



Joy Mining Machinery v. NUMSA

Case No: J 158/02; [2002] ZALC 7

Country: South Africa

Region: Africa

Year: 2002

Court: Labour Court of South Africa

Health Topics: Health care and health services, Health information, HIV/AIDS, Hospitals, Infectious diseases, Informed consent, Occupational health

Human Rights: Freedom from discrimination

Facts

The Applicant, Joy Mining Machinery, was a manufacturer, supplier and service provider of mining machinery. The Applicant had attempted to determine the extent of HIV prevalence at its workplace by commissioning a study of HIV prevalence based on the demographic groups at the workplace. As this was ultimately unhelpful, the Applicant wished to determine the exact prevalence through the testing of its employees.

The Applicant requested permission to test its employees for HIV pursuant to the Employment Equity Act 55 of 1998 (EEA). The EEA prohibits testing of an employee to determine the employee's HIV status unless such testing is determined to be justifiable by the Labour Court. The EEA provides that whether medical testing is justifiable must be determined in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job. If the Labour Court finds HIV testing is justified, it may impose conditions relating to the provision of counselling, the maintenance of confidentiality, the period during which the employee may be tested, and the categories of jobs for which the authorization for testing applies.

Pursuant to the EEA, the Minister of Labour issued a Code of Good Practice: Key Aspects of HIV/AIDS and Employment (the Code). Among other things, the Code provides that testing for HIV may only take place with the informed consent of the employee, the provision of pre- and post-test counselling, and strict procedures relating to confidentiality of the employee's HIV status.

Decision and Reasoning

The Court authorized the Applicant to conduct HIV tests of its employees subject to the following conditions: testing was to be voluntary and done with the consent of the employee; testing was to be done on an anonymous basis, without obtaining the employee's name; participation in testing was not to be a condition of employment, promotion or other benefits; the Applicant was not to discriminate against HIV-positive employees, should it become aware of such status; no prejudicial inference was to be drawn from an employee's refusal to submit to testing; the Applicant was not to be made aware of which employees submitted to testing; the Applicant was only to be informed of the percentage of employees who participated and the percentage of employees within various age groups and job bands who tested positive; test results would be processed by the AIDS Management & Support company.

The Court held that the Code of Good Practice: Key Aspects of HIV/AIDS and Employment (the Code) was intended to guide the Court and others in applying the EEA. In light of the Code, the Court held that the following considerations, among other things, are to be taken into account when determining whether the testing of an employee for HIV is justifiable: the prohibition on unfair discrimination, the need for HIV testing, the purpose of the test, employment conditions, the fair distribution of employee benefits, the inherent requirements of the job, and the category or categories of jobs or employees concerned. The Court further stated that the following considerations are relevant to arriving at a proper decision: whether the test is intended to be voluntary or compulsory, whether the employees are able to formulate informed consent, and whether pre- and post-test counselling will be made available.

The Court noted that employers need to know the prevalence of HIV among their work forces in order to proactively prevent the spread of HIV among its employee, treat the symptoms of the disease, and plan for contingencies and other eventualities.

The Court noted that the Applicant had been engaged in an effort to deal with the AIDS crisis facing South Africa since 1997. The Applicant had implemented various education and awareness campaigns, distributed condoms and provided treatment for sexually transmitted diseases at on-site clinics. The Court further observed that the Applicant had taken steps toward preparing its employees for HIV testing, including consulting with all relevant stakeholders and providing information to all employees concerning the reasons for the testing. The Applicant had also made clear to the Court that all testing would be voluntary and "no one [would] be forced to participate." The Applicant did, however, inform its employees that "it would be best" if employees participated.

The Court stated that the results of the Applicant's testing would be anonymous and only the percentage of people who were infected would be determined from the test results, not which particular employees were HIV-positive. Moreover, the Applicant invited employee representatives to send observers to the testing sites to ensure participation was voluntary and that test specimens were anonymous. Employees who wished to learn their HIV status would be required to arrange for a private test, as the results of the Applicant's test would not be divulged to them.

Decision Excerpts

"17. The [HIV] test must be justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job."

"22. In my opinion the Labour Court, in determining the testing of an employer's employees for their HIV status is justifiable, will take the following considerations into account, in so far as they are applicable to the factual circumstances of the case:

- the prohibition on unfair discrimination
- the need for HIV testing
- the purpose of the test
- the medical facts
- employment conditions
- social policy
- the fair distribution of employee benefits
- the inherent requirements of the job.
- the category or categories of jobs or employees concerned"

"31. In formulating the order, I believe, a court must pay attention, where applicable on the facts, to:

- the declaration permitting testing
- the imposition of conditions regarding that it considers appropriate in the circumstances, including imposing conditions relating to: (a) the provision of counselling; (b) the maintenance of confidentiality; (c) the period during which the authorisation for any testing applies; and (d) the category or categories of jobs or employees in respect of which the authorisation for testing applies.
- measures to prevent the possibility of unfair discrimination
- pre-test briefing to ensure informed consent
- pre-test counselling
- the nature of the proposed test and details of the procedure for conducting it
- post testing counselling
- proof of consent by minors and persons suffering from a legal disability.
- service of the order so that the employees concerned and their trade union or representatives will be fully apprised of their rights."