

GOVERNANCE OF HIV IN THE AVIATION INDUSTRY: ANALYSIS OF MULTILATERAL LABOUR RIGHTS REGIMES

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Abstract - Denying employment to people based on their HIV status is a practice that is informed by social fears and norms, and employers have appropriated existing local and international laws to strengthen their position in refusing employment. There are discriminatory laws that inadvertently or by design deny or limit employment to people living with human immunodeficiency virus (HIV). This is especially true within the airline industry, given it is highly regulated by laws. About 50 countries have laws that regulate the entry and stay of people with HIV. The airline industry hesitates to accept people living with HIV as cabin crew citing safety regulations and international laws, and have refused work to or removed employees from positions within the company. In general, people with HIV face barriers to employment that far exceed those faced by others seeking employment. There is an exacerbated threat to people with HIV because airlines deal with multiple countries and are bound by many legal regulations that extend far beyond the legal system of any one country. The research analyses the regulations that govern the aviation industry within the context of employment. This qualitative research is aided by a constructivist approach, and exclusively uses secondary research. The cases under study in this paper are Sri Lanka in 2016 for a breach of employment law under the scope of ILO guidelines and national policies and South Africa in 2000 for breach of the South African Constitution and its Bill of Rights.

Keywords - Aviation Industry, Employment Regulations, Travel Bans for HIV

I. INTRODUCTION

Social fears result in potential employers refusing to hire people with human immunodeficiency virus (HIV). Employers appropriate existing discriminatory local and international laws to strengthen their discriminatory position. This paper analyses employment practices in

the airline industry and examines the legal background they operate in. They are faced with many binding laws that limit their recruitment of people living with HIV (PLHIV), one of which is the international law imposed by 51 countries against PLHIV entering their countries.

HIV is merely a chronic disease, easily treatable and only requiring proper management (Deeks et al, 2013; WHO publications, 2017). If HIV is a chronic disease, similar to diabetes, governments and organizations must treat PLHIV in a manner similar to those with diabetes. However, PLHIV are not given the same opportunities as people with other illnesses, based on social stigma. With 2.1 million new infections each year and a total of 36.7 million living with HIV in the world (WHO, 2016), a large population of persons who should be in the labour force are HIV-positive. The economic impact of such a loss, if they are to refrain from working, would be catastrophic. This portion of people report that employment opportunities are not guaranteed and might not be sustainable when received (Ranmuthugala, 2014). They are frequently overlooked for promotions, demoted, and not offered positions (Larsson, 2017; Young, 2014). Such discrimination is arguably illegal, but pervasive.

The International Labour Organization (ILO) and the World Health Organization (WHO) along with the Joint United Nations Program on HIV/AIDS (UNAIDS) have proposed multiple international policies on employing PLHIV (ILO, 2006; UNAIDS, 2008) that guide countries and organizations on employment concerns.

However, in the airline and navigation industries, there are also other international laws and treaties that affect the decisions taken by the airlines. Loss of employment within the airline and aviation industry is higher as airlines deal with multiple countries and are bound by their legal regulations that extend beyond the legal system of a single country (POZ and Horn, 2010). The dichotomy

of whether the industry should be held accountable for the human rights of the employee or the passengers informs the current research, which analyses the regulations on employment governing the aviation industry.

The research identifies that laws governing employment and the regulations of individual companies restrict employment for PLHIV. The paper aims to determine the practical application of labour rights within the aviation industry through an examination of the barriers and the reasons behind these barriers that PLHIV face in employment within airlines. The paper asks the question of “What are the employment and labour rules that affect the governance of HIV in the aviation industry and how do they change the tapestry of employment for PLHIV?”

II. METHODOLOGY

This qualitative research is aided by a constructivist approach, and exclusively uses secondary research. Secondary research plays a pivotal role in the analysis given the ethical considerations of speaking to PLHIV and the easy access to archival records from cases around the world. It is constructive because the researcher understands that knowledge is created within a person, and that all knowledge is subjective. It is the intention of this research to show both sides of the problem addressed, and to provide insight to both arguments. The research includes one case study of Sri Lankan Airlines (through the legal case at the Sri Lankan courts) and a seminal court case from South African Airlines. The research includes analysis of existing documents from sources such as the UN, courts from selected countries, legal cases, and other existing research on the area.

III. RESULTS

A. Sri Lankan Airlines

In October 2016, a person with HIV, hereinafter known as X (the name given at the courts), sued Sri Lankan Airlines for wrongful termination of employment, citing that his employment was terminated due to his HIV status (Dias, 2011; Sooriyagoda, 2017). The case file as submitted by Kamani Jinadasa provides the details of employment, screening, testing, and the subsequent rejection of X’s application. X filed a fundamental rights case with the Supreme Court asking to be reinstated with the airlines in the original position he applied for (cabin crew), and the Supreme Court granted this application leave to proceed (Sooriyagoda, 2017).

He had an illustrious 7-year history with Mihin Lanka (now-defunct carrier) before applying for the same position with Sri Lankan Airlines. His enrolment at Sri Lankan entailed a medical test and an HIV screening test, the results of which were made known to the Group Medical Officer of the Airlines, who then notified him that he had failed his medical test and asked him to return the staff identification material issued to him on being accepted.

He contested the decision to reject his application on three components: The decision to subject him to an HIV screening when it is not mandatory according to the “National Policy on HIV/AIDS in the world of work in Sri Lanka” (Ministry of Labour and Labour Relations, 2010), the withdrawal of the appointment, and the sharing of information such as termination and reason thereof with a third party (the medical officer of the airline). The case was won by Sri Lankan Airlines in January 2018.

The judgement against the petitioner was based on the argument that the petitioner had provided false information on the application regarding his sexually transmitted disease (Sooriyagoda, 2018). The three justices, Sisira de Abrew, Priyantha Jayawardena, and Nalin Perera, held that the employer was not at fault because of the original misinformation provided by the applicant, and that it was correct for the potential employer to withdraw the offer of employment on becoming aware that the applicant had produced misleading information. While the technicality is correct, the opposing argument then is that HIV status does not need to be made public or revealed to potential employers.

The respondent’s argument stated that he was aware that the “National Policy on HIV and AIDS in the World of Work in Sri Lanka contained policies which inter alia declared that HIV screening is not required for purposes of employment and confidentiality of his HIV status made it non-obligatory to disclose his HIV status in the said health form” (Sooriyagoda, 2018). He did not disclose to Mihin Airlines, his former employer, his HIV status in 2013 when he first became aware of it because the carrier did not ask for such information. However, he answered in the negative for the 2016 interview application for Sri Lankan Airlines. This was in keeping with the policy, but the Supreme Court held that the airline was not at fault because of the misinformation.

Herein lies the crux of the issue about disclosure and practicality: While the policy for HIV positive persons says

that they should not declare, the courts and companies work on the belief that the status must be declared. In such a situation, which law can the citizens follow? Also, after this possibly seminal case, corporate companies will have the legal backing to not only refuse employment, but to follow up on the confidential medical tests. This will result in a serious breach of privacy. This judgement is the opposite of the judgement in South Africa, as seen in the case study below.

B. South African Airlines

In South Africa, a land of nearly 19% HIV cases, Jacques Hoffman, was refused employment by the South African Airways (SAA) because of a positive HIV test (South African Legal Information Institute, 2000). He applied for the post of cabin crew and was provisionally considered suitable for employment following a four-stage selection process comprising a pre-screening interview, psychometric tests, a formal interview and a final screening process involving role-play. The provision was that the selected persons should face an HIV test. On being found HIV-positive, the respondent's report was edited to unsuitable and he was informed he could not be employed.

In the first case submitted by the respondent to the High Court, the court agreed with the airlines, saying that the practice was "based on considerations of medical, safety and operational grounds ... aimed at achieving a worthy and important societal goal" (South African Legal Information Institute, 2000). They ruled that this did not exclude the respondent from all positions within the company, but only those of cabin crew positions, and that the airlines needed to consider the perceptions about its commercial operations: They said that if the "employment practices of SAA were not seen to promote the health and safety of its passengers and crew, its 'commercial operation, and therefore the public perception about it, will be seriously impaired" (South African Legal Information Institute, 2000). They said that if any discrimination existed in this practice, that the discrimination was justifiable under s36 of the constitution. However, in the appeal he submitted in August 2000, the Constitutional Court ruled that he should be employed by the airlines (South African Legal Information Institute, 2000).

1) Utopia or reality? Utopian laws exist in many countries because law is seen to be upholding humanity's best intentions. The creators of legal systems and laws wish to make these laws Utopian but that renders it

impractical because the system can be twisted to suit any need. The law is ambiguous in some instances and judges must constantly provide meaning for the words in the law. This leads to wilful as well as unintentional misinterpretations, based on the judge's subjective understanding of the law or moral code. Thus, it is imperative that we move beyond the Utopian to a more practical system of laws that will be non-discriminatory, non-marginalizing and inclusive. A closer reading of all laws is imperative, and the changes must reflect an inclusive and modern outlook to ensure justice and rights to all.

IV. DISCUSSION AND CONCLUSION

This section attempts to analyse the two case studies through a better understanding of the religious and cultural backgrounds in each of the countries given that these socio-cultural backgrounds affect the way companies and individuals react to situations. The policies of each country are correlated with the specific case to understand the context and the discrimination.

C. Sri Lanka and Sri Lankan Airlines

Sri Lanka is a majority Sinhala-Buddhist country, where Sinhala culture and Buddhist philosophy inform all actions. With the constitution providing a favoured position to the two (Parliament Secretariat, 2015), Sinhala Buddhist ideologies are important in any understanding of the country. This translates to communal feeling, age-based respect rather than meritocracy, many taboos concerning sex, and the interests of the many over the interests of the few. Religion and morality frequently impinge on secular aspects of life.

As a state-managed entity, Sri Lankan airlines is governed by the National Policy on HIV/AIDS in the world of work and the constitution of Sri Lanka. This means that they are entrusted with providing safe environments for and safeguarding the rights of their employees with HIV, including the right to employment. It is then problematic that the Supreme Court issued a judgment in contravention of this policy. The judges emphasized that the policy could not be used to protect this particular respondent because he had previously not disclosed his status, and thus the company was unaware of his status, and so, they were not at fault for asking him to be subject to a HIV test (Sunday Times, 2018). This is a tortuous argument that adversely impacts those who are to be protected by the policy. Such a judgment is untenable. Also, the other argument of the

judges was that the respondent was “blowing hot and cold” and that such a respondent was not entitled to benefit from the court, adding that the respondent had “breached the trust with the employer” (Sunday Times, 2018). This is employer-centric and such judgments can be harmful in the long term since this allows corporate entities to breach privacy laws relating to HIV. It is also important to move sex and sexually transmitted diseases from taboo topics to socially acceptable topics to counter the belief that a sexually transmitted disease is a precluding factor for employment.

D. South Africa and South African Airlines

South Africa, by contrast to Sinhala Buddhist Sri Lanka, is a secular state where a Christian majority can be seen – especially Protestant Christianity – that encourages selfless work ethics. This is followed by Islam and Hinduism but in minority states. The urban South Africans speak English while the rural South Africans speak Afrikaans along with their native languages. The middle class is predominantly white so that there is also a racial breakdown that affects the way the society segregates.

The Constitution guarantees safety to people with HIV through a Bill of Rights (Gov.za, 2017): It says that “No employer can require that a job applicant have an HIV test before they are employed” and that “An employee cannot be fired, retrenched or refused a job simply because they are HIV positive” (KwaZulu-Natal Department of Health, 2001).

Having looked at the general background of the countries, let us now look at the specifics. What are the legal backgrounds that affect these countries’ decisions, especially in terms of employing people with HIV? There are many instances of employment issues around the world such as low hours of work; loss of employment; and discrimination at work based on gender, religion, caste, creed, and illness (Pebody, 2010; Personnel Today, 2004). But, how does the legal background specifically help or hinder those with HIV?

E. Legal background

1) Sri Lanka: The Chapter on Fundamental Rights in the Constitution of Sri Lanka, being the main document for guarantee of rights of persons, guarantees that, “inter alia, all persons are equal before the law and are entitled to the equal protection of the law [as provided in Article 12(1) of the Constitution]”, and that “no

citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds [as provided in Article 12(2) of the Constitution]; no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment [as provided in Article 11 of the Constitution] and every citizen has the right to freedom to engage by himself in any lawful occupation, profession, trade, business or enterprise [as provided in Article 14(1)(g) of the Constitution]” (Parliament Secretariat, 2015).

The constitution is backed by and made more inclusive by the addition of the National Policy on HIV/AIDS (especially as dealing with voluntary and confidential testing), the National Policy on HIV/AIDS in the world of work in Sri Lanka (advocates for “no discrimination on real or perceived HIV status, testing should not be a requirement”) (Ministry of Labour and Labour Relations, 2010), and the International Labour Organization Convention No. 111 on Discrimination (Employment and Occupation) Convention 1958 (ILO, 1958).

A national policy means that the country is governed by it: It is a piece of de jure legislation. Thus, an employer cannot make an employee take a non-mandatory HIV test, and even if a test has been taken, its contents (test results) must be kept confidential. I believe that Sri Lankan Airlines was completely in the wrong because not only did it make X take a non-voluntary HIV test, it quizzed him about his HIV status and shared information about his HIV status with a third party (group medical officer). Thus, they are in clear violation of the National Policy on HIV and AIDS. In addition, the National Policy on HIV/AIDS in the world of work in Sri Lank advocates for non-discrimination (Ministry of Labour and Labour Relations, 2010), another aspect the airlines are in violation of, given their retraction of the proffered employment contract based on the knowledge of HIV status.

Thus, the airlines have failed both policies set out to regulate companies and make the world of work more accessible and accommodating. This is because of the stigma attached to the illness that affects the attitudes of the employees within the company. Their behaviour is informed by the stigma and attitude they possess towards those with HIV, and thus, they are willing to contravene a national policy.

2) South Africa: The constitutional council upholds the word of the constitution of South Africa and its Bills of

Rights. The rights of PLHIV are protected by one such Bill of Rights (Gov.za, 2017) as mentioned previously, and this is what was upheld when the Constitutional Council decided in favour of the respondent in a case against an employee. The High Court in the first case sided with the employer citing social goals and communal security. This was a breach of the Bill of Rights that specifically sets out the rights of those with HIV as being able to hold employment free of discrimination (Gov.za, 2017). The high court argued on the medical considerations of the person: One of the arguments used frequently by employers is that those with HIV cannot carry out the same tasks as someone without HIV. Also, some argue that a yellow fever vaccination is fatal to people with HIV. However, people with HIV are able to carry out the same tasks as others because they are not physically unable to do so, and they are only at risk with the vaccine if they have reached the AIDS state. Thus, both arguments are invalid.

The High Court argued that the company must be seen to be concerned with the safety of the clientele, which is about national safety. They must balance safety with equality. This is what the Constitutional Council upheld through siding with the Bill of Rights. This allowed equality to take place while placing the onus on the company to ensure the safety of the employee and the clients. This is perfectly acceptable because the employee is able and willing to carry out his or her work and if provided a proper environment, will be able to do so. It is in the pressurizing and the criminalization that mistakes occur and illnesses increase. Thus, by ensuring that the workplace is safe and non-discriminatory, the employer ensures that the workforce and clientele are both safe.

However, is there an argument for the employer to justify his/her allegedly unfair treatment of the person with HIV? Is there a fair basis for why they behave the way they do? The following section addresses this question.

F. Argument for the employer

There are three main arguments for the reassigning of staff or rejection of employment for potential staff in the airline industry. The first is that HIV causes severe physical barriers that affect the capacity of the person to carry out their assigned tasks and this argument is used in all industries. The airline industry in particular has strict laws about physical capabilities, extending to height, weight, and appearance. Thus, the industry is able to refuse persons privileges because he or she does not meet the criteria set

out in the vacancy notices or the airlines' bylaws. These bylaws govern not only HIV, but other illnesses that may have debilitating repercussions such as asthma.

The second, and the argument with the most far-reaching results, is that an organization must ensure not only the employment of the employee but also the safety of its clients. The onus of protection and ensuring the correct conditions of work are provided to the employee lies with the employing organization. In the same vein, the protection of 3rd parties (clients) also lies with the organization. As with the case in China's budget airline (Business Insider, 2014), the organization must look into safeguarding its employee, its travellers with HIV, and travellers without HIV. Thus, the company must walk a tight rope. This leads to discriminatory practices because it is difficult to balance all three separate segments of people. One's rights might be perceived to impact another's and it is the responsibility of the airline to maintain all appearance of impartiality.

The third is that airlines are governed by international laws. With travel bans in place, some people may be refused entry because of their HIV status (HRW, 2017; HIV Travel, 2017). Also, if cabin crew includes a person with HIV, the airline can use that staff member only in certain areas that do not impose a travel ban (HIV Travel, 2017). There are some airlines that fly HIV-positive staff members within their own country or in countries with no travel ban, but this is a tax on their system because the airline must be mindful at all times not to employ him or her in any sector with travel bans in place. Thus, clearly, airlines refuse many potential employees on diverse but arguably compelling reasons such as the safety of passengers, safety of crew, physical ability of crew, and international regulations.

Having analysed both the effects of discrimination and the global instances of discrimination based on one's HIV status, known as serostatus, it is possible to arrive at some regulations that should be incorporated into government policies at the national level. There is a significant need for change in the ways laws are enforced. We cannot allow the law to be carried out to the letter rather than in the spirit it was meant. Understanding that the law is created with a Utopian mindset, hoping to guarantee basic rights to each person without discrimination, one must also understand that Utopian laws cannot be practically implemented. Also, with older laws, there is a very real possibility of the law being outdated. In addition, the law must be accommodating: The work of the law is to accommodate the population. It must be possible, not impossible to carry out.

Laws, by their mere existence, call for the breaking of laws, so it is important for the law to be easy to adhere to. They must be malleable and adaptive in changing situations, moving with the times. Thus, with each new situation (or illness), the law must adapt and change to encompass these changing situations. In addition, changing dynamics need changing strategies for enforcement of the law. However, many officials entrusted with the enforcement of the law at various levels seem to cling to older notions and are unwilling to change. This is true whether in the public sector or the private. While calling for a reduction of discrimination, especially through non-discriminatory laws, it is recommended that suggestions for redress must be shared and implemented. Those whose rights are violated must have the opportunity to have them redressed without facing backlash and further repression. Legal systems must allow and encourage the sharing of stories and must take the side of the oppressed rather than the oppressor.

However, it is also good to keep in mind that the discourse around anti-discrimination leads to a separation of PLHIV and people without HIV. Thus, PLHIV are segregated and marginalized, allowing a greater level of discrimination based on the separation. If they can be brought into the normal discourse by making HIV a normal phenomenon that does not inspire fear and is understood to be treatable (much like other chronic diseases such as diabetes or blood pressure), it is possible to make PLHIV part of the “normal,” or the heterogeneity of society. This would help make laws more inclusive and normative.

As has been shown in the two instances discussed in this paper, there is a certain imperialistic outlook and communal society feeling in these two countries that must be taken into consideration when drawing up laws. We cannot create laws for an individualistic society when these societies are communal. They will put their national safety first, attempting to safeguard the interests of the many over the interests of the one. Thus, it would be of no use to create laws that will only work within an individualistic society. These societies must investigate the social benefit aspects of any law if the law is to succeed. The need is to contextualize the laws: the laws must meet the needs of the community in which they are expected to exist. Thus, policy makers must create laws that are effective within the context of the country.

The most important question one must keep in mind is ‘how can a country protect its citizens while also prioritizing its national security?’ National security is usually paramount

in the interests of a country in modern times because of the possibility of global wars and global threats. A government is concerned with ensuring the safety of its citizens both physically and metaphysically. Thus, priority is given to national security before individual security. However, national policies are created to bridge this gap. Any national policy attempts to provide a country’s citizens with rights but also to promote the wellbeing of the entire country. Thus, policies are the bridge between national security and individual rights.

Thus, in conclusion, it is apparent that the practice of the airline industry looks at the greater good (that of the entire network – clients as well as employees and business), while the policies and constitutions address the rights of the individuals with HIV. Then, how can these two be brought together? By ensuring that the airlines follow closely the rules set out in the constitution or the national policy, and by being accommodating, the company can ensure that the spirit of the law is met rather than an unaccommodating letter of the law. It should be the airline’s intention to follow anti-discrimination laws and provide safe, secure work spaces for employees that do not jeopardize any customers or other employees. The onus rests with the employer to provide safe working conditions and non-discriminatory work spaces that allow all people the possibility to work well and to the best of their ability.

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