

EMPLOYMENT

Religious freedom and operational requirements: which one should prevail?

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Culture is the sum total of the beliefs and traditions of a particular society and religion is a manifestation of culture, not the reverse.”^[1]

Religious and cultural belief systems go to the very core of a human being. They are interwoven with a person's day to day living. Employers are often called upon to strike a balance between their operational requirements and accommodating their employees' different cultural and religious practices.

Where this balance cannot be struck, the Commission for Conciliation, Mediation and Arbitration (**CCMA**) and Courts may be approached for guidance and/or a ruling on whether religious beliefs and practices should prevail over operational requirements or *vice versa*.

Two recent CCMA cases reflect the approach taken in resolving this issue.

Police and Prisons Civil Rights Union obo Chohan / South African Police Service [2022] 12 BALR 1264 (CCMA) ("Chohan Matter")

In 2013, Chohan, a practicing Muslim and member of SAPS, asked his station commander for permission to wear a beard, a requirement of his religion. Chohan was advised to apply to the office of the provincial commissioner for permission to do so. He duly did so and was granted permission. Chohan wore a beard for an uninterrupted period of five years, from 2013 to 2018.

Each of Chohan's successive station commanders took no issue with the fact that he wore a beard. During August 2018, the provincial commissioner held a cluster meeting with station commanders. After seeing an officer with an untidy beard, he instructed the station commanders (including Chohan's) to instruct their officers to shave off their beards. Chohan's commander duly issued a directive, revoking the authority to wear beards. All officers with beards were required to shave off their beards.

When Chohan repeatedly refused to shave off his beard, he was charged with refusing to comply with a lawful instruction. He was found guilty and sanctioned with a month's suspension without pay. Despite this, Chohan re-applied for permission to wear a beard, but received no response thereto.

Chohan lodged a dispute with the CCMA in terms of section 10(7) of the Employment Equity Act 55 of 1998 (**EEA**), alleging discrimination on the grounds of religion and culture.

The CCMA was required to determine whether SAPS discriminated against Chohan and, if so, whether such discrimination was unfair. If the discrimination was found to be unfair, the CCMA was also required to consider whether he was entitled to relief

as per section 48 of the EEA, arising from such discrimination.

The Commissioner found that the senior officers did not prevent Chohan from being subjected to the unfair discrimination he experienced. The Commissioner accordingly found that Chohan had been unfairly discriminated against and was entitled to compensation. In this instance, compensation was not based on financial loss suffered, but is a *solatium* for injured feelings arising from an assault on dignity.

Ismail v Life Entabeni Hospital (KNDB1441-21) [2022] ZACCMA 2 (9 September 2022)

("Ismail Matter")

Ms Ismail, the employee, also a practicing Muslim, was initially employed by Life Entabeni Hospital (**the Employer**) as a pharmacist in 2011.

The Employer's uniform policy made provision for Islamic dress to be worn, subject to certain limitations. The uniform policy was specifically designed to accommodate religious and cultural diversity without compromising clinical sterility, safety to all patients at the workplace and the required standards for health. The employee agreed to abide by the Employer's policies, including amendments thereto.

The employee performed her duties in the dispensary, where she wore full Islamic dress, including the jilbab, scarf and niqab. She did not come into contact with patients.

The Employer amended its uniform policies in 2012, 2018 and 2020 to mirror international best practice and so as to adhere to the Department of Health for the Republic of South Africa Practical Manual for the Implementation of National Infection Prevention and Control Strategic Framework.

The 2018 uniform policy amendment introduced the "bare below the elbow" ("**BBE**") principle, which provided, *inter alia*, that all nurses and multidisciplinary staff entering the clinical environment were to have bare arms below the elbow. No jerseys or jackets were permitted.

The 2020 amendments to the uniform policy specifically stated that only head scarves which were in the Employer's corporate colours could be worn and that the jilbab could only be worn within the pharmacy environment. It stated furthermore that the BBE principle had to be applied within the clinical environment outside of the pharmacy.

When the employee was promoted to Clinical Practice Pharmacist (**CPP**) in 2017, she became part of the multidisciplinary team. The multidisciplinary team was required to work in different wards and the Employer's Intensive Care Unit (**ICU**). The ICU was generally an open space where the different beds are separated by curtains. The immune systems of patients in ICU were compromised and there was therefore a focus in maintaining a sterile environment. The employee did not perform any clinical ward rounds at the end of 2019 and all ward rounds were interrupted by the COVID-19 pandemic. Ward rounds resumed in October 2020. The employee was therefore required to comply with the BBE principle.

The employee was aware that she was not permitted to wear full Islamic dress whilst working in the clinical environment. However, the BBE principle conflicted with the precepts of the employee's religion, which required her arms to be covered from her wrists to her elbow whilst in the presence of males. The employee argued that giving effect to the BBE policy was in contravention with her religion and she was not prepared to comply with same.

The employee requested permission to wear full Islamic dress and proposed alternatives to the BBE policy such as wearing an isolation gown or sleeves that could be changed between patients. Both the request and proposed alternatives were rejected by the Employer as they were contrary to infection prevention principles.

When the parties failed to reach a compromise, the Employer's attorney proposed that the employee be appointed as a pharmacist on the same terms and conditions of employment as a CPP. The employee accepted this proposal and acknowledged that it did not amount to a demotion. The employee then referred an unfair discrimination dispute to the CCMA in terms of section 10 of the EEA, arguing that she had been unfairly discriminated against due to her religion.

The employee's contention that she did not come into physical contact with patients was refuted by both the employee and Employer's witnesses who testified that the employee came into contact with patients during the course and scope of her

work. Furthermore, the employee conceded that she was required to have physical contact with patients. Whether the CPP physically touched a patient or not would inform the necessity of the BBE policy.

Rule of Law

In *Chohan*, the Commissioner reiterated that the EEA was promulgated to give effect to the provisions of the Constitution of the Republic of South Africa, which guarantees, *inter alia*, religious freedom.

Section 6(1) of the EEA prohibits discrimination on listed and arbitrary grounds. Religion is a listed ground in terms of section 6(1). Where an employee alleges unfair discrimination on a ground listed in section 6(1) of the EEA, the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination did not take place as alleged, or if it did, that the discrimination is rational and not unfair or is otherwise justifiable.

Section 6(2) of the EEA creates an exception and provides that it is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of the job.

In both cases, the employees alleged that they were discriminated against based on religion, which is one of the grounds listed in the EEA. Thus, their employers bore the onus of proving that the discrimination was rational and fair. In *Chohan* matter, SAPS had to prove that it was rational and fair not to permit *Chohan* to wear a beard. In the *Ismail* matter, the employer had to prove that the "bare below the elbows" policy was fair.

Distinguishing Factors

While these cases concern employees in seemingly similar circumstances, the differentiating factor is the manner in which the employer justified the alleged discrimination.

In the *Chohan* matter, the SAPS did not adduce any evidence to show that *Chohan's* beard hindered, restricted or limited him in any manner in the performance of his duties. The SAPS did not argue or prove that being clean-shaven was an inherent requirement of the job.

In the *Ismail* matter, the Employer submitted evidence to show that the BBE policy is scientifically justified and adheres to international standards observed by organisations such as the World Health Organisation. The Employer argued that the implementation of the BBE policy is an operational requirement in all its hospitals and the same approach is followed by the Department of Health. The Commissioner found that it was not that the policy had a negative impact on the employee; rather, the employee was not able to give effect to an inherent requirement of the job while simultaneously adhering to the tenets of her religion.

Importance of Cases

While the right to religious freedom is enshrined in the Constitution, it is not absolute and can be limited if such limitation is reasonable and justifiable.

As stated in the *Ismail* matter:

"It is apparent from the case law that discrimination is only unlawful if it is unfair. When the purpose of the discrimination is essential, and can be justified, such as when it constitutes an inherent requirement of the job, it stands to reason that any impact of the alleged discrimination is minimised – and more particularly so when it does not differentiate between employees."

Footnotes

[1] *Police and Prisons Civil Rights Union obo Chohan / South African Police Service* [2022] 12 BALR 1264 (CCMA), para 33.



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