



Diau v. Botswana Building Society (BBS)

Diau v. Botswana Building Society (BBS), 2003 (2) B.L.R. 409 (BwIC) (Bots.).

Country: Botswana

Region: Africa

Year: 2003

Court: Botswana Industrial Court

Facts

The applicant was denied the opportunity to become a permanent employee at the end of the probation period of her job. According to the applicant, the decision to withhold extending her position was based on her refusal to undergo an HIV test as a condition for permanent employment. The plaintiff therefore sought an order declaring that the respondent's decision constituted discrimination on the basis of disability in contravention of sections 15(2) and 23 of the Employment Act. She further sought a declaration that the discrimination constituted a denial of equal protection of the law guaranteed under section 3 of the Constitution of Botswana, as well as degrading treatment in violation of Article 7(1). The employer denied the allegation of discriminatory conduct and claimed it was entitled to deny the applicant the opportunity for permanent employment without an obligation to provide the applicant a reason for its decision.

Decision and Reasoning

The employer terminated the employment relationship with the plaintiff without a valid reason. The plaintiff therefore suffered unfairness in violation of the Constitution's equality provision under Article 3(a) and its prohibition of inhuman and/or degrading treatment under Article 7(1). To rule otherwise would run counter to the public's interest in encouraging citizens to voluntarily seek HIV tests. Therefore, the plaintiff should be reinstated to her position under terms defined in 19(1)(a) of the Trade Disputes Act. The respondent must also pay compensation to the applicant for her premature termination.

Decision Excerpts

"...Punishing the applicant for refusing an invasion of her right to privacy and bodily integrity is inconsistent with human dignity. This is particularly so in the context of HIV/AIDS where even the remotest suspicion of being HIV/AIDS can breed intense prejudice, ostracisation and stigmatisation. This is the context within which one must analyse the right to dignity in this case. The symbolic effect of punishing an employee for refusing to undergo an HIV test is to say that all those who refuse to undergo an HIV test are not competent to be employed - they should lose their jobs and by extension be condemned to unemployment - a form of economic death for simply saying, as a human being, I have decided not to test for HIV/AIDS." Page 39.