Double jeopardy

When can an employee be recharged for the same offence?

by Frikkie Ponelis

It is an employer’s prerogative to impose discipline in the workplace. It is the employer (more usually managers appointed by the employer) who will set the standards of conduct required of employees and who will decide whether to discipline employees for failing to comply with those standards. It is also the employer who decides what sanction, if any, should be imposed if the employee is found guilty.

As readers of CLL will know, an employee who is aggrieved by the outcome of a disciplinary hearing may take the matter further by launching a dispute in the CCMA or in a bargaining council. But what if the disciplinary chairperson’s decision was clearly wrong and this allows an employee who can no longer be trusted to remain employed? Or, what if material evidence relating to the misconduct in question only comes to light after the disciplinary enquiry pursuant to which the employee had been acquitted? Can an employer in these types of situations attempt to remedy the problem by recharging the employee for the same misconduct despite the previous acquittal, or perhaps simply impose a more severe sanction? This question and related issues will be considered in this contribution.

Res iudicata and autrefois acquit

Generally speaking, our law does not permit the re-institution of disputes which have already been determined between the same parties. For instance, civil proceedings will be dismissed if the party against whom the proceedings are brought successfully raises the plea of res iudicata, i.e. that a court of

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competent jurisdiction has already made a final judgement on the same subject-matter, based on the same facts and between the same parties. (Mitfords’ Executor v Ebden’s Executors & others 1917 AD 682). Similarly, criminal proceedings may not be retried if the accused successfully raises the defence that he or she has already been found guilty and convicted of the same offence (autrefois convict) or that he or she has already been charged with and acquitted of the same offence (autrefois acquit). (CWU obo Nchee v SA Post Office [2011] 4 BALR 414 (CCMA)).

The public policy considerations underlying these defences include reaching finality in disputes, achieving certainty in respect of the parties’ respective legal positions and avoiding undue burdens on the justice system.

**Double jeopardy**

In labour law the principles relating to the double-punishment or recharging of employees are commonly known as double jeopardy. In determining issues of double jeopardy our courts initially followed the criminal law principles. If an employee successfully showed the elements of autrefois convict or autrefois acquit, a further disciplinary enquiry, or the overturning of a sanction would not be permitted. (Mondi Paper Co Ltd v PPWAWU (1994) 15 ILJ 778 (LAC)).

The assumption implicit in this approach was that public policy principles applicable to criminal proceedings applied equally to labour disputes. In BMW (SA) (Pty) Ltd v Van Der Walt (2000) 21 ILJ 113 (LAC) the Labour Appeal Court, however, ultimately decided that fairness is the overriding consideration in labour disputes, not the policy considerations applicable in criminal cases. Accordingly, whether a second disciplinary enquiry may be convened will ultimately depend solely on whether it is fair to do so.

In this instance the following frequently quoted *dictum* of the majority of the Court may be regarded as the basis of the current law concerning double jeopardy:

> “[12] Whether or not a second disciplinary enquiry may be opened against an employee would, I consider, depend upon whether it is, in all the circumstances, fair to do so. I agree with the dicta in Amalgamated Engineering Union of SA & others v Carlton Paper of SA (Pty) Ltd (1988) 9 ILJ 588 (IC) at 596A-D that it is unnecessary to ask oneself whether the principles of autrefois acquit or res judicata ought to be imported into our labour law. They are public policy rules. The advantage of finality in criminal and civil proceedings is thought to outweigh the harm which may in individual cases be caused by the application of the rule. In labour law fairness and fairness alone is the yardstick. See also Botha v Gengold [1996] BLLR 441 (IC); Maliwa v Free State Consolidated Gold Mines (Operations) Ltd (1989) 10 ILJ 934 (IC). I should make two cautionary remarks. It may be that the second disciplinary enquiry is ultra vires the employers disciplinary code (Strydom v Usko Ltd [1997] 3 BLRR 343 (CCMA) at 350F-G). That might be a stumbling block. Second, it would probably not be fair to hold more than one disciplinary enquiry save in exceptional circumstances.” (Emphasis added)

The following should be noted in this instance:

- The Court’s reference to “exceptional circumstances” should not be taken to be the actual test to be applied. Fairness alone remains the decisive factor in determining whether or not the second enquiry is justified. The issue of exceptional circumstances is mentioned in this judgement merely as a caveat. (Branford v Metrorail Services (Durban) & others (2003) 25 ILJ 2269 (LAC) at par. 15). If exceptional circumstances were the test it would subject employers to a heavy burden and make it virtually impossible to convene a second disciplinary hearing. (See the minority judgement in the BMW case at par. 30). As will appear below, this does not by any means entail that an employer who seeks to justify a second disciplinary enquiry has an easy burden to discharge.

- The concept of fairness applies to both the employer and the employee. It involves the balancing of the competing and sometimes conflicting interests of the employer, on the one hand, and the employee on the other. The weight to be attached to those respective interests depends largely on the
circumstances of each case. (See the Branford case at par. 16).

**Same offence**

Double jeopardy can only be raised if the employee has either been acquitted or a sanction less severe than dismissal has been imposed and the employee is then recharged with the same offence. (UASA obo Lloyd-Lister v Harmony Gold Mine Limited [2010] 11 BALR 1213 CCMA). Accordingly if the employee later commits similar misconduct the double jeopardy rule does not preclude the employer from bringing the same or similarly worded charges against the employee. (CWU obo Nchee v SA Post Office [2011] 4 BALR 414 CCMA).

**Nature of the proceedings**

Since double jeopardy relates to instances where new disciplinary proceedings are instituted, it does not apply to internal appeal hearings since these constitute extensions of the disciplinary proceedings already launched; not new proceedings. The same applies to internal reviews of disciplinary decisions, provided they are permitted by disciplinary codes or company practices. (Samson v Commission for Conciliation, Mediation & Arbitration & others (2010) 31 ILJ 170 (LC); Rustenburg Base Metal Refiners (Pty) Ltd v Solidarity & others (2009) 30 ILJ 378 (LC)). This will be the case, for example, where the chairperson of an enquiry only has the power to recommend the disciplinary sanction to be applied and it is left to a higher level of management to accept or reject this recommendation.

It is not competent to raise double jeopardy as a defence to external proceedings; i.e. proceedings launched by outside parties such as professional bodies, on the basis that an external disciplinary enquiry has already been held in relation to the conduct in question. (Zondi v SA Police Service (2011) 32 ILJ 1796 (BCA)).

**The role of disciplinary codes**

Some arbitrators are disinclined to endorse the holding of a second enquiry unless it is specifically provided for in the employer’s disciplinary code. (CEPPWAWU obo Kopi & another v Chep SA [2010] 7 BALR 711 (CCMA)). This approach loses sight of the fact that whether it is permissible to hold a second disciplinary enquiry concerns a matter of fairness. It should therefore, in principle, be possible to convene a second enquiry even if the disciplinary code does not specifically cater for this eventuality.

However, the contrary will apply if a disciplinary code specifically prohibits a second enquiry. Such a prohibition may be expressly stated in the disciplinary code or it may be inferred from the fact that the disciplinary chairperson is mandated to make a final decision about disciplinary action against the employee. (Country Fair Foods (Pty) Ltd v CCMA & others (2003) 24 ILJ 355 (LAC)). In such instances the holding of a second enquiry will be beyond the employer’s powers (ultra vires) under the disciplinary code and accordingly be impermissible without further ado. (See the BMW case quoted above).

**Procedural fairness of the second enquiry**

If a second disciplinary enquiry is launched it is to be expected that an employer should take extra care that such enquiry complies with all procedural requirements. A court or an arbitrator may be less forgiving towards procedural defects in a second enquiry, even minor defects, than would otherwise be the case. (Solidarity on behalf of De Vries v Denel (Pty) Ltd t/a Denel Land Systems (2009) 30 ILJ 2210 (BCA)). Another possibility, especially in sensitive cases, would be to utilise the services of an outside and independent chairperson to act as chairperson of the hearing.

**Appropriate relief**

Is double jeopardy an issue relating to procedural fairness or substantive fairness? This is an important consideration if one considers the difference between the nature and the extent of relief that a court or an arbitrator can award for respectively procedural unfairness and substantive unfairness. (See LRA, s 193 and s 194).
Some arbitrators obliquely classify it as an issue of procedural fairness. (See the Solidarity and Denel award). However, the proper approach appears from the minority judgement in the BMW case. (See also the CEPPWAWU and Chep awards). The Court held that if it was not fair to hold a second disciplinary enquiry, the second enquiry becomes devoid of legal significance. This entails that the employer will be bound by the outcome of the first enquiry where it decided against dismissing the employee. Accordingly, on the employer’s own version, there would have been no reason to dismiss the employee. The Court held as follows:

“[19] … In my judgment the point whether the appellant was entitled to subject the respondent to a second disciplinary hearing will, if upheld, mean that in effect the findings and decision of that enquiry must be treated as non-existent in law. That will include the finding that the respondent was guilty of the misconduct he had been found not guilty of in the first disciplinary enquiry.

[20] If in law the findings of the second enquiry were, for all intents and purposes, to be treated as having been set aside, the finding of the first enquiry would remain operative. That is the finding that the respondent was not guilty of the misconduct. In my view the effect of all this in law would be that the appellant had no fair reason to dismiss the respondent and that, in those circumstances, the dismissal was substantively unfair.”

The purpose of a second inquiry

Curing of substantive defects

In the BMW case the employee was confronted with new facts that came to light after the first hearing, on the basis of which, a continued employment relationship was clearly untenable. In this matter the employee arranged to remove equipment which had been declared redundant by the employer from the employer’s premises. The reason he gave was that the goods had to be removed for repairs.

The employer believed that the employee had acquired the goods. Since the employer did not take issue with this acquisition, despite its internal policies to the contrary, it did not have a problem with the removal of the goods from its premises. Its only concern, initially, was that the employee had provided misleading information as to the reason for the removal. The employee was therefore charged and brought before a disciplinary enquiry in relation to his misrepresentation of the facts on the basis of which he had obtained the permission. Though the employee was found guilty in this instance, the employer did not regard this conduct in a serious light and accordingly it did not impose any sanction.

It was only subsequent to the disciplinary enquiry that the employer gained knowledge of some further events that had transpired before the enquiry. After the equipment had been removed from the employer’s premises the employee arranged that it be delivered to an entity known as Garaquip. On the employee’s request Garaquip issued the employer with a quotation to repair the goods. Also on request of the employee this quotation was marked for his attention. The employee thereafter made attempts to sell the equipment to Garaquip in the name of a separate entity in which he held an interest, providing his personal bank account details for payment.

These new facts, in particular Garaquip’s invoice, revealed that the employee had considered the equipment still to belong to the employer. It therefore followed that the employee was trying to sell the employer’s goods for his personal gain. Accordingly, the employee was charged again and dismissed after a second disciplinary enquiry.

The difficulty in balancing the respective competing interests of the employer and the employee is borne out by the different conclusions reached by the minority and the majority of the Court in the BMW case. In essence the difference relates to the degree of blame attributed to the employer in not obtaining the new information sooner.

The minority of the Court held that the employer had failed to show that its receipt of the information at such a late stage was not due to any failure on its part to have conducted a proper investigation prior to the first disciplinary enquiry. Accordingly the minority of the Court concluded that the employer should not have been entitled to subject the employee to the second enquiry.

The majority of the Court was not oblivious to the
possibility that the new information may have come to light sooner if the employer had initially conducted a diligent investigation. However the majority also took into account the employee’s wilful concealment of these facts as well as the serious nature of his misconduct. The Court also took into account that it would be untenable to compel the employer to retain the employee in view of the obvious breakdown in the trust relationship. In rejecting the employee’s contention of double jeopardy the Court accordingly held as follows:

“[13] In casu the appellant was perfectly bona fide throughout. The respondent was the one who concealed what he had done. That concealment was carried into the first disciplinary enquiry. It may be that the appellant should have seen through the respondent’s scheme sooner than it did, but that did not make it fair that the respondent should have come away scot free. Although the charges both involved misrepresentation, the full import of the deception was not realized at the first disciplinary enquiry. It would be unfair to compel an employer to retain an employee in whom it has justifiably lost all confidence. That must have been the case here when the full extent of the respondent’s deceit became apparent. And since the loss of confidence justifiably occurred only after a first disciplinary enquiry had been held, I do not consider that it was unfair to hold another. In my view the respondent’s dismissal was both substantively and procedurally fair.”

On a similar factual scenario the arbitrator in UASA obo Lloyd-Lister v Harmony Gold Mine Limited [2010] 11 BALR 1213 (CCMA) was prepared to completely disregard the fact that the employer may have been remiss in not discovering the evidence that ultimately resulted in the employee’s dismissal. Given the serious nature of the employee’s conduct that came to light as a result of this evidence the arbitrator held that it was fair to convene a second enquiry and to dismiss the employee.

In the Branford case the defects in the initial hearing did not result from an absence of relevant evidence, but from the obvious failure of the initial disciplinarian to properly apply his mind to the matter. In this matter the employee had submitted fraudulent petty cash claims. When his supervisor became aware of this he gave the employee a mere “dressing down” and imposed a warning letter. The employer subsequently convened a proper second disciplinary hearing pursuant to which the employee was dismissed. The Court considered that it was fair to dismiss the employee in these circumstances. It held as follows:

“[17] ... In these circumstances it would manifestly be unfair for the company to be saddled with a quick, ill-informed and incorrect decision of its employee who misconceived the seriousness of the matter and hurriedly took an inappropriate decision leading to an equally inappropriate penalty.”

(A similar approach was followed in Solidarity obo Pienaar v Harmony Gold Mine Ltd [2011] 8 BALR 889 (CCMA)).

Employers will be well advised not to regard this obiter dictum as a carte blanche to convene a second enquiry in any instance where it is dissatisfied with the outcome of the first disciplinary enquiry. This will for all intent and purposes amount to the employer affording itself a right of appeal against its own finding. It is clear that the Court’s aforesaid finding in the Branford case was motivated by the obvious and gross oversights in the first disciplinary enquiry and the serious prejudicial effect of a continued employment relationship. Accordingly, this dictum will probably only apply in exceptional circumstances and provided the employee is guilty beyond a shadow of any doubt.

Curing of procedural defects

As a general proposition an employer who did not follow proper procedures before it dismissed an employee is allowed to revoke the dismissal and to reinstate the employee unconditionally. (Blewitt v Randridge Technical Services (Pty) Ltd [2001] 10 BLLR 1105 (LC) at par. 21). If the employer then holds a second disciplinary enquiry in relation to the same charges it will not amount to double jeopardy. In this regard the following was ruled in Moyo v Avery Dennison SA (Pty) Ltd [2011] 4 BALR 347 (NBCCI):

“Where an employer dismisses an employee without following a fair process and then reinstates the employee and holds an enquiry, it has rectified a wrong that it had previously made. One cannot state that the holding of an enquiry subsequent to reinstatement is double
jeopardy: It may have been double jeopardy had the employee been found guilty of the charges and then charged again on the same offences and dismissed. I use the word “may” because labour law is about fairness. However, I need not delve into this issue as the facts of this case are different.” (Emphasis added)

Conclusion

• Unlike a defendant or a respondent in civil proceedings and an accused in criminal proceedings an employee in internal disciplinary proceedings will not necessarily be successful with a claim of double jeopardy. Whether or not such a claim will succeed depends on considerations of fairness to both the employer and the employee in the circumstances of every case.
• This does not mean that an employer can simply escape from the procedural or substantive defects of a disciplinary enquiry by launching a second enquiry.
• The employer, as the party who controls the structures by which workplace discipline is enforced, is expected to conduct proper investigations and disciplinary enquiries the first time round. Accordingly, a court or an arbitrator will only sanction a second enquiry if there are sufficient reasons for this.
• Where the purpose of the second enquiry is to remedy procedural defects and no additional evidence is introduced the courts and arbitrators may be more forgiving. Otherwise the employer’s motives in calling the second enquiry may be brought into question.
• Where an employer calls a second enquiry in order to introduce new evidence which was not introduced at the initial hearing it can be expected to justify this action with compelling reasons why this evidence had not been introduced in the first place.
• If a second hearing is called, employers should take extra care to comply with its own policies and standards. It is hardly conceivable that a court or arbitrator will allow a defective initial hearing to be remedied by a further defective hearing.

Unfair discrimination and personal grooming

by PAK le Roux

The recent decision of the Labour Appeal Court (LAC) in The Department of Correctional Services and others v Police and Prisons Civil Rights Union (POPCRU) (Unreported CA 6/2010 27 September 2011) is of importance for two main reasons. The first is that it addresses the issue of religious and cultural discrimination in the workplace in the context of employees being required to comply with certain standards of dress or personal grooming. The second is that it contains a detailed analysis of the relevant legal principles and should provide important guidance to employers when dealing with this often difficult issue.

This dispute has its origins in the appointment of a new Area Commissioner at Pollsmoor Prison in January 2007. He was concerned by what he perceived as laxity in discipline in the area under his control. He was of the view that there was poor compliance with employer policies, including security policies. Correctional officers did not comply with the Dress Code in that they mixed their uniforms and wore different hairstyles.

Shortly after taking up his position he convened a meeting with personnel, managers and officials and discussed his concerns with them. The issue of the employer’s Dress Code was also discussed. One aspect of this Code was that dealing with the hairstyles of employees. The relevant part thereof read as follows:

“5.1.2 Hairstyles: Male Officials

5.1.2.1 Hair may not be longer than the collar...
of the shirt when folded down or cover more than half of the ear. The fringe may not hang in the eyes.

5.1.2.2 Hair must always be clean, combed and neat at all times (taken good care of).

5.1.2.3 Hair may not be dyed in colours other than natural hair colours or out (sic) in any punk style, including ‘Rasta man’ hairstyle.’

The day after this meeting the Commissioner issued a written instruction to the effect that employees had to comply with the Dress Code by attending to their hair styles.

The five employees in this matter wore their hair in dreadlocks – a style that contravened the Code. They refused to cut their hair and to comply with the standards required by the employer. Three of these employees refused to do so because they had adopted the Rastafarian faith which required them to wear dreadlocks. They argued that the requirement that they get rid of their dreadlocks infringed their freedom of religion. The other two argued that they should be entitled to retain their dreadlocks for cultural reasons. The one argued that he was required to wear dreadlocks because he had received a calling to become a traditional healer in accordance with his culture. The other justified his dreadlocks on the basis that he had a traditional illness and that his ancestors had instructed him to wear dreadlocks.

The failure of the five employees to comply with the Dress Code eventually led to them being subjected to a disciplinary hearing and being dismissed. They then challenged their dismissals on the basis that the dismissals had been automatically unfair in terms of section 187(1)(f) of the Labour Relations Act, 66 of 1995 (LRA). They argued that the reasons for their dismissal was their religion, belief and/or culture. They also argued that, because female correctional officers had been permitted to wear dreadlocks, they had also been discriminated against on the grounds of their gender. The Labour Court found that the dismissals were automatically unfair because they were based on the gender of the employees concerned. It also found that discrimination on the grounds of religion belief or culture had not been established.

The employer appealed against this decision to the LAC on the ground that the Labour Court had erred in finding that there had been gender discrimination. The employees lodged a cross appeal on the basis that the Labour Court had erred in not finding that their dismissals were automatically unfair by reason of the fact that the dismissals were because of their religion, belief or culture.

During the course of a lengthy judgment the Court dealt with important elements of this type of claim.

**Differentiation that imposes a burden**

The Court stated that the first step in the enquiry as to whether the employer had discriminated was whether there had been any differentiation between employees which imposed burdens or disadvantages on, or withheld benefits opportunities or advantages from, certain employees on one or more of the prohibited grounds of discrimination. The employees in this case would have to show that the prohibition on the wearing of dreadlocks interfered with their participation in, or the practice or expression of, their religion or culture. In the case of a claim based on gender discrimination, it would need to be shown that the disadvantages that they suffered was due to their gender.

In this case the Dress Code specifically introduced a differentiation between male and female correctional officers. Males were prohibited from wearing “Rasta Man” hairstyles but females were not prohibited from doing so. Not only was this gender discrimination but it also introduced another form of differentiation – that between male correctional officers whose sincere religious beliefs and practices were not compromised by the Dress Code and those who were.
“25 ... The norm embodied in the Dress Code is not neutral but enforces mainstream male hairstyles (of the short-back and sides military variety), at the expense of minority and historically excluded hairstyles, such as hippy, punk or dreadlocks. It therefore places a burden or imposes disadvantages on male correctional officers who are prohibited from expressing themselves fully in a work environment where their practices are rejected and in which they are not completely accepted for who they are.”

Applying the decision of the Constitutional Court in Prince v President, Cape Law Society and Others 2002 (2) SA 794 (CC), the LAC accepted that Rastafarianism is a religion entitled to protection under the Bill of Rights and that the spiritual practices of Xhosa culture were also “similarly entitled”.

It also accepted that -

“26. Courts, in any event, are not usually concerned with the centrality or rationality of beliefs and practices when determining questions of equality or religious and cultural freedom. The authenticity of a party’s belief or adherence is of limited relevance. Provided the assertion of belief is sincere and made in good faith, the court will not embark on an inquiry into the belief or practice to judge its validity in terms of either rationality or the prevailing orthodoxy. Equality and freedom of religion and culture protect the subjective belief of an individual provided it is sincerely held; though there may be room for a more objective approach to cultural practices of an associative nature.”

The reason for the discrimination

In coming to the conclusion that there had been discrimination on the basis of religion, belief or culture the Court also had to consider the employer’s argument that it had not on the facts, discriminated on these grounds. The reason for the dismissal was to ensure compliance with departmental policies and, through a “zero tolerance approach”, to address the issue of a general breakdown in discipline amongst correctional officers.

The Court accepted that this reason for the action would be relevant to the question whether the discrimination would be fair, but pointed out that the question was whether the “employer’s overt subjective reason” excluded the dismissal from being automatically unfair. It rejected this notion. The Court was obliged to look for the “objective causative factors” which brought about the dismissal and should not restrict its enquiry to “a subjective reason, in the sense of an explanation” from the employer.

“35. In other words, discrimination is not saved by the fact that a person acted from a benign motive. Usually motive and intention are irrelevant to the determination of discrimination because that is considered by asking the simple question: would the complainant have received the same treatment from the defendant or respondent but for his or her gender, religion, culture etc? The point was made with greater clarity in Nagarajan v London Regional Transport, as follows:

‘An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant’s race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did ... Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of section 1(1)(a).’

36. Direct discrimination does not require that the employer intends to behave in a discriminatory manner or that it realises that it is doing so. Only where the factual criteria upon which the alleged differential treatment is based are unclear, will the court investigate the mental processes of the employer in order to infer, as a question of fact, from that mental state the existence of discrimination on prohibited grounds. In the present case the reason for the dismissal was that the respondents wore and refused to cut their dreadlocks. But for their gender, religion and culture, they would not have been dismissed. The evidence establishes beyond question that the reason for their dismissal was discrimination on grounds of gender, religion and culture. There is
Accordingly no merit in the appellants’ submission.

Justifying the discrimination

Section 187(1)(f) of the LRA only prohibits unfair discrimination and it is the Court’s approach to whether the discrimination was unfair that is perhaps the most interesting part of the decision.

Section 187(2) lists two situations where discrimination will be fair. The one relates to age discrimination and is not relevant here. The other is that a dismissal can be justified if it is based on the inherent requirements of the job. There is some debate as to whether these are the only two grounds on which the fairness of a discriminatory dismissal can be justified or whether there is a “general fairness” defence. Without debating the issue, the LAC appears to have accepted that an employer can justify the discriminatory dismissal on grounds other than those found in s 187(2).

The Area Commissioner gave evidence to justify this approach. His argument was that the primary purpose of the prohibition of dreadlocks was to achieve uniformity and neatness in the dress and appearance of correctional officers with the underlying purpose of enhancing discipline and security. Disciplinary action against the five employees was but one step in a series of actions taken to ensure compliance with departmental policies.

The Area Commissioner had been alarmed by the large scale non-compliance with departmental policies. Laxity in dress and the wearing of uniforms had, according to his view, contributed to a decline in discipline and standards and had manifested itself in other areas such as bad time-keeping, the unauthorised use of funds and property and absenteeism. The enforcement of the prohibition of dreadlocks was seen as an important ingredient in the programme to improve overall discipline. He also raised the “floodgate” argument. If these employees had to be accommodated, other employees with the differing beliefs and convictions would also have to be accommodated and there would be no standard uniform in the Department.

He also argued that the dress code was “neutral” in that it applied to all religions and that correctional officers were not permitted to practice their religion and culture at the expense of the uniformity required in “a security service organised hierarchically along quasi-military lines”.

Whilst the Court accepted that a measure of deference must be shown to authorities who are statutorily required to run the security organs of state, that deference had to be tempered by a consideration of whether the fundamental right to equality had been violated. This required that the employer must show that the discriminatory measure (ie the prohibition of dreadlocks) achieved its purpose. There had to be a rational and proportional relationship between this measure and the purpose that it sought to achieve. Proportionality also envisaged the need to reasonably accommodate diversity. Employers should, whenever reasonable possible, seek to avoid putting religious and cultural adherents to the “burdensome choice of being true to their faith at the expense of being respectful to management prerogative”.

The Court went on to reject all the Area Commissioner’s arguments.

The argument that the Dress Code was neutral was not sustainable. Whilst it was true that the provisions of the Code relating to the wearing of uniforms were applicable uniformly, this did not apply to hairstyles. The Rasta hairstyle is peculiar to Rastafarians and those called to become Xhosa traditional healers. This prohibition affected them only.

The other arguments were rejected on the basis that there was no evidence to support them.
popularised by right-wing nationalist groupings in Europe; or to have “handlebar” moustaches which extend on either side of their faces. These examples of permissible hairstyles, including the military short-back and sides, reinforce the impression that dominant or mainstream hairstyles, representing peculiar cultural stereotypes are to be favoured over those of marginalised religious and cultural groups.”

The Court also stated that it was difficult to use how the prohibition of dreadlocks contributed to the maintenance of discipline, security, probity, trust and performance.

“48.1 Non-compliance with a valid, constitutional, lawful and reasonable rule is undoubtedly a disciplinary infraction. But that proposition provides an insufficient answer to a request for reasonable accommodation or exemption on the grounds of religion and culture. There is no obvious rational connection between a ban on dreadlock hairstyles and the achievement of greater probity by correctional officers and security at the prison. There is also no rational basis to the apprehension that Rasta hairstyles lead to ill discipline. One has only to state the proposition to realise the unacceptable pejorative stereotyping which it entails. The appellants produced no evidence that dreadlock wearing, Rastafarian or traditional healer correctional officers were less disciplined than their colleagues, or that they negatively affected their discipline. On the contrary, it is common cause that the respondents were exemplary officers who wore dreadlocks for a number of years, without objection, until the arrival of the new Area Commissioner. No evidence was presented to support the suggestion that because the respondents wore dreadlocks their work was affected adversely, that they or others became ill-disciplined or that the affairs of the prison fell into disorder.”

The “floodgate” argument was rejected on the basis of the reasoning in adopted by the Constitutional Court in MEC for Education, Kwazulu-Natal and others v Pillay 2008(1) SA 474 (CC). Firstly, this argument would only apply to bona fide cultural and religious practices. Secondly, if the decision encouraged employees who had hitherto been afraid to express their religious or cultures to do so, this was something to be celebrated and not feared. This would contribute to a “pageant of diversity” which would enrich our country. Thirdly the acceptance of one practice would not require the employer to permit all practices. If accommodating a practice would place an unreasonable burden on an employer, the employer could refuse to permit it.

Finally, the Court pointed to the fact that inmates of the prison who were Rastafarian were entitled to wear dreadlocks and that, at the time that the employees were being disciplined, the Department of Correctional Services had reviewed the Dress Code in order to provide greater flexibility in accommodating diversity. The Department was therefore aware of the principle of reasonable accommodation but had nevertheless still opted for the imposition of a blanket prohibition.

Comment

This decision is an important one in that it is the first one to deal, in any detail and rigorously, with the issue of discrimination on religious and cultural grounds - an area that has not been the subject of much consideration. (But see, for example, the approach adopted in the Labour Court decision Dlamini & others v Green Four Security [2006] 11 BLLR 1074 (LC).)

What is clear is that employers will have to lead evidence to show that any discriminatory measure they adopt serves a genuine need of the business, that the measure will actually tend to achieve this purpose and that less restrictive non-discriminatory measures cannot be used. The importance of the employer accommodating, where possible, the religious and cultural beliefs of employees is also important. Finally, it is also clear that these principles will find potential application in areas other than dress and personal grooming. ■

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