

**OF NOSE STUDS, BEARDS AND  
ISSUES OF DISCRIMINATION\***

**Pillay v KwaZulu-Natal MEC of Education  
2006 10 BCLR 1237 (N)**

**Dlamini v Green Four Security  
2006 11 BLLR 1074 (LC)**

“Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on many maps in the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.”

Eleanor Roosevelt

This note attempts to analyse two recent cases involving interesting questions of discrimination law, the one in the context of considering what is acceptable school attire and the other in the realm of employment.

## **1 Pillay v KwaZulu-Natal MEC of Education**

The case of *Pillay v KwaZulu-Natal MEC of Education* (2006 10 BCLR 1237 (N); 2006 (6) SA 363 (EqC)) (hereinafter “the *Pillay* case”) was an appeal against a decision of an equality court prohibiting an Indian girl from wearing a nose stud while attending the Durban Girls’ High School (hereinafter “the school”).

### **1.1 Facts of the case**

The school’s code of conduct provided that no jewellery may be worn at school other than a watch and one earring per ear. When the appellant’s daughter arrived at school towards the end of 2004 wearing a nose stud, the school sought an explanation from the appellant for this behaviour. The

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reasons advanced were, essentially, that the daughter was not wearing the nose stud for reasons of fashion but rather that the appellant's family sought to maintain their cultural identity as a South Indian family wishing to follow the traditions their female ancestors had believed in. The appellant argued that the piercing of her daughter's nose was a time-honoured tradition which indicated that the child had come of age and was now eligible for marriage. (See par 2-5. In modern times, it was submitted that the tradition symbolized the recognition of a daughter as a responsible young adult.) It served the additional purposes of blessing the daughter and was a way for elders of the household to transfer their jewellery to the younger generations of the family since the custom was for the grandmother of the girl to replace the original gold stud with a diamond nose ring once the girl turned 16 years of age (see par 6).

The school's governing body made a decision to disallow the appellant's daughter from wearing the nose stud, as a result of which the appellant wrote a letter to the MEC of Education alleging that the decision was a violation of her daughter's constitutional rights to practise the religious and cultural traditions of her choice and that these rights took precedence over any school code, especially when the issue in dispute did not relate to the actual manner, attitude or conduct of the learner at school (see par 8-9). When the response received was unsatisfactory (the second respondent wrote that "schools are not obliged, as it is unreasonable to expect them, to accommodate all idiosyncratic practices") (see par 10) and after the appellant's daughter was given an ultimatum by the school to remove the nose stud, the appellant instituted proceedings in terms of section 20 of the Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000) (hereinafter "the Equality Act").

### 12 *The decision of the Equality Court*

The Equality Court decided that the school's actions against the appellant's daughter were reasonable and fair in the circumstances; that the school did not discriminate or unfairly discriminate against the appellant's daughter and that the wearing of the nose stud was in violation of the school's code of conduct (see par 13). The appellant appealed to the Natal Provincial Division of the High Court (hereinafter "the court"). (The Equality Court is established by s 16 of the Equality Act and is either a High Court or a designated magistrate's court. In terms of s 23 of the Equality Act, any person aggrieved by any order made by an Equality Court may appeal against such order to the High Court having jurisdiction, or the Supreme Court of Appeal, as the case may be. For further background regarding Equality Courts, see *Minister of Environmental Affairs and Tourism v George* 2007 3 SA 62 SCA. Also see Van der Walt and Kituri "The Equality Court's View on Affirmative Action and Unfair Discrimination" (2006) *Obiter* 674.)

### 1 3 *The Natal Provincial Division decision*

In deciding the appeal, the court had to consider three principal contentions from counsel for the respondents. (Certain issues of a technical or procedural nature were also raised, for example that the appellant's daughter should have personally testified in support of her case, rather than simply relying upon her mother's evidence. The court dealt swiftly with these allegations and concentrated its judgment on the above-mentioned arguments: par 27-29):

- 1 the appellant had chosen to send her daughter to the school and had accepted the school's code of conduct;
- 2 extensive consultation, involving people drawn across the racial, religious and cultural spectrum of South Africans, had taken place prior to the adoption of the code; and
- 3 finally, that it was important for the school to adopt an approach in which all girls were seen to be treated in the same way (see par 23-25).

The court held that the Equality Court had erred in applying the School's code of conduct literally and in disregarding the religious and cultural rights which had been established by the evidence led. (See par 18. The court found that the evidence led at the original enquiry had established that the wearing of the nose ring by Hindu women of South India was of cultural and religious significance. The Equality Court had ruled that it was not feasible to expect the school to bend the rules to suit the appellant's daughter's personal choice pertaining to her culture or tradition and that the school had acted within the ambit of the South African Schools Act 84 of 1996 (hereinafter "the Schools Act"). In other words, the Equality Court had failed to adequately consider whether the code of conduct was consistent with the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution") and the Equality Act, or whether it complied with the requirements of the empowering statute (the Schools Act and Guidelines). (See par 18. The Guidelines for the consideration of governing bodies in adopting a code of conduct for learners were promulgated in GN 776 in GG 1890 of 1998-05-15.) The appeal was accordingly allowed and the order of the Equality Court was replaced with an order declaring the decision to prohibit the wearing of a nose stud, in school, by Hindu/Indian learners, to be null and void.

### 1 4 *Recent developments*

The Department of Education and the school both appealed to the Constitutional Court and the case was argued during February 2007 (case number CCT 51/06 <http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/p3eeecxPXB/19030015/9> accessed 2007-05-16). It was argued, *inter alia*, that the learner in question had not been discriminated against and was not treated worse than any other learner. The school argued that it was better placed than a court to determine appropriate standards of dress and behaviour – issues which it considered to be fundamental to maintaining

discipline and a high standard of education at schools. The learner's mother argued specifically that her daughter's rights to equality (in terms of the Equality Act), freedom of religion and freedom of expression had been ignored. At the time of writing, the Constitutional Court had yet to deliver a judgment in the matter. In the interim, the learner had completed her matriculation examinations, and the National Guidelines on School Uniforms setting out how religious and cultural rights should be accommodated in schools have been promulgated. (The Minister of Education gave notice in terms of s 8(3) of the Schools Act of the National Guidelines on School Uniforms (hereinafter "the National Guidelines"). The Notice was published in GN 173 in GG 28538 of 2006-02-23 <http://www.info.gov.za/gazette/notices/2006/28538.pdf> accessed 2007-05-19. The earlier Draft National Guidelines on School Uniforms has been the subject of comment from the South African Human Rights Commission. This comment is available at [www.sahrc.org.za/sahrc\\_cms/downloads](http://www.sahrc.org.za/sahrc_cms/downloads) accessed on 2007-05-18). The National Guidelines states that a school's uniform policy or dress code should take into account religious and cultural diversity within the community served by the school and that measures should be included to accommodate learners whose religious beliefs are compromised by a uniform requirement. The National Guidelines go on to stipulate that if wearing a particular attire is part of the religious practice of learners or an obligation, schools should not, in terms of the Constitution, prohibit the wearing of such items. For example, male learners requesting to keep a beard as part of a religious practice may be required by the school to produce a letter from their religious teacher or organisation substantiating the validity of the request and the same substantiation is applicable to those who wish to wear certain particular attire (par 29 of the Schedule to the National Guidelines).

## **2        *Dlamini v Green Four Security***

([2006] 11 BLLR 1074 (LC); (2006) 27 ILJ 2098 (LC) (hereinafter "the *Dlamini* case"). The *Dlamini* case has been discussed by Laubscher "Employment Law" March 2007 *De Rebus* 47.) The applicants in this case pleaded that they were discriminated against because of their religious beliefs and that their dismissal was automatically unfair in terms of section 187(1)(f) of the Labour Relations Act 66 of 1995 (hereinafter "the LRA").

### **2 1        *Facts of the case***

It was common cause that the applicants belonged to the Baptised Nazareth Group and that they were dismissed for refusing to shave or trim their beards – a practice which they alleged was prohibited by their faith (par 2). It was further common cause that a rule requiring employees to be clean shaven existed in the workplace, that the applicants knew the rule by time the hearings which led to their dismissal began, and that dismissal was consistently applied as a sanction for employees in breach of the rule (par

5). The only challenge against the rationale for the rule was that it discriminated indirectly against the applicants on religious grounds.

## 2.2 *The Labour Court's approach*

Although the applicants pleaded a claim for automatically unfair dismissal in terms of section 187(1)(f) of the Labour Relations Act, the source of the right, according to the Labour Court, was the Constitution and the Labour Court adopted the following so-called "constitutional approach" in coming to its decision (par 10):

Stage one: Are the facts relied upon to substantiate the complaint of discrimination proved?

Stage two: If discrimination is proved, is it justified? In other words, was the workplace rule justifiable as an inherent requirement of the job?

Stage three: If it is an inherent requirement of the job, it may still be discriminatory if the impact was not ameliorated by a reasonable accommodation or modification of the rule, or an exemption from it (par 13).

## 2.3 *The Labour Court's decision*

Despite it being common cause that the applicants were Nazarenes who held the belief that they could not trim their beards, the Labour Court was of the opinion that the applicants had to show that trimming their beards was prohibited as a violation of an essential tenet of their faith in order to prove that they were the victims of indirect discrimination. (See par 14. Although the respondent did not question the applicants' beliefs, its principal defence was that the Nazareth faith did not prohibit the cutting of hair or beards: par 17.) The Labour Court justified this by arguing that failure to follow this approach would allow anyone to seek refuge under the pretext of religion to claim an accommodation, avoid an obligation, or simply break the rules (see par 23).

Unfortunately for the applicants, the expert witness called to testify regarding this issue testified in such a manner that the court questioned his expertise (the priest was unable to explain relevant portions of the Old Testament), the validity and relevance of the religious tenet (the court placed emphasis on the fact that no evidence had been led as to what the penance might be if the tenet was not adhered to), and the seriousness of the applicants in observing them (the applicants worked on the day of the Sabbath, which was prohibited and wore clothing woven of different materials in violation of other parts of the book of the Bible they relied upon in not shaving) (see par 19-25). The applicants were accordingly open to the criticism that they were selective about which tenets of their faith they chose to follow (see par 26).

The Labour Court concluded that the rule that security guards should be clean-shaven did not differentiate amongst employees as everyone had to be clean-shaven, and that the applicants had failed to discharge their onus

of proving that the no-shaving rule was an essential tenet of the Nazareth faith (see par 27). Although the Labour Court effectively dismissed the claim at the end of its first stage of enquiry, it proceeded to the second stage (in case it had erred during its earlier analysis) and assumed that the workplace rule contravened the applicants' religious freedom and that discrimination had been *prima facie* established (see par 29).

The Labour Court held that a balance must be struck between the competing interests of religious convictions on the one hand and, on the other, countervailing commercial concerns (Laubscher March 2007 *De Rebus* 48). As a general rule, the more serious the impact of the workplace rule on freedom of religion, the more persuasive or compelling the justification must be.

The respondent's policy required employees:

"To be personally clean, neat and hygienic. The employee acknowledges that he/she is in the Security Industry for which a clean-shaven facial appearance is required at all times" (see par 54).

The Labour Court relied on foreign law, the South African National Defence Force standing orders and the dress orders of the South African Police Service in concluding that neatness was the rationale for regulating beards and that the standard of neatness observed in security services was high. The court added that "the rule against wearing beards was driven by the practical and inherent need to be neat, to look like security guards and to project the respondent as a security company with a distinctive image." The Labour Court found that untrimmed beards, as a general proposition, are untidy and that the clean-shaven rule was justified as an inherent requirement of the job (see par 57-63).

Regarding the third stage identified, the Labour Court noted that the applicants had not alleged that the respondent's failure to accommodate them had rendered their dismissals unfair – the applicants had themselves testified that even if the respondent offered to accommodate them, they would not have accepted it. The Labour Court therefore considered it unnecessary to consider the question (Laubscher March 2007 *De Rebus* 48).

The Labour Court essentially balanced the religious rule preventing shaving against the workplace rule and considered the latter to prevail – in particular because the applicants were selective about which rules of their faith they followed and because the former rule was not enforced by any penalty (see par 66). In all the circumstances, the applicants were found not to have been discriminated against and their dismissal was accordingly held not to be automatically unfair.

### **3 Legal analysis**

#### **3.1 The Pillay case**

The *Pillay* case had to be resolved by application of the provisions of the Equality Act, rather than the Constitution directly, to the facts of the matter

(*Minister of Health v New Clicks SA (Pty) Ltd* 2006 2 SA 311 (CC) par 437). The Equality Act states that if a complainant makes out a *prima facie* case of discrimination, the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged or that the conduct is not based on one or more of the prohibited grounds contained in the Equality Act (s 13). "Discrimination" is defined to mean any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantage on, or withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds (s 1 of the Equality Act). "Prohibited grounds" in the Equality Act are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, conscience, religion, belief, culture, language and birth. (S 1: "prohibited grounds" also includes any other ground where discrimination based on that other ground causes or perpetuates systematic disadvantage, undermines human dignity or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on one of the grounds listed above.) If the discrimination is found to have taken place on such a listed ground, then it is unfair, unless the respondent proves that the discrimination is fair (s 13(2)(a)).

The court considered the applicant to have succeeded in establishing a *prima facie* case of discrimination by withholding from her group the benefit, opportunity and advantage of enjoying fully their culture and/or of practising their religion. This would be the case if the school's policy indirectly prevented one category of student from being able to exercise their religious or cultural beliefs at school, whereas other learners whose religions or cultures align with the school policy are in the position of being able to comply with school rules and yet maintain their own religious or cultural identity. One might assume that proper consideration must be given to the religion and culture to which the court deferred before proceeding to the next stage of enquiry. Because of the wording of the Equality Act (which contains a broad list of prohibited grounds and no definition of concepts such as "disadvantage"), it is strictly speaking unnecessary to differentiate between culture and religion at this stage of the enquiry (see *Minister of Environmental Affairs and Tourism v George* 2007 3 SA 62 (SCA) 67A).

Despite the cited grounds of the Constitutional Court challenge referred to above (denying discrimination and alleging that the learner was not treated worse than any other learner), it is submitted that a proper construction of section 13 makes it extremely difficult for the respondents in this case to prove that the indirect discrimination did not take place as alleged, or that the conduct in question was not based on one or more of the prohibited grounds. The only remaining option for the respondents in terms of the Equality Act was, in my view, to prove that the discrimination was fair. It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination, or the members of such groups or categories of persons (s 14(1)). The court held that this exception was clearly not applicable in *Pillay's* case (see par 44). In order to decide whether the respondents had proved that the

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discrimination was fair, the following must be taken into account in terms of section 14(2) and 14(3) of the Equality Act. (The factors listed include the considerations that are taken into account to determine unfairness under s 9(3) of the Constitution and the criteria in the limitation clause of the Bill of Rights. See Currie and De Waal *The Bill of Rights Handbook* 5ed (2005) 269 for support for this approach.)

- (a) the context;
- (b) whether the discrimination impairs or is likely to impair human dignity;
- (c) the impact or likely impact of the discrimination on the complainant;
- (d) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
- (e) the nature and extent of the discrimination;
- (f) whether the discrimination is systematic in nature;
- (g) whether the discrimination has a legitimate purpose;
- (h) whether and to what extent the discrimination achieves its purpose;
- (i) whether there are less restrictive and less disadvantageous means to achieve the purpose;
- (j) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to
  - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
  - (ii) accommodate the diversity; and
- (k) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

Applying these criteria in order to decide whether the respondent should succeed in discharging its onus of proving that the discrimination is fair is a difficult task. The court held that the appellant and her daughter are members of a Hindu/Indian group that had been subjected to systemic inequalities in the past (par 48) and that the discrimination served no legitimate purpose. In essence, the decision at the Constitutional Court may turn upon the weight that the court attaches to the alleged purpose of the school rule in question in order to balance the negative impact of the discrimination on the applicant's group. In order to consider what would be appropriate in this regard, it is necessary to consider provisions of the Schools Act in greater detail.

The preparation of codes of conduct in schools is a requirement imposed on the governing body of a public school by section 8(1) of the Schools Act. The Minister of Education may, in terms of section 8(3) of the Schools Act, determine guidelines for the consideration of governing bodies in adopting a code of conduct for learners. The preamble to the Schools Act states that



the country requires a new national system for schools which will advance democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance and protect and advance our diverse cultures and languages and uphold the rights of learners, parents and educators (Preamble to the Schools Act). The Guidelines provide that the code of conduct of a school must, among other things, be subject to the Constitution, the Schools Act and the Provincial Legislation and reflect constitutional democracy, human rights and transparency; that every learner has an inherent dignity and has the right to have his/her human dignity respected and that that implies mutual respect including respect for one another's convictions and cultural traditions (see par 33). The Guidelines also provide that the learner's freedom of expression is more than freedom of speech and that it includes the right to seek, hear, read and wear.

Applying the considerations contained in sections 14(2) and (3) of the Equality Act, the court held that the respondents had provided no evidence of how the smooth running of the school could be affected by the wearing of the nose stud and that the existence of concerns relating to discipline must be unequivocally established and be sufficient for the infringement of a constitutional right or freedom to be justified (par 60). The court accordingly concluded that:

"The indirect discrimination, on the evidence, is not capable of objective substantiation in terms of criteria intrinsic to the educational system. It is not authorised by the empowering statute. It does not accommodate diversity. Such indirect discrimination is, in my view, arbitrary, unlawful, unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom" (par 68).

Considering the analysis conducted above, it is difficult to find a legal basis for disagreeing with the conclusion reached by the court, assuming that the Constitutional Court indeed rules on the matter instead of considering it to be not justiciable on the basis of mootness. There are, however, some important issues which merit some further comment in this regard.

The wearing of nose studs by young girls may be part of Indian culture, but there is no clear authority to indicate that it is a strict religious requirement for all Hindu females. (See Mchunu "Nose Stud Girl Loses" (30/09/05) [http://www.news24.com/News24/South\\_Africa/News/0,,2-7-1442\\_1809086\\_00.html](http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1809086_00.html) accessed on 2007-05-31. On Hindu law generally, see Menski *Hindu Law: Beyond Tradition and Modernity* (2003). For some background on the origin of the custom, see Raja "Adorning the Nose" (25/01/06) <http://www.thehindu.com/2006/01/25/stories/2006012500040500.htm>.) In fact, because of the nature of Hinduism, which is known to be one of the least prescriptive of all religions, it is difficult to pinpoint precisely what falls within the boundary of the Hindu religion, and what is in fact custom or culture. There are also vast differences in the actual observation of religious and cultural practices amongst Hindus themselves. What might be a family tradition which has been followed by generations of one particular family

may mistakenly be considered to be part of proper Indian culture, assuming of course that such a concept is capable of precise definition. Deciding between tolerating such beliefs (which at best form part of a person's culture and at worst are the sort of "idiosyncratic practice" referred to by the second respondent), affording legal protection to their proponents and rejecting them requires further investigation and research. A related issue is the weight which the court placed upon the testimony of the expert called to testify on the applicant's behalf. If indeed this was the decisive factor in the applicant establishing a *prima facie* case of discrimination, it may be important for respondents in similar future cases to counter such evidence with expert testimony of their own regarding the precise scope of a person's religion and culture. In the case under discussion, the respondents acknowledged that the evidence established that the wearing of a nose stud is of cultural significance to the appellant, her daughter and their group (par 66).

There also appears to be some tension between the broad protection afforded by the Equality Act and the provisions of the National Guidelines on School Uniforms. Whereas the former protects against discrimination on the prohibited grounds on an equal basis, the National Guidelines appear to encourage greater protection for *religious* beliefs and practices. The only reference to be found in the National Guidelines relating to "culture" pertains to taking into account the religious and cultural diversity within the community served by the school. Whether this is a mandate to schools to accommodate diversity *within* such a community, and the extent to which the courts will accommodate such diversity, are questions which remain to be answered.

### 32 *The Dlamini case*

As far as the *Dlamini* case is concerned, section 187(1)(f) renders automatically unfair dismissals that are the result of, or linked to, discrimination against employees on arbitrary grounds including religion and culture. There is a clear overlap between this prohibition and section 6 of the Employment Equity Act (55 of 1998, hereinafter "the EEA"). (S 6(1) of the EEA provides that no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including religion and culture. S 6(2)(b) states that it is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.) An employee who is dismissed for discriminatory reasons could, theoretically, seek relief either under the LRA or the EEA (Grogan *Dismissal Law* (2002) 75). Section 187(1)(f) requires not only that a dismissal be discriminatory, but also that it must be based on an arbitrary ground and be unfair (Grogan 75).

According to Grogan, the first step in the inquiry into a case involving an allegation of unfair discrimination is to ask whether the act or conduct complained of in fact amounts to discrimination in the neutral sense. Discrimination can exist in dismissal law without differential treatment in cases where employees are dismissed for reasons that appear on the face of it to be arbitrary or unacceptable. (*HOSPERSA obo Venter v SA Nursing*

*Council* [2006] 6 BLLR 558 (LC); and Grogan 76. This principle appears to have been ignored in the test formulated in the case of *Mafofane v Rustenberg Platinum Mines Ltd* [2003] 10 BLLR 999 (LC.) Grogan cites the following example in support of this: if an employee is dismissed because the employee is of a particular religious persuasion, that employee does not have to prove that other employees of the same religious persuasion, or of different religious persuasions, were not dismissed because proof that the employee was dismissed for that reason is sufficient to prove discrimination (*HOSPERSA obo Venter v SA Nursing Council supra*; and *Mafofane v Rustenberg Platinum Mines Ltd supra*).

Discrimination is a particular form of differentiation which occurs on any of the listed grounds or on analogous grounds (Currie and De Waal 243). When a listed ground is allegedly involved, however, it is for the applicant to establish that the differentiation is based on one or other of the listed grounds. The applicants in *Dlamini* sought to do this by relying upon the ground of religion. As no further details are provided in labour legislation regarding the scope of this ground, reference may be had to the equality clause of the Constitution, which also contains a prohibited list of grounds regarding discrimination. In this regard, it is generally accepted that grounds contained in the equality clause such as religion, conscience, belief, culture and language (these grounds are all referred to in s 187 of the LRA, s 6 of the EEA and s 9 of the Constitution) reinforce the specific protections provided by the rights to freedom of religion and the minority rights contained in other sections of the Constitution (Currie and De Waal 256). In fact, it is true that most of the cases implicating these grounds have been decided on the basis of their own specific constitutional rights (Albertyn "Equality" in Cheadle, Davis and Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 94). It is therefore appropriate to consider the constitutional right to freedom of religion.

The Constitutional Court has held that the right to freedom of religion in section 15(1) of the Constitution protects religious belief and the practice or manifestation of belief (*Prince v President, Cape Law Society* 2001 2 SA 388 (CC) par 38). The freedom of religion implies absence of coercion or restraint and may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs (*Prince v President, Cape Law Society supra* par 38; and see Farlam "Freedom of Religion, Belief and Opinion" in Woolman, Roux, Klaaren, Stein and Chaskalson (eds) *Constitutional Law of South Africa* 2ed (2006) 41-18). The coercion may be indirect and the Constitutional Court has confirmed that constraints on religion may be imposed in subtle ways (*S v Lawrence*; *S v Negal*; *S v Solberg* 1997 4 SA 1176 (CC); 1997 (10) BCLR 1348 (CC) par 93 and 114).

It has been recognised that determining whether the right to freedom of religion is contravened by an ostensibly neutral rule that may have a disparate effect on various religions and from which some affected believers request an exemption, is a complicated issue (Farlam 41-30). According to Woolman *et al*, in such cases it is necessary for a court to determine whether there is a "sincerely held belief" (whether held by the complainant or

other persons in relation to whom the challenge is brought) that has been “sufficiently burdened” (Farlam 41-31). Importantly, it has been submitted that “in making these enquiries, the court should avoid becoming entangled in doctrinal disputes or imposing its own views as to the validity or worth of the religious beliefs in question” (Farlam 41-31). The following principles are relevant in deciding whether the applicants held a sincere belief (Farlam 41-31):

- The court must conduct an enquiry regarding the religious belief which has been affected but should be sensitive to the varieties of beliefs and the constitutional commitment to diversity.
- Religious beliefs do not have to be objectively reasonable or sophisticated to be worthy of protection for the adherence thereto to be regarded as sincere.
- The sincerity of a complainant’s beliefs is not necessarily called into question by the fact that other members of the religion disagree with his or her interpretation of the religion.
- Only in exceptional cases will the court conclude that a religious belief is not sincerely held.

Applying these factors to the *Dlamini* case results in the conclusion that the applicants held a sincere belief regarding the wearing of beards. It is more problematic to decide whether the practice was central to their faith and whether the applicants’ religion was “sufficiently burdened” by the workplace rule. In other words, are practices which form part of an individual’s personal beliefs protected as part of the right to religious freedom? (Farlam 41-33).

In contrast to the approach followed by lower courts in this regard (see *Christian Education SA v Minister of Education* 1999 9 BCLR 951 (SE); *Garden Cities Incorporated Association Not For Gain v Northpine Islamic Society* 1999 2 SA 257; and *cf Du Plessis* “Doing Damage to Freedom of Religion” 2000 11 *Stell LR* 295-305), the Constitutional Court has held that courts should not be concerned with whether, as a matter of religious doctrine, a particular practice is central to a religion (*Prince v President, Cape Law Society supra* par 42).

“Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational ... 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” (*Prince v President, Cape Law Society supra* as quoted in Farlam 41-34; 41-35; and *cf Pieterse* “Religious Confusion” 2001 64 *THRHR* 672).

It is the last part of this quotation which the Labour Court placed reliance upon in *Dlamini*. By contrast, *Woolman et al* conclude that if freedom of religion is to be properly respected, even the most unorthodox beliefs and convictions should be given some credence and that the court should only

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require “credible explanation” for the religious practice under discussion (Farlam 41-38).

The Labour Court must be criticised for going beyond these principles in questioning the centrality of the applicants’ belief in *Dlamini*. The judge criticised the expert witness called by the applicants for being unable to explain the source of a biblical verse which directs adherents not to cut their hair or clip their beards. The Labour Court held that the applicants had failed to show that the rule still existed or was of current relevance (par 24). The applicants were also criticised for failing to lead evidence in chief as to what the “penance might ensue if the tenet was not adhered to”. The Labour Court also made much of the fact that the applicants were selective about which tenets of their faith they followed (by implication accepting that their decision not to shave was an essential tenet of their faith). It is submitted that the Labour Court misdirected itself in using criteria such as relevance, penance and consistency in rejecting the applicants’ contentions. A number of people would struggle to explain the precise reason for every religious practice they adhere to and many self-proclaimed religious people may be criticised for not maintaining and being consistent in respect of each and every religious directive. In essence, a close inspection of the judgment results in the impression that the Labour Court found against the applicants, at this stage of the enquiry, on the basis of the poor testimony delivered by the expert witness they had called.

The judge was clearly unimpressed with the witness and commented that his “only qualification” was that he was a preacher since 1989 and had performed various ceremonies. The Labour Court went on to say that there was no evidence that the witness had ever testified previously as an expert in his field or qualified himself in any other way, without explaining the relevance of this assertion (par 19). The Labour Court, remarkably, then arrived at the conclusion that the cross-examination of the expert had not only put his expertise into issue, but also raised the validity and relevance of the religious tenet and the seriousness of the applicants in observing them (par 21). It must be submitted that the decision of the Labour Court to completely reject the evidence of the witness was erroneous and that a proper analysis of the germane Constitutional Court decisions on the point would have resulted in the opposite conclusion. The judgment also suffers from not having considered the impact, if any, of the limitations clause of the Constitution as part of the appropriate analysis in this type of case.

In cases of indirect discrimination, the employee chooses some apparently neutral criterion for dismissal (such as being clean shaven) which has as a consequence that employees who happen to possess particular attributes are dismissed (Grogan 79-80). In other words, indirect discrimination takes place when the action (such as implementing a policy about being clean shaven) has results which are discriminatory even though the employer does not intend to discriminate (Grogan 79; and also see *CWIU v Johnson & Johnson (Pty) Ltd* [1997] 9 BLLR 1186 (LC)).

Once it is found that the dismissal of an employee was discriminatory, the court must establish whether the discrimination was unfair. Section 187(f)

links the notion of unfairness to arbitrariness. (Grogan 81. In *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* [1997] 11 BLLR 1438 (LC) the court held that discrimination would be unfair if it was reprehensible in terms of society's prevailing norms and that this depended on the objective of the discrimination and the means used to achieve it.) Discrimination is arbitrary if it is based on any of the grounds listed in the section, because they are generally the conditions or attributes for which an individual is not responsible, over which the person has no control and which are normally regarded as irrelevant to an assessment of a person's ability to work (Grogan 81). A dismissal effected for a reason such as religion is by definition arbitrary and unfair, according to Grogan, unless the defence that a dismissal for any of these reasons is linked to the inherent requirements of the job applies (Grogan 81).

Section 187(2)(a) provides that "despite subsection (1)(f) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job". "Inherent requirements" depend upon the nature of the work and the requirement must relate to the employee's ability to perform the work. Although the law offers no clear guidance on the meaning of the phrase, a requirement is inherent to a particular job if the work cannot be performed without the requirement being met. (See *IMATU & Ano v City of Cape Town* [2005] 11 BLLR 1084 (CC); and Grogan 82.) In *Dlamini*, the court held, correctly in my view, that an inherent requirement of the job must be "an indispensable attribute which must relate in an inescapable way to the performance of the job" (par 40). In other words, a plea that discriminatory selection criteria is fair because it is related to an inherent requirement of a job is sustainable only when possession of such an attribute is indispensable for the performance of the work concerned (*Whitehead v Woolworths (Pty) Ltd* [1999] 8 BLLR 862 (LC)). Such a dismissal, linked to the inherent requirement of a job, cannot be "arbitrary".

The Labour Court has previously found a job's inherent requirements to take precedence over constitutional rights. In particular, the Labour Court has held that the operational requirements of an employer or the inherent requirement of a job takes precedence over the practice of faith by religious minorities on working days (see *FAWU v Rainbow Chicken Farms* 2000 21 ILJ 615 (LC)). In the unreported Labour Court case of *Carlin Hambury v African Hide Trading Corporation* (see Modise and Wilkins "A Job's Inherent Requirements Take Precedence" February 2007 *Business Day* 9), the employee was a Seventh Day Adventist who could not work overtime on a Saturday because of his religious convictions. The employee claimed that he was automatically unfairly dismissed on the grounds of his religious beliefs after he had been dismissed for refusing to work overtime on Saturdays. The Labour Court held that the dismissal was not an automatically unfair dismissal as the employee was employed as a network administrator, and an inherent requirement of such a job was that he be available for information technology projects on Saturdays (see Modise and Wilkins February 2007 *Business Day* 9).

One must, however, question whether it is an inherent requirement of the job to be clean shaven on the basis alluded to by the Labour Court, namely that untrimmed beards are generally untidy. Whereas it may be understandable to compel certain behaviour (such as the wearing of a hard hat) for reasons of safety, it is submitted that the Labour Court erred in considering the image or “brand” of neatness which the respondent wished to portray as constituting an inherent requirement of the job. Further attention is given to this point in conclusion. The analogy drawn between the security company for which the applicants worked in *Dlamini* and the South African National Defence Force and South African Police Service guidelines on dress is also questionable, as is the court's decision to balance the competing rights of the constitutional guarantee of religious freedom and the sanctity of the workplace rule in favour of the latter.

#### 4 Conclusion

In attempting to undertake a legal analysis which explains the varying outcomes in these cases, the differences between the cases must be noted. The *Pillay* case was decided in terms of the Equality Act, initially by the Equality Court and then by the Natal Provincial Division of the High Court on appeal. The *Dlamini* case is a labour matter and was adjudicated by the Labour Court adopting a constitutional approach to the provisions of the LRA. The similarities between the two cases are also self-evident: both matters, broadly speaking, involve issues of equality, religion and minority groups of people. In both cases, applying the *Harksen v Lane NO* (1998 1 SA 300 (CC)) stages of enquiry, there appears to be no differentiation between people or categories of people. In fact, the apparently neutral criteria selected by the school in *Pillay* and by the company in *Dlamini* have the consequence of indirect discrimination in that students or employees who happen to adopt certain religious or cultural beliefs are negatively impacted. So how can the differing outcomes be reconciled or explained?

The *Pillay* decision was able to rely squarely upon the cultural traditions of the appellant's family, rather than solely upon their religious beliefs. In addition to being contained as a specific constitutional right (s 30 of the Constitution: everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights), culture is a listed, prohibited ground of discrimination in the LRA, the EEA and the Equality Act. Unlike the analysis (based upon the religious rights of the applicants) conducted in *Dlamini*, the court in *Pillay*, once it had established that the wearing of a nose ring by Hindu women of the appellant's community had cultural or religious significance, did not question the centrality of the belief of the nose stud to their cultural practices and did not ask whether the nose stud was a “central tenet” of that culture. Had it been mandated to do so by the Equality Act, the decision might have been more in line with the finding in *Dlamini*. It is commonly understood that “culture” is a term which is difficult to define and which can be used to explain a range of belief systems which outsiders to that group of people may find difficult to

fathom. While there is some overlap with a community's religious convictions, specific culture practices may differ even amongst families who adhere to the same faith. Whereas religious beliefs might be contained in some or other scripture, cultural tradition is generally passed down from generation to generation as a way of life and is often difficult to describe in an accurate and precise way.

A related issue which requires some consideration is that the appellant's daughter in *Pillay's* case may be criticised (as per the analysis conducted in *Dlamini*) for being selective in applying her cultural beliefs. No mention is made, for example, that the girl wore Indian traditional dress to school or spoke an Indian language – both of which would have been part of her community's cultural beliefs. The courts have shown an inclination to avoid limitation clause analysis of section 15 where possible, preferring instead to restrict the scope of the right. The effect of this is that not every practice claiming to be an exercise of the freedom of religion, belief, conscience and thought, is treated as such by the courts (Currie and De Waal 341). Currie and De Waal cite three techniques used to restrict the scope of the right: the first is to question the sincerity of the claimant's belief, the second technique is to require the claimant to show a "substantial burden" on the exercise of the freedom of religion, or that the prohibited practice is a "central tenet" of the religion (Currie and De Waal 342), and the third method of avoiding limitation analysis is to not protect practices under section 15 that are specifically excluded from protection elsewhere in the Constitution – a form of contextual interpretation (Currie and De Waal 342). This sort of analysis is not evident when one looks at the right to culture. The very problem which the court in *Dlamini* addressed – namely that anyone could seek refuge under the pretext of religion to claim an accommodation, avoid an obligation, or simply break the rules, remains unaddressed when it comes to questions of culture considering the protection afforded by the court in *Pillay* (see par 23).

A part of the explanation for the differing outcomes may lie in the fact that the Equality Act does not apply to workplace discrimination to the extent that this is covered by the EEA. (S 5(3) of the Equality Act provides that it does not apply to any person to whom and to the extent that the Employment Equity Act 55 of 1998 applies. A complainant will, therefore, not be able to choose to proceed under one or the other statute. Where the Employment Equity Act applies it excludes the operation of the Equality Act: Currie and De Waal 268.) Once the court in *Pillay* applied the criteria contained in section 14 of the Equality Act, rather than questioning the appellant along the lines of the court's enquiry in *Dlamini*, the school's prospects of succeeding were greatly reduced. Importantly, the court held that "the form of discrimination which results from a school's code of conduct is invisible as it is meted out through practices and rules that appear to be neutral, yet operate to exclude the disfavoured groups" (the Equality Act). The respondents had, so the court found, allowed unfair discrimination to creep in under the guise of discipline in circumstances where there was a less restrictive means of achieving their purpose, namely by educating the students about cultural and religious differences (see par 60-62). Ultimately



the problem was that the impugned provision of the code of conduct allowed the wearing, in school, of jewellery in the form of earrings – plain round studs/sleepers, probably for fashion and adornment purposes, but forbid the wearing, in school, of a very tiny nose stud, for cultural and/or religious purposes (par 66).

The *Pillay* case raises some important questions in the context of private/independent schools. The *Wittmann* decision held that the right to freedom of religion had been waived by the applicant submitting to the school's constitution and rules (including the religious instruction requirement which the applicant objected to) when she enrolled her daughter. The impact of the judgment in *Pillay* on the freedom of independent schools to make rules in contravention with the provisions of the Equality Act remains to be seen. One of the more general issues brought into issue by the judgments concerns the value of documents such as a school's code of conduct or an employer's disciplinary or employment policy. The *Pillay* decision raises the question of the worth of such documentation in circumstances where the court adopts an approach which subjugates all terms to the law or policy prevalent at the time of adjudication of a dispute. (The problem is reminiscent of that faced by the Cape Provincial Division in the case of *Minister of Education v Syfrets Trust Ltd* 2006 4 SA 205 (C).)

Finally, it was important that the court rejected the respondent's contention that the wearing of the nose stud affected the smooth running of the school. Similarly, it may be asked precisely how a beard affects one's performance at work and whether this is truly an inherent requirement of the job. Indians in India would be aghast to consider, for example, that Muslims and Sikhs were considered to be untidy in one industry in South Africa merely because they had kept facial hair in line with their faith. Just as Ms Pillay's problem was unconnected to her attitude or conduct at school, one wonders whether the comments made about the security industry's need for a clean-shaven face as an inherent requirement of the job have any merit.

Finally, the role which the respective expert witnesses played in the two cases would appear to have been decisive in explaining the different outcomes reached – in *Pillay*, providing a satisfactory explanation for the so-called idiosyncratic practice of the nose stud, and in *Dlamini*, failing to provide backing for what appears to be a genuinely held religious belief – albeit of only part of that religion. This may serve as a message to parties involved in cases pertaining to questions of unfair discrimination to ensure that they are prepared to delve into the content of constitutional rights such as religion and culture by having proper expertise available to substantiate their versions on the subject.

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