IN THE LABOUR COURT OF SOUTH AFRICA **NOT REPORTABLE**

HELD AT CAPE TOWN

Case no: C88/2007

In the matter between:

DAVID ROBERT LEWIS **Applicant**

and

MEDIA 24 LIMITED **Respondent**

JUDGMENT

CHEADLE AJ

Introduction

[1] The Applicant claims compensation for alleged unfair discrimination under section 50(2)(a) of the Employment Equity Act, 55 of 1998 on grounds of his religious, cultural and political beliefs. In summary, there are two sets of claims.

[2] The *first* is that the Respondent conducted its business by publishing newspapers for target audiences living in 'previously segregated areas' and thus engaged in the 'racial profiling' of its newspapers upholding 'racial divisions'. The Respondent discriminated against him, he claimed, because it required him to comply with these policies and practices, which were 'contrary to his religious and political views', and harassed him and terminated his employment for taking issue with those policies and practices.

[3] The *second* is that the Respondent, knowing that he was Jewish, forced him to work on the Jewish Shabbat and that his employment

was terminated because he refused to work on the Shabbat. This, he said, constituted discrimination on cultural and religious grounds.

[4] The remedy sought is compensation order in the sum of R100 000 plus costs.

[5] Because of the volume of documents (mostly irrelevant and some never referred to) and the extensive reliance on some of those documents, it is necessary to point out that five bundles of documents were filed. The Pleading Bundle is referred to as PB. There is a bundle of Additional Court Documents filed referred to as AD. There are two bundles of documents filed by the Applicant referred to as 1AB and 2AB respectively. There is a bundle filed by the Respondent referred to as RB. The page numbers of the relevant bundle are set out directly after the reference. So the Applicant's statement of case is at PB3 being page 3 of the Pleading Bundle.

A brief chronological context

[6] The Respondent employed the Applicant as a 'layout sub' at R8 000 per month for a fixed period from 1 April 2006 to 30 June 2006. He was employed to work on a new edition of one of the Respondent's community newspapers, the People's Post. The first publication of the new edition took place on 23 May.

[7] He initially underwent training on the Respondent's computer system and worked at its Bellville offices on various community newspapers until moving to the People's Post offices in Tokai on 9 May.

[8] The Applicant claimed that he was promised a renewal of the contract if, in addition to his duties as a layout sub, he authored articles for publication in the newspaper. The Applicant produced several articles – some of which were rejected.

[9] On Friday 19 May 2006, the deadline for the submission of copy for subbing of the first publication was extended to late in the evening. This meant that the Applicant had to work until 10 pm, preventing him from

observing Shabbat that night. He worked for 14 hours on the next day being Saturday, 20 May.

[10] In the editorial process for the first publication, Ms Dean declined to publish an article on the jazz musician Jimmy Dludlu that the applicant had written for that publication.

[11] Mr Taljaard, the publisher, directed the Applicant to oversee the despatch of the first edition on 23 May very early in the morning – there is some dispute as to the exact time but it was between 4 and 5.30 am. Then he, together with other employees including the editor, participated in the launch of the newspaper by distributing copies and small gifts to motorists from 6 to 7:30am.

[12] On 29 May, the Applicant had a meeting with Ms Dean over another article he had submitted based on his interview with another jazz musician. She raised concerns over the content of the article. The upshot was that a meeting was called for the next day to deal with each other's concerns.

[13] Ms Dean, Mr Taljaard, Mr Warren Charles, the HR manager, and the Applicant attended the meeting. At that meeting, issues concerning his performance, the rejection of his articles and his being required to work on Shabbat were raised. After a heated exchange, the meeting ended with the Applicant being escorted off the premises. He was paid the balance of his contract and his contract was not renewed.

Procedural history

[14] A letter of demand was sent to the Respondent by Legal Wise on the Applicant's behalf on 6 June 2006 in which it was stated that it was a 'well known fact' that the Applicant was an Orthodox Jew and therefore 'observed the Sabbath from Friday evening (sunset) until Saturday evening sunset'. Despite knowing this, the letter claimed, Mr Taljaard had demanded that he work during this 'holy period' (RB41). The letter went on to state that the Applicant's contract had been terminated early

and accordingly demanded the balance of one month's salary under threat of legal action.

[15] After receiving the outstanding salary, the Applicant signed a letter under Legal Wise's letterhead stating the he confirmed having received the salary 'as a full and final settlement'.

[16] On 7 November 2006, the Applicant referred a dispute of unfair discrimination to the CCMA for conciliation (RB52–56). There the unfair discrimination claim is characterised in five ways:

- discrimination against Jews (being forced to work on the Sabbath);
- racial discrimination (editorial policy prevented him from writing for African titles and an article on a black musician was rejected because the target audience was 'coloured');
- harassment (forced to attend a 4am appointment, to distribute community newspapers every Tuesday morning; to work a 14-hour day; and to work 7 days a week);
- discrimination against other religious and ethnic minorities (the rejection of his article on an Islamic art exhibition and an exhibition on the history of slavery was evidence of the Respondent's discrimination against Islamic culture and the descendents of slaves); and
- discrimination against anti-apartheid activists and struggle journalists (despite his experience and his willingness to embrace transformation, he was given an 'entry level' position and his willingness to engage in transformation disregarded).

[17] The dispute was not resolved and a certificate to that effect was issued on 27 November 2006 (PB9).

[18] On 23 February 2007, the Applicant filed and served his statement of claim (PB3-8). The discrimination alleged in the statement centres on four forms of discrimination:

- the Respondent's racial profiling of newspapers compelled the Applicant to comply with a policy that was contrary to his religious and political views and led to the rejection of his articles and eventually to the termination of his employment (dismissal and non-renewal of his contract);
- harassment by being forced to work on the Sabbath knowing that the Applicant was Jewish and being subjected to offensive remarks regarding the Applicant's observance of the Sabbath;
- harassment by being required to do work (distribute newspapers) and to work at times (14-hour days and 7 days a week) not provided for in his contract of employment because of his political and religious beliefs;
- the termination of his employment on religious, cultural and political grounds.

[19] On 26 March 2007, the Respondent filed a Notice of Exception on the grounds that various allegations in the Applicant's Statement of Case were vague and embarrassing (PB14–19). This prompted an expansive response by the Applicant (which he called the 'Applicant's Notice of Cause') and in which he spells out at great length his political, cultural and religious views (PB21–32) and the factual allegations in support of his claim. The Respondent did not pursue its exception. It withdrew it on 16 October 2007 (PB35) and filed a Response denying the allegations (PB 38–44).

[20] At a pre-trial conference chaired by Moshoana AJ, a pre-trial minute was apparently agreed on (PB45–54). When the Respondent sent a draft minute of that agreement to the Applicant for signature, the Applicant required three corrections – see his letter dated 24 October 2008 (PB56). He then filed a 'Dissensus' (PB55) attaching the letter to the Respondent's attorneys in which three differences are recorded. Those three corrections were incorporated into the pre-trial minute at the start of the hearing on 19 December 2009.

[21] On 29 October 2009, the Respondent filed a Notice of Intention to Amend its Response (PB57–75) in order to set out its defence in full. The Applicant then filed a 'Notice of Opposition' objecting to the amendments (PB77–79) and a 'Response to Amendment' (PB81–123) in which he 'places on record his response to the fraudulent and inaccurate statements tendered by the Respondent in its latest Intention to Amend'. By agreement, the Respondent's Amendment of its Response together with the Applicant's Response to the Amendments were admitted as part of the pleadings.

[22] The Applicant gave notice of his intention to call an expert witness, a Dr Reichenberger (PB129). By agreement, that testimony was reduced to writing by the Applicant and admitted by the Respondent (PB130–134) during the hearing.

[23] The Applicant subpoenaed three witnesses to testify *on behalf of the Respondent*. Not surprisingly, Mr Kahanovitz, for the Respondent, stated that he was contesting the validity of the subpoenas on that and other grounds. However, it was agreed, after certain admissions were made, to release the witnesses for the reasons recorded below.

[24] The *first* witness subpoenaed was Ms Shelagh Goodwin. She had been subpoenaed, the Applicant said, for two principal reasons. The first was to produce documents, including minutes of Board meetings, regarding the Respondent's policies on racial profiling and policies accommodating employees with different religious practices. Mr Kahanovitz stated that the Respondent did not have any written policies on these matters or any policy on accommodating religious difference. The fact that the Respondent did not have any written policies on these matters was admitted and recorded.

[25] The second reason was to produce an attendance register and minutes of board and editorial meetings for the relevant period. Ms Goodwin filed an affidavit in which she stated that there was no attendance register for journalists for the relevant period and no minutes of editorial

meetings (PB 115). Their non-existence was admitted and recorded. It was accordingly agreed that Ms Goodwin could be released.

[26] The *second* witness was Hanneke Gouws who was subpoenaed to produce the attendance register. Since the Respondent stated that it did not have such a register, the Applicant agreed to release the witness. In any event, there was no material dispute over the time he worked on Friday 19 May, Saturday 20 May and when he started work on 23 May.

[27] The *third* witness was Mr Brian Gatley. He was subpoenaed to prove that he had initialled approval of the Applicant's subbing of the sports page for the 30 May 2009 edition of the People's Post (1AB25). Mr Kahanovitz stated that the Respondent admitted that Mr Gatley had initialled his approval of that page. It was accordingly unnecessary to call him as a witness.

[28] The Applicant was not represented. He stated on a number of occasions that he considered himself to be at a disadvantage particularly because a firm of attorneys and a senior counsel represented the Respondent. The Applicant, however, had used attorneys in the preparation of his pleadings and, throughout the trial, had affected knowledge of the substantive law of discrimination. He was afforded a wide berth in his oral testimony – a much wider berth than would have been the case had he been represented. I drew his attention to the factual allegations in his Statement of Claim and the issues in dispute recorded in the Pre-trial Minute in order to ensure that the Applicant testified on all the material issues raised in the pleadings.

[29] The Applicant was the only witness in support of his claim. After he had closed his case, he applied to re-open it the next day in order to address issues that he had failed to address in his testimony. Mr Kahanovitz agreed and the Applicant led further evidence.

[30] At the close of the Applicant's case, the Respondent applied for absolution from the instance. I declined to grant absolution for the following reasons:

- The Applicant had testified that the Respondent knew that he was Jewish. Although he conceded under cross-examination that he should have objected to being required to work on the Shabbat, he nevertheless claimed that the Respondent knew that he was Jewish and should have taken steps to accommodate his beliefs and practices.
- Section 11 of the EEA provides that the onus shifts to the employer once 'an allegation of discrimination is made'. On a literal reading of section 11, the Applicant had made an allegation of discrimination placing the onus on the Respondent to prove that the conduct did not amount to discrimination.

[31] The Respondent called only one witness – Ms Anneline Dean, the editor.

Outline of the law

[32] Section 9(4) of the Constitution prohibits any person from unfairly discriminating against anyone on a number of grounds, in particular for the purpose of this matter, religion, culture, and belief. The section goes on to require the legislature to enact legislation to prevent and prohibit such discrimination.

[33] There are two pieces of national legislation that do so: The Employment Equity Act, 55 of 1998 (EEA) and the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA). The relationship between the statutes is dealt with under section 5(3) of PEPUDA, which provides that PEPUDA does not apply to any person to whom and to the extent to which the EEA applies. Subject to certain exceptions that are not relevant to this matter, section 4(1) of the EEA applies to all employers and employees. This means that the EEA is the national legislation that gives effect to the

constitutional right as far as the Applicant and the Respondent are concerned.

[34] Section 6(1) of the EEA prohibits unfair discrimination against an employee in any employment policy or practice on one or more of the listed grounds. The list however is not exhaustive. But, for the purposes of this matter, the list includes each of the grounds alleged by the Applicant namely religion, belief, political opinion and culture.

[35] The essential elements that need to prove a contravention of the prohibition in section 6(1) are accordingly:

- there must be discrimination – differential treatment based on a listed or analogous ground;
- the discrimination must be sourced in an employment policy or practice;
- it must be against an employee; and
- it must be unfair.

Each element is discussed more fully below.

Discrimination

[36] The concept of discrimination is made up of three issues: differential treatment; the listed or analogous grounds; and the basis of, or reason for, the treatment. Once a *difference* in treatment is *based* on a *listed ground*, the difference in treatment becomes discrimination for the purposes of section 9 of the Constitution and section 6 of the EEA.

[37] The *first* issue concerns the difference in treatment. There must be a difference in treatment in which the employee is less favourably treated than others.[1] In some instances, this may require a comparison between the victim and a comparator – the so-called 'similarly situated employee'. In other instances, it may be evident that the employee is

[1] This can take different forms – preferential treatment of others, failure to accommodate a difference etc.

treated differently from others precisely because of the targeted nature of the treatment, for example sexual harassment or trade union victimisation. In this case, the Applicant contends that he was subject to three forms of differential treatment: harassment; the failure to accommodate his observance of Shabbat; and the termination of his employment.

[38] Differential treatment also raises the issue of whether the difference in treatment is direct or indirect. It would be direct if the employer *treats* the employee differently from others *because* of the prohibited ground – for example sexual harassment or a policy that provided housing subsidies for male teachers but not for female ones – see *Association of Professional Teachers & Another v Minister of Education & Others* (1995) 16 *ILJ* 1048 (IC). Discrimination is indirect if the employer imposes a policy that does not appear (or intend) to differentiate between employees on the prohibited grounds but which, nevertheless, has the *effect* of treating them differently from others.

[39] In this case, it appears that the Applicant alleges that the harassment and termination of his employment are direct forms of differentiation – ie he was harassed and his employment was terminated because of his political and religious convictions. The policy on working hours has, the Applicant alleges, the effect of requiring employees of different religions to work in breach of their religious practices and is accordingly indirect discrimination.

[40] The *second* issue is the ground relied on. The Applicant relies on three listed grounds, namely religion, political opinion and culture.

[41] The *third* issue is whether the difference in treatment is *based on* the prohibited grounds. There is a lack of clarity in the Labour Courts as to the appropriate approach to the question of the causation in discrimination cases – see the different approaches in *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC); *Ntai & others v SA Breweries Ltd* (2001) 22 ILJ 214 (LC); and the different judgments in *Woolworths (Pty) Ltd v Whitehead* (2000) 21 *ILJ* 571 (LAC). In the

Constitutional Court, the approach seems to require that the differential treatment is 'substantially based on one of the listed grounds – see *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC) at para 43; and *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) at para 33. But in both these cases the links were explicit and there was no need to elaborate on the concept of 'substantially based' or whether it applied in instances when the grounds were denied, disguised or mixed.

[42] It is unnecessary to decide what the proper approach to causation should be in this case because I find that the Applicant has failed to establish any link between the three listed grounds and the alleged difference in his treatment.

Employment policy or practice

[43] The concept of the employment policy or practice is defined in section 1 of the EEA. The relevant provisions of the definition include '…(b) appointments…;(d) …terms and conditions of employment; (e) job assignments; …". The list is not exhaustive and analogous grounds are clearly contemplated by the wording of the definition.

[44] There are two policies or practices alleged in this matter: the policy or practice of racial profiling and the policy or practice in respect of work hours. In so far as the policy or practice of racial profiling is concerned, the claim is made that the policy or practice through its targeting of audiences affects the manner in which work is allocated and directed. The allocation of 'white' stories for 'white' audiences and 'coloured' stories for 'coloured' audiences seems to fall within the parameters of 'job assignments' contemplated in the definition. But even if it does not, such a practice of work allocation is sufficiently analogous to be included.

[45] The policy or practice in respect of working hours is clearly one relating to terms and conditions of employment.

Against the employee

[46] The section 6(1) prohibition of discrimination applies only to the discrimination against employees. Other discriminatory targets do not fall within the prohibition. Much of the Applicant's case was directed at the alleged discriminatory conduct of the Respondent in the manner in which it ran its newspaper business. This evidence was admitted only because it might have constituted proof of an *employment policy or practice* that discriminated against the Applicant.

[47] To the extent that the Applicant sought to go beyond that and sought a finding that the Respondent engaged in discriminatory practices in general, such a finding is not a competent finding in this court. The case is limited to the alleged discrimination against him or others in his or their capacity as employees. It is for this reason that much of the documentation he submitted and the evidence he led, in the end, was not relevant. The case is not whether the Respondent engages in discriminatory practices in general but whether the Respondent's employment policies and practices discriminated against him as an employee. The only issues for determination are therefore whether the employment practices relating to racial profiling and working time discriminated against the Applicant.

Unfairness

[48] If discrimination on listed grounds is proved, unfairness is presumed – *Harksen v Lane NO and Others* 1998(1) SA 300 (CC). In order to discharge the presumption, an employer has to prove that the discrimination is fair for reasons such as affirmative action or inherent requirements of the job – see section 6(2) of the EEA. The Respondent did not lead any evidence on either or any other ground of justification. It did not do so because its case was that its conduct did not discriminate against him.

Summary of the evidence

Applicant's engagement and contract

[49] Although the Applicant's statement of claim states that he was employed as a journalist (PB.4.4.1), it was common cause that the Respondent employed him in March 2006 as a "layout sub" for a fixed term of 3 months. He signed a contract and confirmed that the signature at RB15 is his but he denies that the preceding pages (RB5–14) constituted the contract he entered into. He said that he had repeatedly asked for the original contract but it had never been supplied. He said that the document purporting to be his contract in the Respondent's bundle was a 'fraud' because they had removed an offending clause. The document purporting to be his contract (RB 5–15) filed by the Respondent was a 'mere facsimile'.

[50] The offending clause was one that required him to do 'anything he was instructed to do by Mr Taljaard'. As far as he was concerned that clause invalidated the contract between him and the Respondent. Nevertheless, there was, he claimed, an employment relationship between them.

[51] He also said that the Respondent had misrepresented the hours of work in the contract. Although it stated in clause 7 that he was to work an 8-hour day and a 5-day week, he was required to work 14-hour days and 7-day weeks.

[52] Under cross-examination he was asked to identify the 'amendments' to the purported contract at RB 5-15. He said that the obligation comply with 'any instruction' was missing. He repeated that the contract was not valid and that any questions on the contract were 'hypothetical'.

[53] He referred to the clause 5.1 of the contract (RB6) in which he was appointed to the post of a layout sub but expected to do work of a 'similar nature'. He said he had no objection to the clause but just to its interpretation and that 'work of a similar nature' was interpreted to mean 'anything'. He conceded that he was an all rounder having

worked in a small newspaper and that he had agreed to provide content. He agreed to do this, he said, because he was promised employment in a permanent capacity at the expiry of the fixed term if he did.

[54] He later contradicted himself when he claimed that he was 'forced' to write articles and that this was in breach of clause 5.1 of the contract (RB6). In his cross examination of Ms Dean, he put to her that writing articles was not part of his job description because it was not work that was similar to layout. She denied this and stated that it was common for sub-editors to write content. She also denied that he was forced to write content. She said he never raised an objection with her – on the contrary, he appeared to be very excited about doing this work. He came to her on numerous occasions to discuss possible topics. He never indicated that he was not comfortable with providing content.

[55] Ms Dean's evidence on the Applicant's employment was that after the decision was made in early 2006 to roll out four further editions of the People's Post, the Respondent recruited new employees. All the new recruits, including the Applicant, were trained at the Respondent's head office in Bellville. Those recruited to do layout were trained on the Respondent's layout system. For those employees who had existing skills, the training consisted of transferring those skills into the new system. Because of Mr Lewis's experience as stated in his CV, Ms Dean expected him to have conceptual mastery of the process of layout and that all that was required in his training was familiarisation with the technical tools of the Respondent's layout programme.

[56] His training lasted for 2 weeks after which he worked at the Bellville office assisting with content and other tasks in respect of other titles of the WP newspapers. The People's Post moved into new premises in Tokai on 9 May, which was when the Applicant started work on the new edition of the People's Post.

7-day weeks and 14-hour days

[57] The Applicant pleaded that he "was forced to work 7-day weeks" (RB 4 at 4.4.1) and "14-hour days" (RB 5 at 4.4.3.3). He said that he was 'beholden to them 24/7'. This he said constituted "harassment" because it denied him his right to express his religious and cultural life and prevented him from observing Shabbat.

[58] He confirmed that the production cycle for the new edition of the People's Post ran from Friday to Monday with printing commencing on Monday evening and distribution on Tuesday. He said this was introduced without consultation and was in breach of the hours of work contained in his contract.

[59] He said that he worked from '8a.m to 10p.m' and gave the distinct impression that he did this everyday. He stated that copy came in after deadline, which slowed the subbing process and that this required him to sub late into the evening on Friday. He also said that he spent time on one of the stories on a Friday night.

[60] Under cross-examination, he said that there had been no discussion of the working days and the hours when he entered into the contract he just assumed that it was Monday to Friday. When it was put to him that the working week in newspapers had to be tailored to the distribution deadlines his response was that it was not in his contract. He said he was told on 18 May 2006 he would have to work on Saturday. This was done unilaterally. When asked whether he raised the fact of his Jewish faith with Ms Dean he said that he had not and that he 'should have objected'.

[61] When reminded that he had said that he did not mind working on Saturdays, he confirmed this stating that he had grown up in an environment in which his father, an orthodox Jew, had worked on Saturdays, but had observed the Shabbat on Friday evening. Friday evening, he said, was the issue not Saturday. He confirmed that production of the People's Post began on Thursday (news gathering)

with a deadline on Friday 12 noon for the submission of content. He was prepared to work on Saturday and Sunday particularly if there was a problem with an edition but only until 3pm. He conceded that it was a new publication and that there were teething problems and consequently that changes to the schedule were to be expected. He nevertheless insisted that the required hours were contrary to what was contained in his contract.

[62] He confirmed that he worked on only two publications of the People's Post – the first two publications. He accepted that they were learning as they went along. When it was put to him that in journalism things often do not go as planned and that there has to be flexibility, he said flexibility was always at the 'prerogative of the journalist'. His complaint was that he was 'beholden' to the Respondent '24/7'.

[63] He was cross-examined on the claim that he was required to work 7-day weeks (PB4 at 4.4.1). He said that it was only in respect of his last two weeks that he had worked 7 days, namely on the new edition. On the claim that he was required to work 14-hour days – PB5 at 4.4.3.3, he conceded that this had occurred only in respect of the last two weeks, namely on the new edition, and that he had been required to work four 14-hour days in total. When put to him that this was an exceptional period, he stated that he was nevertheless under a general obligation to work 7 days and 14 hours whenever he was directed to do so and that the Respondent had taken no steps to rectify the problem areas related to the editorial and production processes of the new edition. Mr Taljaard had told him that if he did not do work the hours as directed he could 'attempt the terminus or go to hell', which one assumes was an invitation to resign.

[64] In addition to the allegations of being required to work 7-day weeks and 14-hour days, the Applicant alleged that he was required by Mr Taljaard to meet for an 'appointment at 4am' and to 'distribute newspapers *every* morning from 5am to 7:30am' (PB5 at 4.4.3). In his evidence in chief, he states that he was required by Mr Taljaard to be

at the Respondent's despatch department at 4am on 23 May to supervise the first distribution of the new edition but that he arrived at 5:30am. He also said that he was required to distribute papers every Tuesday. He said that if it had been a one off promotion it would not have been an issue for him but he insisted that he was under a general obligation to distribute papers if management invoked the right to call on him to do so.

[65] Under cross-examination, he conceded that he had participated in the first distribution of the new edition on 23 May. He said that he had been required to participate in the next distribution on 30 May, which he refused to do. He said that this was one reason why they terminated his employment. He was referred to the email correspondence from Mr Taljaard – RB19–21 and 25–6. That correspondence states that the staff were 'invited to join us in the excitement when we launch the new People's Post editions in the southern suburbs' and it refers to those who participate as 'volunteers'. The Applicant's response was that Mr Taljaard was a 'bully' and that he required employees to volunteer in the same way as the South African Defence Force used to call for volunteers.

[66] In her evidence, Ms Dean said the launch on 23 May was a 'splash out' done by invitation. E-mails were sent calling for volunteers. The volunteers were put into teams to work certain high volume intersections. The volunteers wore People's Post t-shirts and handed copies to the occupants of the motorcars. Ms Dean was assigned to the same team as the Applicant. No one, including the Applicant had objected to participating in it.

Respondent's policies on racial profiling

[67] The Applicant alleges in his Statement of Claim (PB4.2) that a system or policy exists in terms of which the Respondent racially profiles its newspapers and thereby continues to uphold racial divisions based on racially segregated areas. By so doing, it discriminated against him because it required him to comply with policies that were 'contrary to

his religious and political views' and because it harassed him on account of those views.

[68] His evidence for the racial profiling allegation is *firstly* that as a matter of history, the Respondent had closely associated itself with the National Party and the policy of apartheid – what the Applicant referred to as the 'chain of shame'. The Respondent had not taken the opportunity of making submissions to the Truth and Reconciliation Commission and apologising for its role (he referred in this regard to sections of the Commission's Report dealing with the role of the Afrikaans press at 1AB1–5). The Respondent had not changed its views and as evidence of this, he referred to cartoons published by the Respondent's newspapers after 1990 in 2AB13–15.

[69] *Secondly,* as a business, the Respondent's newspapers targeted audiences that followed the racial profiles imposed by apartheid. Accordingly, Die Burger targeted the white Afrikaans community; City Vision, the African community; and the People's Post and the Metro Burger, the so-called coloured communities. Under cross-examination when it was put to him that the Respondent was engaged in a business venture to make money, he conceded that the Respondent engaged in a business venture developing titles for specific audiences to make money – whether based on age, gender, content, community etc.

[70] *Thirdly,* its newsrooms were structured and populated to reflect the group areas of the previous regime with African journalists sitting at their desks working on titles geared exclusively for African target audiences; and white journalists sitting at their desks working exclusively on titles for a white target audience; and coloured journalists on coloured titles. As a result of this policy, he had been prevented from writing for a black newspaper. He went on to say that the Respondent appointed persons to senior positions to give effect to this policy. In a particular, he claimed that many members of the Respondent were members of the NGK and that his editor, Ms Dean was such a member. This was significant, he said, because in South

Africa the NGK supported apartheid, which other churches had declared to be a heresy. He claimed that she appeared to share the Respondent's beliefs of the 'demographics of the People's Post'.

[71] Under cross-examination, he conceded that there was a common pool into which journalists could submit articles for use in other newspapers of the Respondent and that one such newspaper, the Mitchell Plains Metroburger, had published one of his articles. He stated, however, that apart from this no other newspaper had used any of his material including a 'wonderful photograph of audio players in Khayelitsha'. When asked how editors were 'prevented' from using articles submitted into the pool, his answer was that they were prevented from doing so by 'racial taboos … ingrained from nursery school'. When asked how he could explain his appointment to work on what he said was a coloured title, he stated that the Respondent must have thought that he was coloured. When asked if his claim of racial profiling was consistent with the appointing a white woman for a coloured community newspaper, he lamely stated that that was an 'interesting point'.

[72] Under cross-examination, he was asked how he knew that Ms Dean was an Afrikaner and a member of the NGK. The Applicant said that he had gained that impression from talking to her. When it was put to him that she was a Catholic he was unable to contest it. When it was put to her that she spoke both English and Afrikaans at home, he insisted that she was a "boere meisie" (while at the same time claiming that he was a "boere jood"). He said that she was appointed to advance the Respondent's aims rather than for any editorial experience or experience of the coloured community – experience that he said he had 'because … [he was] a coloured'. She was, he said, an upper class Afrikaner white editor of a newspaper for the coloured community.

[73] Ms Dean's evidence was that the People's Post was based on the Community Newspaper Model. That model is contrasted with the mainstream model, which has a national or provincial footprint and is published for large audiences either on a daily basis (e.g. Cape Times)

or on a weekly basis (e.g. Sunday Times and the Sunday Sun). The Community Newspaper model reflects a segmented landscape targeting smaller pockets of readership geographically defined.

[74] She said that the geographic definition is normally centred on some form of community identity and some shared points of interest. The object is to target advertising to a smaller catchment area, which means it is both cheaper and more directed form of advertising particularly for small businesses. The People's Post has ten communities in the Cape Peninsula, which include Mitchells Plain, Grassy Park, Retreat, Athlone, False Bay, Wynberg, Claremont/Rondebosch, and the Atlantic Seaboard – each with its own edition.

[75] She conceded that there was a coincidence of homogeneity based on South Africa's past. At a racial and cultural level, many of these communities were shaped by South Africa's past though many newspapers now addressed a mixed profile. Asked whether the demographic profile of the Peoples Post coincided with so called "coloureds" and therefore that the content of the Peoples Post was racially profiled she said that that was incorrect. Several of the areas reflected a mixed profile such as Wynberg and the City Seaboard, Claremont/Rondebosch and False Bay etc.

[76] She said that there was no truth that the Respondent targeted a particular racial group in its community newspapers or that the content of an edition was racially profiled. She stated there were three levels of content for the different editions. The first level is to use content from neighbouring catch material that is what she called 'neighbouring crossovers' – articles dealing with something in Retreat would also be used in the Constantia-Wynberg edition. This was done to avoid pigeonholing communities. The second level was that matters of interest across the whole landscape would be covered in all editions. She gave the example of the recent shark attack at Fish Hoek that story was covered in each of the editions. The third level she said was

a special attribute of the People's Post model was using content for a specific aim for example the request for assistance of families where homes were destroyed in one community would be published in other communities. So, a Rotary Club Campaign in respect of assistance in one area would be published across the editions.

Rejection of Applicant's articles

[77] The Applicant contends that four articles of his had been rejected as a result of the Respondent's racial profiling policy (PB5 para 4.5.1). The four articles are:

- the Dludlu article which was about the jazz musician Jimmy Dludlu and his winning of two South African Music Awards (RB23);
- an amended article on Dludlu and a local jazz musician, Robbie Jansen (the Robbie Jansen article) in which Robbie Jansen comments unfavourably on the awards, the ceremony and the choice (PB10–13);
- a brief on the Hand of Fatima exhibition (the Hand of Fatima article) which is a brief on an art collection with a motif that predates but has been assimilated into Islamic art and culture (1AB30)
- a brief on the Remembering Slavery exhibition at Iziko (the Slavery article) which describes the exhibition (RB31).

[78] The Applicant stated that on 17 April 2006, the Applicant attended a editorial meeting chaired by Ms Dean. At that meeting she said that she wanted to capture the 'heart and soul' of the community. She asked him to write articles on Cape Jazz. As a result, he wrote the story on Jimmy Dludlu, a famous Southern African jazz musician. The article was rejected. She accused him of plagiarism specifically referring to his use of an online biography of the musician. He denied the plagiarism and considered the use of online sources to be a 'style issue'. He said that she could have sent it back for a rewrite but instead it was rejected – it was 'a sign that the boerevolk were right and he was wrong' and that he was 'not to bring the struggle into the newsroom'. The reason

for its rejection, he stated in his evidence in chief, was that it was a story about a black artist and accordingly not suitable for inclusion in a newspaper targeting the coloured community.

[79] When it was also put to him under cross-examination that he had himself described the Dludlu article as a 'vapid piece hastily put together from music industry bumph and promo material' (1AB52), he conceded that it was not ready for publication but continued to insist that the real reason for the refusal of the article was the fact that it was about an African jazz musician and the target audience was a coloured community. It was put to him that editor had difficulties with the posting of the content as original. His response was that the quotes were clearly attributed but conceded that she had a problem with online journalism and that it was her prerogative as editor to make this call. Referring to the article at RB 23 and the portions deleted, he conceded that her concerns were one of the reasons for her rejection but insisted that the true reason was the subject matter and the fact that she had a 'psychological problem' with the complexion of Jimmy Dludlu.

[80] Ms Dean testified that when she read the Jimmy Dludlu article she became aware of the change in style midway through the article. She did an Internet search on a piece of the text and that revealed an Internet document from which a large piece of the Applicant's article had been drawn. She made the pencil markings on the copy of the article (RB23). They marked off the chunks of the text that had been drawn from the Internet. She had originally marked them off in order to see if she could excise them and still run with the article but excision took too much out of the article. She said that it was unacceptable to publish 'cut and paste' content in the absence of a clear attribution that it is the work of another. She denied that her decision to run with the article had anything to do with the fact that the article was about a black African and that this did not fit the profile of the readers of the People's Post.

[81] The Applicant testified that he then rewrote the article (RB37) after speaking to Robbie Jansen, a local jazz musician (PB10–13). Robbie Jansen was, he said, within the 'target market', and that the article was 'spiked'. The Applicant said that Ms Dean wanted Robbie Jansen's telephone number to check whether he stood by the statement in his interview. He refused to give her the number. In the interview with the Applicant, Robbie Jansen makes disparaging remarks in respect of the music industry and its award to Jimmy Dludlu. Under cross-examination, he conceded that although the article suggested that he had interviewed Robbie Jansen at his home, he had in fact conducted the interview over the telephone – this was not misleading, he said, it was a 'journalistic conceit'.

[82] Ms Dean said in her evidence that after reading the article she met with the Applicant to discuss it. She told him that she was concerned that Mr Jansen was making disparaging remarks in respect of an industry in which he earned his living, that the Applicant had 'encouraged' him to make the statement and that his producer had told him not to give an interview. She requested Mr Jansen's telephone number to check the facts. He took great exception to this and refused to give her the number.

[83] She said that after telling him that she wanted to check the facts he started shouting and swearing. He became very agitated and said that he would not write a 'f…ing word for the f…ing newspaper again'. He walked out and went to his desk shouting 'profanities'. Later that day he told her that he could put her in touch with Robbie Jansen's pastor but would not give her Robbie Jansen's number to phone him directly. Because of his behaviour, which she reported to Mr Taljaard, Mr Taljaard called a meeting for the next day.

The meeting on 30 May

[84] Mr Taljaard, Ms Dean, Mr Warren Charles (HR Divisional Head) and the Applicant attended the meeting.

The Applicant's evidence was that he was called to what he considered to be an 'evaluation meeting', which he understood to be a meeting in which he could raise problems he had encountered in the second production cycle. His preparatory notes are at 1AB27–29. Those notes record concerns about copy coming in after deadline, proofing, subbing and editorial directives. He recognised that the newspaper was still getting to grips with its uniqueness but the 'peoples aspirations and expectation' were that the newspaper deliver 'something special'. He then deals briefly with the Jimmy Dludlu and Robbie Jansen stories and their rejection. The handwritten notes refer to the need for direction, production meetings and clarity on the production process.

[85] The Applicant said that Warren Charles and Mr Taljaard immediately put him in the 'hot seat' and played 'games of intimidation' with him. They purported to evaluate his performance and said that they were not happy with him. His layout expertise was questioned – he was referred to a page that was not professionally laid out (RB29). He explained that this was an isolated incident and that the page was not ready and would not have been submitted for publication.

[86] He complained about working overtime on the previous Friday, which meant that he had to work on Shabbat. Mr Charles asked him how he could attend a jazz evening on Shabbat insinuating that he was not a Jew because a Jew would not go to a nightclub on Shabbat. The Applicant stated that Mr Charles had no right to criticise how he observed his Shabbat. The Shabbat was his private time and what he did in his private time was no business of the employer. He took great exception to the fact that Mr Charles challenged his Jewishness.

[87] In response to a question whether he ever advised the Respondent that he was Jewish he said that the Respondent had not been told but the Respondent could not assume everyone was of the same religion. The Applicant assumed that they knew that he was Jewish. He conceded that he should have objected and that it might have lead to a 'better outcome'. The issue of his Jewishness only came up during the

meeting on 30 May 2009. He went on to say that it was no secret that he was a Jew. The Respondent, he said, failed to take steps to find out the religious affiliations of their employees.

[88] He raised the issue of the two articles at the evaluation meeting. Warren Charles became offensive suggesting that he did not know the communities and Grassy Park in particular.

[89] Under cross-examination, he conceded that his notes for the evaluation meeting (1AB27–8) included all the issues that he wished to raise at the meeting on 30 May 2009. He conceded that they were the important issues. When asked why there was no reference to racial profiling or anything in respect of Judaism, he responded that the racial profiling was linked to the rejection of his articles, which was raised in the report and that the excessive hours were linked to the issue of Judaism. He said it was not necessary to develop these points in his notes.

[90] He said that during the meeting he was abused by Mr Sedrick Taljaard and told that 'ons het jou geld gegee – we now want our pound of flesh'. This he said was a reference to Shakespeare's play The Merchant of Venice and that the anti-Semitic inference was clear. The applicant claimed that during the meeting Mr Charles told him that he had been a member of the Umkhonto Isizwe, which applicant believed was told to him in order to intimidate him. The Applicant responded that he had contacts with the 'Kiblah', a reference it seems to a local militant Muslim group.

[91] He denied that he lost his temper in the meeting but did concede that he was 'not toeing the line'. He said that very cruel and hurtful things were said to him and that he could not comprehend the amount of abuse thrown at him. They 'ganged up against him'. He conceded that he might have responded to them by saying "jou ma se ...".

[92] Ms Dean's testimony was that after the Applicant had sworn at her when she had refused to publish the Robbie Jansen article, she

telephoned Mr Taljaard and informed him of what had occurred and asked his advice. He said that it was necessary to meet with human resources to deal with the matter and a meeting was arranged with the Applicant the next day, namely 30 May.

[93] According to Ms Dean, the meeting took place in her office. The Applicant was questioned on his experience given the concerns arising from the layout and the two articles. His conduct the day before was also raised particularly its inappropriateness and the use of foul language before other members of staff. In the course of the discussion, the meeting became chaotic. It was an emotionally charged atmosphere with the Applicant becoming very agitated. She said that the Applicant did not handle the matter professionally. At the end of the meeting, they agreed that he would be paid for the balance of his contract and that he should not come back to work.

[94] She was asked if Warren Charles had made offensive remarks concerning the Applicant's religion. Her response was that the meeting was chaotic, a lot was said but she cannot recall everything that was said and could not recall that. It was put to her that the Applicant's version was that he was physically removed. She said he was not – he left voluntarily accompanied by Mr Taljaard and Mr Charles to his desk and then escorted out of the building. There was no physical removal.

[95] Later that night, the Applicant phoned her and apologised. He said that it was not because of Ms Dean that he got so angry but that "white dominee", which she assumed was Mr Taljaard. He said that he did not want her to view him poorly.

Credibility of the witnesses

[96] The Applicant was not a credible witness. He was hyperbolical. He claimed that he was required to work 'every Tuesday morning from 5am to 7:30am' when he only worked it once and only asked to work it on another occasion. He claimed that the copy of the contract filed in the Respondent's documents was a 'fraud' even though he relied on

certain of its provisions and he admitted that it was his signature on the last page.

[97] He made unfounded and offensive statements about his colleagues accusing them of being ‘cram college’ journalists’ and his editor of not being equal to the job. He claimed that she had asked him to help her ‘fake it as an editor in the know’. He said that she was appointed because she fitted the racial, linguistic and religious profile of the owners and managers of the Respondent namely that she was white, Afrikaans and a member of the NGK. When it was put to him that her father was Italian and her religion Catholic, he could not deny it nor proffer any evidence to the contrary other than claiming that she had led him to believe that she was Afrikaans. He made absurd claims that he was a ‘coloured’. He was argumentative under cross-examination and contradicted himself.

[98] His evidence is unreliable because he is engaged in a campaign against the Respondent for its support of apartheid and its refusal to apologise for doing so before the Truth and Reconciliation Commission. That is clear from his pleadings, the documents he compiled, the evidence he gave and the emotion with which he displayed in conducting his case. This is what drove him and the evidence of his personal engagement with the Respondent was shaped to advance this campaign. His evidence was tendentious.

[99] The evidence of Ms Dean on the other hand was to the point and measured. She gave a good impression. She knew what she was talking about and clearly explained the manner in which the Respondent conducted its newspaper business. Her evidence in respect of the Respondent was consistent with the common cause facts. Her version is to be preferred in any conflict with the Applicant’s version.

Was the Applicant treated differently because of his political views

[100] Fundamental to the first leg of the Applicant's case is that the employment policy and practice of racial profiling led to his being harassed, his articles being rejected and the termination of his contract because of his religious and political views.

Harassment for his religious and political views

[101] The harassment claims take several forms. They are set out in paragraph 4.4.3 of his statement of claim. I deal with each individually.

[102] *'Making an appointment with Applicant at 4am in the morning'.* In his own evidence, the Applicant states that he was required to be the responsible person 'as a member of production' to monitor the despatch of the first edition on 23 May 2006. When cross-examined over the description of this task as an 'appointment', he argumentatively avoided answering the question by telling Mr Kahanovitz to 'call it what you want'. It is clear that the early morning task was associated with the first publication of the new edition. His description of it in his statement of claim as being an 'appointment' was to give it the colour of harassment when the more probable reason for the early morning task was to oversee the smooth running of the launch of the new edition.

[103] *'Requiring Applicant to distribute newspapers every Tuesday morning...'.* In his evidence, the Applicant conceded that he was only called upon to do so on 23 and 30 May and that he only did so once, namely the distribution of the first publication on 23 May 2006. He had been in the Respondent's employ for 7 weeks before 23 May and accordingly the claim that he was required to 'distribute newspapers every Tuesday morning' is a gross exaggeration. When it was put to him that he did not distribute newspapers every Tuesday, he shifted his ground and claimed that the Respondent had the right to require him to do so. But not only did he not work every Tuesday morning distributing papers, it is clear from the email correspondence and Ms Dean's

evidence that the participation in distribution on 23 May and 30 May was voluntary and limited the launch of the new edition. Distribution was done by a separate company. Not only is her evidence to be preferred, the inherent probabilities are that he was not being singled out – all staff were asked or, on his version, 'required' to assist in the launch.

[104] *Requiring the applicant to work 14-hour days.* In his evidence, he states that he was only required to work 14-hour days on four occasions. Each of these occasions was associated with the first two publications of the new edition. It was common cause that there were teething problems with the introduction of the new edition and that these 14-hour days took place in the 2 weeks of the first two publications. Indeed, the Applicant in his notes for the evaluation meeting raises the problems of the second production cycle in particular the late submission of copy leading to subbing to be done late Friday and over the weekend – 1AB27. Ms Dean's evidence was to the effect that there were 'horrendous' problems with the system in the first week'. She had to change deadlines and that affected the hours of work. The probabilities are overwhelmingly that the applicant worked or was required to work hours in excess of normal working hours because of the exigencies of the first two production cycles of the new edition and not because he was the object of harassment.

[105] *The invitation to resign.* In his statement of claim and his evidence, the applicant alleges that Mr Taljaard harassed him by stating that if he was dissatisfied with his working hours he should 'attend the terminus and go home' – PB5 at 4.4.3.3. Mr Taljaard did not give evidence and accordingly the Applicant's evidence that he said this stands though it is not clear quite when this was said and in what context. It is also not clear quite what the statement meant but I assume that it was an invitation to resign. An invitation to resign may or may not constitute harassment – it depends on the circumstances.

[106] The invitation to resign in this case is inextricably linked to its cause namely the applicant's dissatisfaction with his working hours. Given that I have found that the requirement to work those hours is not based on discriminatory grounds, an invitation to resign does not necessarily constitute harassment for political or religious beliefs. The more probable inference is that Mr Taljaard made the statement in response to the applicant's objection to his working hours – hours that had made demands on him as a result of the problems experienced in the production cycle of the launch of the new edition.

[107] It follows that the applicant has failed to prove that the conduct complained of in paragraph 4.4.3 of his Statement of Claim constitutes harassment or that such conduct is based on the alleged grounds of discrimination.

The rejection of his articles because of his political and religious views

[108] In his statement of claim the applicant alleges that he was discriminated against for his religious and political views and in particular that the respondent 'failed to accept a number of the applicant's articles' because of its racial profiling policies – PB4-5 at 4.3 and 4.5.

[109] There are four articles that he claims to have been rejected. The first is the *Jimmy Dludlu* article, the second is the *Robbie Jansen* article, the third and fourth are the Slavery and the Hand of Fatima articles. Not much was said about the last two other than as proof of the discriminatory attitudes of the Respondent in general. The critical articles for the purposes of the Applicant's case are the first two.

[110] *The Jimmy Dludlu article.* The applicant claims that this article was rejected because of the respondent's policy and practice of racial profiling, namely that the article was about an African jazz musician in a newspaper that targeted a 'coloured' constituency'. Assuming that the Applicant demonstrated the existence of such a policy and practice and that it manifested itself in content choices, the Applicant has

nevertheless failed to demonstrate that this policy and practice led to the rejection of his article. By his own admission, he regarded the article to be a 'vapid piece hastily put together from music industry bumph and promo material' (1AB52). Ms Dean confirms this and after trying to rescue the article decides that it is not fit for print because it was unacceptable to publish 'cut and paste' content without attribution that it is the work of another.

[111] The applicant did not contest that it was her prerogative to decide this issue, which he described as 'stylistic'. He insisted though that the reason for the rejection was that she had a 'psychological problem with the complexion of Jimmy Dludlu'. Although conceding that the article was not ready for publication, he insisted that she should not have rejected it but referred it back to him for reworking. But that is precisely what the Applicant says what happened. He reworked the article but in the context of an interview with Robbie Jansen.

[112] The more probable reason for the rejection given his own testimony is that it was not ready for publication and that it was full of 'bumph and promo material', which was not acceptable to Ms Dean, exercising an editorial prerogative recognised by the Applicant. It follows that this rejection was not based on the Respondent's alleged racial profiling policies and practices but on the editorial assessment of the article on grounds of attribution and style – an assessment that the applicant himself shared.

[113] *The Robbie Jansen article.* The applicant stated that he reworked the *Dudlu* article in order to fit it into the 'target market'. That article was also rejected. The applicant claims that this was because of the racial profiling policies and practices of the Respondent. But on its own terms the rejection cannot amount to racial profiling for the very reason that it was an article about a jazz musician who fell within the alleged racial profile of the target market.

[114] Ms Dean testifies that she rejected the article because the applicant had encouraged Mr Jansen to give an interview, which Mr Jansen's

producer had advised him not to give and because that interview contained disparaging remarks made by Mr Jansen about an industry in which he earned his living. She requested Mr Jansen's telephone number to check the facts. The Applicant refused to give her the telephone number at the time. The salient facts are common cause although the reasons for doing so are not. The probabilities are that Ms Dean did not reject the article but wanted to check it before passing it for publication. Even if she did reject the article, the probabilities are that the rejection was based on the reasons advanced by Ms Dean.

[115] Accordingly, the rejection of the articles did not amount to differential treatment based on political and religious beliefs and practices. The articles were rejected for legitimate editorial reasons.

Termination of his contract on grounds of his political and religious beliefs

[116] In his statement of claim, the applicant alleges that he was dismissed and his fixed term contract was not renewed, despite a legitimate expectation of renewal, because of his political, cultural and religious views – PB5 &6.

[117] It is unclear from the applicant's case and his evidence whether he was dismissed on 30 May 2006 because, on the one hand, he claims that he was dismissed on that day and on the other states that he had a legitimate expectation of renewal at the expiry of his contract on 30 June 2006. It is common cause that he was paid his salary up to 30 June.

[118] It is unnecessary to decide whether he was dismissed or whether his contract was not renewed because the nub of the applicant's case was that his contract was terminated (either by way of dismissal or a refusal to renew) because of his religious and political beliefs. Ms Dean in her evidence states that after the meeting, the applicant agreed not to return to work on the basis that he would be paid out the balance of his contract. This she said was put in writing but the document had been

mislaid and was not available. Mr Kahanovitz stated that the Respondent, accordingly, would not be relying on the written agreement.

[119] As a matter of general credibility, I find Ms Dean's evidence on what transpired at and after the meeting on 30 May to be preferred over that tendered by the Applicant. What also should be taken into account is the claim for the balance of the contract in his letter of demand and his receipt of the amount 'in full and final settlement'. But even assuming that the Applicant was dismissed and assuming that he had a legitimate expectation of renewal and that his contract was not renewed, the more probable reasons for the dismissal or the refusal to renew were his poor work performance, his conduct in his meeting with Ms Dean on 29 May when his *Robbie Jansen* article was questioned, his conduct in the newsroom thereafter, and his conduct in the meeting on 30 May with Mr Taljaard, Mr Charles and Ms Dean.

[120] The applicant denies that he was angry and acted emotionally in the meeting. Ms Dean states that he became very agitated and acted unprofessionally. Her evidence is to be preferred on general credibility grounds and the fact the applicant, himself, stated that he was provoked and that he had responded using grossly insulting language in the course of the meeting.

Was the applicant treated differently for his religious views and practices?

[121] The applicant alleges in his statement of claim that his religious harassment took the form of being forced to work 7-day weeks, which prevented him from observing the 'Jewish cultural expression such as Shabbat', and that Mr Charles made offensive remark regarding the Applicant's observance of the Sabbath – PB5 at 4.4.1 and 4.4.4.

Being required to work on the Sabbath

[122] In his evidence, the Applicant states that he had no religious or cultural objection to working on the Saturday part of the Jewish Shabbat. His complaint was being required to work on Friday evening – the Jewish Shabbat commencing at 6pm. Accordingly, on its own terms his claim that the 7-day week trenched on his right to observe the Shabbat on Friday evenings is groundless. In any event, there was no evidence that he had to work 7 days in the 6 weeks prior to the launch of the new edition. It was common cause that, because of the problems associated with the first publication of the new edition, work was done on the Saturday and the Sunday before the publication on 23 May 2006.

[123] In his testimony, he claims that on the Friday before the first publication of the new edition, the deadlines for content were extended because of the problems associated with the production cycle. This meant that he had to work after sunset that day. The same thing occurred on the next Friday. Because the Respondent did not have a policy for accommodating religious minorities, the Applicant argued that he was required to work in breach of his religious and cultural beliefs and practices.

[124] It is common cause that the Respondent does not have a policy on accommodating religious minorities. But even if the Respondent had such a policy, it could only be applied if the employee declared his or her religious affiliation. In the absence of a policy, it could only constitute discrimination if as a matter of practice the employer, knowing of the employee's religious affiliation, nevertheless prevented the employee from observing the employee's religious beliefs and practices. The critical issue in this case is not the existence of such a policy or practice but whether or not the Respondent knew of the Applicant's religious beliefs and practices when it required him to work on the two Friday evenings because of the problems associated with production of the new edition.

[125] In his testimony, he states that he did not advise the Respondent that he was a Jew (it was their responsibility to find out) but he did not hide the fact that he was a Jew. He said that it was common knowledge that he was a Jew but conceded that he ought to have objected on the Friday evenings when he was required to work into the Shabbat. Ms Dean states that she did not know that he was Jewish until the meeting of 30 May and was quite surprised to find this out as she said he never objected to working on the two Fridays. Under cross-examination, she was asked if the hours of work were Christian-oriented and her response was that her approach would have been to take account of other religions in requiring work. When it was put to her by the Applicant that he had to 'fall in line', she stated that he had never told her that he was Jewish nor expressed any objection to working on Friday evenings.

[126] Ms Dean's version is to be preferred. He gave no independent evidence of the fact that Respondent knew that he was Jewish. This is supported by the Applicant's own statement that he should have objected. The Applicant has failed to establish on the balance of probabilities that the Respondent knew of the Applicant's religious affiliation and that it required him to work on the Friday in breach of his religious beliefs and practices.

The offensive remarks

[127] Offensive remarks do constitute a form of harassment. The applicant gave evidence to the effect that Mr Charles doubted that the Applicant was a Jew and questioned his religious commitment to observing the Shabbat. From his own evidence and the cross examination of Ms Dean, it is clear that the Applicant went to night clubs on Friday nights and on one occasion used a company car to do so.

[128] The Applicant insists that it his prerogative to decide how to observe the Shabbat. Without deciding whether an employer is obliged to accommodate an employee's observance of a religious practice even if the employee does not himself observe it in the manner contemplated

by the religion, an employer may surely raise a question over whether the commitment to observe a religious practice is genuine. Without deciding whether the Applicant's observance of the Shabbat on Friday nights is in accordance with his religious and cultural practice, it is not offensive for the Respondent to enquire into the manner and justification of his observance of the practice, particularly in a context where the Applicant does not regard working on the rest of the Shabbat, namely on Saturday. It is not a simple matter of employee choice. Accommodation of religious minorities may require operational changes, which may affect the hours of work of other workers. Such changes are only justifiable if the employee's observance of his religion is genuine and in line with religious practice. Accordingly, doubt expressed as to the employee's religious commitment may be hurtful but does not on that ground alone constitute harassment.

Costs

[129] In determining whether to award costs, I have to take into account both law and fairness. As a matter of law, costs normally follow the result. As a matter of fairness, the Labour Court has generally been reluctant to order costs against an individual employee. In this case, however, fairness requires that the Applicant pay the Respondent's costs. He has engaged in egregious attacks on his colleagues, in particular his editor, without any factual basis. He has filed volumes of irrelevant and unnecessary material, which he did not use. He has used court processes to pursue his campaign against the Respondent.

Order

[130] The Applicant's claim is dismissed with costs, costs to include the costs of counsel.

_____

CHEADLE, AJ

Date of Hearing	:	4-6 November 2009 & 20–21 January 2010
Date of Judgment	:	4 May 2010

Appearances

For the Applicant	:	David Robert Lewis (in person)
For the Respondent	:	Adv C S Kahanovitz SC
Instructed by	:	Maserumule Inc Attorneys