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Holiday roads have different routes

Alan Riddell and Kyle Van Schie ⁝ 10-13 minutes ⁝ 5/9/2017

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Ontario decisions prompt employers to provide additional time off to non-Christian workers to celebrate their religious holidays

One of the big questions facing employers in 2017 is how far to go in accommodating the religious practices of religious minorities in the workplace. As an employer, do you have to give Muslims time off work, several times a day, to perform their prayers, as all observant Muslims are encouraged to do in the Qur'an? Can your Jewish employees insist on providing paid days off for Hannukah, and then working on Christmas or Easter? Such is the dilemma now facing HR managers across Canada, just as the country seeks to intregrate into its workforce some 25,000 Syrian refugees, most of them Muslims.

Human rights legislation — such as the Ontario Human Rights Code — explicitly prohibits an employer from discriminating against Muslim, Jewish and other employees on the basis of creed or religion, unless it can show that such discrimination is necessary to prevent "undue hardship" to itself and its business. But in practice, trying to determine when accommodation measures genuinely give rise to undue hardship can be a highly complex task for even the most legally sophisticated HR staff.

The task facing HR managers is further complicated by the highly subjective test adopted by Canadian courts for determining when an employee's personal beliefs or customs should be protected under the guise of "freedom of religion." That test is not whether the practice or custom is rooted in any recognized religious text, but instead whether the employee sincerely believes that the custom is fundamental to her own interpretation of that religion. In other words, even an uncommon custom followed by a small handful of believers is protected by the code, if their convictions are sincere, even if that custom has been overwhelmingly rejected by mainstream adherents of that same religion!

Consider the following questions:

Can religious employees be forced to follow a secular dress code at work?

Under the code, there are strict requirements for employers seeking to enforce secular dress codes on religious employees. To force employees to abide by a dress code, in violation of their religious practices, an employer must be able to prove that the restrictions on what they wear is a bona fide occupational requirement of the job and their failure to abide by them would result in health and safety issues.

However, even if there is a valid health and safety rationale for the restrictions, the law still requires that the employer accommodate the employee to the point of suffering undue hardship.

These protections cannot be stretched further than is required by the tenets of the employee's religion. By way of illustration, in *Audmax Inc. v. Ontario (Human Rights Tribunal)*, a Muslim complainant insisted on wearing an exotically coloured hijab to work, in contravention of her employer's dress code. When her employer objected to her wearing that hijab to work, she filed a complaint under the code. Ultimately, the Ontario Divisional Court sided with the employer and dismissed her complaint on the grounds that what the dress code prohibited was not her right to wear a hijab, but rather her right to wear a hijab of that particular type. The court reasoned that since the dress code only prevented the employee from wearing a hijab of that flamboyant colour, and not another hijab of a more modest hue, there had not been any breach of her religious rights.

In rendering this verdict, the Divisional Court upheld the legal right of employers to force even the most devout Muslims and Jews to fully comply with corporate dress codes to the extent that this does not impinge on their core religious beliefs.

Must employers give non-Christian employees extra days off to celebrate their own religious holidays?

Employers are now required to allow religious employees to take days off to celebrate their own religious holidays. In *Markovic v. Autocom Manufacturing Ltd.*, the Ontario Human Rights Tribunal stated that the adherents of all faiths must be permitted to observe their own particular holy days by not working those days. The Supreme Court of Canada has further ruled that it is now unlawful for employers to adopt a work calendar which gives Christian employees time off on Christmas and Good Friday without permitting employees from other religions to similarly take off their own separate holy days.

The law is murkier on the issue of whether employers are required to pay their non-Christian employees for the days on which they are off work to celebrate their religious holidays. There is no legal obligation to actually remunerate non-Christian employees on their religious holidays unless their employment agreement provides for general paid leave which can be used, at will, for absences from work. In *Markovic,* the tribunal expressly rejected the position that employers are required to give non-Christian employees two additional paid days off to mirror the Christian holidays of Christmas and Good Friday.

However, the courts have ruled that employers must provide employees with scheduling options to enable them to take off those days without losing salary. In *Chambly (Commission scolaire régionale) v. Bergevin*, the Supreme Court of Canada ruled that an employer cannot bar an employee from using paid discretionary leave days to celebrate her holy days.

The following are examples of scheduling options suggested by the courts and the tribunal:

• Permitting the employee to switch work shifts with those of other faiths.

• Permitting the employee to work overtime, or through a series of lunch hours to bank paid overtime to the day of their religious holiday.

• Permitting the employee to use any unused paid sick leave or compassionate care entitlement which she may have.

Must you modify the daily work schedule of non-Christian employees to accommodate their religious practices?

The duty to accommodate the religious practices of employees requires employers to show flexibility in their work schedules. By way of illustration, a devout Muslim must be given time off to pray several times per day. Similarly, during the winter, devout Jews must be permitted to leave work early enough each Friday afternoon to safely reach home before sundown. This principle was emphasized by the tribunal in *Qureshi v. G4S Security Services (Canada) Ltd.*, where the tribunal found an employer had breached its legal duty under the code by failing to accede to a scheduling change request from one of its Muslim employees who wanted time off to pray on Fridays.

Do non-Christian employees have a right to insist on working during the Christmas and Easter holidays?

For the moment, non-Christian employees do not have the legal right to insist on working on Christmas and Good Friday. In *Markovic*, the tribunal stated that although Christmas and Good Friday were traditionally Christian holidays, they have now become secular pause days in modern society. The Ontario Employment Standards Act defines these days as public holidays, and under the act no employer can be forced to do business, or permit its employees to work on those days just because they wish to do so. Since staff who elect to work on those public holidays must be paid premium pay equal to approximately 2.5 times their salary, the financial repercussions on all employers could be severe if non-Christians were allowed to insist on working on those days.

In 2017, employers would do well to tread carefully when dealing with requests for religious accommodation from employees who are of Muslim, Jewish and other non-Christian backgrounds. Failure to accommodate the religious practices of these employees to the point of undue hardship will cause employers to run the risk of a costly lawsuit, harmful to their organization’s public image and financial bottom line.

For more information see:

• *Audmax Inc. v. Ontario (Human Rights Tribunal)*, 2011 CarswellOnt 262 (Ont. Div. Ct.).

• *Markovic v. Autocom Manufacturing Ltd.*, 2008 CarswellOnt 5936 (Ont. Human Rights Trib.).

• *Chambly (Commission scolaire régionale) v. Bergevin*, 1994 CarswellQue 78 (S.C.C.).

• *Qureshi v. G4S Security Services (Canada) Ltd.*, 2009 CarswellOnt 2931 (Ont. Human Rights Trib.).

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