WHEN MEN WEAR DREADLOCKS TO WORK

Department of Correctional Services v POPCRU [2012] 2 BLLR 110 (LAC)

1 Introduction

The inclusion of constitutional rights within the ambit of the employment relationship raises new tensions between the enforcement of an employee's right to gender equality, religious and cultural freedoms and an employer's right to engage in free economic activity. The employer, in seeking to increase its productivity and efficiency, may insist on standards of uniformity in the manner in which employees dress to work. The employee, on the other hand, might find the insistence of these norms or uniformities in conflict with his/her right to equality and/or religious or cultural freedoms. In this case, the courts were faced with the task of reconciling these tensions between the Department of Correctional Services and some of its employees. This note looks at the manner in which the Labour Court ([2010] 10 *BLLR* 1067; (2010) 31 *ILJ 2433* (LC) and Labour Appeal Court dealt with the issue.

2 Summary of the facts

The facts of the case were set out in great detail in the Labour Court judgment. Five employees (referred to as the applicants in this note) were dismissed by the Department of Correctional Services (the respondent) after they refused to obey a written instruction to cut their dreadlocks. The applicants had worn dreadlocks over a period of time, without complaint or apparent concern from the department. However, in January 2007, when a new area commissioner assumed the post at Pollsmoor Prison where they were stationed, male staff received a written instruction to comply with the existing dress code by cutting their dreadlocks. They refused to do so, on the basis of cultural and religious imperatives.

The first applicant in this matter was the Police and Prisons Civil Rights Union (POPCRU). The second to sixth applicants were the dismissed employees. The second and fifth applicants argued that they could not cut their dreadlocks for cultural reasons. The second applicant contended that he had received the "calling" to be a traditional healer and that he had performed cultural rites to that effect which required him to wear dreadlocks until December 2007. He informed the respondent that he would only be

required to wear the dreadlocks until this date. The fifth applicant testified that he had worn dreadlocks for about six years because he was in the process of becoming a traditional healer, and that he therefore could not cut his dreadlocks.

The third, fourth and sixth applicants argued that they could not cut their dreadlocks because of their religious beliefs. The third applicant testified that he had been wearing dreadlocks for a period of four years from the time he became a Rastafarian. He testified that the importance of dreadlocks was that they were "considered as a crown and were one's identity as a Rastafarian" (Labour Court judgment par 37). He further testified that he would have been willing to wear a cap if he had been required to do so by the respondent (par 38). He was employed in community corrections and only interacted with inmates when he interviewed them at the reception area. The fourth applicant gave evidence that he also grew dreadlocks when he embarked on a spiritual path to become a Rastafarian some three years prior to the disciplinary matter (par 45). The sixth applicant testified that he also wore dreadlocks because he was a Rastafarian.

The applicants were suspended from duty and eventually dismissed by the respondent for failing to obey an instruction to cut their dreadlocks.

They approached the Labour Court for an order declaring their dismissals automatically unfair in terms of section 187(1)(f) of the Labour Relations Act 66 of 1995 and what it constituted prohibited unfair discrimination on the basis of religion and culture in terms of section 6 of the Employment Equity Act 55 of 1998.

The applicants argued that there had been direct discrimination on the basis of gender, because female officers were allowed to wear dreadlocks and they were not. They also contended that they were subjected to direct and/or indirect discrimination in that the application of the dress code prohibiting dreadlocks infringed on their right to practise their religion and culture.

The applicants also raised issues of procedural fairness, which are not the subject of this comment.

The respondent defended the matter on the basis that the reason for the termination of the applicants' employment was not based on unfair discrimination, but rather their failure to comply with a legitimate instruction (par 3).

It was further argued that the dress code applied equally to all employees, regardless of their religion or culture. In support of its case, the respondent led a great deal of evidence about the reasons it had decided to enforce the dress code strictly. It led evidence that there had been a general lack of discipline at Pollsmoor Prison; with problems with drug-smuggling into the prison, a high rate of absenteeism and assaults between prisoners and/or staff members (par 84). In an attempt to instil discipline in the institution, the respondent had decided to instruct members to adhere strictly to its dress

code. It led further evidence that, as a result of compliance with the dress code, the discipline in the prison had improved (par 92).

The Labour Court found that the dismissal of the applicants for refusing to cut their dreadlocks constituted unfair, direct discrimination on the basis of gender in terms of section 6 of the Employment Equity Act and that the dismissals were automatically unfair, being in contravention of 187(1)(f) of the Labour Relations Act (par 239). It was on this basis that it granted an order of reinstatement to the applicants. The Labour Appeal Court confirmed this aspect of the judgment, and added that they were also unfairly discriminated against on the basis of religion and/or culture (par 53).

3 Findings

3 1 Direct discrimination on the grounds of religion and culture

On the issue of direct, unfair discrimination on the basis of religion and culture, the Labour Court held that the applicants' claim must fail because the instruction to cut the dreadlocks was given to all staff, irrespective of their religion or culture. Further, the court found that the applicants were unable to prove they had been discriminated against on these grounds because they had never brought the issue of the cultural or religious beliefs to the attention of the respondent's area commissioner, who had only accepted the post at Pollsmoor Prison shortly before the instruction to cut their dreadlocks was given (par 226).

Accordingly, the court held that there was no basis for it to find that they had been treated differently from other employees. The court found that the motive for the dismissal was not a direct intention to discriminate against them, but was based on their failure to obey a reasonable instruction (par 227). It found that this was evidenced by the undisputed fact that other employees of the same culture or religion who had cut their dreadlocks had not been disciplined by the employer. A similar approach was adopted by the Labour Court in *Dlamini v Green Four Security* ([2006] 11 *BLLR* 1074; (2006) 27 *ILJ* 2098 (LC) par 24), where the applicants were dismissed after they refused to shave their beards for religious reasons, when the instruction was given to all employees.

Accordingly, the Labour Court found that the applicants had failed to discharge the onus of proving that "the respondent's rationale for the dismissal of the applicants was based on direct discrimination" (par 229).

Having come to this conclusion, it was unnecessary for the court to consider the reasons (or justification) for the instruction to cut their dreadlocks.

The Labour Appeal Court took a different view and found that the test to establish unfair, direct discrimination is whether the enforcement of the rule prohibiting the wearing of dreadlocks interfered with the applicants'

"participation in or practice or expression of their religion or culture" (par 24). It held that if this was the case, then discrimination could be presumed, and the remaining question was only whether or not the discrimination was justified. The Labour Appeal Court found that the Labour Court had erred in its approach, because it was undisputed by the parties that they wore dreadlocks as an integral expression of their religion and culture. It held that once the Labour Court had accepted that the prohibition on wearing dreadlocks had a devastating effect on their beliefs, it ought to have presumed discrimination and proceeded to inquire into whether or not the discrimination was unfair (par 27).

The Labour Appeal Court also rejected the finding that the applicants had failed to prove discrimination because they had failed to assert their rights. The Labour Appeal Court found, on the facts, that it had been established that the employees had asserted their rights.

The finding of the Labour Court in this regard is inexplicable because it had, in its own summary of the facts found that the applicants had been invited in writing to make representations to the respondent as to why they should not be suspended for failing to obey the instruction to cut their dreadlocks. All the applicants made written representations where they indicated that they were unwilling to cut their dreadlocks for religious and cultural purposes (par 9 of Labour Court judgment). The respondent was therefore alive to their religious and cultural reasons for refusing to cut their dreadlocks before it decided to suspend and discipline them.

Furthermore, it was clear that the respondent had no intention of considering their religious and cultural concerns. It argued that it would have only considered a deviation from the dress code for medical reasons, and that it would have refused their requests because to grant permission for them to wear dreadlocks "would open the floodgates and if they made allowance for one or two cultures or religions, they would make allowance 'for everybody'" (par 93 of Labour Court judgment).

In any event, the Labour Appeal Court found that even if the applicants had failed to assert rights, this would not obliterate the discriminatory nature of the respondent's conduct (par 27 of Labour Appeal Court judgment).

The Labour Appeal Court concluded that the applicants had been unfairly discriminated against on the basis of religion and culture because they were treated less favourably because of their beliefs, and because they would not have been dismissed had it not been for their beliefs (par 38). It held further that the benign motive of the respondent (to improve discipline in the workplace) did not render the discriminatory conduct non-discriminatory (par 35), as a finding of direct discrimination does not require proof that the employer intended to discriminate (par 36).

This finding of the Labour Appeal Court on this aspect is consistent with the approach of the Constitutional Court in determining whether conduct is discriminatory (see *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) par 46) and cannot be faulted.

3 2 Direct discrimination on the grounds of gender

The Labour Court considered whether the applicants had made out a claim of direct, gender discrimination because only male staff had been required to cut their dreadlocks. On this issue the court found in their favour and held that there was no justifiable basis on which only male staff should be required to cut their dreadlocks. The court rejected the respondent's assertion that there were biological differences between men and women which justified applying a different dress code (par 236). It warned against gender stereotyping, pointing out that one must guard against using cultural practices as evidence that there are differences between men and women (par 237).

The Labour Appeal Court agreed with this finding (par 30) and held that the imposition of the rule prohibiting dreadlocks on male staff only imposed a disadvantage on the male staff who were "prohibited from expressing themselves" and having to work in an environment in which their religious and/or cultural practices were not respected, and in which they were "not completely accepted for who they are" (par 25). The Labour Appeal Court found no justification for the differentiation between the male and female employees (par 52). Both courts also rejected the argument by the respondent that the wearing of dreadlocks posed a security risk to male employees because prisoners could pull them. They found correctly that this justification was not convincing, as female employees with dreadlocks or long hair would be exposed to the same risk and they had not been required to cut their hair. There was also no evidence led to support this claim (par 237 of Labour Court judgment and par 45 of Labour Appeal Court judgment).

3 3 Indirect discrimination on the grounds of religion or culture

On this issue, the applicants argued that the respondent had discriminated indirectly against them by imposing a rule which, although apparently neutral, had a disparate effect on them because of its impact on their religious and cultural freedoms.

The Labour Court found in favour of the respondent on this point, accepting that indirect discrimination occurs when an employer "utilizes an employment practice that is apparently neutral, but [which] disproportionately affects members of disadvantaged groups in circumstances where it is not justifiable" (par 215).

It based this approach on the decision in *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* ([1997] 11 *BLLR* 1438 1445; (1998) 19 *ILJ* 285 291G (LC)), where the court found that the employer had indirectly discriminated against black employees. The employer had permitted monthly-paid employees to belong to a staff benefit fund (to which it made a higher contribution) but weekly paid employees could only belong to a pension fund. The facts revealed that few black

employees were paid monthly, with the effect most black employees were required to belong to the pension fund which received a lower contribution from the employer. This was held to constitute indirect, unfair, racial discriminatory conduct by the employer.

Despite this finding, the Labour Court did not find in the applicants' favour because (as discussed above) it erroneously found that the applicants failed to assert their rights (par 231-232).

The Labour Appeal Court did not deal extensively with the question on indirect discrimination, as it had already found that the applicants were directly discriminated against on the basis on of gender, religion and/or culture. Although the Labour Appeal Court found that the imposition of the rule had a disparate impact on the applicants, which disproportionately disadvantaged them (par 28), it also found that the employer had not imposed an apparently neutral standard. It held that the rule enforced "mainstream hairstyles (of the short-back and sides military variety), at the expense of minority and historically excluded hairstyles" (par 25). The Labour Appeal Court's finding that the respondent did not apply a neutral standard is questionable. It merely establishes direct, rather than indirect, discrimination, on the grounds of hairstyle rather than religion and/or culture. In this regard, it is submitted that the Labour Appeal Court misconstrued the difference between an apparently neutral rule which is applicable to all employees, with the disparate impact that the rule might have on non-mainstream groups.

4 Comment

The Labour Court took a sound, acceptable approach when dealing with the arguments relating to direct discrimination. However, when dealing with indirect discrimination, the reasoning of the court is puzzling.

Having defined the parameters of indirect discrimination as a practice which has a disparate impact on the applicants, it is difficult to grasp how the court came to the conclusion that there was no case for indirect discrimination on the basis of religion or culture. This is in light of the court's own observations that the instruction to cut their dreadlocks "would have a devastating effect on their belief which they held high at the time" (par 231).

This is precisely the reason that the claim of indirect discrimination is justifiable. The effect of forcing the applicants to cut their dreadlocks had a disparate impact on them because it offended their right to practise their religion and culture, in circumstances where the court did not accept the justifications proffered by the respondent for the instruction. Both courts rejected the assertions by the respondent that the prohibition against dreadlocks for reasons of uniformity in appearance would necessarily improve discipline and security in the prisons (par 238 of Labour Court and par 39 of Labour Appeal Court judgments). The Labour Court also rejected argument by the respondent to the effect that the Rastafarian correctional officers would stand out and that an undesirable association between them

and the Rastafarian inmates was likely to take place. The court dismissed this argument as motivated by prejudice and bias and which was speculative and unsubstantiated by the evidence (par 238).

The Labour Appeal Court found that, notwithstanding the nature of the prison environment, the respondent ought to have made every effort to accommodate the unique social and cultural diversity of South Africa reasonably, by granting exemptions for justified religious and cultural reasons (par 49-51). The Labour Appeal Court cautioned further that:

> "Employers should, wherever reasonably possible, seek to avoid putting religious and cultural adherents to the burdensome choice of being true to their faith at the expense of being respectful of the management prerogative and authority" (par 44).

5 Conclusion

The Labour Court's decision that the applicants were unfairly discriminated against on the basis of gender is to be applauded because it eradicates the misplaced gender stereotyping in relation to men and the wearing of dreadlocks. It also achieved the result that the applicants could return to work, with their dreadlocks intact. This allowed them to preserve their religious and cultural practices.

However, the resolution of the problem on the basis of gender discrimination only does not deal adequately with the main reason the applicants refused to cut their dreadlocks. Each applicant cited a cultural or religious reason, which was accepted as legitimate by the court (par 220). The Labour Court had an opportunity to properly vent the issue of the circumstances under which employees' religious and cultural freedoms can be protected or limited within the context of the economic or commercial rationale of the employer's interests. The parties went to great lengths to explore this issue and the court was thus provided with an excellent opportunity to address this matter. Unfortunately, it failed to do so.

However, the Labour Appeal Court took up this point, and its decision to uphold the religious and cultural beliefs of the employees is also welcomed. While the courts did not agree on the legal parameters of unfair discrimination, they agreed that an employer is required to provide a sustainable justification for rules that have a negative impact of the religious and cultural expressions of employees.

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