CASE NOTE

A summary of some cases on HIV/AIDS

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***Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC); 2001 (1) SA (CC)**

This case is about the right of persons living with HIV/AIDS not to be discriminated against when applying for employment. The case is particularly important because of the high incidence of HIV/AIDS on the African continent. It is reported that sub-Saharan Africa accounts for over 70% of the world-wide incidence of HIV/AIDS.[1] With the potential problems of dealing with workers living with HIV/AIDS in terms of chronic illness resulting in absenteeism and low productivity, it is not surprising that employers should be reluctant to employ HIV-positive applicants and tend to exclude such applicants through pre-employment testing for HIV/AIDS. This case, however, emphasises that access to employment for HIV-positive persons is a matter of human rights, in particular the right not to be discriminated against unfairly and the right to human dignity. It should be instructive for other jurisdictions in Africa and elsewhere.

Hoffmann applied for a position with South African Airways (SAA) as a cabin attendant. He was one of 173 applicants. He successfully went through a four-stage selection process and found himself among 12 applicants found suitable for employment. The decision on suitability was, however, subject to a pre-employment medical examination, including a blood test for HIV/AIDS. The medical examination found him fit and therefore suitable for employment. However, the blood test indicated that Hoffmann was HIV-positive. The medical report was then altered to say that he was HIV-positive and therefore 'unsuitable' for employment. He was informed that he could not be employed as a cabin attendant as he was HIV-positive.

Hoffmann challenged the decision not to employ him in the High Court[2] on the ground that the refusal was unconstitutional as it constituted unfair discrimination and infringed his rights to equality, human dignity and fair labour practices[3]. He sought an order directing SAA to employ him as a

1 UNAIDS 2000: 6.

2 *Hoffmann v South African Airways* 2000 (2) 628 (W).

3 Contrary to ss 9, 10, and 23 of the Constitution of the Republic of South Africa Act 108 of 1996, respectively.

flight attendant. SAA defended its decision on medical, safety and operational grounds. It claimed that its flight crew had to be fit for world-wide duty and had to be vaccinated against yellow fever as they may be required to fly in yellow-fever endemic countries. It argued that HIV-positive persons may react negatively to the vaccination and therefore may not be vaccinated. Without such vaccination, however, they run the risk of contracting yellow fever and spreading it to fellow crew and to passengers. HIV-positive persons would also be prone to contracting opportunistic diseases such as tuberculosis and chronic diarrhoea and could spread them to other flight crew and passengers.

Moreover, flight attendants suffering from opportunistic diseases would not perform their duties properly, especially in emergencies. SAA also offered an economic reason for exclusion. The life expectancy of HIV-positive persons was too short to justify the costs of training them.[4] SAA further justified its action on the basis that other major airlines had similar employment practices.

The High Court agreed with SAA's arguments and dismissed the application. It held that the exclusion was based on "medical, safety and operational grounds" and was "aimed at achieving a worthy and important societal goal".[5] It further held that "it is an inherent requirement for a flight attendant, at least for the moment, to be HIV-negative." The High Court concluded that the practice of denying employment to HIV-positive applicants did not amount to unfair discrimination.

Hoffmann appealed to the Constitutional Court. The court found medical evidence, including that tendered by SAA's expert, to be at variance with SAA's claim that Hoffmann would be a medical and safety risk. The evidence showed that only HIV-positive persons whose immune system had deteriorated to the immunosuppressed stage and whose CD4+ count[6] had dropped to below 350 per microlitre of blood would not be safely vaccinated against yellow fever. Further, HIV-positive persons who had not reached that stage were not susceptible to secondary infections. The evidence also showed that modern medical treatment dramatically altered the progression of the HIV infection and that the treatment was capable of completely suppressing the replication of the virus and the person's immune system could recover. At a meeting of a number of experts, including the SAA expert, it was agreed that "with the advent of the [HAART] treatment, individuals are capable of living normal lives and they can perform any employment tasks for which they are otherwise qualified".[7] The medical experts concluded: "on medical grounds alone exclusion of an HIV-positive individual from employment solely on the basis of HIV positivity cannot be justified."[8]

4 It was averred that the cost of training a flight attendant was R30 000 (approximately US $4 000 at the time of the action). SAA would have expected at least 10 years' service from a flight attendant after training.

5 Para 28 of the High Court judgment.

6 CD4+ lymphocytes are white blood cells, which are destroyed by the HI virus.

7 Quoted in para 14 of the Constitutional Court judgment. HAART stands for Highly Active Antiretroviral Therapy.

8 Ibid.

The Constitutional Court held on the basis of its previous decisions that SAA's conduct amounted to unfair discrimination contrary to section 9 of the Constitution.[9] Although section 9(3) does not list HIV/AIDS status as a prohibited ground of discrimination it is now recognised as a ground analogous to those listed.[10] The determining factor for finding conduct to be unfair discrimination is its impact on the victim. The conduct should adversely impact on the victim's dignity or affect him/her in a comparably serious manner.[11] Ngcobo J, for a unanimous court, held that the denial of employment to Hoffmann because he was HIV-positive had impaired his dignity and constituted unfair discrimination and violated his right to equality.[12] The court observed that the discrimination was not based on a legitimate purpose but rather on prejudice against persons living with HIV. Although legitimate commercial requirements were an important consideration in determining whether to employ a person, "we must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interest. The greater interests of society require the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination."[13] Justice Ngcobo further admonished: "People who are living with HIV must be treated with compassion and understanding. We must show *ubuntu*[14] towards them. They must not be condemned to 'economic death' by the denial of equal opportunity in employment."[15]

Having found that Hoffmann had been unfairly discriminated against, the court reversed the decision of the High Court and ordered SAA to employ him with effect from the date of the judgment of the Constitutional Court.

The lesson of this case is that the decision to employ or not to employ a person living with HIV should depend on the medical condition of the particular applicant. No consideration should be given to the perceptions and prejudices of members of the public regarding persons with HIV.

N v Minister of Defence (2000) ILJ 999 (Labour Court of Namibia)

This case also involved the denial of employment to a person who was HIV-positive. Applicant in this case, a former SWAPO combatant in the struggle for the liberation of Namibia, applied to be enlisted in the Namibian Defence Force (NDF). As part of the application process, he was required to undergo a medical examination including a blood test to test

9 Although the Constitutional Court found that SAA was an organ of the state and therefore bound by s 9(3) read with s 8, the decision would have been the same if it was a private company since in terms of s 9(4) "[n]o person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)".

10 It may be noted that HIV status is a prohibited ground of discrimination in terms of s 6 of the Employment Equity Act 55 of 1998.

11 See *Pretoria City Council v Walker* 1998(2) SA363 (CC).

12 Para 40.

13 Para 34.

14 *Ubuntu* is an African concept denoting the recognition of human worth and respect for the dignity of every person.

15 Para 38.

for HIV. The NDF doctor who examined the applicant found him to be HIV-positive and informed him that because he was HIV-positive he would not be accepted by the NDF.

About one month after he tested HIV-positive, the applicant underwent a medical examination (described by the court as a "thorough clinical examination") by a medical officer of the state, who found him to be in good and sound health. The medical report included a question to the doctor whether he considered the applicant to be in good health and free from any physical or mental defect, disease or infirmity which was likely to interfere with the proper performance of duty as a government official in any part of Namibia. The medical officer replied in the affirmative.

The applicant approached the Namibian Labour Court alleging that he was refused enlistment into the NDF on the sole ground that he was HIV-positive which, he argued, constituted unfair discrimination as envisaged in section 107 of the Labour Act 6 of 1992. Alternatively, he averred that he was discriminated against on the impermissible ground of disability in conflict with section 107 of the Labour Act. He sought an order directing the respondent to discontinue discriminating against him and directing respondent to process applicant's application for enlistment in the NDF.

On the basis of the medical report, the court held that the applicant was, at the time of his application, in good health and fit to carry out any duties assigned to him and that the sole and only reason for refusing to enlist him into the NDF was his HIV status.

The court proceeded to inquire whether the respondent was justified in refusing to enlist applicant in the NDF. It referred to section 107 (1) of the Labour Act which provided for a remedy where "any person has been discriminated or is about to discriminate in an unfair manner or so discriminating against him on the grounds of his . . . disability, in relation to his employment."

The court relied on the evidence of medical experts of both litigants and found that a person who is HIV-positive is not necessarily either ill or unable to perform the normal functions required in the Defence Force. The experts agreed that in order for such a person to be susceptible to opportunistic infections or to be unable to perform normal duties, his or her CD4 + count (indicating the number of defensive white blood cells per cubic millilitre of blood) had to have fallen below 200 and the presence of the virus in the body (the viral load) had to be above 100,000. In the case of applicant, no tests had been done to determine the CD4 + count or the viral load. Moreover, it was admitted by respondent's employees that there were people living with HIV/AIDS in the Namibian Defence Force and that facilities existed for their treatment and mechanisms existed for redeploying them to less demanding departments within the NDF when the need arose.

The court came to the conclusion that the exclusion of applicant from the military, solely because he was HIV-positive, constituted, at the time of his application for enlistment, discrimination in an unfair manner in breach of section 107 of the Labour Act. However, because the tests had been made four years before the hearing, the court felt it was not proper

to order immediate enlistment since the applicant's condition could have deteriorated in the four years. On the other hand, medical evidence had shown that a person who is found to be HIV-positive could be fit and healthy for several years. The court decided that the appropriate remedy was to order enlistment subject to applicant undergoing a CD4 + test and a viral load test. Consequently, the court ordered respondent to enlist applicant in the NDF should the applicant reapply for enlistment, provided his CD4 + count was not below 200 and his viral load not above 100,000. As a general practice, the court ordered that medical examinations which applicants into the NDF are required to undergo should include an HIV test together with a CD4 + count test and a viral load test and that no applicant should be denied enlistment solely on the basis of the person's HIV status unless his/her CD4 + count is below 200 and viral load above 100,000.

It should be noted that, unlike Hoffmann, the applicant did not rely on the equality clause in the Constitution to have the discrimination declared unconstitutional. Article 10 of the Namibian constitution is narrower than its South African counterpart. It states that "(1) All Persons shall be equal before the law; (2). No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status." Although HIV status is not mentioned in section 9 of the South African Constitution, HIV has now been recognised by the constitutional court via *Hoffmann* as a prohibited ground of discrimination analogous to the listed grounds.

This case should encourage those in other African countries who test positive for HIV, but are otherwise health, to apply for jobs for which they are qualified. Equally, potential employers should realise that testing HIV-positive does not pose a threat to others except in very limited, controllable circumstances and that HIV-positive persons who have not reached a certain stage in the progression of HIV can give many years of service and should not be denied the opportunity to work.

Sources

UNAIDS Joint United Nations programme on HIV/AIDS Report on the Global HIV/AIDS Epidemic (June 2000, Geneva)