

# The Employee's Right to Freedom of Religion versus the Employer's Workplace Needs: An Ongoing Battle: *TDF Network Africa (Pty) Ltd v Faris* 2019 40 ILJ 326 (LAC)



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### Abstract

The right to religion is well protected in the *Constitution of the Republic of South Africa, 1996* (the Constitution) as well as attendant legislation. Section 15(1) of the Constitution provides that all persons have the right to freedom of religion. Section 31(1) of the Constitution then goes on to state that persons who belong to a religious community, amongst others, may not be denied the right to practise their religion with other members of that community. Section 9(3) of the Constitution prohibits the state from unfairly discriminating against any person directly or indirectly on several grounds, which include the ground of religion. Section 9(4) of the Constitution on the other hand prohibits any person from unfairly discriminating against any other person on the ground of religion, amongst others. These constitutional protections resonate in both the *Labour Relations Act 66 of 1995* and the *Employment Equity Act 55 of 1998*. Despite these protections, the right to freedom of religion is still a contested subject in the workplace, *inter alia*. The contestation intensifies when the right to freedom of religion results in an employee not being able to comply with one or more of the employer's workplace needs. Employers' who do not understand the balance that has to be struck between the employee's right to freedom of religion and its workplace needs will often find themselves on the wrong side of our labour laws if they dismiss an employee without having due regard to the employee's religion. This is what transpired in *TDF Network Africa (Pty) Ltd v Faris* 2019 40 ILJ 326 (LAC).

### Keywords

Right to freedom of religion; right to manifest religion; religion; human dignity; employer's workplace needs; employer's operational requirements; unfair discrimination; religious discrimination; reasonable accommodation; voluntary and mandatory religious practices.

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## 1 Introduction

The right to religion is well protected in the *Constitution of the Republic of South Africa, 1996* (the Constitution) as well as attendant legislation. Section 15(1) of the Constitution provides that all persons have the right to freedom of religion. Section 31(1) of the Constitution then goes on to state that persons who belong to a religious community, amongst others, may not be denied the right to practise their religion with other members of that community. Section 9(3) of the Constitution prohibits the state from unfairly discriminating against any person directly or indirectly on several grounds including the ground of religion. Section 9(4) of the Constitution on the other hand prohibits any person from unfairly discriminating against any other person on the ground of religion, amongst others. These constitutional protections resonate in both the *Labour Relations Act 66 of 1995* (LRA) and the *Employment Equity Act 55 of 1998* (EEA). Section 187(1)(f) of the LRA regards a dismissal of an employee because of an employer unfairly discriminating against him/her on the ground of religion, *inter alia*, as being an automatically unfair dismissal. Section 6(1) of the EEA prohibits anyone from unfairly discriminating against an employee based on several grounds including religion. It must, however, be mentioned that the right to freedom of religion is not absolute as it may be limited in terms of both the LRA and the EEA. Section 187(2)(a) of the LRA provides that despite section 187(1)(f) of the LRA relating to automatically unfair dismissals, a dismissal can be fair if it is based on an inherent requirement of the job in question. Section 6(2)(b) of the EEA then states that it is not unfair discrimination to distinguish, exclude or prefer any person based on an inherent requirement of the job.

Despite these protections, the right to freedom of religion is still a contested subject in the workplace, *inter alia*. The contestation intensifies when the right to freedom of religion results in an employee not being able to comply with one or more of the employer's workplace needs (operational requirements). Employers who do not understand the balance that has to be struck between the employee's right to freedom of religion and their workplace needs will often find themselves on the wrong side of our labour laws if they dismiss an employee without having due regard to the employee's religion. This is what transpired in *TDF Network Africa (Pty) Ltd v Faris*<sup>1</sup> (TFD).

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*TFD* is noteworthy as it deals with the following important issues regarding the right to freedom of religion in the workplace. Firstly, it deals with the nature (mandatory or voluntary), centrality and proof of the religious tenet and secondly, it discusses the importance of the employer's duty to reasonably accommodate the employee's religious beliefs. The purpose of this note is to critically analyse these issues within the purview of the case and to seek guidance from domestic law, international law, and foreign law (including the related scholarship).

## 2 Facts

Ms Faris commenced employment with TFD during August 2012. TFD is in the business of logistics and transportation, which includes warehousing. It was an operational requirement for all managers to assist with warehouse stocktaking on one Saturday per month which commenced at close of business on Friday and continued into Saturday afternoon. It was common cause that Faris did not attend any stocktaking duties from the time she was employed in January 2012 until her dismissal in December 2012. Faris was subsequently dismissed because she refused to work on Saturdays. Faris followed the Seventh Day Adventist religion, which does not allow an adherent to engage in work between sundown on Friday and sundown on Saturday evening (which is known as the Holy Sabbath) as this period is reserved for spiritual and religious dedication.<sup>2</sup>

Faris stated that she had informed TFD that she would not be able to work during the Holy Sabbath as she was an adherent of the Seventh Day Adventist religion. TFD, however, stated that Faris had been informed that working over weekends was a requirement and that Faris had stated that this would not be a problem. TFD further stated that had it known that Faris was not willing to work on Saturdays then it would not have taken her into its employ because the stocktaking duties on Saturdays was an operational requirement.<sup>3</sup>

Faris stated that she had informed the human resources officer, Ms Stander, that she could not work on weekends due to her religious beliefs and that Stander had referred her to Mr Jordaan, who was the warehouse manager.

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<sup>1</sup> *TDF Network Africa (Pty) Ltd v Faris* 2019 40 ILJ 326 (LAC) (hereafter the *TFD* case). It is probable that TDF is a spelling mistake because the employer is referred to throughout the case as "TFD" Network Africa (Pty) Ltd.

<sup>2</sup> *TFD* paras 2, 7-9.

<sup>3</sup> *TFD* paras 3-4.

Faris further stated that she had informed Jordaan of her not being able to work on weekends and he had agreed not to place her on the weekend stocktaking roster. Both Stander and Jordaan denied this. Jordaan stated that Faris was required to do stocktaking every month and she was on the roster to do so. When Faris failed to attend the March 2012 stocktaking her supervisor Mr Smith stated that he confronted her about this, and she informed him that she had personal commitments but never mentioned anything about her religious commitments and he left it at that. Faris did not dispute Smith's version as she stated that she could not remember.<sup>4</sup>

Faris's failure to attend the April 2012 stocktaking again led to Mr Smith confronting her about this and she informed him that she could not attend stocktaking over weekends due to her religious beliefs. Smith then informed Faris that stocktaking was a requirement of the job and no exception could be made for her. Faris then sought special accommodation for her religious beliefs. Faris's failure to attend the June and July 2012 stocktaking once again led to Smith confronting her about it with the same response from her that she was not able to attend stocktaking over the weekends due to her religious beliefs. The outcome of all of this was that Smith refused to make an exception for Faris regarding her working over the weekend due to her religious beliefs. Smith stated that he explained to Faris, using the example of Muslims and Eid, that he was not able to accommodate her, as all managers were required to attend stocktaking.<sup>5</sup>

The matter was escalated to the Human Resources Department and this led to a meeting being held between Faris, Smith and Serfontein (a human resources administrator). The outcome of the meeting was Smith and Serfontein emphasising that stocktaking was a requirement for all managers regardless of their beliefs and Faris repeating that she could not attend the stocktaking duties over the weekend due to her religious beliefs. This then led to incapacity proceedings being held and Faris was subsequently dismissed for incapacity on 20 December 2012. No disciplinary action was taken against Faris for failing to disclose her religious beliefs when she was recruited, nor was any action taken against her for failing to attend stocktaking over the weekends when she was rostered to do so.<sup>6</sup>

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<sup>4</sup> TFD paras 5-6, 9-10.

<sup>5</sup> TFD paras 11-13.

<sup>6</sup> TFD paras 14, 21.

### 3 Proceedings before the CCMA, Labour Court and Labour Appeal Court

Faris referred the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. It found that the matter remained unresolved, and a certificate of outcome was consequently issued to that effect. Faris argued before the Labour Court that her dismissal was both substantively, procedurally, and automatically unfair and that she was being discriminated against unfairly based on her religion.<sup>7</sup>

TFD argued before the Labour Court that it had dismissed Faris due to incapacity and that the Labour Court did not have jurisdiction to deal with the fairness of the dismissal based on incapacity because the fairness of incapacity dismissals should be heard by the CCMA or relevant Bargaining Council. TFD acknowledged, however, that the Labour Court had jurisdiction to decide whether the dismissal was automatically unfair based on unfair discrimination due to religion. The Labour Court nevertheless determined the fairness of the incapacity dismissal and held that it was both procedurally and substantively unfair. The Labour Court further held that Faris's dismissal was automatically unfair.<sup>8</sup>

The Labour Appeal Court found that this approach by the Labour Court was incorrect because once the Labour Court found that the dismissal was automatically unfair then it should not have concerned itself with whether the dismissal was procedurally and substantively unfair as well. The Labour Appeal Court thus dealt only with whether the dismissal was automatically unfair or not. The Labour Appeal Court noted that the automatically unfair dismissal claim was founded on Faris's religion. She thus bore an evidentiary burden to prove that the dominant reason for her dismissal was her religion and that there was a sufficient nexus between her dismissal and her religion. Once this was done then the employer had to produce evidence to show that the reason for the dismissal did not fall within section 187 of the LRA.<sup>9</sup>

TFD did not take issue with Faris stating that she was an adherent of the Seventh Day Adventist faith, but they took issue with her stating that not working at all on the Sabbath was one of the tenets of her religion. It wanted Faris to prove this by producing expert evidence. TFD argued that the

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<sup>7</sup> TFD para 22.

<sup>8</sup> TFD para 23.

<sup>9</sup> TFD paras 23, 25, 27.

dominant reason for Faris's dismissal was based on her refusal to work on Saturdays and not based on her religion.<sup>10</sup>

TFD argued that Faris had not successfully shown that her religion strictly prohibited work being attended to on Saturdays. It further argued that Faris should have called a priest of her church in order to prove the tenets of her faith (no work on the Sabbath) and that she could not get an exemption to work one Saturday per month as her evidence relating to the same was insufficient to prove it. It also argued that her personal views relating to her religion were insufficient. Faris acknowledged that exceptions from observing the Sabbath were made for certain persons such as doctors, nurses and persons engaged in essential service work. She stated, however, that stocktaking did not fall within the exceptional category. Faris's unwillingness to work one Saturday per month was due to her conscience and her faith, which included her subjective understanding of her faith.<sup>11</sup>

The Labour Appeal Court found that the arguments made by TFD were not sustainable. It stated that Faris's dismissal would not have happened if she had not been a follower of the Adventist religion and she would have been willing to work on Saturdays had she not been an adherent of the Adventist faith. The Labour Appeal Court took note that the evidence suggested that Faris performed her work very well. It then remarked that it was unpersuasive to argue that Faris was dismissed due to her not working on Saturdays, which had nothing to do with the reason relating to her not being willing to work on Saturdays, which was her religious beliefs. It then stated that the proximate and dominant reason for her dismissal was her adherence to her religious beliefs.<sup>12</sup>

The Labour Appeal Court then found that the tenets (beliefs) of the Seventh Day Adventist religion were well known and readily ascertainable. It stated that it was proper for it to take judicial notice of well-known facts relating to a religion by referring to works of reference. It then stated that according to the works of reference that it had consulted, Adventists are not allowed to work on Saturdays. The Labour Appeal Court stated further that the works of reference do provide for an exception to the prohibition of working on Saturdays and the exception related to employees who were engaged in

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<sup>10</sup> TFD paras 25, 28.

<sup>11</sup> TFD paras 29-30.

<sup>12</sup> TFD para 31.

emergency humanitarian work. It held that it could hardly be claimed that stocktaking fell within the ambit of emergency humanitarian work.<sup>13</sup>

The Labour Appeal Court remarked that TFD's argument to the effect that Faris should have pursued an exemption from the observance of the Sabbath and placing in issue that it was not a central tenet of her faith amounted to restricting the scope of the right to freedom of religion. It further remarked that it was not certain that Faris would have obtained an exemption as her work did not fall into the category of emergency humanitarian work and even if it were remotely possible then this would conflict with her subjective interpretation relating to her religious duties. The Labour Appeal Court then stated that there are persons who follow a religious creed and who feel that a certain practice is central to their identity in circumstances where they may not be under an obligation to observe the practice.<sup>14</sup>

The Labour Appeal Court then stated that the centrality of the religious tenet is not totally irrelevant as it is relevant to a "limitation analysis justifying the proportional restriction of the right and whether reasonable accommodation is possible." It stated that the centrality of a religious belief must be judged in accordance with how important the religious belief or practice is to the identity of the employee, and to this end, evidence relating to the objective centrality of the religious belief of the religious community at large is permissible. It cautioned that this evidence, however, is relevant only to the extent of it being capable of assisting in addressing the question of subjective centrality.<sup>15</sup>

The Labour Appeal Court stated that the test relating to whether a job requirement constitutes an inherent requirement of the job essentially involves a proportionality enquiry. The job requirement must rationally be connected to the performance of the job. The Labour Appeal Court remarked that notwithstanding that this is proved, the employer still has the burden of proving that it would not be possible to accommodate the employee's beliefs without imposing undue hardship on it.<sup>16</sup>

TFD persisted in its argument that the weekend stocktaking once per month was aimed at a critical operational purpose. TFD also maintained that stocktaking once per month was needed for the efficient and proper running

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<sup>13</sup> TFD para 32.

<sup>14</sup> TFD para 33.

<sup>15</sup> TFD para 34.

<sup>16</sup> TFD paras 37-38.

of the business and was aimed at providing managerial training. It argued that there was a minimal limitation on Faris's right to religion in that she was only required to do stocktaking 12 days a year.<sup>17</sup>

The Labour Appeal Court held that it was not convinced that it was not possible for TFD to achieve the aims of the stocktaking while reasonably accommodating Faris. The Labour Appeal Court also found that there was no evidence to show that TFD suffered any hardship by Faris's absence and that her absence affected its ability to complete the stocktaking. It further found that the real reason for insisting on Faris attending stocktaking was Smith's rigid policy from which he was not willing to make an accommodation. The Labour Appeal Court found that Smith applied his policy rigidly because he was concerned that he would be expected to accommodate other employees as well. It found that this concern of Smith was misplaced because the only employees who would need reasonable accommodation for observing the Sabbath would be Seventh Day Adventists and Orthodox Jews. It also noted that according to the evidence Faris was the only employee who required time off to observe the Sabbath.<sup>18</sup>

The Labour Appeal Court held that the argument by TFD to the effect that the requirement of stocktaking on Faris's Sabbath did not affect her dignity ignored the fundamental link between "the tolerant observance of religious freedom and dignity." It further held that these values strengthen each other and are not mutually exclusive. The Labour Appeal Court held that TFD did not care to understand Faris's position because an employment practice that punishes an employee for practising her religion is a profound attack on her dignity as it assumes that her religion is not worth respecting and/or protecting. It further held that an employee in Faris's position is forced to make a difficult choice between her conscience (beliefs) and her livelihood. It then held that in such circumstances the employer is under an obligation to make a proper concerted effort to provide the employee with reasonable accommodation.<sup>19</sup>

The Labour Appeal Court found that Faris had made several proposals regarding how she could be accommodated but there was no meaningful engagement regarding this from the employer's side. It further found that TFD's approach was incorrect as it took the view that Faris was under an obligation to propose practical solutions which accorded with its commercial

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<sup>17</sup> TFD paras 39-40.

<sup>18</sup> TFD paras 43-44.

<sup>19</sup> TFD para 45.



rationale, and if she failed to do this, then it was entitled to dismiss her. The Labour Appeal Court held that this was not sufficient as more was required of an employer. It further held that an employer is under a duty to accommodate an employee's religious freedoms reasonably unless it would be impossible to do so (if it were to cause the business undue hardship).<sup>20</sup> The Labour Appeal Court then held the following:

It is not enough that it may have a legitimate commercial rationale. The duty of reasonable accommodation imposed on the employer is one of modification or adjustment to a job or the working environment that will enable an employee operating under the constraining tenets of her religion to continue to participate or advance in employment.<sup>21</sup>

The Labour Appeal Court held that besides Smith's evidence there was not enough evidence to prove that Faris could not have obtained the required knowledge of the stocktaking process by other means. Faris was of the view that she would be able to acquire knowledge of stocktaking at times which did not include her Sabbath and that she could then still occupy a supervisory role with some form of reasonable accommodation. It further held that TFD did not reasonably accommodate Faris and there was no inclination on its part to do so. The Labour Appeal Court then held that TFD had failed to discharge its evidentiary burden needed to prove the defences of fair discrimination (including the defence under section 187(2)(a) of the LRA) and as such the dismissal was automatically unfair as set out in section 187(1)(f) of the LRA.<sup>22</sup>

The Labour Appeal Court found that the Labour Court had incorrectly awarded Faris R60 000 in respect of unfair discrimination as it did not sufficiently set out its reasoning regarding this. It, however, agreed with the Labour Court's order of 12 months' compensation and confirmed this part of the order.<sup>23</sup>

## 4 Comments

### 4.1 *The nature (mandatory or voluntary), centrality and proof of the religious tenet*

Article 18 of the *United Nations Universal Declaration of Human Rights*<sup>24</sup> states that everyone (this would include employees) has the right to freedom

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<sup>20</sup> TFD paras 47-48.

<sup>21</sup> TFD para 48.

<sup>22</sup> TFD paras 49-50.

<sup>23</sup> TFD para 51.

<sup>24</sup> *United Nations Universal Declaration of Human Rights* (1948).

of religion and to manifest his/her religion. The *International Covenant on Civil and Political Rights*,<sup>25</sup> likewise, affords everyone the right to freedom of religion and to manifest the same. Article 1 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*<sup>26</sup> states that everyone has the right to freedom of religion and to manifest his/her belief. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* similarly states that everyone has the right to freedom of religion, and this includes the right to manifest the same.<sup>27</sup> The *European Union Guidelines on the Promotion and Protection of Freedom of Religion or Belief*<sup>28</sup> (the European Union Guidelines) states that the right to freedom of religion is a fundamental right of every human being and it safeguards respect for diversity. It further states that violations of freedom of religion may exacerbate intolerance. It similarly states that everyone has the right to manifest their religion by worship, observance, practise and teaching. The European Union Guidelines states that in terms of international law, freedom of religion comprises of two components, namely; (a) the freedom to have a religion of one's choice, and (b) the freedom to manifest one's religion through worship, observance, practise and teaching.<sup>29</sup> The *International Labour Organisation Guide on Promoting Diversity and Inclusion through Workplace Adjustments*<sup>30</sup> (the ILO Guide) states that it is important to acknowledge that there are more often than not differences in any religion and this will impact on how the individual adherent of the religion interprets his/her obligations.<sup>31</sup> It is clear from the above that the right to religion and its manifestation is well protected in international and regional instruments.

In *Dlamini v Green Four Security*<sup>32</sup> the Labour Court held that employees must prove that doing something or abstaining from doing something is an essential tenet of their religion and that they are under an obligation to

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<sup>25</sup> Article 18(1) of the *International Covenant on Civil and Political Rights* (1966).

<sup>26</sup> *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981).

<sup>27</sup> Article 9(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950). Art 14 of this Convention states the following: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

<sup>28</sup> *European Union Guidelines on the Promotion and Protection of Freedom of Religion or Belief* (2013) (the European Union Guidelines).

<sup>29</sup> The European Union Guidelines items 1, 2, 9.

<sup>30</sup> *ILO Promoting Diversity and Inclusion* (the ILO Guide).

<sup>31</sup> The ILO Guide 13.

<sup>32</sup> *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) (hereafter *Dlamini*).

observe it. The Court completed this comment by stating that this is so because, if not, then it would be open to abuse as anyone could avoid an obligation or claim an accommodation under the pretext of religion. In this case the employees were not able to prove that not cutting their hair was an essential tenet of their faith.<sup>33</sup>

In *MEC for Education KZN v Pillay*<sup>34</sup> the Constitutional Court held that the evidence showed that the wearing of a nose stud by a female scholar was not a mandatory belief of Hindu religion or culture but showed that it was a voluntary expression of South Indian Tamil Hindu culture which was intertwined with Hindu religion, and the scholar regarded it as such. The Court then held that while culture and religion remain different forms of human associations they can also be intertwined without borders and in this case the scholar understood the wearing of the nose stud in this light (as an expression of both religion and culture). The Constitutional Court then held that both voluntary and mandatory religious or cultural practices qualify for protection. It further stated that an approach that seeks to determine whether the discrimination is fair by considering the objective centrality of a practice gives rise to numerous difficulties. The Court then held that courts should not attempt to determine the objective centrality of practices because this would of necessity require them to substitute their judgment of the meaning of a practice for that of the person before them. The Court further held that the centrality of the practice must be determined with reference to the importance of the practice to the person's religious identity, and this may involve the Court considering the objective centrality of the practice but only to the extent that it assists in addressing the enquiry relating to the person's subjective centrality. It held that the voluntariness of a practice may be relevant to the centrality of the practice as there might be several persons who would not consider the voluntary practice to be central to their religious identity but there might also be persons who do not consider a practice to be obligatory (a voluntary practice) but who nonetheless consider the voluntary practice to be central to their religious identity.<sup>35</sup>

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<sup>33</sup> *Dlamini* paras 23-24.

<sup>34</sup> *MEC for Education KZN v Pillay* 2008 2 BCLR 99 (CC) (hereafter *Pillay*).

<sup>35</sup> *Pillay* paras 60, 67, 87, 88. *Pillay* states the following at para 62: "There is however more to the protection of religious and cultural practices than saving believers from hard choices. As stated above, religious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality." *Pillay* further states the following at para 87: "If Sunali states that the nose stud is central to her as a South Indian Tamil Hindu, it is not for the Court to tell her that she is wrong because others do not relate to that religion or culture in the same way".

In *Department of Correctional Services v POPCRU*<sup>36</sup> the Supreme Court of Appeal held that a policy which punishes religious and cultural practices effectively devalues and degrades the followers of that religion and culture. It further held that this amounts to a palpable invasion of the followers' dignity with the message that their religion or culture is not deserving of protection. The Court went further and stated that a policy cannot be justified where it restricts a religious or cultural belief that does not affect an employee's ability to perform his/her duties or cause undue hardship to an employer.<sup>37</sup> In *Prince v President of the Law Society of the Cape of Good Hope*<sup>38</sup> the Constitutional Court held the following:

The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice.<sup>39</sup>

In *Lewis v Media 24 Ltd*<sup>40</sup> a Jewish male employee claimed that the respondent unfairly discriminated against him based on his religion because it required him to work on the Sabbath, particularly the part of the Sabbath on the Friday night as he had no problem working on the rest of the Sabbath which fell on a Saturday. The Sabbath is observed from the Friday evening (sunset) until the Saturday evening (sunset). The employee never informed the respondent that he was Jewish and about the Sabbath. He stated that he assumed that the respondent knew that he was Jewish. The Labour Court stated that it was clear from the evidence that the employee went to night clubs on Friday nights. It then held that where an employee does not observe his religious practice in the manner contemplated by the religion then an employer may question whether his/her commitment to observe the religious practice is genuine. The Court then held that accommodating religious minorities may require operational changes, but such changes can only be justifiable provided that the employee's observance of his religion is genuine and within the ambit of his/her religious practice.<sup>41</sup>

In *Eweida v United Kingdom*<sup>42</sup> the European Court of Human Rights held that there is no requirement on an employee to prove that he/she acted in

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<sup>36</sup> *Department of Correctional Services v POPCRU* 2013 34 ILJ 1375 (SCA) (hereafter *POPCRU*). See Ebrahim and Tshoose 2014 *Obiter* 732-739 for an extensive discussion of this case.

<sup>37</sup> *POPCRU* paras 22, 25.

<sup>38</sup> *Prince v President of the Law Society of the Cape of Good Hope* 2002 3 BCLR 231 (CC) (hereafter *Prince*).

<sup>39</sup> *Prince* para 42.

<sup>40</sup> *Lewis v Media 24 Ltd* 2010 31 ILJ 2416 (LC) (hereafter *Lewis*).

<sup>41</sup> *Lewis* paras 3, 14, 61, 87, 122, 127-128.

<sup>42</sup> *Eweida v United Kingdom* 2013 IRLR 231 ECHR (hereafter *Eweida*).

the fulfilment of a duty mandated by religion.<sup>43</sup> It further held that the employee's insistence on wearing a cross visibly at work was driven by her wish to bear witness to the Christian faith, which she followed. She was a practising Coptic Christian. The refusal by her employer to allow her to remain in her position whilst visibly wearing her cross amounted to an interference with her right to manifest her religion.<sup>44</sup>

In *Syndicat Northcrest v Amselem*<sup>45</sup> the Supreme Court of Canada stated that, in essence, religion is about deeply held personal convictions or beliefs, the practise of which allows individuals to connect to the divine or the object of that spiritual faith. The Court further stated that the Supreme Court has on previous occasions held that a person must show "sincerity of belief" and not show that a particular belief is "valid". The Court then held that both obligatory and voluntary expressions of faith must be protected. It stated that it is the religious essence of an action that attracts protection and not the mandatory nature of its observance and an enquiry into whether the religious practice is mandatory is inappropriate and is fraught with difficulties. The Court then remarked that if a person were required to prove that his/her religious practice is a mandatory practice then this would require courts to interfere with personal beliefs, which would be inappropriate. The Court then stated that while it was not qualified to rule on the validity of any religious practice it was qualified to rule on the sincerity of a claimant's belief where this is put in issue. This assessment into sincerity is intended to ensure that the asserted religious belief is held in good faith and is neither fictitious nor capricious or a pretence.<sup>46</sup> The Court then made the following remarks regarding the use of expert evidence:

A claimant may choose to adduce expert evidence to demonstrate that his or her belief is consistent with the practices and beliefs of other adherents of the faith. While such evidence may be relevant to a demonstration of sincerity, it is not necessary. Since the focus of the inquiry is not on what others view the claimant's religious obligations as being, but rather what the claimant views these personal religious "obligations" to be, it is inappropriate to require expert opinions to show sincerity of belief. An "expert" or an authority on religious law is not the surrogate for an individual's affirmation of what his or her religious beliefs are. Religious belief is intensely personal and can easily vary from one individual to another. Requiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect.<sup>47</sup>

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<sup>43</sup> *Eweida* para 82.

<sup>44</sup> *Eweida* paras 9, 89, 91.

<sup>45</sup> *Syndicat Northcrest v Amselem* 2004 2 SCR 551 SCC (hereafter *Amselem*).

<sup>46</sup> *Amselem* paras 39, 43, 47, 49, 51-52.

<sup>47</sup> *Amselem* para 54.

In *Frazee v Illinois Department of Employment Security*<sup>48</sup> the United States Supreme Court remarked that, in the cases mentioned in its judgment, the claimants had a sincere belief that their religion required them to refrain from the specific work (for example not working on the Sabbath). The Court held that it never gave the impression that unless a claimant belongs to a religious sect which forbids that which his job requires then his belief should be deemed to be his own personal preference rather than a religious belief, irrespective of the sincerity of it.<sup>49</sup>

Turning to *TFD*, the Labour Appeal Court correctly rejected the argument by TFD that Faris had failed to prove that the tenets of her faith absolutely forbade work on Saturdays.<sup>50</sup> It thus correctly rejected the argument that the tenet must be mandatory in nature in order to found religious protection. It should be noted, however, that the observance of the Sabbath is mandatory in nature with a limited exception being provided for those engaged in emergency humanitarian work.<sup>51</sup> The argument that the employee must prove that her religious practice is an essential and mandatory tenet of her faith is in line with the approach set out in *Dlamini's* case<sup>52</sup> but is at odds with domestic and foreign case law. In *Pillay's* case the Constitutional Court made it clear that the fact that a religious practice is voluntary does not detract from its protection.<sup>53</sup> In *Eweida's* case the European Court of Human Rights held that there is no requirement that an employee must prove that her religious practice is mandatory.<sup>54</sup> The Canadian Supreme Court in *Amselem* has held that both voluntary and mandatory religious practices must be protected. It also interestingly held that a court should not enquire into whether a particular practice is mandatory because such an enquiry is inappropriate and is fraught with difficulties.<sup>55</sup> The Labour Appeal Court in *TFD* thus correctly rejected the mandatory argument of the religious tenet as this is in line with both domestic and foreign case law. It is submitted that *Dlamini* is no longer good law insofar as the essential and mandatory nature of the religious practice approach is postulated therein.

The Labour Appeal Court in *TFD* correctly dealt with the centrality of the religious tenet issue which was raised by TFD. It stated that the centrality of

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<sup>48</sup> *Frazee v Illinois Department of Employment Security* No 87-1945 1989 31 2 J Church State (hereafter *Frazee*).

<sup>49</sup> *Frazee* 354.

<sup>50</sup> *TFD* paras 25, 31.

<sup>51</sup> *TFD* para 32.

<sup>52</sup> *Dlamini* paras 23-24.

<sup>53</sup> *Pillay* para 67.

<sup>54</sup> *Eweida* para 82.

<sup>55</sup> *Amselem* para 47.

the belief must be judged in accordance with how important the religious belief or practice is to the identity of the employee, and to this end, evidence relating to the objective centrality of the religious belief or practice of the religious community at large is permissible. It cautioned, however, that this evidence is relevant only insofar as it assists in addressing the question of subjective centrality.<sup>56</sup> This approach is in accordance with domestic case law. In *Pillay* the Constitutional Court held that the courts should not attempt to determine the objective centrality of religious practices because doing so would require them to substitute their interpretation of the practice for that of the individual before them. It further held that the centrality of the practice must be determined in relation to the importance thereof to the person's religious identity, and evidence relating to the objective centrality of the practice may be relevant if it assists with the enquiry relating to the subjective centrality.<sup>57</sup> In *Prince's* case the Constitutional Court held that it is undesirable for courts to enter into a debate regarding whether a particular practice is central to a religion unless there is a genuine dispute in this regard.<sup>58</sup>

The Labour Appeal Court in *TFD* correctly rejected the argument by the employer that Faris was obliged to present expert evidence to prove that not working on the Sabbath was a tenet of her faith and that it was central thereto. It further correctly rejected the argument that her personal views relating to her religion were insufficient. The Labour Appeal Court found that her decision to observe the Sabbath was based on her faith and her conscience as well as her subjective understanding of the tenets of her religion. It then importantly stated that there are persons who follow a religious creed who feel that a certain practice is central to their identity in circumstances where they may not be under an obligation to observe it.<sup>59</sup> This approach to the proof of the religious tenet is in accordance with both domestic and foreign case law. In *Prince* the Constitutional Court held that it must not be expected of believers to be put to the proof of their beliefs.<sup>60</sup> In *Amselem* the Supreme Court of Canada held that a claimant can choose to present expert evidence to show that his/her religious beliefs accord with those of other persons belonging to the same faith but this is not a requirement because the focus of the enquiry is not directed at what others view the claimant's religious obligations to be but rather what the claimant

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<sup>56</sup> *TFD* para 34.

<sup>57</sup> *Pillay* paras 87-88.

<sup>58</sup> *Prince* para 42.

<sup>59</sup> *TFD* paras 25, 29-33.

<sup>60</sup> *Prince* para 42.

views his/her religious obligations to be. It further held that it is inappropriate to require expert opinions to show sincerity of belief.<sup>61</sup>

Having dealt with the nature, centrality, and proof of the religious tenet, it is submitted that one aspect stands out as being "central" to determine whether a religious belief can obtain protection. This aspect is the sincerity of belief. In *Lewis* the Labour Court held that where the evidence shows that an employee does not observe his religious practice in the manner contemplated by the religion, then an employer can question whether his commitment to observe the religious practice is genuine.<sup>62</sup> It is submitted that the facts of the case will determine this approach, as one still has to keep in mind that there can be differences within a religion. This is also recognised by the ILO Guide.<sup>63</sup> The evidence in *Lewis's* case showed that the employee was not genuine in his request to be accommodated.<sup>64</sup> In *Amselem*, the Supreme Court of Canada held that while it was not qualified to rule on the validity of a religious practice, it was qualified to rule on the sincerity of a claimant's belief where this is an issue. It further held that this assessment into sincerity is a measure which ensures that the asserted religious belief is held in good faith, is not fictitious or capricious and is not a pretence.<sup>65</sup> In *Frazee* the United States Supreme Court remarked that it had never given the impression that a claimant has to belong to a religious sect which forbids what his job requires, and if he does not, then his belief should be deemed to be his personal preference rather than a religious belief, irrespective of sincerity.<sup>66</sup> It is clear that the United States Supreme Court is concerned with the sincerity of the religious belief. The submission that sincerity plays a central role in obtaining protection for a religious belief should be read and understood in context. For example, a sincere belief to cause injury or harm to another without justification cannot attract religious protection. Likewise, a sincere belief to break the law of the land will not attract religious protection.

#### **4.2 What does the duty of reasonable accommodation entail?**

The ILO Guide recognises that reasonable accommodation may arise for workers who follow a particular religion/belief.<sup>67</sup> It further states that it might not be possible for employers to accommodate every employee's request

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<sup>61</sup> *Amselem* para 54.

<sup>62</sup> *Lewis* para 128.

<sup>63</sup> The ILO Guide 13.

<sup>64</sup> *Lewis* paras 87, 127-128.

<sup>65</sup> *Amselem* paras 51-52.

<sup>66</sup> *Frazee* 354.

<sup>67</sup> The ILO Guide 11.



as some requests may cause undue hardship. It is not sufficient to reject an employee's request merely because it is inconvenient. The ILO Guide then importantly states that reasonable accommodation makes the workplace more inclusive and a company that values diversity may improve retaining workers with diverse backgrounds. It also states that when determining what is reasonable one must consider all the circumstances of an individual case. The ILO Guide states that reasonable accommodation should be adjusted to meet the specific requirements of a worker.<sup>68</sup> It states that where a company does not require an employee to produce evidence to support their request for reasonable accommodation then this approach shows trust by the employer in the employee and it also takes into account that some types of accommodation may be difficult to establish.<sup>69</sup> The ILO Guide then states that when a request for reasonable accommodation is received then it must be carefully considered by the responsible person. This process of consideration should allow the employee making the request to put forth his/her views for accommodation and to respond to any proposed accommodations. Where reasonable accommodation is required in law, then employers must ensure that all requests for reasonable accommodation are handled fairly and transparently as this will promote an atmosphere of trust and working towards a non-discriminatory workplace.<sup>70</sup>

In *Dlamini* the Labour Court held that employers are required to reasonably accommodate the religious beliefs of their employees provided that doing so will not cause undue hardship for the employer.<sup>71</sup> In *Pillay* the Constitutional Court noted that the principle of reasonable accommodation is well settled in our law and the court has on many occasions expressed the need for reasonable accommodation involving matters of religion. It further stated that reasonable accommodation is to be determined by proportionality, which will depend on the facts of the case.<sup>72</sup> The Constitutional Court held that the fear that accommodating the scholar will open the floodgates to others seeking the same should be celebrated if it is

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<sup>68</sup> The ILO Guide 16, 22, 26.

<sup>69</sup> The ILO Guide 34.

<sup>70</sup> The ILO Guide 38-39.

<sup>71</sup> *Dlamini* para 69.

<sup>72</sup> *Pillay* paras 72, 76. *Pillay* held the following at para 86: "I agree that the centrality of a practice or a belief must play a role in determining how far another party must go to accommodate that belief. The essence of reasonable accommodation is an exercise of proportionality. Persons who merely appear to adhere to a religious and/or cultural practice, but who are willing to forego it if necessary, can hardly demand the same adjustment from others as those whose identity will be seriously undermined if they do not follow their belief."

based on *bona fide* religious or cultural practices as it celebrates diversity and should not be taken to be a "parade of horrors".<sup>73</sup>

In *SACTWU v Berg River Textiles*<sup>74</sup> the Labour Court stated, in the context of reasonable accommodation, that an employer must establish that it has taken reasonable steps to accommodate the employee's religious convictions. It further stated, in the same context, that an employer is not allowed to insist on an employee obeying a workplace rule where the refusal will have little or no consequence for the business.<sup>75</sup>

In *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi*<sup>76</sup> the Labour Appeal Court remarked that it is disingenuous to deny that South African society is made up of a diversity of cultures, traditions, and beliefs and as a result thereof there will always be instances where these diverse cultural and traditional beliefs create challenges in the workplace. The Court stated that it must be recognised that some of the cultural beliefs and practices are sincerely and strongly held by those who adhere to them. It then cautioned that those who do not subscribe to these beliefs should not trivialise them. The Court then stated that the correct approach is that of reasonable accommodation of one another to ensure harmony. It then held that "[a]ccommodating one another is nothing else but "botho" or "Ubuntu" which is part of our heritage as a society."<sup>77</sup> Bernard states that society has evolved and employers should therefore accept these changes and reasonably accommodate religious beliefs which are sincerely held, if they do not cause undue hardship to the employer.<sup>78</sup>

In *Ansonia Board of Education v Philbrook*<sup>79</sup> Justice Marshall in a dissenting judgment of the United States Supreme Court stated that where an employer offers reasonable accommodation that fully addresses the conflict between the work and the religious requirements, then there is normally no need to consider further proposals from the employee in this regard. The learned Judge further stated that where the accommodation tendered by the employer is such that it does not fully address the conflict between work and religion, then in such circumstances the employer remains under an

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<sup>73</sup> Pillay para 107.

<sup>74</sup> *SACTWU v Berg River Textiles* 2012 33 ILJ 972 (LC) (hereafter *Berg River Textiles*).

<sup>75</sup> *Berg River Textiles* para 38.6.

<sup>76</sup> *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* 2012 33 ILJ 2812 (LAC) (hereafter *Kievits Kroon*).

<sup>77</sup> *Kievits Kroon* para 26.

<sup>78</sup> Bernard 2014 *PELJ* 2888.

<sup>79</sup> *Ansonia Board of Education v Philbrook* 479 US 60 1986 (hereafter *Philbrook*).

obligation to consider all reasonable proposals submitted by the employee.<sup>80</sup>

Cranmer states that reasonable accommodation is based on the premise that both parties are prepared to be reasonable, but this becomes problematic in matters of religion because individuals might regard issues as matters of principle from which no give and take is possible.<sup>81</sup> Griffiths argues that where the manifestation of a religion is visible, for example the wearing of the hijab or religious jewellery, then reasonable accommodation by the employer for the religious dress or jewellery would promote increased participation and economic advancement of those employees who are from minority religions, and this leads to social inclusion.<sup>82</sup> In *Ontario Human Rights Commission & Theresa O'Malley v Simpsons-Sears Limited*<sup>83</sup> the Supreme Court of Canada made the following remarks with regard to reasonably accommodating an employee and the result of reasonable accommodation(s) not fully accommodating the employee:

In a case of adverse effect discrimination, the employer has a duty to take reasonable steps to accommodate short of undue hardship in the operation of the employer's business. There is no question of justification because the rule, if rationally connected to the employment, needs none. If such reasonable steps do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part, must sacrifice either his religious principles or his employment.<sup>84</sup>

Turning to *TFD*, the Labour Appeal Court correctly found that there was no evidence to suggest that TFD would have suffered undue hardship by accommodating Faris and the real reason for insisting on Faris attending stocktaking on her Sabbath was because of the employer's rigid policy, from which it was not willing to make an accommodation.<sup>85</sup> This factual finding is in accordance with the law relating to reasonable accommodation involving religious practices. In *Dlamini* the Labour Court held that an employer is required to reasonably accommodate the religious beliefs of its employees if it does not cause undue hardship.<sup>86</sup> In *Berg River Textiles* the Labour Court elaborated on the concept of reasonable accommodation and stated that an employer must establish that it has taken reasonable steps to accommodate the employee's religious convictions. It held that an employer

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<sup>80</sup> *Philbrook* 72-73.

<sup>81</sup> Cranmer 2017 *Law & Just – Christian L Rev* 194.

<sup>82</sup> Griffiths 2016 *IJD* 174.

<sup>83</sup> *Ontario Human Rights Commission & Theresa O'Malley v Simpsons-Sears Limited* 1985 2 SCR 536 SCC (hereafter *Theresa O'Malley*).

<sup>84</sup> *Theresa O'Malley* 537D-E.

<sup>85</sup> *TFD* paras 43-44.

<sup>86</sup> *Dlamini* para 69.

is not allowed to insist on an employee obeying a workplace rule where the refusal will have little or no consequence to the business.<sup>87</sup> This is what happened in *TFD*. The employer insisted that Faris attend stocktaking, but the evidence showed that her absence had no effect on the stocktaking. In *Kievits Kroon*, the Labour Appeal Court stated that reasonable accommodation will ensure harmony and accommodating one another is nothing other than Ubuntu.<sup>88</sup> The ILO Guide recognises that reasonable accommodation may be needed for workers who follow a particular religion. It further recognises that it might not be possible for employers to accommodate workers where the granting of their requests might cause undue hardship.<sup>89</sup>

The Labour Appeal Court in *TFD* correctly found that TFD did not care to understand Faris's position because an employment practice that punishes an employee for practising her religion is a profound invasion of her dignity as it assumes that her religion is not worthy of respect or protection. It further held that an employee in Faris's position is forced to make a difficult choice between her conscience (beliefs) and her livelihood. It then held that in such circumstances the employer is under an obligation to make a proper effort to provide the employee with reasonable accommodation. The dictates of fairness and the Constitution require this.<sup>90</sup> The ILO Guide importantly states that where reasonable accommodation is required by law then employers must ensure that all requests for reasonable accommodation are handled fairly and transparently as this will promote an atmosphere of trust and lead towards a non-discriminatory workplace.<sup>91</sup> The employer in *TFD* never handled the request from Faris in a fair manner because it operated on the premise that Faris had to adapt to its policy of being available for stocktaking on the weekend without properly considering the importance to her of observing the Sabbath and the difficult position which it had placed her in – that is the choice between observing the Sabbath or reporting for stocktaking duty. In *Kievits Kroon*, the Labour Appeal Court held that those who do not subscribe to the beliefs of others should not trivialise them.<sup>92</sup> This applied to *TFD* because there was a total disregard for the employee's religious beliefs. The Supreme Court of Canada in the case of *Theresa O' Malley* recognised, in the context of reasonable accommodation, that an

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<sup>87</sup> *Berg River Textiles* para 38.6.

<sup>88</sup> *Kievits Kroon* para 26.

<sup>89</sup> The ILO Guide 11, 16.

<sup>90</sup> *TFD* para 45.

<sup>91</sup> The ILO Guide 39.

<sup>92</sup> *Kievits Kroon* para 26.

employee can be faced with the difficult decision of sacrificing her religious beliefs or her employment.<sup>93</sup>

The Labour Appeal Court found that Faris had made various suggestions regarding how she could be accommodated but there was no meaningful engagement about this from the employer's side. It further found that TFD's approach was incorrect as it took the view that Faris was under an obligation to come up with practical solutions which suited its commercial rationale and if she failed to do this then it was entitled to dismiss her. The Labour Appeal Court correctly held that this was not sufficient as more is required of an employer.<sup>94</sup> In *Theresa O'Malley* the Supreme Court of Canada held that the employer has a duty to take reasonable steps to accommodate religious beliefs, short of undue hardship.<sup>95</sup> The ILO Guide states that it is not sufficient for the employer to reject the employee's request merely because it is inconvenient. It further states that when determining what is reasonable one must take all the circumstances of the case into account and reasonable accommodation should be adjusted to meet the specific requirements of an employee. It also importantly states that the process of determining reasonable accommodation should allow the employee making the request to put forth his/her views for accommodation and he/she should be allowed to respond to any proposed accommodation.<sup>96</sup> TFD did not consider the proposals made by the employee in a proper manner and merely rejected them because they conflicted with its policy. TFD's approach to reasonable accommodation of the employee's religious practice was non-existent. In the United States Supreme Court case of *Philbrook*, Justice Marshall in a dissenting judgment stated that where the accommodation tendered by the employer does not fully address the conflict between work and religion then in such circumstances the employer remains under an obligation to consider all reasonable proposals submitted by the employee.<sup>97</sup> In *TFD* the employer had no intention of accommodating the employee, least of all listening to her reasonable proposals regarding how she could be accommodated.

## 5 Conclusion

It is clear from the above discussion that both mandatory and voluntary religious beliefs attract protection. The voluntary nature of the religious

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<sup>93</sup> *Theresa O'Malley* 537D-E.

<sup>94</sup> *TFD* paras 47-48.

<sup>95</sup> *Theresa O'Malley* 537D-E.

<sup>96</sup> The ILO Guide 16, 26, 38.

<sup>97</sup> *Philbrook* 72-73.

belief does not make it less worthy of protection. The right to freedom of religion and its manifestation is well protected in international law, foreign law, and domestic law. The objective centrality of the belief has a limited role to play to the extent that it can assist the enquiry relating to the subjective centrality of the employee's beliefs. It is also clear that there is no requirement on an employee to produce expert evidence relating to his/her religious belief/s in question. It is submitted that an employer should rather look at the employee's sincerity regarding his/her religious beliefs instead of focussing on whether the religious belief is mandatory or voluntary and requiring expert evidence to show that the belief in question is a tenet of the relevant faith and that it is central to the faith. It is further submitted that employers should deal with a request for religious accommodation in a manner that gives due regard to the requesting employee's dignity and the sincerity of his/her belief. An employer who takes a hard line to an employee's request for religious accommodation in circumstances where the request is reasonable and will not cause undue hardship will most certainly find itself on the wrong side of our labour laws.

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### **List of Abbreviations**

CCMA	Commission for Conciliation, Mediation and Arbitration
EEA	Employment Equity Act
IJDL	International Journal of Discrimination and the Law
ILO	International Labour Organisation
Law & Just – Christian L Rev	Law & Justice – The Christian Law Review
LRA	Labour Relations Act
PELJ	Potchefstroom Electronic Law Journal