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Privacy, Surveillance and HIV/AIDS in the Workplace. A South African Case Study“
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Interview with Ms. Dan PRETORIUS, Attorney, AIDS Law Project 04.12.07

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In assessing the corporate response to confidentiality of HIV/AIDS epidemic it is important to make distinction between big, medium and small employers. Each of these categories has different approach. It is true that big employers have finally decided to rather provide treatment than dismissing people on grounds of their HIV status. But even big employers (e.g. Eskom) are still in the position that local managers do not properly understand what confidentiality means. For example, ALP dealt with the **case** where a woman who was a submanager in one of the Eskom sites has been asked by her supervisor to make the list of all the employees who have tested for HIV. Since this is information that might serve as basis for making assumptions who is positive and who is not, it is not legitimate to make such a list in the workplace. It is crucial that there is no coercion to test. A legitimate action encouraging testing will be providing more councelling, not making a list like this. Again, even big employers, with sophisitcated HIV/AIDS policies like Eskom, have not yet eskaped lack of proper understanding of what confidentiality is on a workplace level.

There were also numerous examples of malpractice in the area of confidentiality in public hospitals. Fortunately, it was possible to eliminate some of the severe cases of HIV/AIDS stigmatization and violation of confidentiality, like e.g. red stickers on medical files of HIV-positive workers (however, ALP has only anecgdotal knowledge about this practice). Nevertheless, often public and private as well as occupational hospitals segregate HIV services. The negative consequences of such segregation for confidentiality of HIV status are obvious. People will be too afraid to be spotted at the queque to the HIV service facility to make use of these services. Also, in the workplace, if HIV services are separated, it is enough to spot a dependant of a worker using HIV services to make assumptions about his/her HIV status. That is why ALP is calling for HIV services to be integrated.

Another example of problem with HIV/AIDS status confidentiality arose in the case of an employee of Bloemfontein municipality. He contacted ALP with the request of assistance. He was HIV positive and since his state of health worsened he decided to take a disability package. In order to do so, he had to be examined by a doctor. He wanted the doctor to hide as much information as it is possible in order to secure confidentiality of his HIV status. His problem was that he lived close to the area where he worked and he was afraid that information about his HIV status may spread among people who know him. Unfortunately, since documents allowing to take a disability package require a detailed medical record, it was necessary for the doctor to include information that lead to indentification of the HIV status. Therefore, ALP could only advice the person concerned to write a letter to the doctor stressing the importance of protecting confidentiality of HIV status in case of positive patients, while the doctor was free to put all the requried medical information on the record.

Example of big companites: African Diamond Mining Network – research Cape Town – The Industrial Health Research Group from the University of Cape Town did some research on big diamond companies and their treatment of H/A data of workers. For instance, there are companies which have diamond mines in and outside of South Africa – in Botswana, Namibia. Central database for HIV/AIDS information is in South Africa, many mines are abroad. The concern was who has access to the data e.g. during transport. People from local clinics refer to centralized database. The problem is data treatment. Obviously, it takes long time before information comes from the centre and it is not clear what is happening in terms of data treatment in the meantime, especially that also HIV/AIDS treatment is managed from the centre in South Africa, while it is performed in occupational clinics abroad.

When it comes to HIV/AIDS workplace discrimination, examples involve cases of indirect discrimination. They commonly take form of misconduct dismissals. That means that a HIV positive worker is not dismissed because of his HIV status. The problem is that still specific situation of a HIV positive worker is not recognized by the employer and he/she is commonly dismissed for absenteesm (caused by the sickness) or desserting the workplace (frequent in cases of workers who, diagnosed with HIV, leave the post and travel back to their homelands, in the first shock after diagnosis). In such cases they usually loose their jobs, being dismissed for misconduct.

The other form of discrimination, apart from misconduct dismissals, are incapacity dismissals. (see chapter „Workplace“ on the ALP website). According to the law, a worker can be legitimately dismissed „if no longer capable of working“. Otherwise, e.g. HIV positive workers, as long as they are capable of performing work, should be provided with the opportunity of „reasonable accomodation“. The incapability is verified by medical examination and reported in a medical report. Frequently, HIV positive workers are classified as incapable without medical grounds to do so, if their employers prefer to get rid of HIV positive workers from the workplace. It seems that incapacity dismissals create an important sphere in which HIV discrimination occurs in the workplace. Therefore, there is a need to provide possibility of an independent medical examination for workers facing this kind of dismissal as well as the need for other kinds

of support. Obviously, trade unions could play a crucial role in this area. It seems that in many cases incapacity dismissal of a HIV positive worker takes place on no real grounds. There are many possibilities of assigning a HIV positive worker a slightly changed responsibilities (like, e.g. less mobile job in order to deal with the problem of diarhorrea etc.).

Another form of discrimination is making HIV positive workers go, justifying a dismissal by retrenchement. In such case the company does not start misconduct or incapability procedures, but argues that there is no more work for a worker who happens to be HIV positive. We are informed about many cases in which a retrenchment takes place soon after a disclosure of positive HIV status by a worker.

Yesterday I saw an advertisement on a poster on the street saying: „Need labour law guidance?“ I wondered what is an intended audience: workers or companies. The following line made the answer obvious. It read: „before you dismiss – call us“. What is the context of such legal service in South Africa?
Definitely, advice on dismissal is offered and taken. Usually, a legal company will advice the employer that wants to get rid of a HIV positive worker to justify dismissal by retrenchment. The other way is dismissal for misconduct which hrequires monitorin of performance. This might be complicated whereas retrenchment dismissal, especially in case of absence of trade unions in a company, is unlikely to be challenged before the court by a dismissed worker.

In a nutshell, despite progress and some good practice in some companies, people are still being dismissed on grounds of HIV status. We had a case of a woman who for several years worked for a restaurant, being employed through a labour broker service (temporary work agency). She thought she had a very good relationship with her manager and one day she disclosed her positive HIV status to him. His reaction was furious. He was reported to shout „how come the agency can send me people like you!“. She worked for this restaurant for more than few years. She was dismissed. This case took place in 2007. It ilustrated how enterprises, especially small ones, are driven by frear and prejudice.

Another recent case concerned an administrative clerk who disclosed his positive HIV status in the workplace. In a direct reaction to this fact he faced massive discrimination from the part of his employer and co-workers. He was eventually banned from using toilet and kitchen together with other workers, while his working conditions were made very difficult in an attempt to make him resign from work.

Workplace discrimination on grounds of HIV status not always involve lack of knowledge about the disease. There was a case of a domestic worker gang raped on her way to work. Her employer took her to the hospital where she (the employer) was informed about the possibility to take a PEP (post exposure prophylaxis), a drug that is supposed to prevent HIV infection after exposure to the virus. The worker, after being informed about the possibility, refused to take the drug. For the employer it was an obvious proof of being already positive. The worker was subsequently dismissed. The

case reached the court and the worker has got a settlement, however, what is interesting in this case is that the employer who committed an obvious act of HIVdiscrimination, was a local magistrate.

To underline one more time, unless big companies who often work with experts – doctors, sociologists etc. – on HIV related issues – employers suffer from extreme prejudicies and fear, as far as HIV in the workplace is concerned.

In case the employer cares to identify the worker's HIV status, unless it is illegal to do it openly, there are other ways to verify whether a worker is HIV positive or not. For instance, a common practice is to test workers not for HIV but for viral load portfolio which may indicate HIV status. In this way companies run over the prohibition of running HIV tests in the workplace.

Politicisation of HIV issues as well as an ambigious and not coherent policy of the Ministry of Health is a characteristic feature of HIV in South Africa. The policy of the South African Department of Health has many layers. Frequently, it also differs, depending on level. It has to be underlined that the practice of denial on the highest levels of the Department, backed by the position of the President of South Africa Thabo Mbeki, caused lack of political climate and support for HIV policy on lower levels of the Department.

In South Africa there is no law requiring employers to report HIV/AIDS related data. Indeed, the Department of Health attempted to make HIV a „notifiable disease“. Fortunately, it appeared possible to convince them that such regulation will be counterproductive in terms of fighting HIV/AIDS, as it will most surely drive the disease underground and stigmatize it. Currently, HIV/AIDS is not notifiable.

The question whether HIV testing shuld be voluntary or not is very difficult. On the one hand, we want much more people to get regularly tested and therefore we want to encourage testing. Because HIV testing in South Africa is still much too low there is some qualified support for provider encoureged testing. In such case testing is still voluntary, but usually uptake is higher as it is made more uncomfortable to refuse. On the other hand, we do not want people to loose their human rigths protection in the workplace. That is why these issues pose so many problems.

The performance of trade unions on HIV in the workplace used to be weak. The disease was marginalized during the independence struggle. To some extend the issue was not properly addressed in terms of trade unions structures, which remained highly bureaucratic.

This situation changed to big extent. However, what can be currently noticed in trade unions practice on HIV/AIDS is a gap between highly concerned HIV coordinators (e.g. in COSATU and its affiliates) and shop stewards on the workplace level. While national and regional coordinators may be higly aware and dedicated, in many cases shop

stewards suffer from significant fear, prejudice and lack of education, which makes trade union action on the workplace level very difficult. However, this situation may be changed and currently there are many positive examples of a crucial role trade unions played at the level of workplace as far as HIV discrimination is concerned. One recent case involved a worker who worked in a bakery and after disclosing his positive HIV status, has been assigned to clean toilets. Thanks to the internvention and strong position of a local shopsteward the employer was made to withdraw from this discriminatory arrangement.
To sum up, workplace HIV related discrimination in the smaller companies takes forms of banning a positive worker from using common utilities like batchroom or kitchen, by either the employer or the co-workers. Also, other working conditions are being made as difficult as possible, in order to make the worker resign from job.

Discrimination in case of big companies takes other forms. Here we face the problem of misconduct dismissals in reaction to increased absenteesm of HIV-positive workers as well as incapability dismissals. Often companies strongly encourage HIV-positive workers to take the so-called „temporary disability benefits“. The employer prepares all the documents and initiates application, while the worker is adviced to sign the documents in order to get money. At the same time, the worker is given resignation form to sign. Many workers were misled, being told that if they will resign from job, they will get interminately the money from the temporary disability benefit (which is 75% of wage). They were not warned that temporary disability benefits may last only 6 months and they will be obliged to attend regular checks. If their health improves (which is usually the case after starting ARV therapy), they will loose the money. However, if this is the case, the employer is not willing to take them back.

Shared confidentiality
There may be some role of „culture“ in treating the right to medical information privacy. The question is whether „culture“ plays a significant role in case of workers moving to towns.

There is definitely a tension between the need for more people to disclose their HIV status in South Africa and the need to release stigmatized consequences for people in case they do disclose. There is a lot of advertising and political encouragement for people to disclose e.g. around the World AIDS Day, people who decide to live openly with HIV/AIDS are praised and congratulated, but when celebrations end, the reality may be different than political declarations and the same people who were acclaimed for disclosure, get discriminated, persecuted, dismissed. There is the need for an ongoing training and support both for HIV-positive and HIV-negative people. For instance, according to the Public Service Coordinating Council Code, HIV related discrimination at work is subject to disciplinary proceedings. Obviously, people do not ofthen know it. We had a case of a KFC shop, where serious cases of HIV related discrimination took place. The manager was asked to intervene and promised to react. Unfortunately, many times, despite duch promises, the employer does not react, like it eventually ocured in this case.

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