

Pre-employment HIV testing

By 1998 there were approximately 3 million people living with HIV/AIDS in South Africa. Of the estimated 33 million people with HIV in the world, 22,8 million are in sub-Saharan Africa. By the year 2000, one in five adults of working age in South Africa could be living with HIV.

Many work seekers in South Africa have been refused jobs because of pre-employment HIV testing. Until March 1997 (when a parliamentary sub-committee decided to outlaw such testing in the public sector) both public and private employers routinely conducted these tests. While this is now mainly a private sector phenomenon, certain sections of the public sector, like the South Africa National Defence Force, continue to conduct these tests.

Why test?

Pre-employment testing is specifically designed to exclude people with HIV from the workplace. This is due to perceptions that employees with HIV are costly, unproductive or a 'threat' to the health of fellow employees. Testing is aimed at establishing the HIV status of an employee at a given time. It is unreliable, however, because it ignores the 'window period', a time of up to six weeks after infection, when an HIV test will be negative. Furthermore, a negative result at any given time does not protect an employee from being infected at a later point. In high HIV

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prevalence areas such as South Africa, all sexually active people are at risk if they do not protect themselves.

Routine HIV testing thus creates a false sense of security. It will not keep any workplace HIV/AIDS free. It delays the only intervention that is cost-effective, that is workplace-based prevention programmes.

Against the trend

Overseas and southern African countries are moving towards outlawing pre-employment testing. In South Africa, however, the trend seems to be the opposite.

Research conducted by Hugh McLean and supervised by the University of the Witwatersrand Faculty of Management shows that employers are becoming more vociferous in support of the 'relevance' of testing. Fifty-nine percent of private employers who were interviewed felt that HIV testing (not necessarily pre-employment testing) is appropriate. Ten percent openly admitted to a policy of testing new recruits.

The law

The LRA does not specifically prohibit or permit HIV or other tests. It does, however, provide for recourse where it can be

shown that there is an 'act or omission' involving unfair discrimination, or where a dismissal amounts to unfair discrimination. It is widely accepted in legal circles that HIV testing is an unfair labour practice, because HIV infection can rarely be shown to relate to the inherent requirements of the job. It is likely that a High Court application against South African Airways (SAA) later this year will offer the first formal judgement on the issue, although the case against SAA is being fought mainly on constitutional grounds.

The Employment Equity Bill, which is currently before parliament, includes a section on medical testing (section 7). This section caused much controversy during the negotiations around the Bill. Human rights lawyers, including those attached to the AIDS Law Project (ALP), are critical of this section in the Bill. They point out that, although it aims to prohibit unjustified medical testing, it does not specifically outlaw HIV testing. For the last five years, the ALP has argued for a specific Act to ban pre-employment testing.

Provisions

The ALP accepts that a specific prohibition on HIV testing may not be necessary if section 7 is re-drafted in its entirety. Section 7 currently states that medical testing of an employee is prohibited unless:

- other legislation permits it; or
- it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job.

The problems with these provisions are that:

- Legislation allowing HIV testing does not exist. The section is meaningless, unless further and specific 'legislation' on medical testing in the context of HIV is introduced. This seems unlikely.
- It is unclear 'who' will decide 'when' a

medical test is justifiable and when this decision must be made. The drafters of the legislation appear to have left this crucial decision to employers. The section does not state that the Labour Court must declare the medical test 'justifiable' or that this must happen before the test is carried out. Such an approach has been recommended by the South African Law Commission in its report on pre-employment testing.

- The grounds on which such a decision can be made are extremely broad and open to abuse by employers. What is social policy? Who determines whether the distribution of employee benefits can be determined fair or not?

Even though the Bill provides for recourse mechanisms, they are meaningless all the while employees with HIV are afraid to use the law because of fears for their privacy. Discrimination cases brought by people with HIV are few and far between. The ALP's experience with employees who have tested positive after an employment-related HIV test is that they often resist challenging their employers for fear of reprisals. This is exacerbated by the stress involved in understanding and accepting their recently discovered HIV status.

High unemployment also means that, even if workers know they are not required to submit to a test, they will agree if the employer demands it.

The Bill has enormous symbolic significance for black people, women and the disabled. If it fails to protect workers living with HIV, it will defeat its own purpose, namely, putting an end to unfair discrimination and creating equal workplace opportunities. ★

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