

Lobbying bears fruit

The AIDS Law Project (ALP) has been lobbying for the inclusion of specific protection in the Employment Equity Act for job applicants and employees perceived to be living, or living with HIV/AIDS. We have also called for the specific prohibition of HIV testing (see 'Pre-employment HIV testing', *SA Labour Bulletin* vol 22 no 4, August 1998).

The Act has now passed into law. Discrimination on the grounds of 'HIV status' and a prohibition on HIV testing have been included in its provisions.

This victory is the first step in the long battle for employment equity for employees living with HIV/AIDS. It was achieved through the effort of AIDS service organisations, who were vigilant in submitting written submissions and making verbal submissions to the Parliamentary Portfolio Committee on Labour. The process has taught us a valuable lesson: democracy and lobbying do work.

The creation of the Employment Equity Alliance, representing over 30 NGOs, CBOs and civil society organisations, as well as support from certain religious groups provided the catalyst for the realisation of these gains.

The new Act will lend a useful lobbying hand to the pending equality legislation process co-ordinated by the Department of Justice and the Human Rights Commission.

by Fatima Hassan

The downside is that, like the LRA, the Employment Equity Act excludes the South Africa National Defence Force (SANDF), National Intelligence Agency and the Secret Service. Thus the SANDF has continued with its policy of testing all recruits for HIV, while other state organs put an end to this practice in March 1997.

Protection

HIV is now included in the definitions section of the Act:

- ☐ 'Discrimination on the grounds of race, gender, pregnancy, marital status, sexual orientation...and HIV is prohibited' (Chapter 2, section 6).
- ☐ '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' (Chapter 2, section 7(2)).

If an employee alleges unfair discrimination on the basis of his/her HIV status (or any other grounds), the employer bears the onus of showing that the discrimination is 'fair'.

Testing

'HIV testing' is specifically prohibited, and is dealt differently from non-HIV medical testing, which is also prohibited in the Act.

Code of employment

During September 1997, the SADC Council of Ministers approved the 'HIV/AIDS Code on Employment'. Since then, Namibia and Zimbabwe have promulgated the code into their national labour legislation.

The code states that an employees' HIV status should not be a factor in job status, promotion or transfer, and that 'there should be no compulsory workplace testing for HIV'.

The Employment Equity Act provides for the creation of an Employment Equity Commission, to act as an advisory board (part time) to the Minister of Labour. It will consist of eight members of designated

employees, employers, government, labour and a chairperson. The commission is responsible for drafting Codes of Good Practice, advising the Minister on Regulations and Codes and for monitoring employment equity in South African workplaces.

Trade unions and AIDS service organisations must ensure that the Employment Equity Commission prioritises the adoption of this code. This is sensible for the following reasons:

- ☐ we will not have to draft a South African Code, thus avoiding a duplication of work;
- ☐ we will comply with our obligations as a SADC member state.

The legislature has made the prohibition on 'HIV testing' much clearer than previous versions of the Act. The exceptions to this prohibition are also now much narrower than the exceptions to the prohibition of non-HIV testing.

Non-HIV medical testing is prohibited unless:

- ☐ legislation permits it;
- ☐ it is justifiable on a number of grounds (medical facts, employment conditions, social policy, fair distribution of employee benefits, inherent requirements of the job).

HIV testing is only permitted if the labour court authorises such testing.

Any employer (public or private) who wishes to conduct pre-employment HIV testing, must first approach the Labour Court for permission. This protects all job applicants and all employees from unfair and routine pre-employment HIV testing, not only 'designated employees'. Similarly, the section that prohibits unfair discrimination on the grounds of 'HIV status' (section 6) is also applicable to all employers and all employees.

The issue of pre-employment HIV testing has finally been settled. AIDS service organisations and trade unions

now have a new role to play: to monitor and challenge employers who test for HIV without Labour Court approval.

Internationally, it is accepted that there are very few jobs - if any at all - that warrant HIV testing based on the 'inherent requirement of the job'. As far back as 1988, the World Health Organisation (WHO) and the ILO stated that 'pre-employment HIV/AIDS screening as part of the assessment of fitness to work is unnecessary and should not be required'.

Authorisation to conduct HIV testing has mainly been obtained for the military (for example, in the US and Australia). There are numerous countries, however, which have rejected HIV testing of military recruits (for example, Belgium and Canada).

If trade unions and service organisations are vigilant, it is unlikely that employers will succeed in obtaining authorisation to test employees for HIV. We have the perfect opportunity to involve ourselves in shaping our jurisprudence on HIV testing. We must not allow this opportunity to slip us by. ★

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