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Religious Accommodation: Tribunal Finds Two Paid Days of Religious Leave Not Required

Date: September 11, 2008

INTRODUCTION

On September 3, 2008, Vice-Chair Sherry Liang of the Human Rights Tribunal of Ontario issued a very helpful decision in *Markovic v. Autocom Manufacturing Ltd.*, 2008 HRTO 64.

The *Autocom* decision provides some much-needed clarification concerning the accommodation of religious observances. Of particular interest, the Tribunal rejected the Ontario Human Rights Commission's long-held policy position that employers must provide employees who are members of non-Western Christian religions with at least two days of paid religious leave to parallel the statutory holidays on Christmas and Good Friday. Rather, the Tribunal held that Autocom could meet its obligations to accommodate the religious observances of its employees by implementing a religious accommodation policy which provides for a menu of options – including scheduling options – and need not first establish that providing two days of paid leave would constitute undue hardship.

THE ONTARIO HUMAN RIGHTS COMMISSION'S POLICY

The Ontario Human Rights Commission's current policy on religious accommodation, the *Policy on Creed and the Accommodation of Religious Observances*, was initially approved in October 1996. One of the cornerstones of the *Policy* is a statement that equal treatment requires employers to provide adherents of non-Western Christian religious faiths with at least two days of paid leave to celebrate their religious observances, to parallel the statutory holidays on Christmas and Good Friday.

The "two paid days requirement" articulated in the *Policy* has long been a source of controversy. Many commentators questioned whether it was an accurate statement of the law, even at the time the *Policy* was introduced. However, the controversy deepened following the release in 2000 of an Ontario Court of Appeal decision known as the *Tratnyek* case. In the *Tratnyek* case, the Court of Appeal recognized that an employer can meet its obligations under the *Human Rights Code* by offering its employees a menu of options – including scheduling options – to enable employees who must take a day off work for religious observances to avoid the loss of a day's pay. The Court further recognized that an employer can fulfill its duty to accommodate the religious needs of its employees through scheduling changes without first having to show that providing paid leave would result in undue hardship.

Following the *Tratnyek* decision, it appeared that the Commission's position that at least two days of paid religious leave must be provided was no longer sustainable. However, the Commission did not change the *Policy*, and continued to advise employees (and their bargaining agents) that non-Western Christian employees are entitled to at least two days of paid religious leave. This situation was a cause of confusion and, in some cases, litigation in workplaces across Ontario.

The *Autocom* decision was the Tribunal's first opportunity to consider the question of whether the Commission's "two paid days" requirement was an accurate reflection of the law. During the proceedings, Autocom put forward a religious accommodation policy that it was prepared to implement in its workplace. That policy provided employees with a menu of options for accommodation of religious observances, which included four different scheduling options, the option of using outstanding paid vacation, and the option of taking a leave of absence without pay. The parties asked the Tribunal to determine whether Autocom's proposed policy was consistent with the *Code* and the jurisprudence regarding accommodating

employee requests for time off for religious holidays. Ultimately, the Tribunal upheld Autocom's proposed policy, and found that there is no blanket requirement to provide – or even include on a menu of options – two days of paid religious leave.

THE TRIBUNAL'S DECISION

Vice-Chair Liang began her analysis by accepting some important "first principles" established in earlier cases. First, although the public holidays on Christmas and Good Friday originated in Western Christian observances, they are now considered secular pause days. Similarly, a work schedule incorporating the public holidays covered by the *Employment Standards Act* (including Christmas and Good Friday) is considered secular and non-discriminatory on its face. Nevertheless, such a work schedule may have a discriminatory effect on non-Western Christian employees. Vice-Chair Liang described this discriminatory effect, and the role of the duty to accommodate, as follows:

…[T]he discriminatory effect arises from the *work schedule*. For non-Western Christians, the discrimination consists of the requirement to work on holy days, a requirement not imposed on Western Christians, at least with respect to Christmas and Good Friday. Following on this, the duty to accommodate … concerns the search for a solution that permits time off for religious observances, without adverse employment consequences.

Vice-Chair Liang next observed that several courts and tribunals have concluded that an employer can fulfil its duty to accommodate religious differences by providing employees with options for achieving time off for religious observances. She stated, "To put it simply, where the 'problem' is the need for time, the solution is the enabling of time." She concluded that none of the decisions dealing with this issue "required an employer to accommodate religious observances by giving non-Western Christian employees two days of paid leave to mirror the public holidays on Christmas Day and Good Friday, short of undue hardship". To the contrary, she agreed with Autocom that the *Tratnyek* decision made clear that there was no such requirement.

Vice-Chair Liang went on to find that this result was consistent with the Supreme Court of Canada's recent decisions in *Hydro-Québec* and *McGill University Health Centre.* First, she noted the Supreme Court's emphasis in *Hydro-Québec* on maintaining the integrity of the basic employment "bargain" of services in exchange for pay:

The regular contract of employment is based on the exchange of services for pay. Typically, the duty to accommodate is about the design and modification of workplace requirements to enhance the ability of certain employees to participate in the workplace without, at least in the first instance, dislodging the assumption of services for pay.

Applying this approach to the accommodation of religious observances, Vice-Chair Liang noted that "where available, adjustments to work schedules provide an appropriate accommodation at least partly because they do not require an alteration of the essential employment bargain".

Vice-Chair Liang held that the menu of options approach was also consistent with the emphasis placed on the individualized nature of the duty to accommodate in *McGill University Health Centre,* and supportive of autonomy of choice. In this regard, she specifically rejected an argument put forward by the Commission that the menu of options approach places an undue burden on non-Western Christian observant employees by requiring them "to negotiate for their time rather than having it 'served' to them as a recognized public holiday". Vice-Chair Liang recognized that an accommodation process is by necessity a process which involves dialogue and even negotiation in order to arrive at an outcome tailored to individual needs. In her view, "There is nothing nefarious about this, and the process envisioned by a menu of options approach is no more burdensome than any other process in which an employee is seeking accommodation of differences under the *Code*."

Finally, Vice-Chair Liang addressed the Commission's argument that "equality of outcome" necessitated that members of non-Western Christian religions be provided with at least two days of paid religious leave. In her view, the concept of "equality of outcome" was not a particularly helpful concept to apply in the context of accommodation of religious needs. Citing the *Meiorin* decision, Vice-Chair Liang held:

…[T]he obligation on the employer is to design its workplace standards in a way that recognizes differences in religion amongst its individual employees, and accommodates those differences. The task is to mesh its workplace rules with the needs of a diverse workforce, with the goal of enhancing participation and inclusion. In the case of religious observances, those goals can be met through the provision of options for scheduling changes that do not result in loss of pay.

Vice-Chair Liang recognized that there might be cases in which the menu of options approach would not provide reasonable accommodation to an individual employee. However, Autocom's policy expressly acknowledged the overarching obligation to accommodate to the point of undue hardship. Moreover, internal and external avenues were available for resolving any questions about whether the application of the policy resulted in discrimination in a particular instance. As a result, Vice-Chair Liang found that the fact that the policy did not cover every possible eventuality was not an obstacle to finding that the policy complied with the *Code* and the jurisprudence.

CONCLUDING COMMENTS

The *Autocom* case not only provides important clarification of the legal principles surrounding accommodation of religious observances, it is yet another positive signal concerning the evolution of the duty to accommodate generally. The underlying message of the decision – that, where possible, accommodation is to be provided in a manner which leaves the basic employment "bargain" intact – is a powerful message which will no doubt prove helpful to employers in future cases.

If you have any questions regarding the decision, please contact your regular Hicks Morley lawyer.

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