfair discrimination, which impaired his dignity.<sup>63</sup> The Court observed that people living with HIV are discriminated, stigmatized and marginalized, and face disadvantage in society.<sup>64</sup> The Court held that neither the purpose nor the medical evidence justified the discrimination.<sup>65</sup> The Court found that the conduct of SAA towards employees living with HIV and who are still in employment is inconsistent with the argument to exclude Hoffmann.<sup>66</sup>

The Court further held that commercial interests are important but they should not undermine equality. More importantly, the Court held that prejudice and stereotyping

---

<sup>59</sup> *Hoffmann v South African Airways* 2000(1) SA 1(CC) Par 13 – 14.

<sup>60</sup> Par 15.

<sup>61</sup> Par 24.

<sup>62</sup> Par 26.

<sup>63</sup> Par 27,29.

<sup>64</sup> Par 27.

<sup>65</sup> Par 30.

<sup>66</sup> Par 25.

should not creep in the guise of commercial interests.<sup>67</sup> The Court emphasised that prejudice can never justify discrimination.<sup>68</sup> Interests of other airlines cannot dictate the policies that promote equality.<sup>69</sup> Furthermore, the exclusion of an employee with HIV from employment without assessing the stage of the progression of the infection is unreasonable and cannot be justified under the Constitution.<sup>70</sup> The Court indicated that it was not an inherent requirement of the job of cabin attendant to be HIV negative.<sup>71</sup> The Court did not find it necessary to embark on the third inquiry in the case.<sup>72</sup> The Court ordered that the SAA should employ Mr. Hoffmann since this was the most effective remedy under the circumstances of the case.

It is important to note that the Constitutional Court did not find it necessary to deal with other equally important rights, which Mr Hoffmann had raised. The case demonstrates that discrimination based on HIV status impairs the right to dignity of infected persons. The case also shows that HIV infected persons have the right to be considered for employment and to be employed. The case illustrates protection of employees living with HIV.

### **2.1.3 Testing for HIV status**

The EEA prohibits HIV testing for employees without the conditional authorisation of the Labour Court.<sup>73</sup> In terms of section 50(4), the Labour Court may authorize the testing for HIV and impose conditions relating to counselling, maintenance of confidentiality, the period which authorisation is given, and the category of jobs or employees in respect of which the authorisation for testing applies.<sup>74</sup>

---

<sup>67</sup> Par 34.

<sup>68</sup> Par 37.

<sup>69</sup> Par 36.

<sup>70</sup> Par 39.

<sup>71</sup> Par 39.

<sup>72</sup> Par 41.

<sup>73</sup> Sec 7(2). Testing of an employee to determine that employee's HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of section 50(4) of this Act.

<sup>74</sup> Sec 50(4).

HIV testing raises complex social, ethical and legal questions in a labour market that is very competitive. The questions relate to the right to privacy, and confidentiality of information as well as the right of access to information. Annali Basson notes that:

The desire to secure employment may place tremendous strain on the job applicant's right to privacy regarding his or her health status. If a clean bill of health could mean the difference between being employed or not, it is possible that many job applicants may be 'forced' by economic considerations to 'voluntarily' disclose information in the hope that such information may secure employment. A negative or unfavourable medical test at pre-employment phase may also well result in non-selection for employment.<sup>75</sup>

The EEA is a tool of control over the employer's powers relating to the use of medical tests to exclude prospective job applicants and employees from employment or benefits.

In considering the testing for HIV status, the Labour Court is required to take into account the relevant codes of Good Practice issued from time to time by the Minister of Labour. The Minister has promulgated the Code of Good Practice on key Aspects of HIV/AIDS and Employment<sup>76</sup>. Under paragraph 6.1 of the Code unfair discrimination in employment relations is prohibited.

Paragraph 7 deals with HIV testing. It contains a general prohibition of pre-employment testing without the approval of the Labour Court.<sup>77</sup> The Code also provides for situations where employers could approach the Court for permission to conduct HIV testing.<sup>78</sup> The Code specifies that all testing must be carried out within a health facility, with informed consent,<sup>79</sup> with strict procedures relating to confidentiality,<sup>80</sup> and must be conducted in accordance with policy guidelines issued by the Department of Health.<sup>81</sup> The Code emphasises that information obtained after permissible testing should not be used to unfairly discriminate against an employee with HIV.

---

<sup>75</sup> Basson A *Essential Labour Law 4<sup>th</sup> ed* (Labour Law Publications 1998) p 192.

<sup>76</sup> Government Gazette 21815 Government Notice No R.1298 of 1 December 2000.

<sup>77</sup> Par 7.1.1.

<sup>78</sup> Par 7.1.4 & 7.1.5. Employers must seek authorisation for pre-employment testing, as part of procedures for termination of employment, for eligibility for training.

<sup>79</sup> Par 7.1.5 (b)(iii).

<sup>80</sup> Par 7.1.5 (b)(iv).

<sup>81</sup> Par 7.1.5(b)(ii).

### 2.1.3.1 Case law

The Labour Court has decided a number of cases related to HIV testing in the workplace. In the case of *Joy Mining v NUMSA*<sup>82</sup> the Labour Court allowed anonymous and unlinked HIV tests at the workplace after considering a long list of factors. The case involved the application by the employer to conduct HIV tests for employees. The application was supported by the employees and their trade union representatives. The purpose of the testing was to determine the prevalence of the HIV in the workplace and to take necessary measures. Judge Landman considered the following factors:

- (i) the employer's policy on prohibition of unfair discrimination at the workplace;
- (ii) the need for HIV testing and the purpose of the test;
- (iii) the medical facts;
- (iv) employment conditions;
- (v) social policy;
- (vi) fair distribution of employee benefits;
- (vii) the inherent requirements of the job;
- (viii) categories of employees concerned;
- (ix) the attitude of employees towards the requested tests;
- (x) whether the test is voluntary or compulsory;
- (xi) the obtaining of informed consent of employees;
- (xii) how the tests are financed;
- (xiii) employee preparedness for testing;
- (xiv) pre-testing and post -testing counselling given to employees;
- (xv) the nature of the proposed test; and finally
- (xvi) the procedure to be used.<sup>83</sup>

In the *Joy Mining case*, the Court also granted the application because it was convinced that there was genuine consent of employees to HIV testing, and that the test was for

---

<sup>82</sup> *Joy Mining Machinery-A Division of Harnischfeger (SA) Pty Ltd v National Union of Mine Workers* (2002) 23 ILJ 391 (LC).

<sup>83</sup> Par 22- 23 at 399.

purposes of determining the prevalence of the infection at the workplace. The Court was convinced that the purpose of the tests was not to unfairly discriminate against employees with HIV. Lastly, the expenses for the test were to be borne by the employer.

The Labour Court has also held that anonymous tests which were not linked to any employee, and which are conducted voluntarily, were authorised in terms of section 7(1) of the EEA.<sup>84</sup> The Labour Court has followed the *Code of Practice on Key Aspects of HIV/AIDS and Employment*, in considering applications for HIV testing. In doing so, the Labour Court has ensured that employees' right not to be tested against his or her informed consent is protected. Informed consent of the user is also a statutory right provided for under the National Health Act.<sup>85</sup>

The EEA protects employees against discrimination when such employees exercise rights granted under the Act.<sup>86</sup> The Code reiterates the legal right to privacy.<sup>87</sup> This right is also protected under the Constitution, the EEA, the LRA, and health legislation.<sup>88</sup>

The EEA does not apply to specific categories of employment, notably the military services and the intelligence services. Although the Code of Good Practice issued under the Act is not a legally binding document, it provides very useful guidance on the treatment of HIV positive employees and the interpretation of the rights of employees with HIV.

In summary, the EEA is important for employees with HIV. Apart from protecting the right to privacy, the Act provides for the right not to be tested for HIV without informed consent, and without conditional authorisation by the Labour Court. More importantly, the EEA protects employees against unfair discrimination on grounds of their HIV status.

---

<sup>84</sup> *Irvin & Johnson Ltd v Trawler & Line Fishing Union & Others* (2003) 24 ILJ 7711 & *PFM Building Glass (Pty) Ltd v CEPPAWU & Others* (2003) 24 ILJ 974 (LC).

<sup>85</sup> 61 of 2003, s 7(1). A user's consent is necessary except where user is unable to give such consent, or where failure to give consent would adversely affect the public or where delays in giving consent would result in the user's death.

<sup>86</sup> Sec.51.

<sup>87</sup> Par 7.2.

<sup>88</sup> Sec 14 of the Constitution, s. 51(1) & (2) of EEA, s 7(1) & 16(5)(a-d) of LRA & s 7(1) of National Health Act.



## **2.2 The Labour Relations Act<sup>89</sup>**

### **2.2.1 Introduction**

The Labour Relations Act (hereafter “LRA”) has the primary objective of advancing economic development, social justice, labour peace and the democratisation of the workplace. The Act gives effect to the rights entrenched under the Constitution and obligations incurred by the Republic as a member state of the International Labour Organisation (ILO).<sup>90</sup> The LRA is one of the most important laws that govern dismissals in South Africa. The purpose of the Act is to give effect to the protection against unfair labour practices.<sup>91</sup> The Act establishes the Labour Court, which has jurisdiction to determine disputes and other labour relations issues.<sup>92</sup>

Sections 4 and 5 of the LRA provide for the rights of employees and persons seeking employment. The rights include the rights to form or join trade unions and to participate in their lawful activities. It is important to note that employees cannot be discriminated against for exercising rights granted by the Act and for failure or refusal to do something that an employer may not lawfully require the employee to do.<sup>93</sup> It is conceivable that an employee, who refuses to undergo testing for HIV without the approval of the Labour Court, can claim protection under both, the LRA, and the EEA.

### **2.2.2 Automatic unfair dismissal**

The LRA guarantees employees the right not to be unfairly dismissed and the right not to be subjected to unfair labour practices.<sup>94</sup> Chapter VIII of the LRA deals extensively with the two issues. The term “dismissal” covers a wide range of methods of termination of employment by the employer with or without notice. Under the LRA, dismissals are characterised as either “automatically unfair”<sup>95</sup> or “unfair”.<sup>96</sup> In terms of section 187(1)(f),

---

<sup>89</sup> 66 of 1995.

<sup>90</sup> Sec 1(a) & (b).

<sup>91</sup> Sec 1.

<sup>92</sup> Sec 151 of LRA, s 77 of BCEA & s 49 of EEA.

<sup>93</sup> Sec 5(1) read with s 5(2)(iv).

<sup>94</sup> Sec 185.

<sup>95</sup> Sec 187(1).

<sup>96</sup> Sec 188 (1) & (2).

it amounts to automatically unfair dismissal when an employer unfairly discriminates against the employee based on any arbitrary ground. The sub-section (f) further enumerates 18 grounds, which describe arbitrary reasons of termination.<sup>97</sup> Although HIV status is not specifically mentioned, it is submitted that when this section is read together with section 6(1) of the EEA, terminating employment because of HIV status alone would amount to unfair dismissal under this section. It is also submitted that, depending on the stage of progression of the infection, a dismissal on grounds of HIV status may also qualify as an automatically unfair dismissal on the listed ground of disability.

### **2.2.3 Unfair dismissal**

Section 188 provides that dismissal may be unfair when employers fail to prove that the reason for dismissal is a fair reason relating to conduct or capacity of the employee to perform the job,<sup>98</sup> or that the dismissal was based on an employer's operational requirements<sup>99</sup> or if the dismissal was effected without following a fair procedure.<sup>100</sup>

“Unfair labour practice” refers to any unfair act or omission that arises between an employer and employee involving the terms of the employment contract and benefits, the continuity of employment, and the occupational detriment following an employee's disclosure of information relating to unlawful conduct of an employer or other employees, which information is protected under the Protected Disclosure Act.<sup>101</sup>

Section 188(2) obliges the Labour Court to consider the various Codes of Good Practice when determining issues related to unfair dismissals. The Minister of Labour has

---

<sup>97</sup> Sec 187(1)(f). A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to s 5, or if the reason for the dismissal is that the employer unfairly discriminated against the employee, directly or indirectly, on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

<sup>98</sup> Sec 188(a)(i).

<sup>99</sup> Sec 188(a)(ii).

<sup>100</sup> Sec 188(b).

<sup>101</sup> 26 of 2000, s 186 (2)(a)-(d). This Act provides for procedures in terms of which employees may disclose information regarding unlawful or irregular conduct of employers and other employees. The Act also protects employees who make such disclosures including disclosures relating to unfair discrimination. Dismissals following disclosure of protected information are deemed automatically unfair as contemplated under s 187 of the Labour Relations Act.

promulgated the Code of Practice: Key aspects of HIV/AIDS and Employment<sup>102</sup> under the EEA and LRA. The key principle of the Code is to balance the employee's right to protection against arbitrary actions and the employer's right to satisfactory performance. The Code aims to ensure that employees are not discriminated against or denied benefits at the workplace.<sup>103</sup> Under the Code, a fair practice relate to dismissal would involve initial investigations, notices, and reasons for dismissals. The Code has no legal binding force. However, it provides basic principles and guidance in labour relations for HIV issues.<sup>104</sup>

The Minister has equally promulgated other codes, which relate to employees with HIV. The Code of Good Practice: Dismissal<sup>105</sup> provides that an employee who is not capable of performing after proper evaluation, instruction and training, guidance and counselling may be dismissed for poor work performance.<sup>106</sup> The Code also provides that an employee may be dismissed on ground of incapacity (ill health or injury) after the employer follows a proper procedure.<sup>107</sup>

The question whether HIV/AIDS is a disability has not been tested in the courts of law in South Africa. However, in practice, South Africans who are too ill to earn a living due to HIV infections receive disability grants under the Social Assistance Act.<sup>108</sup> In the same manner, it is submitted that employers may dismiss employees who are too ill to work because of AIDS related complications.<sup>109</sup> The Code of Practice on Dismissal based on Operational requirements provides that employees who may be dismissed because of economic, technological, structural or operational requirements of the employer are entitled to severance pay. The dismissals under this category are referred to as no fault dismissals.

---

<sup>102</sup> Government Gazette 21815, No R.1298 of I December 2000.

<sup>103</sup> Par 2.1.

<sup>104</sup> Par 3I & par 4.3. It is important to note that the principles in the code are similar to those under the ILO Code of Good Practice on HIV/AIDS at the World of Work.

<sup>105</sup> Workinfo.com resource for the workplace: [http://www.workinfo.com/free/sub\\_for\\_legres/Data/cogp.htm](http://www.workinfo.com/free/sub_for_legres/Data/cogp.htm) [Date of Use: 10/11/2007]. See also Schedule 8 of LRA.

<sup>106</sup> Item 11 of the Code protects employees from being dismissed solely on the basis of their HIV/AIDS status.

<sup>107</sup> Item 10 of the Code.

<sup>108</sup> Sec 9, 59 of 1992.

<sup>109</sup> Christianson M Incapacity and Disability: A retrospective and prospective overview of the past 25 years (2004) 25 *ILJ* 879 at p 884. .

For these dismissals to be fair, the employer must follow a fair procedure and show that there is a substantively fair reason for such dismissals.

### **2.2.3.1 Definition of employee**

The LRA defines an employee as any person other than an independent contractor who works for another person for remuneration, and any person who assists in carrying out the business of an employer.<sup>110</sup> The term “employee” is applied consistently in other labour laws in South Africa.<sup>111</sup> The term includes a former employee or an applicant for employment.<sup>112</sup> Like other labour laws, the term “employee” excludes several government services such as the military, the intelligence, and the security forces.<sup>113</sup>

### **2.2.3.2 Burden of proof**

Section 192 of LRA provides for matters relating to evidence on proceedings relating to dismissals. In terms of the section, the employee must establish the existence of the dismissal. If the dismissal is established, the employer must prove that the dismissal is fair. If the dispute relates to conditions of employment, the employee who alleges that a right or protection has been infringed, must prove the facts of conduct that constitute such conduct.<sup>114</sup> The employer must prove that the alleged conduct did not violate the provisions of BCEA.<sup>115</sup> The Employment Equity Act provides that whenever unfair discrimination is alleged, the employer against whom the allegation is made, must establish that it is fair.<sup>116</sup> In terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, discrimination on listed grounds is unfair when there is evidence that an employee was differentiated on the enumerated. In such cases, the burden of proof shifts to the employer to prove that such discrimination was reasonable, fair and justified.<sup>117</sup> Where the ground upon which discrimination is alleged, is not listed, the applicant must

---

<sup>110</sup> Sec 213.

<sup>111</sup> Sec 1 of EEA, s 1 of BCEA.

<sup>112</sup> Sec 79(1).

<sup>113</sup> Sec 213 of LRA & s 1 of BCEA, & s 1 of EEA.

<sup>114</sup> Sec 81(a) of BCEA.

<sup>115</sup> Sec 81(b).

<sup>116</sup> Sec 11.

<sup>117</sup> Sec 9(5) of PEPUDA.

prove that the acts of the employer impaired the dignity and that such acts are unreasonable and arbitrary. The burden would then shift to the employer to show that the discrimination was fair.

An employee with HIV will have to prove that discrimination based on the HIV status was unfair before the employer could be called upon to give evidence that the exclusion was reasonable and justified. Many of the grounds that are not listed are neutral grounds and discrimination on neutral grounds is often difficult to prove. Jane Hodges argues that in indirect unfair discrimination, employers may win cases by not uttering a word as the burden is on the complainant to prove that the discrimination was unfair.<sup>118</sup>

### **2.2.3.3 Remedies**

The LRA provides for remedies against unfair dismissals of employees. These include the following:

- (1) Reinstatement;<sup>119</sup>
- (2) Re-employment in work before dismissal or alternative work on reasonable terms;<sup>120</sup>
- (3) Reasonable and equitable compensation of not more than 24 months pay in certain cases of automatic unfair dismissal and not more than 12 months pay in cases of unfair labour practices;<sup>121</sup>
- (4) Other appropriate remedies such as interdicts or orders directing compliance, which will remedy a wrong including costs for proceedings before the Labour Court;<sup>122</sup>
- (5) Severance pay if unfair dismissal is based on employer's operational requirements;<sup>123</sup>
- (6) Damages.<sup>124</sup>

---

<sup>118</sup> Hodges J Guidelines on addressing HIV/AIDS in the workplace through employment and labour laws (ILO Geneva January 2004).

<sup>119</sup> Sec 193 (1)( a).

<sup>120</sup> Sec 193(1) (b).

<sup>121</sup> Sec 193(1) read with s 194(1), (3) & (4).

<sup>122</sup> Sec 193(3) read with s 158(1)(a).

<sup>123</sup> Sec 195.

<sup>124</sup> Sec 158(1)(a)(vi) damages depend on circumstances of each case.

#### **2.2.3.4 Incapacity**

In cases of incapacity due to ill health, (e.g. employees with AIDS) the employers must investigate the extent of the incapacity and the period of time when the employee is expected to be absent from work. The employee should state a case in response. Furthermore, the employer must investigate the extent to which an employee is capable to perform the work or alternative work. This means the employees are entitled to reasonable accommodation before their contracts are terminated. In terms of the Labour Relations Act, employers may dismiss an employee who is too ill to work.

Reasonable accommodation may be problematic in certain instances. An example in this regard is given in the Technical Assistance Guidelines (TAG) issued by the Department of Labour and the Commission on Employment Equity.<sup>125</sup> A woman employee was employed as a radio controller, then demoted to be the gardener and later to a cleaning job before she was dismissed. She was refused relevant documents for claiming benefits from the company. The woman was finally dismissed because of HIV infection. This case illustrates that employees with HIV may face less favourable conditions of employment, demotion and dismissal without due regard to their capacity to perform the inherent requirement of a particular job. It is hard to imagine how in the latter case, the particular woman, in carrying out her normal duties, would have posed any risk of infecting other workers or would have failed to perform the normal duties of a radio controller.

#### **2.2.3.5 Operational requirements**

Section 189 deals with dismissals of employees on grounds of operational requirements. There is the potential that this section could apply to employees with HIV. The Act provides for an elaborate procedure on how to proceed in such matters.<sup>126</sup> The procedure entails written notice to, and consultations with the employee and his or her representative. These consultations will look into such issues as reasonable accommodation before

---

<sup>125</sup> Par 2.1.3 of TAG, (Department of Labour June 2003).

<sup>126</sup> Sec 189(1)–(4).

effecting any dismissals. The consultations will also address issues relating to reasons for dismissal, and severance pay.

## **2.3 Basic Conditions of Employment Act<sup>127</sup>**

The Basic Conditions of Employment Act 1997 (hereafter the “BCEA”) was enacted with the purposes of giving effect to and regulate the right to fair labour practices,<sup>128</sup> establishing and enforcing basic conditions of employment and to give effect to obligations incurred by the Republic of South Africa as a member state of the ILO.<sup>129</sup> In terms of section 4 of the Act, the entire Act forms part of all employment contracts to which the Act applies.<sup>130</sup>

### **2.3.1 Working hours**

The BCEA regulates the working time of employees. The basic working time for any employee is not more than 45 hours per week.<sup>131</sup> In addition, employees can also work not more than 10 hours per week of overtime.<sup>132</sup> The working hours permit employees to take meal intervals of at least one hour every five working hours. In addition, employees are entitled to daily rest periods of 12 consecutive hours and to a weekly rest period of 36 consecutive hours.<sup>133</sup> Employees are also entitled to payment for any night work,<sup>134</sup> work on Sundays,<sup>135</sup> and work on public holidays.<sup>136</sup> The Minister of Labour has promulgated, in terms of section 87(1)(a) of BCEA, a Code of Good Practice on Arrangement of Working Time.<sup>137</sup> The Code emphasises issues of health and safety of employees when

---

<sup>127</sup> 77 of 1998.

<sup>128</sup> Sec 2(a).

<sup>129</sup> Sec 2(b).

<sup>130</sup> Sec 83A of BCEA excludes members of the armed forces, and intelligence forces from the application of the Act.

<sup>131</sup> Sec 9(1)(a).

<sup>132</sup> Sec 10.

<sup>133</sup> Sec 15.

<sup>134</sup> Sec 17.

<sup>135</sup> Sec 16.

<sup>136</sup> Sec 18 provides that employees cannot be forced to work on public holidays and if they are so required, they should be paid double the amount of pay.

<sup>137</sup> Government Gazette 13 November 1998 No 19453.

working time is set. The Code imposes a duty on employees to take reasonable steps to protect their own health and the health of other employees.<sup>138</sup>

### **2.3.2 Sick leave**

The BCEA provides for the right to sick leave for all employees. The sick leave follows a defined leave cycle. Employees with HIV are thus entitled to a paid sick leave for a period of six weeks within the 36 months cycle.<sup>139</sup> Employees are also entitled to be paid sick leave for any absences which are certified by a medical doctor.<sup>140</sup>

### **2.3.3 Termination of employment**

The BCEA allows parties to the employment contract to terminate such contracts with written notice or payment of a salary in lieu of notice. In terms of section 37 the length of notice depends on the length of service. When a person has worked for longer than a year a statutory notice of one month is necessary. Compliance with the notice period, and providing such notice in writing are minimum standards for termination of employment. However, complying with these standards does not mean that a termination is fair. In terms of the LRA, a termination with or without notice may still be unfair if it violates the provisions of section 187(1)(f) of the Act.

#### **2.3.3.1 Operational requirements**

The BCEA provides for the payment of severance pay when employers terminate contracts due to inherent requirements of the job.<sup>141</sup> Severance pay may be paid to employees at an advanced stage of AIDS, who cannot discharge their functions due to illness. Severance pay is calculated at the rate of at least one-week's payment for every completed year of service.<sup>142</sup>

### **2.3.4 Other rights**

---

<sup>138</sup> Item 3.3.5 of the Code.

<sup>139</sup> Sec 22.

<sup>140</sup> Sec 23 & 24.

<sup>141</sup> Sec 41(2).

<sup>142</sup> Sec 41(2).



Chapter 10, part C, of the Act specifies other rights that employees can exercise.<sup>143</sup> Employees can approach the Labour Inspectors and make complaints against employers who fail to comply with provisions of the Act. Employees can also inspect records kept by the employer of his employment. Employees can also refuse to comply with unlawful instructions. Employees have the right to participate in legal proceedings under the Act. They also have the right to request an inspection of the records by trade union representatives or labour inspectors and to discuss conditions of work with colleagues, the employer or third parties.

The BCEA also contains a general prohibition against any person who discriminates against employees who exercise rights under the Act.<sup>144</sup> In the same vein, the Act forbids any person from dissuading or preventing or threatening employees who exercise rights.<sup>145</sup> Employees can also file complaints to the Labour Court in terms of section 80 of the Act.

## **2.4 Other Legislation**

### **2.4.1 The Promotion of Equality and Prevention of Unfair Discrimination Act<sup>146</sup>**

#### **2.4.1.1 Objectives**

The Promotion of Equality and Prevention of Unfair Discrimination Act, hereafter “PEPUDA”, is enacted to give effect to the equality clause under the Bill of Rights, Chapter 2 of the Constitution. It is an important law of general application. The objectives of the Act are to facilitate the transition to democracy, facilitation of compliance with international obligations; guided by the principles of equality, fairness, equity, social progress, justice, human dignity, and freedom.<sup>147</sup> The Act seeks to achieve these objectives through promotion of equality, prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution. Several objectives of the Act are relevant to persons living with HIV.

---

<sup>143</sup> Sec 78(1) (a)-(f).

<sup>144</sup> Sec 79(1).

<sup>145</sup> Sec 79(2)(a), (b) & (c).

<sup>146</sup> 4 of 2000.

<sup>147</sup> Sec 2.

### 2.4.1.2 Discrimination

PEPUDA defines discrimination in section 1 in wide terms. In terms of this section, discrimination refers to as any act or omission including a policy, law, rule, practice, condition, situation which directly or indirectly imposes burdens, obligations or disadvantages on or withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds.<sup>148</sup> The Act also lists grounds upon which discrimination is prohibited. Except for pregnancy, the listed grounds are the same as those in section 9(3) of the Bill of Rights. In addition, discrimination also refers any action or omission that undermines human dignity.<sup>149</sup>

The Promotion of Equality and Prevention of Unfair Discrimination Act prohibits unfair discrimination on the same grounds as those enumerated under section 9(3) of the Constitution. The Act defines HIV status to include perceived status and adverse assumptions based on such status.<sup>150</sup> The Act imposes a duty and responsibility to all persons to promote equality,<sup>151</sup> particularly in public activities and relationships.<sup>152</sup>

The PEPUDA contains a schedule with an illustrative list of unfair discrimination practices which must be addressed and eliminated.<sup>153</sup> The schedule also serves as interpreting tool of the Act. Paragraph 3(a) of the Schedule to the Act provides that it is unfair discrimination to subject persons to medical experiments without their informed consent. With respect to insurance, paragraph 5(c) provides that it would amount to unfair discrimination if a person is unfairly or unreasonably refused services or benefits on grounds of HIV/AIDS status.

Equality Courts have jurisdiction over disputes related to the Act. The Act is important for employees who are not covered by other key labour laws discussed in this chapter. For

---

<sup>148</sup> Sec 1(vii)(a) & (b).

<sup>149</sup> Sec 1(xxiii)(b)(ii), s 14(3)(a) also provides that human dignity is an important factor to prove discrimination.

<sup>150</sup> Sec 1(xiv).

<sup>151</sup> Sec 24.

<sup>152</sup> Sec 26(1).

<sup>153</sup> Sec 29.

example, the Act will protect those government employees who are working in the military and intelligence services.

#### **2.4.2 Occupational Health and Safety Act** <sup>154</sup>

This Act does not apply to mine workers and to ship workers.<sup>155</sup> Section 8 provides that every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees. This provision means that employees have the right to a safe and risk free working environment. Specific to HIV status, it obliges employers to take the necessary measures to prevent the spread of the virus at the workplace.

Section 14 of the Act imposes the duty on employees themselves to take reasonable care for their own health and for the health of other employees who may be affected by his actions or omissions. Section 26(2) protects employees from unfair dismissals based on medical information. The section also protects the remuneration of employees because of information received by the employer relating to the health of employees.

The Act protects employees against unfair dismissal. It also protects the right to privacy of employees. In particular, section 12(2) provides for protection of information relating to monitoring and medical surveillance at the workplace. Such information may be divulged only with the consent of the employee. However, section 25 allows medical practitioners to report medical conditions of employees to employers, inspectors and employees. Information obtained by employers cannot be used to unfairly discriminate against employees.

Health workers exposed to HIV infections in the course of their work can be paid compensation under the Act. The importance of the Act for employees with HIV is the obligations it imposes on employers to create a safe working environment.

---

<sup>154</sup> 85 of 1993.

<sup>155</sup> Sec 1(3).

### **2.4.3 Medical Schemes Act<sup>156</sup>**

The Medical Schemes Act regulates the registration of medical schemes and to protect the interests of members of medical schemes. It came into operation in 2001. All medical schemes must be registered. In order for such schemes to be registered, they must comply with statutory provisions. Section 24 is relevant to employees with HIV. The section provides that a medical scheme that discriminates directly or indirectly any person on grounds of health status cannot be registered.

## **2.5 Conclusion**

The Constitution of the Republic of South Africa, 1996 has a Bill of Rights which prohibits unfair discrimination and which allows Parliament to enact laws to prohibit unfair discrimination and to promote equality. The Constitution's equality clause does not specifically mention HIV status as one of the prohibited grounds. However, the Constitutional Court in the case of *Hoffmann v South African Airways* has ruled that discrimination on grounds of HIV status in the workplace is unfair discrimination which is prohibited under the Constitution. The Constitution also protects the employees against unfair labour practices. In addition, the Constitution protects the employees' right to dignity and to privacy. The right to privacy is also protected under the South African common law.

Labour legislation in South Africa provides for the enforcement mechanisms of rights of employees living with HIV/AIDS at the workplace. The BCEA provides for the minimum conditions of contracts of employment with regard to working hours, paid sick leave, and for mandatory notice of termination of contracts. The BCEA thus limits the risks of employers to discriminate employees with HIV on matters relating to conditions of employment.

---

<sup>156</sup> 183 of 1998.

The EEA specifically prohibits unfair discrimination of employees on ground of their HIV status. Furthermore the EEA limits the powers of employers to conduct HIV testing for employees without the consent of employees and of the Labour Court. Codes of practice under the EEA specify the conditions for permissible HIV testing which include the protection of the right to privacy and maintaining confidentiality. The testing for HIV status is in line with Health legislation which requires informed consent of the user of medical services.

The Labour Relations Act lays down procedures for termination of employment. It prohibits unfair dismissals of employees on same grounds that are enumerated under the Constitution of the Republic of South Africa, 1996. The LRA protects employees against unfair dismissals based on their health status including HIV /AIDS. The LRA provides for the freedom of association and for the rights of employees to join trade unions and participate in the activities of such unions. A procedure is provided to deal with employees who are too ill to work. In such cases employers may after following the statutory procedures terminate employment of employees.

The Occupational health and safety Act provides for the right of employees to a safe working environment, while the Medical Schemes Act protects the right to employees to no unfair discrimination in terms of employees benefits.

The legal framework and the enforcement machinery exist for employees with HIV/AIDS to seek redress in case they are victims of unfair discrimination in the workplace on basis of their HIV status.

## CHAPTER 3

# THE IMPACT OF INTERNATIONAL INSTRUMENTS ON HIV PROVISIONS IN SOUTH AFRICA

### 3 Introduction

South Africa has acceded to many international human rights treaties, which are relevant to employees with HIV. The study examines key international instruments in light of their relevance to the position in South Africa. This chapter deals with the International Bill of Rights, two ILO Conventions and the ILO Code of Practice in the World of Work.

On 10 December 1948, the United Nations General Assembly adopted a resolution containing the Universal Declaration of Human Rights (UDHR). In 1966, the United Nations passed two key treaties dealing with civil, political, economic and social rights. The two treaties are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>157</sup> South Africa acceded to the two treaties on 3 October 1994. The ICCPR as well as its two protocols together with the UDHR and the ICESCR form the International Bill of Rights.<sup>158</sup>

#### 3.1 Universal Declaration of Human Rights (UDHR)<sup>159</sup>

The preamble to the UDHR, stresses that human dignity and equality form the foundations of freedom, peace and justice.<sup>160</sup> Article 1 of the Declaration provides that every person is born free and equal in dignity and rights.<sup>161</sup> The article furthermore emphasises responsibility of individuals to respect each other. Human dignity and equality are also

---

<sup>157</sup> United Nations General Assembly Resolution 2200 A (XX) of 16 December 1996 (Treaty Series Vol. 993) p3.

<sup>158</sup> United Nations Commissioner for Human Rights, Fact Sheet No. 2 (Rev.1), *The International Bill of Human Rights* Document also published at <http://www.unhchr.ch/html/menu6/2/fs2.htm> [Date of Use 18 January 2008].

<sup>159</sup> General Assembly Resolution 217 A(III) of 10 December 1948.

<sup>160</sup> Preamble to UDHR.

<sup>161</sup> Art 1 All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

rights that find expression in the Bill of Rights in the South African Constitution. It can thus be said that the UDHR finds expression in the Constitution of South Africa.

Articles 2 and 7 protect individuals against discrimination. Article 2 prohibits discrimination of any kind based on race, colour, creed, religion, political or other opinion, nationality or social origin, property, birth or other status. The United Nation's Commission on Human Rights has defined the expression "other status" to include HIV status.<sup>162</sup> Article 7 of the Declaration further prohibits any discrimination, which may impair equal protection of the law. The Declaration does not use the expression "unfair discrimination".

Article 5 prohibits inhuman or degrading treatment. It is submitted that this article reinforces the right to dignity and prohibits stigmatisation of employees with HIV. The right to privacy and the right to work are recognised.

Article 23 provides that everyone has the right to work.<sup>163</sup> It also provides for the right to equal pay for equal work,<sup>164</sup> the right to just and favourable remuneration including social protection that ensures the existence of human dignity.<sup>165</sup> The Universal Declaration also provides for the right of workers to a standard of living adequate for health and wellbeing of himself and of his family including medical care and social security.<sup>166</sup>

Although the UDHR is not a treaty, it is considered to be an authoritative interpretation of the United Nation's Charter and an authoritative listing of human rights and basic components of international customary law, binding all states, not only members of the United Nations.<sup>167</sup> It is thus a common standard for measuring human rights.

---

<sup>162</sup> For example the Committee on the Rights of the Child interpreting Art 2 of the Convention on the Rights of the Child, has interpreted the expression "other status" to include the HIV status of the child or his parents. See CRC/GC/2003/3 of 17 March 2003.

<sup>163</sup> Art 23(1).

<sup>164</sup> Art 23(2).

<sup>165</sup> Art 23(3).

<sup>166</sup> Art 25(1).

<sup>167</sup> Buegenthal T, Shelton D & Stewart DP *International Human Rights in a Nutshell* 3<sup>rd</sup> ed (West Group 2003) p 42.

Specific to employees with HIV, the Declaration is relevant as it protects such persons and guarantees the following rights:

- (1) The right to dignity;<sup>168</sup>
- (2) The right to equality and equal protection of the law;<sup>169</sup>
- (3) The right to protection against discrimination;<sup>170</sup>
- (4) The right to work, and the right to equitable conditions of employment including the right to fair remuneration.<sup>171</sup>

As illustrated in chapter 2 above, most of the rights under the Universal Declaration of Human Rights have been adopted in the Constitution and other labour laws in South Africa. The Declaration is an important component of customary international law which protects the rights of employees with HIV.

### **3.2 International Covenant on Civil and Political Rights (ICCPR)<sup>172</sup>**

Upon acceding to the ICCPR, member states undertake to respect and ensure that rights under the Covenant are protected without discrimination of any kind.<sup>173</sup> The illustrative prohibited grounds of discrimination under the ICCPR are the same as those under the UDHR and the ICESCR. Furthermore, the ICCPR encourages states to take constitutional and legislative measures to give effect to the rights recognised under the treaty. In addition, and unlike the other covenants, the ICCPR provides for states to create enforcement mechanisms and provide for remedies including judicial remedies for violations of rights.<sup>174</sup> South Africa has largely complied with the ICCPR by domesticating many of its provisions in the Bill of Rights.

---

<sup>168</sup> Art 1.

<sup>169</sup> Art 7.

<sup>170</sup> Art 7.

<sup>171</sup> Art 23.

<sup>172</sup> United Nations General Assembly Resolution 2200 A (XXI) of 16 Dec 1996 (Treaty Series 999) p 171.

<sup>173</sup> Art 2(1).

<sup>174</sup> Art 3(a), (b) &(c)



Article 7 provides that no person may be subjected to torture, or to cruel, inhuman or degrading treatment. This right extends to protection against medical or scientific experimentation without the free consent of the individual concerned. The Constitution of South Africa extends similar protection against scientific research.<sup>175</sup> It is submitted that compulsory HIV testing constitutes a form of medical experimentation that is prohibited under the ICCPR.

Article 17 protects the right to privacy. It protects persons against arbitrary and unlawful attacks and interference with their privacy and reputation. Stigmatisation of employees with HIV is a form of unlawful attack, which infringes the right to honour and reputation of such persons and which is therefore prohibited under this article. Another form of unlawful interference would be compulsory testing of HIV status without the informed consent of employees. The right to privacy is entrenched in the Bill of Rights under the Constitution.<sup>176</sup> This right is also protected under common law. In South Africa, compulsory HIV testing is generally prohibited unless it is conditionally approved by the Labour Court.<sup>177</sup>

Article 26 protects individuals against discrimination. Member states are obliged to enact laws that would prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination based on such grounds as race, colour, sex, language, religion, political or other opinion, national or social origin or *other status*.<sup>178</sup> South Africa has complied with this provision by entrenching the equality clause in the Bill of Rights. Within the context of labour laws, the relevant provisions are discussed under chapter 2 above. Article 19 of the Covenant imposes the duty to all individuals to respect the rights and reputation of others. The article prohibits any advocacy of national, racial or religious

---

<sup>175</sup> Sec 12(2)(c) Everyone has the right to bodily and psychological integrity, which includes the right not to be subjected to medical or scientific experiments without their informed consent.

<sup>176</sup> Sec 14 of the Constitution.

<sup>177</sup> Sec 7(2) of EEA & par 2.1.3 above.

<sup>178</sup> United Nations Commission on Human Rights Resolutions: 1996 /43 in reports submitted to Secretary General ref. E/CN.4/1996 reported in *History of recognition of the importance of human rights in the context of HIV/AIDS* : Annex 1 to International Guidelines on HIV/AIDS and Human Rights (UNAIDS 2006 Consolidated version).

nature that is aimed at inciting discrimination.<sup>179</sup> In terms of section 8 of the Constitution, individuals are both duty bearers and rights holders with respect to rights guaranteed under the Constitution of South Africa. In the case of employees with HIV, this means, they are bound by the Constitution to respect the rights of others.

Equally important, the civil and political rights have limitations. As one author has put it:

The right to equality before the law and the equal protection of the law without discrimination does not make all different treatment discriminatory. All differentiation based on reasonable and objective criteria do not amount to prohibited discrimination within the meaning of Article 26 of the International Covenant on Civil and Political Rights.<sup>180</sup>

For employees with HIV, the ICCPR is important as it protects the following rights:

- (1) The right to privacy including protection against unlawful attack and interference on honour and reputation;<sup>181</sup>
- (2) Protection against medical experimentation, which includes testing for HIV without the employee's consent;<sup>182</sup>
- (3) Protection against discrimination based on HIV status;<sup>183</sup> and
- (4) The right to dignity.<sup>184</sup>

Since South Africa has acceded to the ICCPR, and in terms of section 39(2) of the Constitution, courts are obliged to consider the provisions of this treaty when interpreting the Bill of Rights.<sup>185</sup>

---

<sup>179</sup> Art 20.

<sup>180</sup> D.J. Harries: *Cases and Materials on International Law*, 6<sup>th</sup> ed (Sweet and Maxwell 1998) p 721.

<sup>181</sup> Art 17.

<sup>182</sup> Art 7.

<sup>183</sup> Implied in Art 26.

<sup>184</sup> Art 10.

<sup>185</sup> Sec 39(1)(b) of the Constitution of Republic of South Africa, 1996.

### **3.3 International Covenant on Economic, Cultural and Social Rights (ICESCR)**

The ICESCR provides for social, cultural and economic rights. Rights under the ICESCR can be realised progressively. In South Africa, the progressive realisation of economic rights has meant delays or failure of the implementation of such rights for example access health care services.

Article 2(2) contains a non-discrimination clause. It provides that state parties undertake to guarantee the rights under the Covenant without any discrimination on grounds similar to those listed in the Universal Declaration of Human Rights and the ICCPR. Article 4 contains a limitation clause of rights under the ICESCR. The clause allows states to limit the application of the rights under the covenant for purposes of promoting the welfare of the general society. Under this clause, it may be argued that in terms of the ICESCR, a state may apply coercive measures such as quarantine for Tuberculosis patients who are co-infected with HIV in order to protect other members of the public. This would also be in line with the International Health Regulations to which South Africa has subscribed.<sup>186</sup>

Article 6 provides for the right to work, which includes the right to employment of choice. Employees living with HIV should be able to choose any work which they are competent to perform. It is submitted that the right to work should not be unreasonably limited on grounds of health status.<sup>187</sup>

Article 7 of ICESCR protects the right to just and favourable conditions of work. Under this article, employees enjoy the freedom from discrimination of any kind including discrimination based on HIV status.<sup>188</sup> Articles 8 and 9 provide for the right to form trade

---

<sup>186</sup> South Africa as member of the World health Organization (WHO) has adopted the regulations and domesticated them into the municipal law. See for example International Health Regulations Act 28 of 1974.

<sup>187</sup> The right to health care in South Africa in terms of sec 27(2) is subject to availability of resources

<sup>188</sup> Art 7 State parties to the present convention recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure in particular :

- (a) remuneration which provides all workers as minimum with :
  - (i) fair wages and equal remuneration for work of equal value without distinction of any kind
  - (ii) decent living for themselves and their families.

unions and to social security. These rights are fully recognised under the South African Constitution.<sup>189</sup>

Article 12 provides for the right to enjoyment of the highest standard of physical and mental health that includes the prevention, treatment, and control of epidemic, occupational and other diseases.

In summary, the ICESCR provides for the following:

- (1) Fair wages and equal remuneration of work of equal value without any discrimination of any kind;<sup>190</sup>
- (2) Safe working conditions;<sup>191</sup>
- (3) Promotion based on seniority and competence;<sup>192</sup>
- (4) Rest, leisure and reasonable limitation of working hours , holidays and remuneration for public holidays;<sup>193</sup>
- (5) Protection against discrimination based on HIV status.<sup>194</sup>

People living with HIV have struggled to get their rights enforced in courts in South Africa in spite of the very liberal policies and the Bill of Rights. The Government's reluctance to provide anti-retroviral therapy for HIV positive pregnant mothers and for infants illustrates the struggle for such people.<sup>195</sup> In the case of *Soobramoney v Minister of Health (Kwazulu Natal)*<sup>196</sup> the Constitutional Court held that the state's fulfilment of the right to treatment for dialysis was subject to availability of resources. The author of this study tends to disagree with authors such as Emmanuel Joseph Uko who argues that people living with HIV have cause to rejoice in South Africa since they have a wide range of fundamental rights, which they can use to their advantage.<sup>197</sup> South Africa has been devastatingly slow

---

<sup>189</sup> Sec 23(2) & (3) of the Constitution.

<sup>190</sup> Art 7(a)(i) & (ii).

<sup>191</sup> Art 7(b).

<sup>192</sup> Art 7(c).

<sup>193</sup> Art 7 (d).

<sup>194</sup> Art 2(2).

<sup>195</sup> *Minister of Health v Treatment Action Campaign* 2002 (4) BCLR 356 (CC).

<sup>196</sup> 1998 (1) SA 765 (CC).

<sup>197</sup> Uko EJ: Legal Rights of People Vulnerable to HIV /AIDS in Africa 2004 (Vol. 45 No 1 *Codicillus* ) p 46.

in responding to HIV/AIDS epidemic. The epidemic was in the beginning not seen as a Government priority. Currently the major challenge is to make treatment available to all people whose infections were not prevented.<sup>198</sup>

### **3.4 The International Labour Organisation (ILO)**

The ILO is the intergovernmental organisation dealing with labour issues. The principle of non-discrimination in labour relations is enshrined in the ILO Constitution and many other instruments relating to human rights of employees at the workplace. The ILO, together with other United Nations agencies, is a co-sponsor of the United Nations programmes and response to HIV/AIDS.<sup>199</sup>

#### **3.4.1 ILO Treaties**

In the context of employment, the ILO has defined discrimination in the Convention Concerning Discrimination in Respect of Employment and Occupation of 25 June 1958 (Convention C 111) as any distinction, exclusion or preference, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.<sup>200</sup> Under the Convention, member states of the ILO undertake to declare and pursue policies designed to promote equality and eliminate all forms of discrimination in respect of employment.<sup>201</sup> The Convention is premised on the basis that discrimination is a violation of human rights under the Universal Declaration of Human Rights. South Africa has ratified this convention and has also enacted laws to give effect to this Convention.<sup>202</sup>

Article 1(2) recognises that discrimination based on inherent requirements of a particular job may be fair. The article specifies that such discrimination shall be deemed not to be discrimination under the convention. This position has been adopted into the municipal

---

<sup>198</sup> International Council of AIDS Service Organizations (ICASO) Assessment of country responses in improving access to HIV /AIDS within the framework of International Guidelines on HIV /AIDS and Human Rights and the role played by Community Sector : (ICASO May 2002).

<sup>199</sup> UNAIDS is the United Nations response to the HIV/AIDS epidemic. Other sponsors include UNICEF, UNHCR, IOM, UNHRC, ILO, UNESCO and WFP.

<sup>200</sup> Art 1 (a) & (b).

<sup>201</sup> Art 2.

<sup>202</sup> The LRA, the EEA and BCEA discussed in Chapter 2 above are the specific laws that give effect to the ILO conventions.

laws of South Africa.<sup>203</sup> In the context of HIV/AIDS, it can be argued that depending on the progression of the disease, HIV infection may impair the capacity of employees to perform adequately in certain sectors of employment.

The ILO Convention 158 of 1982 is specific to issues relating to termination of employment. Christianson<sup>204</sup> argues that the Convention laid the foundation of jurisprudence on unfair labour practices and unfair dismissals. The Convention provides for substantive fairness<sup>205</sup> and procedural fairness<sup>206</sup> in dealing with termination of employment based on reasons of incapacity, misconduct or operational requirement of the business.

### **3.4.2 International Guidelines**

The ILO, as part of the United Nation's AIDS programme, has issued International Guidelines on HIV/AIDS and Human Rights.<sup>207</sup> The guidelines call upon States to use national legislation to deal with the key issues of unfair discrimination based on HIV status. The International Guidelines on HIV/AIDS and Human Rights of 1998 are not binding on states. However, they are useful for governments to combat unfair discrimination in the workplace. The guidelines emphasise the protection of human rights as key to safeguard human dignity of employees living with HIV and indicate that a rights-based approach is an effective response to HIV/AIDS generally.<sup>208</sup>

Guideline 10 can benefit employees with HIV. The guideline provides for states to translate human rights principles into professional responsibility and to enforce such principles.

---

<sup>203</sup> Sec 187(2) of LRA.

<sup>204</sup> Incapacity and Disability: A retrospective and prospective overview of the past 25 years (2004) *ILJ* 879 at 881.

<sup>205</sup> Art 4 provides that termination of employment must be based on valid reasons.

<sup>206</sup> Art 7 provides that employees should be given opportunity to defend herself or himself against allegations of incapacity to perform agreed work.

<sup>207</sup> The guidelines were issued by the Office of the High Commissioner for Human Rights (OHCHR) and the Joint United Nations Programme on HIV/AIDS (UNAIDS) in 1998. In 2002 the guidelines which included the revised guideline 6 on access to prevention, care and support, were reissued. The guidelines are published as document HR/PUB/2002/1 issued jointly by OHCHR and UNAIDS. (United Nations New York and Geneva 2002).

<sup>208</sup> United Nations Economic and Social Council report E/CN.4/1997/37 of the General Secretary of 20 January 1997 contains the full text of the guidelines. An NGO summary of the report on the international guidelines on HIV/AIDS and Human Rights ( ICASO September 1989).

Guideline 5 protects people with HIV/AIDS against discrimination. It also provides for the right to privacy and confidentiality.<sup>209</sup> The explanation to the guideline urges states to prohibit any discrimination based on HIV status.<sup>210</sup> The guideline further recommends that states should treat HIV status as a disability. Specific to the workplace, the guideline recommends that employees should benefit from the freedom from HIV screening for employment purposes. Furthermore, employees should enjoy promotion, training and benefits. States must enact laws protecting employees from stigmatisation and discrimination by colleagues, unions, employers and clients. Employers must protect confidentiality on medical matters including information relating to a person's HIV status at the workplace.

The international guidelines on HIV have been largely incorporated in the South African labour laws.

### **3.4.3 The ILO Code of Practice on HIV and the World of Work**

The ILO has issued The Code of Practice on HIV/AIDS and the World of Work.<sup>211</sup> The Code provides useful guidelines to employers, trade unions and employees at the workplace. The Code, if adhered to, can make a difference in the way employees living with HIV/AIDS are protected from compulsory invasive tests, unwarranted disclosure of their HIV status, and unfair dismissals based on their HIV status. The Code also offers protection of employees against real or perceived unfair discrimination in matters of continuity of employment and benefits. The Code also protects employees against violation of their right to privacy and prevents compulsory HIV testing related to recruitment or retention of employment.

The ILO code is based on ten key principles, including gender equality, non-discrimination based on real or perceived HIV status, confidentiality, social dialogue, healthy working

---

<sup>209</sup> OHCHR and UNAIDS HIV/AIDS and Human Rights International Guidelines, (United Nations New York and Geneva 2004).

<sup>210</sup> See footnote 209.

<sup>211</sup> ILO *An ILO Code of Practice on HIV/AIDS and the World of Work* (United Nations Geneva 2001).

environment, continuation of employment relationship, entitlement to reasonable accommodation and benefits, HIV testing and prevention, care and support.

The ILO Code itself is not a treaty and thus not legally binding on states. The ten principles of the ILO Code have been adopted by the Southern African Development Community (SADC) in form of the SADC Code on HIV/AIDS and Employment.<sup>212</sup> South Africa is a member state of SADC. The principles are largely adopted in South Africa through the HIV/AIDS Technical Assistance Guidelines<sup>213</sup> issued by the Department of Labour in June 2003.

### **3.5 Conclusion**

The International Bill of Human Rights provides for standards and for rights which are important for people living with HIV/AIDS. The right to equality irrespective of the status of the individual has been interpreted by the Human Rights Council to include protection of people with HIV status. The right to privacy has been reinforced by the various codes of good practice which oblige employers and trade unions to maintain the confidentiality of the health status of employees.

HIV testing for purposes of recruiting employees is generally prohibited. Employees with HIV have the right to equal pay for equal work. They are entitled to a paid sick leave. However, such employees may be terminated if the progression of the infection to the fourth and last phase of AIDS prevents them from working. Even in such cases employers are obliged to provide reasonable accommodation to such employees. South Africa has implemented many of the rights under international law through national labour legislation which is discussed in detail in chapter 2.

---

<sup>212</sup> The text of the Code can be found at <http://www.cosatu.org.za/docs/1998/sadc-hiv.htm> [Date of Use 20 January 2008].

<sup>213</sup> *HIV Technical Assistance Guidelines* (Department of Labour Chief Directorate of Communication Pretoria June 2003).



## CHAPTER 4

### THE RELEVANCE OF FOREIGN LAW ON PROTECTION OF EMPLOYEES WITH HIV IN SOUTH AFRICA

#### 4.1 Introduction

The Constitution of the Republic of South Africa, 1996 allows courts in the country to consider both, international law and foreign law when interpreting rights.<sup>214</sup> While courts must consider international law, they have discretion to consider foreign law.<sup>215</sup> This study compares the protection of employees with HIV under the Constitution of Canada and the relevance of such position to South Africa. There exist differences as well as similarities between the Bill of Rights under the Constitution of the Republic of South Africa, 1996 and under the Canadian Charter of Rights and Freedoms under the Constitution of Canada.<sup>216</sup> Courts in the two countries have interpreted human rights in a similar manner. With this perspective in mind, a comparison is made of selected aspects of human rights in Canada and their relevance to South Africa.

#### 4.1 Discrimination

Canada is a constitutional democracy, which recognises the supremacy of the rule of law.<sup>217</sup> The Constitution of Canada contains a Bill of Rights commonly known as the Canadian Charter of Rights and Freedoms.<sup>218</sup> The Canadian Charter of Rights and Freedoms (hereafter “the Charter”) binds Parliament, and the Government of Canada as well as the provincial governments.<sup>219</sup> With regard to application of the Charter to private individuals, Hogg remarks as follows:

---

<sup>214</sup> Sec 39(1)(b) & (c).

<sup>215</sup> Sec 39(1)(b) Courts, forums or tribunals may consider foreign law when interpreting the Bill of Rights.

<sup>216</sup> The Charter of Rights and Freedoms was enacted as Schedule B to the Canada Act, 1982(U.K) 1982c.11 and came into force on 17 April 1982. [http://www.solon.org/Constitutions/Canada/English/ca\\_1982.html](http://www.solon.org/Constitutions/Canada/English/ca_1982.html) [Date of Use 30 November 2007].

<sup>217</sup> Preamble to the Charter.

<sup>218</sup> Sec 34 Constitution Act 1982.

<sup>219</sup> Sec 32(1)(a) & (b).

Section 15 does not apply to private acts of discrimination as where an employer hires only male employees or a landlord rents only to white people or a shopkeeper refuses to serve children. However, in all Canadian jurisdictions, Human Rights Codes have been enacted that prohibit private acts of discrimination in employment, accommodation and provision of services.<sup>220</sup>

The Charter's equality clause provides for equality before the law, equality under the law, equal protection, and equal benefit of the law.<sup>221</sup> The Charter specifically mentions eight grounds of prohibited discrimination.<sup>222</sup> The listed grounds exclude HIV status but include physical and mental disability. The Charter does not preclude any law, programme, measures or activities which have the objective of improving the conditions of disadvantaged individuals or groups.<sup>223</sup> This provision is similar to the one on affirmative action under the EEA in South Africa.

The Supreme Court of Canada, which is the highest judicial body in that country, defined discrimination in the case of *Andrew v. Law Society of British Columbia* as:

“a distinction , whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on basis of association with a group will rarely escape the charge of discrimination, while those based on individuals merits and capacities will rarely be so classified”.<sup>224</sup>

Under this definition, employees with HIV can challenge discrimination based on their HIV status, if they can otherwise competently perform the jobs in accordance with standards set by employers. In the same vein, employers could claim that under certain circumstances and jobs, it could be fair to discriminate a person who is too ill to work in accordance with agreed standards because of bona fide requirements of the job. The case of *Andrew v Law Society of British Columbia* involved the disqualification to practice law in Canada on grounds of citizenship.

---

<sup>220</sup> Hogg: PW. *Constitutional Law of Canada* 3<sup>rd</sup> ed (Carswell Thomson Professional Publishing 1992) Par 1.52.5(c).

<sup>221</sup> Sec 15(1).

<sup>222</sup> The enumerated grounds under s 15(1) are race, national or ethnic origin, colour, religion, sex, age, mental or physical disability.

<sup>223</sup> Sec 15(2).

<sup>224</sup> *Andrews v. Law Society of British Columbia* (1989) 1 SCR 143 at 174.

With regard to employment equity, the Supreme Court of Canada has also approved the following definition of equality formulated by the Commission on Equality in Employment:

Equality in employment means that no one is denied opportunities for reasons that have nothing to do with inherent ability. It means equal access free from arbitrary obstruction. Discrimination means that an arbitrary barrier stands between a person's ability and his or her opportunity to demonstrate it. If the access is genuinely available in a way that permits everyone who so wishes the opportunity, to fully develop his or her potential, we have achieved a kind of equality. It is equality defined as equal freedom from discrimination. Discrimination in this context means practices or attitudes that have whether by design or impact, the effect of limiting an individual's or groups right to opportunities generally available because of attributed rather than actual characteristics. What is impeding the full development of the potential is not the individual's capacity but an external barrier that artificially inhibits growth.<sup>225</sup>

The Supreme Court observed that protection of employees would only be achieved if there is awareness that discrimination could be based on myths and stereotypes. Functional limitations exist only in the minds of the employers and are not present in the employee. The Court interpreted "handicap" to include ailments that do not give rise to limitation of functional disability. The ailment could include a perception of illness. The protection would therefore extend to cases of real or perceived HIV status.

#### **4.1.1 Case law**

In *Canada (Attorney General) v Thwaite*<sup>226</sup> the Federal Court of Canada dealt with dismissal of an employee with HIV in the Canadian Armed Forces (CAF).<sup>227</sup> In the case, Mr. Simon Thwaite, an officer in CAF filed a complaint with the Human Rights Tribunal alleging that CAF discriminated against him by terminating his employment and restricting his duties and opportunities because of his HIV status. The Human Rights Tribunal, which heard the case, found in favour of Thwaite and awarded him compensation of \$147,015 for loss of earnings, and the maximum amount of \$5,000 for compensation for hurt feelings. The CAF applied for review of the decision at the Federal Court.

---

<sup>225</sup> *Andrew v Law Society of British Columbia* 1989 1 SCR 143 Par 37.

<sup>226</sup> (1994) 3 FC 38.

On review, the CAF had conceded that it discriminated against Mr. Thwaite. However, the army had argued that the discrimination was justified on grounds of bona fide occupational requirements (BFOR) and under the relevant human rights legislation.

On review, the Federal Court dismissed the application by CAF and awarded the maximum damages and compensation to Mr. Thwaite. The important elements of the judgment on review are:

- (1) For the defence of bona fide occupational requirement to succeed, the employer must show that the requirement is absolutely necessary that is without any other workable, less stringent alternative to assure the efficiency and economical performance of the job.<sup>228</sup>
- (2) Employers relying on safety reasons can establish bona fide occupational requirements by showing that excluded persons pose a significant risk to other employees and to the public. The significant risk standard recognises that some risk is tolerable in that human endeavours are not totally risk free. This standard seeks to integrate people with disabilities into the workplace even though such persons may create some heightened risk but within acceptable limits.<sup>229</sup>
- (3) Wherever an employer relies on health and safety considerations to justify exclusion of its employee, it must be shown that the risk is based on the most authoritative and up to date medical, scientific and statistical information and not haste assumptions, speculative apprehensions and unfounded generalisations.<sup>230</sup>

---

<sup>228</sup> Par 9.

<sup>229</sup> Para 12-15.

<sup>230</sup> Par 20.

The case also set a precedent in Canada for HIV related discrimination for those who continue to work while living with HIV.<sup>231</sup> In this case HIV was treated as a disability.

The Canadian policy on HIV/AIDS provides that everyone has the right to equality and to be treated with dignity and without discrimination, regardless of HIV/AIDS.<sup>232</sup> The policy specifies that protection will be offered to people with real or perceived HIV status.<sup>233</sup> Within the employment sector, the policy clarifies that the Commission will not accept being free from HIV/AIDS as bona fide occupational requirement (BFOR).<sup>234</sup>

The Supreme Court of Canada has decided other cases involving disabilities, which are relevant to HIV/AIDS. From these cases, the Court has placed a premium on human dignity and respect to equality, rather than merely biomedical condition. A handicap may be real or perceived and a person may have no limitation in everyday activities other than those created by prejudice and stereotypes.<sup>235</sup> All distinctions based on handicap are not necessarily discriminatory. The Court has placed the burden of proof on the applicant to prove discrimination and further to prove that such discrimination is prohibited under the Charter.

The defence of bona fide occupational requirement is well developed in Canada. The Supreme Court has used a three-step inquiry to analyse the defence. First, the employer must show that the adopted standard is for a rational purpose connected to the job. Then the employers must show that the standard was adopted in honest and with a good faith belief that it was necessary. Thirdly, the employer must show that the standard is reasonably necessary to achieve the general purpose. In assessing reasonableness, the

---

<sup>231</sup> *Courting Rights: Case studies in litigating the human rights of people living with HIV* (Canadian HIV/AIDS legal Network and Joint UN programme on HIV/AIDS 2006).

<sup>232</sup> Canadian Human Rights Commission Legislation and Policies Canadian Human Rights Commission Policy on HIV/AIDS [http://www.chrc-ccdp.ca/legislation\\_policies/aids-eng.asp](http://www.chrc-ccdp.ca/legislation_policies/aids-eng.asp) [Date of Use 04/09/07].

<sup>233</sup> Par 1.

<sup>234</sup> Par 2.

<sup>235</sup> *Quebec ( Commissions des Droits de la personne et droits de la jeunesse) v Boisbriand* (2000) 1 S.C.R. 665.

employer must show that it is impossible to accommodate the individual without imposing undue hardship to the employer.<sup>236</sup>

Equally important, the Supreme Court has held that employers designing workplace standards owe an obligation to be aware of both the difference between individuals and differences that characterize groups of individuals. They must include the conceptions of equality into workplace standards. To the extent that a standard unnecessarily fails to reflect the difference amongst individuals, it runs afoul of the prohibitions contained in various human rights statutes and must be replaced. The standard itself is required to provide for individual accommodation, if reasonably possible.<sup>237</sup>

#### **4.1.2 Relevance to South Africa**

The legal position in South Africa is that discrimination on the basis of HIV status is now specifically prohibited under the Employment Equity Act.<sup>238</sup> The Constitutional Court in *Hoffmann v SAA* has also affirmed that the blanket exclusion from employment on grounds of HIV status is unfair discrimination which violates the equal protection and benefit of law under the Bill of Rights.<sup>239</sup> The Constitutional Court observed that people with HIV should not be condemned to economic death and that prejudice should not justify unfair discrimination.

Although HIV status is not specifically provided for under the Bill of Rights in South Africa or under the Canadian Charter of Human Rights and Freedoms in Canada, the Courts in the two countries have adopted similar approaches and reasoning in interpreting discrimination based on HIV status. In both countries the capacity of an employee to perform the agreed standards is the most important factor in deciding if discrimination is fair or not. Exclusion of employees who are otherwise capable of performing the inherent requirements of a particular job amounts to prohibited discrimination under the Bill of

---

<sup>236</sup> *British Columbia (Public Service Employee Relations Commission) v BCGSEU* (1999) 3 S.C.R. 3.

<sup>237</sup> BCGSEU (1999) 3 S.C.R. 3 at Par 68.

<sup>238</sup> Sec 6(1).

<sup>239</sup> Par 2.1.2.1 supra.

Rights and under the Canadian Charter of Rights and Freedoms. The Canadian employment policy goes on to declare that being HIV negative is not an inherent requirement of a job.<sup>240</sup> The policy in Canada is very liberal and offers a solid protection against unfair discrimination in employment for people living with HIV/AIDS.

While HIV status is treated as disability in Canada, there are also possibilities for courts in South Africa to adopt a similar stance for the better protection of people living with HIV. This point is not yet decided in South Africa. If HIV status were to be treated as a disability, it would certainly make it easier for more employees to access disability grants in South Africa.

South Africa uses the term “unfair discrimination” in the Bill of Rights and in labour legislation while in Canada the expression used is “discrimination”. Looking at the way discrimination is explained in the various laws that give effect to the Bill of Rights, there is no doubt that the definition adopted by Courts in Canada is very similar to the one used to explain unfair discrimination in South Africa. In order to protect the rights of employees with HIV, it may not be necessary in view of the Employment Equity Act,<sup>241</sup> to amend others labour laws to include HIV status as a ground upon which unfair discrimination is prohibited. However, it could be ideal to amend the PEPUDA to specifically prohibit discrimination based on HIV status.

## **4.2 The right to privacy and confidentiality**

The right to privacy is not specifically provided for under the Canadian Charter of Rights and Freedoms. However, aspects of the right to privacy such as the right to be secure against unreasonable search or seizure are provided for.<sup>242</sup> The common law of Canada recognises the right of privacy and the duty of health care workers to maintain patients’ confidentiality. The Canadian HIV/AIDS Legal Network and the Canadian AIDS Society

---

<sup>240</sup> Footnote 226 supra.

<sup>241</sup> However employees who are not covered by the EEA or LRA can benefit by an amendment to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 to include HIV status as a listed ground.

<sup>242</sup> Sec 8.

have conducted a study which confirms that employers breach confidentiality regarding HIV status, fail to accommodate the needs of such employees, dismiss such employees or tolerate the environment in which employees are ostracised.<sup>243</sup> The same report notes that 50 per cent of employees did not disclose their HIV status for fear of negative attitudes from employers and from co-workers.

Since 1 May 2003, HIV infection became legally notifiable in all provinces in Canada.<sup>244</sup> Persons infected with HIV have duties to inform their partners and spouses of their status. Health authorities normally would trace the sexual contacts of the infected person and inform them of the HIV status of the infected person with or without the consent of the HIV infected patient.

#### **4.2.1 Relevance to South Africa**

Unlike Canada, HIV infection is not a notifiable condition in South Africa. Efforts to make AIDS a notifiable condition, were abandoned by the Health Department following severe criticism including criticisms regarding the protection of privacy and confidentiality.<sup>245</sup> While employees in Canada whose status is known will receive counselling and medical care, this is not necessarily the case in South Africa. The follow-up measures adopted in Canada enable health authorities to disclose to sexual partners with or without the consent of the infected patient. The partner notification in this case is for protection of the partner.

There could be benefits for employees, if they could receive immediate medical care, support, and counselling after the infection is detected. However, these benefits should be weighed against the human rights of the employee to privacy, and also the broader negative impact that it could bring to the future employment relations. With regard to the right to privacy and preservation of the confidentiality, the position in South Africa offers better protection to the infected person than in Canada.

---

<sup>243</sup> Entwisle S: Issues of HIV and Disclosure and confidentiality AIDS Calgary Briefing Document #29

<sup>244</sup> Infections Diseases: HIV/AIDS: Reports and Publications: see [http://www-aspc.gc.ca/publicat/epi-ae/pi/epi\\_update\\_may.04/3\\_e.html](http://www-aspc.gc.ca/publicat/epi-ae/pi/epi_update_may.04/3_e.html) Epi update 2004 [Date of Use: 09 Nov. 2007].

<sup>245</sup> Van Wyk C AIDS to be made a notifiable condition? Sept/Oct 1999 *AIDSScan* 3-4.



### 4.3 Limitation of Fundamental Rights under the Charter

Section 1 of Canadian Charter of Rights and Freedoms provides that the rights are limited by reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The rights under the Charter are not absolute. When interpreting the Charter, the Supreme Court in Canada has provided for a test which Government and its institutions must comply with.<sup>246</sup> The test has the following elements:

- (1) The importance of the purpose of limitation must outweigh the overriding of the right involved.
- (2) The measure must be reasonable, fair and not based on arbitrary or irrational grounds.
- (3) The measure should impair as little as possible the right or freedom in question.
- (4) The benefits of limiting right must be proportional to the negative effect of the right or freedom.

#### 4.3.1 Relevance to South Africa

The approach to limitation of fundamental rights of the Supreme Court of Canada is similar to the way the Constitutional Court has approached limitation of fundamental rights under section 36 of the Constitution. The Constitutional Court has adopted with approval the interpretation of the limitation of the equality clause under the Canadian Charter of Human Rights and Freedoms. In *S v Makwanyane* former Chief Justice Chaskalson formulated the elements of limitation as follows:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing of competing values, and ultimately an assessment based on proportionality. ..In balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and particularly where the limitation has to be necessary whether the desired ends could reasonably be achieved through other means less damaging to the right in question.<sup>247</sup>

The elements are quite similar to what the Supreme Court in Canada interpret section 1 of the Charter.

---

<sup>246</sup> *R v Oakes* (1986) 1 SCR 103 discussed by Hogg PW *The Constitutional law of Canada* Par 35.6 p 860. see also Beaudoin GA & Mendes E *Canadian Charter of Rights and Freedoms 4<sup>th</sup> ed*( Lexis Nexis Butterworths) p 927

<sup>247</sup> *S v Makwanyane* 1995 (3) SA 391 Par 104.

## 4.4 International treaties

Canada became a state party to ICCPR in 1976. Hogg points out that those treaties are only binding at international level.<sup>248</sup> They are not incorporated into Canadian domestic law and are not enforceable in Canadian courts. However, Hogg notes that the ICCPR covers much of the same grounds contained in the Canadian Charter. Treaties are however used to interpret the Canadian Charter.

### 4.4.1 Relevance to South Africa

The position in South Africa is slightly different. Labour legislation in South Africa has as one of its objectives the fulfilment of the obligations of South Africa under international treaties. In this way, many of the core provisions in the treaties are incorporated in the existing labour laws. The incorporation makes it possible for Courts in South Africa to apply international law.<sup>249</sup>

The Bill of Rights in South Africa and the Charter of Rights and Freedoms in Canada contain common equality clauses couched in similar terms. HIV status is not included as a listed ground upon which a person could be protected against unfair dismissals in the workplace. In Canada, the Supreme Court has dealt with many cases dealing with perceived impairments, which are akin to employees living with HIV infection during the first stages. The Supreme Court has linked unfair discrimination with the right to dignity. This has also been the case with decided cases in South Africa.<sup>250</sup>

There is a difference in the manner international law is applied in Canada and South Africa. In South Africa, courts are obliged to prefer any reasonable interpretation that is consistent with international law, to alternative interpretations.<sup>251</sup> In Canada, international treaties do

---

<sup>248</sup> Hogg PW *The Constitutional law of Canada* Par 33. 8 (c).

<sup>249</sup> Sec 231 of the Constitution provides for procedure of Incorporation of international treaties into South African municipal law. The section also provides that customary international law is law in the Republic unless it is inconsistent with the Constitution. Arguably the rights protected of employees with HIV under the Universal Declaration of Human Rights HIV are part of the international customary law in South Africa.

<sup>250</sup> *Harksen v Lane* NO 1997 (11) BCLR 1489 (CC).

<sup>251</sup> Sec.203 of Constitution.

not have the same effect as in South Africa.<sup>252</sup> The Constitutional Court of South Africa and the Supreme Court of have referred to some of the international guidelines on HIV/AIDS and to the International Bill of Rights when interpreting the equality clauses under respective constitutions.<sup>253</sup> The definition of discrimination in Canada finds expression in South African equality laws within the context of employment. Courts in both South Africa and Canada have recognised that unfair dismissals are largely based on prejudice, myths fears and perceptions.<sup>254</sup>

---

<sup>252</sup> Elliot R Protection against Discrimination based on HIV/AIDS status in Canada: the Legal framework, (Vol. 10 number 1, April 2005 *HIV/AIDS Policy and Law Review*) p.20-29.

<sup>253</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) & (*Commission des Droits des Personne et de la Jeunesse v. Boisland (City)* (2000) 1 SCR 665.

<sup>254</sup> Par 2.1.2.1 supra.

## **CHAPTER 5**

### **CONCLUSION**

This study has demonstrated that unfair discrimination based on HIV status places a burden on human development by denying hundreds of thousands of people a chance of reaching their full potential.<sup>255</sup> Employees living with HIV are subject to widespread discrimination and stigmatisation from fellow employees, customers, and from their employers. Such discrimination is unfair, and is prohibited under the International Bill of Human Rights, the Constitution of the Republic of South Africa, 1996 and under existing international and municipal labour laws of South Africa.

In spite of the prohibition of unfair discrimination, employees with actual or perceived HIV infection face risks of dismissals when their HIV status has been known or disclosed. The Constitutional Court has indicated that the reasons for such dismissals arise out lack of awareness and also from stereotypes and myths which project such employees as incompetent to perform their duties when compared to uninfected employees. In addition, lack of information on the transmission of the HI virus has led to employers believing erroneously that dismissing employees can contain the spread of the infection at the workplace. These myths are not supported by the available scientific information on how HIV is transmitted.

Employers have duties to create a safe working environment for all. Striking a balance between the rights of employees living with HIV and those who are HIV free is important. It is submitted that awareness of the transmission, prevention and support are important considerations in such cases. The employers are bound to ensure that employees with disabilities including those living with HIV are accommodated in the work place. The ILO and Governments have been attempting to strike a balance between the competing interests of the employees' rights to privacy and confidentiality on one side and the rights of the

---

<sup>255</sup> UNAIDS Report of Global AIDS Epidemic 2006 ,Impact of AIDS on people and Societies (UNAIDS 2006 ) p 86.

employers to increase productivity through hiring healthy workers on the other side. The ILO has thus been promoting a human rights approach to combating HIV in the workplace. The efforts of the ILO have been reinforced by international guidelines to governments, and trade unions as well as workers on how to combat the spread of the HIV infections and how to protect the right of workers. From a legal perspective, South Africa has the necessary legal framework to deal with the protection of employees with HIV at the workplace. The Constitutional Court and the Labour Court have provided the necessary interpretation of the rights of employees with HIV.

When a comparison is made with Canada, courts in Canada and South Africa have interpreted the human rights of employees with HIV in similar manner and have generally affirmed the rights of employees with HIV. By way of comparison, South Africa has the Bill of Rights with an equality clause that does not specifically address HIV status. Courts in the two countries have dealt with HIV/AIDS cases at the workplace in a similar manner, using similar tests and reasoning. However, courts in Canada have interpreted HIV status as a disability that impairs the dignity of employees. The Constitutional Court in South Africa has refrained from taking the approach that HIV status is a disability. It is argued in this paper that including employees at the last stage of HIV infection as disabled person would enhance their protection in the workplace and enable them to access available social assistance in South Africa. The inclusion of HIV status as one of the prohibited grounds of unfair discrimination under the Employment Equity Act in South Africa means that employees can now easily claim protection under this law and under the Labour Relations Act. If dismissed, such employees could claim that such dismissal is unfair dismissal under the Labour Relations Act. It is therefore a positive step which will advance the protection of employees living with HIV/AIDS.

On the whole, the Constitution of the Republic of South Africa and labour laws are elaborate and protect the rights employees with HIV. Discrimination based on HIV status infringes not only the employee's right to fair labour practices, but also affect other rights such as the right to privacy and the right to dignity. Although courts in South Africa are not bound to consider foreign law, Canadian jurisprudence provides useful and persuasive

manner of interpretation the protection provided to employees with HIV at the workplace. Courts in South Africa can use the interpretation adopted by Canada in dealing with cases of HIV as cases falling with the broad criteria of disability. Given the fact that the HIV infection is progressive in nature, caution must be taken to protect employees who are capable of performing their normal duties from possible discrimination and exclusion from employment and benefits.

## **BIBLIOGRAPHY**

### **B**

Basson A et al *Essential Labour Law* 4<sup>th</sup> ed (Labour Law Publications) 1998.

Blackbeard M “HIV/AIDS “The Right to Privacy v The Right to Life” 2002 (65) *THRHR* 232.

Beaudoin A & Mendes E *Canadian Charter of Rights and Freedoms* 4<sup>th</sup> ed (Lexis Nexis Butterworths )

Burgenthal T, Shelton D & Stewart DP *International Human Rights in a Nutshell* 3<sup>rd</sup> Ed (West Group 2003).

### **C**

Canadian Human Rights Commission: Policy on HIV/AIDS.

Christianson M A retrospective and prospective overview of the past 25 years (2004) *ILJ* 879.

### **D.**

Dr. Devenish G *The South African Constitutional Law* (Lexis Nexis Butterworth’s Durban 2005).

Dyk AV *HIV Aids Care and Counselling: A Multidisciplinary Approach* 3<sup>rd</sup> ed. (Pearson Education South Africa 2005).

### **E**

Elliot R Protection against Discrimination based on HIV/AIDS status in Canada (*HIV/AIDS Policy and Law Review* Vol. 1 April 2005).

Entwisle S Issues on HIV disclosure and confidentiality: Briefing Document # 29 *AIDS Calgary*.

### **G**

Gerntholtz L et al, Your Victory is Our Victory, A case of A v South African Airways: A Guide to pre- employment HIV testing, Business best practices and the rights of South Africans with HIV (*AIDS Law Project*, October 2000).

Gutto S *Equality and Discrimination in South Africa* (New Africa Books 2001)

## **H**

Harris D.J *Cases and Materials on International Law* 6<sup>th</sup> ed. (Sweet and Maxwell 1991).

Albertyn C et al, Facing the Challenge of Transformation: Difficulties in Development of Indigenous Jurisprudence of Equality (1998) 14 *SAJHR* 248.

Hodges J Guidelines on addressing HIV/AIDS in the Workplace through Employment and Labour Law (ILO Geneva January 2004).

Hogg PW *Constitutional law of Canada* 3<sup>rd</sup> ed. (Carswell Thomson Professional Publishing 1992).

## **I**

International Council of AIDS Services Organisations Assessment of Country Responses in Improving Access to HIV/AIDS within The International Guidelines on HIV/AIDS (May 2002).

## **M**

MacLean GR HIV Infections and Limit to Confidentiality 1996 *SALHR* 452.

## **R**

Rycroft A & Louw R Discrimination on Basis of HIV: Lessons from Hoffmann Case (2000) 21 *ILJ* 856.

## **U**

Uko EJ Legal Rights of People Vulnerable to HIV/AIDS in Africa (Vol 45 No 1, 2004 *Codicillus*).

UNAIDS *Courting Rights: case studies in litigating the human rights of people living with HIV* (UNAIDS 2006).

UNAIDS: *International Guidelines on HIV/AIDS* (UNCHR 2001).

UNAIDS: *Impact of AIDS on people and Societies: Report on AIDS Epidemic* (UNAIDS 2006).



## **LIST OF CASES CITED**

### **South Africa**

1. Jansen Van Vuuren and NNO v Kruger (1993) 4 SA 842 (A)
2. S v Makwanyane (1995) (3) SA 391( CC)
3. Harksen v Lane NO and others ( 1998) (1) SA 300 ( CC)
4. Hoffmann v South African Airways 2001 (1) SA 1 (CC)
5. Hoffmann v South African Airways 2000 (2) SA 628 (W)
6. C v Minister of Correctional Services 1996 (4) SA 292(T)
7. Joy Mining Machinery v National Union of Metalworkers and others 2002, 23 *ILJ* 391 (LC)
8. Irvin & Johnson Ltd v Trawler & Line Fishing Union and others (2003)24 *ILJ* 7711 ( LC)
9. PFG Building Glass (Pty)Ltd v CEPPAWU &others (2003) 24 *ILJ* 974 ( LC)
10. Soobramoney v Minister of Health ( Kwazulu- Natal ) 1998 (1) SA 765 (CC)
11. Minister of Health v Treatment Action Campaign 2002 (4) BCLR 356 (CC)

### **Canada**

12. *Andrew v Law Society British Columbia* (1989) 1 S.C.R 143
13. *Canada (Attorney General) v Thwaite* (1994) 3 FC 38 (Federal Court of Canada, TD)
14. *Quebec (Commission des Droits de la Personne et Droits de la Jeunesse) v Boisbriand* (2000) 1 S.C.R 665
15. *British Columbia (Public Service Employee Relations Commission) v BCGSEU* ( 1999) 3 S.C.R 3
16. *R. v Oakes* (1986) 1 SCR 103

## **LIST OF STATUTES**

### **South Africa**

1. The Constitution of the Republic of South Africa, Act 108 of 1996
2. The Employment Equity Act 55 of 1998
3. The Labour Relations Act 66 of 1995
4. The Basic Conditions of Employment Act 75 of 1997
5. The Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000
6. The Protected Disclosure Act. 26 of 2000
7. The National Health Act 61 of 2003
8. The Medical Schemes Act 131 of 1998
9. The Occupational Health and Safety Act 85 of 1993
10. Social Assistance Act 13 of 2004

### **Canada**

1. The Constitution Act 1982, Schedule B : The Canadian Charter of Human Rights and Freedoms , Canada Act 1982 (UK), 1982 c.11.

## **LIST OF CODES OF GOOD PRACTICE AND GUIDELINES**

### **South Africa**

1. The Code of Good Practice on Key Aspects of HIV/AIDS and Employment. December 2000 Department of Labour.
2. The Code of Good Practice: Dismissal Schedule 8 of Labour Relations Act.
3. The Code of Good Practice Act on Dismissal Based on Operational Requirement.
4. The Code of Good Practice on Arrangement of Working Time.
5. HIV Technical Assistance Guidelines (June 2003 Department of Labour).

### **ILO**

6. The Code of Good Practice on HIV/AIDS and the World of Work (2001 ILO United Nations Geneva).
7. International Guidelines on HIV/AIDS and Human Rights (2004 UNAIDS).

### **SADC**

8. SADC Code of Good Practice on HIV/AIDS and Employment.

## **LIST OF TREATIES**

1. The International Covenant on Civil and Political Rights 1996.
2. The International Covenant on Economic, Social and Cultural Rights 1996.
3. ILO Discrimination in respect of (Employment and Occupation) Convention 111 of 1958 (ILO)
4. Convention on Termination of Employment, Convention 158 of 1982 (ILO)

### **Other Instruments:**

5. The Universal Declaration of Human Rights 1948

## LIST OF ABBREVIATIONS

AIDS	Acquired Immune- deficiency syndrome
BCEA	Basic Conditions of Employment Act
BCLR	Butterworth's Commercial Law Reports
BFOR	Bona fide Operational requirements
CAF	Canadian Air Force
EEA	Employment Equity Act
HAART	Hyper Active Anti Retro Treatment
HIV	Human Immunodeficiency Virus
ICASO	International Council of AIDS Services Organisations
ICESCR	International Covenant on Economic Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ILJ	Industrial Law Journal
ILO	International Labour Organisation
OHA	Occupational Health Act
OHCHR	Office of the High Commissioner for Human Rights
LRA	Labour Relations Act
MSA	Medical Schemes Act
NUMSA	National Union of Miners South Africa
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
SAA	South African Airways
SALJ	South African Law Journal
SAJHR	South African Journal on Human Rights
SADC	South African Development Community
TAG	Technical Assistance Guidelines
THRHR	<i>(Tydskrif vir Hedengaagse Romeins Hollandse Reg)</i> Journal of Contemporary Roman Dutch law
UNAIDS	United Nations AIDS programme
UNICEF	United Nations Children Education Fund

UDHR      Universal Declaration of Human Rights  
WFP      World Food Programme  
WHO      World Health Organisation

# INDEX

## A

AIDS 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 21, 23, 26, 28, 29, 31, 33, 35, 36, 40, 43, 44, 45, 46, 47, 52, 54, 55, 58, 59, 60, 62, 63, 66, 68  
Albertyn C et al ..... 14, 63  
Andrew v Law Society ..... 64  
Automatic unfair dismissal ..... 24

## B

Basson A et al ..... 62  
BCEA ..... 2, 24, 27, 30, 31, 32, 35, 44, 65, 68  
BFOR ..... 51, 52, 68  
Bill of Rights 4, 10, 11, 12, 14, 15, 32, 33, 35, 37, 38, 39, 40, 41, 43, 48, 53, 54, 57, 58, 60  
Blackbeard M ..... 11, 13, 62  
British Columbia (Public Service Employee relations Commission) v BCGSEU ..... 64  
Burden of proof ..... 2, 27  
Burgenthal T, Shelton D & Stewart DP ..... 62

## C

C v Minister of Correctional Services ..... 64  
Canada (Attorney General) v Thwaite ..... 64  
Case law ..... 2, 3, 17, 22, 50  
Charter of Rights and Freedoms ..... 6, 48, 54, 56, 57, 62  
Christianson M ..... 62  
Confidentiality 12, 13, 17, 20, 21, 36, 46, 47, 54, 55, 59, 62, 63  
Convention on Termination of Employment, Convention 158 of 1982 (ILO) ..... 67

## D

Damages ..... 28  
Definition of employe ..... 27  
Discrimination 13, 15, 18, 27, 32, 33, 44, 48, 50, 54, 58, 60, 62, 63, 65, 67, 68

## E

EEA 15, 16, 17, 20, 21, 23, 24, 25, 26, 27, 36, 40, 44, 49, 54, 68  
Employees with HIV ..... 5, 8, 31, 47  
Equality clause ..... 2, 5

## G

Gertholtz L et al , Your Victory is Our Victory, A case of A v South African Airways ..... 62  
Gutto S ..... 13, 63

## H

Harksen v Lane ..... 64  
HIV 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, 55, 57, 58, 59, 60, 62, 63, 66, 68  
HIV Technical Assistance Guidelines (June 2003 Department of Labour) ..... 66  
HIV/AIDS ..... 6  
Hodges J ..... 63  
Hoffmann v South African Airways ..... 64  
Hogg PW) ..... 63  
Hyper Active Anti Retro Treatment ..... 68

## I

ICCPR ..... 3, 37, 39, 40, 41, 42, 57, 67, 68  
ILO 3, 4, 5, 16, 24, 26, 28, 30, 37, 44, 45, 46, 47, 59, 63, 66, 67, 68  
ILO Treaties ..... 44  
Incapacity ..... 2, 26, 29, 45  
International Council of AIDS Services Organisations ..... 63, 68  
International Covenant on Economic Social and Cultural Rights ..... 68  
International Guidelines ..... 3, 40, 44, 45, 46, 63, 66  
Irvin & Johnson Ltd v Trawler & Line Fishing Union and others ..... 64

## J

Jansen Van Vuuren and NNO v Kruger ..... 64  
Joy Mining v NUMSA ..... 64

## L

Limitation of fundamental rights ..... 2, 14  
Limitation of Fundamental Rights under the Charter · 56  
LRA 2, 23, 24, 25, 26, 27, 28, 29, 31, 36, 44, 45, 54, 60, 65, 66, 68

## M

MacLean GR ..... 63  
Medical Schemes Act ..... 3, 35, 36, 65, 68  
Methodology ..... 2, 9  
Minister of Health v Treatment Action Campaign 43, 64

## N

National Union of Miners South Africa ..... 68

## O

Occupational Health and Safety Act ..... 3, 34, 65  
Operational requirements ..... 2, 26, 29, 31, 68

## P

PEPUDA ..... 27, 32, 33, 54, 65, 68  
PFG Building Glass (Pty)Ltd v CEPPAWU & others ..... 64  
Protection against discrimination based on HIV status  
..... 41, 43

## Q

Quebec (Commission des Droits de la Personne et  
Droits de la Jeunesse) v Boisbriand ..... 64

## R

R. v Oakes ..... 64  
Remedies ..... 2, 28  
Right to privacy ..... 2, 11

## S

S v Makwanyane ..... 64  
SADC ..... 47, 66, 68  
Sick leave ..... 31  
Social Assistance Act 13 of 2004 ..... 65

Soobramoney v Minister of Health ( Kwazulu- Natal )  
..... 64

## T

Termination of employment ..... 2, 31  
Testing ..... 2, 12, 20  
The ILO Code of Practice on HIV and the World of  
Work ..... 46  
The National Health Act 61 of 2003. .... 65  
The Occupational Health and Safety Act 85 of 1993 ..... 65  
The Protected Disclosure Act. 26 of 2000 ..... 65  
The right to dignity ..... 13, 14, 39, 41  
The right to fair labour practice ..... 14

## U

UDHR ..... 3, 37, 39, 42, 44, 57, 67, 69  
Uko EJ) ..... 63  
Unfair discrimination ..... 2, 10  
Unfair Discrimination Act ..... 27, 32, 33, 54, 65, 68  
Unfair dismissal ..... 5, 25  
United Nations AIDS programme, (UNAIDS) ..... 68  
United Nations Children Education Fund, (UNICEF) 68

## W

WFP ..... 44, 69  
Working hours ..... 30  
Wyk CV ..... 55