

REASONABLE ACCOMMODATION IN THE WORKPLACE: TO BE OR NOT TO BE?

RB Bernard*

SUMMARY

Freedom of religion is a fundamental right enshrined in and protected by section 15 of the *Constitution*. This right allows for the practice of religion without interference from the state and individuals. A question which often arises relates to the extent to which freedom of religion can be exercised in the workplace.

Religious practice often extends beyond societal norms, but religious intolerance has proven to be a source of conflict. In the workplace this conflict arises "where the employer's right to the employee's labour and service conflicts with the employee's inability or refusal to render services because of a religious or cultural belief".¹ The courts have played an important role in balancing the rights of the employer to manage his business operations efficiently with the rights of the employee to practice his religious or cultural beliefs. The critical question is how the employer is expected to balance and maintain an orderly, disciplined and efficient workplace whilst accommodating an employee's right to religious freedom.

The case of *Department of Correctional Services v Police and Prison Civil Rights Union (POPCRU)* 2011 32 ILJ 2629 (LAC) is one where the employer's application of rules relating to the dress code of employees impacted on the religious beliefs and practices of five staff. In this note, this decision and the decisions in other recent cases are analysed in order to determine how the courts have dealt with the issue of the reasonable accommodation of religious practices in the workplace.

The employer in the *POPCRU* case² was justified in wanting to improve the discipline and standards within the prison. The findings of the LAC and SCA were indeed correct: while the dress code appeared to be neutral, the actual impact resulted in

* Rowena Bronwen Bernard. LLB (UND) LLM (UKZN). Lecturer in Law, School of Law, Howard College, University of KwaZulu-Natal. Email: Bernardr@ukzn.ac.za.

¹ Rycroft 2011 *SA Merc LJ* 106.

² *Department of Correctional Services v POPCRU* 2011 32 ILJ 2629 (LAC).

the disparate treatment of the employees. They were discriminated against as a result of wearing dreadlocks. The employer failed to reasonably accommodate the religious beliefs of the employees, and had it done so dismissal would not have occurred.

The employees illustrated that the wearing of dreadlocks was a sincerely held belief, which was a central tenet of their religion. The employer was made aware of this fact, and despite this, they were dismissed. The employer was unable to illustrate that the rule against the wearing of dreadlocks was fair, and neither could the employer illustrate that this rule was an inherent requirement of the job.

It is important to note the trend that has emerged:

- a. For an employee to succeed in a claim for unfair dismissal on the basis of religious discrimination, the employee will have to establish that the belief is sincerely held. Thus, according to *Pillay*,³ employers are required to implement positive measures to reasonably accommodate the religious practices of an employee.
- b. The employer will have to establish that the religious discrimination is fair or that the rule or practice prohibiting the employee's freedom of religion is in terms of an inherent requirement of the job. In order to justify the dismissal of an employee, the employer has to show that the policy or rule was an inherent requirement of the job.
- c. Society has evolved. Employers therefore need to reasonably accommodate the sincerely held religious beliefs of employees.

"When entering the workplace, employees do not leave behind their personalities, their likes and dislikes, their convictions or their faiths and beliefs, morals, sentiments and, of course, religious beliefs."⁴ A concerted effort is therefore required of employers to accommodate diversity and promote religious freedom in the workplace.

³ *MEC for Education, Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC).

⁴ Mischke 2011 *CLL* 81.

KEYWORDS: Reasonable accommodation; the employer is not expected to experience undue hardship; sincerely held religious belief - central tenet of their religion; freedom of religion and culture; unfair discrimination in the workplace; gender discrimination; employer's right to manage his business operations; automatically unfair dismissals; test of unfairness - the impact of the discrimination, any impairment of dignity, and the question of proportionality; an inherent requirement of a job; rational and proportional relationship.