

Hoffmann v South African Airways 2000 (2) SA 628; 2001 (10) BHRC 571; (2000) 3 CHRLD 146

1) Reference Details

Jurisdiction: South African, Constitutional Court of South Africa

Date of Decision: 28 September 2000

Case Status: Concluded

Link to full case: <http://www.saflii.org/za/cases/ZACC/2000/17.html>

2) Facts

The appellant, Hoffman, was HIV positive. In September 1996 he applied for employment as a cabin attendant with South African Airways (SAA). He successfully completed a four-stage selection process. The appellant was found to be a suitable candidate for employment subject to a pre-employment medical examination that included a blood test for HIV/AIDS. Whilst the medical examination found the appellant to be clinically fit and, therefore suitable for employment, he was deemed 'unsuitable' due to the HIV positive test. He challenged the constitutionality of the refusal to employ him on the basis that it was unfair dismissal and violated his constitutional right to equality, human dignity, and fair labour practices. The Witwatersrand High Court dismissed Hoffman's application and he was granted leave to appeal directly to the Constitutional Court (the Court).

3) Law

National Law

- Section 9 of the South African Constitution (right to equality);
- South African Transport Services Act 65 of 1981;
- Railway Board Act 73 of 1962;
- Promotion of Equality Act and Prevention of Unfair Discrimination Act 2000

International Law referred to in the Judgement

- African Charter on Human and Peoples' Rights 1981;
- Convention on the Political Rights of Women 1953;
- International Covenant on Economic, Social and Cultural Rights 1966;
- ILO Convention 111 Discrimination (Employment and Occupation) Convention 1958;
- International Convention on the Elimination of All Forms of Racial Discrimination, 1966

4) Legal Arguments

The Appellant

The appellant argued that the refusal to employ him constituted unfair discrimination and violated his constitutional right to equality, human dignity and fair labour practises.

The Respondent

SAA justified their policy of refusing employment to HIV positive cabin attendants on safety, medical and operational grounds. In particular they argued that HIV positive cabin attendants, (i) would not be able to have yellow fever vaccinations thereby creating a risk to customers, (ii) were prone to contracting opportunistic diseases which could be transmitted to others and (iii) would not be able to perform the emergency and safety procedures required of the position.

The respondent similarly argued that it operated a similar practice in relation to other disabilities such as epilepsy, impaired vision and deafness and that the life expectancy of HIV sufferers was too short to warrant training costs. Further, they argued that the commercial operation would be affected by public perception if HIV positive cabin attendants were employed, particularly given that other airlines operated a similar exclusion policy.

5) Decision

The Majority Opinion

The Court recognised that there are four stages to the progressive HIV disease and according to the respondent's own expert medical evidence it is only at the third immunosuppressant stage that sufferers are prone to medical, safety and operational hazards. Therefore, it was not true for the respondent to assert that all HIV positive people are prone to such hazards and therefore cannot perform the work of a cabin attendant competently. In particular, given there was nothing to indicate that the appellant had reached that stage of the disease, it was not established that he posed the risks claimed.

The respondent conceded that its policy could not be justified on medical grounds and that therefore, its refusal to employ the appellant was unfair. Nonetheless, the court needed to determine whether the respondent violated any of the appellant's constitutional rights and, if so, what was the appropriate relief.

Examining this issue the Court provided that at the heart of the constitutional prohibition on unfair discrimination was the recognition that all human beings, regardless of their position in society, must be accorded equal dignity (*President of the Republic of South Africa and another v Hugo* 1997 (4) SA 1 (CC) para. 41). The determining factor regarding unfairness was its impact on the persons discriminated against and relevant considerations included the position of the victim in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim have been affected and whether the discrimination has impaired their human dignity (*Harksen v Lane NO and others* 1998 (1) SA 300 (CC)).

The Court set out that those living with HIV, including the appellant, were a vulnerable minority treated with intense prejudice by society and subjected to disadvantage, stigmatisation and marginalisation. As such any discrimination could be interpreted as a fresh instance of stigmatisation and assault on their dignity. The impact especially in the field of employment can be devastating since it denies them a right to a living, condemning them to 'economic death'.

Subsequently, the legitimate commercial interests of the respondent, important although they are, could not be allowed to justify unwarranted prejudice and stereotyping.

The Court concluded that the refusal to employ the appellant violated his right to equality as guaranteed by s. 9 of the Constitution. The Court held that the appellant, having been denied employment solely because of his HIV status should be entitled to the fullest redress available, namely reinstatement from the date of this court order.