
Voluntary testing

for HIV at the workplace



*HIV testing in the workplace has been the subject of much debate and a number of court cases. **Leslie London** argues that an analysis of an earlier case by Bednar and van der Haar, SALB 27(2), fails to grasp the importance of the workplace as a site for bringing considerable HIV prevention benefits to employees and wider society.*

The recent commentary by Bednar and van der Haar (SA Labour Bulletin, April 2003) on HIV testing at the workplace illustrates some of the complexities South Africa faces in trying to address the most explosive HIV epidemic in the world. Their commentary examined an application by a large employer in the fishing industry, supported by the employee's trade union, to conduct

voluntary and anonymous testing for HIV.

The Court found that voluntary counseling and testing (VCT) would not require the Court's permission. Indeed, the Court went further to include compulsory anonymous HIV testing as permitted without Labour Court oversight, providing that no discrimination resulted. Central to the Court's analysis, was the recognition that

voluntary consent removes the testing from the ambit of the Act, and that no public interest is threatened by such a waiver of an individual employee's right to protective oversight by the Labour Court

Bednar and van der Haar disagreed with the Labour Court's ruling, essentially for three reasons:

- They argued that HIV testing required special treatment over and

above other medical tests referred to in the Act. Hence, while it might be acceptable for other medical tests to be conducted on the basis of informed consent, it should not be the same in the case of HIV, because of the stigma and possibilities for discrimination.

- They noted that voluntary consent was extremely difficult in the context of unequal power relations between employers and employees; hence employees agreeing to testing might not be doing it with proper volition.
- Lastly, they argued that anonymous testing might still enable individual workers to be identified and exposed to discrimination. They cited rights in the Constitution to privacy and bodily and psychological integrity as being potentially infringed as a result.

Bednar and van der Haar's analysis fails to grasp the importance of the workplace as a site for bringing considerable HIV prevention benefits to employees and wider society. Voluntary testing for HIV, with counselling, is one of the most important public health strategies available to control the spread of infection, and has been recommended as one of the pillars of HIV control by the World Health Organisation, the South African government and by the SADC Economic and Labour Sector in its Code of Practice.

Constitutional rights to non-discrimination, privacy and bodily and psychological integrity are all compatible with well-structured and jointly-planned HIV prevention programmes. Indeed, such programmes may help to meet employees' other constitutional rights, such as the right of access to health care, and rights to dignity. Far from being tested at the employer's behest, VCT with adequate consent allows employees to access services that realise their own constitutional rights.

It is true the HIV stigma makes it a

different problem to other medical conditions but this does not imply that all HIV VCT programmes should be assumed to be stigmatising until proven otherwise by the Labour Court. Similarly, just because abuses have occurred in the past, we cannot define all testing as lacking adequate consent until proven otherwise by the Labour Court. Placing the onus on the Labour Court to adjudicate the validity of every single workplace HIV prevention programme involving HIV testing is both impractical and unlikely to prevent unscrupulous employers who abuse testing. It is far more likely to obstruct programmes of benefit. It is perhaps only in regard to (mandatory) anonymous testing that oversight by the Labour Court may help to ensure that errors in programme design do not result in overt discrimination.

Numerous other guidelines and laws govern the question of informed consent. Health professionals are subject to ethical guidelines on what constitutes adequate informed consent and the National Health Bill contains provisions that make it a criminal offence to conduct testing or treatment without such informed consent. It is therefore incorrect to assume that vulnerable workers will only have weak retrospective protection from the Employment Equity Act if the Labour Court gives up its oversight of any workplace HIV testing.

The right of workers, indeed, of all South Africans, to be free from discrimination, is the cornerstone of our Constitution. However, Bednar and van der Haar's analysis does not help to advance workers' rights in a meaningful way, since it overemphasises certain rights above others, and fails to consider real benefits to workers. Organised labour should be at the forefront of promoting comprehensive HIV prevention and treatment programmes

which include VCT based on best practice. It is both unfortunate and incorrect to interpret the EEA as an obstacle to this key organisational challenge.

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AIDS Helpline

For basic information, counselling and referral contact the multilingual tollfree AIDS helpline at 0800-0123-22.



The *Labour Bulletin* is interested in employee experiences of HIV/AIDS in the workplace.

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