

**NOVEMBER 2013**

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## *1. From the General Secretary's Desk*

The ELRC is pleased to provide stakeholders with its November 2013 Labour Bulletin. It contains notes on recent case law of relevance to the education sector as well as some critical commentary on decided cases.

We hope to both inform and stimulate readers. Some of the issues covered are contentious. It goes without saying that the views are those of the authors alone. We would encourage an exchange of views on the jurisprudence generated by the courts and by the ELRC because these rulings shape the way the sector operates.

We trust you will find value in these pages.

**Ms NO Foca**  
ELRC, General Secretary

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## *2. Mutual accommodation of religious differences in the workplace – a jostling of rights*

### **1. INTRODUCTION**

“The responsibility of tolerance lies with those who have the wider vision.”

Bedevilled with social, economic, political and legal differences our society, not unlike others, reverberates with the drumbeat of diversity. Differences transposed into diversities lead to discordancy and potential for conflict underscored by the observation that “Contradictions are an essential part of life and never cease tearing one apart”. Life presents us with a moto perpetuo (perpetual motion) of contradictions, as stated by Capulet’s “Well, we were born to die!” Most vividly is the recent Marikana debacle – such acts of gross, macabre brutality are irreconcilable and intolerable in a constitutional democracy. Important instruments, addressing diversification in general and religion specifically exist by way of our Bill of Rights and relevant legislation. This paper focuses on how the doctrine of reasonable accommodation on the part of the employer should be extended to embrace a notion of mutual accommodation on the part of the employer and employee as a fairer means of adjudicating claims of religious discrimination – it is also dispositive of constructively dealing

with the phenomena of pluralism. Employment of mutual accommodation in Canada makes it a suitable international comparator. Furthermore, it is also a country that has not influenced our jurisprudence insignificantly richly.

## **2. RELIGION AND THE WORKPLACE**

### **2.1 Notional definition**

Religion, like spiritual, faith, political, conscientious and belief systems shares the same common denominator – they are subjective and intrinsically personal to the individual or a particular body of persons forming an association. Religious freedom has been aptly described as “perhaps the most personal of human rights, as it goes to the very core of a human being”. The freedom to exercise one’s faith (religion) in terms of the dictates of its doctrines in a constitutional society based on human dignity, equality, freedom of association and the right to the non-deprivation of property is protected under the auspices of the Bill of Rights chapter of the South African Constitution (the Constitution). Direct provision is made for the right to religion, its expression and association. In parity of reasoning, the right not to be religious; to be atheistic or agnostic is a belief equally deserving of protection. The manifestation of religion plays itself out in private as well as public spheres.

Establishing whether a proscribed act has occurred requiring legal redress is often reliant on a legal definition, alternatively, an interpretation of facts and circumstances conducing to a legal conclusion. This aligns itself with a basic tenet of the rule of law that all citizens are entitled to foreknowledge of the law. The extent to which religion lends itself (un)favourably as the subject matter of a definition or an open-ended interpretation is largely determined by the limitation(s), if any, that can be attached to its scope and meaning.

Certain definitions are satisfactorily replete to leave no doubt concerning their meaning or purpose. Religion, however, as a term is intensely contextually complex in its depth and breadth of meaning. Its elasticity allows it to permeate the confines of a rigidified definition. To be understood and applied constructively in disputes involving discrimination it is submitted that an open-ended casuistic, judicial, interpretive approach of “balancing competing fundamental rights and freedoms” is required. Aside from extant case authority, there will be an exponential jurisprudential development of

the term, which will also be informed by guidelines offered in terms of the South African Charter of Religious Rights and Freedoms (the SACRRAF).

Although no universal definition exists for religion; the debate concerning what comprises religion is universal. Conversely, does an individual, society or body of persons (an association) that is not “religious” fall to be described as being secular? The multi-diversity of debate on what constitutes religion as opposed to secularism attracts closer analysis given that both terms are material to the question of the basis upon which differentiation takes place. Added to such complexities are issues such as the extent to which individuals of the same faith or belief may vary in degrees of compliance with the tenets of their religion. Is an individual more compliant with her faith more deserving of protection in terms of equality provisions than one who is less compliant? Should differentiation occur, if so, on what basis for it to be considered fair? These are some of the issues our courts are called upon to make value-laden judgments. To what degree should the religion or the religious belief manifest itself on the part of the individual or association before a legally valid allegation is made of unfair treatment?

### **2.2 Workplace concerns**

Discrimination based on religion in the workplace is of particular concern given the importance of striving to achieve a harmonious working environment and the fact that work is an unavoidable means and need for one to earn a living. Discrimination against an employee by an employer, or any other person, based on religion is principally regulated by the legislative provisions of the EEA. Mere mention of the word “discrimination” tends to pique our senses into automatically considering same to be unfair. Plurality of religion induces one to consider more than the stereotypical discrimination perpetrated by an employer against a worker. Some additional issues arising therefrom are:

- Discrimination and / or unfair labour practices between workers themselves; discrimination by a worker against the employer or employer organization;
- How employer organizations justify excluding workers, including applicants for employment, not of the same religious faith;
- Tests our courts apply when adjudicating religious discrimination disputes; and the

importance of consistency in the application of tests to consider justifications to a claim of unfair discrimination.

### **2.3 Equality in the workplace**

Equality in the context of South African law draws heavily on a history marked by human rights violations where basic entitlements and benefits were withheld from persons on capricious grounds of race, culture, gender or sexual orientation. Discrimination based on race, which was once most prolific now reveals itself in various manifestations, including, but not limited to religion. Reference to equality gives rise to diverse opinions on its meaning as well as that of the concept of fairness. Treating all persons equally as a measure of ensuring fairness is a potential recipe for disaster in a heterogeneous society demanding fair treatment as opposed to equal or same treatment. Since formal equality emphasizes form above substance, the outcome may not always be fair. What is required rather is not equal treatment for all, but treating people fairly in accordance with either specific needs or requirements of the employee or the employer. The learned authors Van Niekerk et al refer to “people who are similarly situated should be treated similarly, and people who are not similarly situated should not be treated alike”. Treating everyone in the same manner in respect of heterogeneity may well result in unfair unequal treatment and a violation of human dignity. Allowance must be made to treat different people differently, for reasons that are fair and in a manner consonant with regard to their status and worth as human beings.

Accordingly, the notion of substantive equality is one which is applied in favour of formal equality on account of the fact that it acknowledges differences that require appropriate treatment in terms of certain norms and values. Equality relies for its life-blood on the right to human dignity, stated by O'Regan J as “[...] the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern ...” Human dignity is a social value attached to human beings acknowledging their autonomous self-worth, thereby forming an inexorable ingredient of the right to equality in the substantive sense. Alternatively, it may be used to galvanize non-arbitrary treatment measures. This much can be deduced from the obiter statement by Basson J that: “[The] right to dignity is seriously impaired due to the unfair discrimination.”

Freedom of association is an underpinning right to the right to equality ensuring that all individuals may make unfettered choices as to the manner in which they live their lives. It is a right through which equality, as well as dignity, is asserted not only to exercise a particular religious belief but also to transcend an individual status and become members of associations through which rights and interests are effectively exercised as a collective. When addressing religious pluralism and the balancing of competing rights and interests it is important to keep in mind that this is addressed optimally in terms of substantive equality as opposed to formal equality.

### **2.4 Workplace discrimination**

Everyone has a constitutional right to fair labour practices. This has been interpreted to apply as much to the employer as it does the employee. The constitution purports to endorse a formal equality concept by providing that everyone is equal before the law and has the right to equal protection and benefit of the law. However, the express constitutional provision that no person may discriminate unfairly directly or indirectly against another clears the path to allow for instances of differentiation arising wherein treating somebody differently is actually not unfair. The inference is that, if differentiation was not permitted and equal treatment was simply administered, such equal treatment would have been unfair. An example is where no differentiation is made between the type of treatment given to HIV-AIDS and Tuberculosis patients on the basis that in both instances one is dealing with patients who must be treated equally through administering an aspirin. Fairness demands that we differentiate in the type of treatment. In Van Der Linde, the court found that the essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and respect. The mere differentiation of people is therefore not necessarily considered to be unfair discrimination; a substantive schism is required.

## **3. RELIGIOUS RIGHTS FRAMEWORK**

### **3.1 Fundamental and legislative rights**

Our democratic state is premised on the express provision of the supremacy of the Constitution and the rule of law. These imperatives charge our judges with interpreting legislation through a value-laden prism. The transformation of South Africa from an oppressive regime to a rights-based order obliges such an interpretation. That

“[E]veryone is equal before the law and has the right to equal protection and benefit of the law” is buttressed by the fact that neither the state nor any person may “unfairly discriminate directly or indirectly against anyone [...] on the basis of religion.” National legislation to “prevent or prohibit unfair discrimination” is expressly required to provide statutory mechanisms to give expression to the capacious notions of the protection of equality which are not self-executing. This fulfils a two-fold purpose. First, it provides the necessary framework giving effect to the prohibition against unfair discrimination. Second, it enables persons who have been discriminated against unfairly on the basis of religion a means by which to formulate their cause of action against the transgressor.

### 3.2 Equality in terms of the EEA

The EEA aims at achieving equity in the workplace by promoting equal opportunity and fair treatment through eliminating unfair discrimination and implementing affirmative action measures. Conceptually, unfair discrimination implies instances where one encounters “fair” discrimination. Understandably, discrimination or differentiation per se can be benign. Contextualization is peremptory. On the one hand we have bad or unfair (derogatory, pejorative, adverse, prejudicial) conduct rendering differentiation unfair and on the other hand, good or fair (with reference to principles giving effect to values necessary to realize a particular individual’s needs) conduct rendering the differentiation fair. We need therefore first to decide whether differentiation or preferential treatment has taken place before we turn our attention to consider whether it is fair or unfair.

Express provision is made by the EEA for the elimination of unfair discrimination and the prohibition of unfair discrimination. Two circumstances are listed when it is not unfair to discriminate. It has been pointed out that South Africa is distinguishable for confining discrimination to a legal definition, as borne out by our legislation that refers to “unfair discrimination”. This manifestation appears to have its origins in the development of the unfair labour-practice jurisprudence of the Industrial Court, which culminated in “unfair discrimination” being reflected in our legislation. Interpretation of the EEA must be in compliance with the Constitution, taking into account any relevant code of good practice used in the EEA or any other Act, and comply with any international obligations of the Republic, in

particular the ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation (C 111). Discrimination is defined by Article 1 of Convention 111 as:

“(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality or opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers’ and workers’ organisations, where such exist, and with other appropriate bodies”.

Article 1(a) endorses the notion of substantive equality and human dignity. An exercise of balancing of fundamental rights, it is submitted, must be executed subject to the rule of law and its derivatives, such as rationality, good faith, proportionality, reasonableness and fairness. Non-self-executing provisions of the Constitution, namely s 9 resulted in the EEA, as with the LRA. However, PEPUDA is the legislation utilized in non-workplace-discrimination disputes.

Criticism has been leveled against the manner in which our courts have inconsistently and incorrectly dealt with discrimination disputes under sanctuary provided for a discrimination test as set out in *Harksen v Lane NO*. Both the EEA and LRA are enabling legislation and in the interests of the principle of subsidiarity must be relied upon in discrimination-workplace disputes without bypassing same and relying directly on section 9 of the Constitution. The fact that both Acts are obliged to give effect to Convention 111 also provides our courts with essential guidelines when dealing with religious discrimination disputes.

It is submitted that the argument advanced by Du Toit in this regard is cogent and coherent.

However, further critical analysis and evaluation thereof will be in order to establish:

- The congruency between the reasonable accommodation concept as defined in section 1 of the EEA and the provisions of Convention 111

taking into account that no right is absolute; and

- The extent to which Convention 111 addresses claims, defenses and limitations on the exercise of rights adequately.

Emphasis is placed on analyzing the EEA and LRA as the appropriate legislative framework due to their relevance to Labour Law. Clearly, to the extent that the Constitution is the supreme law of the land, the aforesaid Acts, and ancillary legislation must give effect to any constitutional obligations and principles that have come to bare their own influences or limitations contained elsewhere in the Bill of Rights, the rule of law, the manner in which religious observances may be conducted at state or state-aided institutions, the manner in which freedom of expression may be exercised and the reasonable accommodation or tolerance of religious beliefs.

### **3.3 Equality in terms of the LRA and dispute resolution**

Upholding fundamental labour-law rights inclusive of the right to fair labour practices is an express purpose of the LRA. As previously stated, the right to fair labour practices is equally applicable to both employer and worker alike. Unfair labour practices are currently codified in terms of the LRA. The question arises whether such codification conduces to undue regularization and compartmentalization. The current remedy offered in the form of an automatically unfair dismissal arising from an unfair discrimination based on religion (the prohibition on dismissal based on discrimination in the LRA is read with the prohibition on discrimination in section 6 of the EEA) offers only the employee protection. No framework in terms of the above Acts is provided for to address a situation where, for example, there exists religious discrimination by an employee against an employer. The most appropriate way for this to have been addressed, it is submitted, would be in terms of permitting such conduct to constitute an unfair labour practice.

Determination of religious discrimination disputes is usually adjudicated in the Labour Court. Any cost incentive which may induce the parties to agree to the jurisdiction of the Commission for Conciliation, Mediation and Arbitration (the CCMA) is often dissipated by the perceived inexperience or ineptitude of the commissioners. Alternatively, the respondent party may unnecessarily simply withhold

consent to arbitration before the CCMA. Discrimination claims are by their nature complex, thus warranting referral to the Labour Court for adjudication. Formal litigation has cost implications placing claimants at a potential disadvantage. It does not automatically follow that a claim adjudicated in the Labour Court will per se yield greater success. A well-seasoned commissioner seized with a discrimination arbitration at the CCMA may indeed bring to the matter a richer and more mature finding than a recently appointed inexperienced judge of the Labour Court. To enhance the understanding and complexities pertaining to discrimination claims and disputes it is submitted that a code of conduct relating to religious discrimination should be drafted. This can serve as a guide to those called upon to arbitrate or adjudicate religious discrimination disputes.

Davies gives an assessment of an economist versus a rights-based theory that should be taken into account when addressing religious discrimination in the workplace. Does a costly regulatory intervention of a rights-based legal framework outflank an unregulated, flexible approach where discrimination is left to be addressed by elusive “market forces”? It is submitted that in the context of our constitutional dispensation a laissez-fair approach cannot be tolerated.

The Codes of Good Practice on Picketing, Handling of Sexual Harassment and Dismissal Based on Operational Requirements (the Codes) serve as examples the contents whereof provide insightful guidelines. Whilst the Codes may not be regarded as hard law, they offer guidelines and assistance in arriving at an informed decision. Adoption of the SACRRF on 21 October 2010 was a step in the direction of acknowledging the extent to which religious discrimination requires codification. Regrettably, it lacks the legal status of any of the Codes.

## **4. ADDRESSING RELIGIOUS DISCRIMINATION IN THE WORKPLACE**

### **4.1 Current prohibitions on religious discrimination**

Unfair discrimination infringes both principles of equality and human dignity. Our law deals with religious discrimination in the workplace in terms of the statutory framework of the EEA and LRA. The EEA expressly prohibits unfair discrimination on nineteen (19) listed grounds. An example would be an employer who gives salary increases to all workers save a Muslim

worker on the basis that the employer is prejudiced against the Islamic faith as a religion.

Proof of religious discrimination would be required to take place as follows: First, the Muslim worker has the burden of proving that the reason he did not receive a salary increase was because he is a Muslim. This amounts to differentiation. A second requirement is that the differentiation amounts to unfair discrimination which in turn has two enquiries, namely whether it is on a specified listed ground or an unlisted ground based on "attributes and characteristics which have the potential to impair the fundamental human dignity [of the worker as a human being or affect him] adversely in a comparably serious manner" and then to enquire as to whether the differentiation amounts to unfair discrimination. Should the court find that discrimination took place on a listed ground, unfairness is presumed, however, if on an unlisted ground then the worker must go one step further in proving the unfairness of the discrimination. Religion is one of the listed grounds in section 6(1) and discrimination based on religion is thus presumed to be unfair. Neither direct nor indirect discrimination has been defined by the EEA or any other legislation in our law. The meaning of both terms has been developed by our courts. Our law does not require intention on the part of the employer as an element essential to establishing discrimination. The burden of proof would then rest on the employer to show that it was not unfair discrimination.

#### **4.2 Justifying religious discrimination in the workplace**

Where differentiation amounts to discrimination on an unlisted ground the worker must also prove the unfairness thereof. Naturally, the distinction between direct and indirect discrimination is relevant at this point. It is not unfair to discriminate for reasons based on the inherent requirements of the job. An example of differentiation based on religion that would not constitute unfair discrimination is the inherent requirements of the job such as where a vacancy becomes available in a synagogue for the appointment of a rabbi. The differentiation cannot amount to unfair religious discrimination where the applicant practices non-Jewish religion as opposed to someone from the Jewish faith with the requisite Messianic Jewish Rabbinic qualifications. This example must arguably be distinguished from a situation where the work to be performed by the worker at a particular religious institution is of such a nature

as to be considered "neutral" and that the worker's religious beliefs are irrelevant and unrelated to the inherent requirements of the job. An example would be the maintenance of outer buildings and gardens where the nature of work involves no religious responsibilities and is unaffected by the worker's religious beliefs. Since South African law does not offer a statutory definition of the crucial concept of "inherent requirements of the job", guidance must be sought as to the proper meaning thereof in terms of national and international case law.

#### **4.3 Limiting religious discrimination in the workplace**

It is true that where discrimination may be prevented from occurring it would be unfair of an employer not to take all reasonable steps to prevent same. What may an employer do proactively to prevent discrimination based on religion? In addition, the concept of reasonable accommodation will be analysed and evaluated. "Reasonable accommodation" is defined in the EEA as meaning "any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment". Reference to a person from a designated group appears to confine the term to matters pertaining to affirmative action. This is underscored by the fact that the Code of Good Practice on the Employment of People with Disabilities makes express provision that employers should accommodate the needs of people with disabilities reasonably.

To what extent has reasonable accommodation been utilized by our courts in religious discrimination cases? Can this notion be said to be a juristic tool of assistance to our courts when endeavoring to balance the competing rights of parties to a dispute? In *Dhlamini and others v Green Four Security* an additional enquiry was introduced into establishing whether unfair religious discrimination had taken place. Even if it could be established that being clean-shaven was an inherent requirement of the job, namely being a security guard, the court held that it could still amount to unfair discriminatory conduct on the part of the employer since the employer was obliged to accommodate the worker's religious beliefs reasonably unless it would result in undue hardship for the employer. This is a significant finding as it prima facie imposes an additional requirement for the employer to fulfil before the

court would hold that the discrimination was not unfair.

In *Strydom v NG Gemeente Moreleta Park*, although distinguishable from the Dhlamini case in so far as the matter had to be decided by the Equality court with reference to PEPUDA and the Constitution, the question of what steps the respondent took that amounted to reasonable accommodation of diversification and thereby addressing disadvantages suffered from discrimination was raised.

Moreover, in *Department of Correctional Services v POPCRU*, 21 members of the first respondent who worked as prison warders were dismissed on the basis that they refused to cut their dreadlocks. The dismissed employees insisted their hairstyles were consistent with their religious beliefs as Rastafarians and cutting it would infract their rights. They contended their dismissals were automatically unfair in terms of the LRA and unfair discrimination in terms of the EEA. Having established that differentiation took place on the listed ground of religion, the respondent could not prove the discrimination to be fair in terms of any inherent job requirements. Murphy AJA went further by looking at the question of the fairness and justifiability of the differential treatment. The court found that considerations in determining fairness in the context of section 187(1)(f) were equally applicable in determining fairness under the EEA and PEPUDA. Unfairness under these provisions, according to Murphy AJA, concentrates upon, inter alia, whether reasonable steps have been taken to accommodate the diversity sought to be advanced and protected by the principle of non-discrimination or whether it could be accommodated in any less restrictive manner and still uphold the interests of the employer.

## **5. APPLYING THE LEGAL TESTS**

### **5.1 The correct test to determine the existence of unfair discrimination in a labour context**

The test set out in *Harksen v Lane* was established in respect of determining whether section 21 of the Insolvency Act contravened the equality and discriminatory provisions of section 8 of the Interim Constitution. It has been stated that Harksen, Prinsloo and the Hugo cases provide guidelines on interpreting violations of section 9 of the Constitution. Govender correctly refers to forthcoming national legislation that would regulate the section 9

equality and non-discriminatory right. One would, however, have anticipated the learned author to make more critical reference to the provisions of the LRA that give effect to section 9 of the Constitution. Disputes concerning religious discrimination brought in terms of contraventions of the EEA or the LRA raise the critical question as to the appropriateness of the *Harksen v Lane* test ("the Harksen test"). Numerous cases have relied on the Harksen test. In IMATU, Murphy AJ was emphatic that the Harksen test was "the appropriate test" to establishing unfair discrimination.

If the Harksen test is an appropriate test it cannot, it is submitted, be the panacea determinative of all discrimination disputes. Factors relevant to a religious discrimination dispute will be of no value in determining a discrimination dispute based on incapacity. It is noteworthy that cases referred to in this paper concerning religious discrimination, draw heavily on a duty of reasonable accommodation rather than an express adoption of the Harksen test. A caveat appears from POPCRU, where the court refers to fairness being presumed where discrimination on a listed ground is established. An overview of reported workplace religious discrimination disputes do not indicate that the Harksen test has been eschewed. On the other hand, whether the reasonable accommodation test addresses the issues adequately of deciding how and where to strike a suitable balance in religious discrimination disputes has also been mooted.

### **5.2 Balancing religious group (associational) rights with competing rights**

*Taylor v Kurstag NO* is authority for the associational right to freedom of religion enshrined in sections 31 and 18 of the Constitution and that freedom includes the right of others to exclude non-conformists and to require those who join an association to conform with its principles and rules. Express provision is made for the associational right to institutional freedom of religion in terms of the SACRRAF. A worker alleging religious discrimination on this basis would need to establish differential treatment amounting to discrimination on a listed ground. *MEC for Education, Kwazulu-Natal v Pillay* concerned a claim of religious discrimination based on PEPUDA. Whilst the applicant schoolgirl was required to show differentiation that amounted to discrimination on a listed ground, namely religion, the respondent bore the onus of showing either that

the conduct was not based on one of the prohibited grounds or that discrimination was fair. Fairness includes, but is not limited, to notions such as the fact that discrimination was necessary due to the intrinsic nature of the job and the extent to which the employer has taken steps that are reasonable in order to accommodate diversity.

In *Prince v President, Cape Law Society* the applicant sought to be admitted as an attorney. His application was opposed by the Law Society on the basis that he was not a fit and proper person having two previous convictions relating to dagga and that Prince had expressly stated that he did not intend to desist from smoking the substance since it formed an essential part of his Rastafarian belief-system. Rastafarianism was found by the court in this instance as a religion entitled to be protected, however the right to freedom of religion is not absolute and members of a religious community may not determine for themselves which laws they will obey and which they will not. Case authority supports the fact that religious associations may expel members who fail to conform to their religious code of conduct, mode of dress and or culture. On the other hand, religious associations are also restrained from exercising and practising faith-based corporal punishment at schools.

Neither the Pillay nor Prince cases involve workplace religious discrimination. Their relevance is germane to the right(s) which employer organizations and employers have in asserting their religious unity or identity as a collective whole to the fair exclusion of workers. Should this be tantamount to an employer who is entitled to set the standard by which employees are required to perform? Setting a standard is distinguishable by the prerogative of management in the operational function of its business, whereas assertion of an associational right based on religion, is founded on the right to equality, human dignity and freedom of association. If this is the case, how then is a fair balance struck between the religious associational right and the right of an individual applicant job-seeker insistent upon applying for a position within a particular religious association? An example is where the organization of a particular religion has administrative offices who insist upon its workers across the board, irrespective of the task they fulfill, to be members of the church whose affairs they administer. Another example pertains to trade unions. Although a trade union also has a right to freedom of association and

the right to determine its own constitution and rules, with reference to what is fair the constitution of a trade union may not discriminate unfairly and the LRA expressly lists religion as one of many other grounds such as gender or race that would result in an automatic unfair dismissal.

One has to juxtapose the interests of various role players, namely religious organizations and a secular job applicant, alternatively a worker dismissed for failing to conform sufficiently to the employer's religious associational beliefs or further, alternatively, a worker unfairly discriminated against directly or indirectly by the employer on the basis of religion. One also has to decide whether on account of a public sector-based employment relationship, any factors relevant to the unique nature of the employment relationship or administrative-law requirements could justify limitations on the infringement of the right to equality and/or freedom of association.

### **5.3 Private and public sector employment relationships**

All employees, whether private or public, are deserving of equal protection under the Constitution, LRA and EEA. The preamble of the LRA and PAJA make these Acts submissive to constitutional imperatives imposed on the employment relationship in both the private and public sector. Religious discrimination in the public sector brings into play extraneous factors falling within the purview of PAJA. This warrants critically viewing religious discrimination in the workplace within the context of administrative-law principles in those cases where the action on the part of the state does constitute administrative action. In this context, the following issues may arise there from:

- To what extent is the exercise of public power in terms of section 33 of the Constitution or PAJA prevented from infringing upon the right to equality and freedom of association in so far as the right to religion is concerned? And
- In what manner, if any, does the principle of legality influence and regulate the exercise of public power to ensure respect for the right to equality and freedom of association in so far as the right to religion is concerned?

## 6. CANADA

### 6.1 Equality framework

The Canadian Charter of Rights and Freedoms (the CCRF) provides for freedom of conscience and religion. Every individual is “equal under the law and has the right to the equal protection and benefit of laws without discrimination [based on] religion”. The aforesaid is subject to a “reasonable” limitation clause consonant with limits in a “free and democratic society”. Notably, the Canadian Human Rights Act (the CHRA) imposes a duty to accommodate. This latter duty is also expressed in the Canadian Employment Equity Act (the CEEA), but this legislation is Federal and applicable to certain industries. Non-discriminatory provisions that are catered for by virtue of the aforesaid are subject to the caveat of the occupational imperative of a bona fide occupational requirement (a BFOR), a “reasonable and justifiable defense” and considerations of reasonable accommodation.

### 6.2 Mutual accommodation

Population diversity in Canada has translated into burgeoning cultural, ethnic and religious workplace conflict. This has been addressed in terms of the equality-based legislation. Protection against religious discrimination in the workplace is provided by legislation of various federal governments. These equality laws may vary but are ultimately subject to the CCRF and CHRA. Debate has also ensued as to the extent a BFOR may undermine the individual right and suppress the advancement of pluralism. Crystallization of the current position of the common law is set out below.

In *Ontario Human Rights Commission v Simpsons-Sears Ltd (O'Malley)* an employer was obliged to accommodate an employee who during her employment converted to the Seventh-Day Adventist faith requiring her to be absent from work from Friday evenings and Saturdays, unless the employer could show accommodation would result in undue hardship. The court in *Alberta Human Rights Commission v Central Alberta Dairy Pool* held that an employee who had become a member of the World-wide Church of God which precluded him from attending work on Mondays would be adversely discriminated against even if there is a BFOR unless the employer is able to discharge the onus of showing accommodation would impose undue hardship regard being had to a variety of factors. Where, on the face of it,

a BFOR is discriminatory against an employee's religion, the employer would still be required to prove a rational link between the discriminatory rule and the purpose of the job in order to show that the standard is imposed in good faith solely as a “work-based purpose”.

An employer may still be required to endure a hardship in accommodating the employee's religion, provided it is not “undue”. These duties on the employer has been somewhat mitigated by extending accommodation to the employee as evidenced in *Central Okanagan School District No 23 v Renaud*. The unionized employee who was a member of the Seventh Day Adventist objected to working shifts from sundown-Friday-sundown-Saturday. The recommendation by the employer that Renaud work a Sunday to Thursday shift was rejected since same would have been contrary the collective agreement. This, the court viewed, as “impeding the reasonable efforts of an employer to accommodate” essentially finding that there was a mutual duty of accommodation on both parties to seek accommodation.

Vickers is correct; it is submitted, in advocating that the mutual duty of accommodation can be lauded for “achieving a reasonable balance between [employer and employee]”. Such multi-diversity, non-exclusivity approach has developed Canadian jurisprudence positively in the direction of tolerance and embracement of diversity in the interests of maintaining a harmonious working environment that also holds good for sound community interests. Moreover, the reference of Canadian courts to international articles such as the Charter of the United Nations and foreign jurisprudence has heightened a global awareness of religious freedom and intolerance against discrimination.

## 7. CONCLUDING REMARKS

Legal obligations and rights arise from the pluralistic religious and sectarian milieu of the workplace. In the strife for a harmonious working environment the even-handedness of appointing the employer custodian of balancing these conflicting dynamics must be challenged. The intrinsic personal nature of religion demands meaningful engagement by both parties – employee and employer – to attempt to accommodate differences mutually under the banner of diversity.

Non co-operative approaches can result in victimization as much as hegemony. The assertion that sexual orientation, for example, is

as much part of a person's innate being as is their gender or race, something with which they are born and over which they have no election, as opposed to religion which is socially or culturally informed, makes no difference to the imperative of addressing religious diversity in the workplace which is mirrored in a diverse number of religious faiths. In our constitutional dispensation diversification and tolerance thereof is a peremptory requirement as captured by the statement that: "We need to create an environment that brings about unity, embraces our diversity, and protects the idea of a rainbow nation." In *Fourie, Sachs J* stated:

"[...] Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self [...] but an acknowledgement and acceptance of difference [...] difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society".

Using the mutual accommodation as articulated in Canadian law is not out of kilter with the reciprocity of fairness between employee and employer as firmly established by the court in *NEHAWU*. It is thus incumbent on both parties to create an environment of mutual respect and accommodation of diversity. A jostling of rights creatively played in accordance with mutual accommodation will give creative impetus to the theme and score of tolerance of diversity ...

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## *The condonation of late dispute referrals*

### 1. Introduction

Labour disputes generally take the form of either, unfair labour practice or unfair dismissals. These disputes are normally lodged with the Commission for Conciliation, Mediation and

Arbitration ('CCMA') or the Bargaining Council, if one exists within the sector in which the dispute had arisen.

The dispute resolution processes commence with the disputee (hereinafter referred to as the applicant) lodging his/her dispute with the CCMA or the Bargaining Council as the case may be. When lodging a dispute, the applicant is expected to comply with stringent time frames as set out in the Labour Relations Act<sup>1</sup> (as amended) or the provisions stipulated in the Constitution of the Bargaining Council, many of which simply replicate the provisions of section 191 of the LRA.<sup>2</sup> In the unlikely event if the Constitution of a Bargaining Council is vague or does not provide for time frames, then provisions of section 191 of the LRA<sup>3</sup> would apply to disputes dealt with in that Bargaining Council.

As the Bargaining Council in the Education sector, the Education Labour Relations Council ('ELRC') has exclusive jurisdiction over unfair labour practice and unfair dismissal disputes which arise between educators (employed in terms of the Employment of Educators Act, No 76 of 1998) and the Department of Education (as represented by the Head of Department in each Province) As such, these disputes are dealt with in terms of the Constitution of the ELRC and in accordance with other aspects of dispute resolution laws and processes as prescribed in the LRA, BCEA etc.

The Constitution of the ELRC enumerates clear time frames, which need to be adhered to when lodging disputes:

- (i) In the case of unfair labour practice - 45 days from becoming aware of the alleged unfair labour practice, and;
- (ii) In the case of dismissals - 30 days from the date of the dismissal or, if it is a later date, within 30 days of the employer making the final decision to dismiss or uphold the dismissal.

### 2. Condonation of late referral of a dispute

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<sup>1</sup> Act 66 of 1995 - see section 191 (1) (b) (ii) of the LRA which specifies the times frames to lodged unfair labour practice and unfair dismissal disputes.

<sup>2</sup> Ibid

<sup>3</sup> ibid

Notwithstanding prescriptive time frames, it does happen that a significant number of disputes are referred late, thus affecting jurisdiction of the ELRC in enrolling the dispute for conciliation / arbitration and/or from a commissioner dealing with the substantive nature of the dispute, either, at conciliation or arbitration.

However, and informed by common law practice and the rules of natural justice, the doors are not entirely "closed" for an applicant seeking recourse via the ELRC, this notwithstanding the late referral of his/her dispute. The law provides for the late referral to be condoned if good cause is shown ('condonation').

An applicant seeking condonation for late referral of a dispute at the ELRC would do so in terms of the ELRC's Constitution. At this early juncture it is worthy of mention that should any dispute be referred outside the prescribed time-frames, such a dispute can be dealt with at conciliation/arbitration only if the late referral has been condoned.

Condonation for late referrals are dealt with in one of two ways :

- (i) Firstly, the applicant is aware that his/her dispute would not be lodged within the prescribed time frame. The applicant is then expected to lodge his/her dispute referral together with an application for condonation. (ELRC referral form 1)<sup>4</sup>

The completed set of forms must be sent, both, to the Respondent Party<sup>5</sup> and the ELRC's Dispute Resolution Department. In this instance, the ELRC would deal first with application for condonation by referring same to a commissioner, who decides whether or not to grant condonation based on written submissions. (The applicant's condonation application).

If the commissioner decides to condone the late referral, then the dispute would be enrolled for arbitration. If the

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<sup>4</sup> Pro-forma document designed for use in cases where applicants would need to apply for condonation of late dispute referral.

<sup>5</sup> A copy of the dispute referral together with the condonation application form must be sent to the Employer party who has the right to oppose the application for condonation.

commissioner does not grant condonation, then the dispute would not be enrolled for conciliation/arbitration by the ELRC.<sup>6</sup> The ELRC will notify the applicant of the outcome.

- (ii) Secondly, if a dispute has been lodged and enrolled for conciliation/arbitration, and, at any time during the hearing (conciliation and/or arbitration) the Respondent or the commissioner *mero motto*<sup>7</sup> (of his /her own accord) realizes that the dispute had been referred outside the prescribed time period, then the commissioner would suspend proceedings on the merits of the dispute and direct the applicant party to address the commissioner on why condonation ought to be granted.

### 3. Factors to be considered in a condonation application

Over time, our courts (including commissioners) have given credence to the *ratio* laid down in **Melaine v Santam Insurance Co Ltd**<sup>8</sup> ('Santam case') insofar as this case enumerates key considerations, which are to be used in support of a condonation application. These are:

- i. **The degree of the lateness** (in other words, how many days after the required time period was the dispute referred);
- ii. **The reasons for the lateness** (the explanation must be reasonable or satisfactory);
- iii. **The prospects of success** (of the referring party and obtaining relief sought against the Respondent);

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<sup>6</sup> In such cases, should the applicant party disagree with the commissioner's ruling, she/he has the right to lodge review proceedings in the Labour Court.

<sup>7</sup> Jurisdiction is a fact of law and is either found or not. A commissioner is therefore duty bound to raise a jurisdictional issue with parties if s/he feels that his/her jurisdiction has been affected. In that case the commissioner must request the affected party to address him/her on the issue of why jurisdiction is not affected.

<sup>8</sup> 1962 (4) SA 531 (A) at 532B-E;

- iv. **The prejudice any party may suffer should the commissioner grant or refuse condonation**
- v. **Any other important consideration in support of the application** (eg. the importance of the case, the employers attitude towards the application, ie. has the employer vigorously opposed condonation, the employer already filled the position in cases of dismissal etc)

Having regard of above factors, the courts and arbitrators have latitude and discretion on how they are to consider these grounds. Generally, it is encouraged to view these grounds as being interrelated and not individually decisive, save in an obvious instant, that if there are no prospects of success, there would be no point in granting condonation.

The weight to be given to any one of the factors may vary from case to case. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects, which are not strong. Likewise, it may be that the importance of the issue and strong prospects of success tend to compensate for a long delay.

In the final tally a judicial officer or commissioner acting in the interest of justice, is expected to do a "balancing act" between two important considerations, being *the applicant's claim to justice balanced against the employer's entitlement to finality on a matter.*

Perhaps above all, it is important for anyone intending to lodge a dispute to be aware of the prescribed time frames and as far as possible, to comply with same. At the expense of repeating the point, if condonation is not granted, then the dispute would not be heard thus seriously prejudicing an applicant.

As a recommendation, it is suggested that the following judgments be considered whenever there is a need to prepare and argue an application for condonation:

**1. *Melane v Santam Insurance Co Ltd***  
1962 (4) SA 531 (A) at 532B-E;

**2. *SA Broadcasting Corporation v Commission for Conciliation,***

***Mediation & Arbitration & others***  
(2003) 24 ILJ 999 (LC)

**3. *Moila v Shai NO & Others*** (2007) 28 ILJ 1028 (LAC)

**4. *Meintjies v H D Combrinck (Edms) Bpk***  
1961 (1) SA 262 (A) at 263H-264A;  
***Saloojee & another NNO v Minister of Community Development*** 1965 (2)  
SA 135 (A) at 140H-141A;

**5. *Reinecke v IGI Ltd*** 1974 (2) SA 84 (A) at 92F-H. ***Arnott v Kunene Solutions & Services (Pty) Ltd*** (2002) 23 ILJ 1367 (LC); and

**6. *Chemical Energy Paper Printing Wood & Allied Workers Union & others v Metal Box t/a MB Glass*** (2005) 26 ILJ 92 (LC)

**7. *SA Broadcasting Corporation v Commission for Conciliation, Mediation & Arbitration & others***  
(2003) 24 ILJ 999 (LC)

#### 4. Conclusion

Disputees must at all time be mindful of prescribed time periods by which to lodge a dispute. From the above, it is evident that the late filing of a dispute could seriously prejudice a dispute being heard at the ELRC. In some cases it may prevent a matter being dealt with at all if a commissioner refuses to grant condonation for the late referral.

It would appear that with the development of practice at the CCMA and Bargaining councils, commissioners are viewing condonation applications with greater scrutiny. No plausible reasons are advanced to justify the late referral, then such applications are very likely to fail to be granted condonation.

Therefore it is onerous on disputees/trade union officials to ensure that disputes are timeously lodged thereby averting all the complications and challenges that follow getting the dispute dealt with at the ELRC.

**Mr Dolin Singh**  
ELRC Provincial Manager: KwaZulu-Natal

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### 3. Questions & Answers

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#### Dear General Secretary

##### Question:

I would like to know what the notice period is for termination and non-renewal of my contract.

#### Dear Anonymous

The non-renewal of a fixed term contract amounts to a dismissal. Unfair Dismissal disputes should be referred to Council in terms of section 186 (1) of the Labour Relations Act.

##### *Dismissal means that:*

- (a) An employer has terminated contract of employment with or without notice.
- (b) An employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it.

The test is whether the employee has reasonably expected the employer to renew the contract.

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##### Question:

I would like to understand why my case was refused on the basis that the ELRC has no jurisdiction of termination in terms of section 14(1) of the EEA of 1998.

#### Dear Anonymous

Section 14 (1) of the EEA regulates dismissals due to abscondment. Section 14 dismissals are also known as termination of services by operation of the law. It means that the educator terminated his or her service by not reporting for duty for a period of 14 consecutive days. The dismissal is thus effected by the actions of the educator and not that of the department and is as such not regarded as a dismissal in terms of section 186 (1) of the LRA.

An educator who has been dismissed in terms of section 14 can apply to the Head of Department to be reinstated or can refer the matter to the Labour Court for adjudication thereof.

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##### Question:

I was demoted in September 2012 ('for not responding to a departmental instruction'), and I accordingly appealed the sanction within the given period of five days. My appeal was acknowledged by the MEC's Office, but till today no word from them. Is this right? What must I do to jerk them up?

In the same month last year, September 2012, I was transferred to another school on reason that there was an investigation pending against me. I told them that I was not aware of the investigation; instead of a clarifying response I was slapped with a suspension letter on 12 November 2012. The three months suspension lapsed, no word from them. In May 2013 I lodged a dispute of unfair labour practice. In response to my referral to the ELRC, I was instructed to report at another school. They called it 'precautionary transfer'. When I questioned this, I was threatened with dismissal using Section 14(1) of EEA. In fear of this, I reported at my new school against my will till today. Is this fair and right? Please help.

#### Dear Anonymous

The ELRC does not provide legal advice to parties on their grievances and disputes. The ELRC's mandate is to process disputes of rights and mutual interest between educators, unions and their employer (Department of Education).

Kindly approach your union and request them to give you legal advice on your demotion.

The ELRC currently has an unfair labour practice dispute filed by your union PEU on your behalf. The case is still open and it will be finalised in due course.

**Ms NO Foca**, ELRC General Secretary

Dear Readers

We would like to hear your views and will respond to questions in the next issue of the Labour Bulletin. Please send any questions relating to labour law to the ELRC Research and Media Officer, Ms Bernice Loxton.



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