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# Religious Accommodation in the Workplace

# A Management Perspective

**GEORGE VUICIC**

*This paper by employer counsel George Vuicic provides an overview of the law relating to the accommodation of employees' religious beliefs and practices in the workplace. The author begins by reviewing the legal foundations of religious freedom in Canada, including the* Charter of Rights*, human rights legislation, and judgments of the Supreme Court of Canada on the nature and scope of the freedom. He then considers the evolving duty to accommodate as it applies to employers, unions and employees, again with reference to leading decisions. This discussion of core principles is followed by a detailed review and analysis of cases decided by the courts, human rights tribunals and arbitrators that address specific issues arising from religious accommodation in the workplace: conflicts between scheduling and observance of a Sabbath; requests for a leave of absence to observe holy days; mandatory dress codes that affect an employee's religious practices; requirements to perform duties that are inconsistent with an employee's religion; and the imposition of particular religious beliefs by an employer. The paper also includes a summary of statutory exceptions to the protection of religious freedom. Vuicic notes that while an employee's right to accommodation of his or her beliefs is not absolute, the case law contemplates a cooperative approach to the resolution of such issues, which will often permit a satisfactory balancing of the parties' interests.*

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## Introduction

As the Canadian workforce continues to diversify — paralleling changes in society generally — employers continue to be faced with new challenges in their obligation to balance production efficiency, on the one hand, and accommodation of the needs of employees, on the other. Nowhere is that challenge more evident than in the area of accommodation of religion in the workplace. This paper will consider the legal foundation for freedom of religion in Canada, as well as the evolving duty to accommodate religious beliefs and practices in the workplace. Through a review of arbitral and court decisions, the paper will provide an overview of the changing nature of employers' duty to accommodate employees' religious requirements, and will identify those developments as they relate to specific workplace issues.

## Religion as a Fundamental Freedom

Section 2(a) of the *Canadian Charter of Rights and Freedoms* guarantees freedom of conscience and religion. Similarly, human rights legislation across the country enshrines this right by prohibiting discrimination on the basis of belief, religion or creed. Courts and tribunals have generally taken a liberal approach to interpreting and applying these provisions. In one of the earliest decisions under the *Charter*, *R. v. Big M Drug Mart Ltd.*,[1] the Supreme Court of Canada described freedom of religion as follows:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear and hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
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> Freedom can primarily be characterized by the absence of coercion or constraint.
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> . . .
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> Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice.[2]

The Supreme Court had occasion to revisit the notion of freedom of religion in the leading decision of *Amselem v. Syndicat Northcrest.*[3] This case involved a request for the removal, based on a municipal by-law, of temporary religious huts or "succots" from the balconies of condominium-owners who were Orthodox Jews. The succots were part of the claimants' celebration of religious holy days. The municipality claimed that the tents violated

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[1] *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17 (QL), 1 S.C.R. 295.
[2] *Ibid.*, at paras. 94-95, 123.
[3] *Amselem v. Syndicat Northcrest*, [2004] S.C.J. No. 46 (QL), 2 S.C.R. 551.

its building by-laws, which prohibited any kind of decoration, alteration, or construction on balconies. In holding that the by-law infringed the claimants' freedom of religion, the Court reviewed both the definition and content of an individual's right to religious freedom. The Court emphasized that freedom of religion should be understood broadly, and that it included the right to openly hold and freely declare religious beliefs, as well as a freedom not to hold or be associated with a particular religion. The Court defined religion as follows:

> While it is perhaps not possible to define religion precisely, some outer definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion. Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment . . .[4]

Consistent with the reference to "personal convictions or beliefs" in this definition, the majority of the Supreme Court established a subjective test for assessing claims of infringement of religious freedom, which has two components: a sincere belief related to religion; and contractual or legislative provisions (or conduct) that affect the claimant's capacity to act according to his or her religious beliefs in a manner which is substantial. The majority decision further set out a two-step process for evaluating whether there is a "sincere belief related to religion". First, it must be determined on what religious precept the belief or conviction is based. The majority decision specifies that the employee has the onus of establishing that a belief is genuinely religious, not secular. Second, an assessment must be made of the sincerity of the claimant's religious beliefs. The individual must objectively believe that he or she is under a religious obligation. The extent of sincerity is to be judged on a case-by-case basis, and must be supported by sufficient evidence. The majority cautioned that it is not necessary for an individual to demonstrate that a belief is held by leaders, or even a majority, of a religious group:

> [I]t should be noted that to analyse a religious practice in the context of conscientious objection, it is necessary to examine the believer's perception. It is important that a believer's religious practices not be limited to those of the majority or of an entire community, or to those that are considered to be generally accepted. Still, it is the person relying on a religious precept to establish the mandatory nature of his or her religious practice who must prove that the precept exists . . .[5]

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[4] *Ibid.*, at para. 39.
[5] *Ibid.*, at para. 138.

Two years after the *Amselem* decision, the Supreme Court affirmed those principles in *Multani v. Commission scolaire Marguerite-Bourgeoys*.[6] In this case, the Court considered the claim of infringement of freedom of religion by a Sikh student, who was precluded by the public school board from wearing a "kirpan" (a type of ceremonial dagger worn as an expression of faith) while at school. Although recognizing the importance of the school board's objective of ensuring student safety, the Court found that the school board had not considered relevant evidence about safety incidents involving kirpans, and had made no effort to accommodate the student. In upholding the student's claim, the Court determined that he had a sincere belief in his religious practice, and that not being allowed to wear a kirpan would have constituted more than a trivial infringement of his freedom of religion.

Although these earlier decisions all reflect a broad and liberal approach to the interpretation of religious freedom, in its most recent decision, the Supreme Court of Canada has emphasized that the right is not absolute, and must be reconciled with other rights. In *Bruker v. Marcovitz*,[7] the Supreme Court of Canada addressed an alleged breach of a divorce settlement between two members of the Jewish faith. Bruker and Marcovitz married in 1969, and commenced divorce proceedings in 1980. Three months later, a settlement agreement was negotiated. As a term of the agreement, the parties agreed to appear before the rabbinical authorities to obtain a Jewish divorce, or "get", immediately upon the granting of a civil divorce. In the Jewish faith, a wife cannot obtain a get unless her husband consents to give it; where consent is withheld, she remains his wife (even if divorced under civil law) and is unable to remarry under Jewish law. In this case, the husband refused to grant the get for 15 years, by which time the wife, who never remarried, was almost 47 years old. She commenced proceedings and sought damages for her husband's breach of contract — specifically, the failure to grant a get in accordance with the written agreement. The trial judge found that the agreement was valid and binding, and that the wife's claim for damages was properly justiciable in the civil courts. The Court of Appeal disagreed, finding that the substance of the obligation was a religious or moral one, and therefore unenforceable by the courts (a position adopted by the two dissenting judges of the Supreme Court).

A majority of the Supreme Court allowed the appeal. It noted that determining when the assertion of a right must yield to a more pressing public interest is "a complex, nuanced, fact-specific exercise that defies bright-line application". In this case, however, it had no difficulty finding that the agreement was properly justiciable:

> The fact that Paragraph 12 of the Consent had religious elements does not thereby immunize it from judicial scrutiny. We are not dealing with judicial

[6] *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] S.C.J. No. 6 (QL), S.C.R. 256.

[7] *Bruker v. Marcovitz*, [2007] S.C.J. No. 54 (QL), 3 S.C.R. 607.

> review of doctrinal religious principles, such as whether a particular *get* is valid. Nor are we required to speculate on what the rabbinical court would do. The promise by Mr. Marcovitz to remove the religious barriers to remarriage by providing a *get* was negotiated between two consenting adults, each represented by counsel, as part of a voluntary exchange of commitments intended to have legally enforceable consequences. This puts the obligation appropriately under a judicial microscope.[8]

In coming to this conclusion, the Court observed that many other justiciable types of contracts have religious aspects (*e.g.*, the dismissal of a minister from a church). Here, the public interest in protecting equality rights, the dignity of Jewish women, as well as the public benefit in enforcing valid and binding contractual obligations, were among the interests and values that outweighed Marcovitz's claim that enforcing the agreement would interfere with his religious freedom. Applying *Anselem*, the Court concluded that any infringement of Marcovitz's freedom of religion was "inconsequential" in comparison. The decision reinforces the principle that claims of religious freedom must be balanced against countervailing rights, values, and harm on a case-by-case basis.

## Accommodating Religion in the Workplace

By virtue of the *Charter* and human rights legislation, employers are required to accommodate the religious beliefs and practices of employees in the workplace, to the point of undue hardship. Courts and other tribunals have made it clear that an employer must make serious efforts to accommodate the needs of workers who face an interference with their protected rights. In particular, employers must attempt to create a work environment in which a worker is able to benefit from all rights, including freedom of religion. The result has been a rich history of case law defining the scope of employers' duty to accommodate religious freedom at work.

Interestingly, the earliest cases addressed by the Supreme Court of Canada all involved accommodation of an employee's religious practice in establishing work schedules. In *Ontario (Human Rights Commission) and O'Malley v. Simpsons-Sears*,[9] the Supreme Court of Canada established principles on the application of the duty to accommodate, which remain central to Canadian jurisprudence. The Court determined that a rule or condition of employment that contravenes an employee's protected right should be struck down unless it is justified as a *bona fide* occupational requirement (BFOR). The Court also recognized, for the first time, that accommodation of employee needs to the point of undue hardship may be required for an employer to satisfy its legal obligations. However, the Court also stated that

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[8] *Ibid*., at para. 47.

[9] *Ontario (Human Rights Commission) and O'Malley v. Simpsons-Sears*, [1985] S.C.J. No. 74 (QL), 2 S.C.R. 536.

employers' efforts towards reasonable accommodation may not necessarily result in full accommodation. Specifically, an employee may be expected to take ownership of her or his accommodation, which, in some cases, may mean accepting reasonable limits on the exercise of religious convictions in the workplace.

The Supreme Court's next decision on religious accommodation in the workplace, *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*,[10] provided a non-exhaustive list of factors for determining whether an employer's efforts at accommodation have reached the point of undue hardship. These factors include financial cost, disruption of the collective agreement, problems of morale for other employees, the interchangeability of the workforce and facilities, as well as the size of the employer's operation in measuring financial cost related to accommodation. As will be seen, these factors remain relevant, and underlie a number of arbitration and tribunal decisions on accommodation of religion in the workplace.

Finally, one of the most significant cases in the Supreme Court of Canada's early jurisprudence on workplace accommodation is *School District No. 23 (Central Okanagan) v. Renaud*.[11] Here the Court recognized that an employee seeking accommodation is not entitled to a "perfect solution". Instead, the employee must be prepared to consider all reasonable measures that sufficiently accommodate her or his religious requirements. The other important aspect of the *Renaud* decision was the Supreme Court's declaration that accommodation is a multi-party endeavour, requiring participation and compromise on the part of the union and employee as well as the employer. Evidently, in light of these joint duties and the established factors for assessing accommodation measures, what is determined to be "reasonable" is a question of fact and will vary highly, depending on the circumstances of each case.

Most recently, in *McGill University Health Centre v. Syndicat des employés de l'Hôpital général de Montréal*,[12] the Supreme Court reemphasized the individual nature of the accommodation process. The Court also underlined once again the onus on all workplace parties, including the employee seeking accommodation, to participate meaningfully in the search for accommodation. Although decided in the context of a disability claim, the principles enunciated can be applied equally to the duty to accommodate more generally. In reviewing the law on accommodation, the majority of the Court stated:

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[10] *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] S.C.J. No. 80 (QL), 2 S.C.R. 489.

[11] *School District No. 23 (Central Okanagan) v. Renaud*, [1992] S.C.J. No. 75 (QL), 2 S.C.R. 970.

[12] *McGill University Health Centre v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] S.C.J. No. 4 (QL), 1 S.C.R. 161.

> Throughout the employment relationship, the employer must make an effort to accommodate the employee. However, this does not mean that accommodation is necessarily a one-way street . . . [W]hen an employer makes a proposal that is reasonable, it is incumbent on the employee to facilitate its implementation. If the accommodation process fails because the employee does not co-operate, his or her complaint may be dismissed.[13]

## Evolution of the Duty to Accommodate

Since the *O'Malley* decision, the approach to assessing the duty to accommodate has continued to evolve. Arguably the most significant development arose from two companion cases decided by the Supreme Court of Canada, in which the Court fundamentally changed the test for assessing whether the duty to accommodate individuals' protected rights has been met. In *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U. (Meiorin)*[14] and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) (Grismer)*,[15] the Supreme Court abolished the distinction between direct and adverse-effect discrimination, which had been recognized in *O'Malley* and subsequent decisions. Instead, the Court adopted a "unified approach" to assessing claims of discrimination. This approach is based on the following three-step test, which employers must now satisfy to justify any workplace standard that adversely affects an employee based on a prohibited ground of discrimination, including religion:

(1) The measure or policy was adopted for a purpose that is rationally connected to the performance of the job;
(2) a sincere belief on the part of the employer that this measure or policy is necessary to fulfil a legitimate work-related purpose; and
(3) the measure or policy is reasonably necessary to accomplish a legitimate work-related purpose; to demonstrate reasonable necessity, the employer must establish that it is impossible to accommodate the employee without undue hardship.

Importantly, the Supreme Court held that in order to satisfy the third step of the test, employers must show that workplace standards that have discriminatory effects on employees have "built-in" accommodation measures. In other words, it is not sufficient for an employer to adopt a standard that is, or could be, discriminatory, and assess the need for accommodation as it arises. Instead, employers must be proactive in incorporating accommoda-

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[13] *Ibid*., at para. 22.
[14] *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U. (Meiorin)*, [1999] S.C.J. No. 46 (QL), 3 S.C.R. 3.
[15] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) (Grismer)*, [1999] S.C.J. No. 73 (QL), 3 S.C.R. 868.

tion measures into any standards that may have a negative impact on employees under a prohibited ground of discrimination.

Following the *Meiorin* decision, many accommodation claims were made on the basis that the employer had to demonstrate that it would be "impossible" to accommodate the claimant without undue hardship. In *McGill University*, the Supreme Court clarified the test set out in *Meiorin* by reiterating that the duty to accommodate is "neither absolute nor unlimited", and that employees have a role to play in arriving at an appropriate accommodation. This confirms that the duty to accommodate requires employers to provide *reasonable* accommodation, not accommodation to the point of impossibility.

## Specific Workplace Issues

Cases on accommodation of religious beliefs or practices in the workplace tend to fall into five categories: (1) workplace schedules that conflict with observance of a weekly Sabbath; (2) leave of absence to observe religious holy days; (3) dress codes; (4) workplace duties that conflict with religious beliefs; and (5) imposition by the employer of a particular religious belief. The next part of this paper will examine these categories, as well as an exception to the duty to accommodate employees' religious beliefs and practices that applies to employers who may lawfully require that employees belong to a particular religion as a condition of employment.

### WORKPLACE SCHEDULES AND CONFLICTS WITH WEEKLY SABBATH

As discussed earlier, the Supreme Court's decisions in *O'Malley*, *Central Alberta Dairy Pool*, and *Renaud* established that employers have a positive obligation to consider scheduling changes before discharging an employee, where the work schedule conflicts with the employee's observance of a weekly Sabbath. These decisions establish that in the absence of concrete evidence of undue hardship, the employee's religious discrimination claim will generally be allowed. Thus, employers must be prepared to tolerate *some* hardship, including increased costs and inconvenience, to make the scheduling changes required to accommodate observance of a religious Sabbath.

In *O'Malley*, the employee became a member of the Seventh-Day Adventist Church, one of the tenets of which was strict observance of the Sabbath from sundown Friday to sundown Saturday. She alleged discrimination as a result of being forced to work on Friday evenings and Saturdays as a condition of employment. Although the employee accepted part-time employment that did not require working on the Sabbath, her claim of discrimination was nonetheless pursued to the Supreme Court of Canada. In a unanimous decision, the Court found that the employer had not met its

burden of accommodating the employee's religious practice to the point of undue hardship. The Court outlined the employer's apparent failure to take appropriate action:

> In this case the respondent-employer called no evidence. While the evidence called for the complainant reveals some steps taken by the respondent towards her accommodation, there is no evidence in the record bearing on the question of undue hardship to the employer. The first reaction to the complainant's announcement that she would not be able to continue to work on Saturdays was the response that she would have to resign her job. Within a few days, and before she had left her employment, the employer on its own initiative offered part-time work, which was accepted. In addition the employer agreed to consider Mrs. O'Malley for other jobs as they became vacant. All of the vacancies of which Mrs. O'Malley had notice required Saturday work except one and for that one she was not qualified. There was no evidence adduced regarding the problems which could have arisen as a result of further steps by the respondent, or of what expense would have been incurred in rearranging working periods for her benefit, or of what other problems could have arisen if further steps were taken towards her accommodation. There was therefore no evidence upon which the Board Chairman could have found that such further steps would have caused undue hardship for the respondent and thus have been unreasonable.[16]

To satisfy the duty to accommodate, therefore, employers must present detailed evidence of measures considered or taken within the accommodation process. Moreover, there must be concrete evidence to support an employer's claim that the employee's scheduling needs cannot be met without undue hardship.

Similarly, in both *Central Alberta Dairy Pool* and *Renaud*, the Court concluded that accommodation had not been made to the point of undue hardship, because either the employer or the union failed to consider a reasonable proposal for accommodation of the employee's religious requirements. Nonetheless, other decisions have clarified that there are limits to the inconvenience that an employer is expected to tolerate, whether in terms of increased cost or disruption — provided, of course, that the employer (and/or the union) demonstrates that proper consideration has been given to possible accommodations.

The case of *Ontario (Human Rights Commission) and Roosma v. Ford Motor Co. of Canada*[17] involved two employees who were members of the Worldwide Church of God, which required observance of the Sabbath from sundown Friday to sundown Saturday. The collective agreement, however, required employees to work Friday evening shifts twice a month. The employer and the union provided temporary accommodation for the

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[16] *Supra*, note 9, at para. 29.

[17] *Ontario (Human Rights Commission) and Roosma v. Ford Motor Co. of Canada*, [2002] O.J. No. 3688 (QL), 21 C.C.E.L. (3d) 112 (Ont. Div. Ct.), affirming (1995), 24 C.H.R.R. D/89 (Ont. Bd. Inquiry).

employees through shift swaps, but the employer was not prepared to change the employees' shifts on a permanent basis. Both employees were ultimately discharged for absenteeism related to Sabbath observance.

In upholding the employer's requirement that the employees work Friday evenings, the Ontario Divisional Court noted that morale among other employees was a valid consideration. In this case, the employer had presented evidence of a persistent absenteeism problem on the Friday evening shift, and of resentment on the part of other employees in relation to individual exemptions from the requirement to work that shift. The Court accepted this evidence, holding that both the employer and union had satisfied their respective duties to accommodate the workers to the point of undue hardship.

In *Vanderhoof Specialty Wood Products and I.W.A. – Canada, Local 1-424*,[18] the grievor was a member of the Seventh-Day Adventist faith, whose Sabbath observance conflicted with work schedules. The union and the employer proposed different methods of accommodating the grievor through adjustments to the work schedule. Both proposals involved assigning him to the day shift on a permanent rather than rotational basis; however, they differed as to the role of seniority in the assignment of other employees to cover for the grievor during his missed shifts. Asserting that employees should share the burden of accommodation, the employer proposal required all employees to rotate through the grievor's missed shift. The union proposal, on the other hand, required only those employees who were junior to the grievor to cover the shifts. The arbitrator held that the union's proposal, which favoured senior employees, represented a reasonable accommodation. This decision thus confirms that minimizing disruption to seniority entitlements may be a legitimate consideration in identifying appropriate accommodations.

Arbitrators expect employers to sustain increased costs and inconvenience in implementing schedule changes to enable employees to observe a weekly Sabbath. Thus, undue hardship will not be established without clear evidence of substantial cost and inconvenience. In *Chrysler Canada Ltd. and U.A.W., Local 444*,[19] the employee converted to the Seventh-Day Adventist church while employed at the Windsor plant, and thereafter refused to work Friday night or Saturday shifts. The employer made a variety of efforts to accommodate the grievor within existing scheduling practices and procedures, but disciplined him for absences on those days when he could not be accommodated. The employer eventually discharged the employee. In upholding the grievance, the arbitrator held that the scheduling requirement could not be considered a BFOR, since the employer could have taken

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[18] *Vanderhoof Specialty Wood Products and I.W.A. – Canada, Local 1-424*, [2004] B.C.C.A.A.A. No. 132 (QL), 129 L.A.C. (4th) 181 (McConchie).

[19] *Chrysler Canada Ltd. and U.A.W., Local 444*, [1986] O.L.A.A. No. 27 (QL), 23 L.A.C. (3d) 366 (Kennedy).

reasonable steps to accommodate the employee without undue interference or expense in the operation of the business. Accordingly, the duty to accommodate may require an employer to move beyond its existing scheduling practices.

Human rights tribunals have also made it clear that they will carefully scrutinize decisions to terminate the employment of individuals whose religious observance of the Sabbath calls for scheduling accommodations by the employer. For example, in *Strauss v. Ontario (Liquor Licence Board)*,[20] the employee, an Orthodox Jew, needed to leave work an hour early on Fridays during the winter because sundown occurs earlier, and she needed time to prepare for the Sabbath. The employer initially accommodated this practice through the use of overtime and "flex" time arrangements. However, a new supervisor required the employee to obtain weekly approval. The Tribunal found no discrimination, because the employee had failed to adequately inform her employer (through the new supervisor) of her actual religious needs, which she could have done given the employer's reasonable steps to communicate with her and to accommodate her in the past. In the Tribunal's view, although the employer could have done more without reaching the point of undue hardship, it had sufficiently discharged its duty.

Both courts and arbitrators have indicated that operational difficulties and quality-control issues are legitimate considerations in assessing a claim of undue hardship. For example, the Divisional Court in *Roosma*[21] upheld the Board of Inquiry's conclusion that operational difficulties and quality-control issues were appropriate factors to consider in assessing whether the employer and the union had met their duty to accommodate. In that case, the evidence established that the complainants' absence during Friday shifts had a substantial impact on production, safety, and quality.

Similarly, the employer may succeed in proving undue hardship if its production needs reasonably require the incumbent of a specific position to work a set schedule. This was the situation in *Canadian Forest Products Ltd. and I.W.A. – Canada, Local 1-424*.[22] As in the cases discussed above, the grievor was a Seventh-Day Adventist, and refused to work from sundown on Fridays until sundown Saturdays. The employer had previously accommodated the employee so that he did not have to work on his Sabbath. However, the grievor successfully applied for a new position within the organization. The employer was not willing to accommodate the employee's need for time off on the Sabbath in this position. The arbitrator ultimately held that the employer had clearly advised the employee about the requirements to work on both Friday and Saturday in the new position. The grievor's silence

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[20] *Strauss v. Ontario (Liquor Licence Board)* (1994), 22 C.H.R.R. D/169 (Ont. Bd. Inquiry).
[21] *Supra*, note 17.
[22] *Canadian Forest Products Ltd. and I.W.A. – Canada, Local 1-424*, [1995] B.C.C.A.A.A. No. 307 (QL), 50 L.A.C. (4th) 164 (Blasina).

implied that he was available to work on those days, and his grievance was therefore dismissed.

In another case, *Oakville (Town) and C.U.P.E., Local 1329*,[23] it was held that the duty to accommodate did not require an employer to change the essential requirements of the job where it was essential that work be performed on the day coinciding with the employee's Sabbath. Here, the grievor — a by-law enforcement officer with the Town of Oakville — was an active member of the Church of Jesus Christ of Latter Day Saints (Mormon). He observed the Sabbath on Sundays. The arbitrator held that the critical element of the job for which he had been hired was Sunday by-law enforcement. The arbitrator also ruled that the requirements of a job may mean that certain people simply are unable to hold it, and in this case the grievor's religious beliefs were incompatible with the essential components of the position and the purpose for which it had been created. The duty to accommodate therefore does not extend so far as to force the employer to change a position that was created for a specific purpose.

In assessing whether an employer must accommodate an employee's request for scheduling changes, it is important to distinguish between employees' observance of genuine religious tenets, and their desire to follow practices that may be inspired by their religious beliefs but that do not themselves amount to religious beliefs. Two recent arbitration awards highlight this distinction. In *Toronto Ass'n for Community Living and C.U.P.E., Local 2191*,[24] the grievor was a part-time residential counselor who belonged to the Scarborough Church of God. Following a change in management, she was told that she would have to work weekends. She made clear that this would be difficult for her because of "family and other job commitments". Only some two-and-a-half months later did she specifically advise the employer that she could not work Sundays because it was the Sabbath in her church, and that her religious beliefs compelled her to attend two Sunday services each week. The arbitrator found that she had a genuine belief in the tenets of her church, and was therefore entitled to invoke freedom of religion to request accommodation. Neither of the two accommodation alternatives offered by the employer was reasonable. Instead, the employer should have accommodated the grievor by exempting her from the weekend shift requirements, as it had been doing prior to the management change.

In contrast, in *Hendrickson Spring, Stratford Operations and U.S.W.A., Local 8773*,[25] the grievor could not work 12-hour compulsory overtime shifts on Sundays due to a conflict between the shift schedule and his religious beliefs. Although part of his time on Sunday was dedicated to church

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[23] *Oakville (Town) and C.U.P.E., Local 1329*, [1992] O.L.A.A. No. 852 (QL) (Hunter).

[24] *Toronto Ass'n for Community Living and C.U.P.E., Local 2191*, [2005] O.L.A.A. No. 781 (QL), 138 L.A.C. (4th) 378 (Surdykowski).

[25] *Hendrickson Spring, Stratford Operations and U.S.W.A., Local 8773*, [2005] O.L.A.A. No. 382 (QL), 142 L.A.C. (4th) 159 (Haefling).

attendance, most of the day was taken up by community work that the grievor considered fundamental to his beliefs as a Polish Catholic. The employer had offered an accommodation that, while allowing the grievor to be absent to attend the 9 a.m. and 7 p.m. church services on Sunday, required him to attend work for approximately six hours between services. The union concurred in this arrangement, but the grievor did not, and he was ultimately disciplined for being absent without excuse from compulsory overtime shifts. The arbitrator, referring to the Supreme Court of Canada's *Amselem* decision, agreed that the employer's approach — *i.e.* accommodating the grievor's church attendance but not his other Sunday activities, which were essentially secular in nature — was a reasonable one.

Finally, although not binding in Canada, a case decided in the United States provides insight into the extent of employers' duty to accommodate religious practices in workplace scheduling. Specifically, the case highlights the need for flexibility in providing religious accommodation, and emphasizes that the process should result in equal but not better treatment for the claimant. In *Equal Employment Opportunity Commission v. Firestone Fibers & Textiles Co.*,[26] the complainant became a member of the Living Church of God which, in addition to a weekly Sabbath, prescribed the observance of 20 holy days a year. In his original position, he was not required to work on the Sabbath; however, as part of a company-wide restructuring, he was reassigned to a position that did involve working on the Sabbath. He then approached his supervisor for an accommodation, and the supervisor responded by trying a range of accommodative measures. These included assigning the complainant to a different shift and a different position, as well as arranging for other employees to fill in for him during the hours of his Sabbath. None of these options were viable, in part because the complainant lacked seniority and transferable skills, and because those options placed a significant burden on the company and co-workers. The complainant instead began to take leaves of absence in accordance with standard attendance accommodations available under the collective agreement, which allowed employees to use vacation time, to swap shifts up to eight times per year, and to access up to 60 hours of unpaid leave. The employer discharged the complainant when his unpaid leave time exceeded 60 hours.

In upholding the discharge, the Court made two important observations regarding religious accommodation. First, the Court rejected the complainant's argument that he was entitled to "total accommodation" of his religious practices — in other words, that the employer was required to grant leave for every holy day recognized by his faith. The Court emphasized that the burden imposed on the employer is one of *reasonable* accommodation, not *total* accommodation. Second, the Court ruled that the employer's existing accommodation measures were reasonable, and that providing the

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[26] *Equal Employment Opportunity Commission v. Firestone Fibers & Textiles Co.*, 515 F.3d 307 (4th Cir. 2008).

claimant with additional accommodation would provide him with greater rights than those enjoyed by other employees. The Court's reasoning reflects the principle that employees requiring accommodation are entitled to *equal* treatment, not *better* treatment.

## LEAVE TO OBSERVE RELIGIOUS HOLY DAYS

In *Commission scolaire régionale de Chambly v. Bergevin*, the Supreme Court of Canada addressed the requirements of religious accommodation in the context of requests for religious leave.[27] This case involved a grievance brought on behalf of three Jewish teachers who had asked for a paid day off to observe Yom Kippur. Relying on a policy that employees who took time off for religious holy days would not be paid for those days, the school board denied the request. The Court held that the school board had not met its duty to provide reasonable accommodation:

> There was no proof presented by the respondent School Board, that to pay the salaries of the Jewish teachers would impose an unreasonable financial burden upon it. Indeed it would be extremely difficult to put forward such a position in light of the fact that the Board through collective bargaining had specifically provided, in art. 5-14.05, for the payment of teachers who were absent for what the parties considered to be a good or valid reason and, in art. 5-14.02, for a number of days for a variety of reasons. It would be difficult if not unreasonable to contend that the absence of a teacher in order to observe a holy day would not constitute a "good reason" for the absence. It follows that the observance of a holy day by teachers belonging to the Jewish faith should constitute a "good reason" for their absence and should qualify them for payment of a day's wages, pursuant to the provisions of that collective agreement. This would be an eminently reasonable, indeed a correct, interpretation of the collective agreement. Further I would observe that this had been recognized as acceptable in the past, as confirmed by the practice existing prior to 1983 of many Jewish teachers who were absent on Yom Kippur without any loss of wages.

More recent decisions, however, have recognized that a "menu of options" approach is available to employers to allow employees to observe holy days, which need not be limited to providing a paid leave of absence. In the case of *Richmond v. Canada (Attorney-General)*,[28] employees requested days off to observe the Jewish holy days of Rosh Hashanah and Yom Kippur. In response to the request, the employer offered a range of options including the use of annual leave or compensatory days off, an exchange of work shifts, and other arrangements such as allowing catch-up of lost time. The Federal Court of Appeal found that the range of options provided to the employees constituted reasonable accommodation.

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[27] *Commission scolaire régionale de Chambly v. Bergevin*, [1994] S.C.J. No. 57 (QL), 2 S.C.R. 525.

[28] *Richmond v. Canada (Attorney-General)*, [1997] F.C.J. No. 305 (QL), 2 F.C. 946 (C.A.).

Similarly, in *Ontario (Ministry of Community and Social Services) v. Grievance Settlement Board* ("*Tratnyek*"),[29] the Ontario Court of Appeal addressed a claim by an employee that the employer was required to provide paid leaves of absence to allow him to observe 11 holy days over the calendar year that were recognized by the Worldwide Church of God. The employer had a policy allowing for two days off with pay for religious observance purposes, to reflect the two statutory holidays of Christmas and Good Friday enjoyed by Christians. Employees who required further accommodation to fulfil their religious obligations could request other scheduling modifications, including resort to a compressed work week that gave employees one day off every three weeks, earned vacation entitlements, or unpaid leaves of absence. The Court categorically dismissed the employee's claim that the additional days off gained through a compressed work week amounted to "vacation benefits", which the employer could not force him to use for religious observance purposes. Rather, the Court found that this measure was a scheduling change, and constituted a reasonable form of accommodation:

> A review of the relevant authorities leads me to conclude that employers can satisfy their duty to accommodate the religious requirements of employees by providing appropriate scheduling changes, without first having to show that a leave of absence with pay would result in undue economic or other hardship. Indeed, in some instances, scheduling changes may provide the fairest and most reasonable form of accommodation.[30]

Following *Tratnyek*, the "menu of options" approach to accommodation of employee religious schedules was approved more recently by the Human Rights Tribunal of Ontario in *Markovic v. Autocom Manufacturing Ltd*.[31] The Tribunal declined to accept the position advanced by the Ontario Human Rights Commission, as reflected in its policies, that employers must provide employees who are members of religions other than Western Christianity with at least two paid days of religious leave, to compensate for the paid holidays of Christmas and Good Friday. Rather, the Tribunal held that the employer could accommodate employees' religious observance requirements by providing a menu of options, including a variety of scheduling alternatives, without first having to prove that providing two paid days would amount to undue hardship.

In light of these decisions, employers should be prepared to consider and recognize a range of options to allow employees to observe religious holy days, beyond simply granting paid leave.

In assessing employees' requests for leave for religious observances, as required by the *Amselem* decision, employers must consider whether the requesting employee *subjectively* believes that her or his faith requires the

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[29] *Ontario (Ministry of Community and Social Services) v. Grievance Settlement Board*, [2000] O.J. No. 3411 (QL), 50 O.R. (3d) 560 (C.A.).

[30] *Ibid.*, at para. 37.

observance. Perhaps not surprisingly in light of this obligation, arbitrators have found that employers are entitled to make reasonable inquires to satisfy themselves that requests for leave are legitimate and *bona fide*. This was the result in *York Region District School Board and O.S.S.T.F., District 16*.[32] Following a number of questionable requests for leave (such as "Fridayism" and "Floridaism"), the employer implemented an electronic leave request system in which employees had to select the applicable holy day from a menu of recognized holy days in various faiths. If the day did not appear on the list, employees were asked to obtain basic information from a religious leader to demonstrate that the holy day was "significant". The arbitrator determined that the collective agreement did not limit religious leave to "significant" faith days; however, she agreed that the employer was not required to blindly accept a request without seeking further information. Employees had to be given the opportunity to bring themselves within the *Amselem* test, and the employer had to assess the request on an individualized basis.

Likewise in *P.S.A.C. and Canadian Union of Labour Employees*,[33] the arbitrator affirmed the employer's right to make reasonable inquiries when faced with requests by two employees for leave to observe relatively obscure saint's days on the Roman Catholic calendar.

## DRESS CODES

A number of decisions have addressed conflicts between an employer's dress code requirements and employees' religious beliefs or practices. Usually, the dress code relates to the employer's health and safety policies.

The case of *Bhinder v. Canadian National Railway Co.*[34] involved a Sikh employee who was discharged for refusing to comply with the employer's direction that all employees at a particular site wear a hardhat. The employee refused to do so because it would have involved removing his turban, which his faith required him to wear. The Supreme Court held that the safety helmet rule was a BFOR and, accordingly, did not violate the *Canadian Human Rights Act*. There was therefore no duty to accommodate on the part of the employer. This case must, however, be assessed in light of later decisions, particularly *Meiorin*.

In *Pannu v. Skeena Cellulose*,[35] the employee was a Recaust Operator. Because this job involved potential exposure to toxic gases, Workers'

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[31] *Markovic v. Autocom Manufacturing Ltd.*, [2008] O.H.R.T.D. No. 62 (QL) (Ont. H.R. Trib.).

[32] *York Region District School Board and O.S.S.T.F., District 16*, [2008] O.L.A.A. No. 442 (QL), 176 L.A.C. (4th) 97 (Tacon).

[33] *P.S.A.C. and Canadian Union of Labour Employees*, unreported, December 23, 2009 (Albertyn).

[34] *Bhinder v. Canadian National Railway Co.*, [1985] S.C.J. No. 75 (QL), 2 S.C.R. 561.

[35] *Pannu v. Skeena Cellulose* (2001), 38 C.H.R.R. D/494 (B.C.C.H.R.).

Compensation Board regulations required that a self-contained breathing apparatus (SCBA) be worn. The employee was baptized a Sikh during the course of his employment, and could no longer perform shutdown operations because a tenet of his faith required the wearing of a beard. The employer tried to fit the equipment over the employee's beard, and when that proved not to be possible, it looked without success for an alternative. Eventually, the WCB fined Skeena for failing to ensure that the employee wore a SCBA, as required by the regulations. The employee then filed a discrimination complaint against both the WCB and Skeena. The Tribunal dismissed the complaint against the WCB, as any discrimination would have been the result of the application of the regulations by Skeena, rather than the regulations themselves. The Tribunal further held that, while Skeena had discriminated against the employee, the company had made out an undue hardship defence, as accommodation did not require an employer to transfer the risk of toxic exposure to another employee. Thus, the requirement to wear a SCBA was justified as a BFOR.

However, a uniform requirement that conflicts with religious attire will not be upheld unless it has been applied consistently, as illustrated by the decision of *Loomba v. Home Depot Canada*.[36] The complainant, a Sikh, wore a turban as a religious observance, and consequently could not wear a hardhat at a new store which was under construction. Although the employer contended that the *Occupational Health and Safety Act* mandated the wearing of hardhats on site, the adjudicator found that the rule was not uniformly enforced. Since the rule had been applied more stringently against the complainant than others, and since the complainant had been harassed about it, the safety argument was rejected.

## WORKPLACE DUTIES THAT CONFLICT WITH RELIGIOUS BELIEFS

Consistent with the principles discussed above, human rights tribunals have held that where an employee sincerely holds religious beliefs that are incompatible with workplace duties, the employer will be required to accommodate the employee to the point of undue hardship.

In *Jones v. C.H.E. Pharmacy Inc.*,[37] a Shopper's Drug Mart employee was given an ultimatum by the store manager to either handle poinsettias and assist with the Christmas decorations or lose his job. The employee was a Jehovah's Witness, and his faith prevented him from participating in the display of Christmas decorations. In the past, the employer had accommodated the employee by assigning other employees to do the decorating; however, on this occasion, no accommodation was provided. Not surprisingly, the

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[36] *Loomba v. Home Depot Canada Inc.*, [2010] O.H.R.T.D. No. 1422 (QL) (Ont. H.R. Trib.).
[37] *Jones v. C.H.E. Pharmacy Inc.*, [2001] B.C.H.R.T.D. No. 1 (QL), 39 C.H.R.R. D/93 (B.C.H.R. Trib.).

Tribunal upheld the complaint, ruling that accommodation would not have constituted undue hardship, as the employer could easily have delegated the task to another employee. A similar claim was advanced in *Henry v. Kuntz*, though the outcome was different.[38] The employee, a Rastafarian, claimed that the employer had forced him to attend a Christmas party, contrary to his religious beliefs. The Tribunal found, however, that the employee had not taken sufficient steps to make the employer aware of his beliefs. Accordingly, the duty to accommodate had not been triggered.

In *Moore v. B.C. (Ministry of Social Services)*,[39] a financial aid worker was dismissed because she refused to authorize medical coverage for a client of the Ministry who wished to have an abortion. Her supervisor had ordered her to authorize coverage, and she refused on the basis that her religion did not allow her to do so. The Tribunal held that reasonable accommodation was possible, which would not have any serious impact on service delivery. Thus, the dismissal was held to be discriminatory.

In *407 ETR Concession Co. and C.A.W., Local 414*,[40] the arbitrator reinstated three Pentacostalist grievors who had been discharged for refusing to provide a biometric hand scan. The system had been implemented for security and attendance management purposes, and required a scan of each employee's hand to create a nine-digit biometric identifier. The grievors believed that the collection of this information would subject them to the "mark of the Beast" and lead them to damnation. While recognizing that accommodation of a subjective belief can be difficult, the arbitrator allowed the grievance on the basis that the employer had taken a disciplinary approach to the grievors' objection and had not considered accommodation until after the grievances were filed. He also held that it would have been reasonable for the employer to exempt the grievors from biometric scanning and allow them to use swipe cards, because the employer had not proven a risk of time fraud that would weigh against offering such accommodation.

## IMPOSITION OF RELIGIOUS BELIEFS

Employers cannot arbitrarily impose their religious convictions on employees. The Ontario Board of Inquiry made this clear in *Dufour v. J. Roger Deschamps Comptable Agréé.*[41] In this case, the employer had posted material promoting a particular religious point of view, both in open areas and in individual work stations. The employer also provided employees with copies of the Bible and other religious material, and requested employee participation in fundraising for religion-based campaigns. The Board found that

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[38] *Henry v. Kuntz*, [2004] O.H.R.T.D. No. 7 (QL) (Ont. H.R. Trib.).

[39] *Moore v. B.C. (Ministry of Social Services)* (1992), 17 C.H.R.R. D/426 (B.C.C.H.R.).

[40] *407 ETR Concession Co. and C.A.W., Local 414*, [2007] O.L.A.A. No. 34 (QL), 158 L.A.C. (4th) 289 (Albertyn).

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

such activity was improper. The Board also made it clear that although the complainant has the burden of proving a *prima facie* case of discrimination, the power imbalance between employer and employee must be taken into account in determining whether the employer should be deemed to have known that the impugned conduct was unwelcome.

## Statutory Exemptions to Accommodation Obligations

The human rights legislation of certain jurisdictions allows employers to adopt employment standards that would otherwise be considered discriminatory, in order to safeguard the religious character of the workplace. Ontario's *Human Rights Code*, in s. 24(1), for example, provides exceptions to the right to equal treatment in employment. Those exceptions apply to "special employment", which includes employment by religious, philanthropic, educational, fraternal, or social institutions, or organizations that deliver services to persons protected by the *Code*. Additionally, s. 19(1) of the *Code* provides an explicit exception to the right to freedom from discrimination with respect to denominational schools in the province. This exception essentially incorporates s. 93(1) of the *British North America Act*, which protects denominational schools.

With respect to separate schools, statutory defences have been successful where it was established that the discriminatory distinction was *bona fide* and reasonable. The Supreme Court of Canada, in *Caldwell v. Stuart*, dealt with a statutory exception in the British Columbia *Human Rights Code*.[42] In this case, a Catholic school policy required teachers to adhere to the Catholic faith. The Court determined that not only was the policy a BFOR for the school to serve its purpose of imparting a Christian way of life,[43] but also that the policy was saved by the statutory exception.[44] These findings were based on the duty of teachers to teach the principles of the Catholic faith in all aspects of their behaviour.[45] The Supreme Court held that the Catholic school board was entitled to terminate the employment of a teacher who had married in a way which was not recognized by the Catholic Church, on the basis that the teacher had disqualified herself from satisfying *bona fide* occupational requirements. Similar conclusions were reached by an Ontario board of inquiry with respect to a policy that teachers employed by a multi-denominational Christian school had to conform to its articles of faith.[46]

In *Daly v. Ontario (Attorney General)*,[47] the Ontario Court of Appeal upheld the right of a Roman Catholic school board to consider religion in the

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[42] *Caldwell v. Stuart*, [1984] S.C.J. No. 62 (QL), 2 S.C.R. 603.
[43] *Ibid*., at pp. 624-25.
[44] *Ibid*., at pp. 628.
[45] *Ibid*., at p. 608.
[46] *Garrod v. Rheema Christian School* (1991), 15 C.H.R.R. D/477.
[47] *Daly v. Ontario (Attorney General)*, [1999] O.J. No. 1383 (QL), 44 O.R. (3d) 349 (C.A.).

hiring of a teacher. The claim involved a challenge to the constitutionality of s. 136 of the *Education Act*, which prohibited consideration of religion in hiring if the candidate agreed to respect the philosophy of the separate school. The Court held that s. 136 violated the constitutional guarantee enjoyed by denominational schools in managing their operations.

On the other hand, at least one decision has made it clear that policies adopted by denominational schools may indeed be found discriminatory, in spite of the statutory exemption. In *O.E.C.T.A. v. Dufferin-Peel Roman Catholic Separate School Board*,[48] the policy in question precluded non-Catholics from being hired for positions of responsibility such as principal, vice-principal, and department head. The Court held that it was within the province's competence to enact laws affecting denominational schools, as long as the legislation complied with s. 93(1) of the *British North America Act* extending protection to such schools. Therefore, the Court ruled, the school board was required to demonstrate that its policy against the hiring of non-Catholics for particular positions was reasonably necessary to preserve the Catholic nature of schools.

Likewise, the Human Rights Tribunal of Ontario has signalled that it will strictly interpret the creed-based exemption to the duty to accommodate found in the province's *Human Rights Code*. In *Heintz v. Christian Horizons*,[49] the exemption at issue was set out in s. 24(1)(a) of the *Code*, which protects distinctions on the basis of religion (and other grounds) made by organizations that are engaged in serving the interests of those who identify with the religion advocated by the organization, if the distinction is reasonable and *bona fide*. Unlike the reasoning in the decisions involving separate schools, the Tribunal disagreed that Christian Horizons was engaged in serving the interests of persons of the same creed, because it provided care and support to disabled individuals of any background.[50] The Tribunal rejected an interpretation of s. 24(1)(a) which would have broadly protected the freedom of religion of an organization that was fulfilling a faith-based mission; the protection was effective only to the extent that the organization served individuals of the same creed.[51]

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[48] *O.E.C.T.A. v. Dufferin-Peel Roman Catholic Separate School Board*, [1999] O.J. No. 1382 (QL), 172 D.L.R. (4th) 260 (Ont. C.A.).

[49] *Heintz v. Christian Horizons*, [2008] O.H.R.T.D. No. 21 (QL), 63 C.H.R.R. D/12 (Ont. H.R. Trib.); reversed in part, [2010] O.J. No. 259 (QL), 319 D.L.R. (4th) 477 (Ont. Div. Ct.). On judicial review the Divisional Court held that the Tribunal had erred in disallowing the employer from relying on the exemption in s. 24(1)(a) of the *Code*, but upheld the Tribunal's finding that, in any event, Christian Horizons had not established that its workplace qualifications were reasonable and *bona fide*.

[50] *Ibid*., at paras. 140 and 152.

[51] *Ibid*., at paras. 155 and 157.

## Conclusion

The duty to accommodate religious beliefs and practices in the workplace poses unique challenges for both employers and unions. The decisions reviewed here demonstrate that satisfying the duty to accommodate employees' religious requirements to the point of undue hardship is a significant burden, particularly in light of the Supreme Court of Canada's holding, in *Amselem* and *Multani*, that the standard for assessing religious beliefs or practices is a subjective one. This standard truly means that each individual's subjective beliefs must be considered and addressed, and must be accommodated unless that accommodation would result in undue hardship for either the employer or the union.

However, the daunting task of accommodating a multitude of individually held beliefs has been tempered, at least to some degree, by a healthy dose of reality in the decisions of courts, tribunals, and arbitrators. Those decisions, as discussed above, affirm that the obligation on employers and unions is to provide *reasonable* accommodation, not perfect accommodation. In addition, there is a corresponding duty on employees to cooperate, in a meaningful way, in the search for appropriate accommodations, and to accept reasonable proposals. As a corollary, recent decisions have also affirmed that employers can offer a range of options to meet employees' religious requirements, particularly with respect to scheduling arrangements. Given these parameters, there is no reason why workplace parties who approach accommodation issues reasonably and in a cooperative spirit should not be able to "keep the faith" in the workplace.