

Employer Duties towards Employees Infected with HIV/AIDS

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1 Introduction

Various pieces of legislation deal with employers' duties towards employees infected with HIV/AIDS. Generally¹ these provisions are worded negatively. On the face of it, therefore, it may appear that these duties relate to what employers may not do. Consequently, there seems to be no legislative imposition on employers to take positive steps to protect the interests and ameliorate the position of such employees. Nevertheless, a closer examination of case law, the common law, various pieces of legislation and soft law in the form of codes, as well as their interaction with one another, demonstrates that despite the negative wording in the legislation, employers are in effect legally obliged to take positive steps to protect not only employees but even applicants for employment infected with the virus.

These positive duties have various sources. First there is 'soft law'² which, unlike legislation, is not enforceable in a court of law, but can indirectly impose legal duties on employers. Soft law serves primarily as a guide to employers wishing to implement a policy on HIV/AIDS. In terms of the Employment Equity Act 55 of 1998 (the 'EEA'), the Code of Good Practice on HIV/AIDS must be used as an interpretive tool to give content to its provisions.³ Consequently employers may find that a legislative duty which on the face of it imposes only negative duties, such as the duty not to discriminate unfairly on the basis of a person's HIV status, may in the light of the Code of Good Practice ultimately entail a legal duty to take positive action.

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¹ Positive duties imposed on employers concern the duty to provide a safe working environment and other minimum standards. In terms of s 8(1) of the Occupational Health and Safety Act 85 of 1993, an employer is obliged to provide, as far as is reasonably practicable, a safe workplace. This may include taking steps to minimise occupational exposure to HIV. The Basic Conditions of Employment Act 75 of 1997 provides certain basic minimum standards of employment, inter alia, in terms of s 22(2), a minimum amount of sick leave. Section 2(1) and s 5(1) of the Mine Health and Safety Act 29 of 1996 lay down that an employer must provide, as far as is reasonable practicable, a safe work environment. Again, this may be interpreted to mean that the employer should take positive steps to minimise exposure to HIV. If an employee is infected with HIV as a result of occupational exposure to the virus, the employee is entitled to claim compensation in terms of s 22(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

² Code of Good Practice: Key Aspects of HIV/AIDS and Employment as promulgated in GN R1298 in GG 21815 of 1 Dec 2000. Another relevant source of 'soft law' in this regard is the *King Report on Corporate Governance for South Africa, 2002*.

³ Section 3(c) of the EEA.

It will be demonstrated that the obligation in s 6(1) of the EEA not to discriminate unfairly on the basis of a person's HIV status, if read together with other provisions in the EEA, requires an employer to take positive steps to protect infected employees and job applicants from unfair discrimination on the basis of their HIV status.

A brief discussion of the common law will demonstrate that it too may require employers to take positive steps to protect employees infected with HIV/AIDS.

Finally, an employer's failure to take positive action to address discrimination of HIV-infected employees and to put policies in place by means of strategic action, may, in addition to attracting legal liability for the payment of compensation to the victim(s), most likely result in dire economic repercussions for the employer.

2 The Employment Equity Act

Section 6(1) of the EEA provides that no person may unfairly discriminate against an employee, or an applicant for employment, in any employment policy or practice, on the basis of his or her HIV status. An 'employment policy or practice' is defined as including, but not being limited to, the following:⁴

- (a) recruitment procedures, advertising and selection criteria;
- (b) appointments and appointment process;
- (c) job classification and grading;
- (d) remuneration, employment benefits and terms and conditions of employment;
- (e) job assignments;
- (f) the working environment and facilities;
- (g) training and development;
- (h) performance evaluation systems;
- (i) promotion;
- (j) transfer;
- (k) demotion;
- (l) disciplinary measures other than dismissal; and
- (m) dismissal.⁷

Although the term 'act or omission' is not used in s 6 with regard to an 'employment policy or practice', it is employed in s 10(2) to describe the subject matter of a dispute about unfair discrimination. An omission or failure to do something, therefore, may amount to unfair discrimination. Consequently, s 6(1) read with s 10(2) can oblige an employer to take certain steps in order to avoid breaching the negatively worded terms of s 6(1).

Section 5 of the EEA provides that '[e]very employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any policy or practice'.

In *Harmse v City of Cape Town*,⁵ s 5 was found to provide a right to affirmative action. Affirmative action may loosely be defined as positive

⁴ See s 1 of the EEA.

⁵ [2003] 6 BLLR 557 (LC).

action by the employer in order to redress the imbalances of the past with regard to people who fall within certain designated groups. Although persons living with HIV/AIDS are not a 'designated group',⁶ it is commonly accepted that black women bear the highest risk of contracting the disease.⁷ Therefore, a failure by an employer to take 'steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any policy or practice' with regard to people infected with HIV/AIDS may constitute a breach of s 5.

Section 60 of the EEA provides, inter alia, that if an employer directly encourages or even by its inaction allows or condones conduct which is in breach of the EEA, it will be vicariously liable for damages flowing from such breach. The section reads as follows:

- '(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.
- (2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.
- (3) If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.
- (4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.'

To avoid liability on the basis of this section, an employer is obliged to put in place policies and procedures to prevent unfair discrimination against those of its employees infected with HIV/AIDS. Given the prevalent ignorance, intolerance, irrational fear, prejudice and social stigma surrounding the disease, it is not difficult to imagine that a failure on the part of the employer to implement policies to prevent discrimination could easily result in HIV/AIDS-infected employees bearing the brunt of prejudices imposed on them by their fellow employees.

Moreover, in situations where employees are guilty of discriminating unfairly against fellow employees infected with the virus, the employer is obliged to 'take the necessary steps to eliminate the alleged conduct'. Clearly s 60 obliges an employer to take positive steps in order to prevent unfair discrimination against those of its employees infected with HIV/AIDS.

3 The Labour Relations Act

Section 187(1)(f) of the Labour Relations Act 66 of 1995 (the 'LRA') provides that if the reason for a dismissal is the employer's direct or indirect unfair discrimination on the basis of 'any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, political opinion, culture, language,

⁶ Section 1 of the EEA defines 'designated groups' as 'black people, women and people with disabilities'.

⁷ Statistics from the Department of Health *National Antenatal Survey* (1999) at 21.

marital status or family responsibility', such dismissal will constitute an automatically unfair dismissal.⁸

In the case of other unfair dismissals, the maximum compensation that may be awarded to an employee who has been unfairly dismissed is twelve months' salary.⁹ In the case of an automatically unfair dismissal, the maximum awardable compensation is twenty four months' salary.¹⁰

Although the HIV status of an employee is not specifically listed in s 187(1)(f) as a basis for dismissal which would result in an automatically unfair dismissal, it prohibits dismissal 'on any arbitrary ground'. An arbitrary ground is one 'which is capricious or proceeding merely from will and not based on reason or principle . . . where the discrimination is for no reason or is purposeless', or 'even if there is a reason . . . [where] the reason is not a commercial reason of sufficient magnitude that it outweighs the rights of the job seeker and is not morally offensive'.¹¹ On this basis, discrimination on the basis of a person's HIV status may constitute an automatically unfair dismissal in terms of s 187(1)(f) of the LRA.

However, where as a direct consequence of the disease the employee is unable to adequately perform his or her duties, and provided fair procedures are followed, the employer may dismiss the employee for reasons of incapacity.¹² Also, if an HIV-negative status is an inherent requirement of the job, a dismissal based on a person's HIV status will not be unfair provided the correct procedures were followed.¹³ An inherent requirement of a job, in the words of Waglay J in *Whitehead v Woolworths (Pty) Ltd*,¹⁴ is 'some indispensable attribute' which is 'so inherent that if not met an applicant would simply not qualify for the post'.

With regard to a person's HIV status constituting an inherent requirement of the job, the Constitutional Court in *Hoffman v South African Airways*,¹⁵ although conceding that there may be circumstances which render HIV-positive persons unsuitable for employment as cabin attendants, held that this did not justify 'a blanket exclusion' of all such persons and that each case should be judged on its merits. The Court found that the refusal by South African Airways to employ Hoffman on the grounds of his HIV status, constituted unfair discrimination because the purpose of the discrimination on

⁸ It is interesting to observe that despite the omission of HIV status as a prohibited ground for discrimination in this section, the Code of Good Practice: Key Aspects of HIV/AIDS and Employment op cit note 2 states in par 5.3.4 that '[i]n accordance with section 187(1)(f) of the Labour Relations Act, 66 of 1995, an employee with HIV/AIDS may not be dismissed simply because he or she is HIV positive'.

⁹ Section 194(1).

¹⁰ Section 194(3).

¹¹ Per Landman J in *Kadiaka v Amalgamated Beverage Industries* (1999) 20 ILJ 373 (LC) in pars 42-3.

¹² Section 188(1)(a)(i).

¹³ Section 181(2)(a).

¹⁴ [1999] 8 BLLR 862 (LC) in pars 34-5. See also *Association of Teachers & Another v Minister of Education & Others* [1995] 9 BLLR 29 (IC) at 60; *Woolworths (Pty) Ltd v Whitehead* [2000] 6 BLLR 640 (LAC) in pars 26 and 43.

¹⁵ [2000] 12 BLLR 1365 (CC) in par 35.

this basis on the medical evidence was not justified.¹⁶ In similar vein, it was held in *IMATU & Another v City of Cape Town*¹⁷ that persons with insulin-dependent diabetes should not automatically be excluded as fire fighters on the basis of any inherent requirements of the job. The Court held that each application should be assessed on its individual merits. In *PFG Building Glass (Pty) Ltd v CEPPAWU & Others*,¹⁸ Pillay J, while conceding that there may be situations where a person's HIV status may qualify as an inherent requirement of a job, pointed out that this would not be proved easily.

As seen, s187(1)(f) of the LRA prohibits both direct and indirect discrimination. Even though the HIV status of a person is not specifically mentioned in the subsection as a prohibited ground of unfair discrimination, given the fact that black females bear the highest risk of infection, direct discrimination on the basis of HIV status will in their cases result in indirect discrimination on the basis of both the prohibited grounds of race and gender.

A dismissal need not necessarily take the form of positive action on the part of the employer. An employer's failure to act may likewise constitute a dismissal. For example, if an employee has a legitimate expectation that his or her fixed-term contract will be renewed on the same or similar terms and the employer fails to renew the contract or renews the contract on less favourable terms, this may constitute an unfair dismissal.¹⁹ A positive duty therefore rests on the employer to renew the contract of the employee where he or she has a legitimate expectation that it should be renewed. Failure to renew the contract on the basis of the person's HIV status would in all probability constitute an automatically unfair dismissal in the absence of the employer being able to justify the discrimination on the basis of an inherent job requirement or, possibly, an operational requirement.²⁰

Another example of dismissals occurring without there necessarily being any positive action on the part of the employer is provided by constructive dismissals. A constructive dismissal occurs where the employer by its acts or omissions renders a continuation of employment by the employee intolerable.²¹ This may arise by an employer's inaction. The lack of an HIV policy in the workplace, or an employer's inaction with regard to the harassment of HIV-positive employees by fellow employees, may render continued employment intolerable for an employee. Clearly, then, to prevent liability for unfair dismissals, including automatically unfair dismissals, employers would be well advised to take measures to eliminate all forms of unfair discrimination against HIV-positive employees.

¹⁶ See in par 29.

¹⁷ [2005] 11 BLLR 1084 (LC) in pars 107-12.

¹⁸ [2003] 5 BLLR 475 (LC) in par 59.

¹⁹ Section 186(1)(b).

²⁰ See Stella Vettori 'Operational Requirements: A Justification for Discrimination?' (2000) 33 *De Jure* 336.

²¹ Section 186(1)(e) of the LRA.

4 The Common Law

4.1 An Employer's Duty to Take Reasonable Care of Employee Safety

An employer's breach of the duty of care may also take the form of an omission. Brassey explains that '[s]ince [employers] can be held liable for omissions, employers can be liable for failing to prevent people, such as suppliers, customers or employees, from causing their employees harm. They are likely to be held liable if they provided the opportunity or conditions for the injurious act or had the power to prevent it.'²² Breach of this duty may occur should the employer fail to guard against injury or harm in circumstances where a reasonable person would have foreseen the likelihood of such injury or harm.²³

Given the ignorance surrounding HIV/AIDS and the consequent stigma attached to the disease, possible, even probable, harassment by fellow employees is reasonably foreseeable. Therefore, there is most probably a common-law duty on employers to take positive steps to prevent HIV-infected employees from suffering harm or injury.

In *Media 24 Ltd & Another v Grobler*²⁴ the Supreme Court of Appeal held that it is 'well settled' that employers owe their employees a duty to take reasonable care of their safety.²⁵ The Court opined²⁶ that this duty is not confined to protecting employees from physical harm, but includes a duty to protect them from psychological harm. This decision concerned an appeal by Media 24 to set aside the decision of the High Court in *Grobler v Naspers Bpk & 'n Ander*.²⁷ The Cape High Court had held Naspers vicariously liable for acts of sexual harassment committed by a fellow employee of Grobler against her. It ordered Naspers to pay Grobler an amount of R776 814 in compensation. On appeal, the Court found it unnecessary to deal with the question of the vicarious liability of the employer because the claim could succeed on the basis of Grobler's second cause of action, namely, the employer's common-law duty to take reasonable care of the safety of its employees. The Court found that the legal convictions of the community required an employer to take reasonable steps to protect its employees against acts of sexual harassment by other employees. Failure to do so would result in the employer having to pay compensation to the victim of such harassment.

By analogy, it is not unreasonable to argue that the employer has a common-law duty to take active steps to protect HIV-positive employees from harassment, stigmatisation and discrimination at the hands of their fellow employees.

²² Martin Brassey *Employment and Labour Law* (2000) vol 1 at E4:30.

²³ *Idem* at E4:30-1.

²⁴ (2005) 26 ILJ 1007 (SCA).

²⁵ See also Brassey op cit note 22 at E4:19-49.

²⁶ In par 65.

²⁷ (2004) 25 ILJ 439 (C).

The following constitutional provisions further increase the likelihood of the existence a common-law duty on employers to take reasonable care of, and to protect, HIV-infected employees from physical and psychological harm arising from harassment, stigmatisation and discrimination at the workplace:

- Section 173 of the Constitution provides the High Courts, the Supreme Court of Appeal and the Constitutional Court with inherent jurisdiction to develop the common law, 'taking into account the interests of justice';
- section 39(1)(a) enjoins the courts to promote the 'values that underlie an open and democratic society based on human dignity, equality and freedom';
- section 39(2) enjoins them to develop the common law in line with and giving effect to the spirit, purport and object of, the Bill of Rights;
- section 14 provides that all persons with HIV or AIDS have a right to privacy concerning their HIV status;
- section 9(3) provides that no person may unfairly discriminate against anyone on one or more grounds including race, sex ethnic or social origin; and
- section 10 provides that 'everyone has the right to have their dignity respected and protected'.

4.2 Vicarious Liability

Another possible common-law basis for an employer's liability for failing to take steps to protect HIV-infected employees from harm is its vicarious liability. Unlike the direct liability based on the duty to protect its employees from harm, vicarious liability renders an employer liable for the wrongful acts of its employees. In *Grobler v Naspers Bpk*,²⁸ the Court found the employer vicariously liable for the acts of sexual harassment of one of its employees. After considering the development of the doctrine of vicarious liability in other common-law jurisdictions, the Court concluded that policy considerations justified its finding.²⁹

By analogy, an employer could be held liable on the basis of the common-law doctrine of vicarious liability for the wrongful acts of its employees towards its HIV-positive employees. Nevertheless, given the statutory vicarious liability of the employer for unfair discrimination against employees infected with HIV,³⁰ it is not necessary to rely on the vicarious liability of the employer at common law.³¹

²⁸ Supra note 27.

²⁹ A consideration of the reasoning of the Court in this regard falls outside the scope of this article.

³⁰ Section 60 read with s 6(1) of the EEA.

³¹ As will be mentioned in par 5 below, the EEA does not place a limit on the amount of compensation claimable in such a case and therefore there seems to be no advantage in claiming on the basis of the employer's common-law liability in circumstances where the employer could be vicariously liable under statute for the acts of its employees.

4.3 Constructive Dismissal (Breach of Contract)

If there is a 'sufficiently serious breach of a sufficiently important term' by one party to a contract, the other party will be entitled to cancel the contract.³² Therefore, if an employer renders performance by the employee of his or her duties intolerable, that may constitute a material breach of contract entitling the employee to cancel the contract (to resign) and to claim compensation for that breach.³³ The breached term may be an express or an implied term.

Implied in every contract of employment is a duty of mutual trust and confidence.³⁴ This implied term, a naturalia of employment contracts, was derived from English law. It involves 'that the employer will not, without reasonable and probable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties'.³⁵ Since this is a material term, conduct inconsistent with it will entitle the 'innocent' party to cancel the contract of employment.³⁶ It is not necessary, however, for the party wishing to cancel the contract to prove that the other party intended to repudiate the contract.³⁷ Of relevance is the effect that such breach has on the employee. If it has the effect, judged reasonably and objectively, that the employee cannot be expected to endure the situation, the employee will be entitled to resign.³⁸ Failure by an employer to implement policies and procedures in order to eliminate discrimination against HIV-positive employees may be construed as a material breach of the implied term of mutual trust and confidence rendering the employee's performance in terms of the contract intolerable.

5 Compensation

A refusal by an employer to take steps to ensure that their employees infected with HIV are not harassed and discriminated against, may attract liability to pay compensation on more than one basis. For example, such inaction may result in the employer being liable to pay compensation for an unfair dismissal or for an unfair labour practice³⁹ as well as compensation for

³² RH Christie *The Law of Contract in South Africa* 5 ed (2006) at 514.

³³ In *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) at 951-2, the Court held that the employer had committed a material breach of contract by degrading the status of the employee. The employee was therefore held entitled to cancel the contract of employment and to claim compensation for the breach.

³⁴ See Craig Bosch 'The Implied Term of Trust and Confidence in South African Labour Law' (2006) 27 *Industrial LJ* 28.

³⁵ *Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (A) at 26; *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC) at 985 in par A.

³⁶ *Ibid.*

³⁷ *Pretoria Society for the Care of the Retarded v Loots* supra note 35 at 984 in par J; *Stewart Wrightson v Thorpe* supra note 33 at 951-2; Christie op cit note 32 at 514.

³⁸ *Pretoria Society for the Care of the Retarded v Loots* supra note 35 at 985 in par B.

³⁹ An unfair labour practice is defined in terms 186(2) of the LRA as including 'any unfair act or omission that arises between an employer and an employee involving' promotion, demotion, probation, training, the provision of benefits, suspension, disciplinary action short of dismissal and a failure to re-employ or reinstate an employee contrary to the terms of an agreement'. In terms of s 194(4) of the LRA, the maximum compensation for an unfair labour practice is twelve months' salary. This kind of

contumelia, pain and suffering, emotional trauma, and loss of future earnings and of the amenities of life.⁴⁰

This is what happened in *Ntsabo v Real Security CC*.⁴¹ Ntsabo, a security guard, resigned after being sexually harassed by her supervisor. The employer, despite having been informed of the incidents of such harassment, consistently ignored the situation and complacently did nothing about it. Ntsabo consequently resigned. The Labour Court found that the employer's inaction and complacency had rendered it intolerable for Ntsabo to continue working and consequently she was found to have been constructively dismissed.⁴² The basis of the constructive dismissal was sexual harassment. Sexual harassment is not one of the prohibited grounds of discrimination listed in s 187(f) of the LRA, and it only qualifies as a ground for discrimination in terms of s 6(3) of the EEA. In consequence the Court was unable to find that the dismissal was an automatically unfair dismissal in terms of s 187(f) of the LRA that attracted compensation of up to 24 months' salary. Nevertheless, the employer's inaction was still found to constitute an unfair dismissal in terms of s 186(1)(e) of the LRA. The Court awarded the maximum allowable compensation for an unfair dismissal which is not an automatically unfair dismissal. That amounted to twelve months' salary,⁴³ which in this case amounted to R12 000.

The employer's same inaction resulted in a further two awards of compensation. It was ordered to pay a further amount of R20 00 in terms of the EEA for future medical costs for psychiatric treatment, and an amount of R50 000 for general damages including contumelia. In addition, the employer was ordered to pay the costs of the application. Its liability for future medical costs and general damages was based on the statutory vicarious liability of the employer for the conduct of its employees created by s 60 of the EEA.

Whether a claim is based on statute or on the common law may have an effect on the amount of compensation awarded. The statute may impose limits on the amount claimable with respect to statutory claims, as is the case with claims for unfair dismissals and unfair labour practices in terms of s 194 of the LRA. These limits may also provide guidance for judges faced with the unenviable task of deciding how much compensation to award in the case of a common-law breach.

A claim for a breach of the common law duty to take reasonable care of the safety of employees may be founded either on delict or on contract.⁴⁴ For purposes of determining the amount of compensation recoverable, this

conduct also constitutes a breach of the provisions of the s 6(1) of the EEA since the conduct would constitute an 'employment policy or practice' as defined in s 1 of that Act.

⁴⁰ See, eg, *Christian v Colliers Properties* [2005] 5 BLLR 479 (LC) where compensation was awarded for sexual harassment in terms of s 50(1) of the EEA in addition to compensation for automatically unfair dismissal in terms of s 194 of the LRA.

⁴¹ [2004] 1 BLLR 58 (LC).

⁴² In terms of s 186(1)(e) of the LRA.

⁴³ In terms of s 194(1) of the LRA.

⁴⁴ See *Brassey* op cit note 22 at E4: 20.

distinction has no relevance because in both cases the amount would be the same. As Brassey explains:

‘In delict the employee is entitled to be put in the position he would have been in had the employer not committed the wrongful act or omission. In contract he is entitled to be put in the position he would have occupied had the employer fulfilled her duty to refrain from or prevent the wrongful act. In either case the remedy is aimed at a redress of the harm in so far as this is possible by the payment of money.’⁴⁵

Section 50(1)(d) and (e) of the EEA provide that the Labour Court may make any appropriate order, including awarding compensation and damages ‘in circumstances contemplated in this Act’. Section 50(2) of the EEA further provides that if the Labour Court finds that an employee has been unfairly discriminated against, it may make

‘any order that is just and equitable in the circumstances, including –
(a) payment of compensation by the employer to the employee;
(b) payment of damages by the employer to the employee’.⁴⁶

Since the Court may make an award that it deems to be just and equitable, there is no statutory limitation on the amount that may be awarded. Therefore, whether one’s claim for unfair discrimination is based on the common law (the vicarious liability of the employer, or on the duty to take reasonable care of the safety of employees), or on the statutory provisions contained in the EEA, the ultimate outcome as far as the amount of compensation is concerned, will depend on the court’s sense of what is right. It seems likely that a court will apply the same formula applicable to the award of damages for breach of contract or delict at common law: It will attempt to place the applicant in the same position he or she would have occupied had there been no breach of the EEA ‘in so far as this is possible by the payment of money’.⁴⁷ Even though a judge will have the benefit of the opinions of expert witnesses concerning the extent of the injury, be it physical or psychological, as well as the results of calculations of actuaries, the fact remains that the determination of the amount of damages is never an exact science; inevitably there will always be an element of subjectivity in the final determination.

As mentioned, the amount of compensation claimable for constructive dismissal and unfair labour practices is limited in terms of s 194 of the LRA. However, if rather than basing the claim on the LRA, the applicant claims for breach of contract, there is no statutory limit to the amount recoverable. In *Pretoria Society for the Care of the Retarded v Loots*,⁴⁸ the Court, following English law, listed a number of guidelines that should be considered in determining the amount of an award for compensation.⁴⁹ The case concerned a constructive dismissal and was decided in terms of the Labour Relations Act

⁴⁵ *Idem* at E4: 21.

⁴⁶ In *Coetzer & Others v Minister of Safety & Security & Another* [2003] 2 BLLR 173 (LC) in pars 41-2, the primary remedy for unfair discrimination was held to be what the court deemed just and equitable.

⁴⁷ Brassey *op cit* note 22 at E4: 21.

⁴⁸ *Supra* note 35.

⁴⁹ These were the factors mentioned in *Ferodo (Pty) Ltd v De Ruite* (1993) 14 ILJ 974 (LAC) at 981C-G.

28 of 1956, which unlike the present LRA placed no limitations on the amount claimable for an 'unfair labour practice'.⁵⁰ The guidelines listed⁵¹ are:

- (a) there must be evidence before the court of actual financial loss suffered by the person claiming compensation;
- (b) there must be proof that the loss was caused by the unfair labour practice;
- (c) the loss must be foreseeable, i.e. not too remote or speculative;
- (d) the award must endeavour to place the applicant in monetary terms in the position in which he would have been had the unfair labour practice not been committed;
- (e) in making the award the court must be guided by what is reasonable and fair in the circumstances. It should not be calculated to punish the party;
- (f) there is a duty on the employee (if he is seeking compensation) to mitigate his damages by taking all reasonable steps to acquire alternative employment;
- (g) the benefit which the applicant receives e.g. by way of severance package, must be taken into account'.

In short, therefore, a court is required to make a value judgment as to what is fair and reasonable in the circumstances.

6 Soft Law

6.1 The Code of Good Practice: Key Aspects of HIV/AIDS and Employment

This Code was issued by the Minister of Labour in 2000. Its primary objective 'is to set out guidelines for employers and trade unions to implement so as to ensure individuals with HIV infection are not unfairly discriminated against in the workplace'.⁵² In *Joy Mining Machinery (A Division of Harnischfeger (SA) (Pty) Ltd) v NUMSA & Others*,⁵³ Landman J stated with reference to the Code that it 'is intended to provide guidance to a court and other persons applying the EEA. It may be assumed that a court would take a code into account in adjudicating a matter'. The guidelines in the Code provide for positive action on the part of the employer. This includes the prevention of unfair discrimination and stigmatisation by means of the following actions:

- (i) the development of HIV/AIDS policies and programmes for the workplace;
- (ii) awareness, education and training on the rights of all persons with regard to HIV and AIDS in the workplace;
- (iii) mechanisms to promote acceptance and openness around HIV/AIDS in the workplace;
- (iv) providing support for all employees infected or affected by HIV and AIDS; and
- (v) grievance procedures and disciplinary measures to deal with HIV related complaints in the workplace'.⁵⁴

It is clear that the Code envisages positive action on the part of employers in the elimination of unfair discrimination against employees infected with HIV/AIDS. Given the fact that in terms of s 3(c) of the EEA, it must be interpreted by taking into account 'any relevant code of good practice issued

⁵⁰ In terms of s 46(9) of the Labour Relations Act 28 of 1956, a constructive dismissal could constitute an unfair labour practice.

⁵¹ At 990A-B.

⁵² Par 2 of the Code op cit note 2.

⁵³ [2002] 4 BLLR 372 (LC) in par 19.

⁵⁴ Par 6.2 of the Code op cit note 2.

in terms of this Act', it is not difficult to imagine that an employer's failure to take these positive steps may be interpreted to be a breach of s 6(1) of the EEA. Secondly, such failure may contribute to the ease with which employees can contravene the provisions of the EEA, thus rendering the employer vicariously liable in terms of s 60 of the Act. This was the ultimate result in *Ntsabo v Real Security CC*.⁵⁵ The Court in this case referred to the Code of Good Practice on the Handling of Sexual Harassment Cases, which also provides for procedures to deal with the issue of sexual harassment. It was pointed out that the employer had not implemented 'a policy related to harassment in its operation let alone make plans in that regard'.⁵⁶ On this basis the Court concluded that this failure or omission could not serve as a veil behind which the employer could hide in order to avoid liability.⁵⁷ Likewise, a failure by an employer to develop policies, plans, and procedures as provided for by the Code of Good Practice: Key Aspects of HIV/AIDS and Employment, cannot serve as basis to exclude liability on the part of that employer for its vicarious liability for the acts of discrimination committed by its employees against their HIV-infected fellow employees.

6.2 The King Report

The obligation on employers to take positive steps to manage the effects of HIV/AIDS in an appropriate manner has two consequences. As mentioned, a failure to ensure that HIV-infected employees are not unfairly discriminated against may result in the employer having to pay potentially huge amounts in compensation to the victim of the unfair discrimination. Secondly, such a failure may have dire economic consequences for the employer's organisation. Perhaps this second threat is even more compelling than that of civil litigation. First, it is a more immediate threat. Secondly, such failure may result in the economic demise of the organisation. In 2002 the King Commission drew up a code for good corporate governance in the form of *The King Report on Corporate Governance for South Africa*.⁵⁸ It provides guidelines for South African companies wishing to implement good corporate governance practices.⁵⁹ The King Commission subscribed to the view that in a global economy, no corporation can afford to run its business without due consideration to the interests of all stakeholders.⁶⁰ This view is commonly

⁵⁵ [2004] 1 BLLR 58 (LC).

⁵⁶ At 99.

⁵⁷ Ibid.

⁵⁸ Op cit note 2.

⁵⁹ Corporate governance is defined as 'the system by which companies are directed and controlled' by the *Report of the [Cadbury] Committee on the Financial Aspects of Corporate Governance* (1992) in par 2.5. This is also the meaning ascribed to the term in this article.

⁶⁰ The *King Report* op cit note 2 in par 14 reads: 'In the global economy there are many jurisdictions to which a company can run to avoid regulation and taxes or to reduce labour costs. But, there are few places where a company can hide its activities from skeptical consumers, shareowners or protestors. In short, in the age of electronic information and activism, no company can escape the adverse consequences of poor governance.'

referred to as the 'stakeholder theory'.⁶¹ These stakeholders have been defined as 'those whose relations to the enterprise cannot be completely contracted for, but upon whose co-operation and creativity it depends for its survival and prosperity'.⁶² This includes the community in which the company operates, its customers, employees and suppliers.⁶³ Since corporations are dependent on society for their survival the necessity to conduct their affairs in an ethical and fair manner taking the interests of society in general into account is apparent.⁶⁴ For this reason, it makes no economic sense for employers to ignore the presence of HIV/Aids in the workplace. Failure to take positive steps to address the issue and to ameliorate the position of infected employees can only result in a tarnished company image and reputation which is obviously bad for business.

Even more pressing than the need for a favourable public image are the direct effects of the prevalence of HIV/Aids on the employer. The King Commission identified the following examples:

'decreased productivity, e.g. through death, sick and compassion leave; increased overhead costs, e.g. health care and insurance; reduction in the available skills base (with attendant indirect recruitment and training costs); a contracting consumer base⁶⁵ and changes in consumer spending patterns for some, predominantly retail, industry sectors; reduced profitability; and diminished investor confidence generally'.⁶⁶

Very significant and expensive internal risks for any employer include high rates of employee turnover with the attendant loss of client relationship, loss of workforce morale, reduction in productivity and increased absenteeism.

Therefore, an employer should in its own interest

'ensure that it understands the social and economic impact that HIV/AIDS will have on business activities; adopt an appropriate strategy, plan and policies to address and manage the potential impact of HIV/AIDS on business activities; regularly monitor and measure performance using established indicators; and report on all the above to stakeholders on a regular basis'.⁶⁷

The strategy and plan would obviously have to include positive measures to protect employees from harassment from their fellow employees and from all forms of unfair discrimination.

7 Conclusion

⁶¹ Gerald Vinten "Shareholder versus Stakeholder – Is There a Governance Dilemma?" (2001) 9 *Corporate Governance* 36 at 37.

⁶² The *King Report* vol II op cit note 2 in par 1.4.

⁶³ Idem in par 5.3.

⁶⁴ See Derrick de Jongh 'Know Your Stakeholders' 30 Jun 2004 *Finance Week* 34 who observes: 'In today's CNN age everything we do as individuals and companies is exposed in seconds and therefore it's so important to understand exactly who all the stakeholders are that are affected by our business and how they again affect our business on a daily basis.'

⁶⁵ According to *News 24* (Stoddard 2002), South African Breweries Ltd is experiencing a diminishing domestic consumer base as a result of HIV/AIDS-related deaths. A study conducted by the company in 2002, predicted that the sale of beer would decline by 12.58m litres in 2002 and that by 2006 it would decline by 41.68m litres as a direct result of AIDS-related deaths reducing its consumer base.

⁶⁶ See s 4, ch 4 in par 4.4 of the *King Report* op cit note 2.

⁶⁷ Idem in par 4.6.

Awards against employers as a result of their failure to take positive steps to address HIV/AIDS issues in the workplace are both potentially very high and impossible to predict with certainty. The financial repercussions of a poor public image as a result of such complacency are also impossible to calculate but nevertheless potentially very dangerous. Finally, the direct effects of HIV/AIDS mentioned by the *King Report*, such as decreased productivity, increased overhead costs, reduction in the available skills base with attendant indirect recruitment and training costs, a contracting consumer base and diminished investor confidence generally, cannot be ignored if a corporation wishes to remain in business. Given the prevalence of the HIV infection in South Africa, employers have no choice but to implement policies and strategies regarding the consequences of HIV/AIDS in order to safeguard themselves against these risks.
