SUMMARY

# 2014/3 Dismissal for being HIV-positive violates ECHR (GR)

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**Summary**

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**Facts**

This case was reported in EELC 2009/26. The main facts were as follows. See the 2009 report for a more detailed outline of the facts.

In February 2005, the plaintiff, Mr IB (his full name is not disclosed), informed three of his colleagues that he was HIV-positive. Soon, the entire company of about 70 employees knew about IB's medical condition. This caused anxiety among the staff. At the employer's request, a doctor explained to the staff that there was no risk of contagion, that the plaintiff was perfectly capable of continuing in his job and that there was no reason for concern. However, this explanation failed to remove the staffs' anxiety, and a group of 33 employees signed a petition to management to dismiss the plaintiff. Although management was reluctant to dismiss IB, in the end it gave in to the pressure to do so and terminated the plaintiff's contract.

The plaintiff brought legal proceedings, asking the court to declare his dismissal invalid, to order the defendant to reinstate him and to pay him compensation for lost income as well as €

200,000 for emotional loss.

**National proceedings**

The court of first instance ruled partially in the plaintiff's favour, declaring the dismissal invalid and awarding him compensation for lost salary. The plaintiff was not awarded immaterial damages nor was he reinstated, because in the meantime he had found another job. On appeal, the Athens Court of Appeal upheld the lower court's judgment, additionally awarding € 1,200 for emotional loss. It found that the staffs' anxiety was unfounded, that this had been explained adequately to them by the company doctor and that the plaintiff's infection with the non-contagious HIV virus did not stand in the way of the company's normal operations. The Court of Appeal weighed the company's need to continue operating smoothly in the face of the staff's prejudice against the plaintiff's reasonable expectation to be protected at such a difficult time for him.

The defendant company lodged an appeal with the Supreme Court. On 17 March 2009, it overturned the Court of Appeal's judgment, holding:

that the dismissal was not motivated by spite, vengeance or anger against the plaintiff;
that the dismissal was justified by the employer's need to restore peace and quiet among its staff and to maintain smooth operations;
that the other employees were seriously concerned about their health.

The Supreme Court therefore annulled the Court of Appeal's judgment and instructed that court to rehear the case. However, neither party brought the case to the Court of Appeal. As a result, the case ended in terms of Greek domestic proceedings.

**ECtHR's judgment**

On 2 December 2009, the plaintiff, represented by two (Greek) lawyers in London, brought proceedings against the Hellenic Republic (Greece) before the European Court of Human Rights (ECtHR). He alleged violation of Article 8 in combination with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the 'Convention'). Article 8(1) of the Convention provides that:

*"Everyone has the right to respect for his private and family life, his home and his correspondence."*

Article 14 provides that:

*"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

The ECtHR delivered its judgment on 13 October 2013, almost four years later. Briefly stated, it held as follows.

Applicability of Articles 8 and 14

The notion of 'private life' is broad. It can cover aspects of a person's physical and social identity, including the right to enter into and to develop personal relationships, to develop one's personality and the right to self-determination.

The plaintiff's complaint is not that the Greek national authorities intervened directly in such a manner as to result in his dismissal, but rather that they failed to protect his private life against interference by his employer. This failure engages the State's responsibility.

There can be no doubt that matters of employment and matters implicating HIV-infected persons fall within the scope of private life.

Even though the plaintiff's dismissal was motivated by the need to preserve a good working climate within the company in question, the event that triggered it was the plaintiff's announcement that he was HIV-positive.

Discrimination or account of a person's health must be considered to fall within the scope of the expression "or other status" within the meaning of Article 14.

In view of the foregoing, Articles 8 and 14 apply to the circumstances of this case.

Comparator issue

According to the ECtHR's established case-law, discrimination exists where persons in similar or comparable situations are treated differently in the absence of objective and reasonable justification.

The ECtHR finds that the plaintiff's situation must be compared to that of the other employees in the company that employed him. He was treated less favourably than any of his colleagues would have been treated, solely on account of his being HIV-positive.

**Justification**

Once a plaintiff has established the existence of different treatment, it falls upon the defendant demonstrate that the different treatment was justified. Such a justification must pursue a legitimate aim and the means adopted to achieve that aim must be proportionate. Although governments enjoy a certain margin of application, the extent thereof depends on the circumstances, the strand of discrimination involved and the context.

In its judgment in *Kiyutin – v - Russia* (application 2700/10), the ECtHR held that ignorance concerning the manner in which HIV spreads has fed prejudice and has led to stigmatisation and marginalisation of HIV-positive persons. This has made infected persons, as a group, vulnerable and that in turn reduces the State's margin of appreciation where it comes to (not) adopting measures in favour of this group.

A comparison of the legislation of thirty Member States of the Council of Europe indicates that seven of them have adopted statutes aimed specifically at protecting HIV-positive persons. Although the remaining 23 Member States have not done so, HIV-positive employees in those countries can rely on general non-discrimination law. The ECtHR references a 4 October 2000 judgment by the South African Constitutional Court in the *Hoffmann – v - South African Airways* case (CCT 17/00), as well as the following European judgments:

Tribunal correctionel de Pontoise (France), 13 December 1995, in which an employer was sentenced to five months in prison (suspended) and a fine of € 3,000 for dismissing a HIV-positive assistant veterinarian on the pretext of a business reason;

Tribunal de travail de Dendermonde (Belgium), 5 January 1998, in which an employer was held to have abused its right of dismissal when it dismissed an employee on account of him being HIV-positive;

Tribunal federal (Switzerland), case ATF 127 III 86, in which a dismissal based exclusively on the employee being HIV-positive was held to be abusive;

regional tribunal in Poltava (Ukraine) 18 October 2004, in which a newspaper owner was ordered to compensate an employee whom he had dismissed on account of being HIV-positive;

Constitutional Court (Poland), 23 November 2009, in which a ministerial regulation to the effect that HIV-positive police officers where unfit for service was declared unconstitutional;

Supreme Court (Russia) 26 April 2011, in which a provision in the Aviation Regulations

prohibiting HIV-positive pilots from flying was annulled.

The ECtHR also referenced the amendment of a Croatian police regulation that prohibited HIV-positive persons from becoming or remaining police officers.

In the case at hand, the Greek Supreme Court failed to balance the competing interests of the applicant and his former employer in a manner that takes account of the circumstances of the matter and is as thorough as the manner in which the Court of Appeal weighed those interests. Moreover, the Supreme Court based its finding on a manifestly inaccurate premise, namely the "contagious" nature of the plaintiff's affliction.

Based on the above, the ECtHR orders the Greek government to pay the plaintiff not only the sum previously awarded to him for lost income, but also € 8,000 for immaterial damages. The ECtHR's judgment became final on 3 January 2014.

**Commentary**

My commentary consists of two parts. First, I will examine how the three higher courts balanced the conflicting interests involved in this case: the Athens Court of Appeal, the Greek Supreme Court and the ECtHR. The second part of my commentary focuses on the comparator issue.

Competing interests

The Athens Court of Appeal expressly recognized that the plaintiff's HIV-positive status had no effect on his ability to carry out his work and that there was no evidence that it would lead to an adverse impact on his contract, which could have justified its immediate termination. It also recognized that the company's existence was not threatened by the pressure exerted by the employees. The employees' supposed or expressed prejudice could therefore not be used as a pretext for ending the contract of an HIV-positive colleague. In such cases, the need to protect the employer's interests must be carefully balanced against the need to protect the interests of the employee, who is the weaker party to the contract, especially where the employee is HIV-positive.

The Supreme Court, on the other hand, did not weigh up the competing interests in such a detailed and in-depth manner as the Court of Appeal. In a reasoning that was relatively short, given the importance and unprecedented nature of the issues raised by the case, it held that the dismissal had been fully justified by the employer's interests, in the correct sense of the term, since it had been decided in order to restore calm within the company and to ensure its smooth operation. Whilst the Supreme Court did not dispute the fact that the plaintiff's illness

had no adverse effect on the fulfilment of his employment contract, it nonetheless based its decision, in justifying the employees' fears, on clearly inaccurate information, namely the "contagious" nature of the plaintiff's illness. In doing so, it ascribed to the smooth functioning of the company the same meaning which the employees gave, and aligned it with the employees' subjective perception of smooth functioning.

Finally, the only issue at stake for the plaintiff before the Supreme Court was the compensation he had been awarded by the Court of Appeal, as his initial request to be reinstated in his post had been dismissed by both the first instance and appeal courts. Moreover, the Supreme Court could not speculate as to what the attitude of the company's employees would have been had it upheld the findings of the lower courts in this case, or, in particular, had legislation or well-established case law protecting HIV-positive individuals in their workplace existed in Greece.

In its 2010 judgment in *Kiyutin – v – Russia*, the ECtHR held that ignorance about how AIDS spreads has bred prejudices which, in turn, have stigmatized or marginalized those who carry the HIV virus. It therefore considered that people living with HIV are a vulnerable group with a history of prejudice and stigmatization and that Member States should only be afforded a narrow margin of appreciation in choosing measures that could single out this group for differential treatment on the basis of their HIV status. In the *I.B. – v – Greece* case reported above, the applicant's employer had terminated his contract on account of the pressure to which it was subjected by certain employees, and this pressure had originated in the applicant's HIV status and the concerns to which it had given rise among those persons. Further, the company's employees had been informed by the occupational doctor that there was no risk of infection in the context of their working relations with the applicant. In view of these simple facts, the ECtHR found that the Greek Supreme Court failed to provide an adequate explanation as to how the employer's interests outweighed those of the plaintiff and it failed to weigh up the rights of the two parties in a manner consistent with the ECHR.

**Comparator**

When EELC reported the Greek Supreme Court's judgment in 2009, comments were received from the UK, The Netherlands, Spain, Germany and Italy. The contributor from the UK, Richard Lister, made reference to a 2006 judgment by the British Employment Appeal Tribunal (the 'EAT') in the *High Quality Lifestyles – v – Watts* case. That case also concerned the dismissal of a HIV-positive employee.

The definition of direct disability discrimination in the UK Disability Discrimination Act 1995 was:

*"A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favorably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person."*

According to this definition, the comparator must satisfy two conditions which appear to conflict with each other:

(a) he must not have the particular disability which the disabled person has; and

(b) his relevant circumstances, including his abilities, must be the same as, or not materially different from, those of the disabled person.

Applying this definition in High Quality Lifestyle, the court of first instance found that the dismissal constituted direct disability discrimination, but the EAT overruled this:

*"... holding that a hypothetical comparator, who had some attribute other than being HIV positive which carried the same risk to others, would also have been dismissed".*

As I interpret this, the EAT compared the dismissed employee to a (hypothetical) person with an attribute, not being HIV or another "disability", that poses a risk of transmission to other employees similar to HIV. Let us take, for example, an employee with bird flu. Supposing that in the Greek case reported above the employer had dismissed the employee for having contracted bird flu rather than HIV, and supposing also that my interpretation of *High Quality Lifestyle – v – Watts* is correct, then the EAT would not have found the dismissal to be discriminatory on account of disability.

In 2009, in the *Stockton on Tees – v – Aylott* case[1] the England and Wales Court of Appeal followed a similar reasoning as the EAT had done in *High Quality Lifestyle*. In this case, the claimant was a disabled person with bipolar affective disorder. On his return to work after a lengthy absence, strict deadlines were imposed for his work, his performance was closely monitored, and eventually he was dismissed. The tribunal found that this treatment amounted to direct discrimination, holding that "a comparator who had a similar sickness record in respect of, for example, a complicated broken bone or other surgical problem, would not have been subjected to the same treatment". This led the tribunal to conclude that the claimant's dismissal had been on the grounds of his disability, concluding that "there was a fear of the claimant's return based on a stereotypical view of mental illness".

The EAT, however, held that the tribunal's hypothetical comparator was wrong. It noted that, for the purposes of ascertaining whether there has been discrimination on grounds of

disability, a hypothetical comparator does not have to be a "clone" of the complainant. However, it added: "In our judgment, for a meaningful comparison to be made, the hypothetical comparator should have all the attributes or features which materially affected the employer's decision to carry out the act which is said to be discriminatory". On that basis, it concluded that an appropriate hypothetical comparator for the purpose of considering whether the claimant had been discriminated against in monitoring his performance and setting deadlines, in addition to having a similar sickness absence record, would have been a person who had recently been moved to a different post and whose past behavior and performance had caused concern.

The ECtHR approaches the comparator issue differently. In its reasoning in the Greek case reported here, it held that the applicant's situation had to be compared to that of the company's other employees, since this was what was relevant in assessing his complaint of a difference in treatment. It was undisputed that the applicant had been treated less favourably than another colleague would have been, solely on the basis of his HIV-positive status.

The ECtHR does not seem to share the UK method of avoiding a conclusion of discrimination by narrowing the category of (hypothetical) comparators. I write "seem", because the ECtHR is not specific. Unfortunately, at the time of writing, only the French version of the judgment is available on the court's website. The relevant passage is (paragraph 77):

*"La Cour estime que la situation du requérant doit être comparée à celle des autres salariés dans l'entreprise car c'est celle-ci qui est pertinente pour apprécier son grief tiré de la différence de traitement. Il est certain que le requérant a été traité de manière moins favorable qu'un de ses collègues ne l'aurait été et cela, en raison de sa seule séropositivité."*

This seems to indicate that the ECtHR has not followed the comparator-reasoning that the EAT followed in *High Quality Lifestyle* and *Stockton on Tees*.

In my opinion, decisions such as *High Quality Lifestyle* and *Stockton on Tees* emasculate the concept of direct disability discrimination. Why would an employer behave any differently to an employee who had all the relevant attributes or features of HIV (but was not HIV positive), or to an employee who had all the relevant attributes or features of bipolar affective disorder (without actually having it)? He actually wouldn't. The British courts' interpretation of the comparative test required by the UK Disability Discrimination Act renders the concept of direct discrimination toothless.

It may be noted that two days after the Greek Supreme Court delivered its judgment, the Minister of Health issued a circular prohibiting dismissal based only on the fact that a person is HIV-positive.

**Comments from other jurisdictions**

*Finland (Johanna Ellonen)*: The Finnish Supreme Court ruled on the dismissal of an HIV-positive employee as early as the beginning of the 1990's in its decision KKO:1991:2. In that decision, it upheld the District Court's and Court of Appeals' decisions in which the dismissal was held to be unjustified. The case involved an employer who dismissed a waiter a couple of months after the waiter had notified the employer that he was HIV-positive. The Supreme Court held that the dismissal was mainly due to the employee being HIV-positive. The employer had failed to demonstrate that the employee's working capacity had reduced or that the employee had neglected his duties. Based on information regarding the way HIV is transmitted, the Supreme Court held that working as a waiter had not established a considerable risk for the HIV infection to transmit to other employees or to customers. The Supreme Court further found that the employer had not demonstrated that the restaurant's clientele would have become aware of the employee being HIV-positive and that this would have affected the number of clients in the restaurant. The employee was awarded a compensation for unjustified termination of employment amounting to six months' salary (the maximum being 24 months' salary). The District Court would have awarded the employee a compensation amounting to 10 months' salary but the Court of Appeal lowered the compensation to six months' salary, which the Supreme Court upheld.

The reasoning in the case is very similar to that in the ECtHR's judgment in considering the way how HIV is transmitted and whether it had reduced the employee's working capacity. Interestingly, the European Convention on Human Rights entered into force in Finland on 10 May 1990, a year before the Supreme Court's judgment.

*The Netherlands (Peter Vas Nunes)*: As it happens, the Dutch Human Rights Commission recently (31 December 2013) dealt with a case that was surprisingly similar to that of the Greek case reported above. A temporary agency employee had told three colleagues in the user company (a machinery factory) where he worked that he was HIV-positive. The user undertaking immediately terminated its contract with the temporary employment agency in respect of the "temp". The latter claimed discrimination on the grounds of disability. The user company raised a 'protection of health' defence (as per Article 2(5) of Directive 2000/78), arguing that its workers sometimes share the machines and that some of those machines have gloves fixed on them, into which a worker inserts his bare hands. Even if all regulations in the field of safety and health have been complied with, an employee can still sustain a cutting injury. This creates an unacceptable risk of a HIV-infected worker infecting others, so the user company argued. The Commission, however, ruled that the user company should have investigated that risk rather than simply assuming it existed. A protection of health defence can only be accepted where an independent expert has concluded that no reasonable

accommodation is possible to eliminate the health hazard. This applies equally to a company's own staff and to temps it has hired from third parties.

*Norway (Are Fagerhaug)*: In 1988 the Norwegian Supreme Court set aside a dismissal of a HIV-positive employee (Rt-1988-959). The case concerned an HIV-positive bartender who was fired because he was infected by HIV, and the dismissal was based on fear and other subjective considerations in relation to danger of infection of other employees and guests. The Supreme Court assumed that the bartender would not pose any real risk of infection in his work. Further, the court ruled that an unfounded fear could hardly be recognized as grounds for termination, and the Supreme Court gave the bartender right to resume his work.

Later practice has been in accordance with the 1988 Supreme Court ruling.

*United Kingdom (Bethan Carney):* The case of High Quality Lifestyles Ltd v Scott Watts UKEAT/0671/05 is still the leading UK case on the comparison exercise necessary to establish direct disability discrimination. This case concerned a support worker who was HIV positive and who provided services to individuals with challenging behaviour and learning difficulties. Service users sometimes injured support workers doing this job, including by biting, scratching, kicking and punching and it was not unknown for them to draw blood. There was therefore a (small) risk of transmission. Initially the employment tribunal found that the reason for the dismissal of the claimant was the risk of transmission and that this *automatically* meant that direct discrimination had been established. The Employment Appeal Tribunal ('EAT') criticised this approach and held that the tribunal should first have established a comparator with the same material circumstances and then have worked out if the claimant had been less favourably treated than the comparator would have been. So, if bird flu carried the same risk of transmission, had the same prognosis and affected an infected individual with symptoms that were comparable to HIV, then an employee with bird flu would be an appropriate comparator. In these circumstances, if an employer would dismiss an individual who was HIV positive but would not have dismissed the employee with bird flu, less favourable treatment (and therefore direct discrimination) would have been established.

Finally, it should be mentioned that this form of discrimination is known in the UK as 'direct discrimination' and we have two other forms of disability discrimination. The first is discrimination by not making reasonable adjustments and the second is 'disability-related' discrimination. Disability-related discrimination occurs when an employer discriminates against a disabled person for a reason related to their disability, for example, because an employee with cerebral palsy has mobility issues. It is possible to 'justify' disability-related discrimination but not direct discrimination. So, dismissing someone because they have an infectious disease would be 'disability-related' discrimination and the question of justification

would be engaged. The employment tribunal at first instance found that the employer in *High Quality Lifestyles* had committed both other types of discrimination and this was upheld by the EAT.

Footnote

[i] England and Wales Court of Appeal 29 July 2010, [2009] IRLR 548

*Subject: disability discrimination*

*Parties: I.B. – Hellenic Republic*

*Court: European Court of Human Rights*

*Date: 3 October 2013*

*Application number: 552/10*

*Internet publication: www.echr.coe.int|case law|reports of judgments and decisions| volumes 2013|cases listed alphabetically by respondent State|Greece*

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**Creator**: European Court of Human Rights (ECtHR)
**Verdict at**: 2013-10-03
**Case number**: 552/10