

Unlocking labour laws

This section of the *Bulletin* answers people's queries on labour law. In this issue **Dan Pretorius** from the AIDS Law Project answers questions around HIV/AIDS at work.



Company driver Mr X became seriously ill in 2003 and was diagnosed with HIV at the workplace clinic. He was referred to the Employee Assistance Programme and placed on antiretroviral (ARV) treatment.

Three months later, he was still too ill to work. The company asked him to provide a doctor's certificate stating whether he was fit to work. He went to a local doctor near his home, who examined him and gave him a certificate stating that he was terminally ill and would not be able to work again. The company told him this meant he would have to apply for disability benefits. He did not want to do this, but he signed the forms after pressure from the Human Resources department. The company then dismissed him for incapacity and he started to receive disability benefits.

Two months later and five months after he started the ARV treatment he recovered completely, and reported back to work. The company told him there was

nothing they could do, as he had already been dismissed. He went to a lawyer, who started CCMA proceedings against the company, but later withdrew the case. The lawyer is now assisting him to sue the doctor.

This story raises some questions which we answer below.

Can an employer dismiss a worker who is HIV positive?

No. An employer cannot dismiss a worker simply because of their HIV status. Dismissal for an arbitrary reason, a reason related to the person and not the workplace is unfair. And dismissal for one of the reasons which the Constitution prohibits as grounds for discrimination would also be unfair. This is set out in section 187(1)(f) of the Labour Relations Act.

Can an employer dismiss a worker who is HIV positive and unable to work?

An employer might be able to dismiss a worker who is HIV

positive if the reason for the dismissal is that living with HIV has caused the worker to be unable to work. This is a dismissal for incapacity, linked to illness, in this case because the worker is living with HIV.

Before dismissing an HIV positive worker who is incapable of working, the employer must assess whether the incapacity is temporary or permanent. Often workers living with HIV can seem too ill to recover and later fully recover after ARV treatment (mostly in two months and usually in two years). Employers needing medical advice should be referred to the SA HIV Clinicians Society or the Medicines Information Centre.

This means that employers should consider extended paid sick leave and periods of unpaid leave to accommodate the worker, as an alternative to dismissal.

In some cases the employer should look at the extent to which the worker is able to work, and think about adapting the work

circumstances or look at suitable alternative work until the worker has recovered and is able to do his/her old job.

Can an employer refuse to employ you because you have HIV?

No. An employer cannot refuse to employ you because you are living with HIV. The Employment Equity Act (EEA) says that no person, including a job applicant, may be unfairly discriminated against on the basis of their HIV status.

The EEA also says it is not unfair discrimination to dismiss a person for HIV if being negative is an “inherent requirement of the job”. In *IMATU v City of Cape Town* (2005) 26 ILJ 1404 (LC) the court said that it was unfair to ban all type 1 diabetics from working as fire fighters. Employers should first investigate the actual state of health of the particular job applicant, based on the most recent scientific and medical evidence.

It is difficult to think of any job where it would be a requirement for the worker to be HIV negative.

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HOW WELL CAN YOU WORK WHEN YOU ARE LIVING WITH HIV?

The World Health Organisation says that there are stages of HIV. HIV is a chronic illness. Once you have it, you have it for life. But if you know your stage, you will be more able to assess what you can do at work and to prevent many illnesses.

Stage 1: You become HIV positive, and some people become really sick for about 4-5 days. But many people have no symptoms, except some flu-like or other minor illnesses. For years after that you might not get any major illnesses.

Stage 2: You are HIV positive and you have minor illnesses like skin problems, flu, and tonsillitis and ear infections. You look and feel healthy, but HIV is very active in your body and you can pass it on through unprotected sex.

Stage 3: You might have lost more than 10% of your body weight. You experience illnesses like diarrhea, a temperature for more than a month, thrush in the mouth and pneumonia or tuberculosis of the lung. These illnesses can be successfully treated with antibiotics.

Stage 4: When you reach this stage, it is called AIDS. You may experience illnesses that only people with weak immune systems can get like more severe diarrhea, weight loss or pneumonia. At this point it is important to talk to your doctor about antiretroviral treatment (ARVs or ART). ARVs fight the HIV directly, and give your immune system a chance to become strong again. They must be taken every day, in a combination of three ARVs, for life.

HIV TRANSMISSION

Most workers know that there are no known cases of a person passing on HIV to other employees through day-to-day contact at work, unless you are having unprotected sex at work. Even for doctors and nurses, there is a very low risk of getting HIV from patients, as only

1 in every 300 needle-stick injuries passes on HIV.

HIV is only passed on by these bodily fluids: blood, semen, vaginal and cervical fluids, and breast milk. HIV is usually transmitted from one person to another when one of these fluids goes into another

person's body.

Food service workers cannot transmit HIV by accidentally dripping blood from a cut into food. HIV is not infectious through coughing (like tuberculosis) or touching (like diarrhea or hepatitis).