
THE EMPLOYER'S DUTY TO ACCOMMODATE: RELIGIOUS OBSERVANCES AND BELIEFS

*By Anne-Marie Langan, B.A., B.S.W., LL.B. and Mervyn F. White, B.A., LL.B.
Assisted by Thelson Desamour, B.A., LL.B., and Nancy E. Claridge, B.A., LL.B.*

A. INTRODUCTION

In Ontario, employers are prohibited from discriminating either directly or indirectly in employment on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status and handicap.¹ This prohibition applies to an employer's interaction with all employees including full-time, part-time, contract, temporary staff and probationary employees, and even applies to employees who are members of a union and subject to a collective agreement.² It also applies to all aspects and stages of the employer's relationship with an employee including advertising jobs, the application process, interviewing, promotions, dress requirements and scheduling. Discrimination can include "adverse effect discrimination," which is explained in the *Ontario Human Rights Code* as being,

[W]here a requirement, qualification or factor exists that is not a prohibited ground of discrimination but that results in the exclusion or restriction of a group of persons who are identified by a prohibited ground of discrimination unless the requirement or factor is reasonable and genuine in the circumstances, subject to undue hardship on the employer.³

¹ *Ontario Human Rights Code* (the "Code"), s. 5(1).

² Ontario Human Rights Commission: "Hiring? An employer's Guide" 2nd edition, (13 September 1999) at 2, full text of which is available at: <http://www.ohrc.on.ca/english/publications/hiring-guide.shtml>.

³ Code, *supra* note 1, s. 11(1).

Employers have a duty to accommodate their employees, who are members of one of the identified groups, to the point of “undue hardship.” While there is substantial debate in the case law concerning how the standard of undue hardship should be applied in individual fact situations, the Supreme Court of Canada has interpreted it to mean that the employer must “take such steps as may be reasonable to accommodate without undue interference in the operation of the employer’s business and without undue expense to the employer.”⁴

This *Church Law Bulletin* will explore in detail the scope of an Ontario employer’s duty to accommodate employees who have religious beliefs that have come into conflict with one of the employer’s policies, providing recommendations to employers on how to avoid liability by making appropriate accommodations for these employees.

B. AN EMPLOYER’S DUTY TO ACCOMMODATE AN EMPLOYEE’S RELIGIOUS BELIEFS

In its *Policy on Creed and the Accommodation of Religious Observances*,⁵ the Ontario Human Rights Commission (the “Commission”) recognizes that there is no definition of Creed provided in the Code. This policy suggests that:

“Creed” is defined subjectively. The Code protects personal religious beliefs, practices or observances, even if they are not essential elements of the creed, provided they are sincerely held.⁶

On the other hand,

Creed does not include personal moral, ethical or political views. Nor does it include religions that promote violence or hate towards others, or that violate criminal law.⁷

According to the Commission, the employer’s duty to accommodate an employee’s religious beliefs is based on the guarantee of Freedom of Religion found in the *Charter of Rights and Freedoms*⁸ which states:

⁴ *Ontario Human Rights Commission v. Simpson Sears Ltd.* (1985), 23 D.L.R. (4th) 321 (S.C.C.) [“Simpson Sears decision”].

⁵ Ontario Human Rights Commission, “Policy on Creed and the Accommodation of Religious Observance” (October, 1996) [“Religious Accommodation Policy”].

⁶ *Ibid.* at 2.

⁷ *Ibid.* at 2.

⁸ *Canadian Charter of Rights and Freedoms*, Schedule B, *Constitution Act*, 1982 [“Charter”].

2. Everyone has the right to the following fundamental freedoms:
a) freedom of conscience and religion⁹

This guarantee implies that the law can require an employer to implement “measures to facilitate the practice of religious observances,” and no employer can force an employee to “accept or comply with religious beliefs or practices.”¹⁰

In order to determine whether an employee is eligible to receive religious accommodation, the needs of the group the employee belongs to must be assessed by the court, which “look[s] to the accepted religious practices and observances that are part of a given religion or creed in order to assess those needs.”¹¹ This part of the policy appears to be in conflict with a recent Supreme Court of Canada decision wherein the court held that “freedom of religion is integrally linked with an individual’s self-definition and fulfilment and is a function of personal autonomy and choice” concluding that “claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make.”¹² This principle was borrowed from a previous decision of the Court where it was stated that:

The concept of freedom of religion is to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly without fear of hindrance or reprisal and the right to manifest religious belief by worship and practice or by teaching and dissemination. ... Freedom means that ... no one is to be forced to act in a way contrary to his beliefs or conscience.¹³

In the event that a requirement, qualification or practice of an employer conflicts with an employee’s religious beliefs, the employer has a duty to accommodate the employee to the point of undue hardship.¹⁴ If the employee belongs to a union, the union also has a duty to assist the employer in providing accommodation for the employee.¹⁵ The burden of proving this lies with the employer. Some of the factors to consider in

⁹ *Ibid.* at s. 2(a).

¹⁰ Religious Accommodation Policy, *supra* note 5 at 3.

¹¹ *Ibid.* at 5..

¹² *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para.43.

¹³ *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at pp.336-37 and 351.

¹⁴ *Ibid.* at 5.

¹⁵ *Ibid.* at 6.

determining what constitutes undue hardship are cost, outside sources of funding, and health and safety risks.¹⁶ There is no set standard for undue hardship, by virtue of the fact that,

Undue hardship is a relative concept. Accommodation may cause undue hardship to one employer but not to another. It is also possible that a method of accommodation which does not cause undue hardship to an employer now, may cause undue hardship in the future.¹⁷

The Commission's Religious Accommodation Policy provides some concrete examples of situations that have required religious accommodation, including employment dress codes, break policies or holiday policies conflicting with an employee's religious observance requirements, and hiring practices that preclude the hiring of a person from a certain religious group.¹⁸

There is an exception provided in the Code for "religious, philanthropic, educational, fraternal or social institutions which are primarily engaged in serving the interests of persons who are identified by their creed."¹⁹ These organizations are allowed to show a preference in employment to persons who are similarly identified. However, any such qualification must be rationally connected to the nature of the employment. The Religious Accommodation Policy provides the example of a denominational school which would be justified in hiring teachers who are members of the denomination, but which would have difficulty justifying a requirement that the maintenance staff be members of the denomination.²⁰

C. SITUATIONS REQUIRING RELIGIOUS ACCOMMODATION IN EMPLOYMENT

Case law in this area focuses primarily on problems arising due to a conflict in scheduling between work and religious activities, such as religious holiday observances and prayer requirements. Problems can also arise when someone is asked to do something by their employer that offends their religiously informed conscience.

¹⁶ *Ibid.* at 7-8.

¹⁷ *Ibid.* at 8.

¹⁸ *Ibid.* at 8-13.

¹⁹ Code, *supra* note 1, s.24(1)(a)

²⁰ Religious Accommodation Policy, *supra* note 5 at 13.

1. Scheduling Conflicts

One frequent situation in the case law involves an employee who belongs to a religious denomination that requires religious observance on a day other than Sunday, or which celebrates a holiday, like Christmas, on a day other than when it is traditionally observed, or has frequent prayer requirements that conflict with the regular break schedule. The first Supreme Court of Canada decision to deal with this issue found that an employer:

Must make a reasonable effort to accommodate the religious needs of the employee, short of undue hardship or undue interference in the operation of the employer's business. The onus to show that reasonable efforts to accommodate have been made rests on the employer.²¹

In the O'Malley decision, the Court found the employer was discriminating against an employee by refusing to let her take Saturdays off to celebrate the Sabbath. This was the first decision in which the Court recognized there could be "adverse effect discrimination," which they explained as being rules and regulations that are not discriminatory on their face but have a discriminatory effect.²² Where adverse effect discrimination is found, the employer can meet its obligation to accommodate the employees adversely affected by the rule or regulation by creating an exception for particular employees without having to change the rules of the workplace for all other employees.²³ Once the employer has met its onus of showing it has done everything in its power to accommodate the affected employees short of undue hardship, and is still unable to meet the employee's religious needs, that employee is left with the decision to take some accommodating steps of their own, or to find alternative employment.²⁴

Another example of a scheduling conflict due to religious observance arose in the *Derksen v. Myert Corps Inc.* decision.²⁵ Mr. Derksen, the program coordinator of a youth program sponsored by Myert Corps Inc., asked his employer for accommodation to celebrate "New Moon Day," which is one of the Holy Days celebrated by members of Mr. Derksen's religion, the Christian Churches of God. Mr. Derksen's employer refused to accommodate and responded in writing to Derksen's request as follows:

²¹ *Re Ontario Human Rights Commission et al. and Simpson-Sears Ltd.* (1985), 23 D.L.R. (4th)321 at 321 (S.C.C.) ["O'Malley decision"]

²² *Ibid.* at 9.

²³ *Ibid.* at 11.

²⁴ *Ibid.* at 11.

²⁵ *Derksen v. Myert Corps Inc.*, [2004] B.C.H.R.T.D. No. 57.

We are bound by employment standards and to [sic] our best continue to provide best practices in the work place. Since these days are not part of what is described under current standards, you will need to make other arrangements so that, your religious commitments do not interfere with work.²⁶

In this case, British Columbia’s Human Rights Tribunal found that, “Mr. Derksen has established a *prima facie* case of discrimination on the basis of his religion,” by virtue of the fact that he was denied “the right to his religious days off.” The tribunal also found that Myert Corps Inc. failed to establish undue hardship, as they could not meet the test established by the Supreme Court of Canada in the Meiorin decision,²⁷ namely that:

1. The standard was adopted for a purpose or goal that is rationally connected to the function being performed;
2. The standard was adopted in good faith in the belief that it is necessary for the fulfillment of the purpose or goal; and
3. The standard is reasonably necessary to accomplish its purpose or goal in the sense that the respondent cannot accommodate persons with characteristics of the complainant without incurring undue hardship.

Unionized work environments can create further complications for employers seeking to accommodate the religious beliefs of an employee. In some work environments, unions can even be the cause of the discrimination suffered.²⁸ The courts have found that unions also have a duty to accommodate and should assist the employer in providing accommodation to the fullest extent possible. As a result, the union “shares the obligation to take reasonable steps to remove or alleviate the source of the discriminatory effect.”²⁹ If the union fails to adequately advance the employee’s grievance or fails to take whatever steps it can to accommodate in conjunction with the employer, it too can be held liable.³⁰ On the flip side, courts will be sensitive to “the realities of collective bargaining and the labour relations system,” and will also “take into account the fact that the imposition of a duty to accommodate upon a union will often require that other employees will bear the burden of accommodation.”³¹ In the Ford decision, for example, the Ontario Superior Court of Justice considered the fact that accommodation in

²⁶ *Ibid.* at para. 32.

²⁷ *British Columbia (Public Service Employee Relations Commission) v. B.C.S.G.E.U.*, (“Meiorin decision”). [1993] 3 S.C.R. 3.

²⁸ *Ontario (Human Rights Commission) v. Ford Motor Co. of Canada* [2002] O.J. No. 3688 [“Ford decision”]

²⁹ *Smurfit-MBI v. Industrial Wood and Allied Workers of Canada, Local 500 (Malinas Grievance)* , [2004] O.L.A.A. NO.180 at 29.

³⁰ Ford decision, *supra* note 28.

³¹ *Ibid.* at para.162.

this work environment would have meant giving the employees who were suffering from the effects of discriminatory policies a better work schedule than some of the most senior employees at the plant, which would have a seriously adverse effect on the morale of these more senior employees. As a result, the court found the employer had met the undue hardship standard and was not liable.

2. Freedom of Conscience issues

Employers must also be wary of asking employees to do something the employee might consider to be against his or her religiously informed conscience, as this could lead to allegations the employer has infringed the employee's freedom of conscience as guaranteed in s. 2(a) of the *Charter*.

In *Moore v. British Columbia (Ministry of Social Services)*, a Catholic auxiliary financial assistant worker brought a human rights complaint against her employer, alleging the employer infringed her freedom of religion and conscience by making it a requirement of her employment that she provide applicants with assistance in obtaining financial assistance for abortions. She informed the employer she could not in any way facilitate abortion as this goes against the doctrines of the Catholic Church. In this case the court found the employer should have accommodated the employee by "an exemption or a reassignment of files," as there were other employees who could have assisted these applicants without creating undue hardship for the employer.³²

At present, in several provinces across Canada, marriage commissioners opposed to same-sex marriage on religious grounds are bringing human rights complaints against their provincial governments for forcing them to either perform the ceremonies or to resign their marriage commission. The position of the marriage commissioners is that their employer is asking them to do something contrary to their religious beliefs, thereby infringing their freedom of religion and conscience. It appears these employers have not taken steps to accommodate these complainants to the point of undue hardship, as they have not provided any exemptions for these marriage commissioners, nor have they allowed these marriage commissioners to refer same-sex couples to other marriage commissioners who are not opposed to same-sex marriage. The Government of Ontario has provided an exemption in the *Ontario Human Rights Code* for religious officials who are opposed to same-sex marriage on religious grounds from

³² [1992] B.C.C.H.R.D. No. 15 at para.68.

having to perform these marriages.³³ Furthermore, the recently enacted *Civil Marriage Act* recognizes that those who are opposed to same-sex marriage on religious grounds should not be subject to any sanction of law as a result of their beliefs, as this would be contrary to the freedom of religion and conscience as guaranteed in s.2(a) of the *Charter*.³⁴

3. Dress Code Issues

A conflict may also arise between an employer and an employee over work dress requirements and religious dress requirements. For example, several Sikh employees have brought complaints to Human Rights Commissions on the basis that their employer's dress code infringed their freedom of religion by not allowing them to wear a turban, as is required by their religious laws. Courts have consistently held that unless an employer can show that the religiously required dress poses a serious safety hazard in the workplace or creates undue hardship for the employer for some other reason, the employer must provide an exemption from the dress code requirements and allow the employee to wear his Turban.³⁵

D. STEPS EMPLOYERS SHOULD TAKE TO ACCOMMODATE AN EMPLOYEE'S RELIGIOUS BELIEFS AND PRACTICES?

In its religious accommodation policy,³⁶ the Commission explains that the employer and the employee share responsibility for ensuring an employee's religious beliefs are accommodated in the workplace. The employer is responsible for:

- Respecting the dignity of the person seeking religious accommodation;
- Assessing the need for accommodation based on the needs of the religious group of which the person is a member;
- Replying to requests for accommodation in a reasonable amount of time;
- Granting requests related to the observance of religious practices if this is possible without creating undue hardship;
- Dealing with the employee in good faith;
- Considering alternatives; and
- If accommodation is not possible, explaining this clearly to the employee and being prepared to provide evidence as to why this is so.

³³ For more information about this Ontario legislation refer to *Church Law Bulletin* No. 8 which is available at www.churchlaw.ca.

³⁴ For information about the *Civil Marriage Act* see *Church Law Bulletin* No. 12, available at www.churchlaw.ca.

³⁵ See for Example *Grant v. Canada (Attorney General)*, [1995] 1 F.C.158.

³⁶ *Supra* note 5.

The employee's responsibilities include:

- Taking the initiative to request accommodation;
- Explaining to the employer why the accommodation is required and how the employee's needs could be accommodated;
- Dealing with the employer in good faith; and
- Being flexible and realistic.

When dealing with scheduling conflicts, some of the options the employer should consider are:

- A modified break policy;
- Flexible work hours;
- Providing an area where employees can worship privately;
- Granting paid leave for religious holidays that do not fall on the traditional days; and
- Rescheduling employees so days off fall on days of religious observance.

If an employee complains that taking a certain action would offend their religiously informed conscience, an employer should consider whether an exemption could be provided to that employee or whether the job could be referred to another employee. In the case of a conflict between dress codes and religious dress requirements, employers should consider modifying the work dress code to take into account the religious dress if at all possible, or consider whether the employee can be transferred to another position that does not require the uniform in question.

Finally, if an employee asks for religious accommodation and the employer is not sure how to accommodate that employee's needs, they can call the Ontario Human Rights Commission at 1-800-387-9080 to get further information, or seek advice from a lawyer who specializes in employment law or human rights.