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## TEENS AWARDED COMPENSATION FOR RELIGIOUS DISCRIMINATION IN THE WORKPLACE

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*By Barry Kwasniewski\**

### A. INTRODUCTION

In [\*HT v ES Holdings Inc. o/a Country Herbs\*](#) (“*Country Herbs*”),<sup>1</sup> the Ontario Human Rights Tribunal (the “Tribunal”) considered the discrimination complaints of two teenaged employees (ages 14 and 16 at the time) who alleged that they were fired for refusing to work on a religious holiday. In its decision released on August 11, 2015, the Tribunal held that Country Herbs failed to reasonably accommodate the teenaged employees’ request for time off for religious observance. The two employees were awarded \$26,117 in compensation for lost wages and injury to dignity, feelings and self-respect, and reprisal.

There are relatively few cases that deal with discrimination based on religious creed,<sup>2</sup> and the decision of the Tribunal in this case is a reminder to employers of the importance of reasonable religious accommodation. In the absence of proof of undue hardship, employees who are terminated for observing religious holidays without evidence of proper accommodation from their employers may be found to have suffered discrimination under the Ontario *Human Rights Code* (“*Code*”).<sup>3</sup> Should this happen, employers may be liable to substantial monetary awards against them, as well as other orders as permitted by the *Code*. This *Charity and NFP Law Bulletin* will review the Country Herbs decision, the principles of which will be applicable to Ontario employers, including charities and not-for-profits.

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<sup>1</sup> *HT v ES Holdings Inc. o/a Country Herbs*, 2015 HTRO 1067 (available on CanLII).

<sup>2</sup> *Ibid* at para 86.

<sup>3</sup> *Human Rights Code*, RSO 1990 c H 19 [*Code*].

## B. FACTS

Country Herbs, a grower and importer of vegetables and herbs operating in Courtland, Ontario, fills about 70 orders per week. Orders are received for their clients between 12 and 20 hours prior to the expected delivery, and the maximum expected delivery time is 24 hours. To fill its orders, Country Herbs requires its staff, consisting of between 28 and 35 employees, to be available for work on Mondays and Thursdays, to meet the weekend shopping demands of consumers.

On April 3, 2014, Country Herbs hired HT, 16 at the time, to work between 40-50 hours for five days per week between Monday and Saturday. JT, her brother, was hired on April 16, 2014, to work three to four days per week for between 30.5 and 37 hours per week. Both were engaged in employment with Country Herbs as part of their school program, which they needed in order to pass Grade 12, but both intended to work there after their schooling was finished.

Both HT and JT (the “teenagers”) are Christian Mennonites who celebrate a religious holiday called Himmelfahrt (referred to as “Himmilfaut” in the decision). Both applicants testified that their religion is very important to them and that they try to attend church as often as possible.

At some point after they began working for Country Herbs, their mother, ST, told Ms. Singh, the vice-president of Country Herbs, that working past 9:30 or 10:00 pm was late enough for the teenagers and Ms. Singh agreed. About three weeks before the holiday, ST told the teenagers to speak with the owners of Country Herbs and inform them that they could not work on the religious holiday, which was Thursday May 29, 2014. Both teenagers were present when they told the owners of Country Herbs, Ms. Singh and Mr. Esmile (the president of Country Herbs), that they would not be able to work the holiday. About one week later ST told the teenagers to talk to the owners of Country Herbs again because the teenagers were unsure about the outcome of the first conversation. Both teenagers were present when that second notice of their intent to take the holiday off was provided to Ms. Singh.

Ms. Singh testified that eleven other employees had also requested the holiday off. Six of these employees took the day off, but then started work as of midnight to make up those hours. The rest of the employees

came in on the holiday and worked. Ms. Singh testified that the teenagers were the only two employees who would not agree to either of the options offered to them (i.e. work on the holiday or commence work as of midnight). Ms. Singh had contacted the Ontario Ministry of Labour to inquire about their rights with respect to the holiday, and were apparently advised that since it was not a statutory holiday they were not obligated to give the teenagers the day off.

On May 27, two days before the holiday, HT sent a text to Country Herbs, in response to an announcement by Country Herbs asking employees to inform them if they were coming to work during the day of the holiday, informing Country Herbs that she would not be coming in because she was going to church and she would not be dropped off to work at midnight. There was no discussion about the text when HT attended work on May 28.

On the date of the holiday, Mr. Esmile called to see if the teenagers would be coming in to work either during the day or for the midnight shift. ST replied that they would not be coming to work. Mr. Esmile told ST that they did not have to bother coming in to work anymore. ST asked if this applied to JT since he was not scheduled to work that day and Mr. Esmile replied that it did.

The teenagers subsequently commenced their application to the Tribunal, seeking compensation for alleged violations of the *Code* for discrimination on the basis of creed.

## C. DISCRIMINATION BASED ON RELIGIOUS CREED AND ASSOCIATION

### 1. The Test

The tests for a finding of unlawful discrimination are set out in the leading Supreme Court of Canada decision of *Meiorin*.<sup>4</sup> There, the Court set out a three part test for assessing whether or not the policies, standards or the actions of an employer were discriminatory. The three elements that are to be considered are:

- 1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;

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<sup>4</sup> *British Columbia (Public Service Employees Relations Commission) v British Columbia Government Service Employees' Union*, [1999] 3 SCR 3 ("*Meiorin*") online: <<http://canlii.ca/t/gkpxs>>.

- 2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
- 3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.<sup>5</sup>

Applying these tests, the Tribunal found that the teenagers were discriminated against on the basis of their religious creed. The Tribunal then focussed the analysis on the third factor of the test – that of “reasonable necessity”.

## 2. Reasonably Necessary

Considering the third element of the *Meiorin* test, it is necessary for the employer to demonstrate that the policy it is relying on is reasonably necessary to accomplish the legitimate work-related purpose. In other words, the employer must demonstrate that under the circumstances it would be impossible to accommodate the employee without causing undue hardship to the employer. As a result, the employer must take steps to demonstrate that it took reasonable steps to accommodate the employee. To do this, an employer has to meet a procedural and substantive obligation within the duty to accommodate.

### a) Procedural Obligation

The Tribunal commented that an employer must obtain relevant information concerning the employee’s situation and seriously consider how to accommodate the employee’s request for accommodation. In this regard, the Tribunal ruled that Country Herbs had a policy that required their employees to work on the religious holiday. Further, Country Herbs expected their employees to comply with the policy and, in the case of the teenagers, failed to engage in any form of serious discussion about how it might accommodate their request.

### b) Substantive Obligation

With respect to the substantive obligation, the Tribunal held that expectations placed on the teenaged employee were unreasonable, since Country Herbs had already agreed with the teen’s mother, ST, that working past 10 p.m. would be unreasonable. The only accommodation offered to HT was to work starting at midnight. Given her age, that HT’s mother had concerns

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<sup>5</sup> *Ibid* at para 54.

about her working late at night in a rural setting, and that she had no means of transportation, the Tribunal held that the alternative shift offered to HT was unreasonable. Finally, Country Herbs offered no evidence to the Tribunal of any undue hardship it would incur as a result of the accommodation request.

### 3. Discrimination Based on Association

While dealt with only briefly, the Tribunal also pointed out that in spite of the fact that he was not scheduled to work, JT was fired because of his association with his sister. The Tribunal held that for Country Herbs to fire him on the basis of his association with his sister, with whom he shares the same religion, was a breach of the *Code*.

### 4. Reprisal

In referring to the elements set out for reprisal from a prior decision of the Tribunal,<sup>6</sup> it held that HT, but not JT, had suffered reprisal. According to the Tribunal, this was because JT was not scheduled to work that day, nor had he asserted his right not to work. However, since HT had asserted her right not to work, and because Country Herbs had discussed with employees that if they did not come in to work on the holiday that they could be fired, the Tribunal found that HT's termination was a reprisal, which is also contrary to the *Code*.<sup>7</sup>

### 5. Remedy

The remedial powers of the Tribunal are broad, and extend beyond the award of monetary damages. As such, the Tribunal awarded the teens a total of \$26,117 plus interest in compensation for lost wages and injury to dignity, feelings, self-respect, and for HT, reprisal.

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<sup>6</sup> *Noble v York University*, 2010 HRTO 878 at paras 33 and 34. The elements cited in *Noble* are:

- (a) An action taken against, or threat made to, the complainant;
- (b) The alleged action or threat is related to the complaint having claimed, or attempted to enforce a right under the *Code*; and
- (c) An intention on the part of the respondent to retaliate for the claim or attempt to enforce the right.

The Tribunal also pointed out in paragraph 72 that the principles that:

- (a) There is no strict requirement that the complainant has filed a complaint or application under the *Code*, and
- (b) There is no requirement that the Tribunal find the respondent did in fact violate the complainant's substantive rights to be free from discrimination.

<sup>7</sup> *Supra* note 3, s 8.

In addition to the monetary award, the Tribunal held that as Country Herbs did not have any adequate policy pertaining to unlawful discrimination under the *Code*, it ordered Ms. Singh and Mr. Esmile to take the Ontario Human Rights Commission's online human rights training and provide the teenagers with written confirmation of completion. Furthermore, the Tribunal ordered Country Herbs to put up *Code* cards at central places in the workplace.

## D. CONCLUSION

The amounts awarded to HT and JT in this case are fairly substantial, and are intended by the Tribunal to “ensure that the quantum ... is not set too low since doing so would trivialize the social importance of the *Code*.”<sup>8</sup> As such, this decision sends a clear message to employers, including charities and not-for-profits, that the failure to properly consider, and in appropriate cases, accommodate reasonable requests for religious observance, may result in human rights claims being filed. Given the costs associated with defending a human rights application, and the monetary and non-monetary remedies that could be imposed by the Tribunal if unlawful discrimination is found to have occurred, employers must be mindful of their *Code* obligations in dealing with their employees. In particular, employee termination decisions which are tainted by unlawful discrimination may result not only in human rights claims to the Tribunal, but could also lead to wrongful dismissal lawsuits in the civil courts.



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<sup>8</sup> *Country Herbs* at 83.