

**Dismissal as a fair sanction based on
cultural and religious beliefs – a
comparative study**

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ABSTRACT

The rights to freedom of religion and cultural expression are some of the most important rights a person has, and both are entrenched in the Bill of Rights. Since the expression of these rights is interwoven with a person's day to day living, they also make their way into the workplace. The ability to exercise these rights enables a person to fulfil a spiritual need as well as the need for a sense of belonging. These rights do however have the ability to cause friction in the workplace, such as the wearing of a headscarf, dreadlocks or a cross, some of which might be against the uniform policy of the workplace. They also have the potential to be on a collision course with certain rights of the employer. For this reason there should be a clear understanding with regard to the extent to which protection can be enjoyed under these rights. More importantly, it has to be determined when an employer will be within his rights to consider and effect dismissal based on cultural and religious reasons.

Dismissal may not take place on any of the listed grounds as stipulated by section 187 (1)(f) of the *Labour Relations Act*, nor discrimination on any grounds contained in section 6 of the *Employment Equity Act*. Religion and culture are both included in the aforementioned sections which implies any dismissal or discrimination on these grounds is prohibited. It is further incumbent upon the employer to provide reasonable accommodation towards the employee in order for the latter to exercise the right to freedom of religion and culture in the workplace.

However, the employer cannot be expected to accommodate the employee beyond the point of reasonableness. Should the employer reach the point where his/her interest would suffer a loss, he/she need not accommodate the employee any further. Discrimination and/or dismissal at this point would thus be justified, even if it is based on religious or cultural grounds. An inherent requirement of the job may further justify ostensible discrimination with regard to a particular job.

Courts have had ample opportunity to express themselves on the issues mentioned above. Recent case law seems to be slightly more generous towards the employee than what used to be the case in erstwhile decisions; this can be attributed to the fact that we are now living in a constitutional dispensation. The operational requirements

of the employer may however still be such that the rights of the employee with regard to culture and religion have to give way.

Guidance can also be sought from Canadian jurisprudence, especially because of the similar values of South African and Canadian constitutions. The Canadians have developed the concept of undue hardship which, to a great extent, seems to be successful in striking a balance between the rights of the employer and those of the employee. Under this concept issues such as financial cost, interchangeability of workforce, moral of other employees and health and safety issues are key factors for such a balance.

Key terms:

Dismissal, religion and culture, discrimination, reasonable accommodation, undue hardship.

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ABBREVIATIONS

ACS	Aviation Coordination Services
BCEA	Basic Conditions of Employment Act
BFOQ	Bona Fide Operational Qualification
BFOR	Bona Fide Operational Requirement
CCMA	Commission for Conciliation, Mediation and Arbitration
CHRA	Canadian Human Rights Act
CSMB	Canadian Scolaire Marguerite Burgeoys
EEA	Employment Equity Act
HIV	Human Immunodeficiency Virus
ILO	International Labour Organisation
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination
RCMP	Royal Canadian Mounted Police
SAA	South African Airways
SAPS	South African Police Service
SCA	Supreme Court of Appeal

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CHAPTER 1

INTRODUCTION

1.1 Introduction

South Africa is a diverse country, rich with different cultures and religions, and sooner or later these cultures, religions and practices will undoubtedly make their way into the workplace, since employment and the workplace form an integral part of a person's life. Section 9 of the *Constitution of the Republic of South Africa*¹ entrenches the right to equality before the law, and provides that no one may be discriminated against based, amongst others, on his religion or culture. Furthermore, the Constitution guarantees the right to freedom of religion in section 15, and protects the individual's right to participate in the cultural life of his or her choice in section 30. The rights to religion and culture are thus fundamental rights which are enforceable in all spheres of life.

Apart from the constitutional entrenchment of the right to equality, similar and relevant protections are also extended by various South African statutes. Section 6 of the *Employment Equity Act*² (hereafter the EEA), provides for this right in the labour law sphere specifically. Under this section, unfair discrimination on the grounds of religion and culture is strictly prohibited in the workplace. In addition, the *Labour Relations Act*³ (hereafter the LRA) prohibits in section 187(1)(f) the dismissal of an employee where the reason for the dismissal is on one of the listed grounds. The listed grounds in section 187(1)(f) correspond to a great extent with the grounds contained in section 6 of the EEA. Dismissals in terms of section 187(1)(f) of the LRA are labelled "discriminatory dismissals" and are considered to be automatically unfair unless the employer has a defence. When reading section 187(1)(f), it should be kept in mind that the conduct of an employee can also stem from a tenet based on his religion. A person might for instance smoke *dagga* - which is a criminal offence.⁴ He might, however, not do this to satisfy his personal desire, but to adhere to a religious obligation. Whilst the employer might perceive such an act as misconduct, the

1 *Constitution of the Republic of South Africa*, 1996.

2 Act 55 of 1998.

3 Act 66 of 1995.

employee might see it as nothing but the expression and exercise of a religious tenet. It is this difference in viewpoints that can lead to tension in the workplace, and which forms the basis of this study. The employer can, however, still dismiss such an employee on grounds such as inherent and operational requirements; a matter which will be investigated in this study.⁵

Section 187(2) of the LRA makes provision for an employee to be dismissed based on an inherent requirement of the job. This means that if an employee lacks a crucial or vital element, trade or characteristic of the job, and this prevents him from fulfilling the requirements of a job which can be regarded as a pre-requisite, he or she can be dismissed. Put differently, an employee may be dismissed on one of the listed grounds, or may be discriminated against reasonably, if such discrimination is based on an inherent requirement of the job. This provision in section 187(2) corresponds with the provisions of section 6(2) of the EEA.

The meaning of “operational requirements” is set out in section 213 of the LRA and refers to the economic, technological, structural or similar needs of an employer. Section 188 of the LRA stipulates that dismissals which are not automatically unfair (clearly referring to section 187(1)(f) dismissals), are unfair if the employer fails to prove that such dismissals are based on the conduct or capacity of an employee or operational requirements. Section 189 specifies the approach to be adopted when an employer contemplates to dismiss an employee for operational reasons. In most instances, the observance of religious or cultural practices will have a negative impact on the economic needs,⁶ or structural or similar interest⁷ of an employer in the workplace.

Therefore, although an employee has a number of rights which protect him in the workplace, the employer is not left without options in instances where an employee’s cultural or religious practices have a negative impact on the employer’s business.

4 Section 4 (read with Part iii of Schedule 2) of the *Drug and Drug Trafficking Act* 140 of 1992.

5 See 3.4. under Chapter 3 hereunder.

6 See 4.3 under Chapter 4 hereunder for a discussion of cases such as *Kievits Kroon v Mmoledi* and *Food and Allied Workers Union v Rainbow Chickens*.

7 See the remarks made hereunder about *Dlamini v Green Four Security and Department of Correctional Supervision v Popcru*.

Section 23 of the Constitution⁸ provides for fair labour practices for employees as well as employers, which means the labour interest of an employer and/or employee is of equal importance.⁹ Apart from section 23, the provisions of section 36 of the Constitution¹⁰ should also be borne in mind, which stipulates that the rights contained in the Bill of Rights can be limited for as long as such limitation can be justified in an open and democratic society. As will be seen in this study, rights like the right to equality, freedom of religion, belief, culture and opinion as well as the right to fair labour practices can thus in certain circumstances be curtailed should such curtailment be justified.

Although the aforementioned provisions are unambiguous and should ensure harmony in the workplace, this does not seem to be the case. On numerous occasions employers have faced litigation for dismissals based on religious or cultural beliefs. In many of these cases reinstatement was ordered, although in other cases employers were regarded as having acted within the confines of the law. The following cases prove the aforementioned anomaly.

In *Dlamini v Green Four Security*,¹¹ employees who proclaimed to be part of the Baptist Nazareth Group, and who were working for a security company, refused to shave their beards, saying that it was against their religious beliefs.¹² The employer submitted that the appearance and image projected by the employees was not good for the image and reputation of his business.¹³ The court ruled in favour of the employer and said that this particular practice of the employee was in any event not always observed by all members of this faith. The court further surmised that neatness was an inherent requirement of the job.¹⁴

In *Department of Correctional Services v Popcru*¹⁵ the new area commissioner of Pollsmoor set out to enforce the rules contained in the Department's dress code

8 *Constitution of the Republic of South Africa*, 1996.

9 Further protection for the employee can be found in s 185 of the LRA which protects the latter against unfair dismissal.

10 *Constitution of the Republic of South Africa*, 1996.

11 2006 27 ILJ 2098 (LC).

12 2006 27 ILJ 2101 (LC) par 2.

13 2006 27 ILJ 2110 (LC) par 54.

14 2006 27 ILJ 2111 (LC) par 57.

15 2013 4 SA 176 (SCA).

shortly after he had taken over the reins.¹⁶ He instructed a number of warders to shave their dreadlocks (also known as *Rastaman*-hairstyle) since males were prohibited from having such hairstyles in terms of the dress code. The warders had various reasons why they could not comply with the request or instruction, but the reasons mainly revolved around cultural and religious beliefs and tradition.¹⁷ When the workers were dismissed for failing to cut their dreadlocks, the court ruled that their dismissal was automatically unfair, since it was not shown by the employer that short hair, not worn in dreadlocks, was an inherent requirement of the job.¹⁸

Both cases had to do with the personal appearance of employees as part of their dress code in a highly regulated work environment, but the outcomes from the courts differed. It is thus unclear to what extent an employer has to accommodate and tolerate the religious and cultural practices of an employee, since the parameters seem to fluctuate. Answers to this question will be sought in the investigations below.

With the above-mentioned examples in mind, it also remains to be seen what the position would be should an employee want to exert or carry other symbols, which might or might not be intertwined with their religion, together with their uniform. For example, a determination needs to be made whether a Christian will be allowed to carry a cross (which signifies the crucifixion of Jesus) or whether a Muslim worker will be allowed to wear a headscarf as part of her uniform. This aspect is critical since it can be seen as favouritism or prejudice in respect of and towards other religions, a matter which will also be investigated.¹⁹

These questions and inconsistencies when it comes to the upholding of religious and cultural rights in the workplace create uncertainty, leaving employers in the dark with regard to when dismissal based on religion and culture will be a fair sanction and not amount to discrimination. It also exposes them to unnecessary litigation. The golden thread (if there is one) must be found in order to make sense of these conflicting judgements and to bring about certainty in the workplace.

16 2013 4 SA 181 (SCA) par 14.

17 2013 4 SA 180 (SCA) par 11.

18 2013 4 SA 183 (SCA) par 25.

19 See 2.4 under Chapter 2; 4.5 under Chapter 4 as well as 5.4 under Chapter 5 hereunder.

The concept of reasonable accommodation also needs to be examined.²⁰ Section 15(2)(c) of the EEA provides that an employer must ensure reasonable accommodation for people from designated groups so that the latter can enjoy equal employment opportunities and be equally represented. Section 15(3) even allows for preferential treatment for people from designated groups. Adherence to section 15 of the EEA will inevitably add to the variety of cultures and religions in the workplace, which will make it even more important for the employer to know to which extent cultural and religious practices ought to be allowed, and where the line can be drawn.

Similar to the uncertainty and problems experienced in South Africa, religious beliefs and the accommodation of cultural practices in the workplace have also presented various problems in Canada. In light of the fact that South Africa's Constitution and the Bill of Rights drew heavily on Canada's Charter of Rights and Freedoms²¹, it might be worthwhile to take cognisance of how the Canadian legal system deals with this phenomenon so as to learn best practices and to find solutions to the problems that beset South Africa.

In the past the Canadian legal system made provision for two different approaches, namely the "effect approach" and the "bona fide operational requirement approach".²² The effect approach entails that discrimination will be unfair if a rule (although neutral) brings about a situation whereby certain employees are penalised, obligated or restricted in one way or the other, whilst other employees are not. The *effect* of the provision is thus the determining factor as to whether a provision is discriminatory or not. In terms of the bona fide operational requirement approach an employer can adopt a discriminatory practice if such a practice is based on a bona fide operational requirement. The employer would carry no duty to accommodate in such an instance. The two concepts manifested in *O'Malley v Simpson Sears*²³ and *Bhinder v Canadian National Ry Co.*²⁴

20 See 3.3.3 under Chapter 3 hereunder.

21 *Canadian Charter of Rights and Freedoms*, 1982.

22 See 5.6 under Chapter 5 hereunder.

23 1985 CHRR D/3093.

24 1985 7 CHRR D/3093.

In *O'Malley v Simpson Sears Ltd*,²⁵ an employee joined the Seventh Day Adventist church which made it impossible for her to work on Saturdays since it is regarded as the Sabbath.²⁶ The employer decided to offer Mrs O'Malley part-time employment, and promised to notify her should a position become available which does not require her to work on a Saturday.²⁷ This led to Mrs O'Malley instituting a claim for loss of wages and certain fringe benefits. The Supreme Court found that an employer had a duty to accommodate religious employees unless such accommodation would bring about undue hardship on the employer, and ruled in Mrs O'Malley's favour.²⁸

In *Bhinder v Canadian National Ry Co*,²⁹ a member of the Sikh faith was working as a maintenance technician. A new policy was introduced to the effect that employees had to wear a hard hat when entering the coach yard. Mr Bhinder could not comply with this new policy due to his religious beliefs. Although the tribunal ruled in Mr Bhinder's favour, the Federal Court overruled this decision and found that the requirement was a bona fide operational requirement; and because it was, the employer was right to introduce such a policy and did not have to make any exceptions.³⁰

The question as to when an employer will be entitled to dismiss if such dismissal is based on culture or religion thus remains to be answered. Any accommodation beyond the point of reasonable accommodation might amount to undue hardship. Canadian case law has laid down some good guidelines with regard to what can be perceived as undue hardship in cases after the *Bhinder*-decision.³¹ The ultimate objective of this study will be to see to what extent these guidelines, together with other considerations; can be of assistance to the South African setup. This will be done by analysing the aspects highlighted above.

In this work there will be a reflection on the cosmopolitan nature of South Africa and the effect that this might have on the workplace.³² A brief overview of the pre-and

25 1985 CHRR D/3093.

26 1985 2 SCR 536, 6 par 3.

27 1985 2 SCR 536, 7 par 4.

28 1985 2 SCR 536, 28 par 29.

29 1985 7 CHRR D/3093.

30 1985 2 SCR 561, 581 par D-E.

31 See 5.4 under Chapter 5.

32 See 2.1 and 2.2 under Chapter 2 hereunder.

post- constitutional era of the country will also be provided.³³ This will provide insight into the complexity of the problem that besets employers in the workplace.

Hereafter an in-depth analysis of those sections in the Constitution which entrench the right to equality,³⁴ religion³⁵ and culture will follow.³⁶ Legislation like the EEA³⁷ and the LRA³⁸ will also be dissected with specific reference to concepts like “inherent requirements,”³⁹ “reasonable accommodation”⁴⁰ and “operational requirements”.⁴¹ This exercise is crucial to get an understanding of how the courts reason and approach these concepts. The interpretation of these rights and legislation by the judiciary will follow thereafter to see whether there is a thread that can be followed.⁴² The Canadian position will then be considered to see how this country deals with these issues, and to perhaps adopt best practices. The concept of undue hardship will also be expanded⁴³ since it can serve as a useful guideline with regard to the limits of reasonable accommodation. A consolidation of all the afore-mentioned will take place in the final chapter with recommendations pertaining to the way forward.

33 See 2.3 under Chapter 2 hereunder.
34 See 3.2.1 under Chapter 3 hereunder.
35 See 3.2.3 and 3.2.5 under Chapter 3 hereunder.
36 See 3.2.3 under Chapter 3 hereunder.
37 See 3.3 under Chapter 3 hereunder.
38 See 3.4 under Chapter 3 hereunder.
39 See 3.3.1 under Chapter 3 hereunder.
40 See 3.3.3 under Chapter 3 hereunder.
41 See 3.4.1 under Chapter 3 hereunder.
42 See Chapter 4 hereunder.
43 See 5.5 and 5.7 under Chapter 5.

CHAPTER 2
**AN OVERVIEW OF DIVERSITY IN THE SOUTH AFRICAN
WORKPLACE AND THE EFFECT THEREOF**

2.1 Introduction

Diversity in the workplace could bring with it a tremendous amount of benefits. A group of people comprising different cultures, races and denominations may have a greater wealth of wisdom and experience to draw from than a homogeneous group. It is, however, also true that conflict is more likely to stem from a group consisting of members from diverse backgrounds. It is incumbent upon employers to manage these potential conflicts to create a positive and conducive work environment. Diversity is a reality one cannot escape when the South African population is considered. In light of the fact that diversity is inescapable, it is imperative to determine how best it can be managed in the workplace, since failure to do so can be disastrous for the employer and his business.

This chapter will reflect upon the diverse nature of the South African population. The effect of the pre- and post-constitutional dispensation will also be briefly considered so as to have an understanding where South Africa has come from and how it arrived at where it is. Diversity in the workplace, with particular reference to diversity in terms of religion and culture, will then be considered. The role and position of the employer will also be outlined, especially with regard to the issue of reasonable accommodation in the workplace.

2.2 Diversity in the South African context

As indicated in the introductory part of this work, South Africa is a nation of diversity with over fifty million people and a wide variety of cultures, languages and religious beliefs.⁴⁴ This was also acknowledged by Ngcobo J in his dissenting judgement when he stated that: "Our society is diverse. It is comprised of men and women of different cultural, religious and linguistic backgrounds."⁴⁵ There are eleven official languages

44 Anon 2011 mg.co.za/article/2011-08-26.

45 *Prince v President of Law Society of Cape Good Hope* 2002 2 SA 794 (CC) par 49.

which enjoy constitutional protection⁴⁶ and although the majority of South Africans are adherents of Christianity,⁴⁷ other religions such as Islam, Hinduism, Judaism and others are also subscribed to. At the same time a myriad of different cultural beliefs and practices exist which very often navigate and inform the individual's sense of right and wrong and way of living.

The rights of all these different groups of people, who are together affectionately known as the rainbow nation, need to be protected whilst simultaneously taking cognisance of their different backgrounds.⁴⁸ This might prove to be a difficult task, especially bearing in mind that there can be a huge cultural chasm amongst individuals and different groups of people. It is, however, something that has to be done, especially if one bears in mind the painful and horrendous past that most South Africans were freed from not so long ago.

2.3 The pre- and post-constitutional dispensation

Under apartheid, discrimination against workers on the grounds of race and gender was not only permitted, it was legally enforced,⁴⁹ like the *Industrial Conciliation Act* of 1924.⁵⁰ The concept of equal pay for equal work was unheard of, and white employees were generally better-off than employees of colour. Employers also had a free hand to discriminate against workers on grounds such as religion and culture.⁵¹ These workers very often had little or no recourse. Due to the sovereignty of parliament and the supremacy of legislation, courts enforced the law as it stood,⁵² even though it was clear that a great majority of the citizens were subjected to an unjust system. According to Du Toit, no stable economy and democratic society can be built on such foundations.⁵³ South Africa became increasingly isolated from the rest of the world.⁵⁴ The new era which was ushered in by the *Constitution of the*

46 Section 6 of the *Constitution of the Republic of South Africa*, 1996.

47 Curry 1990 www.firstthing.com (accessed 14 May 2015).

48 Lambrechts 2012 *Interim: Interdisciplinary Journal* 48.

49 Du Toit 2007 www.saflii.org/zajournals/LDD/2007/20 1.

50 Act 11 of 1924.

51 Du Toit 2007 www.saflii.org/zajournals/LDD/2007/20 1.

52 *S v Makwanyane* 1995 (CC) par 301, 391.

53 Du Toit 2007 www.saflii.org/zajournals/LDD/2007/20 1.

54 See the International Convention on the Elimination of All Forms of Racial Discrimination adopted in 1965.

Republic of South Africa, 1996,⁵⁵ was long overdue and brought about the first steps to the stability which was desperately needed. The Bill of Rights contained in the Constitution ensured that a number of basic but essential rights such as the right to dignity, equality and freedom be bestowed upon every citizen. Rights such as the freedom to exercise religious and cultural rights were also included and entrenched.⁵⁶

2.4 Religious and cultural diversity in the workplace

Religion and cultural belief systems are subjective and intrinsically personal to the individual.⁵⁷ Religious freedom has on occasion been described as the most personal of human rights as it goes to the very core of a human being.⁵⁸ In *Christian Education v Minister of Education*⁵⁹ the court acknowledged that it is not easy to make decisions between competing constitutional rights such as equality, human dignity, conscience, and religious freedom. This task is probably even more daunting for employers who, although not as conversant with the law as presiding officers and judges, have to accommodate different cultures and religions in the workplace, so as to ensure that everyone's respective rights are respected. Workers can also avail themselves of their right to cultural and religious freedom, which can bring tension in the workplace if not dealt with properly. The problem can further be exacerbated when the rights of the employer clash with those of the employee in this regard.

To illustrate how difficult it can become and how cultures and religions can differ, one only has to think about something as mundane as time. Cultures differ in how they view time, as well as how to strike a balance between work and family life.⁶⁰ The business world also runs on the western secular year which starts on the 1st of January and ends on the 31st of December. Many cultures, however, use other calendars to determine holidays such as New Year and other specific holy days. Eastern Orthodox Christians celebrate Christmas on a different day from western

55 *Constitution of the Republic of South Africa, 1996* (hereafter referred to as the Constitution).

56 These rights will be analysed at a later stage.

57 Radley *Mutual Accommodation of Religious Rights in the Workplace* 504.

58 Thames 2011 *International Journal for Religious Freedom* 115.

59 2000 4 SA 757 (CC) par 35: "the underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members in religious communities to define for themselves which laws they will obey and which not."

60 [http://: www.diversityresource.com](http://www.diversityresource.com) Alpert *Cultural Diversity in the Workplace* Part 1 (accessed 14 May 2015).

Christians, whilst Muslims generally regard Fridays as a day for prayer.⁶¹ These variations affect the workplace, as people need time off to celebrate their holidays and observe their religious customs.⁶² It is unfortunately not always possible to give people off, since absence from work might create a problem for the employer in the sense that there might not be a sufficient number of employees to deal with the work load. Some businesses also operate 24 hour non-stop shifts and the absence of a group of employees might bring the entire operation to a standstill. It must further be borne in mind that, at all times, consistency and fairness when it comes to the treatment of employees are essential.

Some more contentious issues can also come to the fore, such as clothing and regalia that a person might have to wear or display in observance of one or other religious practice. Certain institutions or places of employment might have a particular dress code or uniform which employees are supposed to wear whilst being at work or whilst executing duties in the scope of their employment. It is commonly accepted that the reason for having something like uniforms could, amongst other things, be for purposes of identification, the promotion of uniformity as well as ensuring that some sense of discipline is instilled. This will be the position whether one is talking about uniforms in the workplace or a dress code in an institution like a school. It must further be remembered that most of these workplaces or institutions will already have a policy in place that regulates issues such as uniforms and dress codes, and it can very well be assumed that a party who feels aggrieved at a later stage consented to these policies when employment was assumed. Any deviation from this norm by the employee must thus be justified and should not erode this noble idea.

Apart from specifying what a person or an employee ought to wear, a dress code can also carry a proscription with regard to the wearing or displaying of certain things which might be associated with a particular religion.⁶³ The main reason for having such a proscription would normally be to guard against a situation where others are

61 [http:// www.diversityresource.com](http://www.diversityresource.com) Alpert *Cultural Diversity in the Workplace* Part 1 (accessed 14 may 2015).

62 [http:// www.diversityresource.com](http://www.diversityresource.com) Alpert *Cultural Diversity in the Workplace* Part 1 (accessed 14 May 2015).

63 See *MEC for Education v Pillay* 2008 1 SA 474 (CC).

offended, or to avoid a situation of perceived favouritism and/or discrimination. Such proscription itself can, however, amount to discrimination against the employee who chooses to subscribe to this particular religion. Similarly, appearance has also proved to be a bone of contention. The wearing of long hair plaited in a particular manner, the refusal to trim a beard, or the wearing of jewellery on a particular part of the body can all be interconnected and associated with a religion or cultural belief.⁶⁴

The question should furthermore be posed as to whether it will suffice if this religious observance is a custom, or whether it should be something more, such as a religious obligation (bearing in mind that the answer to this question can vary and be contradictory, depending on who is being asked). People from a particular culture or religion might differ amongst themselves about what actually constitutes their culture or religion. In other words, it needs to be established whether an employee is obliged to stick to the fundamental values that personify a particular religion which he claims to follow or be part of. The line between practices mandated by religion and those which merely form part of a social culture or tradition is not always clear.⁶⁵ If no such obligation exists, there might be a risk that employers will have to accept certain customs and practices which are not related to religion or cultural beliefs but guised as such. An employee can for instance claim that his religion forbids work on a Sunday or prevents him from doing certain things like assisting during an abortion procedure. Such a situation not only creates uncertainty but can become unbearable and extremely difficult to manage in the workplace if it cannot be regulated.

Another issue that is closely related to the above is whether a person can adopt customs of a group which he is not part of. In Borneo, for instance, women tattoo their forearms to indicate that they are skilled weavers.⁶⁶ This increases their chances of getting married, whereas tattoos around the wrist and fingers are believed to ward away illness.⁶⁷ Tattoos can thus be clearly linked to a cultural practice of a particular group of people, but it is common knowledge that tattoos are not restricted to this group of people. When one has regard to the recruitment policies of an entity

64 See *Department of Correctional Services v Popcru* 2013 4 SA 176 (SCA).

65 *Riad Religious Expressions in the Workplace* 468.

66 <http://www.powerverbs.com> *A Brief History of Tattoos* (accessed 22 May 2015).

67 <http://www.powerverbs.com> *A Brief History of Tattoos* (accessed 22 May 2015).

like the South African Police Service (SAPS)⁶⁸ on the other hand, it would seem that a tattoo can lead to a reduced chance of getting employment in the Service. The same applies to a Christian organisation that refuses to appoint someone with tattoos due to the fact that some scriptures ostensibly regard this as “the mark of the beast” or contrary to what the Bible prescribes.⁶⁹ These questions might only be properly considered once one has taken into consideration the job description, position and seniority of the person, but it is important to test the constitutionality of these exceptions and exclusions.

2.5 The position of the employer

Although much has been said about the employee’s rights so far, it must be remembered that there will always be a push and pull between employers and employees, due to their different positions. Employers and employees can only co-exist if both parties accept that certain basic rules and norms apply. Lambrechts⁷⁰ submits that rights and responsibilities exist in a reciprocal relationship between employer and employee. Employers must ensure that there is no harassment and discrimination based on any of the grounds listed in the Constitution and EEA in the workplace, and if necessary the employer might have to accommodate the employee for the latter in order to, amongst other things, participate in religious and cultural activities.⁷¹ The employee must remember, though, that the employer has a right and legitimate expectation that the employee will render his service and comply with workplace rules.

It must further be remembered that employers carry the bulk of the responsibilities when it comes to the success (or not) of any business; when the business goes down, the employer loses much more than just a job.⁷² An employee can immediately start to look for another job when a company goes down, whilst it might be the end of the road for the employer. It is quite possible that the practising of a particular religion

68 <http://www.saps.gov.za/careers/downloads>: “...Not have any tattoo marks which are visible when wearing a vest...and not irreconcilable with the objectives of the Service.”

69 New International Version Leviticus 19:28 “Do not cut your bodies for the dead or put tattoo marks on yourself.”

70 Lambrechts 2012 *Interim: Interdisciplinary Journal* 49.

71 Lambrechts 2012 *Interim: Interdisciplinary Journal* 49. This matter regarding discrimination will be addressed in the chapter that follows.

72 Anon 2003 <http://www.woodweb.com>.

can go against the essence or basic interest of a workplace and have negative consequences for the workplace as a whole. An equal amount of protection should thus be available to an employer, so that his interests can also be protected.

It is further important that employers strike a balance between different religions and cultures and their obligation to their business and other employees, since failure to do so will lead to despondency and disgruntlement in the workplace. This resentment might not only prevail amongst employees belonging to different groups, but also amongst those who do not adhere to any particular religion, like atheists and other secular believers. Consultation and negotiations should thus be possible to address religious and cultural beliefs and practices that are detrimental to the workplace. Should these not succeed or yield any positive results, disciplinary action must be possible. If all else fails, the employer should be able to dismiss the employee within the legislative framework of the law.

The question however remains whether the particular dismissal was fair or not, and whether the courts can provide legal certainty on this matter. The fairness of the dismissal might also have an impact on the question as to whether the discrimination was fair, should it be found that discrimination took place. Should there be a finding that the discrimination was fair because it was based on an inherent requirement of the job as outlined in section 6(2) of the EEA, such dismissal would be fair. Furthermore, section 187(1)(f) of the LRA proscribes discriminatory dismissals unless such dismissal is linked to an inherent requirement of the job as determined in section 187(2).

2.6 Conclusion

As can be seen from the discussion above, diversity is one of the hallmarks of our country. The problem with diversity, which is the exact opposite of uniformity, is that it can lead to discordance if not managed properly. Employees will from time to time avail themselves of their right to religious and cultural practices as entrenched in the Constitution and legislation. Employers might not always have the skill and the experience to handle this phenomenon in the workplace, and it is for this very reason that the law should give clear guidance to avoid any ambiguity. The issues raised above will thus have to be carefully scrutinised when the Constitution and other

legislation are considered. Case law will also be analysed to see how the courts interpret legislation when dismissal takes place on the basis of cultural and religious grounds in order to get a holistic view as to how diversity should be approached and accommodated in the workplace.

CHAPTER 3
**THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK WITH
REGARD TO RELIGIOUS AND CULTURAL RIGHTS**

3.1 Introduction

The Constitution of the Republic of South Africa is the supreme law of the country.⁷³ Any conduct needs to comply with the spirit and purport of the Bill of Rights contained within it. Legislation enacted and the interpretation thereof also has to meet this yardstick. It is for this reason that the Constitution will be scrutinised and those sections which have a direct bearing on the right to freedom of religion and culture in the workplace will be extrapolated and discussed. This is important, so that employees and employers will be able to know what their respective rights and responsibilities are towards one another in this regard.

Section 9(4) of the Constitution also makes provision for national legislation to be enacted to give effect to its aim and purpose regarding equality. National legislation, in the form of the *Employment Equity Act*⁷⁴ (EEA), the *Labour Relations Act*⁷⁵ (LRA) and the *Promotion of Equality and the Prevention of Unfair Discrimination Act*⁷⁶ (PEPUDA), addresses this issue and will be considered and dissected. These Acts are important since they aim to eradicate discriminatory practices and disparity in employment, seek to ensure fair labour practices, and advance equality. Concepts like “reasonable accommodation”, “inherent requirements” and “operational requirements” applied by these various statutes will further be analysed; these are key concepts for purposes of this study as they are often used to justify or contextualise unfair dismissals or employment discrimination. An understanding of these concepts is crucial for enquiries which will be conducted later in this study, especially where they will be used in the contexts of culture and religion.

73 Section 2: “This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

74 55 of 1998.

75 66 of 1995.

76 4 of 2000.

3.2 Constitutional imperatives

The preamble of the Constitution makes it clear that, because recognition is given to the past injustices, South Africa belongs to all who live in it, and also that South Africans are united in their diversity. It further affirms the supremacy of the Constitution and stipulates that it seeks to lay a foundation for a democratic and open society in which every citizen is equally protected.⁷⁷ These imperatives place a duty on judges to interpret the Constitution through a value-laden prism which is necessitated by the transformation of South Africa from an oppressive regime to a rights-based order.⁷⁸ These provisions are of equal importance and wide enough to cover both employees and employers. Section 7⁷⁹ stipulates that the Bill of Rights is the cornerstone of democracy in South Africa. This means that any act or conduct which goes against the spirit of the Bill of Rights is unlawful and prohibited.

In sections 15, 30 and 31, which deal pertinently with the protection and advancement of religious and cultural rights, it is stated that these rights may not be exercised in a manner inconsistent with the Bill of Rights. The employee should thus be mindful of the fact that, although religious and cultural rights are entrenched, they may be curtailed in appropriate instances should the employer be able to justify it. Moreover, section 8⁸⁰ provides that the Bill of Rights binds natural and juristic persons. This boils down to the fact that the conduct of all natural and juristic persons is measured and evaluated with the yardstick which is established by the Bill of Rights. Conduct which does not seek to enhance this notion is susceptible to constitutional challenge. An employee, as a natural person, will therefore be within his rights to challenge any conduct from the employer, most of the time a juristic person, which does not conform to the yardstick laid down by the Bill of Rights.⁸¹

77 See the Preamble of the *Constitution of the Republic of South Africa*, 1996.

78 Radley *Mutual Accommodation of Religious Differences in the Workplace* 510.

79 *Constitution of the Republic of South Africa*, 1996.

80 *Constitution of the Republic of South Africa*, 1996.

81 See however also the discussion under 3.2.2 hereunder where the provisions of s 23 are discussed in terms of which the employer has a right to fair labour practice.

However, the provisions of section 36,⁸² which contains the limitation clauses, should also be borne in mind. Whereas many of the sections mentioned above indicate which rights belong to individuals and employees alike, section 36 is one of the mechanisms or tools which can be used by the employer to curtail these rights. An employer can thus insist that an employee should adhere to a particular dress code, even if this instruction infringes upon the employee's right to freedom of religion. The limitation of any right may, however, only take place in terms of law of general application, and only to the extent that the limitation is reasonable and justifiable in an open and democratic society. This section will be of importance mainly when persons avail themselves of their rights in terms of human dignity, equality and freedom as contained in the Constitution.⁸³ In *S v Manamela*⁸⁴ the court states that what is required in terms of section 36 is an overall assessment of what would constitute reasonableness, and that this will vary from case to case. The court must thus engage in a balancing act, taking proportionality into account, and should not have a mechanical approach whereby certain blocks are ticked off on a checklist. Since section 36 is mainly engaged when rights like equality, human dignity and freedom are being exercised, it necessitates that these rights be scrutinized, especially in the context of freedom of religion and cultural practices.

3.2.1 Equality

Although the order or sequence of rights does not normally determine their significance, it should come as no surprise that the drafters of the Bill of Rights listed equality as the first inherent right. By doing so, the founders of the Constitution stressed the primary significance of this particular right.⁸⁵ Together with the notions of dignity and freedom, equality also influences the interpretation and application of every other right protected in the Bill of Rights. Section 9⁸⁶ stipulates that everyone is equal before the law and has the right to equal protection. It further provides that equality includes the full and equal enjoyment of all rights and freedoms.

82 *Constitution of the Republic of South Africa, 1996.*

83 *Constitution of the Republic of South Africa, 1996.*

84 2000 5 BCLR 491 (CC) par 32.

85 Dupper et al *Essential Employment Discrimination Law* 16.

86 *Constitution of the Republic of South Africa, 1996.*

Unfair discrimination, directly or indirectly, by the state is specifically prohibited on seventeen listed grounds in terms of section 9(3). These grounds include discrimination pertaining to an employee's right to freedom of religion and culture.⁸⁷ If an employer therefore introduces practices which negatively impact an employee's right to freedom of religion and culture without making an attempt to reasonably accommodate the employee, such practices may be construed as unfair discrimination.⁸⁸ Whereas section 9(3) has vertical application, section 9(4) has horizontal application and stipulates that no person (which would include both natural and juristic persons) may directly or indirectly discriminate against another on any of the listed grounds mentioned in section 9(3), which would once again include discrimination on religious and cultural practices.

In terms of section 9(5) any discrimination on any of the listed grounds is unfair unless it can be proven to be fair. Once an employee who has been discriminated against proves that such discrimination took place as a result of his religion or cultural practice, the fairness of the discrimination will depend on the presence of a valid defence.⁸⁹ The employer will then carry the onus to show that such discrimination was in fact fair, bearing in mind that a rebuttable presumption exists that the discrimination was unfair.⁹⁰

The right to equality is also of particular importance to citizens in South Africa because this is a right which many were denied in the past. Some years ago the system of the day was not only skewed when it came to race, but also unequally balanced with regard to the recognition of different religious and cultural rights. The Christian religion enjoyed preference over and above other religions. To a large extent the state aligned itself with a particular form of Christianity.⁹¹ A number of statutory provisions were legislated to coincide, ratify and show solidarity with the Christian faith. This is evident especially when one considers examples like the

87 Although this study will mainly focus on culture and religion, it must be remembered that issues such as conscience, belief and language can also have an impact and is sometimes integrated with a person's culture and religion.

88 Bernard 2014 *PER* 2870.

89 These defences will be discussed in detail in par 3.3.2 hereunder.

90 See the discussion of *Harkson v Lane* hereunder at par 3.3.1.

91 Bilchitz and De Freitas 2012 *SAJHR* 141.

definition of “closed days” with reference to section 2(1) of the former *Liquor Act*,⁹² which stipulated that liquor may not be sold on Sundays, Good Friday and Christmas. Another example of preferential treatment towards Christianity is the provision contained in section 16 of the *Basic Conditions of Employment Act*⁹³ (hereafter BCEA) which stipulates that an employee is entitled to one and one-half times or double such employee’s wage, pending on whether the employee normally works on Sundays. All these days are days of rest or great commemoration for the Christian believer and the tone of the legislature is such that it demonstrates allegiance towards Christianity as a religion.

Some religions were thus acknowledged and certain concessions were made whilst an attitude of indifference prevailed against others, especially those of African origin, largely due to ignorance and the fact that they did not conform to indigenous and traditional thinking. Whether this is still the case will be determined at a later stage when recent case law will be scrutinised. Some writers opine that, where discrimination had previously been focused on race, it reveals itself nowadays in various manifestations, including, but not limited to, religion.⁹⁴ It must be noted that if the aforementioned position is denied, it will be difficult to objectively assess the current state of affairs and to design a way forward that will be beneficial for both employers and employees.

Two approaches can be adopted with regard to equality, namely that of formal equality and that of substantive equality. Formal equality presupposes or assumes that all persons are already equal and are the bearers of equal rights. Equality can thus be achieved by simply extending the same rights to everybody and treating them the same. This concept is based on the Aristotelian concept that likes should be treated alike and those who are unlike should be treated unlike in proportion to their unlikeness.⁹⁵ Formal equality does not take into account that people are at different stations at different times of their lives, sometimes due to circumstances beyond their control. It also does not keep track of the different socio-economic circumstances that people are confronted with. Substantive equality on the other hand, is sensitive to

92 27 of 1989.

93 75 of 1997.

94 Radley *Mutual Accommodation of Religious Differences in the Workplace* 507.

95 Davis *Equality and Equal Protection* 197.

entrenched and structural inequality and focuses on the result or effect of a particular rule and not so much on the form it takes.⁹⁶ It does not pre-suppose a just social order. Substantive equality examines the actual socio-economic conditions of individuals in order to determine whether the Constitution achieves that which it intended to achieve, and if it does not, changes are made within the framework provided by the Constitution. Certain people or groups of people may thus be treated differently than others to ensure that equality is brought about in the long run.

Considering what has been said in terms of the Christian faith above, it is safe to assume that people from different religious groups are not enjoying the same level of protection and the same rights. Furthermore, for purposes of this study, it would seem that a substantive approach would be more appropriate than a formal approach when it comes to equality. This is so due to the fact that it acknowledges the differences amongst individuals, which is a reality, especially in the South African workplace.

3.2.2 Fair labour practices

Section 23(1)⁹⁷ determines that everyone has the right to labour practices that are fair. This section is broadly phrased and would for instance include illegal workers, independent contractors as well as employers. When interpreting what fairness means, it must be borne in mind what the aim and purport of the Bill of Rights is. According to Ngcobo J in his judgment of *NEHAWU v University of Cape Town*,⁹⁸ the term “fairness” refers to the relationship between worker and the employer and the continuation of that relationship on terms that are fair to both parties. The learned judge further mentions that cognisance should be taken of the fact that there will always be tension between the interests of the employee and that of the employer, and that care must be taken to accommodate all of these interests in order to maintain a balance.

The provisions of sections 15, 30 and 31 of the Constitution,⁹⁹ which overlap to a certain extent, will henceforth be considered.

96 Van Niekerk et al *Law@Work* 3rd ed 117.

97 *Constitution of the Republic of South Africa*, 1996.

98 2003 2 BCLR 154 (CC).

99 *Constitution of the Republic of South Africa*, 1996.

3.2.3 *Freedom of religion, belief and opinion*

Freedom of religion is a fundamental right enshrined in and protected by section 15 of the Constitution. This section provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion. The section further provides that religious observances may be conducted at state or state aided institutions on a free, voluntary and equitable basis.¹⁰⁰

This section concerns itself more with the observance of religious practices at state aided institutions and might at first glance seem to have little significance for the workplace in general. This is however not so and it must be remembered that not all cases that can shed light on the appropriate approach between employer and employee emanate from the workplace.¹⁰¹ Judgements of cases which do not necessarily pertain to labour law can also be of assistance when the appropriate approach has to be determined in a particular situation.

In *S v Lawrence*,¹⁰² Chaskalson P confirmed the attributes of freedom of religion as stated by Dickson CJC in the *Big M Drug Mart*-case which specifies as follows:

...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 or practice or by teaching and dissemination.

In *MEC v Pillay*,¹⁰³ the court found that religious practices are frequently informed by faith and custom. Cultural beliefs on the other hand may be based on the community's underlying religious or spiritual beliefs. A belief may thus be purely spiritual or purely cultural, but it is equally possible for it to be both.¹⁰⁴

The right to religious freedom is the most sacred of all freedoms¹⁰⁵ and includes the right to have a belief, to express that belief publicly and to manifest that belief by worship and practice.¹⁰⁶ This requires that an individual be allowed to exercise,

100 Section 15(2) of the *Constitution of the Republic of South Africa*, 1996.

101 See *Christian Education v Minister of Education* 2000 4 SA 757 (CC) on page 24 hereunder.

102 1997 4 1176 (CC) 61 par 92.

103 2008 1 SA 474 (CC).

104 2008 1 SA 474 (CC) 491 par 47

105 Dlamini *Culture, Education and Religion* 592

106 Currie and De Waal *Bill of Rights Handbook* 6th ed 316.

practice and openly declare his religious beliefs without fear of reprisal.¹⁰⁷ The rights protected under section 15 are not only applied vertically, but also horizontally. There is thus an equal amount of responsibility among citizens to accept and respect one another's rights as there is on the state to do the same.

3.2.4 Language and culture

Section 30 affords everyone the right to use the language and to participate in the cultural life of their choice. Participation in one's cultural life (and especially if it is done on a full and equitable basis as provided for by section 9¹⁰⁸), might from time to time necessitate absenteeism from work.¹⁰⁹ This has the potential to bring some tension into the workplace especially when it might be difficult for the employer to make alternative arrangements. It is important to remember, however, that this is a right which the employee is entitled to.

3.2.5 Cultural, religious and linguistic communities

Section 31¹¹⁰ provides that persons belonging to a cultural, religious or linguistic community have the right to enjoy their culture, practise their religion, and use their language together with other members of the same community, and to form associations. This section seems to cater and cover for those situations which fall outside the scope of section 15 and section 30. Whereas section 15 speaks of religious observance at state aided institutions, section 31 speaks of religious observance and practices at other places and institutions. Whereas section 30 speaks of the cultural life observed by the individual, section 31 speaks of the cultural life observed by the individual together with other members belonging to the same group.

A good example where all the aforementioned rights together with section 36 were considered can be found in *Christian Education v Minister of Education*.¹¹¹ In this case the court had to determine whether the rights of parents and children in private schools were violated when parliament decreed an act abolishing all forms of

107 Bernard 2014 PER 2870.

108 *Constitution of the Republic of South Africa*, 1996.

109 See *Kievits Kroon v Mmoledi* 2014 1 SA 585 (SCA).

110 *Constitution of the Republic of South Africa*, 1996.

111 2000 4 CCT4/00.

corporal punishment.¹¹² In their application parents relied on their right to freedom of religion and cultural life. In terms of the Christian faith, corporal punishment is not something to be frowned upon, but an integral part of discipline. The provisions of sections 15, 30 and 31 were some of the key sections relied upon on which parents based their claim.¹¹³

The Minister of Education, who was the respondent, contended that it was the infliction of corporal punishment and not its prohibition that was unconstitutional.¹¹⁴ Sections 9, 10, 12 and 28 were relied upon, which deal with equality, human dignity, freedom of security of the person and the rights of children respectively. In his affidavit the Minister avers that the advent of the Constitution requires persons and groups of people to desist from practices, which according to their beliefs and traditions may previously have been regarded as generally acceptable.¹¹⁵ The affidavit avers further that corporal punishment is degrading, inherently violent, incompatible with human dignity and not in line with the values of the Constitution, and that the state has an obligation to ensure that the constitutional rights of learners are protected.¹¹⁶ In conclusion the respondent avers that, although the outlawing of corporal punishment might curtail other rights, such limitation is a reasonable and justifiable one in an open and democratic society based on human dignity, equality and freedom, thus relying on section 36.¹¹⁷

112 2000 4 SA 3 (CC) par 3.

113 2000 4 SA 7 (CC) par 7.

114 2000 4 SA 8 (CC) par 8.

115 2000 4 SA 10 (CC) par 11.

116 2000 4 SA 11 (CC) par 12.

117 *Constitution of the Republic of South Africa*, 1996.

The court adopted a generous approach in deciding that both sections 15 and 31 were applicable¹¹⁸ and that section 10¹¹⁹ of the *Schools Act*¹²⁰ infringed upon these sections. The court then had to determine whether this limitation on the rights of parents and children can be justified in terms of section 36 of the Constitution. The court found that such limitation was justifiable and that what is actually been outlawed is not the parents' right to discipline their children, but the phenomenon whereby teachers discipline children on behalf of the parents.¹²¹ Parents are thus not placed in a position where they have to decide whether they are going to adhere to their religion or the laws of the country, since they can still do both.

It can be expected that this generous interpretation will similarly be the approach in the workplace where issues such as culture and religion have to be considered.¹²² As far as possible, the rights of the employee must be acknowledged and be respected. Furthermore, courts will most probably also adopt a generous approach when it has to be determined whether there was an infringement of a particular right as was the case in the *Christian Education-case*. This, however, remains only the first step, since a determination will still have to be made as to whether such infringement can be justified in terms of section 36¹²³ or any other remedy available to the employer.

Equality is one of the main aims of the Bill of Rights. Any attempt to break away from the culture and tradition of the past would be futile if this very important aspect is not addressed first. The crux of the apartheid-system was that people were not equal before the law. It is also clear that a concerted effort was made to ensure that the individual's right to freedom of religion and cultural activities is protected under the Bill of Rights as outlined in sections 15, 30 and 31. The fact that these sections overlap creates the impression that the legislator wanted to ensure that the right to freedom of religion and the right to cultural life (amongst others) are protected from any kind of onslaught. It also means that an individual may use any one of them in a particular situation, or all of them simultaneously, pending on the circumstances. The caveat in sections 30 and 31 to the effect that these rights may not be exercised in a

118 2000 4 SA 32 par 27.

119 Section 10 states: "No person may administer corporal punishment at a school to a learner."

120 27 of 1996.

121 2000 4 SA 41 (CC) par 38.

122 See the *Popcru-* and *Kievits Kroon-*case under 4.2 and 4.3 hereunder for a comparison.

manner contrary to the provisions of the Bill of Rights must however constantly be borne in mind and will not be tolerated, as illustrated with case law above.

Effect to section 9(4) which stipulates that national legislation must be enacted to prevent unfair discrimination was realised in the form of the *Employment Equity Act*.

3.3 Employment Equity Act (EEA)

As alluded to above, section 9(4) of the Constitution¹²⁴ stipulates that national legislation must be enacted to prevent or prohibit unfair discrimination. This is so because the Constitution is primarily intended to regulate the power of the State, while statutes are aimed at giving effect to constitutional rights. If an employee is of the opinion that his rights have been violated, he will have to avail himself on the statute which provides protection with regard to the specific right in question. Only if such statute does not provide adequate protection can reliance be placed on the Constitution.

The instruction contained in section 9(4) was executed by the embodiment and enactment of the EEA,¹²⁵ which aims to achieve equity in the workplace by promoting equal opportunity and fair treatment through eliminating unfair discrimination. Affirmative measures are also endorsed to undo the inequality characterising the work environment. This is achieved through section 6¹²⁶ which firstly provides that *no person* may unfairly discriminate, directly or indirectly against *an employee* in any employment policy or practice, on one or more of the nineteen grounds mentioned in the Act, including religion and culture.

The prohibition in section 6¹²⁷ does not seem to be aimed at or limited to employers only, but equally applies to fellow employees. Confirmation for this proposal can be found in the section preceding section 6,¹²⁸ which stipulates that every employer must take positive steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.¹²⁹ This means that not

123 *Constitution of the Republic of South Africa, 1996.*

124 *Constitution of the Republic of South Africa, 1996.*

125 55 of 1998.

126 55 of 1998.

127 55 of 1998.

128 55 of 1998.

129 Section 5 of the EEA 55 of 1998.

only must the employer ensure that no unfair discrimination takes place, but measures should be put in place to ensure that such discrimination is also not visited on an employee by a fellow employee.

It must be noted that the prohibition is aimed at unfair discrimination. This tacitly implies that discrimination is allowed and can take place, provided that it is fair. Section 6(2)¹³⁰ gives an indication as to when discrimination can be deemed to be fair, and provides that affirmative measures taken, which are consistent with the act, will be such an instance. To distinguish, exclude or prefer someone on the basis of the inherent requirements of the job, similarly constitutes fair discrimination. A matter such as this boils down to fair differentiation, rather than unfair discrimination.

3.3.1 *Differentiation as opposed to discrimination*

To fully understand the difference between fair and unfair discrimination, one needs to grasp the difference between differentiation and that of discrimination. Differentiation lies at the heart of unfair discrimination and simply means that an employer treats employees or applicants for employment differently, or the employer uses policies and practices that exclude certain groups of employees.¹³¹ It is a neutral term in the sense that if differentiation does occur, that in itself does not necessarily mean that the differentiation takes place for a negative reason.¹³² An example of differentiation is when one applicant for a job is appointed and another not. Some practices in the workplace might also amount to differentiation where, for example, a certain qualification is an inherent requirement for a particular job in terms of section 6(2)(b),¹³³ and one person satisfying this requirement is preferred for appointment above another who does not meet this requirement.

Employers are entitled to raise the defence of “inherent requirement of a job” even in instances where a differentiation between employees is made solely on the basis of discrimination which is presumed to be unfair. This defence thus enables the employer to withhold or deny the employee certain rights in terms of one of the

130 55 of 1998.

131 Dupper et al *Essential Employment Discrimination Law* 33.

132 Dupper et al *Essential Employment Discrimination Law* 33.

133 Dupper et al *Essential Employment Discrimination Law* 33.

forbidden grounds listed. This defence is available both in terms of the EEA¹³⁴ with regard to discrimination in general and the LRA with regard to discriminatory dismissals.¹³⁵ There is, however, no definition of this term in both the EEA¹³⁶ and the LRA,¹³⁷ and it will appear that the phrase emanates from Convention 111 of 1958 of the International Labour Organisation (ILO), which is aimed at discrimination in respect of employment and occupation.¹³⁸ When one considers the ordinary meaning of the words “inherent” and “requirement” it is suggested that the former refers to an essential quality or attribute, whilst the latter refers to an element of compulsion.¹³⁹ A requirement is inherent to a particular job if the work cannot be performed without it because the employee cannot satisfy the requirement needed to do the job.¹⁴⁰ This means that only essential job duties should be taken into account for purposes of determining whether something constitutes an inherent requirement. The provisions of section 15(2)(c)¹⁴¹ also amount to discrimination based on an inherent requirement of a job, although it is not described as such in the section. In terms of this section, affirmative action measures must be put in place to ensure reasonable accommodation of people from disadvantaged groups so that they can enjoy equal opportunities and be equitably represented.

Before an employer will be allowed to discriminate on the basis of an inherent requirement of the job it will have to be proven that it will be impossible or extremely difficult to accommodate any deviation from that which the discrimination seeks to achieve. An employer who is the owner of an Italian restaurant and who wants to create an Italian ambience will not be able to do so unless he is allowed to recruit Italian waiters (and perhaps Italian chefs) at the exclusion of other races. Issues like safety and the ability to do the job are also key factors which can be used to determine the validity of such a claim.

134 Section 6 of the EEA 55 of 1998.

135 See s 187(2) of the LRA 66 of 1995.

136 55 of 1998.

137 66 of 1995.

138 Article 1 (2) “Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.”

139 Dupper et al *Essential Employment Discrimination Law* 83.

140 Grogan *Dismissal* 2nd ed 172.

141 55 of 1998.

Religion may also be an inherent requirement in certain workplaces, and as will be seen later,¹⁴² although this defence of discrimination is not commonly used, it has already caused a considerable amount of litigation in instances where dismissal was effected.

The defence of an inherent requirement of the job seems to be interwoven with the employer's business operations when one considers other jurisdictions. In the United States of America an employer will only be successful with this defence if it forms part of, or manifests from, a bona fide occupational qualification.¹⁴³ In the United Kingdom an inherent requirement of the job defence has to be linked to a genuine occupational qualification.¹⁴⁴ In a later chapter it will become clear that in Canada reference is made to a bona fide qualification as well as a bona fide requirement.¹⁴⁵ With regard to the South African context it would seem that the defence of an inherent requirement of the job is not commonly used since it would seem that employers prefer to use the 'general fairness defence' which is more relaxed and less stringent.

Under discrimination, one needs to understand that if no acceptable reason can be found for the differentiation, it becomes discrimination. The unacceptable reasons are all the grounds of discrimination listed in section 6(1)¹⁴⁶ as well as reasons so closely related thereto so as to also elevate them from differentiation to discrimination. In other words, differentiation can become discrimination if a link can be established between the differentiation and one of the listed grounds. An example of the latter is where an employee is transferred because of his religion. Still the discrimination is not necessarily objectionable. It will only be so when it is found that the differentiation on one of the listed grounds was made for an unacceptable reason.

To establish whether conduct is only differentiation or whether it amounts to discrimination, the court laid down a three phased approach in *Harkson v Lane*.¹⁴⁷ The first question that should be asked is whether the provision or a practice

142 See Chapter 4 under 4.2 hereafter.

143 Dupper et al *Essential Employment Discrimination Law* 71.

144 Dupper et al *Essential Employment Discrimination Law* 80.

145 See Chapter 5 hereunder.

146 55 of 1998.

147 1998 1 SA 300 (CC) 325 par A.

differentiates between people or a category of people. If there is differentiation, it must subsequently be established whether it amounts to unfair discrimination. To determine this, one first needs to determine whether the differentiation amounts to discrimination. If it is on one of the listed grounds, discrimination will have been established. It is imperative to note that discrimination can still be present even if it is not on one of the listed grounds or any other arbitrary ground; if it is based on attributes which have the potential to impair the human dignity of persons as was done in the *Hoffmann*-case¹⁴⁸ which is discussed hereunder.¹⁴⁹

If it has been established that the differentiation amounts to discrimination the next step will be to determine whether the particular situation amounts to unfair discrimination. Unfairness will be *presumed* if the discrimination is found to be on one of the listed grounds as outlined in section 6(1) of the EEA.¹⁵⁰ The complainant will have to *prove* unfairness if discrimination is not on one of the listed grounds mentioned in section 6(1). If at this stage the differentiation is found not to be unfair, then there will be no violation. If the discrimination is found to be unfair, then a determination will have to be made, whether the provision or the practice can be justified under the limitation clause.¹⁵¹

In *Hoffman v SA Airways*,¹⁵² the issues of equality, differentiation and section 36 were also considered when a prospective cabin attendant was not appointed due to the fact that he was suffering from the Human Immunodeficiency Virus (HIV). The employment policy of South African Airways (SAA) dictated that a person should be HIV-negative to be considered for employment as a cabin attendant since such a person will have to perform work that is laborious and will have to be vaccinated against yellow fever. Medical evidence has revealed that it will not be possible to vaccinate persons who are HIV-positive and whose immune system has been attacked to such an extent that their CD4+ count has dropped below a certain level.

148 2000 21 ILJ 2357 (CC).

149 See page 31 below.

150 55 of 1998.

151 Section 36 of the Constitution; see also Van Niekerk et al *Law@Work* 3rd ed 131.

152 2000 21 ILJ 2357 (CC).

The High Court in *Hoffman v SA Airways*¹⁵³ found that the applicant was not discriminated against since he did not have a right to be appointed in a specific category of employment. Consideration was also given to the commercial interest of SAA, and the Court ruled that SAA would be at a disadvantage with its competitors if it was not allowed to regard an HIV-negative status as an inherent requirement of the job. The Court further found that the SAA did not unfairly discriminate against the applicant, and even if such discrimination was unfair, it was justifiable in terms of section 36 of the Constitution.¹⁵⁴

On appeal the Constitutional Court applied the same steps mentioned above in the *Harkson-case*¹⁵⁵ and concluded that all human beings, regardless of their position in life, had to be accorded equal dignity.¹⁵⁶ The Court further found that the applicant was part of a group of people who were facing intense prejudice on a daily basis, and that this group was in need of protection from the court.¹⁵⁷ The Court indicated that prejudice could never justify unfair discrimination¹⁵⁸ and further disagreed with the finding of the High Court that an HIV-negative status was an inherent requirement of the job.¹⁵⁹

The Constitutional Court has indicated in its approach and judgement that employers will not be able to hide behind flimsy reasons to trample upon the rights of employees. The same approach can be expected as the one in the *Hoffman-case*¹⁶⁰ should a claim be based on religious grounds and cultural practices.

153 2000 21 ILJ, 907 (CC) par 28.

154 2000 21 ILJ, 907 (CC) par 28.

155 1997 11 BCLR 1489 (CC).

156 2000 21 ILJ 2357 (CC) par 27.

157 2000 21 ILJ 2357 (CC) par 28.

158 2000 21 ILJ 2357 (CC) par 37.

159 2000 21 ILJ 2357 (CC) par 39.

160 1997 11 BCLR 1489 (CC).

3.3.2 Direct versus indirect discrimination

A further striking feature of section 6¹⁶¹ is the fact that it speaks of direct and indirect discrimination. These terms are not defined by the EEA¹⁶² and it has been left up to the courts to give meaning to them. The distinction between these two types of discrimination originated in the United States, and their meanings are well recognised in discrimination law worldwide.¹⁶³ Direct discrimination refers to situations in which some people are treated differently from others on the basis of their race, sex, religion or other protected trait. These concepts will be further illuminated by case law including cases emanating from American jurisprudence for a richer understanding of its origin.

In *Teamsters v United States*,¹⁶⁴ the government instituted litigation against a company who discriminated against Negroes (African Americans) and Spanish-surnamed persons. Workers falling in these categories were employed in lower paying positions as local city drivers, unlike their white counterparts who were appointed as long distance drivers. When the affected workers applied for long distance positions they had to forfeit their seniority and start at the bottom of the line driver's board.¹⁶⁵ Many black and Spanish-surname applicants who applied for work were also either told lies, or their applications were simply ignored.¹⁶⁶ The District Court found that there was direct discrimination against black and Spanish-surnamed persons if they had to give up their senior ranking in the workplace for them to get a line driver job, since they would never be able to catch-up in terms of seniority when it comes to their counterparts who were not subjected to the same discriminatory practice.¹⁶⁷

Another example of direct discrimination can be found in the South African case of *Professional Teachers v Minister of Education*¹⁶⁸ where Mrs Rademan, a female school principal, applied for a subsidy towards her home loan. She was informed that

161 55 of 1998.

162 55 of 1998.

163 Dupper et al *Essential Employment Discrimination Law* 39.

164 431 US 1977 par 324.

165 431 US 1977 par 324.

166 431 US 1977 par 338.

167 431 US 1977 par 345.

168 1995 16 ILJ 1048 (IC).

she does not qualify since her husband had to be permanently medically unfit to be gainfully employed before she could qualify.¹⁶⁹ Mrs Rademan did not find the explanation satisfactory and challenged the Department, submitting that the only reason why she was not being given a subsidy was because she was a married woman. This, she argued, amounted to discrimination based on gender, which was unconstitutional in the new legal dispensation.¹⁷⁰ The department indicated that they appreciated Mrs Rademan's opinion but that it could unfortunately not waive the stipulation.¹⁷¹ The Transvaal Teachers' Association (of which Mrs Rademan was a member) took the matter up and challenged the constitutionality of the policy and argued that it was an unfair labour practice. The court found that an injustice had been perpetrated by the State in regard to married female employees by denying them access to home owners' allowances.¹⁷²

In *Swart v Mr Video*,¹⁷³ direct discrimination took place on the grounds of age. The employer in this instance sought to employ a shop assistant between the ages of 18 and 25 years. When a 28 year old applicant applied, she was told that she did not meet the requirement because she was three years older than the requirement.¹⁷⁴ The applicant challenged the employer's recruitment policy, and when the matter was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) the Commissioner held that the employer committed an unfair labour practice and had unfairly discriminated against the applicant without being able to justify the limitation it had placed on recruitment.¹⁷⁵

Indirect discrimination, on the other hand, occurs when an employer utilises an employment practice that seems to be neutral but which disproportionately affects members of disadvantaged groups in circumstances where it is not justifiable.¹⁷⁶ It is said that the notion of equal treatment underpins direct discrimination since it is based on the principle that like should be treated alike. Indirect discrimination

169 1995 16 ILJ 1053 (IC) par G.
170 1995 16 ILJ 1054 (IC) par A-C.
171 1995 16 ILJ 1054 (IC) par D.
172 1995 16 ILJ 1095 (IC) par E.
173 1998 19 ILJ 1315 CCMA.
174 1998 19 ILJ 1317 CCMA par B.
175 1998 19 ILJ 1318 CCMA par C-D.
176 Van Niekerk et al *Law@Work* 3rd ed 125.

recognises that even equal treatment might produce unequal results if the relevant subjects are socially unequal to begin with.¹⁷⁷

In the landmark case of *Griggs v Duke Power Company*,¹⁷⁸ the US court held that when an employment requirement is linked to recruitment and promotion policy and such a requirement has a disparate effect on different races, it amounts to indirect discrimination. In this case both an aptitude test and a high school qualification were requirements for consideration of higher paying jobs. It was a fact that Negroes (African Americans) would not be able to express themselves eloquently, and received inferior education. The fact that the requirements seemed neutral and applicable to all, did not matter.

The distinction between direct and indirect discrimination is reminiscent of the difference between formal and substantive equality mentioned above. In both instances (whether it is about equality and whether it is about discrimination) the socio-economic position of the individual is important to determine whether there is equality or discrimination.

Direct and indirect discrimination can also take place on the grounds of religion. Should this take place, courts would be equally less tolerant against such a practice. It is thus incumbent upon employers to avoid any direct or indirect discrimination against employees and to see to it that their employees are reasonably accommodated.

3.3.3 Reasonable accommodation

Reasonable accommodation refers to any deliberate change that is made to a job or in the workplace with the aim of enabling someone from a designated group to have access, or to participate or advance in employment.¹⁷⁹ It is also promoted as a way of ensuring that employees who have the requisite ability and qualifications for a job should be given accommodation that is reasonable, when necessary, and if possible. “Designated group” means black people and people with disabilities.¹⁸⁰ The words

177 Dupper et al *Essential Employment Discrimination Law* 39.

178 1971 401 US 424.

179 Section 1 of the EEA 55 of 1998.

180 Section 1 of the EEA 55 of 1998.

black people are inclusive of Africans, Coloureds and Indians. In terms of section 15¹⁸¹ of the *EEA* which deals with affirmative action measures, designated employers must make reasonable accommodation for people from designated groups to ensure that the latter enjoy equal opportunities and are equitably represented in the workplace. It would seem that the terms “reasonable accommodation” and “affirmative action” are geared to achieve the same goal, which is the advancement of designated groups in the workplace.

When plans are made to reasonably accommodate people from designated groups in the workplace, it follows that their religion and culture should also be accommodated. Religion and culture are part of the day to day living of every individual and cannot be ignored when the workplace is entered. Should an employer fail to reasonably accommodate an employee with regards to his/her religion and culture in the workplace and such failure is followed by a dismissal, the dismissal might be successfully challenged.¹⁸² This is also in line with the provisions of section 15(2)(a)¹⁸³ of the Act which requires that employment barriers be identified and eliminated. Further amplification for this notion is contained in section 15(2)(c)¹⁸⁴ which obliges employers to see to it that the workplace is diverse, based on equal dignity and respect for all. Only when this is done will the aim of the Bill of Rights be realised, which is to affirm people’s rights to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and to enjoy the right to be different.¹⁸⁵ The employer will however only be expected to accommodate the employee up to the point where undue hardship will follow should any further accommodation be expected.¹⁸⁶

The *EEA* is an important piece of legislation and sheds light on issues such as discrimination, differentiation and reasonable accommodation. Once these concepts

181 55 of 1998.

182 See the *Popcru-* and *Kievits Kroon-case* under 4.2 and 4.3 hereunder.

183 55 of 1998.

184 55 of 1998.

185 McGregor 2013 *SA MERC LJ 225*.

186 See 5.7 hereunder for an analysis on reasonable accommodation and undue hardship.

are understood, it will be easier to distinguish between fair and unfair dismissals in terms of the LRA where religion and culture are relevant.¹⁸⁷

3.4 Labour Relations Act (LRA)

The LRA¹⁸⁸ was enacted to give effect to section 27 of the Interim Constitution of the Republic of South Africa.¹⁸⁹ Section 27¹⁹⁰ was the predecessor of the current section 23¹⁹¹ which outlines the rights of employers and employees. Section 23¹⁹² mentioned above is equally applicable when the provisions of the LRA are considered. The LRA also makes provision for discriminatory practices, specifically with regard to dismissals. Two of the most important sections dealing with dismissals are sections 185 and 187. Only section 187 will be further elucidated since it has more relevance for purposes of this study.

In terms of section 187(1)(f) of the LRA¹⁹³ an employer may not discriminate against an employee directly or indirectly by dismissing an employee based on one or more of the listed grounds. Should it happen that a dismissal does take place under any of these grounds as listed; such a dismissal would be automatically unfair.

Religion and culture are two of the grounds listed under section 187.¹⁹⁴ Employees claiming to be victims of automatically unfair dismissals due to their religion or culture must prove that they have been discriminated against, and that the discrimination was unfair.¹⁹⁵ The moment the employee is able to prove that the dismissal did take place for such a reason, such dismissal would be discriminatory and the employer can raise no defence. In cases such as these an employee would be entitled to choose between reinstatement and compensation.¹⁹⁶ It will thus be up to the employee to decide what remedial relief he chooses. An automatically unfair dismissal can be tinted to seem as if it occurred because of a secondary or

187 66 of 1995.

188 66 of 1995.

189 200 of 1993.

190 200 of 1993.

191 *Constitution of the Republic of South Africa*, 1996.

192 *Constitution of the Republic of South Africa*, 1996.

193 66 of 1995.

194 66 of 1995.

195 Grogan *Workplace Law* 11th ed 220.

196 Grogan *Workplace Law* 11th ed 208.

permissible reason. It must be noted, however, that an employer will be successful with this claim only in highly exceptional circumstances.¹⁹⁷

Section 187(1)(f)¹⁹⁸ must be read in conjunction with section 187(2),¹⁹⁹ which stipulates that despite the provisions of section 187(1)(f),²⁰⁰ a dismissal may be fair if it is based on an inherent requirement of the job or if the dismissal took place as a result of the age of an employee. The scope of the exception that permits discrimination on the basis of the inherent requirements of the job depends on how generously the courts construe the relationship between the particular attributes of the employee and the nature of the job.²⁰¹ This means that the court must determine whether the employee, because of one or other characteristic, falls short in terms of the qualifications needed to perform a job, to such an extent that it renders him unsuitable to perform it. Only if the employee is unsuitable will discrimination based on inherent requirements be allowed, but this proviso will be strictly construed.

The case of *Association of Professional Teachers v Minister of Education*²⁰² is a classic example of how strict courts will interpret the phrase of an inherent requirement of a job in which the court stated that:

...it should immediately be stressed that a differentiation based on the inherent requirements of a particular job should only be allowed in very limited circumstances and should not be allowed in circumstances where the decision to differentiate is based on a subconscious (or worse, a conscious) perception that one sex is superior to the other.²⁰³

Similarly in *CWIU v Johnson & Johnson*,²⁰⁴ the court expressed the view that “it is seriously difficult in thinking what job exists under the sun which can be said to inherently require a worker to be a male or female in order to perform.”²⁰⁵

197 Grogan *Workplace Law* 11th ed 208.

198 66 of 1995.

199 66 of 1995.

200 66 of 1995.

201 Grogan *Workplace Law* 11th ed 224.

202 1995 16 ILJ 1048 (IC).

203 1995 16 ILJ 1081 (IC) par B.

204 1997 9 BLLR 1186 (LC).

205 1997 9 BLLR 1186 (LC) 1196 par I-J.

Based on the aforementioned it should similarly be clear that it will be difficult to discriminate against someone just because he adheres or does not adhere to a particular religion or culture.

3.4.1 Operational requirements

Employers are frequently compelled for economic reasons to review their staffing levels and to terminate the employment of some of their employees to effect savings or austerity measures. These dismissals are referred to as dismissals based on operational requirements. Unauthorised absenteeism to perform or adhere to a religious or cultural practice can also lead to dismissal should it be found that the operational requirements of the workplace necessitated that such an employee reports for duty. In such an instance employers would normally first conduct a disciplinary hearing, and should it be found that an employee does not have grounds of justification for such absenteeism, a dismissal based on misconduct can follow.²⁰⁶

In terms of section 213 of the LRA²⁰⁷ “operational requirements” means a dismissal which takes place as a result of the economic, technological, structural or similar needs of the employer. It is also referred to as a “no fault” dismissal.²⁰⁸ Although the reasons for a dismissal based on operational requirements seems clearly distinguishable and does not in any way refer to the conduct of the employee, this infusion was exactly the contention of the applicant in the *Kievits Kroon*-case where the employer argued that the employees conduct amounted to misconduct and could not be accommodated given the operational requirements of the business.²⁰⁹

The term and its definition are drawn from Convention 158 of the International Labour Organisation.²¹⁰ Numerous considerations might force an employer to consider taking this step, namely a drop in production, the introduction of new technology, the

206 See *Food and Allied Workers Union v Rainbow Chickens* and *Kievits Kroon v Mmoledi* under 4.3 hereunder

207 66 of 1995.

208 Van Niekerk et al *Law@Work* 3rd ed 314.

209 See 4.3 hereunder as well as *Kievits Kroon v Mmoledi* 2014 1 SA 585 (SCA) 590 par 18.

210 ILO Convention 158 Termination of Employment Convention, 1982. S 4: “The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

reorganisation of work and the restructuring of a business.²¹¹ Employers may even retrench employees to become more competitive or to increase profits.

In *SA Transport and Allied Workers v Khulani Fidelity Security*,²¹² the Aviation Coordination Services (ACS), who was the client of the respondent, experienced high volumes of theft amongst baggage handlers. ACS then entered into an agreement with the respondent whereby ACS would be allowed to dismiss any employee who would fail a mandatory polygraph test. The Labour Appeal Court found that there was a legitimate agreement in place between ACS and the respondent and that the dismissal had taken place in terms of an operational requirement.²¹³

While employers have a right to retrench in terms of operational requirements, this should only be done when there is an absolute need to do so, since the consequences of such a decision have a far greater impact than other forms of dismissal. It might affect workers who are still economically active and who have been diligent and loyal towards their employers.²¹⁴ It is for this reason that there has been a shift in the way dismissal due to operational requirements is being viewed and assessed. Whereas in the past it was sufficient for the employer to demonstrate that he had a bona fide reason to retrench,²¹⁵ it is now incumbent upon the employer to prove that the dismissal was for a fair reason. Since the line can become blurred between a dismissal based on operational requirements and one based on unfair discrimination, it is submitted that this latter approach will help to expose and circumvent otherwise unfair dismissals.

3.5 Conclusion

The Constitution as the supreme law of our country has a dual role it constantly fulfils. Firstly it provides specific guidelines when it comes to rights based on human dignity, equality and freedom. Secondly it provides a benchmark which serves as a standard to which all other legislation should conform. As stated above, employees who subscribe to the traditional Christian beliefs and traditions have experienced far

211 Van Niekerk et al *Law@Work* 3rd ed 314.

212 2011 32 ILJ 130 (LAC).

213 2011 32 ILJ 130 (LAC) 136 par H.

214 Grogan *Workplace law* 11th ed 317.

less attacks and grief in the workplace as a result of their religion than employees who are followers of other religions. Section 9 is an important section to remember when trying to level the playing field in terms of religion and culture in the workplace. Only when such even-handedness has been achieved will it be possible for an employer to act fairly and to be consistent when dismissal based on religion and culture has to be considered in a particular set of facts. Section 36 entitles an employer to curtail the rights of an employee in certain circumstances. Such limitation must be justifiable in a free and open society, since everybody is entitled to fair labour practices.

Sections 15, 30 and 31 are rights which overlap to a certain extent, but entrench the rights of employees in a number of instances. With regard to differentiation and discrimination it must be remembered that not all forms of differentiation amount to discrimination. Differentiation as opposed to discrimination as well as direct and indirect discrimination are concepts which should be understood to prevent discriminatory policies and to be in a position to make sound decisions which can be substantiated should they be challenged in a court of law. These concepts are often used in literature and judgements. The EEA and the LRA both prohibit discrimination in terms of employment and dismissals based on religion and culture, but they similarly acknowledge an inherent requirement of a job as a justifiable ground on which discrimination can take place. It is also the responsibility of the employer to make a concerted effort to accommodate the employee before he will be allowed to discriminate. Dismissal based on operational requirements is furthermore sanctioned in terms of section 188, but the dismissal will have to be for a fair reason. A thorough understanding of the above-mentioned principles and guidelines will make it easier to understand the reasoning and different approaches adopted in the subsequent chapters when case law will be discussed and when the position in Canada will be considered.

CHAPTER 4
**AN EVALUATION OF THE FAIRNESS OF DISMISSAL ON THE BASIS
OF CULTURAL AND RELIGIOUS BELIEFS AS INTERPRETED BY
THE COURTS**

4.1 Introduction

Case law remains the most important barometer which can be used to determine the extent to which a right will enjoy sanction under the Constitution. Courts are there to interpret, translate and give meaning to rights contained in the Constitution and more particularly the Bill of Rights as well as other forms of legislation. There has been no shortage of jurisprudence on the issue of dismissal as a fair sanction when based on religious and cultural practices over the past few years. The approach adopted by the courts recently seems to deviate from the erstwhile approach when it comes to concepts like reasonable accommodation, operational requirements and inherent requirements of the job. In this chapter a number of cases will be considered where these principles featured strongly. An effort will be made to determine the fairness of dismissals based on religion and culture. In order to get a holistic view some prominent cases will also be considered where employers were instructed to re-instate employees. The reasonableness of these judgements will also be scrutinised. This will be done against the backdrop of the constitutional and statutory imperatives mentioned in the previous chapter.

4.2 Appearance, dreadlocks and dress code in the workplace

In *Dlamini v Green Four Security*²¹⁶ the court laid down very clear guidelines with regard to the circumstances under which an employer may be entitled to dismiss an employee when the dismissal is based on religion or culture. In this case the applicants; who belonged to the Baptised Nazareth Group, pleaded that they were indirectly discriminated against because of their religious beliefs.²¹⁷ They refused to trim or shave their beard which was one of the tenets of their religion. They further alleged that they had beard when they were employed, which was disputed by the

216 2006 27 ILJ 2098 (LC).

217 2006 27 ILJ 2089 (LC) 2101 par 2H.

respondent.²¹⁸ It was, however, common cause that the rule existed and that they were dismissed as a result thereof.²¹⁹ What should further be borne in mind is the fact that a senior shop steward, who was not a Nazarene, was dismissed for having a “swine” which is a stub of hair under the lower lip.²²⁰ What the court ultimately had to determine was whether the clean-shaven rule was an inherent requirement of the job.²²¹

It will be remembered that employers are entitled to differentiate between employees on the basis of inherent requirements of the job in terms of both the EEA and the LRA.²²² As already pointed out in Chapter 3, inherent requirements are those requirements without which the job cannot be performed, and it must further be extremely difficult or impossible for the employer to accommodate any deviation. In this particular case the court accepted that “inherent” means an element which is an indispensable attribute which must relate in an inescapable way to the performance of the job.²²³

The court also systematically reflected on the case law available at that stage to get a clear understanding of what exactly constitutes an inherent requirement of the job as interpreted and understood by the courts. The controversial case of *Woolworths v Whitehead*²²⁴ was considered in which the court found that continuity of employment was an inherent requirement of the job.²²⁵ The case of *Hoffman v SA Airways*²²⁶ was taken into account in which the court found that being HIV-negative cannot be an inherent requirement of the job of a cabin attendant.²²⁷ A similar case to that of the *Hoffman*-case namely *IMAWU v Cape Town*²²⁸ was also referred to wherein the court indicated that the mere fact that someone is dependent on insulin does not mean that he cannot become a fire-fighter or lacks an inherent requirement of the job.²²⁹

218 2006 27 ILJ 2089 (LC) 2101 par 3J.
219 2006 27 ILJ 2089 (LC) 2101 par 5B.
220 2006 27 ILJ 2089 (LC) 2102 par 4A.
221 2006 27 ILJ 2089 (LC) 2102 par 9H.
222 See Chapter 3 par 3.3 above.
223 2006 27 ILJ 2089 (LC) 2108 par 40.
224 2000 21 ILJ 571 (LAC).
225 2006 27 ILJ 2089 (LC) 2108 par 41.
226 2000 21 ILJ 2357 (CC).
227 2006 27 ILJ 2089 (LC) 2108 par 41.
228 2005 26 ILJ 1404 (LC).
229 2006 27 ILJ 2089 (LC) 2108 par 41.

The Labour Court (LC) held that the rule requiring guards to be clean-shaven applied equally to all employees and was consistently applied and that the purpose of the rule was to ensure neatness and hygiene.²³⁰ The Court stated further that as a general proposition, untrimmed beards are untidy and that an employer is entitled to set a uniform dress code as a condition of employment.²³¹ To be clean-shaven was thus regarded as an inherent requirement of the job in the security industry.²³² The court also referred to other industries which had similar requirements like the South African Defence Force²³³ and the police.²³⁴

The court also made an interesting observation, stating that those who claim the right to do or abstain from doing something because it is permitted or prohibited by a particular religion must prove that it is an essential tenet of their religion. If this is not made a requirement it will be easy for people to refuse lawful instruction or to constantly break workplace rules under the pretext of religion.²³⁵ The court used the same reasoning and came to the conclusion that the applicants were selective about which of the tenets they would observe, since they were working on Sundays, which was also forbidden by their religion.²³⁶ It was submitted that this could easily be construed as a bona fide gesture from the employee's side to meet the employer halfway in terms of accommodating each other, but in this instance the court interpreted it as non-committal to religious tenets and found that it was reason enough for the applicants to also forego the tenet which proscribed the shaving of beard. The court thus found that, due to the selective approach of the applicants, and due to the inherent requirement of having a clean-shaven face in the security industry, the employer had enough reason to dismiss the employees.

Although the reasoning behind the judgement of the above-mentioned case seems sound and serves as ostensibly good authority for an employer to lay down workplace rules, the court came to an almost complete opposite finding in

230 2006 27 ILJ 2089 (LC) 2106 par 27.
231 2006 27 ILJ 2089 (LC) 2112 par 63A-B.
232 2006 27 ILJ 2089 (LC) 2111 par 57C.
233 2006 27 ILJ 2089 (LC) 2111 par 58.
234 2006 27 ILJ 2089 (LC) 2108 par 60.
235 2006 27 ILJ 2089 (LC) 2108 par 23.
236 2006 27 ILJ 2089 (LC) 2108 par 25.

*Department of Correctional Services v Popcru*²³⁷ (*Popcru-case*) which has features strikingly similar to the *Dlamini*-case. In this case the respondents claimed that they had been discriminated against on the basis of their religion and culture and were dismissed because of the fact that they refused to cut off their dreadlocks (also referred to as Rastaman hairstyles). Three of the respondents who were followers of the Rastafarian faith contended that it was against their religion to cut off their dreadlocks,²³⁸ whilst the other two respondents, who were Xhosas, maintained that they wore dreadlocks because of their cultural beliefs.²³⁹ The commissioner who acted on behalf of the employer was of the view that compliance with policy cannot be negotiated on management level.²⁴⁰ The employees were subsequently dismissed for breaching the disciplinary and dress code, as well as for the refusal to carry out a lawful instruction.²⁴¹ The LC found that since the respondents failed to bring their religious and cultural beliefs to the attention of the Commissioner, they were only entitled to claim discrimination based on gender. The court thus found that no link was established between the respondents' religion and their cultural belief and the circumstances of the dismissal.²⁴²

When the matter was referred to the LAC, the court considered whether any differentiation took place between employees. This was indeed found to be the case, since there was a workplace policy which affected employees differently. It further found that discrimination took place on the grounds of gender, religion and culture.

The employer appealed against this judgement and when the matter was referred to the Supreme Court of Appeal (SCA) the applicants' council conceded that discrimination took place on the grounds of gender, religion and culture,²⁴³ but submitted that such discrimination was justifiable since the officers were working in a high-regulation and quasi- military institution.²⁴⁴

237 2013 4 SA 176 (SCA).

238 2013 4 SA 176 (SCA) 179 par 6.

239 2013 4 SA 176 (SCA) 179 par 7.

240 2013 4 SA 176 (SCA) 179 par 8.

241 2013 4 SA 176 (SCA) 179 par 8.

242 2013 4 SA 176 (SCA) 181 par 15.

243 2013 4 SA 176 (SCA) 182 par 18.

244 2013 4 SA 176 (SCA) 182 par 19.

Having regard to the court's approach in the *Dlamini*-case, one would expect that the court would find this to be reason enough to serve as justification for such differentiation and discrimination. The court in the *Dlamini*-case did mention that appearance, neatness and hygiene were extremely important in the security industry. The same argument should be able hold water when one is dealing with a detention facility, where one of the main aims is the rehabilitation of inmates. In the *Popcru*-case, however, the court found that the respondents' hairstyles did not have an impact on their performance or work.²⁴⁵

There is further no certainty whether short hair, not worn in dreadlocks, can be regarded as an inherent requirement of the job in a facility like a prison. It would seem that the applicants in the *Popcru*-case did not succeed with their argument because their initial contention was that the dress code entrenched uniformity and neatness which would help with discipline and security.²⁴⁶ It was thus not initially argued, according to the court, that the aim of the dress code is there to curb the smuggling and use of "dagga".²⁴⁷ There was, according to the court, no link between the initial aim of the dress code (which was the promotion of neatness and uniformity which would help with security and discipline) and the subsequent claim, which was the prevention of the smuggling of dagga. Logic dictates, however, that the prevention and curbing of the smuggling of "dagga" directly and indirectly ties in with issues such as discipline and security. The hairstyles of the employees did project them as people who practise cultural and religious beliefs which induced the occasional use of "dagga". That being the position, it stands to reason that they would not frown upon the use of dagga and would be the most obvious persons to approach to help with the smuggling of "dagga". If "dagga" were to be smuggled into the detention facility, it would speak of ill-discipline, amount to an offence and show that the facility's security measures were not effective. There was thus no reason for the court to compartmentalise these issues.

It is furthermore true that certain careers and professions call for a greater stance of integrity and obedience to the law than others, which in itself can be regarded as an

245 2013 4 SA 176 (SCA) 183 par 25.

246 2013 4 SA 176 (SCA) 183 par 24.

247 2013 4 SA 176 (SCA) 183 par 24.

inherent requirement of the job. It cannot be denied that the use of “dagga” is an integral part of the Rastafari religion. According to Professor Yawney who was called as an expert on the Rastafari religion in *Prince v Law Society*²⁴⁸ (*Prince-case*), the Rastafarians insist that they have a duty to praise the Creator by using “dagga”.²⁴⁹ It can therefore be assumed that the respondents in the *Popcru*-case would have a similar attitude with regard to the use of “dagga”. In respect to the respondents who argued that the wearing of dreadlocks was in line with the Xhosa-culture, the respondents themselves said that “dagga” was used during the cleansing rituals and celebrations when someone becomes a traditional healer.²⁵⁰ It should thus be possible for an employer (especially one in the position of the applicant) to have a dress code which will address and remedy such traditions in a workplace such as a prison, where the main aim is to correct human behaviour. The possession, use and cultivation of “dagga” is an offence. The right of Rastafarians to smoke “dagga” was curtailed in terms of section 36 of the Constitution.²⁵¹ Using this reasoning of the Constitutional Court, it would be hypocritical to have people in a position of authority, as in the *Popcru*-case, who subscribe to certain practices but guard over people who are being incarcerated and punished for those very same reasons or practices.

It would seem that, pertaining to appearance, the *Popcru*-case is the most authoritative case when it comes to dismissal based on religion. This case demonstrates a deviation from the earlier *Dlamini*-case. It would seem that courts have become stricter in ensuring that cultural and religious rights are upheld insofar as appearance and dress codes are concerned. It is clear that when drafting workplace policies employers will have to be extra careful when they want to enforce same.

4.3 Absence from work due to religious beliefs or cultural practices

Every person is understandably entitled to a certain number of leave days which will be specified in the employment contract.²⁵² Provided that leave is arranged and the workload allows same, it should not be a problem if an employee requests to take

248 2002 2 SA 794 (CC).

249 2002 2 SA 794 (CC) 102.

250 2013 4 SA 585 (SCA) 587 par 7.

251 2002 2 SA 794 par 139.

252 See Chapter 3 (and in particular s 20) of the *Basic Conditions of Employment Act*, 1997.

leave during a certain period of time. It is, however, possible that the situation at work might not lend itself for a particular person or group of people to take leave at a given point in time. Wilful absence from work is a serious misconduct which can justifiably be met by dismissal.²⁵³ If leave is requested to perform or comply with a religious belief or cultural practice, the employee's rights can very easily be on a collision course with the employer's interests; a number of cases bear testimony to this. Two cases will henceforth be mentioned to give an indication of how the courts dealt with absenteeism due to religious or cultural practices, before an analysis of *Kievits Kroon v Mmoled*²⁵⁴ will follow.

In *Food and Allied Workers Union v Rainbow Chickens*,²⁵⁵ the appellants were a group of butchers who were employed by the respondent for their religious alignment. It was thus an operational requirement that the butchers who slaughtered the chickens should be persons who practise the Islamic faith.²⁵⁶ It was further common cause that the rest of the workforce of 1400 employees were dependent on the slaughtering of the chickens by the butchers, for them to have work to do.²⁵⁷ Since the new Constitution entrenches the right to freedom of religion, a strong sentiment developed that Muslim employees should not work on Eid, which was a significant religious day, but not a statutory public holiday.²⁵⁸ When the respondent refused to give the applicants this day off, which was in line with their collective agreement, the applicants stayed away from work. The applicants were suspended and after they had refused to accept a written warning and waived their right to appeal, they were dismissed.²⁵⁹ The reason for their dismissal was based on a collective refusal to work as per contract.²⁶⁰

When the applicants challenged their dismissal they had a two pronged approach. Firstly they submitted that their dismissal was unfair in terms of section 187(1)(f) in that they were discriminated against in terms of their religion. Secondly they submitted that, should the court find that the dismissal was not unfair in terms of

253 Van Niekerk et al *Law@work* 3rd ed 274.

254 2014 1 SA 585 SCA.

255 2000 21 ILJ 615 (LC).

256 2000 21 ILJ 615 (LC) 617 par 4.

257 2000 21 ILJ 615 (LC) 617 par 5.

258 2000 21 ILJ 615 (LC) 618 par 8.

259 2000 21 ILJ 615 (LC) 619 par 12.

260 2000 21 ILJ 615 (LC) 619 par 12.

section 187(1)(f), it was procedurally unfair in terms of section 188(1)(b).²⁶¹ It was the submission of the applicants that the chairman of the disciplinary enquiry was biased, tended his own submissions rather than those of the applicants, and refused the applicants representation.²⁶²

The court found that the applicants were not discriminated against in terms of section 187(1)(f), since all workers were required to work on the particular day. Differentiation did therefore not take place. The butchers were also expected to work, due to the fact that their work formed part of an operational requirement. The employer was thus entitled to compel the employees to work.²⁶³ The court, however, found that the dismissal was not for a fair reason and ordered reinstatement.²⁶⁴

It is submitted that the above-mentioned judgement is sound and fair to the employees as well as to the employer. It must be remembered that there was no evidence of any prior misconduct from the side of the employees, and they come across as loyal workers. They also did not absent themselves for a trivial reason but for something noble and dear to their heart. The employer did in fact suffer a substantial loss and was greatly inconvenienced. He could, however, manage to do damage control and arrange for substitutes to a certain extent on short notice. It is thus submitted that, with the benefit of more time, proper arrangements could be made and a compromise could be agreed on, so that both parties could demonstrate and assure each other of their commitment and loyalty.

In *Fairy Tales Boutique v CCMA*,²⁶⁵ the respondent requested family responsibility leave to take care of the funeral arrangements of her mother-in-law. The applicant informed the respondent that she had exhausted her family responsibility leave, the purpose of the leave sought did not qualify as family responsibility leave and that she was needed for purposes of stock taking which was going to be done on the weekend of the funeral.²⁶⁶ The respondent indicated that she would nevertheless not

261 2000 21 ILJ 615 (LC) 620 par 17.

262 2000 21 ILJ 615 (LC) 622 par 30.

263 2000 21 ILJ 615 (LC) 623 par 33.

264 2000 21 ILJ 615 (LC) 623 par 36-37.

265 JR 469/09.

266 JR 469/09 2 par 3.

come to work, and only returned the following week. Upon her return she was charged and dismissed on the basis of gross insubordination.

The respondent referred the matter to the CCMA and a default award of R17 820,00 was granted to her,²⁶⁷ the equivalent of six months' wages. After a number of rescission applications the matter was set down for re-enrolment, and during this process the maximum compensation was awarded to the employee. The employer sought a review given the fact that the commissioner unjustifiably found that the respondent was dismissed because she attended her mother in law's funeral, and argued that the employee failed to obey a lawful instruction, which was according to him the true reason for dismissal. According to the applicant the commissioner also erred by finding that the dismissal was procedurally unfair, and in granting the maximum compensation award.²⁶⁸

The court considered the manner in which the commissioner assessed the evidence. The court noted that the commissioner applied her mind to the facts which on the applicant's side boiled down to the fact that leave was refused, stock had to be taken on the weekend in question and that the working relationship had broken down irretrievably between the employer and the employee.²⁶⁹ The respondent's case amounted to her requesting leave to bury her mother-in-law, and when this application was refused, she decided to take leave since she had to take care of the funeral and burial rituals as she was the primary caregiver.

The court further considered the commissioner's findings and noted that the commissioner concluded that the respondent had a right to disobey an unreasonable instruction since it seemed that the applicant had little regard for the arrangements associated with African funerals.²⁷⁰ The commissioner also found that the applicant could have granted the respondent annual leave.²⁷¹ The respondent was also deprived of availing herself of representation during the disciplinary hearing. The court could not find anything wrong with the commissioners' finding,²⁷² and found that

267 JR 469/09 2 par 5.

268 JR 469/09 4 par 10.

269 JR 469/09 5-6 par 12.

270 JR 469/09 7 par 13.

271 JR 469/09 7 par 13.

272 JR 469/09 9 par 20.

it complied with the test as outlined in *Sidumo v Rustenburg Platinum*²⁷³ which stated that interference with a judgement would only take place if the Commissioner's decision was one which no other reasonable decision maker would arrive at.²⁷⁴ The award of maximum compensation of twelve months was thus confirmed.

The above judgement is fair and can hardly be criticised. Death is mostly a sudden occurrence and cannot adequately be prepared for. Some arrangements can be made in advance, but certain things can only be arranged and taken care of after death has struck. The employee had no control over the occurrence and could not move or reasonably be expected to postpone the funeral arrangements that she had to make. Her absence from work was also for the shortest period of time. The employee's record does reflect that she was not the most exemplary of employees, and that she had received written warnings for late coming and till mistakes.²⁷⁵ It is, however, important to note that these transgressions were unrelated to the issue at hand. The employer was expected to act differently, even if it was just for being humane in this particular instance.

With these two cases in mind, it might now be prudent to consider the reasoning and judgement in the *Kievits Kroon*-case.²⁷⁶ In this case the respondent requested the applicant to go on leave to complete a course to become a traditional healer after she had experienced "peminisions". The applicant decided not to accede to this request in light of the fact that the respondent had used up all her annual, sick and compassionate leave.²⁷⁷ The respondent had also received a final warning for staying away from work after being instructed not to do so.²⁷⁸ The respondent decided to ignore the instructions of the employer in any event and stayed away. When she returned to work, a disciplinary hearing was held and she was dismissed owing to the fact that she had disregarded the company's policies and decided to attend a course unrelated to her employment without her employer's permission.²⁷⁹

273 2007 28 ILJ 2405 (CC).

274 2007 28 ILJ 2405 (CC) 2441 par 119.

275 JR 469/09 2 par 4.

276 2014 1 SA 585 (SCA).

277 2014 1 SA 585 (SCA) 587 par 5.

278 2014 1 SA 585 (SCA) 587 par 5.

279 2014 1 SA 585 (SCA) 588 par 12

The respondent referred the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA), as an unfair dismissal. The commissioner during the arbitration process found that there was a cultural chasm between the employer and the employee and because of this Mr Walter (who acted on behalf of the employer) did not understand the significance of the employee's request. The commissioner further found that the employee stayed away from work because of circumstances beyond her control, since she genuinely believed that her life was in danger. The employee's dismissal was therefore found to be substantially unfair.²⁸⁰

The LC concluded that the award was well reasoned. The legal issue considered by this court was whether the employee's leave of five weeks was justified. The test applied in the *Sidumo*-case²⁸¹ was referred to, which stipulated that the presiding officer should ask himself whether the decision reached by the commissioner was one which a reasonable decision maker could not reach. The LC found that the decision reached by the commissioner was one which any decision maker could reach.²⁸²

The matter was hereafter referred to the LAC which dismissed the appeal.²⁸³ The LAC found that the commissioner's conclusions were supported by reasons, that the reasoning process could not be faulted, that the commissioner was alive to issues and that he had properly applied his mind to the material before him.²⁸⁴ The matter was then referred to the SCA to strike a balance between the rights of the employer and those of the employee. The appeal was dismissed with costs²⁸⁵ and some of the reasons for the order (as well as its reasonableness), will henceforth be scrutinised.

The first issue that needs to be canvassed is whether there was reasonable accommodation on the side of the employer. It would seem that the employee initially asked to be exempted from the afternoon shift, which request the employer was susceptible to, after arrangements had been made with other employees.²⁸⁶ It would further be fair to assume that the employee's training to become a traditional leader

280 2014 1 SA 585 (SCA) 589 par 15.

281 2007 28 ILJ 2405 (CC).

282 2014 1 SA 585 (SCA) 586 par 1.

283 2014 1 SA 585 (SCA) 589 par 16.

284 2014 1 SA 585 (SCA) 589 par 16.

285 2014 1 SA 585 (SCA) 594 par 34.

286 2014 1 SA 585 (SCA) 587 par 4.

continued during this period, especially in the afternoons when she was not working. When the employee requested leave for five weeks, no indication was given as to what had brought about this sudden need for acceleration in the training to become a traditional healer. The employer was nevertheless prepared to accommodate the employee further with one week's leave since her annual, sick and compassionate leave were almost exhausted.²⁸⁷ The employer was prepared to do this despite the fact that the employee had received a final written warning five months earlier for staying away from work. The fact that the warning in December was a final written warning tacitly implies that similar transgressions had been committed in the past, for which warnings must have been issued. To top it all; the employer was very busy at the time, short of staff and would have found it very difficult to render a proper service.²⁸⁸ The operational requirements were thus of such a nature that it was not possible to grant the employee leave without seriously disrupting the day to day running of the establishment. Despite this, the employer made a genuine attempt to meet the employee halfway. The same cannot be said about the employee.

Much was also made of the fact that the employee provided a letter from the traditional leader under whose care she had been since 13 January 2007.²⁸⁹ It must be remembered that the letter which was presented merely contained the very same request which had already been made by the employee and which had been considered and dealt with. As said above, the employer had already made a reasonable (if not generous) attempt to accommodate the employee. It is thus doubtful whether hearing the same request from another source would have made any difference.

The letter itself also made no mention of the issue of what had brought about the need for a sudden change. The employee had been having these "permissions of ancestors" since January, lived with them and reported for duty. No indication was given that her condition had worsened, apart from her own opinion that she thought she would have collapsed had she not attended the course.²⁹⁰ The court attempted to remedy this vacuum created by the dubious note by mentioning that such belief

287 2014 1 SA 585 (SCA) 587 par 5.

288 2014 1 SA 585 (SCA) 587 par 6.

289 2014 1 SA 585 (SCA) 587 par 8.

290 2014 1 SA 585 (SCA) 589 par 14.

systems are part of a large percentage of the population²⁹¹ and that 80% of South Africans consult traditional healers.²⁹² This vacuum is of even more importance given the fact that the employee's argument was that the letter should have been construed as a medical certificate. The employee had been able to work with her affliction for six months; it would thus be reasonable to assume that she could have continued to work the morning shift and carry on with her course in the afternoons, unless the contrary had been proven or her situation and condition had worsened.

It is conceded that it speaks of double standards for the employer to indicate that a medical certificate from a registered medical practitioner would have been accepted. The employer thereby created the impression that, because the employee's cultural practice seemed less sophisticated and differed from the norm, it was inferior and should not be taken seriously. On this point it must however be remembered what the aim of a medical certificate is as opposed to the aim for which the letter from the traditional leader was tendered. The main reason for which a medical certificate is ostensibly tendered is to prove that a person is too sick to carry on with his work or duties. This is in line with the definition of illness which is understood to refer to a condition of incapacity. As has been said already, the letter from the traditional leader was silent on the suitability of the employee to do her job as was expected and set out in Rule 15(1) of the Ethical and Professional Rules of Medical and Dental Professions Board of the Health Professions Council of South Africa. All that the note from the traditional healer stated was the request for unpaid leave. It was only during the hearing at the CCMA that it was said in so many words that the employee was too sick to report for work. This information was not at the employer's disposal at the time when the decision for dismissal was made. The letter thus fell short of its intended purpose and failed to shed light on the issue in question which was the employee's suitability to carry out her work as normal at the time when it mattered most.

It is submitted that because of the above-mentioned reasons the court underplayed the interest of the employer and the operational requirements of the job which did not allow for an employee to be absent for such a long period of time. The respondent in

291 2014 1 SA 585 (SCA) 591 par 23.

292 2014 1 SA 585 (SCA) 591 par 24.

this particular case was not an ordinary employee but a senior who was employed as a line cook.²⁹³ This made the chances of finding a substitute more difficult. Section 23 stipulates that everyone is entitled to fair labour practices, which includes the employer. The court also neglected to have due regard for the factors surrounding and relating to the employee's conduct prior to her dismissal.

4.4 Sexual orientation in a religious work environment

The EEA governs discrimination in the workplace on various grounds. The definition of an employee according to the EEA is someone who works for another person or the State and who is entitled to remuneration, or someone who in any manner assists in conducting the business of an employee.²⁹⁴ An independent contractor is pertinently excluded from this definition and the application of this Act. An independent contractor will have to claim in terms of PEPUDA, should there be any discrimination on the basis of religion and/or culture in terms of sections 6 and 8. The case of *Strydom v Nederduitse Gereformeerde Gemeente*²⁹⁵ (*Strydom-case*) will henceforth be scrutinised, and although the complainant in this case was an independent contract worker, enough was said in the analysis of the facts and the judgement to have a good understanding of how the court would go about should the complainant be an employee as envisaged by the EEA.

As already mentioned, the applicant in the *Strydom-case* was an independent contractor who was employed by the respondent church to teach music to students.²⁹⁶ The applicant's contract was terminated and according to him this was done as a result of his sexual orientation.²⁹⁷ The applicant relied on sections 9 and 10 of the Constitution which deal with equity and human dignity²⁹⁸ as well as the provisions of PEPUDA which outlaw discrimination on sexual orientation.²⁹⁹ The church in return relied on the fact that they had a right to discriminate against the applicant in terms of section 14(3)(f) since his lifestyle was contradictory to their religious doctrine.

293 2014 1 SA 586 SCA par 3.

294 Section 1 of EEA 55 of 1998.

295 2009 30 ILJ 868 (EqC).

296 2009 30 ILJ 868 (EqC) 870 par 1.

297 2009 30 ILJ 868 (EqC) 870 par 1.

298 2009 30 ILJ 868 (EqC) 871 par 2.

299 Section 6 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.

In the analysis of the evidence and weighing up of the authority on the issues at hand, the court considered the devastating consequences that would follow should an institution like the church not be able to lay down the rules with regard to the selection of their leaders and their sexual orientation.³⁰⁰ The court considered the argument of the respondent insofar as it contended that the applicant was a spiritual leader and that he had to live an exemplary life.³⁰¹ The court, however, came to the conclusion that not a shred of evidence was tendered indicating that the complainant had to teach Christian doctrine; he was employed to teach nothing but music.³⁰²

From the above it can be deduced that institutions like churches can expect to be exempted from the obligation not to implement discriminatory rules. Such an exemption will especially be in order when a person finds himself in a leadership position at such an institution where he has to teach and minister the doctrine and principles of the institution. The right to equality and human dignity will thus have to yield to the right of freedom of religion in such an instance.

4.5 Sincerity of belief and non-obligatory practices

In the event that there is an allegation of infringement on a religious or cultural right; a court will first have to conduct an enquiry to determine the sincerity of the believer.³⁰³ An assumption that a religious or cultural right has been violated is not sufficient. The majority of religious beliefs and cultural practices are to a great extent established, and are identifiable by certain practices and characteristics. It would thus be easy in most instances to determine whether a particular religion or cultural practice has been infringed upon. There might be situations, however, whereby someone's conduct differs from that of the mainstream believers who subscribe to a particular faith. It is further possible to have a situation where someone who belongs to a particular belief either includes non-obligatory practices in the exercising of his or her cultural belief system, or interprets them slightly different from other believers. Should this happen in the workplace, it is incumbent upon the employer to decide whether such conduct would be allowed and accommodated if it has an impact on

300 2009 30 ILJ 875 par 15.

301 2009 30 ILJ 875 par 16.

302 2009 30 ILJ 876 par 17.

303 Farlam *Freedom of Religion, Belief and Opinion* 41-31.

the work environment. It is for this reason that a determination should be made to establish whether such an employee will enjoy the protection afforded by sections 15, 30 and 31.

The judgement of the *Dlamini*-case should also be borne in mind, wherein which the court found that those who claim that to do or abstain from something because of a prescription or prohibition of their religion, bears the onus to prove that such a tenet is central to such religion or culture.³⁰⁴ This was essential, the court reasoned, to avoid a situation whereby people will promote and advance personal preference and masquerade them as religious or cultural practices.³⁰⁵

In *MEC v Pillay*³⁰⁶ the court had to consider whether a pupil who wanted to wear a gold nose-stud could do so since this was forbidden by the school's code of conduct.³⁰⁷ The pupil was a girl who came from a South Indian family, and the wearing of such a stud would signify that she had reached physical maturity and that she had become eligible for marriage.³⁰⁸ When an expert was called by the school to come and express his opinion on this aspect, he indicated that this practice was not obligatory nor was it a religious rite.³⁰⁹ The court consequently had to determine whether voluntary practices in respect of culture and religion were worthy of protection.

The court looked at the code of conduct of the particular school and found that there was no effort in it to reasonably accommodate the needs of people who are diverse in terms of race, gender or disability.³¹⁰ The court mentioned that it was core that a community, whether it be the State, an employer or a school, should take positive measures and incur additional hardships to allow people to enjoy all their rights equally.³¹¹ The court further looked at the rule which barred the wearing of a nose

304 2006 27 ILJ 2098 (LC) 2105 par 23.

305 2006 27 ILJ 2098 (LC) 2105 par 23.

306 2008 1 SA 474 (CC).

307 2008 1 SA 474 (CC) 480 par 5.

308 2008 1 SA 474 (CC) 480 par 7.

309 2008 1 SA 474 (CC) 480 par 13.

310 2008 1 SA 474 (CC) 500 par 72.

311 2008 1 SA 474 (CC) 500 par 73.

stud and concluded that, although the rule seemed neutral, it had a marginalising effect on a certain sector of the population.³¹²

After assessing the facts, the court was of the view that voluntary practices were indeed worthy of protection, and even more so than obligatory rules.³¹³ The court further remarked that one individual would seldom observe all the practices that pertained to a particular culture, but would choose those which he or she felt were most important to him or her to give expression to his or her culture. An employee should thus be able to invoke the provision of sections 15, 30 and 31 in the workplace if there is a need to give expression to a cultural or religious need, even if such a practice is not central to his culture or religion.

In the *Prince*-case the appellant wanted to become an attorney³¹⁴ and expressed his desire to be registered as a candidate attorney so that he could do his community service. The law society refused to register his contract since he had two previous convictions for possession of cannabis and he had expressed his intention to keep on using dagga, which was in line with his religious belief.³¹⁵ The applicant applied for an exemption for the Rastafari to be allowed to possess and use dagga under a permit similar as other dangerous drugs which are available on prescription. The centrality of the use of dagga, as well as the sincerity of the appellant's religious beliefs in the Rastafari religion, was questioned by the Director General of Health.³¹⁶ The court, however, found that it was not the court's duty or prerogative to determine the centrality of a particular practice when it came to religion, unless there was a genuine dispute about its centrality.³¹⁷ The court thus dismissed the Director General's submission.³¹⁸

With regard to the applicant's application, the court found that there was a substantial illicit trade in respect of dagga and that, according to the applicant's own version, the drug was not being used for sacramental purposes only.³¹⁹ It further found that the

312 2008 1 SA 474 (CC) 500 par 78.

313 2008 1 SA 474 (CC) 497 par 66.

314 2002 2 SA (CC) 2 par 1.

315 2002 2 SA (CC) 2 par 2.

316 2002 2 SA (CC) 25 par 41.

317 2002 2 SA (CC) 44 par 72.

318 2002 2 SA (CC) 45 par 73.

319 2002 2 SA (CC) 77 par 129.

fact that permission would be granted by the executive would be against the very nature of freedom that was supposed to be enjoyed under freedom of religion.³²⁰ The court further found that the failure to make provision for an exemption in respect of the possession of dagga was reasonable and justifiable in terms of section 36 of our Constitution.

When it comes to the sincerity of a belief it must be noted that the courts will only in exceptional circumstances conclude that a religious belief is not sincere, and only when there is little or no evidence of true devotion to a religion.³²¹

4.6 Conclusion

Courts seem to have become stricter with the enforcement of rights pertaining to cultural and religious practices. Judging by recent case law, the employer's right to resort to dismissal when attempting to protect his interest appears to have been curtailed to a great extent. It is doubtful that the *Dlamini*-case would have the same outcome if it were to be trialled today. A greater emphasis is now being placed on a tolerant attitude towards those who look and come across as different from the mainstream. Courts were also inclined to easily order reinstatement in the past when it came to employees who absented themselves from work without permission. It was difficult already for employers to prove that the conduct of the employee was serious enough to justify the maximum punishment in the form of dismissal. After the *Kievits*-case it would appear that where religion and culture are the reason for the absenteeism, it is going to be even more of an uphill battle to convince the courts that dismissal is an appropriate sanction.

Religious institutions like churches will generally be exempted from non-discriminatory policies, especially when someone is appointed in a leadership position and has to minister the doctrine and religious beliefs of the institution. It must further be noted that non-obligatory practices are also protected under the provisions of section 15 and 30. How far such protection stretches is still unclear at this point in time.

320 2002 2 SA (CC) 81 par 138.

321 Farlam *Freedom of Religion, Belief and Opinion* 41-31.

CHAPTER 5

DISMISSAL BASED ON CULTURAL AND RELIGIOUS BELIEFS - A CANADIAN PERSPECTIVE

5.1 Introduction

Canada is a parliamentary democracy in which the law is the supreme authority. The Constitution³²² of Canada provides that there shall be one parliament for Canada consisting of the Crown, the Senate and the House of Commons.³²³ The law-making responsibility is shared amongst one federal, ten provincial³²⁴ and three territorial³²⁵ governments.³²⁶ The main difference between provinces and territorial states is the fact that a province derives its authority from the Constitution whilst a territorial government derives its power from the federal government. Provincial and territorial governments are responsible for government-regulated activities while municipalities take care of the day-to-day running of government work.³²⁷

South Africa and Canada have a lot in common. Both countries have a cosmopolitan nature with Canada becoming more of a pluralistic and multicultural country especially over the last thirty years.³²⁸ Jean Kunz refers to the fact that Will Kymlicka (a Canadian philosopher known for his works on multiculturalism) in 2008 already observed that multiculturalism is under pressure to add religion as a third track, along with ethnicity and race in Canada as a result of the growing religious diversity.³²⁹ The main reason for the growing diversity has been found to be immigration.³³⁰

Another trait of both countries is the fact that Christianity is the predominant belief practised by the greater part of their respective inhabitants. As a result of this, in

322 *Constitution Act* 1867.

323 Section 17 of the *Constitution Act* 1867.

324 The ten provinces are Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario and Prince Edward Island.

325 The three territorial governments are Qubec, Saskatchewan and Yukon.

326 Marleau and Montpetit 2000 www.parl.gc.ca/marleaumontpetit 185.

327 Provincial and territorial governments 2011 www.cic.gc.ca/english/newcomers/before-provincial-gov.

328 Buckingham 2011 *IJRF* 65.

329 Kunz 2014 www.horizons.gc.ca 1.

330 Kunz 2014 www.horizons.gc.ca 2.

Canada, just like in South Africa, shops were closed, as per legislation, on Sundays,³³¹ church services were broadcast on the radio and children in public schools commenced their day with a prayer unto the Lord. In both countries Parliament enjoyed sovereignty before the introduction of a constitutional dispensation.³³² It is, however, a fact that Canada's legal system is more established than South Africa's in terms of democratic rules and principles, especially since Canada has had a constitution since 1867, which was augmented in 1982. It is for this reason that the drafters of the South African Constitution³³³ deemed it fit to borrow some of the principles encapsulated in the Canadian Charter³³⁴ (Charter) which forms the first part of the Canadian constitution.³³⁵ This was especially the case when the Bill of Rights was drafted.³³⁶ In certain instances the exact wording as it appears in the Charter was used.

Given the similarities of both countries in terms of diverse cultures, religions and legislative provisions, it can be assumed that they will experience similar problems in the workplace from time to time. It is for this reason that it might be worthwhile to have a look at the Canadian approach when it comes to issues relating to religion and cultural practices in the workplace and the enforcement thereof. The manner in which the Canadian justice system deals with issues such as reasonable accommodation, undue hardship, operational requirements and dismissal based on cultural and religious beliefs, will also be analysed to learn lessons and perhaps adopt best practices.

As mentioned above, legislative powers and responsibilities are distributed to the federal parliament and each of the provincial legislatures.³³⁷ Only the federal and provincial legislations, which were used in the cases mentioned below, will be considered, which includes the *Alberta's Individual Rights Protection Act*,³³⁸ the

331 See the *Lords Day Act* 1906

332 Sossin 2009 *Comp Lab Law & Pol'y* J 488.

333 *Constitution of the Republic of South Africa*, 1996.

334 *Canadian Charter of Rights and Freedoms*, 1982.

335 Sarkin *The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights* 181-186.

336 Schwartz 2012 www.cbc.ca.

337 Lederman 1963 *McGill Law Journal* 187.

338 *Individual Rights Protection Act SA* 1972.

*Canadian Human Rights Act*³³⁹ and the *Ontario Human Rights Code*.³⁴⁰ These Acts will be referred to insofar as religious and cultural discrimination are concerned, as well as the dismissal of employees based on cultural and religious beliefs. The Charter,³⁴¹ which lends greater powers to judicial officers to strike down unconstitutional federal and provincial statutes, will also be analysed. It must be remembered that the Charter only governs the vertical relationship between the state and citizens. The discussion of these legislative frameworks will however be confined to the extent that they were used in *Ontario Human Rights Commission v Simpson Sears*³⁴² and *Bhinder v Canadian National Railway*.³⁴³

5.2 Federal legislation

5.2.1 *Canadian Human Rights Act*

The main aim of the *Canadian Human Rights Act*³⁴⁴ is to extend the laws in Canada to give effect to the principle that all individuals should have an equal opportunity to make for themselves the lives that they are able and wish to have, without being hindered to do so by discriminatory practices based on religion, national or ethnic origin, or any other ground specified in the Act.³⁴⁵

Other important sections such as sections 3, 7 and 14 will be referred to below.

5.2.2 *The Canadian Charter of Rights and Freedoms*

The pluralistic and multicultural influence in Canada, which has become more evident over the last three decades, necessitated the enactment of legislation to govern and regulate interaction between the different cultures and religions so as to minimise conflict. This need led to the introduction of the *Canadian Charter of Rights and Freedoms*, 1982.³⁴⁶ The Charter which binds all spheres of government came into force with a lot of fanfare³⁴⁷ and signalled a new era for religious and cultural freedom

339 *Canadian Human Rights Act* 1977.

340 RSO 1980, C. 340.

341 *Canadian Charter of Rights and Freedoms*, 1982.

342 1985 2 SCR 536.

343 1985 7 CHRR D/3093,23 DLR 4th 481.

344 *Canadian Human Rights Act* 1977.

345 Section 2 of the *Canadian Human Rights Act* 1977.

346 Hereinafter referred to as the (Canadian) Charter.

347 Buckingham 2011 *IJRF* 65.

in Canada by protecting it as a constitutionally recognised fundamental freedom.³⁴⁸ This means that any federal, provincial or municipal law which is inconsistent with the Charter when it comes to issues such as religion and culture is null and void due to the fact that the Charter forms part of Canada's Constitution.³⁴⁹ This resonates well with sections 2 and 8 of the South African Constitution,³⁵⁰ which determines that the Constitution is the supreme law of the Republic and binds the legislature, the executive, the judiciary and all organs of state respectively.

Given the fact that Canada had a federal Bill of Rights since 1960 (which to a certain extent already provided protection to certain human rights,) sceptics were of the view that the Charter would not make any difference.³⁵¹ The problem with the Bill of Rights of 1960 is the fact that it had the status of federal law. It thus did not apply to provincial laws and its effectiveness was limited, unlike the Charter which formed part of the Canadian Constitution. In *R v Big M Drug Mart*,³⁵² which was one of the early cases decided under the Charter, the court highlighted the true strength of the Charter by finding that the imposition of religious tenets would not be tolerated. As a result of this, the *Lord's Day Act*,³⁵³ which determined that shops should be closed on Sundays by law,³⁵⁴ was struck down as unconstitutional in 1995, since it was regarded as an attempt by the state to force citizens to observe practices closely linked to the Christian religion.³⁵⁵ So as to place this decision into perspective, the most important parts of the Charter with regard to religious and cultural freedom will now be considered.

In its introductory part, the Charter recognises the supremacy of the rule of law. Section 1 guarantees the rights set out in the Charter but also indicates that such rights can be curtailed by law if the limitation can be justified in a free and democratic society.³⁵⁶ Section 2 stipulates that everyone has the right to freedom of conscience and religion as well as freedom of thought and belief. The Supreme Court of Canada

348 Dabby 2011 *Lex Electronica* 11.

349 Barnett *et al* 2012 *An examination of the duty to accommodate* 3.

350 *Constitution of the Republic of South Africa*, 1996.

351 Buckingham 2011 *IJRF* 65.

352 1985 1 SCR 295.

353 *Lords Day Act* 1906.

354 Buckingham 2011 *IJRF* 65.

355 1985 1 SCR 295 par 136.

356 Similar to s 36 of the *Constitution of the Republic of South Africa*, 1996.

has interpreted the freedom of religion under the Charter to include both the freedom to express religious belief and the right to be free from any imposition of religious practices through state practices.³⁵⁷

Section 15(1) determines that everyone is equal before the law and entitled to the same protection and benefit of the law. It further states that no discrimination may take place on the basis of ethnic origin and religion. Section 15(2) furthermore stipulates that the provisions of section 15(1) do not prevent any law or programme that seeks to improve the conditions of disadvantaged individuals or groups, including those that have been disadvantaged on the basis of race, ethnic origin and religion. Affirmative action measures can thus be used to address imbalances brought about by discriminatory practices in the past.

Importantly, section 24 provides that any person whose rights to freedom have been violated can approach a competent court with jurisdiction to obtain such remedy or relief as the court deems fit and appropriate under the circumstances.

In addition, section 33 provides a mechanism for Parliament to override certain sections of the Charter, including the right to freedom of religion and equality. From this point of view it would seem that the Charter is fragile, but in practice it has shown to be robust and not easily shaken, especially in the area of religion³⁵⁸ as can be seen in *R v Big M Drug Mart*³⁵⁹ mentioned above. Section 33 can be employed by the elected legislative branch to shape policies and isolate same from judicial review. Such an invocation is, however, only valid for five years, which coincides with the term the elected branch members will serve in office.

Before the introduction of the Canadian Charter, courts made use of the adverse impact theory,³⁶⁰ also known as the adverse effect discrimination theory. The aim of this approach was to determine whether there was a violation of human rights to the extent that courts needed to intervene. Intention on the part of the employer was not a pre-requisite for discrimination to be established.³⁶¹ This trend was, however, not

357 See *Queen v Big M Drug Mart* 1984 2 SCR 145.

358 Sossin 2009 *Comp Lab L & Pol'y J* 489.

359 1985 1 SCR 295.

360 Finkin *Comparative Labour Law* RSO 1980 c. 340 241.

361 Ivankovich 1987-1988 *Can Bus LJ* 317-318.

adopted consistently by all courts in the different provinces, and there remained a measure of uncertainty as to whether the adverse impact theory could also be extended to human rights. The uncertainty was dealt with by the courts in two cases namely *Ontario Human Rights Commission v Simpson Sears*³⁶² (O'Malley-case) and *Bhinder v Canadian National Railway*³⁶³ (Bhinder-case). Before these cases are discussed it might be prudent to look at the different legislative frameworks of the provinces which were discussed in these two cases.

5.3 Provincial legislation

5.3.1 Alberta's Individual Rights and Protection Act

As mentioned above, the Charter is only applicable to government laws and actions³⁶⁴ (including the laws and actions of federal, provincial and municipal governments).³⁶⁵ Applicable legislation and codes such as the *Alberta's Individual Rights Protection Act*³⁶⁶ should be used in the various provinces when dealing with private employers. Section 7(1) of this Act, which deals with the grounds of dismissal as well as discrimination in general, stipulates that:

No employer or person acting on behalf of an employer shall (a) refuse to employ or refuse to continue to employ any person, or (b) discriminate against any person with regard to employment or any term or condition of employment, because of the race, religious beliefs...of that person or of any other person.

Section 7(3) stipulates that subsection (1) does not apply with respect to a refusal, limitation, specification or preference which is based on a bona fide occupational qualification. The employer will thus be allowed to discriminate (even on the grounds of religion) should he be able to prove that such discrimination was based on a bona fide operational requirement.³⁶⁷ The provisions of section 7(3) correspond with the provisions of section 187(2) of the LRA and section 6 of the EEA with regard to inherent requirements of a job.

362 1985 2 SCR 536.

363 1985 7 CHRR D/3093, 23 DLR 4th 481.

364 See 5.2.2 above.

365 Barnett *et al* 2012 *An examination on the duty to accommodate* 1,3.

366 *Individual Rights Protection Act* SA 1972.

367 The application of this Act will be demonstrated in the cases of *Bhinder v Canadian National Railway* and *Central Alberta Dairy Pool v Alberta* hereunder.

5.3.2 Ontario Human Rights Code

The main aim with the introduction of the *Ontario Human Rights Code*³⁶⁸ (the Code) was to remove discrimination and to provide relief to the victims of discrimination.³⁶⁹ Section 4(1)(g) of the Code states that: “No person shall directly or indirectly discriminate against any employee with regard to any term of condition of employment because of the...creed,...of such person or employee.” The court developed its own test of “adverse effect” discrimination based on the spirit and intent of the Code. This test meant that if an action, which formed the basis of a complaint, had differential effects on different individuals or groups of people, it was discriminatory. It was further not necessary to prove intent on the part of the perpetrator for the conduct to amount to discrimination. This approach was described by Chief Justice Dickson as a result of a commitment to the purposive interpretation of human rights legislation.³⁷⁰

The extent to which the Canadian Charter, the *Individual Rights and Protection Act of Alberta*, the *Ontario Human Rights Code* and the *Canadian Human Rights Act* have brought about changes in the workplace in earlier decisions will henceforth be considered in two cases below.

These cases, namely *Ontario Human Rights Commission v Simpson Sears*³⁷¹ (O'Malley-case) and *Bhinder v Canadian National Railway*³⁷²(*Bhinder*-case) will also provide a historical perspective on the development of the term reasonable accommodation with regard to culture and religion. The term undue hardship was also considered, although no clear guideline emanated from these cases with regard to this concept.

368 RSO 1980 c. 340.

369 Hunter *Indirect Discrimination in the Workplace* 18.

370 *Action Travail v Canadian National Railway* 1987 1 SCR 1114, 1137.

371 1985 2 SCR 536.

372 1985 7 CHRR D/3093,23 DLR 4th 481.

5.4 O'Malley versus Bhinder

In the *O'Malley*-case Mrs O'Malley, the employee, was working as a sales clerk in the ladies' wear department of a store in Ontario.³⁷³ This position required of her to work on Fridays as well as Saturdays on a rotating basis. These were considered to be the busiest times of the retailing week. In October 1978 Mrs O'Malley became a Seventh Day Adventist member and, according to her new faith, work was forbidden from Friday sunset until sunset on Saturdays, since this was regarded to be their Sabbath.³⁷⁴ Her employer indicated that she would have to work on Saturdays when it was her turn but that he would consider her for any permanent job that might become available in the future, where she would not have to work on Friday afternoons and Saturdays. The employer was, however, not prepared to exempt her from Friday evening and Saturday work in her current position since this would amount to preferential treatment.³⁷⁵ As such, Mrs O'Malley was offered part time employment³⁷⁶ which she accepted, but later launched a complaint, arguing that she was discriminated against based on her religion.³⁷⁷ She claimed for loss of wages and fringe benefits in terms of section 4(1) of the *Ontario Human Rights Code*³⁷⁸ (Code) which, amongst other things, stipulates that no person shall discriminate against an employee because of creed.³⁷⁹

The questions which the board of enquiry had to answer were, firstly, whether a generally established employment condition, which was not instituted with a discriminatory motive but for legitimate business purposes, could amount to discrimination under the Code when such a rule applied to all employees. The second question to be answered was to what extent it could be expected from the employer to accommodate such religious beliefs of the employee.³⁸⁰

373 1985 2 SCR 536, 5 par 2.

374 1985 2 SCR 536, 6 par 3.

375 1985 2 SCR 536, 6 par 4.

376 1985 2 SCR 536, 7 par 4.

377 1985 2 SCR 536, 8 par 5.

378 RSO 1990 c.H.19.

379 1985 2 SCR 536, 8 par 5.

380 1985 2 SCR 536, 9 par 6.

The chairperson of the board of enquiry applied an “effects” approach³⁸¹ and came to the conclusion that proof of an intention to discriminate was not essential to contravene section 4(1) of the Code.³⁸² No particular standard was furthermore set with regard to the extent of the accommodation an employer would have to make in respect of the employee. The chairperson nevertheless proceeded to dismiss Mrs O’Malley’s claim, due to the fact that she failed to prove that the employer had not acted reasonably in attempting to accommodate her.³⁸³

An appeal to the Ontario Divisional Court was dismissed,³⁸⁴ but when Mrs O’Malley appealed to the Supreme Court, the employer was ordered to pay her compensation for her lost remuneration.³⁸⁵ The Supreme Court also found that it is not necessary for a claimant to prove intent, that there is an obligation on the employer to accommodate the employee’s religion unless it will bring about undue hardship, and that the onus of proving undue hardship rests on the employer.³⁸⁶

This was a great victory for employees, since the Supreme Court now confirmed that employers should make an effort to accommodate employees when it comes to their religion, although it was shocking that it took the Court so long to confirm as much.³⁸⁷ The idea of adverse effect discrimination in Canadian jurisprudence was now entrenched.³⁸⁸ This Court, however, did also not stipulate to what extent an employer is obligated to accommodate the employee and what undue hardship entails.

The victory achieved in the O’Malley case was short-lived and basically undone by the judgement given on the same day in the case of Bhinder. In the Bhinder case an employee (Mr Bhinder) who was a member of the Sikh faith³⁸⁹ had been working as a maintenance electrician for the Canadian National Railways in Toronto since April 1974.³⁹⁰ On 30 November 1978 the employer introduced a new rule, making the

381 See par 5.3.2 above.

382 1985 2 SCR 536, 9 par 6.

383 1985 2 SCR 536, 10 par 7.

384 1985 2 SCR 536, 11 par 8.

385 1985 2 SCR 536, 28 par 29.

386 1985 2 SCR 536, 27 par 28.

387 Etherington 1992 *Canadian Lab LJ* 315.

388 Campbell *Freedom of Religion in the Workplace: Legislative Protection* 11.

389 See point 5.10 hereunder for an in depth discussion on Sikhs and their religion.

390 1985 2 SCR 561, 581 par D.

coach yard a hard hat area.³⁹¹ Mr Bhinder informed his employer that he would not be able to comply with the new policy, since one of the Sikhs' tenets was that men should at all times wear a turban. He was informed that no exceptions would be made and that he would lose his employment should he not comply with the rule, especially since he was also not prepared to perform other work where a hard hat would not be required.³⁹² The employee eventually failed to comply with the hard hat rule and was subsequently dismissed.³⁹³ This led to Mr Bhinder lodging a complaint seeking reinstatement. He further applied for exemption from the hard hat rule as well as compensation for lost wages.³⁹⁴

The relevant provisions in the *Canadian Human Rights Act*³⁹⁵ (CHRA) were considered.³⁹⁶ Section 3(1) determines that there are a number of prohibited grounds of discrimination, of which religion is one. The idea behind the provision of section 3(1) is to provide substantive equality and not just formal equality.³⁹⁷ It will be remembered that substantive equality means that people are treated in such a way that their differences are taken into account with equal enjoyment of the law as the ultimate goal.³⁹⁸ Section 7 of the CHRA stipulates that it is a discriminatory practice, directly or indirectly to refuse to employ or to refuse to continue to employ an individual or to differentiate adversely in relation to an employee on a prohibited ground of discrimination. Section 15(1) of the CHRA stipulates, however, it is not discriminatory if any refusal, exclusion, suspension, limitation, specification or preference is established by an employer to be based on a "bona fide occupational requirement".

391 1985 2 SCR 561, 581 par E.

392 1985 2 SCR 561, 581 par G.

393 1985 2 SCR 561, 581 par H.

394 1985 2 SCR 561, 581 par I.

395 *Canadian Human Rights Act* 1977.

396 1985 2 SCR 561, 582 par A.

397 Barnett *et al* *An examination of the duty to accommodate* 2.

398 See 3.2.1 under Chapter 3 above.

The Human Rights Tribunal adopted the “effects” approach and upheld Bhinder’s complaint. The Tribunal found that the hard hat rule was not necessary to perform the job.³⁹⁹ On appeal the Federal Court had a different approach and concluded that the hard hat rule was a bona fide operational requirement (BFOR) and as such the employer did not have any obligation to accommodate the employee.⁴⁰⁰ The Federal Court thus relied on the provisions of section 15(1) of the CHRA. When the matter was referred to the Supreme Court of Canada, the appeal was dismissed.⁴⁰¹ The Supreme Court of Appeal stated that once it had been established that a rule was a BFOR it remained a BFOR even if it was discriminatory.⁴⁰² The Supreme Court thus differed with the findings of the Tribunal which came to the conclusion that a BFOR can never be discriminatory. The Court further reiterated that there was no duty on the employer to accommodate once a BFOR existed or was established.⁴⁰³

The Bhinder-case received a lot of criticism.⁴⁰⁴ One of the biggest problems with the Bhinder decision was the fact that employees who suffered direct discrimination were worse off than employees who suffered indirect discrimination. All that an employer had to do in the instance of direct discrimination was to prove that there was a BFOR. Further criticism against the judgement was the fact that the Human Rights Commission’s objective could be detrimentally impacted since employers would not have to modify workplaces in certain instances to accommodate employees.⁴⁰⁵ The mileage gained by the O’Malley case seemed to have been lost by the Bhinder decision. It was only in a subsequent case of *Central Alberta Dairy Pool v Alberta*⁴⁰⁶ that the damage was to a certain extent undone.

5.5 A second bite at the cherry: Central Alberta Dairy Pool case

In *Central Alberta Dairy Pool v Alberta*⁴⁰⁷ (the Alberta-case) the employee (Jim Christie) was employed by the respondent from 26 August 1980 to 4 April 1983.⁴⁰⁸ In

399 1985 2 SCR 561, 582 par A-B.

400 1985 2 SCR 561, 581 par D-E.

401 1985 2 SCR 561, 580 par J.

402 1985 2 SCR 561, 589 par H-J.

403 1985 2 SCR 561, 590 par H.

404 Etherington 1992 *Canadian Lab LJ* 317.

405 Canadian Human Rights Commission *Special Report 2*.

406 1990 2 SCR 489.

407 1990 2 SCR 489.

408 1990 2 SCR 489, 494 par J.

February 1983 he became a member of the World Wide Church of God.⁴⁰⁹ One of his religious tenets entailed that he should not work on holy days throughout the year.⁴¹⁰ As a result of this the employee requested to work the early shift on Fridays so that he could be able to observe the Sabbath which started on a Friday afternoon.⁴¹¹ The employer was susceptible to this request and granted the employee his wish. At a later stage the employee requested to be exempted from work on Easter Monday and was prepared to work any alternative day outside his regular schedule.⁴¹² His employer, having made a number of concessions in the past, was not prepared to give Mr Christie a day off on Easter Monday, especially due to the fact that Mondays was the busiest day of the week for the company.⁴¹³ As such there was a rule that employees should report for duty on Mondays and should someone be sick or have an emergency on a Monday, his position would be filled by one of the managers or supervisors.⁴¹⁴ The employee repeated his request but was told by the Branch Manager that should he fail to report for duty his employment would be terminated.⁴¹⁵ The employee did not come to work on the Monday and was subsequently dismissed.⁴¹⁶

The employee lodged a complaint and a Board of Inquiry was established. In its analysis of the facts the Board found that the complainant should make out a *prima facie* case by proving the existence of a bona fide religion, that adequate notice had been given to the employer about the religious requirements and that an effort had been made to accommodate the employee without being required to compromise his beliefs. The Board found that the respondent (employer) had discriminated against the complainant contrary to the provisions of section 7(1) of *Alberta's Individual's Rights Protection Act*⁴¹⁷ and ordered the employer to pay the employee for lost wages.⁴¹⁸

409 1990 2 SCR 489, 494 par J.

410 1990 2 SCR 489, 495 par A.

411 1990 2 SCR 489, 495 par B.

412 1990 2 SCR 489, 495 par D.

413 1990 2 SCR 489, 495 par E.

414 1990 2 SCR 489, 495 par F-H.

415 1990 2 SCR 489, 495 par J.

416 1990 2 SCR 489, 495 par J.

417 *Individual Rights Protection Act* SA 1972. See par 5.3.1 above.

418 1990 2 SCR 489, 496 par B.

The employer appealed to the Court of Queen Bench and maintained that they had a BFOR (just like in the case of Bhinder), and as such, he was under no obligation to accommodate the employee. The appeal was allowed and MacNaughton J held that the Board had erred in law in finding that the employer's action was not based on a bona fide occupational qualification⁴¹⁹ (BFOQ) which was equated to be a BFOR.⁴²⁰

When the matter was referred to the Supreme Court, the decision in Bhinder was reconsidered and the Court came to the conclusion that the Court had erred in the Bhinder decision.⁴²¹ The Supreme Court held that the Bhinder decision was right insofar it determined that there was no duty to accommodate when there was a BFOR, but that that principle could not be extended to a case of adverse effect discrimination.⁴²² The Court aligned itself with the approach adopted in the O'Malley-case and said that the employee was entitled to pursue the practices of his religion and be free of the compulsion to work on the Monday, and that the onus rested on the employer to prove that he had made efforts to accommodate the employee up to the point of undue hardship.⁴²³ With regard to undue hardship, the court indicated that the following factors should be taken into account:

(i) Financial cost⁴²⁴

Economic cost in terms of increased expenses or decreased efficiency has often been a controlling factor in the balancing process.⁴²⁵ Under financial cost an employer would be allowed to include actual cost and reasonable foreseeable cost, but not purely hypothetical costs. An employer will have to show that the business (due to its size and turnover perhaps) will suffer a substantial loss which it cannot absorb should the employee(s) be accommodated. By doing this, undue hardship will be established. It should further be noted that accommodation does not mean that

419 1990 2 SCR 489, 499 par J.

420 1990 2 SCR 489, 502 par I-J.

421 1990 2 SCR 489, 512 par G.

422 1990 2 SCR 489, 517 par A.

423 1990 2 SCR 489, 520 par H-I.

424 1990 2 SCR 489, 521 par A.

425 Ivankovich 1987-1988 *Can Bus LJ* 355.

the employee is accommodated to the extent that it does not cost him (the employee) anything.⁴²⁶

(ii) Morale problems of other employees⁴²⁷

It is important to consider what effect the religious and cultural accommodation of some workers has on the morale of other employees. The duty to accommodate does not mean discrimination against the complainant must be replaced by discrimination against others.⁴²⁸ Normally random complaints are regarded as insufficient and not much importance is attached to these. It is only when acute or chaotic personnel problems erupt that it will be accepted that undue hardship has been established.⁴²⁹

(iii) Interchangeability of workforce and facilities⁴³⁰

Under interchangeability of the workforce it is assumed that bigger organisations with a great staff compliment will find it easier to accommodate religious practices of employees as opposed to smaller organisations.⁴³¹ When an employee possesses a scarce or unique skill which other employees do not, and schedule adjustments will be impractical, it can be assumed that undue hardship might ensue, should such an employee be accommodated.⁴³²

(iv) Health and safety issues⁴³³

Courts are very receptive to assertions of employers when it comes to health and safety of the public if the accommodation of employees may lead to undue hardship. This is so because employers are ultimately responsible to create and provide a clean and safe working environment, but should also take hazards which threaten the

426 See *Pinsker v Joint District 28J*, 735 F 2d 388, 390 where the court indicated that a school teacher reasonably accommodated when he was requested to take unpaid leave to observe a religious tenet.

427 1990 2 SCR 489, 521 par A.

428 *Barnett et al An examination of the duty to accommodate* 5.

429 *Ivankovich 1987-1988 Can Bus LJ* 351.

430 1990 2 SCR 489, 521 par A.

431 *Ivankovich 1987-1988 Can Bus LJ* 347.

432 *Ivankovich 1987-1988 Can Bus LJ* 348.

433 1990 2 SCR 489, 521 par A.

health of the general public into account.⁴³⁴ The impact that such accommodation will have on the organisation's ability to still render an effective service will also be taken into account.⁴³⁵ An institution like a hospital should for instance always have a sufficient number of nurses and doctors so as to deal with the workload at hand. If the accommodation of an employee(s) leads to a situation where there will not be enough staff members, such accommodation will be regarded as bringing about undue hardship.

(v) Disruption of collective agreements⁴³⁶

Collective agreements are agreements which are concluded between registered trade unions and employers with regard to terms and conditions of employment and other issues of mutual interest. During these negotiations it is a matter of give and take and the employer(s) very often have to make certain concessions. An expectation that further concessions should be made after such negotiations can thus be regarded to be unreasonable. Any deviation from the collective agreement can also put the validity of the agreement at risk.

(vi) Customer preference

Customer preference has to a great extent been dismissed as a factor which can be seen as undue hardship should such preference not be satisfied. It is for this reason that the personal preference of an employer that a secretary should be a Roman Catholic if she was going to work for a Roman Catholic School Board was dismissed.⁴³⁷ It is submitted that such requirement might be relevant if someone were to apply for a teacher's post at such an institution.

After having considered all these factors discussed above, the Court indicated that it was not convinced that the employer would have suffered undue hardship had the employee been accommodated, especially since the employee only asked to be excused on one particular Monday.⁴³⁸

434 Etherington 1992 *Canadian Lab LJ* 328.

435 Baker 1991 *McGill Law Journal* 1464.

436 1990 2 SCR 489, 521 par A. See also Smith 2014 *Denning Law Journal* 291.

437 *Dubniczky and Proulx v J.L.K. Kiriakopoulos Co. Ltd* 1981 2 CHRR D/458.

438 1990 2 SCR 489, 521 par H.

As mentioned above, some certainty was brought about after the Alberta case. This case was followed by a number of cases which involved Sikhs, where greater certainty was ultimately achieved.

5.6 The Sikh trilogy

Sikhs are one of the most prominent non-Christian groups living in Canada with a population of more than 468 673 within its borders. This makes Canada the host of the largest Sikh settlement outside of Punjab.⁴³⁹ With such a high representation it is to be expected that there will from time to time be cases in court involving Sikhs, as could already be seen in the Bhinder-case mentioned above. The peculiar traits of their religion are the main reason why Sikhs have to litigate so often. These traits will become evident under the discussion to follow as well as when some of the most renowned cases involving Sikhs are scrutinised.

5.6.1 The five K's in Sikhism

Sikhism is a major world religion which arose through the teachings of Guru Nanak, in the Punjab region of India.⁴⁴⁰ Sikhism is a monotheistic religion whose believers believe in one God, known as Akal Purakh. There are a number of sub-groups in Sikhism of which the Khalsa order is one. To enter the Khalsa order one has to undergo an initiation, and during this initiation ceremony the aspirant undertakes to adhere to a Code of Conduct known as the Rahit. To fulfil the requirements of the Rahit followers have to observe the “panj kakke” which is also referred to as the Five K's. The Five K's involves the wearing of five items which are uncut hair (kesh), a comb (kanga), a steel bracelet (kara), undershorts (kachera), and a religious knife (kirpan).⁴⁴¹ To neglect to wear any of the Five K's mentioned above constitutes a serious offence or lapse with dire repercussions.

5.6.2 The Kirpan - a weapon or religious symbol

The carrying of a kirpan has often been the cause of litigation in the past. Whilst the Sikhs regard this as an integral part of observing their religion, others see it as nothing else but a person walking around with a dangerous weapon. This can lead to

439 <http://dailysikhupdates.com/top-ten-highest-populated-cities-sikh-population-outside-India/>.

440 www.thecanadianencyclopedia.ca/en/article/sikhism/.

tension or potential conflict in a situation where security is of importance or heightened due to the increased risk of possible attacks like in public areas, schools and aeroplanes.

In *Nijjar v Canada 3000 Airline*,⁴⁴² Mr Nijjar wanted to board an aircraft to fly to Vancouver to deliver a lecture about Sikhism.⁴⁴³ Due to the fact that he is a devout Sikh, he had a kirpan in his possession as part of observing his religious tenets. Mr Nijjar specifically bought a kirpan of which the blade was 3 1/8 inch to travel since he was aware of the fact that blades longer than 4 inches would not be allowed on aircrafts.⁴⁴⁴ When Mr Nijjar went through the metal detector the sensor went off. Mr Nijjar showed the kirpan to the security officer and was allowed to go through.⁴⁴⁵ Before Mr Nijjar could board the aircraft he was approached by a security supervisor who wanted to see the kirpan, and who informed Mr Nijjar that they would have to get permission from the airline supervisor for him to board with the kirpan. The airline supervisor finally refused to allow Mr Nijjar to board with the kirpan, a decision which was affirmed by her superior despite the fact that Mr Nijjar had been allowed to travel with this particular kirpan on two previous occasions.⁴⁴⁶ Mr Nijjar ultimately had to make alternative travelling arrangements.

Mr Nijjar laid a complaint in terms of section 5 of the CHRA. This section prohibits discrimination in terms of refusal to render goods, services, facilities or accommodation which is generally available to the public, if such refusal is based on any of the prohibited grounds of which religion is one.

The court had regard to the rule in issue which is the safety policy of Canada 3000. This policy, according to the court, is neutral since the prohibition to carry dangerous weapons such as knives did not target a particular group. The court further found that the respondent (Canada 3000) acted honestly and in good faith when adopting this rule.⁴⁴⁷ It is however so, as is clearly illustrated by the case in question, that the rule

441 Singh 2014 <http://www.faithstreet.com/onfaith/2014/11/10>. .

442 1999 CanLii 1986 1.

443 1999 CanLii 1986 2.

444 1999 CanLii 1986 3.

445 1999 CanLii 1986 4.

446 1999 CanLii 1986 4.

447 1999 CanLii 1986 5.

affected different people (like the Sikhs) differently. As a result of this there was thus indirect discrimination.

With regard to indirect discrimination an applicant will first have to prove that:

- (i) There is a rule.
- (ii) That this rule is based on honest and sound business reasons.
- (iii) That this rule is connected to the business.
- (iv) That the rule applies to all.
- (v) That the rule has a discriminatory effect on an individual or group due to characteristics of this individual or group.⁴⁴⁸

Once an applicant has managed to prove the aforesaid, the duty will shift to the respondent to prove that he has tried to accommodate the affected individual or group up until the point where undue hardship was about to follow.

The Court considered the role of the kirpan⁴⁴⁹ as well as Mr Nijjar's beliefs.⁴⁵⁰ The Court further considered the concept of reasonable accommodation,⁴⁵¹ the fact that there was very little time to scrutinise and assess passengers⁴⁵² and also the fact that there had been incidents in the past where a two inch knife was used to threaten a passenger.⁴⁵³ The Court paid particular attention to the evidence of Dr McAuliffe, a pathologist, who was called upon to testify about the possible injuries a bladed and sharpened object could cause. Dr McAuliffe testified that Mr Nijjar's travel kirpan had sufficient length and sharpness to cause a fatal outcome.⁴⁵⁴

In the end the court found that undue hardship would ensue if Mr Nijjar had to be accommodated. The Court was of the opinion that the seriousness and potential injuries that could ensue as a result of an attack with a kirpan were too great and that

448 1985 2 SCR 536, 19 par 18.

449 1999 CanLii 1986 6.

450 1999 CanLii 1986 8.

451 1999 CanLii 1986 9.

452 1999 CanLii 1987 2 "between 45 and 90 seconds".

453 1999 CanLii 1987 3.

454 1999 CanLii 1987 4.

such risk was visited on the public.⁴⁵⁵ Considering the Court's judgement, it would seem that the Court was satisfied that there was no unfair discrimination which took place in respect of the airlines rule since the rule was applicable to all. The limitation and infringement on Mr Nijjar's rights could thus be justified.

In a later case of *Multani v Commission Scolaire*⁴⁵⁶ there was an appeal against a school board's decision which prohibited the carrying of a kirpan, by one of its students, to school.⁴⁵⁷ The appellant, Balvir Multani, and his son, Gurbaj Multani, were orthodox Sikhs. Gurbaj was baptised and believed that his religion required of him to carry a kirpan at all times.⁴⁵⁸ Although the school Gurbaj attended initially granted him permission to carry his kirpan under certain conditions on 21 December 2001,⁴⁵⁹ such permission was revoked on 12 February 2002 when the governing board refused to ratify the agreement.⁴⁶⁰ The matter was referred to the Commission Scolaire Marguerite Bourgeoys (CSMB) by a unanimous decision, but this council of commissioners also turned down the application by the Multanis.⁴⁶¹ On 25 March 2002 Balvir Multani (in his capacity as tutor to his son) filed papers in the Superior Court of Canada asking for declaratory judgement that the CSMB's decision carried no weight.

On 16 April 2002, the Supreme Court in an interlocutory injunction authorised Gurbaj to wear his kirpan to school under the conditions initially proposed by the CSMB. The order was confirmed on 17 May 2002. This victory was, however, short-lived since the Appeal Court overturned the order on 4 March 2004.⁴⁶² After this appeal Mr Multani turned to the Supreme Court of Canada.

The issues the Court had to adjudicate on were whether the decision of the CSMB infringed Multani's right to freedom under religion as prescribed by section 2 of the Charter; whether Multani's right to freedom of equality, which is entrenched by

455 1999 CanLii 1987 8.

456 2006 1 SCR SCC 6, 256.

457 2006 1 SCR SCC 6, 265 par 1.

458 2006 1 SCR SCC 6, 265 par 3.

459 2006 1 SCR SCC 6, 266 par 3.

460 2006 1 SCR SCC 6, 266 par 4.

461 2006 1 SCR SCC 6, 266 par 5.

462 2006 1 SCR SCC 6, 266 par 7.

section 15 was encroached on, and whether such infringement (if present) could be justified under section 1 of the Charter.⁴⁶³

With regard to the first issue, the Court reminded itself that freedom of religion could be limited when such freedom could cause harm to or interfere with the rights of others⁴⁶⁴ (as was also decided in the case of Mr Nijjar above). The Court also observed that the fact that different people practised the same religion differently did not affect the validity of a person alleging that his freedom had been infringed.⁴⁶⁵ In the end the court came to the conclusion that Gurbaj's right to freedom of religion had been infringed.⁴⁶⁶

The next issue the court had to determine was whether the infringement could be justified in terms of section 1⁴⁶⁷ of the Charter.⁴⁶⁸ The onus to prove that such limitations (if present) are reasonable and justifiable rests on the respondent. The Court considered the argument by the respondent and the objective of the rule, which is to ensure the development of an area that is conducive for learning.⁴⁶⁹ The Court further had regard to the argument that a kirpan is a symbol of violence⁴⁷⁰ and that it can be grabbed by another student to inflict injury.⁴⁷¹ On assessing these arguments, the Court concluded that the chances of someone grabbing the kirpan from Gurbaj are very slim, especially when it is worn in the manner initially suggested by the Board. Furthermore, other objects such as scissors and baseball bats are equally dangerous but such objects are allowed and easily obtainable by students.⁴⁷²

The case of Mr Nijjar mentioned above was also referred to by the respondent as an example of how religious rights could be limited even in the absence of real risk.⁴⁷³ On this point the Court found, however, that each and every environment's own and

463 2006 1 SCR SCC 6, 268 par 13.

464 2006 1 SCR SCC 6, 273 par 26.

465 2006 1 SCR SCC 6, 275-276 par 35.

466 2006 1 SCR SCC 6, 277 par 41.

467 Section 1: "the Canadian Charter guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"

468 2006 1 SCR SCC 6, 277 par 42.

469 2006 1 SCR SCC 6, 278 par 44.

470 2006 1 SCR SCC 6, 281 par 55.

471 2006 1 SCR SCC 6, 281 par 56.

472 2006 1 SCR SCC 6, 291 par 58.

473 2006 1 SCR SCC 6, 284 par 62.

unique characteristics must be considered and taken into account when the desirable level of safety is considered.⁴⁷⁴ The Court ruled that the environment of an aeroplane where passengers are screened in a matter of seconds cannot be compared to that of a school where there is ample time to make observations and to come to conclusions with regard to students. In its final analysis the court observed that a total ban on the wearing of kirpans to school would undermine the value of this religious symbol and that the commissioners' decision cannot be justified.⁴⁷⁵

It is submitted that the judgements above succinctly demonstrate how issues surrounding kirpans should be approached. The Court on the one hand shows a determination to protect and advance the rights of minorities, which are protected in the Charter, but also gives a good indication as to how far such rights can be exercised. Not one of these cases emanated from the workplace, but valuable lessons can be learned and adopted for the employer-employee relationship. A case that does involve parties who found themselves in the employer-employee relationship will henceforth be considered, although the parties were not directly pitted against each other.

In *Grant v Canada*,⁴⁷⁶ the plaintiff sought an order against a decision of the Commissioner of the Royal Canadian Mounted Police (RCMP) which permitted Sikhs to wear religious symbols on their uniform as well as to wear a turban⁴⁷⁷ instead of the traditional hat.⁴⁷⁸ The plaintiff based their challenge on section 7 and 15 of the Charter which entails the right to life, liberty and security⁴⁷⁹ as well as the right to equality.⁴⁸⁰

The defendants indicated that the change in the uniform was brought about by a decision to remove any barriers to the employment of Khalsa Sikhs as members of

474 2006 1 SCR SCC 6, 285 par 66.

475 2006 1 SCR SCC 6, 288 par 79.

476 1995 1 FC 158.

477 Also see the *Bhinder*-case under 5.4 above.

478 1995 1 FC 164.

479 Section 7 of the Charter.

480 Section 15 of the Charter.

the RCMP.⁴⁸¹ The barriers referred to include the fact that Khalsa Sikhs were not allowed to wear a turban together with other religious symbols.

The Court listened to testimony of Dr Gualtieri who testified that for a Khalsa Sikh the wearing of the turban is a public demonstration of his or her allegiance to Sikhism and to its religious values and goals.⁴⁸² Dr Gualtieri further testified that religious pluralism and mutual respect for different religions were best guaranteed when the state maintained neutrality by not mixing the symbols of the state with those of any religion.⁴⁸³

The Court considered how the turban policy had developed since 1980 and how further developments were necessitated by the adoption of the CHRA.⁴⁸⁴ Cognisance was also taken of the fact that the Canadian Human Rights Tribunal had recently decided that the approach adopted in the Bhinder case was wrong. The clear and logical approach outlined in *R v Big M Drug Mart*⁴⁸⁵ was also reflected upon, wherein which the Court said that “Freedom can primarily be characterized by the absence of coercion or constraint.” This remark was made in relation to freedom of religion that a person has, and boiled down to the fact that a person is not acting freely if he or she is compelled by the state to do something or refrain from doing something.

The Court concluded that this was an instance where it would be an injustice to treat unequals as equals and that employers were required to accommodate employees in instances where adverse effect discrimination existed.⁴⁸⁶ The Court was thus determined to ensure that substantive equality prevailed at the end of the day and found that no constitutional impediments existed which prevented the commissioner from making such decisions.

Having regard to all the above mentioned cases, it might be prudent to reflect on what reasonable accommodation and undue hardship entail and how these should be approached.

481 1995 1 FC 165.

482 1995 1 FC 165.

483 1995 1 FC 166.

484 1995 1 FC 171.

485 1985 1 SCR 295.

486 1995 1 FC 195.

5.7 Reasonable accommodation and undue hardship as interpreted by courts

The Canadian model and approach when it comes to reasonable accommodation is hailed by some scholars as currently the most developed and the best.⁴⁸⁷ Canadian human rights legislation does not contain specific provisions requiring and explaining reasonable accommodation, but the concept itself has been sufficiently illuminated and applied in a number of cases by Canadian boards, tribunals and courts as previously discussed. According to this model, once a religious belief has been identified it must be recognised as sincere and form the basis of the discrimination complained of.⁴⁸⁸ In such an instance an employer will have to accommodate the employee even in instances and jurisdictions where a BFOR is permitted.⁴⁸⁹

The standard test to which all discriminatory conduct in the workplace is now subjected involves answering the following questions: (1) Did the employer adopt the rule or standard for a purpose logically connected to the performance of the job? (2) Were the standard and rule adopted in an honest and bona fide belief that it was necessary for the fulfilment of a legitimate work-related purpose? (3) Was the standard or rule reasonably necessary to the accomplishment of that legitimate work-related purpose?⁴⁹⁰ If all the aforementioned questions are answered in the affirmative, it is incumbent upon the employer to demonstrate that it is impossible to accommodate the employee(s) without suffering undue hardship. The terms reasonable accommodation and undue hardship are closely related because the reasonableness of the accommodation depends on the amount of hardship it will inflict and bring upon the employer.⁴⁹¹

It is not clear what exactly constitutes undue hardship, and no definition is provided. In the Alberta-case mentioned earlier the Court indicated that it did not find it necessary to provide a comprehensive definition of what undue hardship entailed.⁴⁹² This is lamentable since the impression is created that there is such a definition but the Court did not deem it necessary to provide same. One can only assume that the

487 Smith 2014 *Denning Law Journal* 290. (See also Schwartz 2012 www.cbc.ca.)

488 Smith 2014 *Denning Law Journal* 291.

489 Sossin 2009 *Comp Lab L Pol'y J* 497.

490 Smith 2014 *Denning Law Journal* 291.

491 Ivankovich 1987-1988 *Can Bus LJ* 342.

reason for a refusal to give such a definition is because of the infinite variety of workplaces and the difference in needs when it comes to different employers.⁴⁹³ The end result of this lack of a definition is that every case will have to be judged on its own merits, which brings about legal uncertainty. In the absence of a definition of undue hardship, the best a trier of fact can do is to consider the guidance given in the O'Malley-case⁴⁹⁴ and the factors mentioned in the Alberta-case.⁴⁹⁵ Undue hardship, according to O'Malley,⁴⁹⁶ would be when there is an undue interference in the operation of an employer's business or when the employer has to incur undue expenses to accommodate the employee. Other instances like a great risk, which seriously jeopardises the safety of the public, like in the *Nijjar v Canada 3000 Airline*,⁴⁹⁷ will also very likely amount to undue hardship.

5.8 Conclusion

As mentioned in the introductory part of this chapter, Canada and South Africa have many things in common and the one country can learn from the other. Although Canada has been a democracy for such a long period of time, it is clear that that in itself is no guarantee that there will not be growing pains and a misapplication of legal principles when new legislation and principles are promulgated and phased in. It might even be possible to take one step forward and two steps back as was illustrated with the O'Malley and Bhinder cases.

Canada seems fixed on having a tolerant approach when it comes to the accommodation of religious and cultural differences. This attitude was already made known and displayed as early as 1906 with the abolishment of the *Lord's Day Act* in *R v Big M Drug Mart* and in *Central Alberta Dairy Pool v Alberta* case. Subsequent legislation like the Charter, the CHRA and different codes which are applicable in various provinces; as well as the more recent cases involving Sikhs, further cement this notion.

492 1990 2 SCR 489, 520 par J.

493 Etherington 1992 *Canadian Lab LJ* 327.

494 See 5.4 above.

495 1990 2 SCR 489, 520 par J. See also 5.7 above.

496 1985 2 SCR 536, 23 par 23.

497 1999 CanLii 1986 1.

It would seem that it is only in extreme cases where safety is really of concern that there will be an encroachment on fundamental rights such as religion and culture; as was demonstrated in *Nijjar v Canada 3000 Airline*.

Concepts such as reasonable accommodation and undue hardship have also been more clearly characterised. Whereas reasonable accommodation now needs to be made in both direct and indirect discrimination, the factors mentioned under undue hardship are practical and easy to determine. It might be for this reason that scholars hold that Canada's model with regard to reasonable accommodation is the best.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

Dismissal is the most severe sanction that an employer can impose against an employee. Employers must ensure that proper procedures are followed when an employee stands to be dismissed, and that it is not effected for an unacceptable reason. As was seen in the foregoing chapters, the rights of employees are protected in more ways than one. The provisions of the Constitution, the LRA, as well as that of the EEA must be observed. Cognisance must also be taken as to how courts interpret these provisions as well as previous decisions by other courts. When an employee stands to be dismissed on the basis of cultural or religious beliefs, even greater caution should be exercised due to the sensitivity of the issue and the close connection it has with fundamental rights such as the right to equality, freedom and human dignity.

Reasonable accommodation in respect of every employee with regard to religious and cultural practices remains vital, and this should be the point of departure for every employer.⁴⁹⁸ By so doing an employer will not only give effect to the aim of section 9 of the Constitution, which deals with equality, but will also ensure that substantive equality and not only formal equality occurs.⁴⁹⁹ This is in line with what was expressed in the *Pillay-* and *Prince-case*.

Reasonable accommodation need only take place up to the point where the employer is about to suffer undue hardship. Undue hardship must be determined in each and every case individually. The guidelines and factors enunciated in Canada in the *Alberta-case* are of great help to determine the absence or presence of undue hardship.⁵⁰⁰ The burden of proof of undue hardship rests upon the employer. It should further be borne in mind that reasonable accommodation does not imply that the employee should not incur any cost at all from his side.

498 See par 3.3.3 above.

499 See par 3.2.1 above.

500 See par 5.5 above.

If the employer made a genuine attempt to accommodate the employee up to the point that he was about to suffer undue hardship, but the latter insists on further accommodation, dismissal can be effected.

It should further be noted that such accommodation is only necessary in respect of sincere beliefs connected to an employee's culture or religion. The employee who for instance brings on a tattoo on a part of his or her body whilst this has no connection to his or her religion or culture cannot insist on reasonable accommodation.⁵⁰¹ Such conduct might purely be misconduct, pending on the workplace as well as the conduct in issue. The provisions of section 187(1)(f) of the LRA which deals with automatically unfair dismissals and section 6 of the EEA which deals with unfair discrimination will also not be available to such a person.

The above-mentioned situation should clearly be distinguished from a situation whereby an individual indulges in voluntary practices to give manifestation to his/her cultural and religious beliefs. As was said in *MEC v Pillay*, voluntary practices with regard to cultural and religious beliefs are equally (and sometimes more) entitled to protection by the law as obligatory rules.⁵⁰²

With regard to inherent requirements of the job, section 187(2)⁵⁰³ of the LRA and section 6 of the EEA are of importance.⁵⁰⁴ Looking at the trends over the years it would seem that courts have become stricter in their interpretation of what exactly constitutes an inherent requirement of a job. Whereas it was possible for the employer to argue that a clean-shaven face is an inherent requirement of the job in the security industry in the *Dlamini-case*,⁵⁰⁵ it now seems set that such an argument will not hold water any more, especially when decisions such as the *Hoffman*⁵⁰⁶ and *Popcrucases*⁵⁰⁷ are considered. Courts seem to be much more focused on whether the requirement in question really makes a difference with regard to the way the employee executes his or her duties. Differently put, the reasoning by the court seems to be that a security officer will be able to execute his duties diligently with or

501 See par 2.4 above.

502 See par 4.5 above.

503 See par 3.4 above.

504 See par 3.3.1 above.

505 See par 4.2 above.

506 See 3.3.1 and 4.2 above.

507 See par 4.2 above.

without a clean-shaven face. The same approach was adopted in Canada and although a different approach was adopted in the erstwhile *Bhinder-era*,⁵⁰⁸ this anomaly was acknowledged and corrected in the *Alberta-case*.⁵⁰⁹

In the event that an employee lacks an indispensable requirement of the job, such a person should not be hired, or stands to lose his job if he or she is an employee. Thus someone who is not Chinese might lack an inherent requirement of the job if the employer wants to create an Asian ambiance; similarly, a pilot who loses his sight, might lose his job since good eyesight can be regarded as an inherent requirement of the job. In such an instance the employer would be within in his rights if he discriminates against someone who is not from Asian descent. The approach of the courts, to be stricter with regard to what constitutes an inherent requirement, cannot be faulted and actually needs to be applauded. It is, however, submitted that in certain instances the peculiar circumstances and characteristics of a workplace need to be taken into account like in the *Popcru-case* where the culture and religious practices impacted negatively on the core business and aims of the employer.⁵¹⁰

Section 188 of the LRA provides that an employer can dismiss an employee due to operational requirements. An employer will have to prove that the dismissal took place as a result of economic, technological, structural or similar needs of the employer or the business. A good and clear example of dismissal based on operational requirements can be found in the *Food Allied Workers-case* where the employer's entire business came to a standstill due to the fact that a certain segment of his staff (the slaughterers) decided to stay away to observe a religious day. Since this day was not gazetted, the employer was under no obligation to accommodate the employees as per a bargaining agreement. The court held that in the circumstances it was operationally justifiable to compel the employees to work. The employer in the *Kievits Kroon-case* advanced a similar argument in light of the fact that the employee who was a supervisor and employed as a line cook, gave short notice of her leave, making it almost impossible for the employer to make arrangements for a substitute. The employer in the *Kievits Kroon-case* was, however,

508 See par 5.4 above.

509 See par 5.5 above.

510 See further remarks under Recommendations hereunder.

unsuccessful. Whether the judgement in the *Kievits Kroon-case* was justified is open for debate, especially given the conduct of the employee preceding her application for leave and the response of the employer on several occasions when leave had been applied for.⁵¹¹

The terms “inherent requirement of the job” and “operational requirements” do not appear in Canadian literature or jurisprudence in the same context as used in South Africa. These concepts are covered by the terms “bona fide operational requirement” and “bona fide operational qualification.”⁵¹² An inherent requirement of the job or something that amounts to an operational requirement will thus be described in either one of these two concepts. Case law in the South African context has always been based on the concepts “inherent requirement of the job” and “operational requirements” to such an extent that it might just create confusion to try and adopt the Canadian terms.

Given all the rights mentioned above, and keeping in touch with section 23 of the Constitution,⁵¹³ which provides for fair labour practices, it must be remembered that section 36⁵¹⁴ of the Constitution provides for the limitation of any right, should such limitation be justifiable in an open and democratic society. In the *Prince-case* it was acknowledged that a total ban on the possession and use of “dagga” was an infringement on the rights of the Rastafari, but such limitation was held to be justifiable in terms of section 36.⁵¹⁵ The main reason for this ruling was South Africa’s commitment and obligation to combat the smuggling, selling and use of drugs.⁵¹⁶ Similarly it was acknowledged in *Christian Education v Minister of Education*⁵¹⁷ that the abolishment of corporal punishment might infringe on the rights of Christian parents to allow their children to be subjected to corporal punishment, but such limitation was once again justified in terms of section 36. This was especially so since corporal punishment infringed on other rights such as the right to dignity and personal integrity.

511 See further remarks under Recommendations hereunder.

512 See par 5.7 above.

513 *Constitution of the Republic of South Africa*, 1996

514 See par 3.2 above.

515 See par 4.2 above.

516 2002 2 SA (CC) par 132.

517 See par 3.2.5 above.

The employer will thus equally be entitled to employ the provisions of section 36 should an employee's religious observance amount to unlawful conduct or infringe unreasonably upon the rights of other employees or those of the employer. A worker who is a Rastafari can thus be charged with misconduct should he be found smoking dagga during working hours and eventually be dismissed should he not adhere to warnings. A worker might even be dealt with more swiftly if he is smoking dagga whilst holding a high ranking post and working in a high risk environment. Should someone for instance be working in the mining sector, the smoking of dagga will in all likelihood not be tolerated since it might endanger the lives of workers. The endangerment of the health and safety of co-workers is one of the issues which have been mentioned as an indicator that the employer would suffer undue hardship.⁵¹⁸

6.1 Recommendations

South Africa's Constitution has often been hailed as one of the most progressive and sophisticated Constitutions in the world for the protection of socio economic rights.⁵¹⁹ This is a great achievement worth celebrating. The Constitution, together with other legislation, provides ample protection to workers. Courts have also played a big role in making sure that the law is interpreted in such a way that the rights of workers are enforced. This too is worth celebrating. It is, however, equally important that the rights of employers be protected to promote harmony in the workplace to ensure that the equilibrium is sustained. It is for this reason that the two cases mentioned above namely the *Popcru*-⁵²⁰ and *Kievits Kroon*-cases⁵²¹ be revisited with the aim of making recommendations with regard to the way forward.

It is submitted that the expectation and the burden that was placed on the employer in the *Kievits Kroon*-case were too onerous. The employer made a concerted effort to accommodate the employee every time the employee asked for a concession. When the employer could not grant the employee her last request, the employer was regarded as unreasonable. It is further submitted that the misconduct which preceded the employee's request for leave was not given the amount of weight it

518 See 5.5 and 5.7 above.

519 Heyns and Brand 1998 *Law, Democracy and Development* 153.

520 See 4.2 above.

521 See 4.3 above.

should have carried. Employers might be totally in the dark as to when dismissal will be justified, if based on culture and religion, if the factors in the *Kievits Kroon*-case do not seem to be sufficient.

It is further submitted that this is also one of the cases where the factors which were stipulated in the *Alberta*-case in Canada would have made a huge difference. In this case factors such as morale problems of other workers and difficulty with the interchangeability of the workforce were some of the issues which had to be considered to establish undue hardship. As mentioned above, the employee in this instance was a senior cook and not someone who could easily be replaced by someone else.

With regard to the *Popcru*-case it is submitted that the environment in which the employees were working as well as the self-confessed practise of the use of dagga was also under-played. The court's reasoning with regard to the exemplary records of the employees is understood. However, the fact remains that the use of dagga (which the employees admitted to), left the employer in a predicament when it came to the rehabilitative environment that it had to create. There are certain elements in a person's private life that can simply not be ignored or treated in isolation when it comes to the workplace (like the divorcee who marries again whilst working at a Catholic school as a teacher; as was decided in *Strydom v Nederduitse Gereformeerde Gemeente*).⁵²² If the employee has a belief which is in direct contrast of a cardinal issue relating to the workplace, the employer should either be at liberty to terminate such employment or at least be able to redeploy such a person to an area where such belief would not contradict the ultimate goal and business of the employer.

522 See 4.4 above.

It is up to the courts to provide further direction on the recommendations above, and such direction will have to come from the Supreme Court or the Constitutional Court. South Africa is a country where the unemployment rate is extremely high. Employees need protection so that they do not fall into this unenviable category. Making it impossible for employers to enforce workplace rules in certain instances will without a doubt not help the case. For now, an employer who does not have the appetite to litigate will have to abide by these decisions.

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