IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

CASE NO: CA 6/2010

In the matter between:

THE DEPARTMENT OF CORRECTIONAL SERVICES	First Appellant
THE AREA COMMISSIONER: POLLSMOOR	Second Appellant
and	
POLICE AND PRISONS CIVIL RIGHTS UNION (POPCRU)	First Respondent
LEBATLANG EJ	Second Respondent
NGQULA TR	Third Respondent
KAMLANA T	Fourth Respondent
JACOBS C	Fifth Respondent
KHUBHEKA MW	Sixth Respondent

Date of hearing : 01 September 2011

Date of judgment :27 September 2011

JUDGMENT

MURPHY AJA

1. The appellants, the Department of Correctional Services and the Area Commissioner: Pollsmoor, appeal against the decision of the Labour Court (per Cele J) that the dismissal of the second to sixth respondents was

automatically unfair within the meaning of section 187(1)(f) of the Labour Relations Act,[1] ("the LRA") because the reason for the dismissal was that the appellants had unfairly discriminated against the respondents.

2. The respondents were employed as correctional officers by the Department at Pollsmoor Prison in Cape Town. All of them were long serving employees having been employed for periods varying between 7 and 14 years. They were dismissed in June 2007 on the grounds that they wore their hair in "dreadlocks" and refused to cut their hair when ordered to do so. None of the respondents had any prior disciplinary infractions, and all of them had worn their hair in dreadlocks at work for some years before they were ordered to cut them.

3. The judgment of the court *a quo*[2] deals fully with the facts and discusses the testimony of all the witnesses. It is therefore unnecessary to canvass the evidence in detail. The material facts are either common cause or undisputed, and can be stated briefly.

4. The second appellant, ("the Area Commissioner") commenced duty at Pollsmoor in January 2007. He was troubled by what he perceived as an apparent laxity in discipline. His impression was that there was large scale non-compliance with departmental policies. There was poor compliance with security policies and inefficient access control. Officials did not comply with the Dress Code in that they mixed their uniforms, and wore different

[1] Act 66 of 1995
[2] *POPCRU and Others v Department of Correctional Services and Another* [2010] 10 BLLR 1067 (LC).

hairstyles. On 18 January 2007, the Area Commissioner convened a meeting with the personnel, officials and managers of the prison and outlined his concerns regarding security, performance management and human resources issues. The question of the Dress Code was also discussed. The next day, 19 January 2007, the Area Commissioner issued a written instruction to the respondents and other officers to comply with the Dress Code by attending to their hairstyles. The officers were requested to advance reasons by 25 January 2007 why corrective action should not be taken against them in the event that they did not comply with the instruction. Certain officers complied with the instruction, while the respondents did not.

5. On 26 January 2007, the Area Commissioner wrote to the respondents advising them that they faced suspension and granted them an opportunity to advance reasons why they should not be suspended. In their responses the second, fifth and sixth respondents indicated that they had embraced Rastafarianism and essentially contended that the instruction to cut their dreadlocks infringed their freedom of religion and constituted unfair discrimination on the ground of their religion. The third and the fourth respondent advanced cultural reasons for wearing dreadlocks. The third respondent said that he wore dreadlocks because he had received a calling to become a traditional healer in accordance with his culture. The fourth respondent said his reason for wearing dreadlocks had to do with traditional sickness known as "*Ntwasa*", and that his ancestors had instructed him to wear dreadlocks. They accordingly contended that the instruction infringed their right to participate in the cultural life of their choice and hence discriminated against them on the ground of culture.

6. The respondents were suspended from duty on 2 February 2007. They were then served with a charge sheet in which they were charged with the following main count:

> "You are alleged to have contravened the Department of Correctional Services and Disciplinary Code and Procedure Resolution 1 of 2006 (a) in that on or about 19 January 2007 you contravened the Department of Correctional Services dress code by wearing/keeping dreadlocks whilst on official duty at Pollsmoor Management Area."

The respondents were charged with the following alternative charge:

> "You are alleged to have contravened the Department of Correctional Services Disciplinary Code and Procedure Resolution 1of 2006 (k) in that on or about 19 January 2007, you failed to carry out a lawful order or routine instruction without just or reasonable cause by refusing to keep your hair in accordance with the dress code of the Department of Correctional Services whilst on official duty at Pollsmoor Management Area."

7. At the end of a disciplinary hearing held between 4 and 7 June 2007, and in which the respondents refused to participate for reasons related to legal representation and the alleged bias of the chairperson, the respondents were found to have contravened the Disciplinary Code contained in

Resolution 1 of 2006, by undermining the Dress Code of the Department by wearing dreadlocks while on duty. They were dismissed with immediate effect. Although they were informed of their right to appeal, the respondents did not effectively exercise that right. The issues of procedural fairness arising from the questions of legal representation, bias and the right to appeal were not persisted with on appeal before us and hence require no further discussion.

8. Paragraph 5.1 of the Dress Code upon which the appellants rely, deals with hairstyles. The relevant part reads:

> "5.1 Hairstyles
>
> The following guidelines are down (sic) for the hairstyles of all Departmental officials. In judging whether a hairstyle is acceptable, neatness is of overriding importance.
>
> 5.1.1 Hairstyles: Female Officials
>
> 5.1.1.1 Hair must be clean, combed or brushed and neat at all times (taken good care of). Unnatural hair colours and styles, such as punk, are disallowed.
>
> 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."

9. The respondents have pointed out that the extract from the Dress Code handed in during the disciplinary hearing made no reference to the prohibition on "Rasta man" hairstyles and that the restrictions therein pertained only to length and the proscription of punk hairstyles, with the overriding requirement of neatness. Be that as it may, the *lis* between the parties has always been whether the dismissal of the respondents on the grounds of their wearing dreadlocks was automatically unfair. That issue should be determined with reference to paragraph 5.1.2.3 of the amended Dress Code upon which the appellants relied before the Labour Court and on appeal before us.

10. After conciliation, the appellants referred the dispute about the fairness of their dismissal to the Labour Court in terms of section 191(5)(b)(i) of the LRA for adjudication of whether the dismissal amounted to an automatically unfair dismissal in terms of section 187(1)(f). They also sought an order declaring their dismissal to be unfair discrimination in terms of section 6 of the Employment Equity Act.[3] The primary dispute is that declared in terms of the

[3] Act 55 or 1998, ("the EEA").

LRA. The respondents conceded during argument that a declarator in terms of the EEA, without a claim for additional damages, would be superfluous and of no practical consequence. Accordingly, there is no need to make any finding in that regard either.

11. The relevant part of section 187(1)(f) of the LRA reads:

> "A dismissal is automatically unfair …… if the reason for the dismissal is -
>
> (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

Section 187(2)(a) is of some relevance. It provides:

> 'Despite subsection (1)(f)-
>
> (a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job.'"

12. In paragraph 35 of their Statement of Case, the respondents alleged:

> "The dismissal of the second to sixth Applicants is substantively unfair and amounts to an automatically unfair dismissal in terms of s187(1)(f) of the Labour Relations Act No 66 of 1996 ….. in that the Respondent discriminated against the second to sixth Applicants directly and/or indirectly on the grounds of religion and/or conscience and/or belief and/or culture and/or gender."

13. All of the respondents testified in the court below as to their sincerely held religious beliefs and cultural practices. Their evidence has not been contested and may be summarised briefly as follows. None of them wore dreadlocks at the time they joined the department because they had not at that stage began to subscribe to the religious and cultural beliefs in question. Over the years, three of the respondents became attracted to the beliefs and way of life espoused by Rastafarianism and converted to it. They observed the various practices of the religion, which included growing dreadlocks. The two other respondents grew dreadlocks as part of traditional Xhosa cultural practices related to the healing arts and rituals of the culture. Mr Ndihleli Kandekana, a traditional healer, was called as an expert witness on their behalf. He testified that in the spiritual healing tradition of Xhosa culture, dreadlocks are a symbol that a person is following the calling that comes from his forefathers. Unlike the requirements of Rastafarianism, the wearing of dreadlocks may be required only temporarily as determined by the initiate's spiritual mentor. The dreadlocks are cut as part of the cleansing ceremony, symbolising the initiate's transition from "ordinary human being to traditional healer".

14. Throughout their testimony the respondents asserted that the reason for their dismissal, their choosing to wear dreadlocks, amounted to unfair discrimination on the grounds of their religion, belief or culture. However, at various points in their evidence, the respondents mentioned that certain of their female colleagues wore dreadlocks. The third respondent when testifying that he felt discriminated against on the basis of both his gender and culture, explained his view as follows:

> "[B]ecause of the fact that I was dismissed for wearing dreadlocks and of which they didn't have any negative impact to my workplace, whilst the other genders, like the females, they were having the dreadlocks and they didn't even have - they were not disciplined." (sic)

Other respondents also referred to the fact that the Dress Code contained no ban or restriction on women wearing a Rasta hairstyle and confirmed that there were a number of women who wore dreadlocks, including a certain Ms Mjabi who was a traditional healer.

15. The court *a quo* accepted that the respondents wore dreadlocks because of their religious and cultural beliefs which they held sincerely. It appreciated moreover that a practice or belief will fall within the protected sphere of religion and culture provided the claimant professed a sincere belief. A court will ordinarily not be concerned with the validity or correctness of the beliefs of the relevant religion or cultural practice, in this case the

Rastafarian faith and Xhosa spiritual practices, it being sufficient that they are bona fide beliefs sincerely held by the complainants.[4] However, the learned judge concluded, for reasons which are frankly difficult to fathom, that the respondents had not established direct or indirect discrimination on the grounds of religion or culture. He found instead that they had established only gender discrimination. I shall return to the judge's reasoning in relation to religious and cultural discrimination later.

16. The conclusion that the respondents had been discriminated against on the basis of their gender was based on the finding that the Dress Code provided for differentiation between male and female officers when it came to the wearing of dreadlocks. Paragraph 5.1.2.3 of the Dress Code, which prohibits "Rasta man" hairstyles applies only to male officers. The learned judge felt that hair platting was not an exclusively feminine practice. He held that the justifications put forward by the appellants for the differential treatment based on security and discipline (which I will discuss below) were insufficient to justify the discrimination as fair. The appellants accordingly had not rebutted the presumption of unfairness, meaning that the dismissal was automatically unfair because the reason for it was unfair discrimination on the ground of gender. He ordered the appellants to reinstate those applicants who wished to be reinstated and to pay compensation to those who did not wish to be reinstated in an amount equivalent to 20 months salary.

17. In their notice of appeal, the appellants confined their grounds of appeal to the contentions that the court *a quo* erred in holding that to permit

[4] *MEC for Education, Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) at para 47

female but not male correctional officers to wear dreadlocks constitutes gender discrimination, and that the dismissals consequently were automatically unfair because the reason for them was gender discrimination. In their heads of argument they maintained that because the respondents did not apply to the court *a quo* for leave "to cross appeal the order dismissing their claim of unfair discrimination on the grounds of religion, conscience or belief, or culture", as contemplated in rule 30(2) of the Labour Court Rules, the only issue for determination is whether the dismissal was automatically unfair on the ground of gender discrimination. It needs, immediately, to be pointed out that the court *a quo* did not make an order dismissing the claim of unfair discrimination on grounds of religion or culture. It merely made a finding that no such discrimination had been proved.

18. The notice of appeal was filed on 1 September 2010. On 6 April 2011, the respondents filed a notice of cross appeal together with an application for condonation of its late filing. The notice of cross appeal contends that the court *a quo* erred in its various findings that led it to conclude that the respondents had failed to establish that their dismissal was automatically unfair because the reason for it was unfair discrimination on the grounds of religion, belief or culture. In supplementary heads of argument filed in response to enquiries raised by the court, the appellants have argued that in the absence of the Labour Court on application, or the Labour Appeal Court on petition, granting leave to cross appeal, the Labour Appeal Court has no jurisdiction to entertain a cross appeal.

19. The appellants' submission is, in my view, not correct. Firstly, a cross appeal was not required in this case. A cross appeal would have been necessary only had the respondents desired a variation of the order appealed against. A respondent is, without a cross appeal, entitled to seek to convince the court of appeal to uphold the judgment of the court below on another ground.[5] It is always open to a respondent on appeal to contend that the order appealed against should be supported on grounds which were rejected by the trial judge even though a cross appeal has not been noted, provided the respondent is content with the order of the court below and seeks no variation of it. In this event, the respondent may support the order on any relevant ground, the same way the appellant may attack it on any relevant ground.[6] An appeal is against the substantive order of the court, not against the reasons for judgment.[7]

20. The respondents in the present matter have not sought a variation of the order of the court *a quo*. They simply wish for the judgment to be upheld on other or additional grounds. They do not take issue with the order but rather with the reasoning which justified the ultimate decision. The order of the court *a quo* was that the respondents are to be reinstated or compensated because their dismissals were automatically unfair on grounds of gender discrimination. The respondents maintain that the court *a quo* should have found, on the evidence, not only the existence of gender discrimination, but also religious and cultural discrimination. If that contention is upheld on

[5] *Cirota and Another v Law Society of the Transvaal* 1979 (1) SA 172 (A) at 187E - G
[6] *Publications Control Board v Central News Agency Ltd* 1977 (1) SA 717 (A) at 747A - 748C
[7] *Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) 355

appeal, the same result and order will nonetheless ensue, namely that the respondents were dismissed contrary to the provisions of section 187(1)(f) of the LRA and are entitled to the relief granted by the court *a quo*. There is accordingly no merit in the appellants' submission that this court is precluded from hearing argument on or determining the issues of religious and cultural discrimination because the Labour Court did not grant leave to cross appeal on these issues.

21. In any event, the relevant statutory provisions and the rules governing appeals to the Labour Appeal Court do not require respondents on appeal to obtain leave to cross appeal. Section 166(1) of the LRA provides that any party may apply to the Labour Court for leave to appeal to the Labour Appeal Court, and if it is refused, the applicant may in terms of section 166(2) petition the Labour Appeal Court for leave to appeal. The section does not make any reference to leave to cross appeal. The Rules of the Labour Court also do not provide any procedure for an application to cross appeal. Rule 30 deals only with applications for leave to appeal and the procedure in that regard. However, Rule 5(4) and Rule 5(5) of the Rules of the Labour Appeal Court provide that any respondent who wishes to cross appeal must deliver a notice of cross appeal within 10 days, or such longer period as may on good cause be allowed, after receiving notice of appeal from the appellant. The clear implication of these sub-rules is that there is no need to seek leave to cross appeal. They allow for a choice to be exercised by a respondent who wishes to cross appeal, which choice need only be made if and when the appellant has obtained leave to appeal. Mere delivery of a notice of cross appeal is sufficient and there is no need for the respondent to seek or obtain leave,

even in instances where the respondent wishes to have the order varied. This expedited procedure is consistent with the object of the LRA to provide for effective and expeditious dispute resolution. The introduction of a requirement for leave to cross appeal would result in proceedings becoming unduly lengthy and cumbersome. Although the point has not previously been decided definitively, this position is in accordance with previous pronouncements of this court.[8]

22. Accordingly, even if a cross appeal had been required, the respondent's filing of the notice of cross appeal was sufficient for that purpose. In so far as the notice was filed outside of the 10 day period stipulated in Rule 5 (5) of the Labour Appeal Court Rules, the respondents have applied for condonation and set out a reasonable excuse for the delay. The appellants have filed an answering affidavit, but they did so way out of time and without seeking condonation. Had it been necessary to rule on the application for condonation, such would legitimately have been considered to be unopposed and may have been granted on the basis of the averments explaining the delay and the good cause shown therein.

23. I turn now to the substantive issues. An enquiry into whether there has been unfair discrimination on proscribed grounds in the context of a dismissal involves firstly a determination of whether there has been any differentiation between employees or groups of employees which imposes burdens or

[8] *Mkonto v Ford NO and Others* (2000) 21 ILJ 1312 (LAC) at para 8; *SA Metal and Machinery v Gamaroff* [2010] 2 BLLR 136 (LAC) at para 29; and *Solidarity and Others v Eskom Holdings Ltd* (2008) 29 ILJ 1450 (LAC) at 1455B-C.

disadvantages, or withholds benefits, opportunities or advantages from certain employees, on one or more of the prohibited grounds.

24. In order to establish religious or cultural discrimination in this case, it was incumbent on the respondents to show that the appellants through their enforcement of the prohibition on the wearing of dreadlocks interfered with their participation in or practice or expression of their religion or culture.[9] Likewise, in relation to the claim of gender discrimination, it would need to be shown that the disadvantage the respondents suffered arose on account of their gender. If that is shown, being differentiation on specified grounds, unfairness is presumed and the appellants bear the onus of rebutting this presumption. The test of unfairness focuses upon the impact of the discrimination, any impairment of dignity, and the question of proportionality. In addition, a discriminatory dismissal might be fair in terms of section 187(2)(a) of the LRA if there is a justification based on an inherent requirement of a particular job.

25. The Dress Code introduced differentiation in respect of hairstyle, which is not facially neutral. "Rasta man" hairstyles are directly prohibited among male correctional officers. The Code makes a distinction between male and female officers. Whereas female officials are allowed to wear Rasta hairstyles, male officials are not. Contrary to the finding of the court *a quo*, there is irrefutably another comparator besides gender which operates in the circumstances of this case. It is those male correctional officers whose sincere religious or cultural beliefs or practices are not compromised by the

[9] *MEC for Education, Kwazulu- Natal and Others v Pillay*, n4 above at 46

Dress Code, as compared to those whose beliefs or practices are compromised. 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.[10]

26. As I have said, the respondents all wore dreadlocks because it was either an expression of their Rastafarianism, their religious beliefs, or an expression of their cultural practices and beliefs pertaining to the calling and traditions of Xhosa spiritual healing. The Constitutional Court has accepted that Rastafarianism is a religion entitled to protection under our Bill of Rights.[11] It has not been contended that the spiritual practices of Xhosa culture are not similarly entitled. There is also no dispute between the parties that the wearing of dreadlocks is a central tenet of Rastafarianism and is a form of personal adornment resorted to by some who follow the spiritual traditions of Xhosa culture. 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

[10] Id at 44
[11] *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC) at para 40.

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.[12]

27. The reasons of the Labour Court for rejecting the claims of discrimination on religious and cultural grounds do not withstand scrutiny. The respondents, as explained, all wore dreadlocks as a necessary or integral expression of their religious and cultural beliefs, the protection of which is at the heart of the Constitution's commitment to affirming diversity. In his judgment, the judge stated:

> "It is beyond doubt that the impact of the instruction would have a devastating effect on their beliefs which they held high at the time. Rastafarians stood to be scorned at by those who knew them and the practice of their faith. The third and fourth applicants would similarly be frustrated in their traditional calling, for the period during which they had to keep the dread-locks hair style."[13]

These *dicta* are in effect a finding that the Dress Code discriminated against the respondents on religious and cultural grounds. Instead of proceeding to assess the justification put up by the appellants in support of their assertion that the discrimination was fair and justifiable, the judge held that there was

[12] *MEC for Education, Kwazulu-Natal and Others v Pillay* n4 above at 52 - 53; *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, at para [22]; and *Lyng v Northwest Indian Cemetery* 485 US 439

[13] *POPCRU and Others v Department of Correctional Services and Another* n2 above para 231.

no discrimination because the respondents had not asserted their rights. This finding is factually incorrect and conceptually erroneous. The respondents wore dreadlocks prior to the introduction of the prohibition and when given notice to attend to their hairstyles they all responded in writing asserting their rights. But whatever the facts, the failure by complainants to assert their rights does not render discriminatory action non-discriminatory.

28. The Dress Code directly discriminated against the respondents in that they were treated less favourably than not only their female colleagues but also those upon whom the Code imposed no religious or cultural disadvantage. The respondent's beliefs were necessary factual criteria upon which the decision to dismiss was based in a causative sense: but for their beliefs, the respondents would not have been dismissed. Even were we to elevate the requirements of direct discrimination to necessitate a provision in the Code explicitly prohibiting correctional officers who were Rastafarians or traditional healers from wearing dreadlocks, then the seemingly more neutral prohibition of "Rasta man" hairstyles would have a disparate impact disproportionately affecting Rastafarians and traditional healers or adherents and would on that account amount to indirect discrimination.

29. Accordingly, the court below erred in its finding that the respondents had not established discrimination on religious and cultural grounds.

30. The court *a quo's* finding that there was gender discrimination is correct. The evidence is straightforward enough. The prohibition in the Dress Code is explicitly confined to male correctional officers. Female officers may

wear dreadlocks; male officials may not. But for the fact that the respondents were male correctional officers who wore dreadlocks, they would not have been dismissed. There is accordingly overlapping gender, religious and cultural discrimination. The real question for adjudication is whether that discrimination can be justified as fair or justifiable.

31. As already explained, because the court *a quo* found only gender discrimination the appellants sought to contend that such was the only issue, which they said was neither pleaded nor supported by the evidence. Both contentions are unsound. The case for gender discrimination is pleaded in paragraphs 15 and 35 of the Statement of Case and in paragraphs 4.2 and 4.3 of the pre-trial minute. And, as discussed, each respondent in his testimony referred to certain of their fellow female officers who wore dreadlocks.

32. Because the prohibition was discriminatory on specified grounds it is in our law presumed to be unfair.[14] But before turning to the questions of fairness and justification it is necessary to deal with the appellants' contention that the dismissal of the respondents was not automatically unfair on the ground that "the facts clearly show that the respondents were not dismissed because of their religion, belief, culture or gender". In this regard they rely on the *dicta* of Nugent JA in *Raol Investments (Pty) Ltd t/a Thekwini Toyota v Madala,*[15] where he said:

[14] *Harksen v Lane NO* 1998 (4) SA 1 (CC) at para 53
[15] 2008 (1) SA 551 (SCA) at para 9 - 10

> "[9] In the present case the Labour Appeal Court reached its conclusion as a matter of inference from the established facts. Quite simply, it reasoned that because there was disparity of treatment that was not justified it followed axiomatically that the company discriminated against the respondent on the grounds of race.
>
> [10] That reasoning is unsound. Whether an employer has discriminated against an employee on the grounds or race (or on any other arbitrary ground) is a question of fact (whether the discrimination was unfair is a separate question). Where the evidence establishes, as it does in this case, that the employer treated employees differently on grounds other than race, there is simply no scope to infer that the employee was discriminated against on the ground of race, because the reason for the disparate treatment has been established to be something else. That the differential treatment was not justified is immaterial to the factual enquiry as to the reason that it occurred."

33. As I understand the appellants' submission, the employer's reason in dismissing the respondents was to ensure compliance with the departmental policies and through a zero tolerance approach to address the general breakdown of discipline among officers in the interests of greater security. These issues plainly have some bearing on the justification of the discrimination. But the narrower question at this point is whether the employer's overt subjective reason in and of itself excludes the dismissal from being automatically unfair. It will be recalled that section 187(1)(f) of the LRA

categorises a dismissal as automatically unfair only "if the *reason* for the dismissal" is unfair discrimination on the specified and analogous grounds.

34. The respondents have rightly submitted that the explanation for the dismissal tendered or suggested by the employer (or for that matter the employee) can never without more simply be accepted as the reason postulated by the section. The reason contemplated and to be sought by the court is the objective reason in a causative sense. The court must enquire into the objective causative factors which brought about the dismissal, and should not restrict the enquiry to a subjective reason, in the sense of an explanation from one or other of the parties. Counsel for the respondents has referred to various UK authorities directly on point. In *R v Birmingham City Council Exp Equal Opportunities Commission,*[16] the issue was whether certain criteria which were applied by the Council for entry to single sex grammar schools were discriminatory. Because there were more places for boys in such schools than girls, the girls had to do better in the entrance exam in order to secure a place. Although the Council's motive in setting the entrance criteria was laudatory (it was trying to ensure entry on merit), the House of Lords held that the disparity constituted unlawful discrimination on the grounds of sex, contrary to the Sex Discrimination Act of 1975. The court observed:

> "There is discrimination under the statute if there is less favourable treatment on the ground of sex, in order words if the relevant girl or girls would have received the same

[16] [1989] AC 1155

> treatment as the boys but for their sex. The intention or motive of the defendant to discriminate, although it may be relevant insofar as remedies are concerned … is not a necessary condition of liability; it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground of sex. Indeed … if the Council's submission were correct it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy. In the present case, whatever may have been the intention or motive of the Council, nevertheless it is because of their sex that the girls in question receive less favourable treatment than the boys, and so are the subject of discrimination under the Act of 1975."[17]

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?[18] The point was made with greater clarity in *Nagarajan v London Regional Transport,*[19] as follows:

[17] Id at 1194A
[18] *James v Eastleigh Borough Council* [1990] 2 AC 751, 774.
[19] [2000] 1 AC 501, 512

> "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.

37. I turn now to the question of the fairness and justifiability of the differential treatment. A dismissal is automatically unfair only if the discrimination complained of is unfair. The LRA does not define the concept of fairness in the context of section 187(1)(f), but it may be accepted that the

considerations normally applicable in determining fairness under the EEA and the Promotion of Equality and Prevention of Unfair Discrimination,[20] apply equally under the LRA. The test of unfairness under these provisions concentrates upon the nature and extent of the limitation of the respondent's rights; the impact of the discrimination on the complainants; the social position of the complainants; whether the discrimination impairs the dignity of the complainants; whether the discrimination has a legitimate purpose; and whether reasonable steps have been taken to accommodate the diversity sought to be advanced and protected by the principle of non-discrimination. Under the Constitution,[21]a remedy may be granted provided the discrimination is unfair but also is not justifiable in terms of the limitations clause.[22] The provisions of the Constitution find no direct application in the present dispute. However, it is permissible when determining fairness to have regard to considerations similar to those usually taken into account when weighing the justifiability of a measure,that is the questions normally relevant to a limitations analysis under the Constitution. These include the purpose of the prohibition; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

38. From the evidence the appellants led at the trial and the submissions they made regarding religious and cultural discrimination at the trial, and on the subject of gender discrimination on appeal, it is evident that the primary purpose of the prohibition against dreadlocks was to achieve uniformity and neatness in the dress and appearance of the correctional officers, with the

[20] Act 4 of 2000
[21] Act 108 of 1996
[22] Section 36(1)

underlying object of enhancing discipline and security. They saw the disciplinary action against the respondents as but one step in a series of actions taken by the Commissioner to ensure compliance with departmental policies. Non-compliance, the Commissioner testified, led to a lack of discipline and security and adversely affected service delivery. As mentioned earlier, the Commissioner was alarmed on his arrival at Pollsmoor by the large scale non-compliance with departmental policies, including the Dress Code. There was poor access control and inadequate security with regard to movement on the prison grounds. Of particular relevance to the present case was the laxity in dress and uniforms. Some officers mixed the uniform, wore private shoes and had different hairstyles.

39. The Commissioner believed that this laxity contributed to a decline in discipline and standards and manifested in problems in other areas, such as: a lack of punctuality; unauthorised use of funds and property; a high rate of absenteeism; numerous audit queries; prisoner-on-prisoner and member-on-prisoner assaults; escapes; negative publicity for the institution; and a lack of accountability. He saw the prohibition on dreadlocks and the instruction to comply with it as an important ingredient in his programme to improve the overall discipline situation at Pollsmoor. He testified that since introducing a strict compliance approach service delivery has improved and there is better discipline. When asked why he insisted on strict compliance, he replied:

> "Let me give a picture of what the dress code means to the department. This is a package, you cannot separate the dress code from discipline, separate it from rehabilitation as our

> core function. Then you cannot also allow a situation where we focus on our personal preference, at the end of the day the main issue being our personal preferences and that will also cause conflict in the future."[23]

40. Perhaps more important to the Commissioner was his apprehension that if individual deviations from the uniform were allowed, this would open the floodgates. He explained:

> "That request would open the floodgates. That means if other members come now and say they are making the same request for deviation, I had to also grant them that permission and at the end of the day there won't be uniform at all in Correctional Services because if a Swazi person, like myself, come and say, 'No, I want to wear my Swazi gear because of cultural reasons' then I need to agree to that because of consistency. Then also, as I've already said, we have got different cultures, religions, in Correctional Services. Then, to allow one or two cultures or religions that would mean we need to allow for everybody and at the end of the day there's no uniform in Correctional Services".[24]

41. The Commissioner also felt that the Dress Code was neutral and applied to all religions; and all officers were not allowed to practice their religion and culture at the expense of the uniformity required in a security service organised hierarchically along quasi-military lines.

[23] Record vol. 7, 631-632
[24] Record vol. 7, 560

42. When the Commissioner was asked how he justified the gender discrimination, he relied on biological difference. He said:

> "We need to make a distinction here because female officials are different from males and the dress code makes that difference and for me or any manager to say a female - if a male official wants to wear pantyhose and high heels and that manager says, 'No, you mustn't wear that' and that member says it is a discrimination, that is not discrimination, it's the provision that is made by the dress code."[25]

43. Courts must show a measure of deference to the authorities who are statutorily required to run the security organs of state and have the necessary insight and expertise to do so. But that deference must always be tempered by a concern that the fundamental right to equality has not been violated. The court is required to determine what obligations the relevant organ of state bears to accommodate diversity reasonably in its peculiar context.[26] Of importance in this enquiry is an evaluation of any impairment to the dignity of the complainants, the impact upon them, and whether there are less restrictive and less disadvantageous means of achieving the purpose. Perhaps most importantly, an employer must show that the discriminatory measure or prohibition achieves its purpose. Expressed differently, there must be a rational and proportional relationship between the measure and the purpose it seeks to achieve. Reasonable accommodation of diversity is an

[25] Record vol. 7, 619
[26] *MEC for Education, Kwazulu- Natal and Others v Pillay* n 4 above at 81

exercise in proportionality bearing upon the rationality of the means of achieving the legitimate purpose of the prohibition.

44. The Constitutional Court has repeatedly expressed the need for reasonable accommodation when considering matters of religion and culture.[27] In *MEC for Education, Kwazulu-Natal and Others v Pillay*,[28] Langa CJ described the content of the principle of reasonable accommodation as follows:

> "At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms."

Employers, accordingly, should, wherever reasonably 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 of the management prerogative and authority.[29]

[27] *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC); *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC); and *MEC for Education, Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC).
[28] N4 above at para 73
[29] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at para 35

45. The appellants have not put up any defence that short hair or un-dreadlocked hair is an inherent requirement of the job and that the measure was accordingly protected by section 187(2) of the LRA. The suggestion that short hair offered greater protection against assaults by inmates by leaving them with less hair to grab during an assault cannot be entertained seriously. Firstly, the same rationale does not apply to women; and secondly there is no evidence supporting the claim that such events are a genuine or recurring threat outweighing the rights to equality and dignity.

46. The appellants' assertion that the provisions of the Dress Code were facially neutral and applied equally to all officials, cultures and denominations is also not sustainable. While the provisions of the Dress Code pertaining to the wearing of uniforms are applicable uniformly, the same is not correct in respect of hairstyles. The Rasta hairstyle is peculiar to Rastafarians and those called to become Xhosa traditional healers. The evidence establishes that wearing dreadlocks was of profound religious and cultural meaning to the respondents. If we accept that the respondents were sincere in their beliefs and practices, which on the evidence we do, the impact upon them was great, resulting ultimately in their loss of employment. Other similarly situated employees did not endure this burden.

47. To the extent that the appellants' submission is that neatness, uniformity and discipline were the purposes of the discrimination, there is no rational connection between those purposes and the measure. Not a single witness testified that the respondents' hairstyles were not neat. And, if the suggestion is that all dreadlock hairstyles are axiomatically untidy, then the

discrimination appears in not applying the same standard to women. As Mr. *Sher*, counsel for the respondents, pointed out in argument, male correctional officers are not prohibited from wearing a florid "Afro" hairstyle, which may protrude from the top and sides of the head and be as long as they like, provided it does not extend below the collar at the back, or cover more than half their ears on the sides. They are similarly not prohibited from shaving their heads in a "skinhead" fashion, a style 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.

48. It is also difficult to understand how the prohibition of dreadlock hairstyles contributes positively to the issues of discipline, security, probity, trust and performance, which were the focal concerns of the Commissioner. 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.

49. While I accept the importance of uniforms in promoting a culture of discipline and respect for authority, we live in a constitutional order founded upon a unique social and cultural diversity which because of our past history deserves to be afforded special protection. It is doubtful that the admirable purposes served by uniforms will be undermined by reasonable accommodation of that diversity by granting religious and cultural exemptions where justified.

50. The appellants' argument is aligned with the floodgate argument raised by the Commissioner during his testimony. It was rejected by the Constitutional Court in *MEC for Education, Kwazulu-Natal and Others v Pillay,*[30] for the following reasons:

> "The other argument raised by this school took the form of a 'parade of horribles' or slippery slope scenario that the necessary consequence of a judgment in favour of Ms Pillay is that

[30] N4 above at para 107

> many more learners will come to school with dreadlocks, body piercing, tattoos and loin cloths. This argument has no merit. Firstly, this judgment applies only to bona fide religious and cultural practices. It says little about other forms of expression. The possibility for abuse should not affect the rights of those who hold sincere beliefs. Secondly, if there are other learners who hitherto were afraid to express their religions or cultures and who will now be encouraged to do so, that is something to be celebrated, not feared. As a general rule, the more learners feel free to express their religions and cultures in school the closer we will come to the society envisaged in the Constitution. The display of religion and culture in public is not a 'parade of horribles' but a pageant of diversity which will enrich our schools and in turn our country. Thirdly, acceptance of one practice does not require the school to permit all practices. If accommodating a particular practice would impose an unreasonable burden on the school, it may refuse to permit it."

51. Those remarks are equally apposite in this matter. The appellants' refusal to reasonably accommodate diversity and the lack of rationality in its measure aimed at the legitimate purposes of discipline, security and uniformity leads inescapably to the conclusion that the discriminatory prohibition on dreadlocks was unfair, disproportionate and overly restrictive. The lack of proportionality is captured in a communication addressed by the Department's Divisional Head: Employer Relations to his subordinates on 2 August 2007, in which he said:

> "Department of Correctional Services does not withstand any religion, beliefs or otherwise, employees have to adapt to the employer's policy and not the other way round." (sic).[31]

This approach was ironically in contrast to departmental policy in relation to Rastafarian inmates who in terms of the applicable guidelines were entitled to "wear their dreadlocks as an essential symbol of their religion". What is more, at the time the respondents were disciplined the department had reviewed the Dress Code and sought to provide greater "flexibility in accommodating issues of diversity … religions, gender and cultural." The revised draft policy was merely awaiting the approval of the Minister. Quite evidently, therefore, the department was aware of the requirements of the principle of reasonable accommodation, yet curiously opted for the imposition of a blanket prohibition, irrespective of the unfair impact upon the rights and dignity of the respondents and its constitutional and statutory obligation to accommodate diversity.

52. Finally, the appellants' attempt to justify gender discrimination along the lines of biological difference is equally without merit. Dreadlocks are most often worn by Rastafarian men. A biological justification would be sustainable if the measure related to the wearing of a brassiere in the case of female officers, or to the wearing of a moustache or beard in the case of male officers. Other than that, the only other justifications put forward for the gender discrimination are precisely those advanced in relation to the religious and cultural discrimination and are unsustainable for the same reasons.

[31] Record vol 10, 1903.

53. In the result, although the Labour Court may have erred in dismissing the claim based on religious and cultural discrimination, it did not err in its finding that the dismissal was automatically unfair. The dismissal was automatically unfair because the reason for the dismissal was that the employer unfairly discriminated against the employees on the grounds of religion, culture and/or gender. Consequently, the appeal cannot succeed.

54. This is a case where costs should follow the result. Considering the issues at stake and the relative complexity of the matter, the employment of two counsel was justified. However, in so far as the cross appeal was unnecessary and filed only in response to the appellants' raising the point in its heads of argument, I am of the view that each party should pay its own costs in the cross-appeal.

53. The following orders are made:

i) The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

ii) Each party shall pay its own costs in the cross appeal.

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JR MURPHY AJA

I Agree

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WAGLAY DJP

I Agree

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DAVIS JA

APPEARANCES

For the Appellants : Adv. A Schippers SC with Adv S O'Brein

Instructed by : The State Attorney

For the Respondents : Adv. M L Sher with Adv G A Leslie

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