Schreuder Attorneys

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news

Newsletter, Articles and Matters of Interest

1 DRESS CODE IN THE WORKPLACE

Some employees have cultural or religious requirements which dictate their clothing or appearance. A workplace dress code which does not accommodate these will amount to religious discrimination, unless it can be justified.

The debate about religious customs in the workplace involves the balancing of competing interest. Where does the line get drawn between the requirements of the business (the employer operational requirements) and the rights of the employees?

In terms of section 9 (4) of the Bill of Rights "no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)". The grounds listed in subsection 3 include race, gender and culture and belief.

Section 187 (1) (f) of the Labour Relations Act[1] states that a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to religion, culture and belief.

Examples of rules which may disadvantage employees of a certain race or religion include:

* a requirement not to cover the face may adversely affect Muslim women who wish to wear a full veil
* stipulating that employees must wear conventional hairstyles could discriminate against Rastafarians who wear dreadlocks
* requiring employees to be clean shaven may discriminate against Muslim employees who wear

[1] The Labour Relations Act No. 66 of 1995

a beard
* preventing employees from wearing jewellery or tattoos could discriminate against employees from certain cultures or religions.

In order to defend discrimination claims, employers must show that the rule is justified and that it is necessary to achieve a legitimate aim. The courts have held that employers should accommodate cultural or religious requirements if they can do so without detracting from the aim behind the dress rules.

In the LAC case of POPCRU*& others v Department of Correctional Services & another*[2] five male employees were dismissed after they refused to obey the new commanding officer's instruction to cut off their dreadlocks. Three of the five employees claimed they wore dreadlocks because they adhered to the Rastafarian faith, and the other two said they did so for cultural reasons. The employees claimed that their dismissals were automatically unfair because they had been discriminated against on the basis of their religion, conscience, belief and/or gender. The Department argued that it had merely sought to enforce the regulation dress code, strict compliance with which was necessary to maintain discipline. Furthermore that the employees had not been discriminated against because the dress code applied to all.

[2](2011) 32 ILJ 2629 (LAC)

The employees relied on the provisions of both the LRA[3] and of the Employment Equity Act[4].

Labour Court (LC)

On the gender discrimination issue it was accepted that the female officials were permitted to wear dreadlocks and that it was never made clear why the biological differences between men and women had to justify discriminating among them. The Labour Court held that the dismissal of each of the employees on the basis of gender was automatically unfair.

On Appeal to the Labour Appeal Court (LAC)

The court held that in order to establish religious or cultural discrimination the employees had to show that the employer through their enforcement of the prohibition on the wearing of dreadlocks interfered with their participation in or practice or expression of their religion or culture. The test the court stated of unfairness focuses upon the impact of the discrimination, any impairment of dignity, and the question of proportionality. In addition, a discriminatory dismissal might be fair in terms of section 187(2) (a) of the LRA if there is a justification based on an inherent requirement of a particular job.

The Court further held that the dress Code directly discriminated against the employees in that they were treated less favourably than not only their female colleagues but also those upon whom the Code imposed no religious or cultural disadvantage. The employee's beliefs were necessary factual criteria upon which the decision to dismiss was based in a causative sense: but for their beliefs, the employees would not have been dismissed. The evidence establishes beyond question that the reason for their dismissal was discrimination on grounds of gender, religion and culture.

The prohibition in the Dress Code is confined to male correctional officers. Female officers may wear dreadlocks; male officials may not. But for the fact that the respondents were male correctional officers who wore dreadlocks, they would not have been dismissed.

[3] Sec 187 (1) (f) Labour Relations Act No. 66 of 1995
[4] Sec 6 of the Employment Equity Act 55 of 1998

The Court held that obvious rational connection between a ban on dreadlock hairstyles and the achievement of greater probity by correctional officers and security at the prison.

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

The LAC held that the Labour Court may have erred in dismissing the claim based on religious and cultural discrimination, it did not err in its finding that the dismissal was automatically unfair.

An employer can still lay down rules regarding appearance and dress, and the Court will be relatively reluctant to interfere unless there is clear discriminatory conduct by the employer or if the rule is applied inconsistently in respect of men and women or another discriminatory reason.

Employees who claim religious discrimination must prove the religious foundations on which their arguments are based and that they are genuinely belonging to and following the religion and to prove that there was a causal link between their religious beliefs and what the employer did.

2. RELIGION AND TRADITION IN THE WORKPLACE

- In the matter between Kievits Kroon Country Estate (Pty) Ltd v CCMA & others the employer declined the request of one of its employees for one month's unpaid leave. The employee worked in a high pressure environment where attendance was of utmost importance, since she was employed as a chef de partie. The employee requested one month's unpaid leave in order to become a Sangoma ("Traditional Healer"). In support of her application she submitted a letter from North West Dingaka Association. The application was declined by the employer due to the operational requirements. The employer simply could not afford to be without the services of the employee for a month. Despite not having permission to be absent from work the employee stayed away from work for the period of unpaid leave she applied for. The employee was charged with absence without a valid reason for 3 days or more and gross insubordination / challenge of employer's authority. The employee was dismissed and referred the matter to the Commission for Conciliation Meditation and Arbitration ("CCMA") as an unfair dismissal.
- During Arbitration the employee's manager maintained that he would have acted in a similar fashion if another employee approached him for leave to do a karate course but also agreed that Sangomas constitute a vital part of the cultural life of Africans but did not agree that attending a traditional ritual was a valid reason for being absent from duty. He did not agree that a certificate issued

by the North West Dingaka Association was a valid medical certificate. According to the manager, attending a ceremony to become a Sangoma does not qualify as sick leave.

- In terms of the company's rules, employees desiring to take leave whether paid or unpaid should apply for authorisation to their managers stating the reasons thereof and non-compliance constituted serious misconduct. The employer has a grievance procedure in place and the employee did not invoke the procedure to address her grievance if she was not satisfied with her manager's decisions. The employee believed that she was called by the ancestors to become a Sangoma.
- The commissioner held that employees have a fundamental duty to render service and their employers have a corresponding right to expect them to do so. The commissioner referred to John Grogan, Dismissal, and Discrimination & Unfair Labour Practices: Juta & Co Ltd (2005) p.239, an explanation for an absence would be adequate if employees could prove that the absence was beyond their control. The employee had to prove that her absence from duty was necessitated by circumstances beyond her control. The commissioner said that the employee's absence from duty was due to circumstances beyond her control and she was justified to disregard the applicant's instructions and attend the sangoma course and reinstated herself. The commissioner found the dismissal to be substantively unfair and ordered reinstatement.
- The employer approached the Labour Court to review the award on the basis that by making the findings of both fact and of law that are so grossly out of touch with the evidence presented to him, the commissioner not only exceeded his powers but also failed to apply his mind to the matter he was called upon to consider and adjudicate. Judge Francis ruled: "The commissioner has in a well-reasoned award dealt with why he believed that the dismissal was harsh and why reinstatement was appropriate. I am satisfied that the award made by the commissioner is one that a reasonable decision maker would have made."
- The Labour Court remarked further that the commissioner found that the respondent had breached the appellant's rule but that she was justified to do so and concluded thus:
- "The employer was approached at the end of May 2007 for permission to take one month's unpaid leave to complete the training course. The employer refused although the employee had produced a traditional healer certificate. The employer knew what the reasons were for the employee's absence. The duration of absence was going to be for a month. She had been working for the appellant (employer) for eight years. The explanation tendered for the absence was to attend a Sangoma course to appease her ancestors. This is not one of those cases where an employer did not know about the whereabouts of the employee. It was prepared to give her a week off as unpaid leave. The commissioner found that the explanation that she tendered was reasonable."
- The application was dismissed.
- The employer appealed to the Labour Appeal Court. The court held that the decision reached by the commissioner on the facts is not the one that a reasonable decision maker could not reach and the appeal was dismissed.
- It is argued that this case will open a "can of worms" when dealing with tradition in the workplace for example when a Christian applies for four months unpaid leave to do missionary work, believing that he will die if he does not adhere to God's calling.

- However the Constitutional Court has expressed the need for reasonable accommodation when considering matters of religion and culture. In the case of MEC for Education, Kwazulu-Natal and Others v Pillay Langa CJ described the content of the principle of reasonable accommodation as follows: At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms."

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