

**RELIGION AND CULTURE IN THE WORKPLACE: A  
BALANCING ACT OF COMPETING RIGHTS AND INTERESTS**

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## **DECLARATION**

I, Aneesa Yakoob do hereby declare that unless specifically indicated to the contrary in this text, this dissertation is my own original work and has not been submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or other qualification.

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## **ABSTRACT**

This thesis will seek to explore the effect religion and culture has in the workplace. Given the diversity of South Africa and the existence of many cultures and religions co-existing, there are bound to be conflicts in our everyday lives and the workplace is no exception. The focus of this thesis is to determine how competing rights of employers and employees are balanced in the workplace.

The courts have a critical role in performing a balancing act between an employee's right to exercise or observe their culture and religion in the workplace against the commercial rights of the employer who seek to run their business in a manner that is efficient and professional. The dissertation in Chapter One is an introduction into the topic. Chapter two will look briefly at the historical development of religion and culture in South Africa. Chapter Three will explore the statutory protection offered for the right to freedom of religion and culture in the workplace and how these are implemented. The important and established principle of reasonable accommodation will be looked at in Chapter Four. A determination into the international arena and comparative analysis will be made between South Africa and international jurisdictions in Chapter Five. The courts critical role in balancing competing rights are dealt with in Chapter Six. Chapter Seven will lastly provide concluding remarks and recommendations and will end the dissertation.

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## CHAPTER ONE: INTRODUCTION

South Africa is a place where many diverse cultures and religions attempt to co-exist harmoniously. Like the Constitution of the Republic of South Africa Act 108 of 1996 (the “Constitution”) states in its Preamble, “South Africa belongs to all who live in it, united in our diversity”. The large number of religious denominations reflect the many origins of South Africa’s population.<sup>1</sup> The workplace is a microcosm of a broader society and the need to work results in employees and employers spending a significant amount of time together in the workplace.<sup>2</sup> This inevitably results in an intermixing of religious beliefs and diversity.<sup>3</sup> The harmonious working relationship between employer and employee can soon dissipate when an employee’s religious beliefs, cultural beliefs or outward manifestations conflict with an employers’ commercial interests. The employment sphere may therefore be required to bring about a working environment conducive to cultural and religious diversity in order to maintain harmony between employer and employee.

The Constitution and various other pieces of legislation seek to regulate the diversity of individuals by prohibiting unfair dismissal and unfair labour practices particularly on the basis of religion, culture and race. It furthermore entrenches an individuals’ right to practice their religion or observe cultures freely and this extends to the workplace. These rights, as will be explored in greater detail, are not absolute thus giving rise to certain limitations placed on an employees’ fundamental rights. The reason for the limitation on an employees’ fundamental rights, are often, the competing commercial interests of an employer. An employers’ competing commercial interests will often present itself in the prescribing of a dress code or perhaps denying leave of absence to an employee on religious days to be observed by such employee. Employees’ may refuse to comply with certain rules which will be directly in contravention of their religion or may want to express their religious or cultural beliefs, in contravention of the employer’s rules or policies.<sup>4</sup> The employers’ rules or policies are imposed in order to carry out their business in a professional, effective, coordinated and efficient manner.

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<sup>1</sup> Constitution of the Republic of South Africa, Act 103 of 1996.

<sup>2</sup> R Henrico ‘Religious discrimination in the South African Workplace: Regulated regimes and flexible adjudication’ (2016) 37 *ILJ* 847.

<sup>3</sup> *Ibid.*

<sup>4</sup> C Mischke ‘Religion, Discrimination and Dismissal- Matters of faith and devotion’ (2011) 20 (9) *CLL* 81.

The question therefore is how are these competing rights balanced? How are the rights of employees to freely practice their religion balanced against the commercial interests of an employer? How is an employer to balance and maintain disciplined and orderly conduct or create a professional, efficient and cohesive environment in the workplace whilst accommodating the employees' right to practice their religion freely? To what extent can religious beliefs or practices be exercised in the workplace? What is the concept of reasonable accommodation and to what extent should it be applied?

There is a need to explore how conflicts of this nature are dealt with. Given the amount of time employees' spend at work and how intrinsic religion and culture is to an individuals' autonomy, these conflicts are bound to constantly arise within the work environment. What is of particular importance is how the courts have dealt with these conflicts thus far and from this we can extract guidelines in an attempt to resolve the problem in the future.

## CHAPTER TWO: SOUTH AFRICA'S HISTORICAL DEVELOPMENT OF RELIGION AND CULTURE

The right to freedom of religion has had a turbulent history and an intolerance towards religion has always been prevalent in society.<sup>5</sup> Discriminatory behaviour against religious faiths in South Africa date far back. Despite the pressures, religion and culture remained and in time colonial courts were permitted to apply forms of customary law as long as it was not contrary to the ideologies of humanity.<sup>6</sup>

Systems of customary law were not applied uniformly and as a result the Native Administrations Act<sup>7</sup> was enacted.<sup>8</sup> The unfairness of the non-recognition of religion and culture as forming part of a South African legal system was corrected with the confirmation of the final Constitution. The Constitution brought about a paradigm shift for religions in South Africa.<sup>9</sup> Chapter 1, Section 2 of the Constitution highlights that it is the supreme law of South Africa. Any conduct, policy or law contrary to the Constitution is invalid. The right to freedom of religion, belief and opinion contained in the Constitution was designed to bring about religious diversity.

The prohibition of unfair discrimination, particularly in the workplace, is an extremely vast and crucial area of consideration in labour law.<sup>10</sup> Discrimination is deeply rooted in South African history and in a society where racial inequality was a norm and discriminatory practices became a pervasive feature of employment relations also. Under the apartheid government, discrimination against employees were permitted and unfortunately, legally enforced. The law allowed employers to discriminate on various grounds.<sup>11</sup> Gradually discrimination on the grounds of sex, race and colour were outlawed. Thereafter discrimination on these grounds were deemed unfair labour practices. After the introduction of the Constitution in 1994 discrimination in the workplace was dealt with comprehensively. When the Labour Relations Act (the "LRA") came into existence, residual unfair labour practices were defined to include "any unfair act or omission that arises between an employer and an employee involving the unfair

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<sup>5</sup> G Van Der Schyff 'The historical development of the right to freedom of religion' (2004) 2 *TSAR* 259.

<sup>6</sup> *Ibid* 301.

<sup>7</sup> 38 of 1927 (it should be noted that the Act was repealed).

<sup>8</sup> Van Der Schyff (see note 5 above) 302.

<sup>9</sup> P Coertzen 'Constitution, charter and religions in South Africa' (2014) 14 *AHRLJ* 126.

<sup>10</sup> D Du Toit 'Protection against unfair discrimination in the workplace: Are the courts getting it right?' (2007) 11 *Law, Democracy & Development* 67.

<sup>11</sup> *Ibid*.



discrimination, either directly or indirectly, against an employee on any arbitrary ground, including but not limited to, race sex, ethnic, religion etc”.

The enactment of national legislation to prevent unfair discrimination then give rise to the enactment of the Employment Equity Act 55 of 1998 (the “EEA”) in which unfair discrimination in the workplace was dealt with in its own right. It was necessary and essential to eradicate unfair discrimination in the workplace to give effect to the principles envisaged in the Constitution and the LRA.<sup>12</sup> Section 6 of the EEA now embodies the objectives of the Constitution and LRA.

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<sup>12</sup> *Ibid* 68.

## CHAPTER THREE: STATUTORY PROTECTION OF RIGHTS

### 3.1. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

Human dignity, equality and the development of human rights are core values of South African democracy.<sup>13</sup> As was correctly emphasized in *MEC for Education, Kwazulu-Natal v Pillay*<sup>14</sup>, when interpreting any right, the courts should do so in a way that promotes human dignity, equality and freedom.

#### 3.1.1. *The right to freedom of religion and culture*

Section 15(1) of the Bill of Rights as contained in the Constitution<sup>15</sup> enshrines the right to freedom of religion and culture. *S v Lawrence; S v Negal; S v Solberg*<sup>16</sup> referred to the Canadian case of *R v Big M Drug Mart Ltd*<sup>17</sup> that defined freedom of religion as “the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination”.<sup>18</sup>

This right entailed that an individual should not be forced to act contrary to their religious rights and beliefs.<sup>19</sup>

The right to religious freedom is an important one as it invokes the idea of self-worth which forms the foundation of human dignity.<sup>20</sup> Religious and cultural rights and practices are central to human dignity which in turn is central to equality.<sup>21</sup> Persons belonging to religious communities should be able to practice their culture and religion. They should be allowed to form, join or maintain religious associations as long as they are not inconsistent with what is contained Bill of Rights.<sup>22</sup> Whilst Section 15 entrenches the right to religious freedom, Section 30 and 31 does so with culture. As explained in the case of *Pillay*<sup>23</sup> the Constitution seems to separate the two concepts. Religion can be understood as beliefs that a person may possess

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<sup>13</sup> The Constitution Act 108 of 1996; Section 1(a); Chapter 1 ; M McGregor ‘Employees’ right to freedom of religion versus employers’ commercial interests : A balancing Act in favour of religious diversity : A decade of cases’ (2013) 25 SA MERC LJ 224.

<sup>14</sup> *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) at 63.

<sup>15</sup> Act No. 108 of 1996.

<sup>16</sup> *S v Lawrence; S v Negal; S v Solberg* 1997 4 SA 1176 (CC).

<sup>17</sup> *R v Big M Drug Mart Ltd* 1985 1 SCR 295 (hereinafter referred to as the Drug Mart case).

<sup>18</sup> *Lawrence* supra note 16 at para 92.

<sup>19</sup> P De Vos ‘Freedom of religion v drug traffic control: The Rastafarian, the law, society and the right to smoke the “holy weed” (2001) 5 (1) *Law, Democracy & Development* 86.

<sup>20</sup> McGregor (note 13 above; 225).

<sup>21</sup> *Pillay* supra note 14 at 62.

<sup>22</sup> The Constitution Act 108 of 1996; Section 31.

<sup>23</sup> *Pillay* supra note 14 at 143-144.

irrespective of other peoples beliefs whilst culture can be seen as the rights of persons who belong to a religious community with other members of that community.<sup>24</sup> It is of paramount importance for there to be a degree of tolerance and accommodation if everyone is to enjoy the right to religious freedom. However in the context of the workplace the right to religious freedom often competes with and may even sometimes be outweighed by other rights.<sup>25</sup>

### 3.1.2. *The right to equality*

The right to equality finds expression in Section 9 of the Constitution and sets out that “Everyone is equal before the law and has the right to equal protection and benefit of the law”. Section 9 (2) emphasizes and states that “equality includes the full and equal enjoyment of all rights and freedoms”. The succeeding sections explicitly proscribe unfair discrimination against anyone, directly or indirectly, on the grounds of, but not limited to, religion, conscience and belief.<sup>26</sup> The right to equality and the adjunct right not to be unfairly discriminated against is regulated by national legislation.<sup>27</sup>

#### 3.1.2.1. *Formal and Substantive Equality*

There should be a distinction drawn between formal and substantive equality in that the former means likeness of treatment, treating individuals alike in similar circumstances whilst the latter necessitates that the law achieves equality of outcome even if there is inconsistency of treatment in order to achieve this objective.<sup>28</sup>

With formal equality, differences between groups and individuals on an economic and social level are not considered. With substantive equality, there is consideration of an individual or a groups social and economic circumstances when considering the right to equality in terms of the Constitution.<sup>29</sup>

When considering the two concepts in light of principles and purposes coupled with the historical burden of inequality, a formal concept of equality risks disregarding the fundamental values of the Constitution whilst a substantive notion is supportive of such core constitutional

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<sup>24</sup> *Ibid.*

<sup>25</sup> McGregor (note 13 above; 226).

<sup>26</sup> The Constitution; Section 9 (3)- 9 (5).

<sup>27</sup> R Henrico ‘South African Constitutional and Legislative Framework on Equality: How effective is it in addressing religious discrimination in the workplace’ (2015) 36 (2) *Obiter* 275.

<sup>28</sup> I Currie, J De Waal *The Bill of Rights Handbook* 6 ed. (2014) 214.

<sup>29</sup> *Ibid.*

values.<sup>30</sup> Section 9(2) makes it clear that in order to achieve equality, the substantive approach should be embraced. Substantive equality recognizes differences in a diverse society which requires accommodation.<sup>31</sup>

It appears that the Constitutional Court (the “CC”) has applied a substantive interpretation when considering the concept of equality.<sup>32</sup> The substantive approach which provides for the accommodation of diversity should in turn be looked at in the context of the right to fair labour practices accorded to employer and employee alike. The substantive approach is therefore fundamental to the concept of equality in the workplace.<sup>33</sup>

The right to equal treatment referred to in the Constitution is to be interpreted as an employees’ right not to be unfairly discriminated against by his or her employer, on the basis of religion as provided for in the EEA and the LRA.<sup>34</sup>

### 3.1.3. *The right to human dignity*

An inescapable component of equality is human dignity.<sup>35</sup> Our Constitution provides that “everyone has inherent dignity and the right to have their dignity respected and protected”.<sup>36</sup> Though the concept of human dignity has not been clearly defined, we know that to qualify for constitutional protection, human dignity requires us to acknowledge and value all members of society as diverse as they may be.<sup>37</sup> As was highlighted in the case of *Pillay*<sup>38</sup> where a quote from the case of *Ferreira v Levin NO and Others*<sup>39</sup> and *Vryenhoek and Others v Powell No and Others*<sup>40</sup> was extracted, Ackerman J stated: “Human dignity has little value without freedom, for without freedom, personal development and fulfilment are not possible. Without freedom, human

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<sup>30</sup> *Ibid* 214-5.

<sup>31</sup> Henrico (note 2 above; 851).

<sup>32</sup> S Gaibie ‘Employment Equity and Anti-Discrimination Law: The Employment Equity Act 12 years on’ (2011). 32 *ILJ* 21; *President of the Republic of SA & another v Hugo* 1997(4) SA 1(CC) 41 at para 112 where the court stated “Although the long term goal of our constitutional order [the South African Constitution] is equal treatment, insisting upon equal treatment in established inequality may well result in the entrenchment of that inequality”. Also see *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para 35.

<sup>33</sup> The Constitution Act 108 of 1996; Section 23(1); Henrico (note 2 above; 851).

<sup>34</sup> Henrico (note 27 above; 276).

<sup>35</sup> Henrico (note 2 above; 851).

<sup>36</sup> The Constitution Act 108 of 1996; Section 10.

<sup>37</sup> De Waal (note 28 above; 251).

<sup>38</sup> *Pillay* supra note 14 at para 63.

<sup>39</sup> *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC).

<sup>40</sup> *Vryenhoek and Others v Powell No and Others* 1996 (1) BCLR 1 (CC).

dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.”<sup>41</sup>

When considering discrimination disputes in the workplace based on religion, our courts may include an analysis on the impact unfair discrimination has on the complainants’ dignity.<sup>42</sup>

### 3.2. LEGISLATIVE PROVISIONS

Section 23 of the Constitution sets out labour law provisions however these are strengthened by national legislation giving effect to those constitutional rights.<sup>43</sup> Section 23 (1) of the Constitution states that “everyone has the right to fair labour practices”. The intention of the enactment of the Constitution was to regulate how state power is exercised, whilst the enactment of statutes was to give effect to basic rights as contained in the Constitution.<sup>44</sup> The EEA and LRA are the principal pieces of legislation in regulating unfair religious discrimination disputes in the workplace. There has been no code developed in the EEA or the LRA to deal with unfair discrimination.<sup>45</sup>

Employees alleging unfair discrimination must rely on the EEA. The EEA offers greater protection to employees when unfair discrimination is alleged as opposed to the basic right as contained in the Constitution<sup>46</sup>.

When a workplace conflict arises and an employees’ right to religious freedom is infringed upon, the employees right should be enforced under legislation. If an employees right is capable of being enforced under legislation then the employee is precluded from relying directly on the Constitution.<sup>47</sup> Where a statute or the common law fails to protect a basic right, only then should the Constitution be relied upon.<sup>48</sup>

The first blanket prohibition of unfair discrimination was contained in the Interim Constitution.<sup>49</sup> Discrimination in the workplace on any of the listed grounds were considered

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<sup>41</sup> *Pillay* supra note 14 at para 63.

<sup>42</sup> R Henrico ‘The role played by human dignity in religious-discrimination disputes’ (2014) 35(1) *Obiter* 25.

<sup>43</sup> De Waal (note 28 above; 474) ; The LRA; section 1 (a).

<sup>44</sup> Du Toit (note 10 above; 68).

<sup>45</sup> Henrico (note 2 above; 851).

<sup>46</sup> Du Toit (note 10 above; 68).

<sup>47</sup> De Waal (note 28 above; 474).

<sup>48</sup> Du Toit (note 10 above; 68).

<sup>49</sup> Section 8 states that “no person shall be unfairly discriminated against on any ground including a number of listed grounds such as race sex and religion”.

as an unfair labour practice. Direct<sup>50</sup> and indirect discrimination<sup>51</sup> were prohibited in the Interim Constitution.<sup>52</sup> In the case of *Hoffman v South African Airways*<sup>53</sup> the CC sought to interpret what unfair discrimination means. The LRA then sought to enact a prohibition of unfair discrimination similar to the one contained in the Constitution however applicable exclusively in the employment context. Thereafter in 1997 the EEA was enacted with defences of affirmative action and inherent requirements of a job comparable to those contained in the Constitution and the International Labour Organization Convention 111 (the “Convention 111”).<sup>54</sup> An example of discrimination is where an employer implements practice or policies which would have the effect of negatively impacting on an employee’s religious freedom or belief. Where the employer then fails to reasonably accommodate the employees’ religious belief when applying the practice, this may constitute unfair discrimination.<sup>55</sup>

### 3.2.1. *Employment Equity Act 55 of 1998*

The EEA is the primary legal instrument regulating equality in the workplace.<sup>56</sup> The EEA states that “no person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice on one or more grounds of, including ...religion, conscience, belief...culture”.<sup>57</sup> The EEA replaced the repealed item 2(1) (a) of Schedule 7 to the LRA.<sup>58</sup>

In addition, the purpose of the enactment of the EEA was to give effect to the requirements of the Convention 111.<sup>59</sup> Article 1 of the Convention 111 defines discrimination as “any distinction, exclusion or preference made on the basis of race, color, sex, religion, amongst other listed grounds which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”.

Section 2 of Convention 111 provides that “any distinction, exclusion or preference in respect of a particular job based on the inherent requirements shall not be deemed to be discrimination”.

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<sup>50</sup> Du Toits’ example of direct discrimination is the refusal to employ a person based on gender.

<sup>51</sup> Du Toits’ example of direct discrimination is giving fewer leave days to employees on fixed-term contracts where majority are woman.

<sup>52</sup> Du Toit (note 10 above; 68).

<sup>53</sup> *Hoffman v South African Airways* (2000)12 BLLR 1438 (CC).

<sup>54</sup> Du Toit (note 10 above; 68).

<sup>55</sup> R B Bernard ‘Reasonable Accommodation in the Workplace: To be or not to be?’ J (2014) 17(6) *PELJ* 2870.

<sup>56</sup> S Singlee, ‘Conscience Discrimination in the South African workplace’ (2014) 35 *ILJ* 1851; O Dupper and C Garbers ‘The prohibition of unfair discrimination and the pursuit of affirmative action in the South African Workplace’ *Reinventing Labour Law* (2012) 1 *Acta Juridica* 244.

<sup>57</sup> The EEA; Section 6 (1).

<sup>58</sup> J Grogan *Dismissal Discrimination and Unfair Labour Practices* 2 ed. (2007) 108.

<sup>59</sup> Du Toit (note 10 above; 68); The EEA; Section 3 (d).

In terms of both Convention 111 (Article 1) and the EEA, religion is one of the listed prohibited grounds. With the EEA, the use of the words unfairly or unfair means that it would, in certain circumstances, be fair to discriminate against an employee.

The liability imposed on an employer is onerous as the EEA makes reference to the words ‘no person’ thereby giving effect to the duty imposed upon the employer. The employer should seek to eliminate unfair discrimination in employment policies or practices and is therefore required to take steps necessary in promoting equal opportunity in the workplace.<sup>60</sup> There is therefore a positive obligation on employers to eliminate unfair discrimination. Where employers have failed to take cognisance of such a duty, employees have persevered in making claims on that basis.<sup>61</sup>

Henrico states that criticism has been levelled against the manner in which our courts have incorrectly and incoherently dealt with discrimination disputes in terms of the discrimination test which was set out in *Harksen v Lane*<sup>62</sup> and both the EEA and LRA should not be bypassed and should be relied on as enabling legislation in discrimination workplace disputes without relying directly on the Constitution.<sup>63</sup> Furthermore effect is given to Convention 111 which also serves to provide essential guidelines to courts when dealing with religious discrimination disputes.<sup>64</sup>

### *3.2.1.1 Unfair Discrimination in terms of the EEA*

The Act provides for the prohibition of direct or indirect discrimination against any employee in any employment practice, irrespective of the motive.<sup>65</sup> There does not have to be intention to discriminate as the discriminatory practice would be the decisive factor.<sup>66</sup> Discrimination does not involve actual prejudice to the individual complaining of the discrimination.<sup>67</sup> The courts have held that where discrimination is based on a specified ground then there is a presumption of unfairness. If based on some other ground, then the person complaining of the discrimination must establish unfairness. Section 6 of the Act indicates that the prohibited

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<sup>60</sup> The EEA; Section 5 ; Henrico (note 27 above; 281).

<sup>61</sup> Singlee (note 56 above; 1851).

<sup>62</sup> *Harksen v Lane* 1997 (11) BCLR 1489 (CC).

<sup>63</sup> R Henrico ‘Mutual accommodation of religious differences in the workplace - a jostling of rights’ (2012) 33 (3) *Obiter* 512.

<sup>64</sup> *Ibid.*

<sup>65</sup> Grogan, J *Workplace Law* 11 ed. (2014)107.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid* ; For example where an employee is denied a promotion, the employee does not lose anything as such but are denied benefits which should have been rendered to them.

grounds listed are not exclusive however discrimination falls within the scope of prohibition only if it is on a ground similar to those listed in the definition.<sup>68</sup> It is important that an employee who alleges discrimination on an arbitrary ground needs to prove that the ground is akin to the listed grounds.<sup>69</sup>

The Constitutional Court and Labour Courts have emphasized the distinction between the terms differentiation and discrimination. The CC in the landmark case of *Harksen*<sup>70</sup> stated that the determination as to whether differentiation amounts to unfair discrimination, necessitates a two stage analysis<sup>71</sup> Firstly, it should be determined whether differentiation amounts to discrimination. Secondly, if differentiation does amount to discrimination, then whether it is unfair discrimination. With a specified ground, such as religion, the unfairness is presumed.<sup>72</sup>

Where the discrimination is unfair one would have to determine whether the provision is justified in terms of the limitation clause. This approach was adopted by Labour courts in applying the discrimination clause in the EEA and has been decisively applied by the CC.<sup>73</sup> The LC judgment of *Leonard Dingler Employee Representative Council v Leonard Dingler Pty Ltd & others*<sup>74</sup> embraced the *Harksen* test as highlighted above.<sup>75</sup> The case however created some confusion. The court suggested that discrimination may be justified where the means are proportional and rational and if the object is legitimate.<sup>76</sup> This would then mean that an employer can plead fairness in order to justify the discrimination on prohibited grounds. This would be in conflict with what was purported in Convention 111, the Constitution, the LRA and EEA.<sup>77</sup> This has the effect of reducing protection available to the employees.<sup>78</sup> Later judgments removed the confusion with the CC (*Harksen* case) and LAC (*Mias v Minister of Justice & Others* (2002) 1 BLLR 1 (LAC) at para 21) re-emphasizing the distinction between ‘differentiation’ and ‘discrimination’.

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<sup>68</sup> Grogan (note 65 above; 108).

<sup>69</sup> *Ibid.*

<sup>70</sup> *Harksen* supra note 63 at para 45.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> Gaibie (note 32 above; 27).

<sup>74</sup> *Leonard Dingler Employee Representative Council v Leonard Dingler Pty Ltd & others* (1998) 19 ILJ 285 (LC).

<sup>75</sup> Gaibie (note 32 above; 28).

<sup>76</sup> *Leonard* supra note 74.

<sup>77</sup> Du Toit (note 10 above; 73).

<sup>78</sup> *Ibid.*



### 3.2.1.2. *Employment policy or practice in terms of Section 1 of the EEA*

The court in *Department of Correctional Services and another v POPCRU and others*<sup>79</sup> stated that:

“A policy that effectively punishes the practice of a religion and culture, degrades and devalues the followers of that religion and culture in society; it is a palpable invasion of their dignity which says their religion or culture is not worthy of protection and the impact of the limitation is profound. That impact here was devastating because the respondents’ refusal to yield to an instruction at odds with their sincerely held beliefs cost them their employment.”<sup>80</sup> The court further held

“A policy is not justified if it restricts a practice of a religious belief – and by necessary extension, a cultural belief - that does not affect an employees’ ability to perform his duties nor jeopardise the safety of public or other employees nor cause undue hardship to the employer in a practical sense”.<sup>81</sup>

### 3.2.1.3. *Causal Link between differentiation and prohibited ground*

In terms of both Convention 111 and the EEA, religion is listed as a prohibited ground for discrimination. It is important that there exists a causal link between differentiation and the prohibited ground.<sup>82</sup> In the context of litigation, this means prohibitive burdens of proof particularly with regards to the link between differentiation and the ground of discrimination.<sup>83</sup>

In *Lewis v Media 24 Ltd*<sup>84</sup> the court held that the employee failed to establish a link between differential treatment between employees and the listed grounds.<sup>85</sup> The court held that it is not enough to allege discrimination on the mere fact that the employee is Jewish and was required to work on Saturday which is the Jewish Sabbath unless the employee proves that the employer made him work merely because he is Jewish. By considering the evidence it was established that the employer had no knowledge that the employee was Jewish. The employer therefore did not commit any discriminatory act.<sup>86</sup>

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<sup>79</sup> *Department of Correctional Services and another v POPCRU and others* 2013 4 SA 176 (SCA).

<sup>80</sup> *Ibid* at para 22.

<sup>81</sup> *Ibid* at para 25.

<sup>82</sup> Dupper (note 56 above; 244).

<sup>83</sup> *Ibid* 246.

<sup>84</sup> *Lewis v Media 24 Ltd* (2010) 31 ILJ 2416 LC.

<sup>85</sup> *Ibid* 45.

<sup>86</sup> *Ibid* 124.

#### *3.2.1.4. Burden of proof of employer and employee*

In unfair discrimination matters, the onus of proving discrimination rests on the employee however once the onus is discharged it then shifts to the employer where he would be required to establish that he has not acted unfairly.

Where a dispute arises under section 6 (1) of the EEA, the burden of proof is regulated in section 11 of the Chapter which states that “whenever unfair discrimination is alleged in terms of the Act, the employer against whom the allegation is made must prove on a balance of probabilities that such discrimination did not take place as alleged or is rational and not unfair or otherwise justifiable”. A burden is therefore imposed on the employer when rebutting a claim of unfair discrimination on the grounds of religion of disproving that the discrimination had taken place. Alternatively the employer is required to prove on a balance of probabilities that the act was fair or justified and rational.<sup>87</sup>

#### *3.2.2. Labour Relations Act 66 of 1995*

##### *3.2.2.1. Unfair Discrimination in terms of LRA*

In the ordinary sense people would be discriminated against unfairly when they are denied privileges or rights that have been given to others.<sup>88</sup>

In terms of Section 187 “a dismissal will be automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is, ... that the employer unfairly discriminated against the employee, directly or indirectly, on any arbitrary ground, including but not limited to ... religion, conscience belief and culture”.<sup>89</sup> In terms of Section 187 (2) (a)<sup>90</sup>, a dismissal based on an inherent requirement of the particular job, may be fair. If a dismissal is in terms of one of the specified categories as set out in the LRA then it is regarded as being automatically unfair.

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<sup>87</sup> Henrico (note 2 above; 853).

<sup>88</sup> Grogan (note 65 above; 107).

<sup>89</sup> The Labour Relations Act; Section 187 (1) (f).

<sup>90</sup> Labour Relations Act 66 of 1995.

### 3.2.2.2. *Causal Link and Burden of proof in terms of the LRA*

An employee dismissed in terms of Section 187 (1) (f) would be required to discharge the onus on a balance of probabilities of proving unfair discrimination on the basis of religion. A causal link needs to exist between the reasons for the dismissal as prohibited and the circumstances surrounding the dismissal. Once this is established and the court is satisfied that a causal link does exist then a rebuttable presumption of unfairness arises. The onus rests on the employer to show that the dismissal was fair as the requirement was an inherent requirement of the job or that accommodating the employee's religion would cause an undue hardship on the employer.<sup>91</sup> Where the employer is unable to provide any justification, then the employee would succeed in terms of the Section.

### 3.3. *Direct and indirect discrimination in terms of both LRA and EEA*

Both the LRA and the EEA prohibit direct and indirect unfair discrimination in terms of the Convention 111. The prohibition of direct and indirect discrimination is put in place to ensure that discrimination in every respect and form is covered by both specified and unspecified grounds.<sup>92</sup>

Direct discrimination can be defined as less favourable or unequal treatment on a specified ground. Direct discrimination is said to occur when adverse action is taken against a person because that person possesses a characteristic of a specified ground or comparable attribute. Direct discrimination would be considered as intentional.<sup>93</sup>

With indirect discrimination, a practice may appear to be fair in nature however it is in fact discriminatory in operation. Grogan describes indirect discrimination as "occurring when seemingly objective or neutral barriers exclude members of particular groups because members of those groups happen to be unable to surmount the barriers."<sup>94</sup> Indirect discrimination can either be intentional or unintentional. There is also no onus on the employee to prove that he suffered a loss or was prejudiced.<sup>95</sup>

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<sup>91</sup> Henrico (see note 27; 281).

<sup>92</sup> Gaibie (note 32 above; 32).

<sup>93</sup> Grogan (note 65 above; 108).

<sup>94</sup> *Ibid*; Grogan provides an example of an indirect discrimination- where a height or weight requirement that would exclude all but a tiny minority of women.

<sup>95</sup> Grogan (note 65 above; 109).

In the *Department of Correctional Services and another v Police and Prison Civil Rights Union and others*<sup>96</sup> case, the LAC highlighted that the test to establish unfair direct discrimination on the grounds of religion and culture is whether the enforcement of the rule that prohibits the wearing of dreadlocks interfered with the applicants “participation in or practice or expression of their religion or culture”.<sup>97</sup>

### 3.4. Defences To Discrimination

#### 3.4.1. Introduction

With a case for discrimination the employer would firstly have to prove the act or omission did not amount to unfair discrimination. Employees would be tasked with proving that the discrimination did occur.<sup>98</sup>

Once unfairness of discrimination is established in terms of the EEA, the process moves to the justification process. The employer is required to prove and establish that its conduct although discriminatory is not unfair.

In terms of Section 6 of the EEA the employer would have two opportunities for the justification of the discrimination complained of. First is a general defense of fair discrimination as set out in the *Harksen* case and secondly is the two specific defenses as set out in the EEA. Section 6 (2) states that “it is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job”.<sup>99</sup> The case of *Leonard Dingler*<sup>100</sup> differed from the *Harksen* enquiry in that it dealt with fairness and justification in one process. Gaibie argues that the collapsing of the fairness and justification enquiries is incorrect as the CC has consistently applied the *Harksen* test in this manner.<sup>101</sup>

The case of *SATAWU obo Finca v Old Mutual Life Assurance Company (SA) Ltd & Another*<sup>102</sup> established the ruling where the EEA is also applicable to unfair discrimination committed by one employee to another. A defence would arise where the discrimination complained of was

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<sup>96</sup> *Department of Correctional Services and another v Police and Prison Civil Rights Union and others* 2011 32 ILJ 2629 (LAC).

<sup>97</sup> *POPCRU* supra note 96 at para 24 ; B Grant ‘When men wear dreadlocks to work – *Department of Correctional Services v POPCRU* [2012] 2 BCLR 110 (LAC)’ (2012) 33(1) *Obiter* 181.

<sup>98</sup> Grogan (note 65 above; 117).

<sup>99</sup> The EEA; Section 2.

<sup>100</sup> *Leonard* supra note 74 at para 295; Gaibie (note 32 above; 29).

<sup>101</sup> Gaibie (note 32 above; 29).

<sup>102</sup> *SATAWU obo Finca v Old Mutual Life Assurance Company (SA) Ltd & Another* (2006) 8 BLLR 737 (LC).

perpetrated by another employee and not the employer himself. There is an onus on the employer when the conduct is brought to his attention to consult all relevant parties. The employer must, in addition, take steps to eliminate the discriminatory conduct in order to comply with the Act.<sup>103</sup> The employers' failure to do so where the employee has contravened the provision, will be deemed to also be a contravention of the provision by the employer.<sup>104</sup> However this would not be the case "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 the Act".<sup>105</sup>

The other defence available to the employer is to prove that even though the act or omission amounted to discrimination, it was fair.<sup>106</sup>

### 3.4.2 *Fair Discrimination*

The onus of proving that the act amounting to discrimination was fair rests of the employer.<sup>107</sup> The employer has to satisfy the court that the alleged discrimination does not amount to discrimination as contemplated in the Act but rather differentiation.<sup>108</sup> The employer would be required to prove that the discriminatory act was rational and was fair or justifiable.

### 3.4.3. *Inherent Requirements of the Job*

Section 2 of Convention 111 provides that "any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination". This aspect of the Convention has been adopted in the EEA in Section 6 (2) (b) which states that it would not be considered as unfair discrimination "to distinguish, exclude or prefer any person on the basis of on an inherent requirement of a job".

The Labour Relations Act states as follows:

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<sup>103</sup> The EEA; Section 60 (1) & (2).

<sup>104</sup> The EEA; Section 60 (3).

<sup>105</sup> The EEA; Section 60 (4).

<sup>106</sup> Grogan (note 65 above; 118).

<sup>107</sup> Section 11 of the Act states: "Whenever unfair discrimination is alleged in terms of the Act, the employer against whom the allegation was made must establish that it is fair".

<sup>108</sup> Grogan (note 65 above; 118).

“Despite subsection 187 (1) (f) <sup>109</sup>a dismissal may be fair if the reason for the dismissal is based on an inherent requirement of a particular job”. <sup>110</sup>

The term ‘inherent’ can be interpreted as “existing in something, a permanent attribute or quality, forming an element, especially an essential element, or something essential”. <sup>111</sup> Grogan defines the term as relating to “the possession of a particular personal physical attribute which must be necessary for effectively carrying out the duties attached to a particular position”.<sup>112</sup>

Inherent requirements of a job are requirements which, if removed from the job, would have the effect of dramatically altering the nature of the job. <sup>113</sup>

In *Dlamini & others v Green Four Security* <sup>114</sup> the Applicants brought the matter before the Labour Court averring that they had been discriminated against on the basis of religion and that, in terms of Section 187 (f) of the LRA, their dismissal was automatically unfair.

The court had to determine whether the workplace rule requiring employees to be clean-shaven was an inherent requirement of the job and justified as this was one of the issues in dispute for determination. An inherent requirement of the job may still be considered discriminatory if there was no reasonable accommodation or adjustment of the rule when there is a duty to do so. <sup>115</sup>

The court stated that it is an established rule that “the more serious the impact of the workplace rule on the freedom of religion, the more persuasive or compelling the justification must be”.<sup>116</sup> The employees did not dispute that neatness was an inherent requirement of a job however they disputed that having an untrimmed beard was untidy. The court had to therefore decide whether the untrimmed beard was neat or not. <sup>117</sup>The court held that the Respondents rule was neither arbitrary nor irrational and that the effect of the rule would have had a greater impact had the

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<sup>109</sup> Section 187 (1) (f) provides that “dismissal is automatically unfair ...if the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly on an arbitrary ground including but not limited to ...religion”.

<sup>110</sup> The LRA; Section 187 (2).

<sup>111</sup> D DuToit *Labour Relations Law -A comprehensive guide* 4 ed (2006) 569.

<sup>112</sup> Grogan, J *Workplace Law* 11 ed. (2008) 295 – 296.

<sup>113</sup> A Rycroft ‘Inherent requirements of a job’ (2015) 36 *ILJ* 900.

<sup>114</sup>*Dlamini & others v Green Four Security* (2006) 11 BLLR 1074 (LC).

<sup>115</sup> *Ibid* 13.

<sup>116</sup> *Ibid* 38.

<sup>117</sup>*Ibid* 58.

Applicants not practiced their religion so flexibly.<sup>118</sup> The courts concluded that the workplace rule was an inherent requirement and was justified.<sup>119</sup>

In *POPCRU*<sup>120</sup> the Department failed to prove that its policy had any impact on the way in which the employees had performed their duties. As a result it could not be established as an inherent requirement of the job. It is not always the case that compliance with a particular dress code is not seen as an inherent requirement, as was the case in *POPCRU*<sup>121</sup>. It is of utmost importance that adjudicators seek to determine whether a requirement is essential to achieve a job purpose as the concept is a defence against the allegations of dismissal.<sup>122</sup>

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<sup>118</sup>*Ibid* 62.

<sup>119</sup> *Ibid* 66-67.

<sup>120</sup> *POPCRU* supra note 79.

<sup>121</sup> *Ibid*.

<sup>122</sup> Rycroft (note 113 above; 906).

## CHAPTER FOUR: REASONABLE ACCOMODATION IN THE WORKPLACE

### 4.1. INTRODUCTION

The right to freedom of religion is one that is fundamental and is enshrined in the Constitution.<sup>123</sup> The concept of freedom of religion encapsulates the right to practice ones religion without fear of any hindrance or reprisal and to be able to express that belief publicly.<sup>124</sup> It allows one to practice their religion without any intrusion from other individuals and the state.<sup>125</sup>

A question that often gets asked in the context of labour law is to what extent can freedom of religion be exercised in the workplace. Should the employee be expected to leave their religious practices and beliefs behind when entering the workplace? Surely this should not be the case as religion is an essential and intrinsic element of a person's identity.<sup>126</sup> Additionally how can employers conduct their workplace environment in a manner that has order and that is efficient whilst at the same time seeking to accommodate their employees' religious rights and freedoms?

The courts have been instrumental in balancing the rights of both employer and employee and adopting the thinking that religious intolerance and the adoption of policies that are rigid would ultimately hamper the right to freedom of religion.

### 4.2. CONCEPT OF REASONABLE ACCOMMODATION

The EEA defines reasonable accommodation in Section 1 as "any modification or adjustment to a job or working environment that will enable the employee from a designated group to have access to, or participate in employment". The EEA addresses the concept of reasonable accommodation from the perspective of disability, however it can be applied in terms of religious discrimination disputes.

In the case of *Pillay*<sup>127</sup> the Constitutional Court stated that "reasonable accommodation is most appropriate where... discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose, but which nevertheless has a marginalizing effect on certain

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<sup>123</sup> The Constitution; Section 15.

<sup>124</sup> *Lawrence* supra note 16 at 92; De Waal (note 28 above; 339).

<sup>125</sup> Bernard (note 55 above; 2870).

<sup>126</sup> *Ibid* 2871.

<sup>127</sup> *Pillay* supra note 14.



portions of society. Second the principle is particularly appropriate in specific localized contexts, such as an individual workplace or school where a reasonable balance between conflicting interests may more easily be struck”.<sup>128</sup>

The concept of reasonable accommodation has been explored in several labour cases and the courts have provided a level of certainty for future reference.

#### 4.3. EMPLOYERS DUTY TO ACCOMMODATE

In South Africa it has been established by case law that there is a certain duty that rests on an employer to reasonably accommodate diversity in the workplace. Employers shouldn't experience undue hardship when doing so.<sup>129</sup>

In the case of *POPCRU*<sup>130</sup> the court addressed the issue of reasonable accommodation in the workplace.

The court in dealing with the issue of reasonable accommodation stated that “diversity is an exercise in proportionality bearing upon the rationality of the means of achieving the legitimate purpose of the prohibition”.<sup>131</sup> The court made reference to the case of *Pillay*<sup>132</sup> highlighting the Constitutional Courts continuous expression for the need for reasonable accommodation. The court warned against employers placing restrictions on religious and cultural practices where employees have “the burdensome choice of being true to their faith at the expense of being respectful of the management prerogative and authority”.<sup>133</sup>

The court correctly and importantly highlighted,

“While I accept the importance of uniforms in promoting a culture of discipline and respect for authority, we live in a constitutional order founded upon a unique social and cultural diversity which, because of our past history, deserves to be afforded special protection. It is doubtful that the admirable purposes served by uniforms will be undermined by reasonable accommodation of that diversity by granting religious and cultural exemptions where justified.”<sup>134</sup>

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<sup>128</sup> *Ibid* 78.

<sup>129</sup> Bernard (note 55 above; 2880); *Pillay, Dlamini, Popcru* and *Kievits* cases establish the employers' duty to accommodate).

<sup>130</sup> *POPCRU* supra note 79.

<sup>131</sup> *Ibid* 43.

<sup>132</sup> *Pillay* supra note 14.

<sup>133</sup> *POPCRU* supra note 79.

<sup>134</sup> *Ibid* 49.

The court in *POPCRU* held that the employers refusal to reasonably accommodate diversity resulted in a prohibition which was discriminatory was “unfair, disproportionate and overly restrictive”.<sup>135</sup>

#### 4.4. EXTENT OF THE DUTY TO ACCOMMODATE

In dealing with the concepts of the duty to accommodate, the courts are required to determine the extent to which the obligation applies. The court is required to evaluate “any impairment to the dignity of the complainants, the impact upon them, and whether there are less restrictive and less disadvantageous means of achieving that purpose”.<sup>136</sup> The employer has to show a link between the discriminatory measure and purpose. In the LAC decision of the *POPCRU* case the court held that there was no connection between the purpose and the measure. Furthermore it was not shown that the Department would suffer a burden which was unreasonable if it granted an exemption to the employees. As a result the Appeal had to fail.

In the case of *Christian Education South Africa v Minister of Education*<sup>137</sup> the court emphasized that the state should, wherever possible, avoid placing intensely painful and burdensome choices on individuals to either choose their religious and cultural practices or abiding by the law.<sup>138</sup>

There is therefore a need for society to act positively in accommodating diversity. It may be as simple as granting exemptions from a rule or even the modification of buildings or reasonable monetary loss being incurred.<sup>139</sup> The court in *Pillay*<sup>140</sup> looked into the extent of the duty to accommodate and comparatively viewed different positions taken in international jurisdictions. In both Canada and United States the term ‘undue hardship’ has been adopted as the test for reasonable accommodation. However the United States Supreme Court of Appeal has held that in order to accommodate a person’s religion the employer need only incur a *de minimus* cost.

The Canadian Supreme Court on the other hand has declined that standard. It has emphasized that more is required than just a mere negligible effort. The court stated that the Canadian

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<sup>135</sup>*Ibid* 51.

<sup>136</sup> *Ibid* 43; Bernard (note 55 above; 2880).

<sup>137</sup> *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC).

<sup>138</sup> *Ibid*.

<sup>139</sup> *Pillay* supra note 14 at para 75.

<sup>140</sup> *Pillay* supra note 14.

approach is in line with the South African Constitutional order however reasonable accommodation will be looked at on a case by case basis and will depend on the set of facts presented to court and the question will be a contextual one in line with the values and principles underlying the Constitution<sup>141</sup>

The court in *Pillay* went on to highlight that a person who merely adheres to a religious or cultural practice but is willing to sacrifice the practice if required to do so cannot demand the same accommodation as those who strictly adhere to the belief and whose identity will be undermined.<sup>142</sup> The court cited *Christian Education* case which held that

“It is true that to single out a member of a religious community for disadvantageous treatment would, on the face of it, constitute unfair discrimination against that community. The contrary, however, does not hold true. To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views.”<sup>143</sup> If accommodating a religious practice becomes unreasonably burdensome on an employer then it may refuse to make an allowance for the practice.<sup>144</sup>

*Dlamini & others v Green Four Security* in dealing with the issue of reasonable accommodation, established that the onus was on the Respondents to show that it had attempted accommodating the employees. The court held that whether the respondents attempted accommodating the employees or not was irrelevant as that was not the basis for the dismissal. Furthermore the Applicants indicated that had the employers granted an accommodation they still would not have accepted it as it was against their religion to trim their beards and this was a firm belief of the Applicants.<sup>145</sup>

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<sup>141</sup> *Pillay* supra note 14 at para 76.

<sup>142</sup> *Ibid* 86.

<sup>143</sup> *Ibid* 103.

<sup>144</sup> *Ibid* 107.

<sup>145</sup> *Dlamini* supra note 114 at para 70.

## CHAPTER FIVE: INTERNATIONAL JURISDICTION AND COMPARATIVE ANALYSIS OF FOREIGN JURISDICTIONS

### 5.1. INTRODUCTION

For many years South Africa has adopted a comparative law approach to foreign precedent and international law.<sup>146</sup> In the case of *S v Makwanyane*<sup>147</sup> Chaskalson pointed out that

“ In dealing with comparative law we must bear in mind that we are required to construe the South African Constitution and not an international instrument or the constitution of some foreign country, and this has to be done with due regard to our legal system, history and circumstances having regard to our own Constitution. We can derive assistance from public international law and foreign case law however but we are in no way bound to follow it”.

In order to evolve the South African approach to the constitutional rights to religious and cultural freedom it can be useful in assessing the ways other legal systems have dealt with such issues. The courts use of foreign and international law in the area of religion is particularly noteworthy.<sup>148</sup> The case of *S v Lawrence, S v Negal, S v Solberg*<sup>149</sup> adopted the Canadian definition of freedom of religion.<sup>150</sup> This definition has been recognized by the CC on various occasions.<sup>151</sup>

Judge Sachs in this judgement emphasized that the use of foreign jurisdiction is needed in order to develop legal doctrines in South Africa however its use should be limited and used in context. He cited as follows:

“In *Prinsloo v Van Der Linde and another*<sup>152</sup> this Court cautioned against the simplistic transplantation into our jurisprudence of formulae modes of classification and legal doctrine developed in other countries where the constitutional texts and socio- historical situations were different from ours. ... If I draw on statements by certain United States Supreme Court Justices, I do so not because I treat their decisions as precedents to be applied by our courts but because their *dicta* articulate in an elegant and helpful manner problems which face any modern court... Thus though drawn from another legal culture,

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<sup>146</sup> C Rautenbach ‘The South African Constitutional Courts use of foreign precedent in matters of religion: without fear or favour’ (2015)18(5) *PELJ* 1546.

<sup>147</sup> *S v Makwanyane* 1995 3 SA 391 (CC) at para 39.

<sup>148</sup> Rautenbach (note 146 above; 1550).

<sup>149</sup> *Lawrence* supra note 17.

<sup>150</sup> C Rautenbach (note 146 above; 1554); *Drug Mart* supra note 17 at 92.

<sup>151</sup> In *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC) the Canadian *Drug Mart* case was cited for its definition of freedom of religion.

<sup>152</sup> *Prinsloo v Van Der Linde and another* 1997 3 SA 1012 (CC).

they express values and dilemmas in a way which I find most helpful in elucidating the meaning of our own constitutional text.”<sup>153</sup>

In *Pillay*<sup>154</sup> Justice Langa in evaluating the application of ‘reasonable accommodation’ considered how the United States and Canada applied the test for reasonable accommodation.

## 5.2. UNITED STATES

### 5.2.1. Introduction

The Congress in the United States passed the Title VII of the Civil Rights Act of 1964 which sought to eradicate religious discrimination in the workplace.<sup>155</sup> This piece of legislation sought to regulate employment relations by preventing employers from discriminating and “limiting, segregating or classifying his employees in any way which would deprive any individual from opportunities, adversely affect his status as an employee because of his or her religion.”<sup>156</sup>

### 5.2.2. Reasonable Accommodation

Despite these laws protecting employees, the question that remained was whether there was a duty that existed on the part of the employer to actively accommodate religion in the workplace. It would appear that case law held that there was indeed a positive obligation on employers to accommodate employees.

Religion means “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employees religious observance or practice without undue hardship on the conduct of the employer's business”.<sup>157</sup>

The burden of proof would therefore shift on the employer once a need for accommodation is asserted by the employee.

The introduction of the definition of religion now places a positive duty on employers to accommodate religion in the workplace in the United States.

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<sup>153</sup> C Rautenbach (note 146 above; 1555) ; *Lawrence* supra note 17 at para 141.

<sup>154</sup> *Pillay* supra note 14.

<sup>155</sup> R J Friedman ‘Religious Discrimination in the workplace: The persistent polarized struggle’ (2008) 27(1) *Midwest BLSA L.J* 29; The statute states: “it shall be an unlawful employment practice for an employer to discriminate against any individual with respect to his religion”.

<sup>156</sup> Friedman (note 155 above; 30).

<sup>157</sup> Friedman (note 155 above; 31).

In the case of *Thomas v Review Board of Indiana Employment Security Division*<sup>158</sup> the Supreme Court found in favour of the employee and granted unemployment compensation as requested by the employee. The employee did not want to deal with the production of weapons as he believed it violated his religious beliefs. Similarly in the case of *Frazer v Ill. Department of Employment Security*<sup>159</sup> the court decided in favour of the employee. The employee refused to accept a job assignment requiring him to work on Sundays which violated his religious rights. The court held that it was satisfied that employees had sincerely held beliefs.<sup>160</sup>

In *Equal Employment Opportunity Commission v Remedial Education and Diagnostic Services Inc.*<sup>161</sup> the court held that the wearing of a headscarf by a woman of the Islamic faith “was protected despite the fact that the covering failed to satisfy the doctrinal requirements of the Islamic faith”.<sup>162</sup>

In *EEOC v Ilona of Hungary, Inc*<sup>163</sup> the employee admitted that she is not a religious person and didn’t observe Jewish holidays. Despite these admissions, the court held that the employee requesting time from work for the Jewish holiday, Yom Kippur, was a genuine manifestation of her religious faith.<sup>164</sup> From the above cases we see that the court readily accommodates and accepts the employee’s religious practices without second-guessing whether the practice is indeed a sincere one.<sup>165</sup> The burden of proof required by the employee to prove his or her sincerity of religious belief is low.<sup>166</sup>

As stated above, the definition of religion placed a duty on employers to accommodate religion in the workplace, unless the employer demonstrates undue hardship that would be experienced in accommodating the employee. This results in the burden shifting back to the employee where it remains.<sup>167</sup> The United States adopts a three step approach as a test for the evaluation of religious accommodation for an employee. Firstly the employees’ religious belief must be sincere. Secondly, where there is conflict between an employees’ job responsibility and

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<sup>158</sup>*Thomas v Review Board of Indiana Employment Security Division* 450 U.S. 707 (1981).

<sup>159</sup>*Frazer v Ill. Department of Employment Security* 489 U.S. 829 (1989).

<sup>160</sup> Friedman (note 155 above; 33).

<sup>161</sup> *Equal Employment Opportunity Commission v Remedial Education and Diagnostic Services Inc.* 759 F sup 1150.

<sup>162</sup> Friedman (note 155 above; 33).

<sup>163</sup> *EEOC v Ilona of Hungary, Inc* 108 F. 3d 1569 (7<sup>th</sup> Cir. 1996, modified on rehearing Mar 6, 1997).

<sup>164</sup> Friedman (note 155 above; 34).

<sup>165</sup> *Ibid* 33.

<sup>166</sup> *Ibid* 34.

<sup>167</sup> Friedman (note 155 above; 35).

religious observance, the employee must communicate this to the employer. Thirdly an employee must establish that if he is not accommodated by the employer, he will endure hardship.<sup>168</sup> If the employee meets the test then an employer is required to reasonably accommodate the employee. The exception however is if the employer demonstrates an undue hardship then he is not required to accommodate the employee.

Undue hardship has been said to constitute any monetary cost above *de minimus*.<sup>169</sup> This differs from the Canadian and South African approach which prescribes more than a minor effort to accommodate. The court in *Webb v City of Phila*<sup>170</sup> has also found that a female officer who wore a headscarf could result in hardship on the employer as it was contrary to the dress code of police officers.<sup>171</sup> Damage done to an employer's image could also meet the *de minimus* standard of undue hardship.<sup>172</sup>

The concept of undue hardship was dealt with in *Trans World Airlines Inc. v Hardison*<sup>173</sup> The plaintiff requested that he be given time off from his job as a stores clerk because of the Sabbath which required him to refrain from working from sundown Friday to sundown Saturday. His employer refused to grant him accommodation. The court held that to require the employer to endure more than a *de minimus* cost in order to give the employee off on Saturdays constituted an undue hardship.<sup>174</sup> The case resulted in implications for employees exercising their religious rights and leaves employees in a vulnerable position.

### 5.3. CANADA

#### 5.3.1. Introduction

The introduction of the Canadian Charter of Rights and Freedoms which forms part of the Constitution, 1982 (the "CCRF") resulted in the protection of religious freedom.

Section 2 which emphasizes religious freedom and states:

"Everyone has the following fundamental freedoms

- (a) Freedom of conscience and religion"

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<sup>168</sup> *Ibid* 36.

<sup>169</sup> V David 'Chapter 287:Religious Accommodation for Employees' (2013) 680 (44) *Mc George L Rev.* 691.

<sup>170</sup> *Webb v City of Phila* 562 F.3d 256, 261-62 (3d Cir. 2009).

<sup>171</sup> David (note 169 above; 691).

<sup>172</sup> *Cloutier v Costco Wholesale Corp* 390 F. 3d 126, 136 (1<sup>st</sup> Cir. 2004) ; David (note 169 above; 691).

<sup>173</sup> *Trans World Airlines Inc. v Hardison* 432 U. S 63 (1977).

<sup>174</sup> Friedman (note 155 above; 36-37).

Section 15(1) also provides for religious freedom and states that “every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on... religion”.

The Supreme Court of Canada interprets freedom of religion under the CCRF to include the freedom to express ones religious beliefs.<sup>175</sup> In the case of *Syndicat Northcrest v Amselem*<sup>176</sup> the SCA held when it comes to an infringement of a person’s freedom of religion, a claimant must establish that the belief in the practice is sincere and there is a link or nexus with religion. Furthermore the interference by the state results in him or her not being able to act in accordance with the belief or practice. It was further stated that the religious practice or belief must not be “fictitious, capricious or an artifice”.<sup>177</sup>

In *Multani v Commission scolaire Margeurite- Bourgeouys*<sup>178</sup> the court was tasked with determining a student’s right to demonstrate a religious practice by wearing a *kirpan* (ceremonial dagger). The court stated that it is not necessary for the student to establish that the *kirpan* is not a weapon. The student needed to demonstrate that his “personal and subjective belief in the religious significance of the *kirpan* is sincere”.<sup>179</sup>

When assessing a constitutional regulation of religion in the workplace the court will have to interpret the scope of freedom of religion and conscience<sup>180</sup> and the equality guarantee<sup>181</sup> within the reasonable limits provision in terms of Section 1 of the Charter.<sup>182</sup>

The courts have developed a proportionality test in applying the Section 1` analysis. A person will have the onus of proving on a balance of probabilities that the infringement was reasonable and justified. Two requirements should be fulfilled in this regard. Firstly the legislative aim sought must be important enough to limit the constitutional right. Secondly, the means in doing so must be proportional and reasonably linked to the objective. The right should not be

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<sup>175</sup> L Sossin ‘God at work: Religion in the workplace and the limits of pluralism in Canada’ (2008- 2009) 30 *Comp. Lab. L & Poly J.* 485 at 489.

<sup>176</sup> *Syndicat Northcrest v Amselem* (2004) 2 S.C.R 551(Can).

<sup>177</sup> Sossin (note 175; 489); *Syndicat Northcrest v Amselem* (2004) 2 S.C.R 551(Can) at para 52.

<sup>178</sup> *Multani v Commission scolaire Margeurite- Bourgeouys* (2006) 1 S.C.R 259 at para 37.

<sup>179</sup> Sossin (note 175; 490); *Multani* supra note 178 at para 37.

<sup>180</sup> The Charter;Section 2(a).

<sup>181</sup> The Charter; Section 15(1).

<sup>182</sup> Sossin (note 175; 490).



infringed any more than is required and the effects of the infringement should not be disproportionate.<sup>183</sup>

In addition to the CCRF, as highlighted above, there are several Human Rights instruments with the aim of protecting the freedom from religious discrimination in the workplace. The CCRF applies to state action solely whereas the human rights statutes would be applicable in both the public and private spheres which would include the workplace.<sup>184</sup>

Section 5 (1) of the Ontario Human Rights Code provides that “every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability”. The provision is qualified by the following:

“Section 11 (1)<sup>185</sup> - A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

- (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or
- (b) it is declared in this Act other than in Section 17, that to discriminate because of such grounds is not an infringement of a right.

(2) The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any and health and safety requirements, if any.”

A duty therefore exists on employers to accommodate and to take steps in order to eliminate disadvantages to employees unless it has the result of causing “undue hardship” for the employer.

In *Ontario Human Rights Commission v Simpsons- Sears Ltd*<sup>186</sup> the plaintiff worked in a department store. She was a member of a Church and requested that, in order to observe the Sabbath, she be exempt from working on Friday evenings and Saturdays. Her employer failed

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<sup>183</sup> *Ibid* 491.

<sup>184</sup> *Ibid* 492.

<sup>185</sup> Ontario Human Rights Code.

<sup>186</sup> *Ontario Human Rights Commission v Simpsons- Sears Ltd* (1985) 2 S.C.R. 536 (Can.).

to accommodate her request. The SCA highlighted that intention is not a necessary requirement when proving a contravention of the code. It held that the employer was guilty of contravening the code. The employer has an onus of demonstrating that, should the employee be accommodated this will result in an undue hardship. If no undue hardship exists then the duty to accommodate the employee remains.<sup>187</sup>

### 5.3.2 Operational Requirements

The case of *Bhinder v Canadian National Railway Co.*<sup>188</sup> dealt with an issue regarding workplace dress code. The employee was a maintenance electrician employed by Canadian National Railway who was required in terms of a policy to wear a hard hat. Being a Sikh, the employee was required to adhere to wearing a turban and it was therefore contrary to his religion to wear any other hat. He therefore refused to wear the hard hat and was dismissed. He then filed a complaint against the employer on the basis that they had violated the Canadian Human Rights Act. The human rights tribunal found in favour of the employee which was later reversed by the Federal Court of Appeal on the basis that the employer's policy constituted a "bona fide operational requirement".

The SCA then found in favour of the employee. Exempting the employee from wearing a hard hat would not have imposed a hardship on the employer. It was noted that the Canadian Human Rights Act does not require the accommodation of an employee if it is conflicting with occupational requirements of a job. The courts had to determine the employers' reasons for implementing the rule. If implementing the rule was for genuine business reasons and not done maliciously then no guilt can be contributed to the employer.<sup>189</sup>

Another aspect that the Canadian courts have looked at was the issue of religious holidays and observances during working hours. In *Alberta Human Rights Commission v Central Alberta Dairy Pool*<sup>190</sup> the employee, in terms of his religion, was not allowed to work on certain days and on religious holidays.

The employee requested to be excused from work on a religious holiday however his request was denied by his employer. The employee was later dismissed.<sup>191</sup> The issues before the

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<sup>187</sup> Sossin (note 175; 494).

<sup>188</sup> *Bhinder v Canadian National Railway Co.* (1985)2 S.C.R. 489 (Can.).

<sup>189</sup> Sossin (note 175; 497).

<sup>190</sup> *Alberta Human Rights Commission v Central Alberta Dairy Pool* (1990) 2 S.C.R. 489 (Can.).

<sup>191</sup> *Ibid* at para 1 page 494.

Supreme Court were whether the dismissal could be justified as the requirement to work was a *bona fide* occupational requirement. If the employer could not justify that it was in fact a *bona fide* occupational requirement then the courts had to determine whether the employer reasonably accommodated the employees' religious belief to the point of undue hardship.<sup>192</sup>

The court held that the employer failed to accommodate the employee. In addition the court found that there was no *bona fide* occupational requirement.<sup>193</sup> The court has not defined the term "undue hardship" but has emphasized that it should be determined on a case by case basis.<sup>194</sup>

Religion in the workplace is further governed by labour and employment law and the statutes which govern the two set out minimum standards to be complied with in all workplaces.<sup>195</sup>

The case of *Commission scolaire regionale de Chambly v Bergevin*<sup>196</sup> dealt with three Jewish teachers who took a day off to celebrate the religious Jewish holiday, Yom Kippur. They were granted leave of absence but without pay which led to them lodging a grievance for reimbursement of payment. The school calendar was part of a collective agreement which confirmed the schedule of the teachers. However it was found by the Supreme Court of Canada that requiring Jewish staff to work on Yom Kippur was discriminatory and that no reasonable steps had been taken to accommodate the teachers' religious beliefs. The court further held that a *de minimus* test should not apply when evaluating the duty to accommodate. The agreement provided for teachers to be paid where there was a good and valid reason for being absent and the court held that observing a religious day did constitute a valid and good reason.

## 5.4. UNITED KINGDOM

### 5.4.1. Introduction

The Human Rights Act of 1998 incorporating Article 9 of the European Convention on Human Rights (the "ECHR") which provided for discrimination in the workplace was later extended, with the implementation of the European Community Directive 2000/78, to include the grounds

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<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid* at para 1 page 529 – 530.

<sup>194</sup> P Bowal ; M Goloubev ' Religious Accommodation in the Workplace' (2010- 2011) 35 *LawNow* 19 at page 21.

<sup>195</sup> *Ibid* at para 1 page 497- 498.

<sup>196</sup> *Commission scolaire regionale de Chambly v Bergevin* 1994 (2) S.C.R. 525(Can.).

of religion and belief.<sup>197</sup> The Employment Equality Regulations, 2003 (the “Regulations”) provides for protection against unfair discrimination on the ground of religion.

These regulations have the effect of eradicating discrimination caused by the employer as well as unreasonable refusals to accommodate employee’s religious beliefs.<sup>198</sup> The Human Rights Act, 1998 provides for the protection of human rights of employees within the public sector.<sup>199</sup>

Article 9 of the ECHR provides for the right to freedom of thought, conscience and religion. However the right is qualified by restrictions, should the manifestation of the right interfere with the rights of others. The courts will have to consider whether limitations serve a legitimate aim and may be justified. “Public safety, public health, national security, protecting the rights and freedoms of others and preventing fundamentalist religious movements from exerting pressure on others” are all grounds which limit freedom of religion, thought and conscience.<sup>200</sup>

A religious expression could be in the form of worship, teaching, a practice and an observance. Whether a declaration or expression of a religious belief or practice is accepted would be a subjective enquiry by the courts and determined on the facts of each case.<sup>201</sup>

Article 14 of the Convention states as follows:

“The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion ... birth or other status.”

Article 14 is to be interpreted with Article 9 and cannot be applied on its own. The test would be “whether or not the applicant has been treated in a different way and if there is differential treatment whether such treatment is justified”. The onus rests on the state to show that “the limitation was objectively and reasonably justifiable”. The ECHR will not likely consider a claim for discrimination if there is no violation of Article 9.<sup>202</sup>

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<sup>197</sup> M Freedland ; L Vickers ‘ Religious Expression in the Workplace in the United Kingdom’ (2008-2009) 30 *Comp. Lab. L & Pol’y* 597.

<sup>198</sup> *Ibid* 601.

<sup>199</sup> *Ibid* 602.

<sup>200</sup> J Squelch ‘Religious Symbols in the Workplace: Balancing the Respective Rights of Employees and Employers’ (2013) 20 *Murdoch U.L. Rev.* 38 at 46.

<sup>201</sup> *Ibid* 44-45.

<sup>202</sup> *Ibid* 48.

#### 5.4.2. *Direct Discrimination*

This concept is defined as less favorable “on grounds of ... religion or belief”. It would include discrimination on the basis of an individual’s actual religion or belief or perceived belief or religion. The exception to the rule would be an occupational requirement of a job.

In terms of Regulation 7 (2), non-discrimination duty would not apply where:

- “(a) being of a particular religion is a genuine and determining occupational requirement of the job; and
- (b) it is proportionate to apply that requirement in the particular case ”.

The exception will only apply where there exists a nexus between the work to be done and characteristics required.<sup>203</sup>

When dealing with an occupational requirement which is religious in nature, the requirement must be proportionate and will need to serve a legitimate aim. There should also be no alternate less discriminatory way to achieve the purpose.<sup>204</sup>

#### 5.4.3. *Indirect Discrimination*

This concept refers to a practice or criterion that would put a person of a particular religion at a disadvantage as compared to other individuals who are not necessarily of the same religion.<sup>205</sup>

With indirect discrimination, it needs to be established that the work requirement would have the effect of operating to the disadvantage of the religious group.

The test would be whether it is more difficult for the employee to act in accordance with with the requirement therefore putting that employee at a disadvantage as opposed to other employees.<sup>206</sup> If the work requirement is putting the employee at a disadvantage then this will constitute unlawful indirect discrimination and the requirement is incapable of being justified. The onus would rest of the employee where he will be required to demonstrate that the requirement places him/her at a disadvantage. The onus will then shift to the employer to show that the requirement is justified as a “proportionate means of achieving a legitimate aim”.

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<sup>203</sup> Freeland (note 197 above; 604).

<sup>204</sup> *Ibid* 604.

<sup>205</sup> *Ibid* 607.

<sup>206</sup> *Ibid* 608.

#### 5.4.4. Dress Codes in the workplace

There would often be instances where employers impose dress codes on employees which could leave these employees at a disadvantage where they are unable to comply due to their religious beliefs. Conversely the employer may ban certain religious symbols.<sup>207</sup> A legitimate aim for a particular dress code may exist however a refusal to adhere to a dress code by an employee would have to be proportionate. A balancing act of competing interests in assessing justification and proportionality would have to be conducted.

A critical question that has arisen in the United Kingdom is the allowance of Muslim female employees to wear the headscarf in the workplace. Preventing a Muslim female from wearing a headscarf would require a determination of whether the restriction is proportionate to a legitimate aim.<sup>208</sup> These aims will have to be balanced against the interests of the restricted person and should only be implemented if it is proportional to the aim.<sup>209</sup>

In the case of *Eweida and others v The United Kingdom*<sup>210</sup> the court had to decide on the employees' right to visibly wear a cross to work. The employee Ms. Eweida was required to wear a formal uniform as she worked at the check-in section at British Airways.<sup>211</sup> The company's uniform policy required clothing or accessories worn for religious purposes to be concealed. Items that could not be concealed were sometimes permitted.<sup>212</sup> She initially wore her cross concealed but later on she did not conceal it. Due to her failure and refusal to conceal the cross, she was sent home without pay and remained at home for 6 months. A different position that did not require her to wear a uniform was offered to her however she declined this offer.<sup>213</sup> Having received negative publicity, the company had changed its uniform policy. The employee returned to work and was allowed to wear her cross. However British Airways failed to compensate her.<sup>214</sup>

In 2008 the employee took the matter up with the Employment Tribunal (the "ET") for indirect discrimination on the basis of religion.<sup>215</sup> The Tribunal, Employment Appeal Tribunal (the

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<sup>207</sup> Freeland (note 197 above; 613).

<sup>208</sup> *Ibid* 614.

<sup>209</sup> *Ibid*.

<sup>210</sup> *Eweida and others v The United Kingdom* 2013 ECHR 37.

<sup>211</sup> *Ibid* 9.

<sup>212</sup> *Ibid* 10.

<sup>213</sup> *Ibid* 12.

<sup>214</sup> *Ibid* 13.

<sup>215</sup> *Ibid* 14.

“EAT”) and Court of Appeal all rejected her claim finding the rule as a proportionate means of achieving a legitimate aim.<sup>216</sup> British Airways had attempted to accommodate the employee by placing her in another section however the employee did not accept this and chose to stay at home.<sup>217</sup> The Supreme Court refused the employee leave to appeal.<sup>218</sup> Mrs Chaplin a second Applicant brought a similar claim. She worked in a hospital and the hospital policy stated that necklaces shouldn't be worn to prevent injury to patients when they are being attended to.<sup>219</sup>

She applied to the ET complaining of both direct and indirect discrimination on religious grounds. The ET held that there was no direct discrimination as the restriction was based on health and the safety of its patients and not religious grounds and furthermore no “persons” other than the applicant was restricted.

The European Court of Human Rights (‘ECHR’) highlighted that freedom of religion as set out in Article 9 also includes a freedom to manifest ones belief.<sup>220</sup> To constitute a manifestation, the act must be linked to the religious belief. Hence no onus exists on the applicant “to show that he or she acted in fulfilment of a duty mandated by the religion in question”.<sup>221</sup> The court ultimately found all claims admissible. However the court did find that Ms. Chaplin was directly discriminated against.

The Court had to examine whether the right to wear her cross was secured by a domestic legal order.<sup>222</sup> The lack of protection under domestic law would mean that the applicant’s right to manifest her religion at work was insufficiently protected<sup>223</sup>

The Court therefore concluded that, “the domestic authorities failed sufficiently to protect the first applicant’s right to manifest her religion, in breach of the positive obligation under Article 9”.

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<sup>216</sup> *Ibid* 15 – 16.

<sup>217</sup> *Ibid*.

<sup>218</sup> *Ibid*.

<sup>219</sup> *Ibid* 18-21.

<sup>220</sup> *Ibid* 81.

<sup>221</sup> *Ibid* 82.

<sup>222</sup> *Ibid* 91

<sup>223</sup> *Ibid* 92

The Court considered the second applicants claim. The court noted that the reason for asking her to remove the cross for health and safety reasons was more significant than the reasons in Ms. Eweidas situation.

The Court couldn't conclude that the measures taken were disproportionate. The intrusion was necessary and Article 9 was not violated.<sup>224</sup>

#### 5.4.5. *Defences*

Two defences that exist in respect of the Regulations are Genuine Occupational Requirements or justifications for indirect discrimination. In balancing competing interests the court will have to do so in assessing proportionality. Factors that would be considered to determine proportionality would be “the status of the employer; the existence of a right to freedom of religion for all parties; and socio economic factors”.<sup>225</sup>

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<sup>224</sup> *Ibid* 99 – 101.

<sup>225</sup> Freeland (note 197 above; 617).



## CHAPTER SIX: SOUTH AFRICAN CASE LAW

It would appear that the courts have taken a context – sensitive approach rather than a rigid adherence to a formal or universal test when adjudicating workplace religious discrimination disputes.

### 6.1. *Department of Correctional Services and another v Police and Prison Civil Rights Union and others* 2011 32 ILJ 2629 (LAC)

The court in this case had to consider the dismissal of five employees who were employed by the Department of Correctional Services that were automatically unfair in terms of Section 187(1) (f) of the LRA. The Applicants in this case alleged that they had been dismissed as a result of a manifestation of their religious beliefs by wearing their hair in dreadlocks and refusing to cut it off when ordered to do so. None of them had any prior disciplinary violations. They wore their hair in dreadlocks for some time before being asked to cut them off<sup>226</sup>. The Area Commissioner indicated that it was necessary to implement such changes as the poor discipline was due to non-compliance of policies and dress codes.<sup>227</sup> The employees failed to comply with written instruction due to their religious and/or cultural beliefs which resulted in their dismissals.<sup>228</sup> They approached the LC claiming that their dismissals were automatically unfair in terms of Section 187(1) (f) of the LRA and that their dismissal constituted unfair discrimination on the grounds of religion and culture in terms of Section 6 of the EEA.

The employees also emphasized their female colleagues were permitted to wear dreadlocks and the dress code allowed them to do so.<sup>229</sup>

The LC held that the dismissal amounted to direct unfair discrimination in terms of Section 6 of the EEA on the grounds of gender and that the dismissals were automatically unfair in terms of Section 187 (1)(f) of the LRA.

The Department and area commissioner then appealed the decision of the court a quo. The LAC when dealing with the claim of unfair discrimination had to determine whether there was differentiation between employees or groups of employees “which imposes burdens, disadvantages, withholds benefits, opportunities or advantages from certain employees on one or more of the prohibited grounds”.<sup>230</sup>

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<sup>226</sup> *POPCRU* supra note 96 at 2.

<sup>227</sup> *Ibid* 3.

<sup>228</sup> *Ibid* 4.

<sup>229</sup> *Ibid*14.

<sup>230</sup> *Ibid* 23.

The employees, when claiming religious discrimination, had to prove that the employers restricted their practice, participation or expression of their religion and culture. If differentiation on the grounds of religion and culture and gender are shown, unfairness is presumed and the employers bear the onus of rebutting the presumption.<sup>231</sup>

In terms of Section 187 (2) (a) of the LRA, a dismissal may be fair if it is justified on the basis of an inherent requirement of a job.<sup>232</sup>

The employees had worn dreadlocks for the purpose of an expression of their Rastafari religion or as an expression of the Xhosa spiritual healing. The CC has recognized Rastafarianism as a religion which should be protected in terms of the Bill of Rights.<sup>233</sup>

The employers had not disputed that wearing dreadlocks was a central tenet of Rastafarianism and similarly worn as an adornment in following the traditions of the Xhosa culture.<sup>234</sup>

Courts don't usually concern themselves with the centrality or rationality of beliefs and practices provided the declaration of belief is done in good faith and sincerely.<sup>235</sup>

The court stated that the employees had all worn dreadlocks as an expression of their religious and cultural beliefs and such protection is enshrined in the Constitutions' commitment to affirm diversity in this country.<sup>236</sup>

The LAC found that the lower court erroneously held that there was no discrimination on religious and cultural grounds because the employees failed to assert their rights. The court further stated that the failure by the employees to assert their rights would not render discriminatory action non-discriminatory.<sup>237</sup>

The Court held that the implementation of the Dress code was in fact discriminatory in nature twofold: firstly the employees were treated less favorably than their female counterparts and secondly, they were treated less favorably than those who were not affected by the Code.<sup>238</sup> The court held further that the real enquiry that needs to be determined is whether the discrimination was fair or justifiable.<sup>239</sup>

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<sup>231</sup> *Ibid* 24.

<sup>232</sup> *Ibid*.

<sup>233</sup> *Ibid* 26.

<sup>234</sup> *Ibid*.

<sup>235</sup> *Ibid*.

<sup>236</sup> *Ibid* 27.

<sup>237</sup> *Ibid*.

<sup>238</sup> *Ibid* 28.

<sup>239</sup> *Ibid* 30.

In terms of the *Harksen v Lane*<sup>240</sup> case, where a prohibition is discriminatory on specified grounds, it is presumed to be unfair. The employers stated that the reasons for the dismissals of the employees was to deal with the deterioration of discipline by ensuring compliance with policies. The question that the court needed to consider was whether this reasoning excludes the dismissal from being automatically unfair.<sup>241</sup>

The court should not restrict its enquiry to a subjective reason.<sup>242</sup> The court correctly stated “Usually motive and intention are irrelevant to the determination of discrimination because that is considered by asking the question: would the complainant have received the same treatment from the defendant or respondent but for his or her gender, religion, culture etc?”<sup>243</sup>

When it comes to direct discrimination, it is not required that the employer intended to act in a discriminatory manner or that he realized he is doing so. Where factual criteria is unclear the court may investigate the mental processes of the employer. The court held after considering the evidence that the dismissal was discrimination on the grounds of gender, religion and culture.<sup>244</sup>

The court then turned to the issue of whether the differential treatment is fair and justifiable. A dismissal is automatically unfair if the discrimination is unfair.

The court stated : “the test of unfairness under these provisions concentrates upon the nature and extent of the limitation of the respondent’s rights; the impact of the discrimination on the complainants; the social position of the complainants; whether the discrimination impairs the dignity of the complainants; whether the discrimination has a legitimate purpose; and whether reasonable steps have been taken to accommodate the diversity sought to be advanced and protected by the principle of non-discrimination”.<sup>245</sup>

In the present case, there was no direct reliance on the Constitution however when determining fairness, the court may have regard to the limitations analysis under the Constitution.<sup>246</sup>

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<sup>240</sup> *Harksen* supra note 62 at para 53.

<sup>241</sup> *POPCRU* supra note 96 at 33.

<sup>242</sup> *Ibid* 34.

<sup>243</sup> *Ibid* 35.

<sup>244</sup> *Ibid* 36.

<sup>245</sup> *Ibid* 37.

<sup>246</sup> *Ibid*.

The purpose of the employers implementing the rule was to achieve uniformity and neatness to achieve discipline.<sup>247</sup> The employer would be required to demonstrate that the discriminatory restriction achieves its purpose. A rational or proportional link between the measure and the purpose being sought must exist.<sup>248</sup>

The court held that the employer failed to establish that short or un-dreadlocked hair was an inherent requirement of the job and the argument that short hair resulted in a safer environment in prison could not be entertained. Firstly, the argument did not apply to females and secondly there was no evidence showing that such threats outweigh the rights to equality and dignity.<sup>249</sup>

The court found that there was no rational connection between the purpose and the measure as there was no evidence that the respondents' hairstyles were untidy in any way given the fact that the employers had indicated that neatness were the reasons for the discrimination.<sup>250</sup> There was no rational basis that dreadlocks lead to poor discipline.<sup>251</sup>

The employees showed no evidence that correctional officers who wore dreads were less disciplined than their colleagues.<sup>252</sup> On the contrary the correctional officers were exemplary officers.<sup>253</sup> The court in its conclusion held that the dismissal was automatically unfair. The employees were unfairly discriminated against on the grounds of religion, culture and/or gender which led to the dismissals.<sup>254</sup>

## 6.2. *Department of Correctional Services and another v POPCRU and others* 2013 4 SA 176 (SCA)

The matter then went on appeal with special leave to the SCA. The court echoed what was decided in the Labour Appeal Court. The court held that no evidence was presented to prove that the employees' hair which was worn for a long time until they were ordered to shave it,

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<sup>247</sup> *Ibid* 39-40.

<sup>248</sup> *Ibid* 43.

<sup>249</sup> *Ibid* 45.

<sup>250</sup> *Ibid* 47.

<sup>251</sup> *Ibid* 48.

<sup>252</sup> *Ibid*.

<sup>253</sup> *Ibid* 48-49.

<sup>254</sup> *Ibid* 53.

diminished the performance of their work or made them susceptible to corruption.<sup>255</sup> The employers could not satisfy the court that short hair was an inherent requirement of their job.

The court stated that “a policy is not justified if it restricts a practice of religious and cultural belief that does not affect an employee’s ability to perform his duties, nor jeopardize the safety of the public or other employees, nor cause undue hardship to the employer in a practical sense”.<sup>256</sup> In conclusion the court held that “no rational connection was established between the purpose of the discrimination and the measure taken”. The Appeal had to fail for these reasons.

### 6.3. *Kieviets Kroon Country Estate (Pty) Ltd v CCMA & Others* 2011 32 ILJ 923 (LC)

The employee respondent was employed by the applicant as a chef. She requested permission from her employer to be granted a month’s unpaid leave to attend sangoma training. The employee presented a certificate by her traditional healer however her request was denied. When her employer refused to grant her leave she went on leave without the permission of her employer. She was then charged with several acts of misconduct and dismissed for being absent from work for more than 3 days without leave.<sup>257</sup> The employee’s supervisor indicated that the certificate the employee had submitted was from the North West Dingaka Association and was therefore not a valid certificate.<sup>258</sup> He further stated that had she produced a valid medical certificate, they would have granted her leave and would not have dismissed her.

The Commissioner indicated that employees have a duty to render a service. Employees are expected to be at work during working hours unless their absence is warranted by a valid reason.<sup>259</sup> It was noted that the parties had conflicting and competing interests. However there was a lack of empathy in the applicant’s workplace.<sup>260</sup>

The Commissioner stated that the issue was whether the employees’ absence was justifiable.<sup>261</sup> The onus was on the employee to prove that her absence from work was necessitated by circumstances beyond her control. The main aspect of the judgment focused on the fact that the employee had feared that if she did not abide by the sangoma course, her life would be in danger or she would suffer a misfortune.<sup>262</sup> The Commissioner emphasized the

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<sup>255</sup> *POPCRU* supra note 79 at 25.

<sup>256</sup> *Ibid* 25.

<sup>257</sup> *Kieviets Kroon Country Estate (Pty) Ltd v CCMA & Others* 2011 32 ILJ 923 (LC) at 1-4.

<sup>258</sup> *Ibid* 9.

<sup>259</sup> *Ibid* 17.

<sup>260</sup> *Ibid* 17.

<sup>261</sup> *Ibid* 18.

<sup>262</sup> *Ibid* 18-19.

importance of life and that it ranked higher than anything else. Also that the Applicant would not have suffered irreparable harm as a result of the employees leave of absence. It was established that the employee's absence was beyond her control. The commissioner held that the employees' refusal to grant her unpaid leave was unreasonable and the dismissal was substantively unfair. A reinstatement of the employee with immediate effect was ordered by the Commissioner. The matter went on review which was also dismissed.

6.4. *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* 2012 11 BLLR 1099 (LAC)

The matter went on Appeal before the LAC. The court indicated that the focus was on "whether the result of the award falls within a range of reasonable results and not whether it was in fact the correct one. The question is whether there is justification for the decision on the material before the Commissioner".<sup>263</sup>

The court indicated that the employers relied heavily on the fact that the employee claimed to be ill and that the traditional healers certificate was not a valid medical certificate. The employee never did aver that she was ill in the conventional sense but rather that she was experiencing something that required the help and assistance from a traditional healer.<sup>264</sup>

The court in its judgment stated "it would be disingenuous of anybody to deny that our society is characterized by a diversity of cultures, traditions and beliefs".<sup>265</sup> The court correctly pointed out that cultural and traditional diversity will inevitably create challenges and the workplace is no exception.<sup>266</sup> The court emphasized that there are those who subscribe to certain religious and cultural beliefs and consider them as strongly held beliefs. Furthermore, those who do not subscribe to them should in no way trivialize them.<sup>267</sup>

The court further emphasized the need for reasonable accommodation in order to ensure a society that is harmonious and unified. Tlaetsi, J A highlighted the need for accommodating one another. It was held that both employers and employees should develop solutions to these challenges.<sup>268</sup> The court ultimately held that the decision reached is one that a reasonable decision maker would reach.

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<sup>263</sup> *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* 2012 11 BLLR 1099 (LAC) at 20.

<sup>264</sup> *Ibid* 22-23.

<sup>265</sup> *Ibid* 26.

<sup>266</sup> *Ibid*.

<sup>267</sup> *Ibid*.

<sup>268</sup> *Ibid* 27.

6.5. *Kievits Kroon Country Estate v. Mmoledi & Others* 2014 1 SA 585 (SCA)

The matter then went to the SCA where the appellants contended that the Commissioner carried out the incorrect inquiry as to whether the employee was justified in absenting herself from work furthermore the Commissioner taking judicial notice of certain concepts.<sup>269</sup>

The Appellants indicated that the Commissioner should have considered whether it was fair for the employer not to grant the employee leave. The Appellants contended that the dismissal was substantively fair in that there was no provision in the employment contract for unpaid leave, the appellants were accommodating in allowing for one week's unpaid leave and her request for such a lengthy period of leave was unreasonable given the operational requirements of the company.<sup>270</sup> The Appellants stated that the Commissioner made the incorrect inquiry: whether the respondents' failure in reporting to work was justified. The correct enquiry was whether the principles pertaining to a request for unpaid leave was applied.<sup>271</sup> The court in assessing the enquiry made reference to the *POPCRU* case in that the employees sincerely held beliefs were protected by the Constitution.<sup>272</sup>

Crucially the court stated that when it comes to traditional medicine or culture and belief, the courts are unable and should not evaluate the "acceptability, logic, consistency or comprehensibility of the belief". The courts should only take into consideration an employee's sincerity of the belief. It should determine if it is a *bona fide* belief or whether there is some other ulterior motive for invoking the belief.<sup>273</sup>

The court can order in favour of the employee if it is found that the employee's failure to present herself at work without authorization from the employer or where the employer specifically denies leave of absence, if the leave of absence was justified or reasonable. The commissioner's inquiry was whether the respondent's failure to obey her employers order to report to work and the denial of leave of absence was justified.<sup>274</sup>

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<sup>269</sup> *Kievits Kroon Country Estate v. Mmoledi & Others* 2014 1 SA 585 (SCA) at 17.

<sup>270</sup> *Ibid* 18.

<sup>271</sup> *Ibid* 19.

<sup>272</sup> *Ibid* 23.

<sup>273</sup> *Ibid* 27.

<sup>274</sup> *Ibid* 28.

In addition, the court stated that the Appellants failed to understand the significance of the traditional healer's certificate. Had they taken the opportunity to understand its significance, they would probably have been more accommodating to the employee.<sup>275</sup>

The court ultimately dismissed the Appeal.

#### 6.6. *Dlamini and others v Green Four Security* 2006 11 BLLR 1074 (LC)

The Applicant employees' brought the matter before the Labour Court averring that they had been discriminated against on the basis of religion and that their dismissal was automatically unfair in terms of Section 187 (f) of the LRA. The Applicants couldn't shave or trim their beards as they were a part of the Baptised Nazareth Group which forbid them from doing so. The applicants had to prove that "this was an essential tenet" of their faith and that they were dismissed for refusing to shave or trim their beards,<sup>276</sup> which was prescribed by a policy requiring employees to be clean-shaven.<sup>277</sup>

The right not to be discriminated against is a crucial right as it gives effect to the Constitutional provision of fair labour practice.<sup>278</sup>

The court when analyzing the dispute adopted a conceptual framework.

The first step in the enquiry when dealing with a claim for discrimination is whether the facts relied upon is proved? Secondly, if discrimination is proven, is it justified? The court must then consider whether the workplace rule is an inherent requirement of a job and therefore justified. If it cannot be justified then the enquiry ceases. The rule would not be considered as justified and would therefore be unlawful. Thirdly, even where the rule is an inherent requirement of the job, it may still be discriminatory in nature, if the employer had failed to reasonably accommodate the employee or did not modify the rule or allow the employee to be exempted from the rule.<sup>279</sup>

In the first step of the enquiry the employees bear the onus. The Applicants would have to prove that trimming their beards would be a violation of an essential part of their faith. Establishing this would prove that they were indirectly discriminated against.<sup>280</sup> The

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<sup>275</sup> *Ibid* 30.

<sup>276</sup> *Dlamini* supra note 114 at 2.

<sup>277</sup> *Ibid* 3.

<sup>278</sup> *Ibid* 10.

<sup>279</sup> *Ibid* 13.

<sup>280</sup> *Ibid* 14.



Respondents did not question the applicant’s belief. They however did not agree that the Nazareth faith prohibited the trimming of hair or a beard.

The applicants failed to prove that the rule is in existence or relevant today and furthermore that it is an essential tenant of the religion.<sup>281</sup> The court held that the Applicants were selective in the rules they followed.<sup>282</sup>

The court highlighted the US approach. In the US, the courts apply a “strict scrutiny” test. This test requires that a rule denying a person’s freedom to practice their religion must serve a “compelling State interest”. The Constitutional Court rejected this test and favoured “a nuanced and context-sensitive” balance.<sup>283</sup> The court highlighted that a balance has to be struck between the competing interests of the right to religious freedom commercial interests of an employer. This should be done in a way that is reasonable and rational.<sup>284</sup> If these competing interests cannot be balanced and no accommodation is provided for, then the one has to prevail over the other.<sup>285</sup>

The court indicated that “workplaces are typically home to diverse religions and the balance has to be struck sensitively. To balance freedom of religion against other rights and the interests of a diverse workforce, even-handedness is required, not subtle or explicit bias in favour one or other religion, or scrupulous secularism, or complete neutrality. (*S v Lawrence* para 122; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC) para 122) However when the balance is struck, it cannot be to the detriment of the enterprise or other workers.”<sup>286</sup>

It is an established rule that the “more serious the impact of the workplace rule on the freedom of religion, the more persuasive or compelling the justification must be”.<sup>287</sup> A rule would be justified if it’s an inherent requirement of a job.<sup>288</sup> The employees did not dispute that neatness was an inherent requirement of a job however they disputed that having an untrimmed beard was untidy. The court had to therefore decide whether the untrimmed beard was neat or not.<sup>289</sup>

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<sup>281</sup> *Ibid* 24.

<sup>282</sup> *Ibid* 26.

<sup>283</sup> *Ibid* 30.

<sup>284</sup> *Ibid* 31.

<sup>285</sup> *Ibid*.

<sup>286</sup> *Ibid*.

<sup>287</sup> *Ibid* 38.

<sup>288</sup> *Ibid*.

<sup>289</sup> *Ibid* 58.

SANDEF, SAPS, Durban Metro Police issued standing orders relating to neatness and dress codes.<sup>290</sup> In all three standing orders the standards of neatness were high. The court held that the Respondents rule was neither arbitrary nor irrational.<sup>291</sup> The court further held that had the Applicants practiced their religion strictly and not in such a flexible way, the effects of the rule would have been more serious.<sup>292</sup> The religious rule did not have a consequential penalty whereas the workplace rule did. When the courts balanced the one rule against the other the workplace rule had to prevail. The workplace rule was also an inherent requirement and was justified.<sup>293</sup>

The court held the applicants were not discriminated against and that their dismissal is accordingly not unfair.

Throughout the case the court refers to foreign cases and how they have dealt with religious issues in the workplace.

#### 6.7. *FAWU & Others v Rainbow Chicken Farms* 2000 21 ILJ 615 (LC)

The Applicants were employed by Rainbow Chickens Farms as butchers to slaughter chickens at their farm. It was an operational requirement that all butchers were Muslim so that halaal standards could be adhered to when the chickens were being slaughtered.<sup>294</sup> The operation of the farm was dependent on the slaughterers because without them there was no need for the additional 2000 workers who were employed to pack.<sup>295</sup> The issue of contention between employer and employees were that the employees did not want to work on the Muslim religious holiday Eid-ul-fitr and had in fact refused to do so. They were absent from work on the said day without the permission.<sup>296</sup> A collective agreement between the employer company and the union only entitled the workers to gazette public holidays and Eid- ul- fitr was one of them.<sup>297</sup>

The decisive issue was the fact that had the employer given the butchers off on the said date, then no work could have been done. The rest of the employees would have to take the day off even if they were not Muslim.<sup>298</sup> The butchers did not attend work on the said date which

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<sup>290</sup> *Ibid* 58-61.

<sup>291</sup> *Ibid* 62.

<sup>292</sup> *Ibid* 66.

<sup>293</sup> *Ibid* 66-67.

<sup>294</sup> *FAWU & Others v Rainbow Chicken Farms* 2000 21 ILJ 615 (LC) 1-4.

<sup>295</sup> *Ibid* 5.

<sup>296</sup> *Ibid* 7.

<sup>297</sup> *Ibid* 8.

<sup>298</sup> *Ibid* 10 ; A Rycroft 'Accommodating religious or cultural beliefs in the workplace: *Kieviets Kroon Country Estate v CCMA; Dlamini v Green Four Security; POPCRU v Department of Correctional Services: case notes*' (2011) 23(1) *SA Merc LJ* 107.

resulted in a disciplinary hearing leading ultimately to their dismissals.<sup>299</sup> The employees then approached the Labour Court. They claimed their dismissals were automatically unfair in terms of 187 (1) (f) of the Labour Relations Act alternatively that their dismissals were substantively and procedurally unfair in terms of Section 188 of the Act.<sup>300</sup> It was decided that the employees were not discriminated against unfairly as all employees were required to work on Eid.<sup>301</sup>

The court held that dismissal was not the appropriate sanction. Looking holistically at the judgment ultimately the main point made by the court was that there was equality in treatment of the employees. However an important principle articulated was that where an employer allows only some employees to celebrate a religious holiday whereas others are not permitted, this may constitute unfair discrimination. It can be seen from the case that there would be a proviso attached to this in that it will not be unfair where the granting of permission has the result that no work can be done.<sup>302</sup> The employer's operational requirements took precedence over the employees' religious day. The court barely touched on the issue of what accommodation is required of employers to employees who wish to express their faith. All that was stated was that the parties should endeavour to find a solution where no production is lost on Eid, and the butchers take the day off, at least on some Eid celebrations.

#### 6.8. *Lewis v Media 24 Ltd* 2010 31 ILJ 2416 (LC)

The Applicant employee in this case claimed compensation for unfair discrimination in terms of section 50(2) (a) of the Employment Equity Act on grounds of religion, cultural and political beliefs.<sup>303</sup> The Applicant claimed that the Respondent required him to comply with policies against his religion, thereby discriminating against him. He further stated that the employer harassed him and terminated his employment because he had taken issue with the policies and practices.<sup>304</sup> He also stated that his employer despite being aware that he belonged to the Jewish faith forced him to work on the Jewish Sabbath. The remedy sought by the Applicant was R100 000.00 compensation.<sup>305</sup> The court in this case largely relied on the evidence and testimony of the parties and witnesses.

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<sup>299</sup> FAWU supra note 294 at 12-13.

<sup>300</sup> *Ibid* 17.

<sup>301</sup> *Ibid* 20.

<sup>302</sup> Rycroft (note 298 above; 107).

<sup>303</sup> *Lewis* supra note 84 at para 1.

<sup>304</sup> *Ibid* 2.

<sup>305</sup> *Ibid* 4.

The court highlighted that the essential elements to be proven when there is a contravention of section 6(1) are:

1. “there must be discrimination – differential treatment based on a listed or analogous ground;
2. the discrimination must be sourced in an employment policy or practice;
3. it must be against an employee; and
4. it must be unfair”<sup>306</sup>

The court went further. It stated that “the concept of discrimination is made up of three issues: differential treatment; the listed grounds; and the reason for the treatment. Once a difference in treatment is based on a listed ground; the difference in treatment becomes discrimination for the purpose of Section 9 of the Constitution and Section 6 of the EEA.”<sup>307</sup>

There must be a difference in treatment in which the employee is less favourably treated than others”. The Applicant based his claim on alleged differential treatment by the employer as follows: “harassment; the failure to accommodate his observance of Shabbat; and the termination of his employment”<sup>308</sup>.

The court had to determine if the differential treatment was direct or indirect. Direct discrimination is where the employer treats the employee differently from others as a result prohibited ground<sup>309</sup> Indirect discrimination is where a rule is imposed and on the face of it does not seem to differentiate between employees, however it has the effect of differentiating between employees.<sup>310</sup> The Applicant relied on religion, political opinion and culture as grounds for the discrimination.<sup>311</sup> The third issue for determination by the court was whether the difference in treatment was based on the prohibited grounds. The Constitutional Court has established that differential treatment is “substantially based on one of the listed grounds”<sup>312</sup> The Applicant failed to establish a nexus between the listed grounds and differential treatment.<sup>313</sup>

One of the main issues of contention in this case was the fact that the Applicant complained about working overtime and therefore on the religious Shabbat.<sup>314</sup> He was asked whether he

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<sup>306</sup> *Ibid* 35.

<sup>307</sup> *Ibid* 36.

<sup>308</sup> *Ibid* 37.

<sup>309</sup> *Ibid* 38.

<sup>310</sup> *Ibid* 38.

<sup>311</sup> *Ibid* 40.

<sup>312</sup> *Ibid* 41.

<sup>313</sup> *Ibid* 42.

<sup>314</sup> *Ibid* 86.

informed the employer that he was Jewish. He said that the employer “could not assume everyone was of the same faith” and had assumed that the employer was in fact aware that he was Jewish. Cheadle JA held that in this case it was common cause that the employer did not have a policy to accommodate religious minorities, but the court made it clear that even if it did have such policy it would only be applied if the employer was aware of the employees’ religious affiliation.<sup>315</sup>

The court highlighted that the critical issue in this case was not whether there existed a policy or practice but rather whether the employer was aware of the religious beliefs and practices and still expected him to work overtime.<sup>316</sup> By considering the evidence it was established that the employer had no knowledge that the Applicant was Jewish and therefore requiring him to work on the religious holiday did not constitute discrimination.

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<sup>315</sup> *Ibid* 124.

<sup>316</sup> *Ibid* 124.

## CHAPTER SEVEN: CONCLUSION AND RECOMMENDATIONS

The right to practice ones' religious and cultural beliefs is firmly entrenched in the Constitution and applies in the workplace through employment law. The right is not absolute and requires the weighing of rights in a constitutionally compliant manner. In weighing up competing rights, a certain level of understanding and respect by the employer is required.<sup>317</sup>

When analyzing the case law in respect of workplace religious discrimination, it is to be noted that the courts have not adopted a formal or universal test in dealing with such disputes. Adopting a universal test would have unfavorable effects and consequences on the developing jurisprudence as the test would be restrictive in nature. When adjudicating such disputes it is necessary for the courts to adopt a context-sensitive approach to each case.<sup>318</sup>

The courts should establish certain factors when adjudicating religious discrimination disputes as highlighted in the case law:

- The courts should firstly establish that the dispute is employment based with reference to requirements of the employment relationship;
- The parties to the dispute are to rely on national legislation and not directly on the Constitution;
- The definition should be looked at in terms of the Convention 111;
- When conducting an interpretation of legislation, it must be done in a way that would advance the rights, values and principles of the Bill of Rights;
- By avoiding the adoption a one-test-fits-all approach, this will ensure the development of jurisprudence in dealing with religious based disputes;
- The more judicial analyses there are on issues of religious discrimination in the workplace, the greater this can influence the quantity and quality of jurisprudence.<sup>319</sup>

The case of *SACTWU and others v Berg River Textiles, A division of Seardel Group Trading (Pty) Ltd*<sup>320</sup> is a noteworthy one as it seeks to set out guidelines that are comprehensive, thereby

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<sup>317</sup> E Shamier,; C Tshoose 'The right to practice cultural and religious beliefs in the workplace – a double- edged sword *Department of Correctional Services v Popcru* (107/12) [2013] ZASCA 40: cases' (2014) 35 (3) *Obiter* 738-739.

<sup>318</sup> Henrico (note 2 above; 851).

<sup>319</sup> Henrico (note 2 above; 862-863).

<sup>320</sup> *SACTWU and others v Berg River Textiles, A division of Seardel Group Trading (Pty) Ltd* 2012 33 ILJ 972 (LC).

having the effect of assisting courts in the future when dealing with religious discrimination disputes.

The matter involved the dismissal of 36 employees for being absent from work without leave. The issue at hand was whether or not the dismissal was fair. A further issue to the case, which is relevant to this thesis is the issue of the second applicant, who averred that the primary reason for his dismissal was due to his refusal with work on Sundays. He therefore claimed that his dismissal was automatically unfair in terms of Section 187 (1) (f) of the LRA on the basis that he was discriminated against on the grounds of his religious beliefs. The focus will therefore be on the issues relating to the second respondent and how the issue was decided.<sup>321</sup>

Berg River Textiles sought to implement a new shift system resulting in the second applicant's issue of contention which was that the new shift system required him to work on Sundays which was contrary to his religious beliefs.<sup>322</sup> The members were given written warnings that the stoppages engaged in constituted an unprotected strike<sup>323</sup> The second applicant when asked to report to duty one Sunday, refused to do so.<sup>324</sup> Disciplinary enquiries were held and all other members pleaded guilty except for the second applicant who pleaded not guilty as his religion prohibited him from working on Sundays and this was the reason for his failure to report to work. He was found guilty and dismissed.<sup>325</sup>

This case is important in that it succinctly sets out the principles and requirements for a claim based on religious discrimination particularly in a workplace environment and can therefore be relied upon in other matters of this nature. In relying on the Labour Appeal Judgment in the *POPCRU* case, the court set out as follows:

1. A workplace rule or policy that appears to be neutral and which is applied uniformly to all employees may be discriminatory if it goes against an individual employees' religious beliefs. This approach contrary to what was expressed in the *FAWU* case<sup>326</sup> where the judge held "that there be some form of differentiation between employees" for a rule or policy to be discriminatory.

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<sup>321</sup> *Ibid* 1.

<sup>322</sup> *Ibid* 9.

<sup>323</sup> *Ibid* 10.

<sup>324</sup> *Ibid* 11-20.

<sup>325</sup> *Ibid* 23.

<sup>326</sup> *FAWU* supra note 294 at 12-13.

2. It is “incumbent on the [employees] to show that the [employer] through their enforcement of the prohibition ...interfered with their participation in or practice of their religion or culture”.
3. The religious belief or principle claimed by the employee must be a central tenet of that religion.
4. An employee is not required to assert their religious convictions to an employer. However an employer must be aware of the employees’ religious belief or practice in order for a claim of religious discrimination to succeed.
5. Where religious discrimination exists as demonstrated by the employee, the onus is on the employer to prove that the rule was either an inherent requirement of the job or that the discrimination was fair.
6. In addition the employer has to demonstrate that it reasonably accommodated the employee in respect of his or her religious convictions. The proportionality test must apply and if there is none or little consequence to the business, if the rule is not complied with by the employee, then the employee should be exempted from having to comply with the rule.
7. Intention of the employer is irrelevant to the enquiry.<sup>327</sup>

The second applicant testified vehemently that the prohibition to work on Sundays was a central tenet to his religion as a Christian and that those beliefs were of utmost importance to him.<sup>328</sup> The court importantly stated that despite the fact that the workplace rule applied uniformly to everyone without any differentiation between the employees, “the test is whether workplace rule discriminated against the beliefs of any single employee irrespective of how neutral it was”.<sup>329</sup> The Respondents were always aware that the prohibition to work on Sundays was a central tenet to the second applicant’s religion. The second applicants had turned down promotions and overtime work so that he would not have to work on Sundays.<sup>330</sup>

The second applicant established a case of discrimination on the basis of his religious beliefs.

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<sup>327</sup> *Ibid* 38.

<sup>328</sup> *Ibid* 39.

<sup>329</sup> *Ibid* 40.

<sup>330</sup> *Ibid* 41.



The Respondent claimed the rule was an inherent requirement of the job and that it had no means of accommodating the second respondent. The court held that against the clear guidelines formulated in the *POPCRU* case the failure to accommodate the employee by removing his obligation to work on Sundays rendered the dismissal automatically and substantively unfair. The Respondents were ordered to reinstate the employee.

A trend has emerged from analysis of case law. In order for a claim of unfair dismissal to succeed, the employee will be required to establish a sincerely held belief.<sup>331</sup> In terms of the *Pillay* case, an employer should take positive measures to reasonably accommodate an employees' religious practice however they are not required to incur unnecessary or undue hardship.<sup>332</sup>

The employer will have to establish that the discrimination was fair. Alternatively that the rule or practice was an inherent requirement of a job.<sup>333</sup> With the evolvement of society there is a need for employers to accommodate sincerely held religious beliefs.<sup>334</sup> Ultimately, the fundamental subjective nature of religion demands "meaningful engagement" between employer and employee to accommodate differences thus ensuring the right to fair labour practices.<sup>335</sup>

South African labour law has a long way to go in dealing with disputes of this nature. Despite the development and evolvement of this country, diversity will more often than not result in disputes in the context of employment law. It is therefore necessary for such diversity to be embraced and celebrated for the creation of a harmonious workplace environment.

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<sup>331</sup> Bernard (note 55 above; 2888-2889).

<sup>332</sup> *Pillay* supra note 14.

<sup>333</sup> *POPCRU* supra note 79; *POPCRU* supra note 96.

<sup>334</sup> *Kievits* supra note 263.

<sup>335</sup> Henrico (note 63 above; 524).

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