THE CONTEST BETWEEN RELIGIOUS INTERESTS AND BUSINESS INTERESTS

TFD Network Africa (Pty) Ltd v Faris (2019) 40 *ILJ* 326 (LAC)

1 Introduction

The right to freedom of religion is one of the fundamental human rights. This is evident from several sections of the Constitution of the Republic of South Africa, 1996 (the Constitution), including sections 9, 15 and 31. Section 9(4) prohibits unfair discrimination (whether direct or indirect) against anyone on one or more of the grounds listed in section 9(3), which includes religion. Section 15(1) states that everyone has the right to freedom of conscience, religion, thought, belief and opinion, while section 31(1)(*a*) provides that persons belonging to a religious community may not be denied the right to practise their religion with other members of the community.

In line with the Constitution, labour legislation such as the Labour Relations Act 66 of 1995 (LRA) and the Employment Equity Act 55 of 1998 (EEA) also protects this right. Section 187(1)(*f*) of the LRA provides that if an employee is discriminated against and is dismissed based on religion, among other grounds, such a dismissal will be deemed to be an automatically unfair dismissal. Section 6(1) of the EEA prohibits unfair discrimination, whether direct or indirect, in any employment policy or practice based on prohibited grounds such as religion. It is evident from all the above provisions that the right to freedom of religion is vital to people's lives, including employees' lives (see Bilchitz and De Freitas "Introduction: The Right to Freedom of Religion in South Africa and Related Challenges" 2012 28 *SAJHR* 141).

Although an employee has the right to practise religion, he or she also has the common-law duty to render services or to put his or her labour potential at the disposal of the employer as agreed in terms of the contract of employment – except during the employee's annual leave, sick leave and maternity leave. (see Garbers, Le Roux, Strydom, Basson, Christianson, Germishuys-Burchell *The New Essential Labour Law Handbook* 7ed (2019) 35; *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) 61C; Rycroft "Accommodating Religious or Cultural Beliefs in the Workplace: *Kiviets Kroon Country Estate v CCMA*; *Dlamini v Green Four Security*; *POPCRU v Department of Correctional Services*" 2011 *SA Merc LJ* 109). An employee may therefore be in breach of this duty if he or she refuses to work or deserts his or her employment or absconds from his or her employment or is absent from work without permission. In addition to the above duty, employees have a duty to serve the employer's interests and to act in good faith (Grogan *Workplace Law* 12ed (2017) 93; Mischke "Acting in Good

Faith: Courts Focus on Employee's Fiduciary Duty to the Employer" 2004 14(1) *CLL* 1).

Often, employees' right to freedom of religion collides with their duty to render services and to serve the employer's interests; employees present various reasons related to their religious practices for their failure to render services (Rycroft 2011 *SA Merc LJ* 106–113). As a result, employers are regularly required to be lenient and make efforts to accommodate employees' religious beliefs in the workplace. At times, this becomes a burden to employers as they have to accommodate employees with diverse individual religious interests, but also ensure that their businesses remain operational (McGregor "Employees' Right to Freedom of Religion Versus Employers' Commercial Interests: A Balancing Act in Favor of Religious Diversity: A Decade of Cases" 2013 25 *SA Merc LJ* 223). In a recent Labour Appeal Court (LAC) case of *TFD Network Africa (Pty) Ltd v Faris* ((2019) 40 *ILJ* 326 (LAC)) (*TFD Network Africa v Faris*), the employee could not work on Saturdays because her religion did not allow her to do so. Ultimately, the employer dismissed her based on incapacity. However, the court found that the dismissal was actually automatically unfair because it was based on religion. Religion remains one of the most contentious and problematic areas for employees and employers to deal with in the workplace.

The discussion that follows evaluates the court's finding in view of relevant constitutional provisions, labour law legislation and common law. It further considers the position under American law regarding religion and reasonable accommodation in the workplace.

2 Facts

Deidre Faris (Faris) was employed by TFD Network Africa (Pty) Ltd (TFD) in 2012 as part of its graduate management training programme. When Faris was interviewed telephonically and on several other occasions, she informed TFD that she was a Seventh-Day Adventist and therefore she could not work on the holy Sabbath, which falls on a Saturday (par 3 and 5). However, TFD maintained that, during an on-site interview, Faris was told that she would be required to work over weekends as it was an operational requirement of the job, to which she indicated that she had no problem. Clause 3.3 of the contract of employment signed by Faris stated as follows:

> "By signing this contract, you undertake and agree to perform such overtime duties as may be reasonably required of you from time to time, provided this does not exceed the limitations laid down in relevant legislation." (par 7)

In terms of her religion, she was required to reserve Saturdays for her religious practices when followers of the religion are not permitted to work. TFD was involved in logistics and warehousing services and it had to conduct monthly stocktaking on weekends. As a result, a roster was drawn up in terms of which TFD managers had to attend monthly stocktakings. However, Faris never attended such stocktakings for religious reasons. Faris was called to a meeting regarding her failure to work on Saturdays, where she confirmed that she could not take part in stocktaking on Saturdays as she was prohibited in terms of her religion from working on Saturdays before sunset. She suggested that she could instead work on Sundays (par 47) but

TFD stated that it could not make an exception for Faris. It then continued to institute proceedings against her based on incapacity, which resulted in her dismissal.

Faris referred the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) and after receiving a certificate of non-resolution, referred the matter to the Labour Court, contending that TFD discriminated against her on religious grounds. The Labour Court found that Faris's dismissal was automatically unfair and granted her 12 months' compensation as well as R60 000 for unfair discrimination. TFD appealed the finding, arguing that Faris was not dismissed because of her religion, but because she could not work on Saturdays, which was an inherent requirement of her job. The LAC, however, also found that Faris was dismissed because of her religion, as there was a direct link between her inability to work on Saturdays and her religious convictions. The court considered the fairness of the discrimination – that is, whether it was connected to a legitimate purpose and whether it impacted unduly on Faris's dignity. In this regard, the court drew a distinction between *TFD Network Africa v Faris* (*supra*) and *FAWU v Rainbow Chicken Farms* ((2000) 21 *ILJ* 615 (LC)), which involved Muslims who refused to work on Eid. The court found that the company's insistence that employees work on Eid had not amounted to unfair discrimination because had the employer allowed affected employees to take leave, the factory would have closed. Regarding legitimate purpose, the court in *TFD Networks v Faris* (*supra*) held that it was possible for TFD to accommodate Faris without imposing undue hardship or operational difficulty. In relation to Faris's dignity, the court stated:

> "[W]ithout question, an employment practice that penalizes an employee for practicing her religion is a palpable invasion of her dignity in that it supposes that her religion is not worthy of protection or respect. It is a form of intolerant compulsion to yield to an instruction at odds with sincerely held beliefs on pain of losing employment. The employee is forced to make an unenviable choice between conscience and livelihood. In such a situation, the dictates of fairness and our constitutional values oblige the employer to exert considerable effort in seeking reasonable accommodation." (par 45)

The LAC therefore found that the employer had an obligation to reasonably accommodate an employee's religious freedom unless it imposed undue hardship on the employer; it upheld the award of 12 months' compensation but discarded the R60 000 that the Labour Court awarded on the basis that it was unduly onerous.

3 Protection of the right to freedom of religion in South Africa

3 1 Religion under the Constitution

As stated in the introduction, the right to freedom of religion is protected and referred to in a number of constitutional provisions. Everyone, including employees, has this right and would generally want to enjoy and practise it freely. Courts in general are reluctant to become involved in doctrinal disputes of a religious character (see *Taylor v Kurtstag NO* 2005 (1) SA 362

(W) par 39). In *Prince v President of the Law Society of the Cape of Good Hope* (2001 (2) SA 388 (CC) par 97), it was stated that it is undesirable for courts to enter into debates about whether a particular practice is central to a religion, unless there is a genuine dispute as to the centrality of the practice.

In terms of section 39 of the Constitution, when interpreting the Bill of Rights, it is required that international law, among others, be considered. With this in view, it is appropriate to consider article 1 of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, which protects the right to "thought, conscience, and religion or belief", however, without offering any definition of the term "religion". The right to freedom of religion covers, among other things, the right to have a belief, to express that belief publicly and to show or display the belief through, among others, worship and practice (see Currie and De Waal *The Bill of Rights Handbook* 5ed (2005) 388). In *S v Lawrence* ((1997) 4 SA 1176 CC), Chaskalson borrowed the definition of the concept of religion from the Canadian Courts (see *R v Big M Drug Mart Ltd* 1985 1 SCR 295) and stated:

> "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal and the right to manifest religious beliefs by worship and practice or by teaching and dissemination." (par 92)

It is evident from this definition that freedom of religion is a belief of a personal nature that an individual has the right to exercise freely. Although employees are free to exercise their right to freedom of religion, it must be noted that, just like any other right, this right is not absolute as it can be limited in terms of section 36 of the Constitution. Therefore, each case involving this right should be considered on its merits.

3 2 Religion under the EEA

3 2 1 Discrimination based on religion

The purpose of the EEA is to achieve equity in the workplace and one of its primary means of achieving this is through the elimination of unfair discrimination (s 2 of the EEA). Section 3 of the EEA states that this Act must be interpreted in compliance with the Constitution, so as to give effect to the purpose of the Act, taking into account any relevant code of good practice issued in terms of the Act or any other employment law, and in compliance with South Africa's international law obligations – in particular those contained in the International Labour Organisation (ILO) Convention 111 concerning Discrimination in Respect of Employment and Occupation, 1958.

Section 6(1) of the EEA prohibits unfair discrimination, whether direct or indirect, in any employment policy or practice on grounds such as religion. At times, employers introduce and implement policies and practices that have an effect on employees' right to freedom of religion. According to section 1 of the EEA, an "employment policy or practice" includes, among others, recruitment procedures, advertising and selection criteria, appointments and

appointments processes, job classification and grading, job assignments, the working environment and facilities, and dismissal (see also *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* (1998) 19 *ILJ* 285)). As is evident from this definition, the list of employment policies or practices includes dismissal; section 10(1) of the EEA provides that disputes about discriminatory dismissal should be dealt with in terms of Chapter VIII of the LRA. In relation thereto, section 187(1) of the LRA declares a dismissal based on any of the listed grounds to be automatically unfair.

It must be noted that at the heart of unfair discrimination is differentiation. Differentiation in the employment context means that an employer treats employees or applicants for employment differently or it uses policies or practices that exclude certain groups of employees. However, differentiation cannot be equated with discrimination. Differentiation only becomes discrimination when it is made for unacceptable reasons (see Garbers *et al The New Essential Labour Law Handbook* 354). These reasons include, but are not limited to, those listed under section 6(1) of the EEA. Not all acts of discrimination will be regarded as unfair since section 6(2) of the EEA provides that it is not unfair discrimination to take affirmative action measures consistent with the Act or to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job. The latter exception is relevant to this discussion and is discussed in detail later.

3 2 2 Reasonable accommodation

In line with the above, section 15(2)(*c*) of the EEA requires designated employers to make attempts to reasonably accommodate the needs of their employees. Those needs include those related to the employees' religion. It must however be noted that in accommodating an employee, the employer must not incur undue hardship. "Reasonable accommodation" is defined as "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 in the workforce of a designated employer" (s 1 of the EEA). Employers may therefore be required to reasonably accommodate employees' religious beliefs and practices in order for their policies or practices not to be seen as unfair discrimination against such employees.

The issue of reasonable accommodation was further emphasised in *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* ([2012] 11 BLLR 1099 (LAC)), where the following was stated:

> "It would be disingenuous of anybody to deny that our society is characterised by a diversity of cultures, traditions and beliefs. That being the case, there will always be instances where these diverse cultural and traditional beliefs and practices create challenges within our society, the workplace being no exception. The Constitution of the country itself recognises these rights and practices. It must be recognised that some of these cultural beliefs and practices are strongly held by those who subscribe to them and regard them as part of their lives. Those who do not subscribe to the others' cultural beliefs should not trivialise them … What is required is reasonable accommodation of each other to ensure harmony and to achieve a united society." (par 26)

Furthermore, in *MEC for Education, Kwazulu-Natal v Pillay* (2008 (1) SA 474 (CC) par 73), the court stated that reasonable accommodation requires that an employer must take positive measures, even if it means incurring additional hardship or expenses, to ensure that all employees enjoy their right to equality. It was held in *FAWU v Rainbow Chicken Farms* (*supra*) that a refusal to allow Muslim employees to take a day off for their religious holidays would only be unfair if some employees were allowed to do so and others were not. Furthermore, if the absence of these employees (Muslim butchers) would disrupt the employer's business, the employer was entitled to insist that they remain at work for operational reasons. In *SA Clothing and Textile Workers Union v Berg River Textiles – A Division of Seardel Group Trading (Pty) Ltd* ((2012) 33 *ILJ* 972 (LC)), the Labour Court said:

> "[I]n particular, the employer must establish that it has taken reasonable steps to accommodate the employee's religious convictions. Ultimately the principle of proportionality must be applied. Thus, an employer may not insist on the employee obeying a workplace rule where that refusal would have little or no consequence to the business." (par 38)

From the above cases, it is evident that employers are expected to make an effort to accommodate their employees for religious reasons for as long as they do not incur unreasonable hardship.

3 3 Religion under the LRA: automatically unfair dismissal

In terms of section 185 of the LRA, employees have the right not to be unfairly dismissed. In the case of dismissal, it is upon the employee to show that there has indeed been a dismissal (see *De Beer v SA Export Connection CC t/a Global Paws* [2008] 1 BLLR 36 (LC) par 13; *Atkins v Datacentrix (Pty) Ltd* [2010] 4 BLLR 351 (LC) par 15) and thereafter it is upon the employer to prove that the dismissal was fair. However, the approach is different in cases of an automatically unfair dismissal.

The concept of "automatically unfair dismissal" originates from article 5 of the ILO Convention 158 of 1982 on Termination of Employment. Under the LRA, section 187 provides for this type of dismissal. If an employee is dismissed for one of the reasons contained in section 187 of the LRA, it means there has been an infringement of a basic human right and the dismissal will be regarded as automatically unfair (see Garbers *et al* The New *Essential Labour Law Handbook* 151). Through this concept, several constitutional rights (such as the right to equality (s 9), the right to dignity (s 10) and the right to fair labour practices (s 23)) are protected. In terms of section 187(1)(*f*) of the LRA, it is automatically unfair to dismiss an employee if the reason for the dismissal is that the employer has discriminated unfairly on any one of or more of the grounds listed in the section, which includes religion (see also *Department of Correctional Services v POPCRU* [2013] 7 BLLR 639 (SCA) par 25). Unlike other forms of dismissal, in the case of an automatically unfair dismissal, the employer cannot defend termination of the employment contract by proving that it was for a fair reason.

An employee who has been dismissed on a prohibited ground may claim unfair discrimination in terms of the EEA in addition to pursuing an

automatically unfair dismissal claim (see *Gauteng Shared Services Centre v Ditsamai* [2012] 4 BLLR 328 (LAC); *Atkins v Datacentrix (Pty) Ltd supra*); the applicable principles are generally the same in both cases (see also Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law* 6ed (2015) 675). In *SACTWU v Berg River Textiles (supra)*, employees did not agree with a new shift that was introduced because of a downturn in trade. They wanted to strike in order to show their resistance to the new system. Before the strike, Williams informed the employer that he could not work on Sundays owing to his religion (Apostolic Faith Mission), which prohibited work on Sundays. He also lodged a grievance in this regard. Mr Williams was later dismissed with others who took part in an unprotected strike. While others pleaded guilty of misconduct, Mr Williams did not plead guilty to misconduct on the basis that his right to freedom of religion entitled him not to work on Sundays (par 23). The Labour Court held that all the other employees were dismissed fairly, but that Mr Williams's dismissal was automatically unfair in terms of section 187(1)(*f*) of the LRA. In *Dlamini v Green Four Security* ((2006) 27 *ILJ* 2098 (LC)), members of the Baptised Nazareth Church who were security guards were dismissed because of their refusal to shave or trim their beards as it was against their religious convictions. They argued that their dismissal was automatically unfair because they were discriminated against on religious grounds. The court found that the security guards were selective about the religious rules they chose to obey and held that the employer had proved that the rule requiring them to be clean shaven served a clear purpose and was seen as an inherent requirement of a security officer's job.

It is imperative, when establishing whether the reason for a dismissal amounts to unfair discrimination, to determine whether the ground for discrimination was "arbitrary" or otherwise unfair on a listed or unlisted ground. Section 187(2) of the LRA, however, states that despite subsection 1(*f*), a dismissal may be fair if the reason is based on an inherent requirement of the particular job (see also *Woolworths (Pty) Ltd v Whitehead* [2000] 6 BLLR 640 (LAC) par 41) or a dismissal is based on age if the employee has reached the normal or agreed retirement age for persons employed in that capacity (see also *Schmahmann v Concept Communications Natal (Pty) Ltd* 1997 *ILJ* 1333 (LC); *Rubenstein v Prices Daelite (Pty) Ltd* 2002 *ILJ* 528 (LC) pars 19-28). The defence is an exception to the general rule on automatically unfair dismissals.

3 4 Exception to the rule: Inherent requirements of a job under the EEA and the LRA

The inherent requirements of a job appear as an exception to the rule against unfair discrimination under both the EEA (s 6(2)) and the LRA (s 187(1)(*f*)). Neither the EEA nor the LRA define the concept "inherent requirements of a job". "Inherent" has been interpreted by Cooper (see Cooper "The Boundaries of Equality in Labour Law" 2004 25 *ILJ* 813) to mean:

> "existing in something as a permanent attribute or quality; forming an element, especially an essential element, of something, intrinsic, essential' and as an

> 'indispensable attribute' which 'must relate in an inescapable way to the performing of the job". (835)

According to Grogan (see Grogan *Workplace Law* 104; Grogan *Employment Rights* 3ed (2019) 258), the word "inherent" suggests that possession of a particular personal characteristic should be necessary for effectively carrying out the duties attached to a particular position. In *IMATU v City of Cape Town* ([2005] 11 BLLR 1084 (LC) par 102), it was indicated that this concept means "existing in something, a permanent attribute or quality; forming an element, especially an essential element, of something". In terms of article 2 of the ILO Convention 111, "any distinction, exclusion or preference in respect of a particular job based on an inherent requirement thereof shall not be deemed to be discrimination". It is therefore important that the inherent requirements of a job must relate to the job itself and not the individual employee, in order to qualify as such (see also *Dlamini v Green Four Security supra* par 52). These are the requirements without which the job cannot be done (see Van Niekerk, Smit, Christianson, McGregor and Van Eck *Law@work* 4ed (2017) 285–286). It is upon the employer to establish that some inherent characteristic is important for the effective performance of the obligations that attach to a specific job. In *Department of Correctional Services v POPCRU* (*supra*), the court considered the inherent-requirement-of-the-job defence where prison officials who wore dreadlocks refused to comply with the employer's rules relating to hairstyles. The court found:

> "no evidence was adduced to prove that the respondents' hair, worn over many years before they were ordered to shave it, detracted in any way from the performance of their duties or rendered them vulnerable to manipulation and corruption. Therefore, it was not established that short hair, not worn in dreadlocks, was an inherent requirement of their jobs. A policy is not justified if it restricts a practice of religious belief – and by necessary extension, a cultural belief – that does not affect an employee's ability to perform his duties, nor jeopardise the safety of the public or other employees, nor cause undue hardship to the employer in a practical sense." (par 25)

In *Association of Professional Teachers v Minister of Education* ((1995) 16 *ILJ* 1048 (IC) 1081B), the Industrial Court held that a differentiation based on the inherent requirements of a job should only be allowed in very limited circumstances and should not be allowed where the decision to differentiate is based on subconscious perceptions. In *Ntai v SAB Ltd* ([2001] 2 BLLR 186 (LC) par 88), a stricter test was adopted; the court rejected "mere" commercial rationale as a criterion and adopted a test more akin to business necessity (see *Whitehead v Woolworths (Pty) Ltd* [1999] 8 BLLR 862 (LC) par 30; Du Toit *et al Labour Relations Law* 694).

The exception "inherent requirements of the job" will therefore be accepted if a requirement is an essential or permanent element of the job and does not relate to an individual employee.

4 Protection of the right to freedom of religion under American Law: The Civil Rights Act of 1964

The Civil Rights Act of 1964 prohibits discrimination based on race, colour, religion, sex or national origin. Title VII of the Civil Rights Act of 1964, in particular, prohibits employers from discriminating against individuals based on religion in hiring, firing and in other terms and conditions of employment (see also *EEOC v Abercrombie & Fitch Stores, Inc*, 135 S. Ct. 2033 (U.S. 2015). According to Title VII, the term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. Title VII is applicable to employers who have 15 or more employees for each working day. These employers are required to reasonably accommodate the religious practices of an employee or prospective employee, unless doing so would create an undue hardship upon the employer. Employees may therefore not be treated more or less favorably because of their religion and may not be required to participate or refrain from participating in a religious activity as a condition of employment. Reasonable accommodation may include the following: shift swaps between employees, flexible scheduling, and transfers to other positions within the company. An employer who claims that accommodation is not feasible because it would result in undue hardship must prove undue hardship and its effect on the business. However, employers are not expected to provide the specific accommodation requested by employees, as long as they have reasonably accommodated the employee (see *Ansonia Board of Education v Philbrook*, 479 U.S. 60 (1986)). With regard to undue hardship, the United States Supreme Court in *Trans World Airlines, Inc v Hardison* (432 U.S. 63 (1977)) held that the employer need not incur more than minimal costs in order to accommodate an employee's religious practices. Among other considerations, an accommodation may cause undue hardship if it is costly, compromises workplace safety, decreases workplace efficiency, or infringes on the rights of other employees.

Under American law, an employer is permitted to discriminate against an employee based on a "protected trait" where the trait is "a *bona fide* occupational qualification, reasonably necessary to the normal operation of that particular business or enterprise". The *bona fide* occupational qualification must, however, meet three requirements – that is, there must be a direct relationship between the protected trait and the ability to perform the duties; the *bona fide* qualification must relate to the essence or central mission of the employer's business and there must be no less-restrictive or reasonable alternative (see *United Automobile Workers v Johnson Controls, Inc*, 499 U.S. 187 (1991)).

5 Employee's duty to tender services and the duty of good faith

Under common law, an employee has a duty to tender his or her services (see *Smit v Workmen's Compensation Commissioner supra*). An employee must make his or her services personally available to the employer. He or she is also required to render his or her services in a satisfactory manner and in accordance with contractual provisions (see *NUM v Libanon Gold Mining Co Ltd* (1994) 15 *ILJ* 585 (LAC)). An employee who refuses to work or who deserts his or her employment or who absconds from his or her employment or is absent without permission will be in breach of this duty (see Garbers *et al* The New *Essential Labour Law Handbook* 35). Such conduct may also amount to misconduct, which is one of the grounds for the employer to dismiss the employee.

The relationship between employer and employee is one of trust and confidence (see *Council for Scientific & Industrial Research v Fijen* (1996) 17 *ILJ* 18 (A) par 26D). The employee owes the employer a fiduciary duty. The duty of good faith requires that an employee should always give priority to the interests of his or her employer (see *Nel v Ndaba* 1999 *ILJ* 2666 (LC) par 25). Therefore, his or her conduct when tendering services should not result in his or her private interests conflicting with the execution of his or her duties or interests of the employer (see *IMATU v Rustenburg Transitional Council* [1999] 12 BLLR 1299 (LC) par 7).

6 Evaluation of the court's finding

As a citizen of South Africa, Faris had a right to exercise her constitutionally protected right to freedom of religion without being discriminated against. She had a right to enjoy and practise her religion freely, including to display her belief through worship and practice (see Currie and De Waal *The Bill of Rights Handbook* 388; article 1 of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief). Faris had a right to entertain her religious beliefs and declare them openly, without fear of reprisal (see *S v Lawrence supra*). It must however be noted that Faris's right to freedom of religion is not absolute as it can be limited in terms of section 36 of the Constitution, as long as the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Faris also had protection in terms of section 6(1) of the EEA, which prohibits direct or indirect unfair discrimination based on religion, among other grounds, in any employment policy or practice. TFD had an employment policy or practice that required employees, including Faris, to attend monthly stocktaking. "Employment policy or practice" includes job assignments and dismissal (s 1 of the EEA; *Leonard Dingler Employee Representative Council v Leonard Dingler supra*). Faris failed to attend to a job assignment in the form of stocktaking for religious reasons and practices. TFD's employment policy or practice therefore discriminated against Faris based on her religion; if she attended the stocktaking, she would not be able to practise her religion. Faris was a Seventh-Day Adventist and could not

work on the Sabbath, which is a Saturday, whereas TFD required employees to work on Saturdays. Based on her religion, Saturdays had to be reserved for her religious practices.

Furthermore, that Faris was dismissed for her failure to work on Saturdays meant that she was treated differently based on the employment policy or practice. The differentiation was unfortunately based on religion, which is one of the listed prohibited grounds (see s 6(1) of the EEA; Garbers *et al The New Essential Labour Law Handbook* 346) and was therefore regarded as unfair discrimination. After the matter was referred to the Labour Court, it found that the dismissal was automatically unfair based on religion as provided for in terms of section 187(1)(*f*) of the LRA. On appeal, TFD argued that Faris was not dismissed based on religion but because she could not work on Saturdays, which was an inherent requirement of the job. The LAC, however, found that there was a link between her inability to work on Saturday and her religious practices, and therefore that the dismissal was based on religion.

Both the EEA and the LRA provide for the "inherent requirements of a job" to be one of the exceptions in unfair discrimination cases. However, it must be noted that, to qualify as such, the requirement (among others) must be a permanent attribute or quality of the job and if it is so, such distinction or exclusion shall not be regarded as discrimination (see article 2 of the ILO Convention 111; *IMATU v City of Cape Town supra*). This should be allowed only when it is not based on subconscious perceptions (see *Association of Professional Teachers v Minister of Education supra*) but it is necessary for the effective carrying out of the duties (see Grogan *Workplace Law* 104) and is a business necessity (see *Ntai v SAB supra; Whitehead v Woolworths (Pty) Ltd supra*). Nevertheless, section 15(2)(*c*) of the EEA requires employers to make attempts to reasonably accommodate the needs of employees (s 15(2)(*c*); *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi supra*). However, in doing so, employers must not incur undue hardship. This includes the modification or adjustment of a job to enable an employee to have access to or participate or advance in employment. The employer should take positive steps, even if it means incurring additional hardship or expenses, to ensure that employees enjoy their right to equality (see *MEC for Education, Kwazulu-Natal v Pillay supra*). When she was employed, Faris informed TFD that she was a Seventh-Day Adventist and that she would not be able to work on Saturdays as it is regarded as the holy Sabbath. In addition, at the meeting that was called to discuss her failure to work on Saturdays, she confirmed that she could not take part in stocktaking on Saturdays. She even suggested that she could instead work on Sundays, but TFD stated that it could not make an exception for her. It is submitted that TFD failed to make any reasonable effort to accommodate Faris.

Similar to the South African position, under Title VII of the Civil Rights Act, 1964 employees may not be treated more or less favourably because of their religion and may not be required to refrain from participating in a religious activity. Nonetheless, the employer also need not incur more than minimal costs in order to accommodate the employee (see *Trans World Airlines, Inc v Hardison supra*). If a "protected trait" is used as a defence, there must be a direct relationship between the protected trait and the ability

to perform duties. The requirement must relate to the essence or central mission of the employer's business and there must be no less-restrictive or reasonable alternative (see *United Automobile Workers v Johnson Controls supra*). This is similar to the "inherent requirements of a job" exception under South African law.

If Faris's dismissal was based on religion, it qualified as an automatically unfair dismissal in terms of section 187(1)(*f*) of the LRA (see also article 5 of the ILO Convention 158 of 1982 on Termination of Employment; *Department of Correctional Services v POPCRU supra*). TFD could therefore not defend the dismissal by proving that it was fair unless it was indeed based on the inherent requirements of the job. These requirements must relate to the job itself and not to the employee (see *Dlamini v Green Four Security supra*). However, in Faris's case, it was her religion that was an impediment to her working on Saturdays and therefore the discrimination and dismissal were directly linked to the practice of her religion and not to her ability to perform her duties based on the nature of her job. For Faris, there was an alternative to working on Saturday as she offered to work on Sunday, but TFD refused to make reasonable concessions to accommodate her. It must however be stated that, despite her right to freedom of religion, Faris still had a duty to render services or to make her services available to TFD (see *Smit v Workmen's Compensation Commissioner supra*). Faris had to make efforts to give priority to the interests of TFD (see *Nel v Ndaba supra*).

Indeed, Faris did this by offering to work on Sundays instead of working on Saturdays, which TFD refused. With this in mind, it is submitted that the court was correct in finding that Faris's dismissal was automatically unfair based on her religion.

7 Conclusion

The fact that employees have a right to freedom of religion does not mean that they can neglect their duties to the employer or always put their religious interests above business interests. The right to freedom of religion can be limited and should be exercised in view of other rights and duties such as the duty by the employee to tender services. There must therefore be a balance between the right to freedom of religion and employees' duty to tender services and to act in the interest of the employer. A contract of employment is reciprocal in nature and therefore each party must fulfil its duties in the employment relationship. Employers should however also make efforts to reasonably accommodate religious needs of employees (s 15(2)(*c*) of the EEA), to enable them to perform their duties, as long as the employer does not as a result incur undue hardship (see *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi supra*; *MEC for Education, Kwazulu-Natal v Pillay supra; SA Clothing and Textile Workers Union v Berg River Textiles supra*). It is imperative for employers to offer reasonable accommodation, even if they do not provide the specific accommodation requested by the employee (see *Ansonia Board of Education v Philbrook supra*). Such a concession by the employer can improve the morale of employees and assist the employer to retain hard-working employees who are staunch in their religious beliefs and practices.

Employees should also from the beginning of an employment relationship inform the employer about their religious commitments and practices at that time or as soon as they arise in order to avoid unnecessary conflict. In *Lewis v Media 24 Ltd* ((2010) 31 *ILJ* 2416 (LC)), the applicant (who was a Jewish male) was required to work long and late hours and this caused him to be unable to observe the Sabbath. The employee's contract of employment was as a result terminated because of his absence from work without permission. He alleged that he had been unfairly discriminated against based on religious, cultural and political beliefs. The court found that, when appointed, the employee did not declare to his employer that he was a Jew and neither did he object to work on the Sabbath. The application was accordingly dismissed.

Employers should also avoid hiding behind the "inherent requirements of the job" exception provided for by the EEA and the LRA when dismissing employees based on religion, unless it is relevant and necessary. A refusal by the employer to accommodate an employee based on religion should be based on actual facts. In this constitutional dispensation, employers have an obligation to ensure that employees are treated with respect and dignity regardless of their religion.

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