

# HIV and the Law Certificate Course

## Employment Law

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# The Constitution

- + **S 9** Non-discrimination
- + **S 10** Dignity
- + **S 14** Privacy
- + **S23** Fair labour practices

# Labour Relations Act

- + **S185** an employee may not be unfairly dismissed or subjected to unfair labour practices
- + **S187(1)(f)** dismissal on the basis of HIV status may be automatically unfair
  - + *Bootes v Eagle Ink Systems KZN*

# Employment Equity Act

- + The purpose of EEA –
- + promoting equal opportunity and fair treatment in employment through the elimination of **unfair discrimination**; and
- + implementing **affirmative action** measures to redress the disadvantages in employment experienced by designated groups

# EEA

- + **S 6(1)** prohibits unfair discrimination: grounds including race, gender, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, **HIV status**, conscience, belief, political opinion, culture, language, and birth.
- + **S 6(2)(b)** not discriminatory to distinguish, exclude or prefer on the basis of an **inherent requirement of a job**

# Inherent job requirements

- + Not defined by EEA but interpreted in technical guidelines, 'essential characteristic, quality or capacity required to fulfil duties of job'
- + ILO: strict interpretation is appropriate
- + *Hoffman v SAA* - HIV negative status not an inherent requirement

## ...inherent job requirements

- + **ILO**: discriminatory job requirements:
  - + Evaluation of individual competence based on stereotypes
  - + Preferences of employees and clients
  - + Perform task particular way when other reasonable ways of doing so
  - + Qualifications based on 'light' or heavy' work which effectively discriminate against women

**Other examples?**

# EEA

- + **S 7(2) medical testing** for HIV status prohibited unless found justifiable by Labour Court
- + **S 10 an unfair discrimination dispute** may be referred to CCMA in 6 months, if unresolved refer to Labour Court for adjudication
- + ***IMATU v City of Cape Town***

# Basic Conditions of Employment Act

- + Minimum working standards – leave, work hours, etc
- + **S22 BCEA** 6 weeks paid sick leave over 3 year cycle
- + Employees can negotiate more sick leave

# Occupational Health and Safety Act

+ **S 8(1)** an employer is obliged to provide, as far as is reasonably practicable, a safe workplace. This may include ensuring that the risk of occupational exposure to HIV is minimised.

# Code of Good Practice on Key Aspects of HIV/AIDS & Employment

- + Draws on all major labour legislation
  - + LRA; EEA; OHSA; COIDA; BCEA; MSA
  - + Gives content to protections enjoyed by employees flowing from legislation
  - + Employee benefits; dismissal; safety; confidentiality; testing; disclosure; non-discrimination
  
- + Promotes workplace HIV/AIDS policies and programmes – content?

# Disclosure of HIV status

- + An employer may not disclose the HIV status of an employee
- + Where an employee chooses to voluntarily disclose his or her HIV status to the employer or to other employees, this information may not be disclosed to others without the employee's express written consent (**Code**)

# Unfair Labour Practice

- + S186(2) LRA – any unfair act or omission that arises between employer and employee
- + Dispute must be referred to bargaining council or CCMA within 90 days

# Dismissals

- + Substantive and procedural fairness
- + **S187(1)(f)** automatically unfair dismissal – arbitrary grounds
- + Employee must establish dismissal; employer must establish fairness
- + Employer must make reasonable accommodation for affected employee (**Bootes**)

# Remedies

- + **S 50 EEA** Labour Court has the powers to make any appropriate orders, award compensation, or impose fines.
- + **S193 LRA** remedies for dismissal & unfair labour practice: reinstatement; re-employment; compensation 12-24 months

Thanks