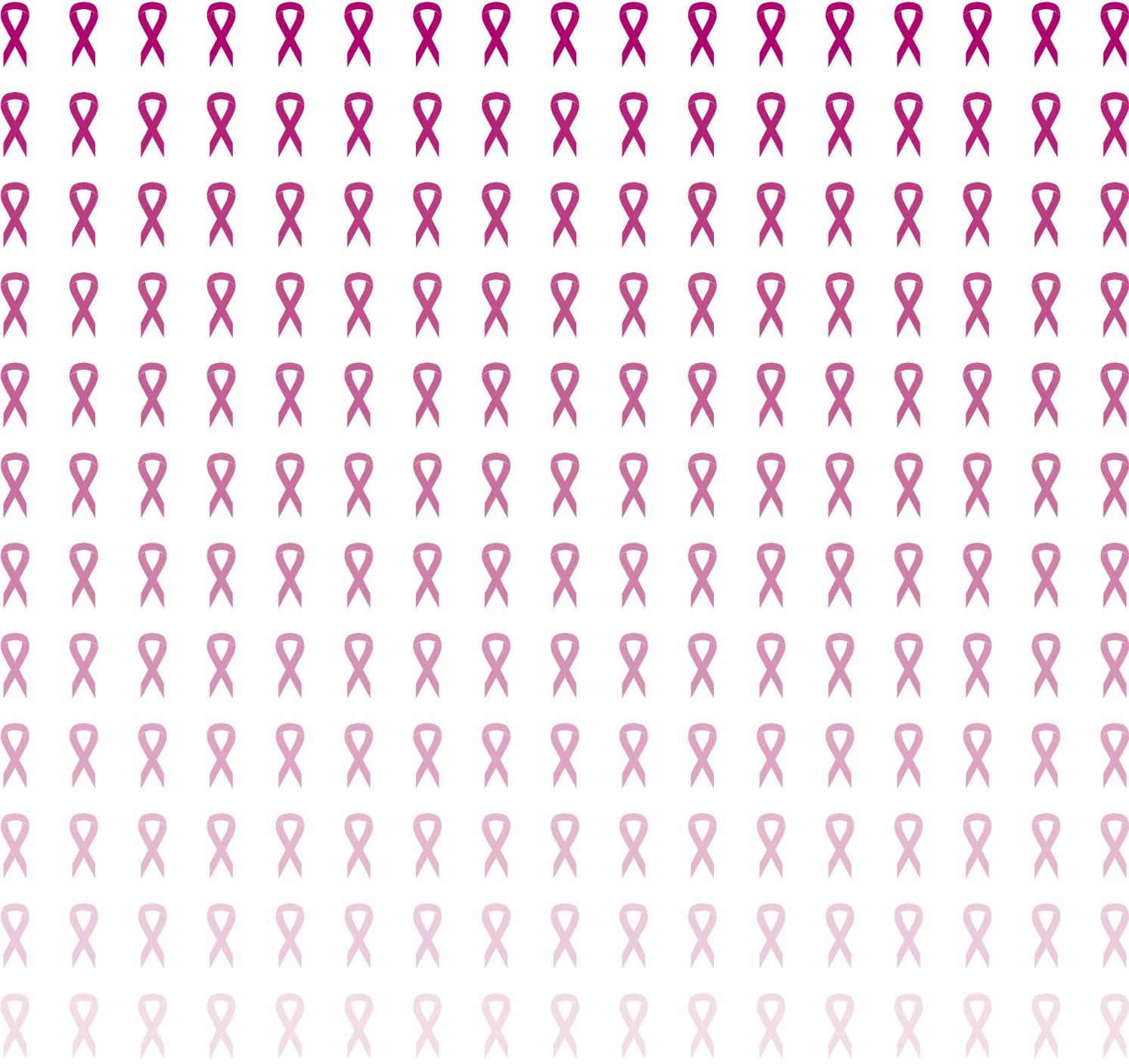


MARIE-CLAUDE CHARTIER

Legal initiatives

to address HIV/AIDS in the world of work



Research
and
policy
analysis

1

Legal initiatives to address HIV/AIDS in the world of work

by Marie-Claude Chartier

The ILO Programme on HIV/AIDS and the World of Work

2005

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The ILO Programme on HIV/AIDS and the World of Work (ILO/AIDS) is initiating the Research and Policy Analysis series to serve the growing need for research information on HIV/AIDS and work, and to disseminate relevant findings by a simple, rapid means.

The HIV/AIDS epidemic is in its third decade, and much research exists on its immediate impact on the health of individuals, diagnostic and therapeutic approaches, and immediate methods of prevention. The broader determinants and consequences of the epidemic on societies and economies make up a relatively newer and less developed science.

Research into and analysis of the impact of HIV/AIDS on the world of work in developing countries help us to understand how HIV/AIDS both results from poverty and causes poverty. Research can help to inform policy and provide tools for decision-making that can bring about change. This contributes to better responses in both poverty eradication and the management of HIV/AIDS in the workplace and the community.

Articles in the series are written by staff of ILO/AIDS or invited specialists and are authored. ILO/AIDS welcomes comments, criticisms and suggestions.

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The *ILO Code of Practice on HIV/AIDS and the world of work* promotes the development of national legislation that will help address the epidemic. It states that in order to eliminate workplace discrimination and ensure workplace prevention and social protection, governments, in consultation with the social partners and experts in the field of HIV/AIDS, should provide the relevant regulatory framework and, where necessary, revise labour laws and other legislation¹. In June 2001, 189 Heads of State adopted the UN Declaration of Commitment on HIV/AIDS and committed themselves to “By 2003, develop a national legal and policy framework that protects in the workplace the rights and dignity of persons living with and affected by HIV/AIDS and those at greater risk of HIV/AIDS, in consultation with representatives of employers and workers, taking into account established international guidelines on HIV/AIDS and the workplace”.

Some countries have already adopted or revised legislation in order specifically to cover HIV/AIDS and employment issues. In other countries, especially those with common law systems, courts have used the provisions dealing with human rights in existing legislation (such as constitutions) to provide protection to persons infected and affected by HIV/AIDS. The ILO can offer support for legislative reform and with the elements that should guide legislators.

The purpose of this document is to present selected case studies showing a variety of legal initiatives that can help fight the HIV epidemic in the world of work. These initiatives include specific HIV laws, labour legislation, anti-discrimination and human rights legislation, disability laws and insurance laws. They also include examples of important case laws that illustrate how court decision makers can apply the law sensitively to protect the rights of persons living with HIV/AIDS in the workplace.

1. ILO support for legislative reform

The ILO has a long tradition of providing assistance in the field of labour law, including laws addressing HIV/AIDS and the workplace. This assistance takes various forms and is always carried out in partnership with other relevant ILO services and, in particular, those operating in different regions worldwide. The assistance takes account of the social, economic and political environment as well as the extent of the HIV epidemic in the country concerned. Upon written request from member States, the International Labour Office (the Office) undertakes a technical analysis of draft labour laws taking account of ILO standards. Account is also taken of overall labour law trends in countries with comparable legal, social and economic backgrounds. The analysis made by the Office takes the form of technical memoranda (reports) that contain proposals on how to regulate certain labour market issues. Where appropriate, the Office also makes proposals for redrafting. Some requests received by the Office concern partial revisions of existing legislation; others may lead to a comprehensive review and overhaul of the labour law system in a given country.

The ILO's commitment to tripartism and social dialogue presupposes that any ILO-guided labour law reform process will seek to heighten the involvement of the social partners throughout the process. In most legal systems, the executive and legislative branches of the member States are ultimately responsible for the elaboration and adoption of legislation. However, in the general domain of social legislation, and more specifically in the area of labour legislation concerning HIV and the workplace, the stakeholders should be involved in the process of labour law making. This involvement is formalized in certain countries; in others it is practiced on an ad hoc basis. The ILO encourages and facilitates the participation of the social partners by advising on how to enhance their involvement in labour law reform and by disseminating examples of good practices from around the world. Finally, the ILO can also play a role once a draft law dealing with HIV/AIDS has been prepared, by convening seminars/workshops to explain the legislation, attending parliamentary sessions when the legislation is being considered and by helping the parties to disseminate information on the rights and obligations spelt out in the new legislation.

2. Legislative elements

In order to prevent the spread of HIV/AIDS, mitigate its impact, provide care and support for workers infected and affected by HIV/AIDS and eliminate the stigma and discrimination in the world of work, legislation should adopt a rights-based approach in accordance with universally recognized human rights instruments² and more specifically the ILO Code of Practice on HIV/AIDS and the world of work. The ILO Code of Practice contains 10 key principles that should guide legislators when elaborating a law to fight HIV/AIDS in the world of work:

- Recognition of HIV/AIDS as a workplace issue
- Non-discrimination based on real or perceived HIV status
- Gender equality
- Healthy work environment
- Social dialogue
- No HIV testing for purposes of exclusion of employment
- Confidentiality of HIV-related data
- Continuation of employment relationship and adaptation of work
- Prevention
- Care and support

In order to be effectively implemented the law must be unambiguous and provide for clear grievance procedures as well as strong yet realistic sanctions. It must also be coherent with the policies and standards adopted at the national and international levels and accompanied by enforcement mechanisms³.

There is no ‘model law’, but the legal framework should reflect the outcome of consultations at national and regional levels with the social partners and other relevant stakeholders, including men and women living with HIV/AIDS. The laws presented in this document have been selected in order to show the regional variations as well as the different types of instruments. Most of them have been adopted very recently so it is not yet possible to evaluate their application in practice.

² Prominent among these instruments adopted by the UN are the International Guidelines on HIV/AIDS and Human Rights, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of all Forms of Discrimination against Women, and the Convention on the Rights of the Child.

³ For further details on the policy and legal issues relating to HIV/AIDS and the world of work see HODGES-AERBERHARD, J. *Policy and Legal Issues relating to HIV/AIDS and the World of Work*, ILO, 1998, Geneva.

3. Specific AIDS laws

Specific HIV/AIDS laws lend themselves to a comprehensive and coordinated approach. They often cover many issues relating to HIV/AIDS: national coordination of the fight against the epidemic; prevention; protection of rights in employment, education, health services and budget appropriation as well as care and support. The fact that most of the provisions covering HIV/AIDS issues are included in the same document can make it easier to understand the protection provided by law. Furthermore, HIV/AIDS laws are often detailed and clearly defined and are, therefore, less open to interpretation by tribunals.

3.1 Mozambique, Act No. 5 of February 2002

This law is interesting because its objective is specifically to address issues relating to HIV/AIDS and the world of work. The law applies to all workers and job applicants in the public and private sectors, including domestic workers who are often excluded from labour regulations. It focuses on the prohibition of discrimination in employment rights, training, promotion, and career opportunities. It also prohibits employers from requiring workers or job applicants to take an HIV test without their consent. It should be noted that the law does not provide sanctions for every obligation it sets out (e.g. obligation to provide reasonable accommodation to workers to help them remain in work or the development of HIV information services). Moreover, the law does not specify who is responsible for its application. The draft Act was discussed with the social partners and other stakeholders during a national seminar on the Prevention and Fight against HIV/AIDS in the Labour Sector in December 2001. The participants concluded that regulations to implement the law were necessary. Finally, it is worth mentioning that in its 2003 report on the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the ILO's Committee of Experts in charge of monitoring the application of ILO Conventions and Recommendations noted with interest the enactment of the Act and asked the Government to supply information in future reports on the application and enforcement of this law and practice.

3.2 Costa Rica, General Act on HIV/AIDS No. 7771, 1998 and its Regulations, No. 27894-S, 1999

This Act is a very comprehensive instrument covering many issues such as HIV prevention, care and support, epidemiological surveillance, blood safety and protection of rights. Questions relating to the world of work are also well covered by the law and its regulations. It is worth mentioning that, in its 1999 report concerning Convention No. 111, the Committee of Experts on the Application of ILO Conventions and Recommendations noted with interest the enactment of the Act.

Under the Act, all carriers of HIV, their relatives and persons closely related to them are entitled to protection against discrimination in their occupational and educational activities. The Act also outlaws discrimination based on many other grounds such as race, nationality, gender, sexual orientation, and age. The prohibition of multiple grounds of discrimination is a key element in the fight against the epidemic. As stated in the International Guidelines on HIV/AIDS and Human Rights⁴:

“Discrimination on any of these grounds (race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status) is not only wrong in itself but also creates and sustains conditions leading to societal vulnerability to infection by HIV, including lack of access to an enabling environment that will promote behavioural change and enable people to cope with HIV/AIDS. Groups suffering from discrimination, which also disables them in the context of HIV/AIDS are, women, children, those living in poverty, minorities, indigenous people, migrants, refugees and internally displaced persons, people with disabilities, prisoners, sex workers, men having sex with men, and injecting drug users. Responses by States to the epidemic should include the implementation of laws and policies to eliminate systemic discrimination where it occurs against these groups.”

⁴ Office of the High Commissioner for Human Rights (OHCHR)/UNAIDS: HIV/AIDS and Human Rights International Guidelines (New York and Geneva, 1998), Para. 85.

The Regulations provide for quick, administrative grievance procedures. When complaints concerning HIV discrimination or screening are lodged, the Minister of Labour and Social Security has 15 days to undertake an inquiry. If a violation is found to have occurred, employers are liable to an administrative and disciplinary fine. In addition, when discrimination occurs between colleagues, those responsible for the workplace have to implement urgent measures to encourage mutual respect and non-discrimination. One important feature of the General Act is that it specifically mentions the right to have access to antiretroviral treatment. This is interesting because, while access to treatment is often mentioned in the law and policies of other Latin American countries, the definition of treatment is frequently vague⁵. Finally, it is noteworthy that the Ombudsman's office has resolved complaints of discrimination under the General Act on HIV/AIDS and its role has been decisive in the improvement of respect for the fundamental rights of people with HIV/AIDS in the country⁶.

Programme and ensure the timely disbursement of the annual budget.

The law imposes extremely heavy penalties including fines and imprisonment for any violations. Although dissuasive sanctions are important in implementing the law, the internationally accepted principle of proportionality between the offence and the penalty needs to be taken into consideration, e.g. penal sanctions such as imprisonment might be excessive. Judges may hesitate to impose a heavy penalty, especially for a first offence. Furthermore, in some jurisdictions there is a higher burden of proof on the victim if a penal sanction is imposed. Ideally, the law should give the judge some discretion to decide on the basis of individual cases which sanction is more appropriate.

3.3 Cambodia, Law on the prevention and control of HIV/AIDS, 2002

The Cambodian Law constitutes a very comprehensive document that covers: education and information dissemination, safe practices and procedures against HIV occupational transmission; testing and counselling; health and support services, non-discrimination and confidentiality issues as well as budget appropriation. It should be highlighted that consultations on the draft law were held with different stakeholders including relevant international and local NGOs, ministries, civil society, people living with HIV/AIDS and the private sector. Although the Khmer version of the law has already been disseminated and NGOs have started advocacy based on the law, a Legal and Policy Working Group is still developing guidelines for its implementation.

The law bans HIV testing of workers and job applicants, and prohibits discrimination in employment based on the actual, perceived or suspected HIV status of a person or his/her family members. Of great interest is the obligation for all institutions and enterprises to collaborate with the National AIDS Authority to develop HIV/AIDS workplace education programmes and prevention plans. Health care services are free of charge for all persons with HIV/AIDS and special attention is paid to gender issues⁷. Furthermore, the law specifies that the State should include HIV/AIDS as a priority in the National Development Plan

5 VARAS-DIAZ, Nelson: *Juggling individual and collective concerns with respect to HIV/AIDS policies*, *Canadian HIV/AIDS Policy and Law Review*, Vol. 7, No. 2/3, Dec. 2002.

6 VALERIO, Carlos: *Costa Rican ombudsman tackles HIV/AIDS*, *Canadian HIV/AIDS Policy and Law Review*, Vol. 8, No. 1, Apr. 2003.

7 *The law stipulates that education programmes focusing on adolescent girls and female-headed households must be elaborated by the State.*

4. Labour legislation

Labour legislation is widely used both to regulate the employer-employee relationship and to establish the framework in which workers and employers interact with each other, such as in collective bargaining. In an environment where much discrimination occurs, it also represents a clear reminder and guarantee of the fundamental principles and rights at work. Therefore, the integration of provisions prohibiting HIV discrimination and screening into labour legislation can help protect the rights of HIV-positive workers and job applicants.

4.1 Bahamas, Employment Act No. 27, 2001⁸

The Bahamas Employment Act was developed in full consultation with the tripartite partners who met during the formulation of the Act and again before it was presented to Parliament for approval. The Act applies to all women and men workers and employers in the private and public sectors, excluding the armed forces. It contains a very comprehensive provision prohibiting discrimination against an employee or job applicant on the basis of their HIV/AIDS status. The Act also bans HIV screening. In recognition of the progressive nature of the illness, it also includes procedures to ensure that an individual who is sick with AIDS and can no longer continue working is given the same benefits as someone who retires early. They are therefore entitled to all the monies that have accumulated in their pension/providence funds up to that time, as well as any other company benefits due to them. Any person who violates these provisions is guilty of an offence and is liable to a fine⁹. The convicting court may also order an employer to pay the employee wages to which she or he is entitled¹⁰. In case of unfair dismissal, the complainant can be reinstated or obtain a compensation award.

4.2 Zimbabwe, Labour Relations Act [Chapter 28:01], as amended by the Labour Relations Amendment Act, 2002 and the Labour Relations (HIV/AIDS) Regulations, 1998

In 1998, the National Tripartite Committee adopted the Labour Relations (HIV/AIDS) Regulations, which were introduced under the Labour Relations Act [Chapter 28:01].

The drafting of the Regulations involved three years of consultation and review of draft provisions by various national organizations. The Regulations provide for HIV/AIDS education and information during normal working hours; ban mandatory HIV testing; prohibit discrimination in all aspects of employment; protect the confidentiality of HIV-related data; and provide for safe practices against occupational transmission of HIV. While providing a comprehensive workplace approach, the Regulations provide for a judge's discretion in imposing a range of harsh penalties, e.g. imprisonment for violating any provision.

In 2002, the Labour Relations Act was amended. It now explicitly prohibits an employer from discriminating against any employee or prospective employee on the grounds of HIV status¹¹. Any person who violates this provision is guilty of an offence and is liable to a fine and/or to imprisonment for a period not exceeding one year. Victims can claim damages from their employers and job reinstatement¹².

4.3 Namibia, National Code on HIV/AIDS in Employment, 1998, adopted in terms of section 112 of the Labour Act, 1992 (Act No. 6 of 1992).

In response to the AIDS pandemic, the Minister of Labour, in conjunction with the Ministry of Health and Social Services and with wide tripartite consultation through the Labour Advisory Council, formulated the National Code on HIV/AIDS and Employment. The Code, which was adopted under the Labour Act, 1992, provides guidelines and instructions to be followed by all employers and employees in applying the relevant provisions of the Labour Act in respect of HIV/AIDS in employment. It outlaws discrimination in employment on the basis of HIV/AIDS; prohibits direct or indirect HIV testing of workers or job applicants; guarantees confidentiality regarding HIV/AIDS and the workplace; and encourages the implementation of workplace HIV prevention and education programmes. Its approach to enforcement is worth mentioning insofar as the tripartite Labour Advisory Council and the Ministry of Labour are entrusted with the implementation, monitoring and review of the Code.

⁸ Official Gazette, 2001-12-31, No. 27, pp. 1-45.

⁹ Section 75, Bahamas dollars 5,000 (US dollars 5,000).

¹⁰ Section 76.

¹¹ The definition of "HIV status". In relation to any individual means the presence or otherwise in that individual of the human immuno-deficiency virus - begs the question of testing for an individual who wishes to avail him/herself of the ban.

¹² For more details on heavy penalties, see the section on the Cambodian law, p. 8.

5. Anti-discrimination and human rights legislation

Anti-discrimination and human rights legislation has the specific objective of ensuring the protection of fundamental rights and freedoms. Complaints under these laws are often filed before specialized tribunals that have the advantage of being bodies well-versed in discrimination and rights-based issues. Anti-discrimination and human rights legislation does not aim primarily to punish the author of a prohibited act but rather to educate and provide remedies which fully repair the prejudices caused by the violations of a right. In addition to compensation and reinstatement in employment, innovative remedies such as workplace education on non-discrimination can be obtained.

5.1 Romania, Emergency Ordinance No. 137/2000 on Preventing and Punishing all Forms of Discrimination

In January 2002, the Romanian Government adopted an Emergency Ordinance No. 137/2000 on preventing and punishing all forms of discrimination. The Ordinance prohibits discrimination based on several grounds including belonging to a disfavoured category. The term “disfavoured category” includes persons living with HIV/AIDS. As far as equality in employment and occupation are concerned, the Ordinance prohibits discrimination with respect to the conclusion, suspension or modification of employment contracts, remuneration and benefits, training and promotion. It provides for the adoption of affirmative action measures and sanctions to ensure the elimination of discrimination and the fielding of complaints to the National Council for the Prevention of Discrimination. Not only do the individual victims of discrimination have recourse to the courts but non-governmental human rights organizations also have the right to be represented. The ILO’s Committee of Experts on the Application of Conventions and Recommendations, in its 2003 report on Convention No. 111, noted with interest the adoption of this Ordinance and requested the Government to provide information on its application and enforcement, and on any measures taken to bring it to the attention of workers and employers.

¹³ Employment covers hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, lay-off, suspension, dismissal and individual conditions of employment.

¹⁴ Quebec (*Commission des droits de la personne et des droits de la jeunesse*) v Montreal (City), Quebec (*Commission des droits de la personne et des droits de la jeunesse*) v Boisbriand (City), 2000 SCC 27 [2000] SCJ No 24 (QL)

5.2 Canada, Quebec Charter of Human Rights and Freedom, 1975

The Quebec Charter of Human Rights and Freedoms prohibits discrimination in employment¹³ on the basis of several grounds, including a handicap. HIV infection is considered a handicap under the Charter. On May 2000, the Supreme Court of Canada released a unanimous decision¹⁴ involving the interpretation of the term “handicap” in the Quebec Charter of Rights and Freedom. The decision recognizes that people are protected against discrimination based on disability even if their condition does not give rise to any functional limitation and the discrimination is based on the perception that they are disabled. This decision is beneficial in protecting and promoting the rights of people living with HIV/AIDS, including asymptomatic HIV-positive persons. The Charter also provides for the right to non-disclosure of confidential information and the right to work in fair and reasonable conditions of employment which have proper regard for health, safety and physical well-being. Complaints must be filed to the provincial Commission of Human Rights, a body specialized in human rights issues. The complainant can obtain the cessation of interference with a right, compensation for moral or material prejudice or any other measure of redress that the Commission considers appropriate. These measures can consist of compulsory education on specific human rights in the workplace.

6. Disability laws

Many disability laws aim to protect people with disability against discrimination and integrate them as fully as possible into society. In order to ensure equal treatment, these laws often contain detailed provisions on the obligation of employers to make reasonable accommodation to help disabled persons remain in work as long as possible. Therefore these laws can be very useful in providing protection for persons who have started to develop HIV-related symptoms but are still fit for work. However, the protection of asymptomatic HIV-positive persons is uncertain. It depends on the definition of disability given in the laws and its interpretation by the tribunals. For example, while most US courts have accepted that HIV is a disability per se, some courts have required proof that HIV limits a major life activity prior to accepting that HIV is a disability¹⁵. This has affected the realm of protection under the American with Disability Act, 1990, for people with asymptomatic HIV.

6.1 China, Hong Kong Special Administrative Region, Disability Discrimination Ordinance, 1995

The Disability Discrimination Ordinance (DDO) prohibits discrimination, harassment or vilification based on disability in several areas, including employment and education. The definition of disability includes the presence of organisms in the body that cause or are capable of causing disease or illness. This definition includes HIV/AIDS even when asymptomatic. The DDO's protection against discrimination extends to associates of an infected individual, for example a spouse or a person who is living with the individual in a genuine domestic situation, as well as relatives, care givers and those in business, sporting or recreational relationships with the infected individual. Under the Ordinance, it is unlawful for an employer to dismiss an employee on the sole basis of his or her HIV status. The employer has first to determine whether the employee can fulfill the tasks required of the job and has a duty to provide any special services or facilities to help him or her carry them out when such tasks do not impose unjustifiable hardship. It is also interesting to note that the employer may be held responsible for behaviour among colleagues and for providing a workplace that is free from harassment and vilification. A Code of Practice on Employment has been issued under

the DDO to assist employers and employees to understand their responsibilities and to provide practical guidelines to management on procedures and practices that can help prevent discrimination and other unlawful acts in the workplace. Complaints can be lodged with the Equal Opportunities Commission (EOC) which will investigate with the aim of resolving them through conciliation. When complaints cannot be resolved they can be taken to a tribunal. Furthermore, assistance can be obtained from the EOC, including legal assistance.

6.2 United Kingdom, Disability Discrimination Act 1995

The Disability Discrimination Act (DDA) prohibits discrimination against a worker or job applicant with disability in all aspects of employment. This provision applies only when there are 15 or more employees in the workplace. The definition of disability includes HIV/AIDS, however it only covers HIV at the symptomatic stage of the disease. A Bill amending the DDA to cover HIV from the moment of diagnosis is currently before Parliament. Under the DDA, it is illegal to dismiss a person simply because she or he has HIV. Employers are also required to make reasonable adjustments to help people with HIV and other disabilities to remain at work. These adjustments may include: making changes to the premises; altering an employee's working hours; allowing an employee to be absent during working hours for treatment or rehabilitation; allocating some of an employee's duties to another colleague or transferring him or her to an existing vacancy. Employers are liable for the discriminatory acts of their employees or agents, even if the discrimination occurs without their knowledge or approval, unless they can provide sufficient evidence that they took "reasonable steps" to prevent such discrimination from occurring (such as having policies and training on non-discrimination at the workplace). Complaints may be presented to an Employment Tribunal that can award compensation for moral injuries, loss of earnings and other expenses. It can also order any reasonable action to prevent or reduce the adverse effects on the complainant. Notwithstanding the possible problems arising from the definition of disability, people with HIV/AIDS have used the Act successfully against their employers¹⁶.

¹⁵ See for examples: *Bragdon v Abbott* 118 S Ct 2196 (US 1998); *Runnebaum v Nationsbank of Maryland* 1997 WL 465301. JURGENS, R.: *Important legal Victories for People with HIV/AIDS in the US, Canadian HIV/AIDS Policy and Law Review*, Vol. 4, No. 2/3, Spring 1999. JURGENS, R.: *Your Health is Back. Now you May Lose Your Protection against Discrimination, Canadian HIV/AIDS Policy and Law Review*, Vol. 3, No. 4, Winter 1997/1998.

¹⁶ DEUTZ, S., PITT, S., JOSEET, L.: *Canadian HIV/AIDS Policy and Law Review*, Vol. 5, No. 2/3, Spring/Summer 2000.

7. Insurance laws

The exclusion of HIV-positive people from life and health insurance, either by preventing them from taking up policies or by excluding them from any benefits, is a common practice all over the world. High insurance premiums also lead to the indirect exclusion of people who are unable to afford them. Many HIV-positive people and their households have found themselves without cover when they needed it the most. Numerous governments are struggling to develop policies that on the one hand reduce exclusion and on the other ensure a viable and stable insurance industry.

7.1 South Africa, Medical Schemes Act 131 of 1998¹⁷

This Act is interesting because it provides that a registered medical aid scheme may not unfairly discriminate directly against its members on the basis of their HIV status. It states that no medical scheme shall be registered under this Act unless the Council is satisfied that it does not or will not unfairly discriminate directly or indirectly against any person on one or more arbitrary grounds including the state of health. The Act also makes provision for regulations stipulating a basket of minimum level of benefits that all schemes must offer to their members.

¹⁷ GG 20556, 20 Oct. 1999.

8. Court cases

Numerous court cases have arisen involving HIV/AIDS issues. The following examples of good practices in case law illustrate the sensitive way the judiciary can apply the law in order to protect the rights of men and women infected and affected by HIV/AIDS in the world of work.

8.1 El Salvador

In November 2001, Salvadorian HIV activists initiated a proceeding before the Supreme Court of Justice (Constitutional Chamber) challenging section 16(d) of the Law on the Prevention and Control of HIV/AIDS, No 588, 2001. This provision contained a general prohibition on compulsory testing, but allowed employers or administrative authorities to impose testing on workers, whenever required, in order to verify their health status. The judgment was still pending before the tribunal when, on 11 October 2002, the Legislative Assembly of El Salvador repealed section 16(d)¹⁸ following a year of criticism against the law.

8.2 Venezuela

A professional football player was fired because he tested HIV-positive. His employer carried out the test without his consent and the positive results were communicated to fellow players and others involved in the sport. On 6 February 2003, the tribunal ordered his reinstatement with full employment entitlements and benefits. The tribunal established an important precedent when it ruled that the agreement that he had signed under pressure from his employer waiving his rights was void¹⁹.

8.3 Namibia, N. v Minister of Defence²⁰

In this case, the Minister of Defence was sued by a potential recruit whose application to join the Namibian Defence Force (NDF) was refused on the sole basis of his HIV-positive status. The Court ruled that the NDF may not exclude any person from joining the Namibian military only because the person, who was otherwise fit and healthy, had tested HIV-positive. The Court found that the NDF had to determine to what extent a potential

recruit's HIV-positive immune system had been damaged and how far the HIV infection had developed. It found that an HIV test alone would not achieve the purpose of assessing fitness for employment and could thus only be undertaken as part of a broader assessment of physical fitness. This judgment represented a step forward in the fight against discrimination but, unfortunately, the National Assembly subsequently approved a Defence Amendment Act, 2002, that appears to require the Namibian Defence Force to exclude people solely on the basis of their HIV status.

8.4 South Africa, Hoffmann v South African Airways²¹

Mr. Hoffmann was refused a job as a cabin attendant at South African Airways (SAA) because he was HIV-positive. SAA argued that its decision was based on considerations of medical, safety and operational grounds. It stated that harm would be done to its commercial interests if it were known that HIV-positive people were in its employ. In this case, the Constitutional Court was asked to rule on the exclusion of a job applicant on the sole basis of his HIV status. The Court found that:

An asymptomatic HIV positive person can perform the work of a cabin attendant competently. Any hazards to which an immunocompetent cabin attendant may be exposed can be managed by counselling, monitoring, vaccination and the administration of the appropriate antibiotic prophylaxis if necessary. Similarly, the risks to passengers and other third parties arising from an asymptomatic HIV positive cabin crew member are therefore inconsequential and, if necessary, well-established universal precautions can be utilised....

Concerning SAA allegations that hiring HIV-positive persons would harm its public image and favour its competitors, the Court added:

Legitimate commercial requirements are, of course, an important consideration in determining whether to employ an individual. However, we must guard against allowing stereotyping and prejudice to creep in under

18 The revised text of the law is available on the Government's website at www.asamblea.gob.sv.

19 CARRASCO, E.: *Canadian HIV/AIDS Policy and Law Review*, Vol. 8, No. 1, Apr. 2003.

20 Haindongo Nghidipohamba Nanditume v. Minister of Defence, Labour Court of Namibia, delivered 10 May 2000, Case No. LC 24/98.

21 CCT 17/00, Constitutional Court of South Africa (28 Sep. 2000).

the guise of commercial interests. The greater interests of society require the recognition of the inherent dignity of every human being, and the elimination of all forms of discrimination. Our Constitution protects the weak, the marginalised, the socially outcast, and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secure that our own rights are protected....

The Constitution of South Africa, which prohibits unfair discrimination, does not expressly mention HIV status. Nevertheless, the Court held that unfairly discriminating against an employee on the basis of his or her HIV status amounts to a violation of their right to dignity. The Court ruled in favour of the applicant and ordered SAA to employ him.

This case was significant because it was the first Constitutional Court case heard in South Africa, a country with infection levels of over 20%, on the issue of HIV/AIDS discrimination in the workplace.

8.5 Canada, Thwaites v Canada (Canadian Armed Forces²²)

Mr. Thwaites, a master seaman of the Canadian Armed Forces (CAF), filed a complaint against the CAF alleging that it discriminated against him by terminating his employment and restricting his duties and opportunities because of his disabilities, i.e. because he was HIV-positive. The Canadian Human Rights Commission found that Mr. Thwaites had been discriminated against because of his disability. It found that the military failed in its legal duty to accommodate him and to individually assess his capabilities in the context of the potential risk he posed to himself and others. It also held that the increased risk posed by retaining a disabled person in the Forces had to be more than minimal risk before the Forces could justify outright dismissal. It is worth citing the Commission's strong statement concerning these last points:

The importance of searching for reasonable alternatives or accommodating the individual to permit him or her to do the job or to lessen any risk (if risk is a factor) is now the bedrock of human rights law in this country. Indeed without reasonable accommodation, the protection given by the Canadian Human Rights Act (CHRA) to certain groups, the disabled in particular, would be quite illusory... It is of critical importance that the accommodation of

22 [1993] CHR D No. 9 (7 June 1993); affirmed Canada (Attorney General) v Thwaites, [1994] 3 FC 38 (TD).

23 Robinson v CAF. The Supreme Court of Canada refused an application of leave to appeal the two cases.

24 Labour Court (J90/03), (2003) 24 ILJ 974 (LC).

persons with disabilities be approached on an individual basis. Disabilities differ dramatically, one from another. There are also great individual variations within the same disability group.... It should be acknowledged that this may add some risks and make matters somewhat more burdensome for employers but this is a small price to pay for the higher value that society places on equal opportunity. (In a different context see Huck v. Canadian Odeon Theaters (1985) 3 WWR 717 at 744 (Sask. C.A.), leave to appeal to S.C.C. refused). An employer cannot rely on undue hardship unless it would be forced to take action requiring significant difficulty or expense which would clearly place upon the business enterprise an undue economic or administrative burden."

This decision was upheld on review by the Federal Court. However, shortly after the Thwaites decision, the Federal Court of Appeal took a step backward when deciding in two cases²³ that the military could release or refuse to hire a person if retaining that person posed any greater risk than retaining an able-bodied member, regardless of how small that increase in risk might be.

8.6 South Africa, PFG Building Glass (PTY.) LTD. v Chemical Engineering Pulp Paper Wood & Allied Workers' Union & Others²⁴

PFG Building Glass, with the informed consent of its employees, wished to perform an anonymous HIV test on them to determine the incidence of the virus amongst its staff. It applied to the Court to carry out this exercise because section 7(2) of the Employment Equity Act (EEA) of South Africa prohibits the HIV testing of an employee unless the Labour Court determines it justifiable. The Court ruled that, since the employees had voluntarily given their informed consent to being tested for HIV, there was no need for an application to the Labour Court to determine the justifiability of the test. However, the Court stressed that, if employees refuse to consent to HIV testing or consented without being fully informed, an application to the Labour Court to determine the justifiability of the test would be necessary.

This judgment is interesting because it places the evaluation of the justifiability of a HIV test in a constitutional setting. The Court

found that an HIV test, since it affects the fundamental rights to people's physical and psychological integrity, must meet the requirement of the Constitution. It must be balanced against the right to integrity and all other rights in order to give effect to the values of an open and democratic society based on human dignity, equality and freedom²⁵. The Court stressed that the testing may not in any way be discriminatory:

The first constitutional rights and value against which the application for testing must be assessed is whether it is unfairly discriminatory on any grounds and specifically in relation to any aspect of employment ... (If it is found) to be discriminatory, then it will be automatically unjustifiable. That is the end of the enquiry. The prohibition against testing that is unfairly discriminatory is absolute in terms of the EAA and the Constitution... If the testing is not unfairly discriminatory, only then may the Labour Court continue to balance other rights and values against the limitation.

The Court also spelt out a range of criteria that can be taken into consideration when the constitutionality of testing must be assessed such as the employment conditions, the social policy, the fair distribution of employee benefits, the inherent requirement of the job, the quality and content of the test and whether the method of testing is capable of achieving the objectives with minimum encroachment on fundamental rights.

²⁵ Relevant factors should be taken into account: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

The good practices listed in this document show that different regulatory frameworks can be used to eliminate workplace discrimination based on HIV/AIDS and ensure workplace prevention as well as social protection. It has to be stressed that the use of one type of instrument does not preclude the use of other instruments, but rather the opposite is often true. For instance, different provisions covering HIV/AIDS issues can be incorporated into the labour code, anti-discrimination legislation, and disability act of the same country. This multifaceted approach ensures that every issue is covered under a relevant instrument. Each state has to choose the proper regulatory framework which reflects considerations agreed at the national or regional level after consultation with the social partners and other relevant stakeholders.

Annex

Legislative texts and soft law instruments dealing with HIV/AIDS and the world of work

To access the full text of some of these instruments, see ILO/AIDS website: www.ilo.org/aids and click on **Laws and policies**.

This list contains legislative texts (hard law) and soft law instruments (codes of practice, guidelines, policies) dealing, entirely or in part, with HIV/AIDS and the world of work. These texts are not presented as models or even examples of good practices. Nor are they exhaustive. Rather, they seek to provide a variety of States' different approaches to HIV/AIDS in the world of work. Moreover, it is important to emphasize that inclusion of a text in this collection does not guarantee that the text

is in conformity with the ILO Code of Practice on HIV/AIDS and the world of work and other ILO instruments and standards.

Bahamas

Employment Act No. 27 of 2001, Official Gazette. 2001-12-31. No. 27, pp.1-45.

Brazil

Portaria interministerial No. 3 195, de 10 Agosto de 1988 (Pub.D.O.U. de 11/08/88).

Cambodia

Law on the Prevention and Control of HIV/AIDS, 2002.

Canada

Quebec Charter of Human Rights and Freedom, 1975 (R.S.Q.C-12).

Chile

Ley No. 19.779, de 4 diciembre de 2001, que establece normas relativas al VIH y cree bonificación fiscal para enfermedades catastróficas.

China, Hong Kong Special Administrative Region

Disability Discrimination Ordinance No. 86 of 1995.

Costa Rica

Ley general sobre el VIH/SIDA, No. 7771 de 29 abril de 1998.

El Salvador

Ley de prevención y control de la infección provocada por el VIH de 24 Octubre de 2001.

Guatemala

Decreto Numero 27-2000-06-26, de 3 Mayo de 2000.

Honduras

Decreto No. 147-99 de 9 septiembre de 1999.

Malaysia

Code of Practice on Prevention and Management of HIV/AIDS at the Workplace.

Mexico

Norma Oficial Mexicana Nom-010-SSA2-1993, para la prevención y control de la infección por VIH, incluyendo las enmiendas hasta el 16 marzo de 2000.

Mozambique

Lei No. 5/2002 de 5 fevereiro de 2002 (Boletim da República, quarta-feira, 13 fevereiro de 2002, 1 Serie No. 7).

Namibia

Namibian HIV/AIDS Charter of Rights.

National Code on HIV/AIDS in employment, No. 78, 1998 (Government Gazette 3 April 1998, No. 1835).

Nicaragua

Ley de promoción, protección y defensa de los derechos humanos ante el SIDA, No. 238 de 14 de octubre de 1996.
Reglamento de la Ley No. 238.

Panama

Ley general sobre las infecciones de transmisión sexual, el VIH y el sida, No. 3 de enero de 2000.

Peru

Ley No. 26626, de 15 junio de 1996, que encarga al ministerio de salud la elaboración del plan nacional de lucha contra el virus de inmunodeficiencia humana, el SIDA y las enfermedades de transmisión sexual.

Philippines

Philippines AIDS Prevention and Control Act, No. 8504, 13 Feb. 1998, (Philippines Official Gazette, June 29 1998, Vol. 94, No. 26).

Romania

Law No. 584/2002 on Prevention Measures to combat AIDS and protection of Persons affected by HIV or sick with AIDS, Monitorul Oficial, 2002-11-8, No. 814, pp. 2-4.

Emergency Ordinance No.137/2000 on Preventing and Punishing all Forms of Discrimination, Monitorul Oficial, 2002-01-31, No. 69, pp. 2-4.

Russian Federation

Federal Law on the Prevention of the Spread in the Russian Federation of Diseases Caused by the Human Immunodeficiency Virus (HIV-Infection), 1 Aug. 1995.

South Africa

Code of Practice on Key Aspects of HIV/AIDS and Employment, Government Gazette, 1 Dec. 2000, Vol. 426, No. 21815.

Employment Equity Act No. 55 of 1998, Government Gazette, 1998-10-19, Vol. 400, No. 19370, 55 p. Promotion of Equality and Prevention of Unfair Discrimination Act, No.4 of 2000, Government Gazette, 2000-02-09, Vol. 416, No. 20876, pp.1-9.

Medical Schemes Act 131 of 1998 and Regulations, Government Gazette, 20556, 20 Oct. 1999.

United Kingdom

Disability Discrimination Ordinance, 1995.

Vietnam

Ordinance on the Prevention and Fight Against HIV-AIDS Infection, 31 May 1995.

Governmental Decision No. 34/CP on Guidance to Execute Laws on HIV/AIDS Prevention and Protection, 1 Jun. 1996.

Zimbabwe

Labour Relations Act [Chapter 28:01], as amended by the Labour relations Amendment Act, 2002.

Labour Relations (HIV AND AIDS) Regulations, 1998 (Supplement to the Zimbabwean Government Gazette, 14 Aug. 1998).

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