

Blakes Bulletin

Labour & Employment

Duty to Accommodate Religious Observance does not Require Paid Leave in all Circumstances

The Ontario Human Rights Tribunal ruled recently that employers are not required to give employees paid leave from work in order to accommodate religious observances. Rather, in most cases, the employer's duty to accommodate can be satisfied by providing employees with options involving scheduling changes that allow employees to observe their religious holidays without incurring any loss of pay.

In the case of *Markovic v. Autocom Manufacturing Ltd.*, the Tribunal considered a complaint of discrimination filed by Savo Markovic. Mr. Markovic, a member of the Serbian Orthodox Church, alleged that Autocom discriminated against him by refusing to provide paid leave for his observance of the Eastern Orthodox Christmas on January 7, 2004. Autocom's leave policy did not provide two paid days off for religious observance to parallel payment for the statutory holidays that fall on Good Friday and Christmas.

The Ontario Human Rights Commission presented the employee's position before the Tribunal. While acknowledging that a "menu of options" could satisfy the employer's duty of religious accommodation, the Commission argued that two days of paid leave from work *must* constitute one of the options available to an employee on an equal basis with other options. According to the Commission, an employer could only avoid offering two days of paid leave if providing those days would cause the employer to suffer undue hardship. This position is consistent with the Commission's published *Policy on Creed and the Accommodation of Religious Observances*, which states that "Equality of treatment requires at a minimum that employees receive paid religious days off, to the extent of the number of religious Christian days that are also statutory holidays, namely two days (Christmas and Good Friday)."

Endorsing arbitral case law, the Tribunal found no legal duty compelling employers to provide two paid days of religious leave to non-Western Christians to mirror the statutory holidays of Christmas Day and Good Friday.

Emphasizing the traditional workplace bargain – the exchange of services for pay – the Tribunal held that the duty to accommodate could be met by providing employees with options for scheduling changes that do not result in any loss of pay to the employee. In the case of *Markovic*, such options included (a) making up time when the employee was not otherwise scheduled to work, (b) working on a secular holiday, subject to the *Employment Standards Act*, when the facility was in operation, (c) arranging to switch shifts with another employee, or (d) adjusting the employee's shift schedule where possible. The Tribunal held that scheduling changes, rather than paid time off from the workplace, better reflect the workplace bargain since they do not require employers to compensate employees for work not done. As the Tribunal noted, "where the "problem" is the need for time, the solution is the enabling of time".

The Tribunal rejected the Commission's argument that employees suffer discrimination by having to negotiate time off for religious observance, rather than having religious holidays automatically recognized. According to the Tribunal, there was nothing "nefarious" about the dialogue required to settle upon a menu of options that would accommodate individual employees, and such dialogue did not "impose an undue burden on those employees". Rather, the dialogue and negotiation between employers and employees was found to be an integral component of the accommodation process.

We can conclude from the *Markovic* decision that the accommodation of religious observance will not require in all cases that employees be provided paid days off. Rather, the Tribunal's position is that by providing a process for employees to arrange for time off through options for scheduling changes, without loss of pay, an employer can satisfy its duty to accommodate, and it is only where scheduling changes would create undue hardship that employers will be required to annually grant employees a minimum of two days of paid leave for religious observances.

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