

MINKEN

EMPLOYMENT LAWYERS

145 Main Street, Unionville, ON L3R 2G7
(905) 477-7011 | Fax: (905) 477-7010



Religious Accommodation in the Workplace

Evelyn Perez Youssoufian, B.A. (Hons.), LL.B., J.D.

eperez@minken.com

February 22, 2016

The Commons Institute

Advanced Sessions in Labour and Employment Law

Centre for Social Innovation
215 Spadina Avenue, Suite 400
Toronto, ON M5T 2C7

Ontario *Human Rights Code*

- Under Part 1 section 5 of the *Code*, people are protected from discrimination and harassment based on Creed in Employment, including:
 - full time work,
 - part-time work,
 - volunteer work,
 - student internships,
 - special employment programs,
 - probationary employment, and
 - temporary or contract work.

Creed

- Creed is not a defined term in the Code. The OHRC has adopted the following definition of creed:
 - Interpreted to mean "religious creed" or "religion";
 - Defined as a professed system and confession of faith, including both beliefs and observances or worship. A belief in a God or gods, or a single supreme being or deity is not a requisite;
 - Religion is broadly accepted by OHRC to include, e.g., non-deistic bodies of faith, such as the spiritual faiths/practices of aboriginal cultures, and also bona fide newer religions (assessed on a case by case basis);
 - Existence of religious beliefs *and* practices are both necessary and sufficient to the meaning of creed, if beliefs and practices are sincerely held/observed.

Creed

- "Creed" is defined subjectively. The *Code* protects personal religious beliefs, practices or observances, even if not essential elements of the creed provided they are sincerely held.
- Every person has the right to be free from discriminatory or harassing behaviour based on religion or which arises because targeted person does not share same faith.
- Includes those with no religious beliefs, i.e. atheists and agnostics.
- Discrimination whether person seeks to practice own religion, or person who is harassing or discriminating is trying to impose their creed on someone else.

Creed

- Creed does *not* include secular, moral or ethical beliefs or political convictions.
- Does not extend to:
 - Religions that incite hatred or violence against other individuals or groups; or
 - Practices or observances purporting to have religious basis but contravene international human rights standards/criminal law.
 - **For example:** female genital mutilation is a violation of women's human rights and not protected.

Creed

- Freedom of religion is a basic principle informing right to equal treatment under the *Code* on the ground of creed, meaning:
 - 1) law can require measures to facilitate the practice of religious observances; and
 - 2) no person can force another to accept or comply with religious beliefs or practices.

Imposition of Religious Beliefs – No Proselytising in the Workforce

- Caselaw has consistently protected freedom of religion and expressions of religious beliefs *and* non-beliefs and refusals to participate in religious practices.
- No matter how convinced a person may be he/she has a religious message others should hear and heed, *Code* prohibits imposition of that message onto others.
- In the workplace, a religiously militant employer is no more entitled to impose his or her version of religious enlightenment on employees than a sexually militant employer is entitled to impose his or her sexual ideas or wishes.

For Example: Employee provided with a Bible by employer, employees prayed for Employee's migraines; Employer initiated almost all of the many discussions about religion; prayer sessions held each morning in the boardroom.

Dufour v J. Roger Deschamps Comptable Agréé (1989), 10 C.H.R.R. D/6153 (Ont. Bd. of Inquiry).

No Discrimination or Harassment

“Harassment or discrimination against someone because of religion is a severe affront to that person's dignity, and a denial of the equal respect that is essential to a liberal democratic society.”

*Lapcevic v Pablo Neruda Non-Profit Housing Corporation, 2010 HRTO 927
at 58 citing Dufour v J. Roger Deschamps.*

Discrimination and Harassment due to Creed

- Includes any:
 - distinction,
 - exclusion,
 - restriction, or
 - preference

based on religion/belief and having as its purpose or as its effect the nullification or impairment of the recognition of human rights and fundamental freedoms on an equal basis.

International Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981).

Discrimination and Harassment due to Creed

- Involves conduct or comments concerning religious beliefs or practices which *are known or ought to be known* to be offensive.
 - **For example:** Management making jokes or derogatory comments about an employee's religious practices or beliefs.
- A single incident may constitute harassment and may create a poisoned environment if it is substantial or significant enough.

Examples of Discrimination

- Unless a discriminatory practice meets a statutory justification test, it is illegal and will be struck down.

For Example: An employer giving priority to the Lord's Prayer during opening exercises fails to treat non-Christians equally.

Zylberberg v Sudbury Board of Education (Director) (1988), 65 OR (2d)641(CA).

For Example: an employer that screens out all persons who do not share the employer's religion.

- Exception: s. 24(1)(a) of the *Code*, allows an institution primarily serving the interests of an identifiable religious group to prefer job applicants who are also members of that group.

Constructive Discrimination

- Where discrimination is unintentional.
- Where an employer's rule or practice unintentionally singles out a group of people and results in unequal treatment.

For example: Employer has rule of no head covering. The employer refuses to hire a Sikh man or a Muslim woman because of rule. Rule not "intended" to exclude Sikh men or Muslim women from a job, but has that effect.

- Section 11(1) of the Code provides discrimination occurs:

Where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member.

Possible Areas of Constructive Discrimination

- Issues arise in the areas of:
 1. dress codes
 2. break policies
 3. recruitment and job applications
 4. duties that Conflict with Religious Beliefs
 5. flexible scheduling
 6. religious leave

Duty to Accommodate

- Arises when a person's religious beliefs conflict with an employer's requirement, qualification or practice.
- Limited to those steps that may be required to accommodate short of undue hardship.
- Subsection 11(2) of the Code imposes the duty to accommodate in cases of constructive discrimination:

The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Employee Rights and Duties During Accommodation

- The Employee must:
 - Take the initiative to request the accommodation
 - Explain why accommodation is required
 - Provide notice of request in writing
 - Allow a reasonable time for reply
 - Explain accommodation required
 - Be flexible and realistic
 - Deal in good faith

Employer Rights and Duties During Accommodation

- The Employer must:
 - Respect the dignity of the person seeking accommodation
 - Assess the need for accommodation based on the needs of the group
 - Reply to the request within a reasonable time
 - Grant requests related to the observance of religious practices
 - Consider alternatives
 - Deal in good faith

Test re: Duty to Accommodate

- Where a standard, factor, requirement or rule results in discrimination, employer must show the standard, factor, requirement or rule:
 1. was adopted for a purpose that is rationally connected to the function being performed;
 2. was adopted in good faith; and
 3. is reasonably necessary to accomplish its goal or purpose, in the sense that it is impossible to accommodate the claimant without undue hardship.

British Columbia (Public Service Employee Relations Commission) v BCGSEU (1999) 3 SCR 3.

- Rule/standard itself must be inclusive and must accommodate individual differences up to the point of undue hardship.

Undue Hardship

- Employee may request details of cost of accommodation if undue hardship may be a factor.
- If accommodation is not possible due to undue hardship, employer should explain this clearly to the person concerned and be prepared to demonstrate why.
- Sometimes, it may not be possible completely to resolve the conflict without causing undue hardship to the Employer.
- A measure of accommodation may be acceptable if it meets the needs of the employee, to the greatest extent possible, short of undue hardship, and if it respects the dignity of the employee.

Proving Undue Hardship

- Onus is on the employer.
- Courts will look at:
 - **Cost:** actual, present financial cost of carrying out an accommodation measure, and any reasonably foreseeable costs that may arise. May include operational costs which may be significant enough to constitute undue hardship.

For Example: sole proprietor wedding planner would not be required to hire a Jewish assistant who observes the Sabbath, as most weddings are on Saturdays, and it would likely be prohibitively expensive for the wedding planner to employ an additional Saturday assistant.

- **Health and safety risks:** Health and safety risks to the Employee seeking accommodation, and employees.

Cost as a Defence

- Cost standard is a high one.
- Costs will amount to undue hardship if they are:
 1. quantifiable;
 2. shown to be related to the accommodation; and
 3. so substantial they would alter the essential nature of the enterprise, or so significant they would substantially affect its viability.

British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights), [1999] 3 SCR 868.

Proving Undue Hardship

- Assessment of factors should take into account:
 - Size of the organization and its operations
 - Nature of its business
 - Its financial capabilities
 - How many employees are seeking accommodation at the same time
- Factors not to take into account:
 - Discriminatory customer preferences
 - Discriminatory preferences of co-workers

Accommodation and Undue Hardship caselaw

- *McGill University Health Centre v Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 SCR 161.
- *School District No. 23 (Central Okanagan) v Renaud*, [1992] 2 SCR 970.
- *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489.
- *Ontario Human Rights Commission v Simpsons - Sears Ltd.*, [1985] 2 SCR 536.

Dress Code

- Dress codes may come into direct conflict with religious dress requirements. Considerations when dealing with dress codes:
 1. Exact nature of the religious observance;
 2. Reason for the uniform or dress code;
 3. What measures can be taken to accommodate;
 4. Whether there are alternatives;
 5. Whether there are health or safety factors involved;
 6. If yes, do they involve the health or safety of the employee alone or are there consequences for other employees;
 7. If yes, can the employer show that to accommodate the employee would create a health or safety hazard amounting undue hardship?

Dress Code caselaw

- *Markovic v Autocom Manufacturing Ltd.*, [2008] OHRTD No. 62.
- *York Region District School Board and O.S.S.T.F., District 16*, [2008] OLAA No. 442.
- *Bhinder v Canadian National Railway Co.*, [1985] 2 SCR 561.
- *Pannu v Skeena Cellulose (2001)*, 38 C.H.R.R. D/494 (BCCHR).
- *Loomba v Home Depot Canada Inc.*, [2010] OHRTD No. 1422.

Breaks

- Some religions require observed periods of prayer during the day.
- May conflict with employer's regular work hours or daily routines.
- Possible forms of accommodation include:
 - modified break policy;
 - flexible hours; and
 - providing a private area for devotions.

Recruitment and Job Applications

- Creed cannot be used as a selection criteria.
- Job applications/interviews cannot:
 1. Ask questions re: availability for work, asked in a manner that reveals the applicant's creed.
 2. Ask questions designed to reveal religious requirements may conflict with the prospective employer's work schedules or workplace routines.
 3. Make inquiries as to religious affiliation, places of worship that are attended, or customs observed.
- **Exception:** if workplace qualifies as "special interest" organization under the *Code*.
- **For Example:** Requiring all Catholic School Board teachers to be Catholic/and requesting necessary documents re: same.

Duties that Conflict with Religious Beliefs

- Human rights tribunals have held where an employee sincerely holds religious beliefs incompatible with workplace duties, the employer will be required to accommodate the employee to the point of undue hardship.

For Example: An employer should accommodate a Jehovah's Witness by having another employee handle and decorate the store for Christmas.

For Example: Employee's cannot be forced to attend Christmas parties if it is contrary to their religious beliefs.

For Example: An employer should accommodate an employee who refuses to authorize medical coverage for a client to have an abortion, if another employee can carry out that task.

For Example: It is reasonable for an Employer to accommodate an employee by exempting the employee from a biometric scan where the employee believes the collection of this information would subject them to the "mark of the Beast" and lead them to damnation.

Duties that Conflict with Religious Beliefs caselaw

- *Jones v C.H.E. Pharmacy Inc.*, 2001 BCHRT 1.
- *Henry v Kuntz*, [2004] OHRTD No. 7.
- *Moore v B.C. (Ministry of Social Services)* (1992), 17 CHRR D/426 (BCCHR).
- *407 ETR Concession. and C.A.W., Local 414*, [2007] OLAA No. 34.

Flexible scheduling

- To allow flexible work schedule for employees, or substitution/reschedule of days when employee's religious beliefs do not permit him/her to work certain hours/days.

For Example: Seventh Day Adventists or members of the Jewish faith who observe the Sabbath.

- Might include: alternative arrival/departure times, use of lunch times in exchange for early departure, staggered work hours.

Workplace schedules caselaw

- *Ontario (Human Rights Commission) and Roosma v Ford Motor Co. of Canada*, [2002] 21 CCEL (3d) 112 (Ont. Div Ct.), affirming (1995), 24 CHRR D/89 (Ont Bd Inquiry).
- *Chrysler Canada Ltd. and U.A.W., Local 444*, [1986] OLAA No. 27.
- *Strauss v Ontario (Liquor Licence Board)* (1994), 22 CHRR D/169 (Ont Bd Inquiry).
- *Oakville (Town) and C.U.P.E., Local 1329*, [1992] OLAA No. 852.
- *Toronto Ass'n for Community Living and C.U.P.E., Local 2191*, [2005] OLAA No. 781.
- *Hendrickson Spring, Stratford Operations and U.S.W.A., Local 8773*, [2005] OLAA No. 382.

Religious Leave

- Employers have obligation to accommodate employees requesting time off for a holy day.
- Employer has duty to consider and grant requests for religious leave, including paid religious leave, unless to do so will cause undue hardship.
- Employer might provide additional paid leave days i.e. floating days or compassionate leave days, if such exist under company policy, or through unpaid leave.
- Standard for *all* accommodation requests is undue hardship.

Religious Leave caselaw

- *Commission scolaire régionale Chamblay Bergevin*, [1994] 2 SCR 525.
- *Richmond v Canada (Attorney-General)* [1997] 2 FC 946 (CA).
- *Ontario (Ministry of Community and Social Services) v Grievance Settlement Board*, [2000] 50 OR (3d) 560 (CA).

Exemptions

1. Participating in special interest organizations.
2. Employment in special interest organizations.
3. Reasonable and bona fide occupational requirements, qualifications or factors.

Participating in special interest organizations

- Section 18 of the *Code* provides: religious, philanthropic, educational, fraternal or social institutions primarily engaged in serving the interests of persons who are identified by their creed, may give priority to persons of the same creed with regard to participation or membership.

For Example: Church membership.

Employment in special interest organizations

- Section 24(1)(a) of the *Code* provides religious, philanthropic, educational, fraternal or social institutions primarily engaged in serving interests of persons identified by their creed may employ or give preference in employment to persons similarly identified, if the qualification is *reasonable and in good faith* in relation to the nature of the employment.

For Example: A denominational school can employ teachers of the same denomination or faith if personal faith is related to the professional functions teachers are expected to perform in the school.

However: Defence not available re: hiring of maintenance staff because requirement of belonging to a particular faith has no rational connection to the essential duties of the job.

Reasonable and bona fide occupational requirements, qualifications or factors

- See s. 11 of the *Code* and Constructive Discrimination: if requirement, qualification or factor is reasonable and in good faith, and if needs of persons affected cannot be accommodated without undue hardship to employer.

For Example: Policy requiring all employees to work on the Sabbath.

Defence: if nature of the business is such that a certain day of the week is critical to the operations of the establishment.

However: Employer has a duty to accommodate observant employee, if can be accomplished short of undue hardship to employer

Administrative inconvenience does not constitute undue hardship.

Exemptions caselaw

- *Caldwell v Stuart*, [1984], 2 SCR 603.
- *Daly v Ontario (Attorney General)*, [1999] 44 OR (3d) 349 (CA).
- *O.E.C.T.A. v Dufferin-Peel Roman Catholic Separate School Board*, [1999] 172 DLR (4th) 260 (Ont CA).
- *Heintz v Christian Horizons*, [2008] OHRTD No. 21 reversed in part, [2010], 319 DLR (4th) 477 (Div Ct).
- *Garrod v Rheema Christian School* (1991), 15 CHRRD/477.

Recent caselaw

Ontario Public Service Employees Union, Local 560 v Seneca College, 2014 CanLII 39592 (ON LA).

- Jewish community college teacher grieved employer's refusal to schedule his classes in the afternoon as an accommodation to his religious conviction that he is required by his faith to "give back" to his community by teaching at a Jewish school in the mornings.
- Board held while the grievor does indeed have a sincerely held belief that "he must give back to the community", and that this is worthy of protection, the question of whether that belief has been infringed must be assessed on the basis of an objective analysis.
- Board held in addition to the subjective component of the test which requires the employees must hold a "sincere belief" regarding the belief or practice in question, proving the infringement also requires an objective analysis of the rules, events, or acts that interfere with the exercise of that freedom.
- Board found employee failed to make out a *prima facie* case of discrimination on the basis of creed as there were other avenues available to him to "give back".

Recent caselaw

H.T. v ES Holdings Inc. o/a Country Herbs, 2015 HRTO 1067.

- Tribunal ruled employer discriminated against the young siblings on the basis of their creed.
- Two teens provided several weeks of notice they planned to take the day off to celebrate a holiday important to their faith.
- Only sister was scheduled to work, however, both terminated immediately after sister failed to report to work.
- Employer argued dismissed sister for not complying with attendance policy, but tribunal ruled company made no effort to work with her to accommodate her.
- Tribunal found brother was terminated solely due to his association with his sister.
- Awarded more than \$26,000 in compensation and lost wages.

Best Practices for Employers

- Implement supportive Guidelines/Procedures/Policy for Religious Accommodation.
- Foster supportive culture: Be wary of making comments that could trample on someone's religious beliefs.
- Discipline, in writing, any employee making inappropriate comments.
- Refrain from making assumptions about how people practise their faith.
- Request all accommodation requests in writing.
- Make inquiries as to the accommodation requested (i.e. what is the religious significance of attending Friday prayer, at particular times), but do so in good faith and with the aim to accommodate the employee if possible.
- Avoid discussing religious garb. If the religious dress does not interfere with the company's business operations, do not address it.
- Remember duty to accommodate is not absolute. If accommodating an employee's religious beliefs will cause the company legitimate problems, speak to an employment lawyer. You may be able to effectively argue the accommodation will cause the company actual undue hardship and not merely inconvenience.

Best Practices for Employees

- Review corporate policy on accommodation.
- Put all requests in writing.
- Be polite, succinct and clear as to the reasons you are seeking accommodation, what accommodation you are seeking, and how you best believe the accommodation can be provided.
- Answer all questions re: accommodation needs politely and in writing.

Resources

- Ontario Human Rights Commission: <http://www.ohrc.on.ca/en>.
- Ponak, A et al, “Labour Arbitration Yearbook”: <http://goo.gl/mCaZcL>.
- Canadian Court Cases Involving Religion: <http://goo.gl/dTx6tX>.
- Fraser, Employee Rights and Religious Holidays”: <http://goo.gl/IZR3QL>.
- Allj, N., “Work: How to Request Religious Accommodation at Work”: <http://goo.gl/Ag1QhG>.
- Krupat, K., “Should Canadian Employees Have Faith in Workplace Accommodation of Religion?”: <http://goo.gl/SRXTUz>.
- A Manager’s Guide to Reasonable Accommodation: <http://goo.gl/tnAQR1>.

Conclusion

- Definition of religion is practices and beliefs, having a nexus with religion, in which an individual demonstrate he or she sincerely believes irrespective of whether the belief is required by the religion.
- Accommodation of Creed is equivalent to all other forms of accommodation.
- Where work requirements interferes with an employee's needs in the context of Creed, the employer must accommodate those needs to the point of undue hardship.
- Duty to accommodate religion cannot result in discrimination against another employee.
- Cases involving religion as a ground for accommodation can be controversial, and many receive considerable media attention. See: Niqabs and oath swearing; Porter airlines seat change; York university decision re: student's request to be removed from a group project with women; Dalhousie professor's refusal to wear hearing device.
- As Canadian society becomes more diverse, its tolerance for diverse religious customs, practices and beliefs will increasingly be tested.

Evelyn Perez Youssoufian

MINKEN
EMPLOYMENT LAWYERS