

SANDF's arguments were "vexatious and frivolous and an abuse of process," the Court stated that the SANDF had been unable to provide any evidence to suggest that the requisite health required for the positions sought by the Applicants could not be achieved by a person infected with HIV.

Conclusion

The applicants were successful. The Court made various orders including reinstatement, but also granted punitive costs because of the respondents' non-compliance with the earlier court orders and its attempt to relitigate an issue that was already settled.

Significance

Discriminatory attitudes and practices against persons with HIV are still prevalent in our societies, despite the progress that many countries have made in terms of putting in place public policies to curb these forms of discrimination. Having legislation in place or even a court decision is sometimes not enough incentive, even for public institutions, to end discriminatory practices. The Court commented that public institutions should be exemplary in complying with constitutional norms and standards, such as respect and protection of the rights of persons living with HIV.

Gary Shane Allpass v. Mooikloof Estates (Pty) Ltd.

[2011] ZALCJHB 7, Case No. JS178/09

South Africa, Labour Court

COURT HOLDING

The applicant's dismissal from employment for HIV-positivity was automatically unfair in terms of Section 187(1)(f) of the Labour Relations Act, 66 of 1995, because the reason for dismissal was his HIV status, and was not justifiable on any other ground.

Summary of Facts

The applicant sought relief for dismissal from employment on the grounds of his HIV status, which was unfair according to Section 187(1)(f) of the Labour Relations Act, 66 of 1995 (the "LRA"). In the alternative, the applicant pleaded that his dismissal was substantively and procedurally unfair according to Section 188 of the LRA. He also sought relief arising from unfair discrimination on the grounds of his HIV status, as proscribed by Section 6(1) read with Section 50(2)(b) of the Employment Equity Act, 55 of 1998 (the "EEA").

The applicant was employed by the respondent as a manager of a stable and a horse riding instructor at the Mooikloof Equestrian Centre (the "Centre"), owned by the respondent. In the pre-employment interviews, the applicant was asked about his health, and he stated that he was in good health.

The applicant had been living with HIV for 18 years and was on a treatment regime. Otherwise, according to his medical expert, he was in excellent health.

A week later, he and other colleagues were asked to complete a Personal Particulars Form (“PPF”), and amongst others, it required information about allergies and medication taken for these allergies as well as medication for chronic conditions. The applicant listed chronic conditions including HIV, and indicated the anti-retroviral medication he was taking.

A few days after he had submitted the PPF, a confrontation ensued between the applicant and his employer, which resulted in his being dismissed. He was ordered to vacate the premises. The dismissal note referred to the pre-employment interview and the fact that the applicant had said he was in good health. The note said that he had been dishonest in the interview for not stating the truth about his health. The final notice of his dismissal indicated “fraudulent misrepresentations” as the reason for his dismissal.

The applicant argued two claims. In the first claim, he submitted that the circumstances of his dismissal constituted automatic unfair dismissal under Section 187(1)(f) of the LRA. He claimed that the dismissal was discrimination against him due to his HIV status, and therefore violated his constitutional rights to dignity and privacy. The applicant submitted in the alternative that, should the Court not find unfair dismissal, then it should find that the dismissal was invalid, and the procedure of dismissal was not in accordance with Section 188 of the LRA.

In the second claim, the applicant submitted that the conduct of the respondent amounted to unfair dismissal in terms of the EEA. He claimed that he was dismissed without notice, and removed from the employer’s property in a manner calculated to humiliate him because of his HIV status.

The respondent replied to the first claim with the argument that the reason for dismissal was dishonesty of the applicant, as during pre-employment interviews he stated that he was in good health. The respondent said he only realised the dishonesty when the applicant volunteered information about his medical conditions after completing the PPF. The respondent claimed that this had created a breakdown of trust. The respondent argued that if the Court did not accept this explanation, then it should accept the argument that the respondent was dismissed because he was not suitable for the requirements of the job.

On the applicant’s second claim, the respondent denied the claim, and referred to its reasoning in the argument against the first claim.

Issues

The issues before the Court were:

- (a) Whether the automatic dismissal of the applicant was unfair, or alternatively procedurally and/or substantively unfair, and if so, the appropriate measure of compensation to which the applicant was entitled.
- (b) Whether the applicant was unfairly discriminated against on the basis of his HIV status and if so, the appropriate relief to which he was entitled.

Court's Analysis

The Court reviewed the relevant employment law in relation to unfair dismissal. The Court said that the basis for protection against unfair discrimination in employment is the right to equality under Section 9 of the Constitution of the Republic of South Africa, 1996. It then referred to the LRA, which provides that dismissal for a discriminatory reason is automatically unfair unless it can be justified on the grounds of inherent job requirements. Section 187(1) says that dismissal is automatically unfair if:

... the employer unfairly discriminated against an 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.

The Court referenced *Bootes v. Eagle Inc System KZ Natal (Pty) Ltd* (2008) 29 ILJ 139 (Labour Court) in which Pillay J. had held that HIV status was an arbitrary ground as envisaged in Section 187(1) of the LRA.

The Court considered the EEA, which prohibits unfair discrimination on grounds including HIV status (Section 6(1)). The Court reminded itself that Section 50 of the EEA empowers it to grant appropriate relief for unfair dismissal, and this includes payment of compensation, payment of damages, and other orders. The EEA also enjoins the courts to take into account relevant codes of practice and international conventions. The Court therefore referenced the Code of Good Practice on the Key Aspects of HIV and AIDS in Employment (Code) issued under the EEA. Amongst others, the Code has guidelines relating to confidentiality, privacy, and disclosure of one's HIV status in the workplace. The Code states that an employee has the right to privacy and is not required to disclose HIV status to an employer or other employees.

The Court noted that South Africa's anti-discrimination laws are based on the International Labour Organisation Conventions, including C111 Discrimination (Employment and Occupation) Convention of 1958. It also referenced the ILO Recommendation concerning HIV and AIDS and the World of Work 200 of 2010 that recognised the impact of discrimination based on HIV status in the workplace.

The Court also took into account the decision in *Hoffmann v. South African Airways* (2000) 21 ILJ 2357 (Constitutional Court) in which it was held that denial of employment to the Appellant because he was living with HIV impaired his dignity and constituted unfair discrimination, and that this was unconstitutional.

In evaluating the evidence before it, the Court found that the main reason for the respondent's action to dismiss the applicant from employment was because of the applicant's disclosure of his HIV status. The Court therefore was persuaded that the applicant had proven, in accordance with Section 187, that he was dismissed unfairly because of his HIV status. The Court went on to determine whether the respondent had a valid defence. The Court referred to the decision in *Leonard Dingler Employee Representative Council and Others v. Leonard Dingler (Pty) Ltd and Others* (1997) 11 BLLR 1438 (Labour Court) at 148H, which held that an inherent job requirement would constitute an absolute defence against unfairness. In the Court's opinion, the respondent's defence that non-allergy to penicillin was an inherent job requirement was just a thin veil to mask the real reason for the dismissal. It therefore dismissed the respondent's defence to the claim of unfair dismissal.

The Court also reviewed the respondent's reasoning that failure by the applicant to disclose his HIV status had led to the breakdown of trust. The Court however reminded the respondent that an employee is not required to disclose HIV status to the employer. The expectation that he should have disclosed his status violated his right to privacy and dignity.

The Court dismissed the applicant's second claim. The Court was of the view that this concerned a claim for damages for humiliating treatment after the fact of the dismissal, and this was not within the competence of the Court to address.

The Court therefore held that the applicant's dismissal was automatically unfair under Section 187(1)(f) of the LRA, because it was discriminatory as it was based on his HIV status.

Conclusion

The respondent was ordered to pay damages in the sum of twelve months' remuneration.

Significance

Discrimination against persons living with HIV is still a challenge in many countries and there is need for vigilance for states to promote a culture of respect for human rights to address discrimination in the workplace. Many countries are parties to international treaties that recognise various human rights that are infringed when a person is discriminated against on the basis of HIV. These include the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The rights recognised and protected in these treaties include the rights to equality and non-discrimination, dignity and health.

In Africa, the important human rights treaties include the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

Apart from these treaties, there are various authoritative documents issued by human rights monitoring bodies or other bodies that explain, interpret, or apply provisions on human rights to employment in relation to HIV. Further, various bodies have developed codes or policy documents to address discrimination against persons living with HIV in the workplace. The Southern African Litigation Centre has brought all these resources together in the publication entitled *Equal rights for all: Litigating cases of HIV-related discrimination*.¹⁰⁶

Many countries in Africa recognise human rights in their constitutional and legal frameworks and integrate human rights protections. An important aspect of promoting respect for human rights is enforcement of rights in the national justice system, such as the courts, as was the circumstance in this decision. Unless rights can be enforced, they remain unrealisable for many people who experience discrimination due to their HIV status in the workplace but cannot access justice in the courts or other tribunals.