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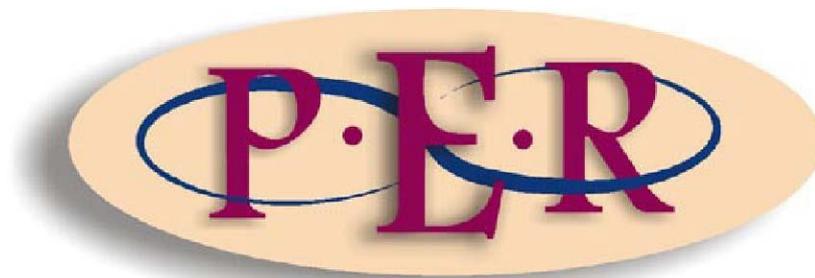
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**REASONABLE ACCOMMODATION IN THE WORKPLACE:  
TO BE OR NOT TO BE?**

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

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### 1 Introduction

The attainment of human dignity, the achievement of equality and the advancement of human rights are regarded as the founding values of the South African *Constitution*.<sup>1</sup> Section 9(3) prohibits unfair discrimination - directly or indirectly - on 17 listed grounds, including race, gender, religion and culture. The core purpose of this is to eliminate unfair discrimination. In this regard, an example of discrimination in the workplace is when employers implement practices which impact negatively on an employee's religious practice. If an employer fails to reasonably accommodate an employee's religious practice when implementing such procedures that may be construed as unfair discrimination.

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. Chaskalson P in *S v Lawrence*,<sup>2</sup> borrowing the concept of freedom of religion from the Canadian Courts, stated that:

... the concept of freedom of religion is 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 beliefs by worship and practice or by teaching and dissemination.<sup>3</sup>

Religious freedom includes the right to "have a belief, to express that belief publicly and to manifest that belief by worship and practice".<sup>4</sup> This requires that an individual be permitted to exercise, practice and openly declare his religious beliefs, without fear of reprisal.

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<sup>1</sup> Section 1 of the *Constitution of the Republic of South Africa*, 1996.

<sup>2</sup> *S v Lawrence* 1997 4 SA 1176 (CC).

<sup>3</sup> *S v Lawrence* 1997 4 SA 1176 (CC) para 92.

<sup>4</sup> Currie and De Waal *Bill of Rights Handbook* 339.

A question which often arises is the extent to which freedom of religion can be exercised in the workplace. When an employee enters the workplace, the employee is not expected to leave behind his religious beliefs and practices,<sup>5</sup> as religion is an intrinsic element of a person's individuality and identity and forms the foundation of a person's life.

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".<sup>6</sup> The courts have in fact 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 which arises, though, 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) (hereafter "*POPCRU* case"), is one where the employer's application of rules relating to the dress code of its employees impacted on the religious beliefs and practices of five members of staff. In this note, this decision - and other recent cases - will be analysed in order to determine how the courts have dealt with the issue of the reasonable accommodation of religious practices in the workplace.

## **2 Summary of the facts**

In the *POPCRU* case, the central issue was if the dismissal of five employees was automatically unfair in terms of section 187(1)(f) of the *Labour Relations Act* 66 of 1995 (hereafter "*LRA*"). They were employed as correctional officers by the Department of Correctional Services. It was alleged by the employees that they had

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<sup>5</sup> Mischke 2011 *CLL* 81.

<sup>6</sup> Rycroft 2011 *SA Merc LJ* 106.

<sup>7</sup> *Department of Correctional Services v POPCRU* 2011 32 ILJ 2629 (LAC) (hereafter the *POPCRU* case).

been dismissed as a result of their religious beliefs, when they refused to cut off their dreadlocks after being ordered to do so.

The facts were that the Area Commissioner was dissatisfied with the discipline at the prison, which he attributed to poor compliance with security policies and poor adherence to the dress code. The employees were issued with written instructions to comply with the dress code in particular by attending to their hairstyles. However, the employees in question refused to carry out the instruction. In this regard, the employees argued that they wore dreadlocks because of their religious and/or cultural beliefs.<sup>8</sup> Despite this, the employees were dismissed. They then argued that their dismissal was because of their religion, belief or culture - and this clearly amounted to unfair discrimination.

The employees approached the Labour Court for an order declaring their dismissals automatically unfair in terms of section 187(1)(f) of the LRA, and that the dismissal constituted unfair discrimination on the basis of religion and culture in terms of section 6 of the *Employment Equity Act* 55 of 1998 (hereafter "EEA").<sup>9</sup> The employees argued that there had been direct discrimination on the listed grounds of gender, as the dress code permitted female officers to wear dreadlocks whilst prohibiting this in male officers. In addition, they stated that the prohibition on wearing dreadlocks infringed on their religion and culture.<sup>10</sup>

It was argued by the employer, on the other hand, that the dismissals of the employees were not automatically unfair. The dress code was enforced as it sought to improve discipline, which had broken down considerably. The employees were dismissed as they failed to adhere to departmental policies and not because of their religious beliefs - and therefore their dismissals were not automatically unfair.

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<sup>8</sup> Para 5 of the *POPCRU* case. The employees contended that they all wore dreadlocks for various religious reasons. Some were Rastafarians, one had received a calling to become a traditional healer in accordance with his culture, while another had a traditional sickness known as *Ntwasa*, and his ancestors had instructed him to wear dreadlocks.

<sup>9</sup> Grant 2012 *Obiter* 179, 180.

<sup>10</sup> Grant 2012 *Obiter* 179, 180.

It is submitted that the employer was justified in seeking to improve the discipline and standards in the prison, but the approach should have been balanced and justifications should have been made. Religious and cultural practices ought to have been considered before the department policies were applied.

The Labour Court found that the dismissal of the employees amounted to direct, unfair discrimination on the grounds of gender, in terms of section 6 of the EEA, and further that the dismissals were automatically unfair in terms of section 187(1)(f) of the LRA. On appeal to the LAC (Labour Appeal Court), it was found that the dismissal of the five employees was automatically unfair, not only in respect of gender, but also on the grounds of religion and culture.

### **3 Comparison of the Labour Court and LAC findings with respect to religion and culture**

The Labour Court<sup>11</sup> accepted that the employees wore dreadlocks because of their religious and cultural beliefs, and that these beliefs were sincerely held.<sup>12</sup> However, the Court found that the employees had not experienced either direct or indirect discrimination on the grounds of religion. The dress code was held to be facially neutral as it applied equally to all officials of the Department. According to the Labour Court, the dress code did not have a disparate impact on the followers of any religion or culture, as its impact and enforcement were applied equally to members of different religions and cultures. However, the dress code did have a disparate impact on the employees, in that they could not wear their hair in dreadlocks - which the Labour Court found to be a practice arising from a sincerely-held belief. The application of the code could therefore be said to have discriminated against the employees in question.

On appeal to the LAC, a different finding was reached. The LAC stated that in order to determine whether or not there had been unfair discrimination on a listed ground,

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<sup>11</sup> *Police and Prison Rights Union v Department of Correctional Services* 2010 10 BLLR 1067 (LC).

<sup>12</sup> *POPCRU* case para 15.

a determination had to be made of whether there had been any differentiation between employees or groups of employees, which imposed burdens or disadvantages, or withheld benefits, opportunities or advantages from certain employees, on one or more of the prohibited grounds.<sup>13</sup> The LAC stated that in order to establish religious or cultural discrimination in this case, the employees had to show that the employer - through its enforcement of the prohibition on the wearing of dreadlocks - interfered with their participation in or practice of their religion or culture.<sup>14</sup> If differentiation on specified grounds were to be proven, unfairness would be presumed, and the appellants would bear the onus of rebutting this presumption.<sup>15</sup> The test of unfairness, the LAC held, focused upon "the impact of the discrimination, any impairment of dignity, and the question of proportionality".<sup>16</sup>

Although the dress code appeared uniform, its actual enforcement - the LAC held - resulted in the disparate treatment of the employees. The dress code expressly prohibited the wearing of dreadlocks, which clearly amounted to an infringement of the employees' constitutional right to religious freedom. Whereas the Labour Court had held that there was no discrimination against the employees because they had failed to assert their rights to religious freedom, the LAC rejected this view as being "factually incorrect and conceptually erroneous".<sup>17</sup> All of the employees had worn dreadlocks before the introduction of the prohibition, and when they had been issued with notices to change their hairstyles they had responded according to the facts, in writing, setting out their reasons for retaining their hairstyles. This, according to the LAC, was an assertion of their rights. In any event, the non-assertion of their rights, the LAC noted, could not render "discriminatory action non-discriminatory".<sup>18</sup>

The employer was required to produce evidence to the Court to establish that the application of the dress code and the subsequent dismissal of the employees, were

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<sup>13</sup> *POPCRU* case para 23.

<sup>14</sup> *POPCRU* case para 24.

<sup>15</sup> *POPCRU* case para 24.

<sup>16</sup> *POPCRU* case para 24.

<sup>17</sup> *POPCRU* case para 27.

<sup>18</sup> *POPCRU* case para 27.

linked to an important purpose of maintaining discipline and an orderly prison. There had to be a rational and proportional relationship between the measure and its purpose. It is submitted that had the appellant acted reasonably and attempted to accommodate the sincerely-held beliefs of the employees, the dismissals would not have occurred. It is conceded that there was a rational purpose to the application of the dress code; however, the sanction imposed for failing to comply with it was not in proportion. The employer could have considered alternatives to dismissal. The LAC found that the employees had been unfairly discriminated against on the basis of religion and culture.

#### **4 Comparison of the findings of the Labour Court and LAC with respect to gender**

The Labour Court had found that the employees had been discriminated against on the basis of their gender.<sup>19</sup> It was found that the dress code provided for differentiation between male and female officers when it came to the wearing of dreadlocks. Paragraph 5.1.2.3 of the dress code prohibited "Rasta man" hairstyles and applied only to male officers. This the Labour Court found to be unfair discrimination.

The Labour Court rejected the assertion that there were biological differences between men and women which justified applying a different dress code.<sup>20</sup> It warned against gender stereotyping - pointing out that one must guard against using cultural practices as evidence that there are differences between men and women.<sup>21</sup> The LAC agreed with this finding, and held that the imposition of the rule prohibiting dreadlocks in male staff imposed a disadvantage on only the male staff, who were "prohibited from expressing themselves" and had to work in an environment in which their religious and/or cultural practices were not respected, and in which they

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<sup>19</sup> *POPCRU* case para 16.

<sup>20</sup> *Police and Prison Rights Union v Department of Correctional Services* 2010 10 BLLR 1067 (LC) para 236.

<sup>21</sup> Grant 2012 *Obiter* 183.

were "not completely accepted for who they are".<sup>22</sup> The LAC found no validation for differentiating between male and female employees.

The LAC held that the dress code directly discriminated against the employees.

## **5 Analysis of the Supreme Court of Appeal decision<sup>23</sup>**

The employer conceded on appeal to the SCA that the dress code operated disparately among correctional officers and was directly discriminatory on the grounds of religion, culture and gender.<sup>24</sup> If it had not been for the employees' religious and cultural beliefs they would not have worn dreadlocks, and but for their gender they would not have been dismissed - and, as such, the disparate treatment constituted discrimination.

The employer argued that the discrimination against the employees was justifiable as it sought to eliminate the "risk and anomaly posed by placing officers who subscribe to a religion or culture that promotes criminality - in the form of the use of dagga".<sup>25</sup> The employer further argued that it did not oppose the hairstyles worn by Rastafari and "intwasa". It did, however, oppose their faiths, which required the use of dagga - which is an illegal and harmful drug used as an integral part of their observance.<sup>26</sup> The wearing of dreadlocks made the employees noticeable and vulnerable to manipulation by Rastafari and other inmates wanting to smuggle dagga into correctional centres. This - according to the employer - would negatively affect the discipline and rehabilitation of inmates within the prison.<sup>27</sup> The dress code therefore served an important and legitimate government purpose.

The SCA held that discrimination on a listed ground is presumed to be unfair until the contrary is proved. Various factors are considered in ascertaining whether the discrimination is fair, and these included: "the position of the victim of discrimination

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<sup>22</sup> Grant 2012 *Obiter* 183.

<sup>23</sup> *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013).

<sup>24</sup> *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) para 18.

<sup>25</sup> *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) para 19.

<sup>26</sup> *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) para 19.

<sup>27</sup> *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) para 20.

in society; the purpose sought to be achieved by the discrimination; the extent to which rights or interests of the victim have been affected; whether the discrimination has impaired the victim's dignity and whether less restrictive means are available to achieve the purpose of the discrimination".<sup>28</sup>

In the light of the above reasoning the SCA ultimately held that a policy that effectively punishes the practice of a religion and culture is a palpable invasion of the dignity of the followers of that religion and culture.<sup>29</sup>

The SCA looked at section 187(2)(a) of the LRA to determine whether or not the discriminatory impact of the dress code was justifiable. According to section 187(2)(a): "a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job". According to the SCA, an inherent requirement of a job refers to "a permanent attribute or quality forming an ... essential element ... and an indispensable attribute which must relate in an inescapable way to the performing of a job".<sup>30</sup> The employer was required to establish that short hair not worn in dreadlocks was an inherent requirement of the job. It was argued that the rationale for the dress code was to maintain discipline, uniformity and neatness amongst the correctional officers. This was meant to enhance security in the prison. However, the employer failed to show how the dress code would prevent the smuggling or use of dagga.<sup>31</sup>

The employer was unable to provide the court with evidence to prove that the employees' hair, "worn over many years before they were ordered to shave it, detracted in any way from the performance of their duties or rendered them vulnerable to manipulation and corruption".<sup>32</sup> The employer was unsuccessful in showing that the wearing of short hair was an inherent requirement of the job.

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<sup>28</sup> *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) para 21.

<sup>29</sup> *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) para 22.

<sup>30</sup> *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) para 23.

<sup>31</sup> *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) para 25.

<sup>32</sup> *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) para 25.

The case of *Dlamini v Green Four Security*<sup>33</sup> was another important case that looked at the inherent requirements of a job. In this case the employees were dismissed for refusing to shave or trim their beards - because it was against their religious convictions to do so. They argued that their dismissals were automatically unfair in terms of section 187(1)(f) of the LRA. The employees belonged to the Baptised Nazareth Group, which did not allow them to trim their beards. The employees bore the onus of proving that this was an essential tenet of Nazareths.

The employer argued that the prohibition against the cutting of hair or beards was not central to the Nazarene faith. The employees were able to prove neither that the prohibition against beard-trimming was a central tenet of their religion nor that they would suffer some significant penance if they broke the rule.<sup>34</sup> In fact, they worked on Sundays, which was also prohibited by the church. This indicated that the church applied its rules flexibly, and that the employees were selective about the rules to which they chose to adhere. The Labour Court held that the rule requiring guards to be clean shaven was being applied equally to all employees and was consistently applied.

The Labour Court noted that in terms of the LRA a workplace rule is justified if it is an inherent requirement of the job. The employer had a workplace rule which expressly prohibited the growing of beards. The purpose of the rule was to ensure neatness and hygiene. The Labour Court found that grooming was a high priority within all security services - including the South African National Defence Force, Police Service, and Metro Police.<sup>35</sup> The Labour Court stated that "untrimmed beards are untidy".<sup>36</sup> The Labour Court also pointed out that an employer is at liberty to set a uniform dress code as a condition of employment.<sup>37</sup> Furthermore, employees are required to comply with a dress code - especially if the dress code is related to the nature of the job. In this case "the rule against wearing beards was driven by the

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<sup>33</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC).

<sup>34</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) para 26.

<sup>35</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) para 62.

<sup>36</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) para 63.

<sup>37</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) para 63.

practical and inherent need to be neat, to look like security guards and to project the employer as a security company with a distinctive image".<sup>38</sup>

According to the Labour Court, the employees were flexible when it came to the practising of their religion. They worked on the Sabbath despite not being allowed to by their Nazareth faith. In addition, no penalty was imposed for the trimming of their beards. Thus it appeared as if they were selective "about which rules of the Nazareth faith they would follow",<sup>39</sup> and "thus the impact of the clean-shaven rule would have been more serious if the employees were not flexible in the way they practised their religion".<sup>40</sup>

After balancing both the rules, the Labour Court found that the clean-shaven rule was an inherent requirement of the job. This finding contrasts with the decision of the SCA in *POPCRU*, where it was finally held that: "A policy is not justified if it restricts a practice of religious belief - and by necessary extension, a cultural belief - that does not affect an employee's ability to perform his duties, nor jeopardise the safety of the public or other employees nor cause undue hardship to the employer in a practical sense".<sup>41</sup> The employer in *POPCRU*<sup>42</sup> was unable to illustrate a rational connection between the purported purpose of the discrimination and the measure taken, nor was it shown that the department would suffer an unreasonable burden if it had exempted the respondents.<sup>43</sup>

The appeal in *POPCRU* was thus dismissed, as no rational connection was established between the purpose of the discrimination and the measure taken.

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<sup>38</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) para 63.

<sup>39</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) para 66.

<sup>40</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) para 66.

<sup>41</sup> *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) para 25.

<sup>42</sup> *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) para 236.

<sup>43</sup> *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) para 25.

## 6 Reasonable accommodation of religious practices

Another important concept discussed in the *POPCRU* case<sup>44</sup> was that of reasonable accommodation. Reasonable accommodation has been defined as "any modification or adjustment to a job or the working environment that will enable ... a person to have access to, or participate in employment".<sup>45</sup> Employers are required to reasonably accommodate diversity in the workplace - however, the employer is not expected to experience undue hardship. The role of the court is to determine the extent of this obligation. 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 the purpose".<sup>46</sup> The employer is required to show that the discriminatory measure it seeks to impose is linked to a particular purpose - ie that the measure or prohibition achieves its purpose.<sup>47</sup> Thus there has to be a rational and proportional relationship between the measure and the purpose it seeks to achieve.<sup>48</sup>

In *MEC for Education, Kwazulu-Natal v Pillay*,<sup>49</sup> the Constitutional Court stated that "reasonable accommodation requires that an employer must take positive measures, even if it means incurring additional hardship or expenses to ensure that all employees enjoy their right to equality".<sup>50</sup> The duty to accommodate may be both positive and negative. In applying the above, it can be inferred that there is a duty on all employers to reasonably accommodate the religious and cultural practices of employees in the workplace. Employees should not have to choose between their religious convictions and management's prerogative and authority. However, employers are not expected to endure undue hardship to accommodate the religious and cultural practices of employees. No court will expect an employer to incur

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<sup>44</sup> *Department of Correctional Services v POPCRU* 2011 32 ILJ 2629 (LAC).

<sup>45</sup> Section 1 of the *Employment Equity Act* 55 of 1998.

<sup>46</sup> *POPCRU case* para 43.

<sup>47</sup> *POPCRU case* para 43.

<sup>48</sup> *POPCRU case* para 43.

<sup>49</sup> *MEC for Education, Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC).

<sup>50</sup> *MEC for Education, Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC) para 73.

expenses disproportionately, if it cannot accommodate the religious and cultural practices concerned.<sup>51</sup>

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

In *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi*,<sup>52</sup> the concept of reasonable accommodation was further emphasised and discussed. In this matter, the employee was dismissed for being absent from work without leave. The employee had been attending a traditional healer's course to qualify as a sangoma, and required one month's leave to complete the course. The employee requested that the leave be unpaid. Despite submitting a certificate issued by her traditional healer and other supporting documents, the employee's application for leave was declined. Instead, the employer granted one week's leave. This was insufficient, and the employee failed to return to work after the week concerned. When she did return to work, a disciplinary inquiry was held, and she was found guilty of misconduct - and accordingly dismissed.

The employee referred an unfair dismissal dispute to the CCMA. The CCMA found that there was a "lack of empathy and understanding of cultural diversity in the Appellant's workplace".<sup>53</sup> The CCMA stated that the employee was justified under the circumstances to disregard the instructions of the employer. In fact, the employee's life would have been at risk had she not disregarded the instructions. It was found that the refusal of the employer to grant the employee unpaid leave was unreasonable.<sup>54</sup> On review to the Labour Court, it was found that the decision taken by the Commissioner was reasonable, and the Court dismissed the review. The matter was taken on appeal to the LAC.

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<sup>51</sup> Govender and Bernard 2009 *Obiter* 9.

<sup>52</sup> *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* 2012 11 BLLR 1099 (LAC).

<sup>53</sup> *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* 2012 11 BLLR 1099 (LAC) para 13.

<sup>54</sup> Rycroft 2011 *SA Merc LJ* 108.

The LAC emphasised that some cultural beliefs and practices are strongly held - and should not be trivialised by those who do not subscribe to them. The fact that the employer did not believe in the authenticity of the culture and that no credible and expert evidence was presented to prove that the employee was ill was subjective and irrelevant.<sup>55</sup> According to the LAC:

... what is required is reasonable accommodation of each other to ensure harmony and to achieve a united society. A paradigm shift is necessary and one must appreciate the kind of society we live in. Accommodating one another is nothing else but "botho" or "Ubuntu" which is part of our heritage as a society.<sup>56</sup>

According to Rycroft, employees have a duty to render services to employers on every working day - except during annual, sick, maternity or family-responsibility leave.<sup>57</sup> Rycroft suggests that employees should use time outside of working hours to exercise their religious and cultural beliefs; however, employers ought not to be inflexible, and wherever possible should be sensitive to the religious and cultural beliefs of their employees.<sup>58</sup> Employers should accommodate the religious and cultural beliefs of employees where possible.

Our courts have emphasised that employers must demonstrate that they have exercised reasonable accommodation. To this end, they may need to use resources to build suitable prayer rooms in the office building; they may have to change their toilet facilities to include washing facilities such as taps within the toilet cubicles; meals provided by the employer may have to accommodate religious dietary requirements; and working hours may have to be amended so as to allow employees time to pray.

That said, the employer is not required to ensure "absolute" accommodation - merely reasonable accommodation. Consequently, an employer is not required to incur expenses disproportionately, nor is an employer expected to implement

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<sup>55</sup> *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* 2012 11 BLLR 1099 (LAC) para 26.

<sup>56</sup> *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* 2012 11 BLLR 1099 (LAC) para 26.

<sup>57</sup> Rycroft 2011 *SA Merc LJ* 109.

<sup>58</sup> Rycroft 2011 *SA Merc LJ* 109.

practices which adversely and unreasonably impact on the effectiveness of the business.

## **6.2 POPCRU<sup>59</sup>**

The LAC in the *POPCRU* case found that there was no rational connection between the purpose sought to be achieved by the employer, and the measure. The court based its reasoning on the following:

- a. It was not argued that short hair was an inherent requirement of the job in terms of section 187(2) of the LRA.
- b. It was argued that short hair offered greater protection from assaults by prisoners. This was held to be unsustainable, as female wardens have long hair, which meant that they were also at risk, but no restrictions had been placed on them. If the risk were real the same sanction ought to have been imposed on the female wardens, in order to extend greater protection to them as well.
- c. The LAC agreed that while the dress code was uniformly applied when it came to the wearing of uniforms, it was not constant in respect of hairstyles, as it expressly prohibited the "Rasta" hairstyle. There was no dispute between the parties that the wearing of dreadlocks was a central tenet of Rastafarianism and is a form of personal adornment used by some who follow the spiritual traditions of Xhosa culture. Thus, their beliefs were sincere.
- d. Furthermore, other male correctional officers were permitted to wear "Afro" hairstyles, to shave their heads in a "skinhead" fashion, and to wear handlebar moustaches which extended on either side of their faces. These examples of permissible hairstyles reinforced the impression that dominant or mainstream hairstyles representing particular cultural stereotypes were favoured over those of marginalised religious and cultural groups.<sup>60</sup>
- e. There was no rational basis for the contention that the prohibition of dreadlocks could contribute to improving discipline, security, probity, trust and

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<sup>59</sup> *Department of Correctional Services v POPCRU* 2011 32 ILJ 2629 (LAC).

<sup>60</sup> *POPCRU* case para 47.

performance.<sup>61</sup> It was found that the employees - despite wearing their hair in dreadlocks - were exemplary officers. No evidence was submitted that the employees, as a result of their hairstyles, were less disciplined; the hairstyles had no bearing on their performance. Therefore, the discriminatory prohibition on dreadlocks was unfair, disproportionate and overly restrictive.<sup>62</sup>

The LAC stated that the "refusal to reasonably accommodate diversity and the lack of rationality in its measure aimed at the legitimate purposes of discipline, security and uniformity leads inescapably to the conclusion that the discriminatory prohibition on dreadlocks was unfair, disproportionate and overly restrictive".<sup>63</sup> The LAC also found it peculiar that at the time the employees were disciplined the Department had reviewed its policy on the dress code to offer greater flexibility in "accommodating issues of diversity ... religions, gender and culture".<sup>64</sup> The employer, despite being aware of the need for reasonable accommodation, imposed a blanket prohibition on the employees, irrespective of the unfair impact on them.<sup>65</sup>

## **7 Requirements for a successful religious discrimination claim**

The case of *SACTWU v Berg River Textiles, A division of Seardel Group Trading (Pty) Ltd*<sup>66</sup> (hereafter the "*SACTWU* case") sets out the requirements an applicant must establish to ensure a successful claim of religious discrimination.

The employer sought to introduce a new shift system, which resulted in the employees engaging in an unprotected work stoppage. The court had to consider whether the dismissal of an employee was automatically unfair. According to the new shift system, employees were required to work on Sundays. The employee concerned refused to work on a Sunday, as this was prohibited in terms of his religion. He argued that this was a central tenet of his religious beliefs, and he was a

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<sup>61</sup> *POPCRU* case para 48.

<sup>62</sup> *POPCRU* case para 51.

<sup>63</sup> *POPCRU* case para 51.

<sup>64</sup> *POPCRU* case para 51.

<sup>65</sup> *POPCRU* case para 51.

<sup>66</sup> *SACTWU v Berg River Textiles, A division of Seardel Group Trading (Pty) Ltd* 2012 33 ILJ 972 (LC) (the *SACTWU* case).

passionate Christian and a lay preacher. The employer was aware of the employee's religious beliefs. He was dismissed, however, together with the other employees.

The court found that the failure to accommodate the employee's religious belief amounted to an automatically unfair dismissal. It held that the employer was well aware of the employee's religious convictions - "so much so that he had in the past turned down promotions and lucrative overtime work in order to go to church, preach and not work on Sundays".<sup>67</sup> The court looked at the findings of the LAC in the *POPCRU case* and set out the requirements for a successful religious-discrimination claim.<sup>68</sup>

Based on the guidelines formulated in the *SACTWU case*,<sup>69</sup> there is a burden on both the employer and employee. The employee is required to prove that a policy or rule which appears to be neutral is in fact discriminatory in its application.<sup>70</sup> Furthermore, the employee has to show that the employer - through its enforcement of a prohibition - interfered with the employee's participation in a religion or culture.<sup>71</sup> The employee also has to demonstrate that the prohibition is a central tenet of his or her religion.<sup>72</sup> The employer should be made aware of the employee's religious practice. Thus, there is an onus on the employee to ensure that the employer is made aware of this fact.<sup>73</sup>

Once an employee discharges the above burden, the employer has to establish that the discrimination is fair or that the prohibition or rule is an inherent requirement of the job.<sup>74</sup> It is also essential for the employer to prove that steps were taken to reasonably accommodate the sincerely-held religious belief of the employee.<sup>75</sup> The

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<sup>67</sup> *SACTWU case* para 41.

<sup>68</sup> *SACTWU case* para 38.

<sup>69</sup> *SACTWU case* para 38.

<sup>70</sup> *POPCRU case* para 35.

<sup>71</sup> *POPCRU case* para 24, citing *MEC for Education, Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC) para 46.

<sup>72</sup> *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC); *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) paras 14-18.

<sup>73</sup> *POPCRU case* para 27.

<sup>74</sup> *POPCRU case* para 35.

<sup>75</sup> *POPCRU case* para 35.

principle of proportionality must be applied. The employer's motive and intention are irrelevant.<sup>76</sup> The employer is therefore required to balance the operational needs of the business against the religious convictions of the employee.

The guidelines set out in the *SACTWU* case<sup>77</sup> are comprehensive and offer guidance to courts when dealing with claims of unfair discrimination in the workplace. The guidelines place a duty on both the employer and the employee, but the responsibility of balancing the relevant interests remains with the employer.

## 8 Conclusion

In *Prince v President of the Law Society of the Cape of Good Hope*<sup>78</sup> Ngcobo J aptly stated:

The right to religious freedom is especially important for our constitutional democracy ... Our society is diverse. It is comprised of men and women of differential cultural, social, religious and linguistic backgrounds. Our constitution recognizes this diversity ... The protection of diversity is the hallmark of a free and open society.<sup>79</sup>

South African society is characterised by a diversity of cultures, traditions and beliefs.<sup>80</sup> This being the case, there will always be instances where these diverse cultural and traditional beliefs and practices present challenges within our society - the workplace being no exception.<sup>81</sup> Against this backdrop, regulating diversity is a challenge to both the employer and the employee. It is clear that the courts are prepared to carefully scrutinise an employer's justification for limiting an employee's right to freedom of religion. In the *POPCRU* case this was especially important as the practice concerned extended beyond societal "norms".

The employer in the *POPCRU* case was certainly justified in wanting to improve the discipline and standards within the prison. It is submitted, however, that alternatives

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<sup>76</sup> *POPCRU* case para 35.

<sup>77</sup> *SACTWU v Berg River Textiles, A division of Seardel Group Trading (Pty) Ltd* 2012 33 ILJ 972 (LC).

<sup>78</sup> *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC).

<sup>79</sup> *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC) para 9.

<sup>80</sup> *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) para 26.

<sup>81</sup> *Department of Correctional Services v POPCRU* 2013 ZASCA 40 (28 March 2013) para 26.

ought to have been considered before the application of the departmental policies. The findings of the LAC and SCA were indeed correct; while the dress code appeared to be neutral, the actual impact resulted in the disparate treatment of the employees. They were discriminated against as a result of their wearing dreadlocks - which was proven by the employees to be concomitant with their sincerely-held beliefs. Thus the employer failed to reasonably accommodate the religious beliefs of the employees, and had it done so dismissal would not have occurred.

Furthermore, the finding of the SCA that the policy against the wearing of dreadlocks was not an inherent requirement of the job was indeed correct. The goals of the employer were acceptable, but it could not be established by the employer that the wearing of dreadlocks by employees would affect the discipline and standards of the prison. This was in contrast to *Dlamini*,<sup>82</sup> where the Labour Court found that the rule within the workplace was an inherent requirement of the job and the employees were unable to prove that their dismissal was a result of their religious beliefs. Indeed, the employees were unable to illustrate that their beliefs were sincerely held. The employer, on the other hand, could illustrate that the rule was an inherent requirement of the job.

It is important to note the trend that has emerged from the analysis of the cases above:

- a. In order for an employee to succeed in a claim for unfair dismissal on the basis of religious discrimination, the employee will have to establish that his or her belief was sincerely held. Thus, according to *Pillay*,<sup>83</sup> employers are required to implement positive measures to reasonably accommodate the religious practices of an employee, but no employer will be expected to incur unnecessary or undue hardship.
- 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

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<sup>82</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC).

<sup>83</sup> *MEC for Education, Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC).

an inherent requirement of the job. In *POPCRU*<sup>84</sup> both the LAC and the SCA held that the employees who wore dreadlocks due to their religious or cultural beliefs had been unfairly discriminated against, and thus their dismissals were automatically unfair. 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. In this case the employer was unable to establish the inherent requirement of the job.

c. Society has evolved, and there is therefore a need for employers to accept societal changes and reasonably accommodate the sincerely held religious beliefs of employees to the extent that the employer does not experience undue hardship. The LAC in *Kievits Kroon*<sup>85</sup> stated that cultural beliefs and practices which are strongly held should not be trivialised by those who do not practice such beliefs. Employers need to reasonably accommodate the religious and cultural practices of their employees in order to ensure harmony.

d. The guidelines set out in *SACTWU*<sup>86</sup> are comprehensive and will certainly assist courts in the future when dealing with unfair discrimination claims based on religion and culture.

When these guidelines are applied to the *POPCRU* case,<sup>87</sup> it is evident that the employees clearly illustrated that the wearing of dreadlocks was concomitant with a sincerely held belief in their religion. The employer was made aware of this fact, and despite this, the employees were dismissed. The employer, on the other hand, 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.

The context then is that "when entering the workplace, employees do not leave behind their personalities, their likes and dislikes, their convictions or their faiths and

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<sup>84</sup> *Department of Correctional Services v POPCRU* 2011 32 ILJ 2629 (LAC).

<sup>85</sup> *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* 2012 11 BLLR 1099 (LAC).

<sup>86</sup> *SACTWU v Berg River Textiles, A division of Seardel Group Trading (Pty) Ltd* 2012 33 ILJ 972 (LC).

<sup>87</sup> *Department of Correctional Services v POPCRU* 2011 32 ILJ 2629 (LAC).

beliefs, morals, sentiments and, of course, religious beliefs".<sup>88</sup> Thus, it appears from the above that regardless of the practice concerned, a concerted effort is required of employers to promote diversity and religious freedom in the workplace.

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<sup>88</sup> Mischke 2011 *CLL* 81.

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## **Legislation**

*Constitution of the Republic of South Africa*, 1996

*Employment Equity Act* 55 of 1995

*Labour Relations Act* 66 of 1995

## **LIST OF ABBREVIATIONS**

CCMA	Commission for Conciliation, Mediation and Arbitration
CLL	Contemporary Labour Law
EEA	Employment Equity Act
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
POPCRU	Police and Prison Civil Rights Union
SA Merc LJ	South African Mercantile Law Journal
SCA	Supreme Court of Appeal