

employment and labour relations bulletin

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Religious Leave – A Menu of Options

Markovic v. Autocom Manufacturing Ltd. [2008] HRTO 64

It is commonly understood that employers are required to accommodate requests for time off to observe religious holidays. But what exactly is the scope of the employer's obligation? Is flexible scheduling an acceptable means of accommodation? Is the employer required to pay an employee during the employee's religious leave and, if so, under what circumstances? These are just a few of the questions that often trouble employers when it comes to accommodation of religious leave.

The Ontario Human Rights Tribunal's (the "Tribunal") recent decision in ***Markovic v. Autocom Manufacturing Ltd.*** [2008] HRTO 64, released September 3, 2008 ("Markovic"), provides a useful summary of the law to guide an employer's efforts at religious accommodation. Ultimately, the Tribunal held that there is no automatic right to paid leave for religious observances and endorsed flexible scheduling or the "menu of options" approach as an appropriate response to requests for religious leave.

Background

Savo Markovic (the "Employee") claimed that Autocom Manufacturing Ltd. ("the Employer") discriminated against him on the basis of creed (religion) by failing to provide compensation while he was off work due to the observance of Eastern Orthodox Christmas. In response to this complaint, the Employer developed a "Procedure for Accommodation of Religious Observances" (the "Policy") under which *bona fide* requests for religious leave would be accommodated to the point of undue hardship. The Employee, the Employer and the Human Rights Commission (the "Commission") agreed to have the Tribunal assess the legality of the Policy as a preliminary question of law.

The Employer's Policy provided: (1) a process for employees to arrange for time off and (2) a range of options whereby employees could obtain religious leave without loss of pay. Pursuant to the Policy, employees were asked to notify their supervisor of the holy day and the accommodation required as soon as practicable. A scheduling change, vacation time and an unpaid leave of absence were among the options listed as means of reasonable accommodation.

The Ontario Human Rights Tribunal's Decision

The Tribunal noted that while Christmas and Good Friday originated as Western Christian observances, they are now considered secular holidays recognized under the Ontario *Employment Standards Act, 2000* (the "ESA"). While secular holidays are not overtly discriminatory, a work schedule that provides observant Christians with time off to celebrate Christmas and Good Friday, but does not recognize non-Western Christian holy days, is discriminatory in its effect.

The Tribunal affirmed the proposition that an employee does not have an automatic entitlement to two additional paid holidays based on the recognition of Christian holidays in the regular work calendar. The Tribunal held that scheduling changes that do not result in a loss of pay are an appropriate means of accommodating religious observances in the workplace.

In the end, the Tribunal held that the Policy's menu of options approach, whereby the Employer provided for scheduling changes without loss of pay, was an appropriate means of religious accommodation and consistent with the Ontario *Human Rights Code* (the "Code").

What *Markovic* means for Employers

When an employer can accommodate an employee's request for religious leave without incurring undue hardship, an employer is obligated to do so. However,

Markovic reiterated that there is **no** absolute right or entitlement to **paid** religious leave. Based on the Tribunal's decision, a policy which establishes a process whereby employees can arrange for religious accommodation by way of a menu of scheduling options is all that is required under the Code. At the same time, employers are reminded that accommodation is a highly individualized process and even the most flexible scheduling may not be sufficient to accommodate each employee's particular circumstances.

Employers should also be aware that the Tribunal's decision is not in line with the Ontario Human Rights Commission's "Policy on Creed and the Accommodation of Religious Observances". The Commission's policy specifically states that employees are automatically entitled to two paid days of religious leave to echo the two Christian days that are also statutory holidays under the ESA. However, this policy was last updated in October 1996 and it is commonly accepted that it does not reflect the current state of the law. While only a Tribunal level decision, *Markovic*'s menu of options approach is consistent with the case law in this area and as such, provides a guide for employers when formulating and administering religious leave policies.

Written by Cheryl Thacker

A Cautionary Note

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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The members of the Employment and Labour Relations Group have the expertise and experience to deal efficiently and effectively with all matters rising out of employment and labour law, as well as planning for legislative changes, structuring of business activities, and any other related matters.

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