Religious Accommodation in the Workplace

A Union Perspective

STEVEN BARRETT

Union counsel Steven Barrett explores the issue of whether employers, pursuant to their duty to accommodate to the point of undue hardship, should be required to provide paid leave to employees who request time off work in order to observe non-Christian or minority religious holidays. As the author notes, courts, tribunals and arbitrators have held that an employer can meet its duty to accommodate in such circumstances by permitting employees to access discretionary paid leave entitlements or by making scheduling changes that enable the employees to observe their religious holidays without loss of pay, at least where those alternatives are available. While accepting that this approach is a reasonable one, Barrett points out that the case law has not yet satisfactorily addressed the scope of the employer's duty in situations where adjustments to the schedule cannot be made, or where the collective agreement does not provide for discretionary paid time off. In this regard, he rejects the proposition that the principle of "no work, no pay" — adopted by the Ontario Court of Appeal in Orillia Soldiers, *in a case of alleged disability discrimination — should automatically be applied to exempt employers from being required to provide paid leave to allow employees to observe holy days. Rather, Barrett argues, the question of whether offering paid leave would constitute undue hardship should be determined on a case-by-case basis, as it is in other types of accommodation claims.*

* This article is a revised version of a paper originally published in *Arbitration 2009: Due Process in the Workplace* (Proceedings of the Sixty-Second Annual Meeting of the National Academy of Arbitrators), Chapter 11, pp. 257-278, and is reproduced with permission of BNA Books (www.bnabooks.com). I am grateful for the research, writing and analytical assistance of Simran Prihar, a first-year associate at Sack Goldblatt Mitchell.

Introduction

Decisions dealing with the duty to accommodate religious beliefs and practices constitute a large part of Canadian human rights jurisprudence.[1] In that context, courts and arbitrators alike have struggled with the specific question of when an employee may legitimately receive paid time off for religious holidays, so that the employee can fulfil his or her religious obligations without loss of pay or benefits. This paper begins by providing a brief overview of the law surrounding the duty to accommodate in Canada, and then explores the issue of the circumstances in which an employee is entitled to receive paid time off to observe a religious holy day.

This question has become increasingly relevant in arbitral jurisprudence as well. Initially, the Supreme Court of Canada's 1994 decision in *Chambly*[2] was interpreted by the Ontario Human Rights Commission (the body charged with administering Ontario's *Human Rights Code*) as requiring an employer to provide employees with at least two paid days off to observe non-Western Christian religious holidays (on the theory that two Christian holidays, Good Friday and Christmas, are statutory public holidays for which Christian observers receive paid time off, despite not working). However, the courts, arbitrators, and even human rights adjudicators have not interpreted *Chambly* in this way, in large measure reflecting the view (often not explicitly acknowledged) that the right to be free from discrimination, and the corresponding duty to accommodate, must co-exist with and should not override a fundamental feature of the employment relationship — namely, the requirement to provide labour and attend at work in order to receive compensation. On this view, the duty to accommodate must be reconciled with, and effectively be subservient to, the overriding principle that human rights legislation does not require an employer to provide compensation without receiving labour in return (*i.e.* when an employee is not at work).[3]

As a result, it would appear that the general trend of the case law has been that an employee whose religion requires that he or she take time off for a non-Christian holiday is not entitled to be paid for not working on a non-Christian holy day, except where the employee can use a separate entitlement

---

[1] Indeed, some of the leading cases in the Supreme Court of Canada involving discrimination in the workplace, and the roles of both employers and unions in combating discrimination, have arisen in the religious context, including the Court's seminal decisions in *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] S.C.J. No. 74 (QL), 2 S.C.R. 536 (recognizing adverse effect discrimination and the duty to accommodate) and *Central Okanagan School District No. 23 v. Renaud*, [1992] S.C.J. No. 75 (QL), 2 S.C.R. 970 (outlining the respective roles of employers, unions, and individual employees in the accommodation process). Both decisions are reviewed in the next section.

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

[3] The leading case in this area is generally regarded to be the Ontario Court of Appeal's decision in *O.N.A. v. Orillia Soldiers Memorial Hospital*, [1999] O.J. No. 44 (QL), 42 O.R. (3d) 692, discussed below.

to a pre-existing earned or discretionary paid leave entitlement on the day of the religious holiday, or indirectly where the employee can make up the time through rescheduling in order to be "compensated" for the pay lost. Because in most cases one or the other of these possibilities exists to some extent, the case law has not yet satisfactorily addressed the outcome in a situation where paid leave provisions are not available *and* where no scheduling change is possible. In addressing that issue, courts and arbitrators will have to determine whether paying employees when they do not provide work is undue hardship *per se*, or whether some additional degree of undue hardship should and will be required to be shown.

To some extent, the difficulty in this area may stem from the fact that it has not been easy for adjudicators to compartmentalize and separate the supposedly discrete legal concept of the duty to accommodate up to the point of undue hardship from the concept of discrimination, a finding of which is a prerequisite to the invocation of a duty to accommodate in the first place. This would appear to reflect, at least in part, the notion that no discrimination occurs when employees are not paid because they are not at work, so that the only accommodation arbitrators are prepared to consider is one that is consistent with that result. However, this approach seems to miss the fundamental point that the essence of the discriminatory treatment in such situations is the preferential treatment given to Christian observers, who in fact are paid for not being at work on their religious holidays. It seems reasonable to ask why, if the Christian majority can be accommodated by receiving paid time off for their religious holidays, the religious minorities to whom the protection against discrimination is directed cannot.

The following section provides a general overview of the duty to accommodate in Canada — when it is triggered, and how it applies. The paper then briefly reviews the prevalent approach taken to the duty to accommodate in cases involving claims for compensation by employees who are not able to work because of their membership in a disadvantaged or minority group protected by human rights legislation. The final section discusses the prevalent Canadian approach to the specific question of whether the duty to accommodate requires paid time off in the case of claims by non-Christian employees for the time they take off to celebrate their religious holidays.

Discrimination and the Duty to Accommodate

The duty to accommodate in Canada arises in the context of both the *Charter of Rights and Freedoms* and the human rights legislation of each province. This paper focuses on the duty as interpreted in decisions involving alleged breaches of the Ontario *Human Rights Code*[4] and, in some instances, similar legislation in other jurisdictions.

---

[4] R.S.O. 1990, c. H.19.

In Ontario, under Part 1, s. 5(1) of the *Code*, every person has a right to equal treatment in employment without discrimination on the basis of enumerated grounds, including creed. Creed is not defined in the *Code* but has been interpreted to encompass, at the very least, organized religion accompanied by established practices and observances. Section 11 of the *Code* provides that the right of a person under Part 1 is infringed where an employer practice or policy results in an exclusion, restriction, or preference of a group of persons who are identified by a prohibited ground of discrimination and of which the person is a member. Section 11 also provides an exception to this rule: an employer policy will not constitute a breach of the *Code* where it is "reasonable and *bona fide* in the circumstances". However, a policy will not be held to be "reasonable and *bona fide*" unless the claimant cannot be accommodated without undue hardship. These provisions have been interpreted by the courts numerous times, resulting in a general framework for assessing discrimination claims and any duty to accommodate that may arise.

The Supreme Court of Canada first dealt with the concept of religious accommodation in *Ontario (Human Rights Commission) v. Simpsons Sears* (the *O'Malley* case).[5] O'Malley became a member of the Seventh-Day Adventist church and as a result was no longer able to work on that church's Sabbath — *i.e.* from sundown Friday to sundown Saturday. However, periodic Friday night and Saturday shifts were required of all employees, as this was the store's busiest time during the week. Justice McIntyre, on behalf of the Court, held that a blanket employment rule honestly made for sound economic and business reasons may nevertheless be discriminatory if it affects a person differently from others to whom it is intended to apply. The Court enunciated a bifurcated analysis with respect to assessing discrimination complaints. Under this approach, claims were divided into "direct" discrimination and "adverse effect" discrimination. The Court explained that direct discrimination occurs where "an employer adopts a practice or rule which on its face discriminates on a prohibited ground". Adverse affect discrimination, on the other hand, arises where an employer

> for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.[6]

Either type of rule could lead to a *prima facie* case of discrimination based on creed. Nonetheless, the Court in *O'Malley* held that the remedies available differed in the two types of cases. Where a rule discriminated directly, and did not meet any statutory justification test, it would simply be struck down. However, it constituted a full defence to a complaint of direct discrimination if the rule

---

[5] *Supra*, note 1.

[6] *Ibid.*, at para. 18.

was found to be a *bona fide* occupational requirement (BFOR). In the case of adverse effect discrimination, the rule or condition would not be struck down, but its effect on the complainant would be considered and some accommodation would be required from the employer for the benefit of the complainant. There would be no need to justify the rule as a BFOR, as a facially neutral rule required none.

Justice McIntyre, on behalf of the Court, stated that the *Code* must be "construed and flexibly applied to protect the right of the employee who is subject to discrimination and also to protect the right of the employer to proceed with the lawful conduct of his business".[7] He went on to adopt what the American courts had described as a "duty to accommodate" short of undue hardship:

> . . . the duty to accommodate, referred to in the American cases, provide[s] that where it is shown that a working rule has caused discrimination it is incumbent upon the employer to make a reasonable effort to accommodate the religious needs of the employee, short of undue hardship to the employer in the conduct of his business.
>
> . . .
>
> . . . in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer.[8]

As there was no express statutory basis for such a proposition in the *Code* at the time, the Court saw fit to import this doctrine to fill the "vacuum in the *Code*".[9]

Fourteen years after the *O'Malley* decision, in *Meiorin*,[10] the Supreme Court developed a revised "unified" approach to resolving cases of discrimination. Justice McLachlin (now the Chief Justice) outlined various problems with the conventional bifurcated approach set out in *O'Malley* and proposed a new unified approach to discrimination claims that imposed a duty to accommodate in

---

[7] *Ibid.*, at para. 20.

[8] *Ibid.*, at paras. 20, 23.

[9] *Ibid.*, at para. 20. The *Code* has since been amended, and the current s. 11 now codifies this doctrine, in the case of constructive or adverse effect discrimination, as follows:

> 11. (1) A right of a person under Part I is infringed 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, except where,
>
> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
>
> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.
>
> (2) 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.

[10] *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.

all cases in which *prima facie* discrimination had been proven, whether the discrimination was categorized as direct or adverse effect. The Court also created a new test for determining whether a workplace rule or standard that was *prima facie* discriminatory could be justified as a BFOR. Under that test, an employer may justify the impugned standard by establishing, on a balance of probabilities:

(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
(2) that the employer adopted the particular standard in an honest and good-faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.[11]

Justice McLachlin went on to state that this approach was premised on the requirement that employers develop standards which accommodate the potential contributions of all employees, in so far as this could be done without undue hardship. In short, "[u]nless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the *prima facie* case of discrimination stands".[12]

Application of the *Meiorin* test often turns on the third step, as the first two steps are generally not hard to meet. In order to establish that a standard is reasonably necessary to the accomplishment of the legitimate work-related purpose, the employer must prove that it cannot accommodate the claimant without undue hardship. The Court in *Meiorin* elaborated on what the term "undue hardship" means, drawing on its previous jurisprudence dealing with both the justification for direct discrimination and the concept of accommodation in adverse effect discrimination cases.

As had been noted by Justice Sopinka in *Central Okanagan School District No. 23 v. Renaud*,[13] more than negligible effort is required to satisfy the duty to accommodate: "The use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test".[14] Justice Wilson, in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*,[15] listed factors that may be considered when assessing an employer's duty to accommodate to the point of undue hardship:

---

[11] *Ibid.*, at para. 54.
[12] *Ibid.*, at para. 55.
[13] *Supra*, note 1.
[14] *Ibid.*, at para. 19.
[15] [1990] S.C.J. No. 80 (QL), 2 S.C.R. 489.

> . . . financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.[16]

In *Meiorin*, the Court noted that the factors going to undue hardship are not entrenched, except to the extent that they are expressly included or excluded by statute. In all cases such considerations are not set in stone and "should be applied with common sense and flexibility in the context of the factual situation presented in each case".[17] McLachlin J. went on to enumerate some of the questions that may be asked in the course of this analysis:

(a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
(b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
(c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
(d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
(e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
(f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? As Sopinka J. noted in *Renaud*, the task of determining how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, a union.[18]

If individual differences can be accommodated without imposing undue hardship on the employer, then the standard is not a BFOR and the employer has failed to establish a defence to the charge of discrimination.

The Requirement for Work in Exchange for Compensation

Although not specifically dealing with a claim for paid leave in respect of religious holidays, the Ontario Court of Appeal has considered the question of

---

[16] *Ibid.*, at p. 521.
[17] *Chambly*, *supra*, note 2, at p. 546.
[18] *Meiorin*, *supra*, note 10, at para. 65 [internal citations omitted].

whether the requirement to work in exchange for compensation contravenes human rights legislation, in *O.N.A. v. Orillia Soldiers Memorial Hospital.*[19] That case involved a collective agreement term providing that employers would no longer make premium contributions to benefit plans on behalf of employees who remained on unpaid leave after a certain period had expired; the issue was whether that provision discriminated against employees on the ground of disability.

At the outset the Court held that in order to determine if the provision was discriminatory on its face, it was necessary to identify the proper comparator group. Noting that the purpose of benefit premium contributions is to provide an additional form of compensation in exchange for work, the Court ruled that the proper comparator group consisted of other employees on unpaid leave, not other employees who were actively working. On this basis, the Court concluded as follows:

> It is not prohibited discrimination to distinguish for purposes of compensation between employees who are providing services to the employer and those who are not. It would be prohibited discrimination for the employer to provide different compensation to different groups of employees providing services, if the distinction were based on a prohibited ground.[20]

This is not inconsistent with the Supreme Court of Canada's holding in *Chambly*, as the discrimination in that case was not direct, but constructive (*i.e.* adverse effect). Indeed, the Court of Appeal went on to hold that the collective agreement provision terminating employer benefit premium contributions could be regarded as resulting in adverse effect or constructive discrimination:

> In my view, it is possible to find that the neutral rule in this case has a discriminatory effect within the meaning of s. 11(1). To repeat, the neutral rule may be stated as follows: the employer contributes toward premium coverage of participating eligible nurses in the active employ of the hospital. This rule has the effect of requiring the group of employees identified by the prohibited ground of discrimination to assume the burden of paying the entire contributions for benefits if they wish to maintain coverage. Admittedly, these employees are treated no differently than other employees on unpaid leave of absence, the difference is that these employees are adversely affected by the rule because of their disability. The issue then is whether the employers are entitled to the BFOQ justification in s. 11(1)(b). In my view, they are.[21]

However, the Court went on to hold that "requiring work in exchange for compensation is a reasonable and *bona fide* requirement".[22] As a result, according to the Court, no compensation-related accommodation is required or possible in circumstances where employees are incapable, by reason of their disability,

---

[19] *Supra*, note 3.
[20] *Ibid.*, at para. 27.
[21] *Ibid.*, at para. 53.
[22] *Ibid.*, at para. 58.

of performing work. In the Court's words, "these employees are on long-term disability because they are unable to provide any service. Thus, there is no amount of accommodation that the employer could provide that would overcome the fundamental problem that these employees are unable to work".[23]

Orillia Soldiers has been widely accepted by courts and arbitrators as setting forth the governing legal principles on the duty to accommodate disabled employees in matters of compensation.

One of the more thoughtful analyses of these issues is contained in *Real Canadian Superstore*,[24] in which the Saskatchewan Court of Appeal considered whether collective agreement provisions making eligibility for bonuses conditional on full-time employment discriminated against employees who were working part-time hours as a result of their disabilities. In her decision, Justice Smith drew a distinction between the accommodation of the special needs of disabled workers, the purpose of which is to facilitate their participation in the workplace, and the compensation owing to such workers:

> Generally, to find that a rule or policy of general application, neutral on its face, has a discriminatory adverse impact on an individual or group identified by a protected ground, it is necessary to find disparate treatment of the individual or group in comparison to other members of the comparator group not so identified, on the basis of the protected personal characteristic. In my view, it is not possible to make that finding in this case. Again, were it sufficient, in order to find discrimination in the prohibited sense, to find simply that an employee has received less benefit than he or she would have received had he or she not been disabled, there would be no need for even entering into the complex determination of the appropriate comparator group, based upon the underlying purpose or rationale of the policy or rule at issue. On the simple "but for" test these factors, endorsed and relied upon in repeated decisions of the Supreme Court, simply do not figure in the equation.
>
> The Board's confusion in this case is attributable, I believe, to a more general and widely prevalent confusion and uncertainty in relation to the scope of the "duty to accommodate" the special needs of protected groups that arbitrators, human rights commissions and the courts have, generally, implied into both legislated protection against discrimination and the guarantee of equality in s. 15 of the *Charter*. In particular, the Board has, in my view, failed to give effect to a distinction that must be drawn between the duty imposed on employers to accommodate differences in order to facilitate equal access to or participation in the workplace for individuals and groups who may be excluded by reason of sex, religion or disability, for example, and the prohibition against discriminatory disparate treatment in relation to compensatory benefits provided for work performed.
>
> . . .
>
> What the Ontario Court of Appeal has recognized, in *Orillia Hospital*, is that comparisons in relation to compensation issues must be made in recognition of the reality that normally the purpose or underlying rationale of such benefits is to

---

[23] *Ibid.*, at para. 60.

[24] *Real Canadian Superstore v. U.F.C.W., Local 1400*, [1999] S.J. No. 777 (QL), 182 D.L.R. (4th) 223 (Sask. Q.B.); affirmed [2000] S.J. No. 334 (QL), 187 D.L.R. (4th) 759 (Sask. C.A.).

> compensate employees for work performed. Accordingly, to distinguish among employees on the basis of whether and to what extent work has been performed does not contravene the equality principles which drive the interpretation of legislation such as ours. To say that the duty to accommodate inherent in the Saskatchewan *Code* does not oblige employers simply to top up wages of disabled employees who are unable, even with full accommodation to the point of undue hardship, to perform work is simply another way of saying the same thing.[25]

As another Saskatchewan judge put it in *Canada Safeway Ltd.*,[26] "[t]he duty to accommodate does not extend so far as to oblige an employer to provide better salary and benefits to a disabled employee than it provides to non-disabled employees working the same number of hours".[27]

Paid Religious Holidays

THE SUPREME COURT OF CANADA'S DECISION IN *CHAMBLY*

The Supreme Court considered the issue of entitlement to time off for religious leave in the context of discrimination and the duty to accommodate in *Commission scolaire régionale de Chambly v. Bergevin*,[28] a case arising under the Quebec *Charter of Human Rights and Freedoms*.[29] The Court indicated that the principles outlined in *O'Malley*[30] had been followed in other provinces and in the federal sphere, and that the principles set out in that decision were equally applicable in Quebec. In *Chambly*, three Jewish teachers employed by the respondent school board took a day off to celebrate Yom Kippur. The

---

[25] *Ibid.*, at paras. 31-32, 56.

[26] *Canada Safeway Ltd. v. R.W.D.S.U., Local 454*, [2004] S.J. No. 153 (QL), 246 Sask. R. 260 (Q.B.).

[27] *Ibid.*, at para. 26. Notably, in its *Orillia Soldiers* decision, the Court of Appeal disagreed with the view expressed by Arbitrator Richard Brown in *Versa Services Ltd. and Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees Union, Local 647*, [1994] O.L.A.A. No. 22 (QL), 39 L.A.C. (4th) 196. Brown had held that the concept of adverse effect or indirect discrimination applied only to issues of participation and not compensation. As set out above, the Court of Appeal disagreed, holding that a failure to compensate employees because of their disability can amount to adverse effect discrimination, but that an employer is not, by reason of the *bona fide* occupational qualification justification, required to accommodate disabled employees who cannot work by paying them compensation, as the provision of labour for compensation is itself a BFOR. Presumably, undue hardship, on this reasoning, is met at the point where the only accommodation would be to provide an employee with wages or benefits where he or she is not working in exchange for payment. In either event, the result is the same, and rests on the notion that, at least in the employment context involving disabled employees, the provision of work is the fundamental *quid pro quo* of compensation. Interestingly, subsequent to *Orillia Soldiers*, in *Canadian Bank Note Co. and Graphic Communications Union, Local 41-M*, [1999] O.L.A.A. No. 700 (QL), Arbitrator Brown indicated that he agreed with and preferred the Court of Appeal's *Orillia Soldiers* approach to his earlier decision in *Versa Services*.

[28] *Supra*, note 2.

[29] R.S.Q. c. C-12.

[30] *Ontario (Human Rights Commission) v. Simpsons Sears*, *supra*, note 1.

school board granted them leave of absence, but without pay, and a grievance was brought seeking reimbursement for the day's pay. Historically, the teachers had been able to utilize special leave provisions contained in their collective agreement in order to receive pay for this day off. However, the school board ceased allowing the teachers to use this provision in 1983.

The Supreme Court held that the school calendar, although neutral on its face, and thus not directly discriminatory, had the effect of adversely discriminating against Jewish teachers. In the Court's view, as a result of their religious beliefs, and in the absence of some accommodation by their employer, they had to lose a day's pay to observe their holy day while a majority of their colleagues had their religious holy days recognized as holidays from work. As the Court stated:

> In my view, the calendar which sets out the work schedule, one of the most important conditions of employment, is discriminatory in its effect. Teachers who belong to most of the Christian religions do not have to take any days off for religious purposes, since the Christian holy days of Christmas and Good Friday are specifically provided for in the calendar. Yet, members of the Jewish religion must take a day off work in order to celebrate Yom Kippur. It thus inevitably follows that the effect of the calendar is different for Jewish teachers. They, as a result of their religious beliefs, must take a day off work while the majority of their colleagues have their religious holy days recognized as holidays from work. In the absence of some accommodation by their employer the Jewish teachers must lose a day's pay to observe their holy day. It follows that the effect of the calendar is to discriminate against members of an identifiable group because of their religious beliefs. The calendar or work schedule is thus discriminatory in its effect.[31]

It followed, in the Court's view, that the employer had to take reasonable steps to accommodate the adversely affected employees.

With regard to the duty to accommodate, the Court found it significant that because the annual salary of the teachers was based upon 200 working days when students were at school, it would be impossible for a Jewish teacher to make up for a lost day by working on another day (for example, a weekend or holiday). In short, teachers can teach only when the school is open and students are in attendance. In the Court's view, the loss of a day's pay which could not be made up in any way had a real impact on the teachers and their families. The Court readily found that replacing Jewish teachers on Yom Kippur and compensating them for their absence did not constitute undue hardship. The school board had provided no evidence that paying the salaries of the Jewish teachers would impose an unreasonable financial burden upon it. Furthermore, the Court pointed out, this would indeed be difficult for the board to establish, given that the collective agreement specifically provided for paid "special leave" that could be utilized where teachers were absent for what the parties considered to be a good or valid reason, as well as for other leave provisions that applied in various situations. The Court stated: "the collective agreement

---

[31] *Supra*, note 2, at para. 18.

provides a flexibility that demonstrates that a reasonable accommodation could be made".[32] The Court concluded 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".[33] The Court also found support for this conclusion in the board's pre-1983 practice of paying teachers on Yom Kippur.

However, despite the result in *Chambly*, the impact of this decision has been relatively limited, being confined to situations in which scheduling changes were not possible because of the nature of the workplace, and in which paid leave entitlements were available in the collective agreement and could be invoked by the employees. To a large extent, this is due to the fact that arbitrators and courts have, explicitly or implicitly, invoked the *Orillia Soldiers* "work for pay" *quid pro quo* to trump claims for religious accommodation.

THE INTERSECTION OF *CHAMBLY* AND *ORILLIA SOLDIERS*: CONFLICTING INTERESTS IN RELIGIOUS ACCOMMODATION CASES

In its 2000 decision in *Ontario (Ministry of Community and Social Services) v. O.P.S.E.U.* (the *Tratnyek* case),[34] the Ontario Court of Appeal considered a claim by an employee who had requested a number of days off for religious purposes and who had been offered various options that would have enabled him to receive pay on those days (including use of five mandatory days off, or of extra paid days he had banked as a result of voluntarily working a compressed work week). The employee declined the employer's offer on the basis that these days were also available to other employees, and that it was discriminatory to require him to use them for religious observance purposes. Although it did not specifically consider the *Orillia Soldiers* decision, the Court found that the employer had met its duty to accommodate by offering scheduling changes (such as the compressed work week) so that employees could fulfil their religious obligations without having to lose wages or encroach on pre-existing earned entitlements such as vacation time. According to the Court, "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".[35]

Referring to *Chambly*, the Court also held that "[j]ust as scheduling changes can provide reasonable accommodation in some cases, in others they will not. If the proposed scheduling change occasions significant hardship or

---

[32] *Ibid.*, at para. 39.

[33] *Ibid.*, at para. 40.

[34] *Ontario (Ministry of Community and Social Services) v. O.P.S.E.U.*, [2000] O.J. No. 3411 (QL), 50 O.R. (3d) 560 (C.A.).

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

inconvenience to the employee, other forms of accommodation must be explored".[36] In this respect, in the Court's view, the result in *Chambly* would have been different had reasonable scheduling changes been available and presented to the teachers; it was only because the day could not be made up that the Supreme Court of Canada held that the employees should have been permitted to access their entitlement to paid days off in the collective agreement. Thus, nothing in *Chambly* stood for the proposition that employers cannot fulfil their duty to accommodate by offering appropriate scheduling changes, where such changes are reasonably available.

Echoing *Orillia Soldiers* (but not referring to it), the Court observed that if scheduling changes were feasible, they would enable "employees to observe their religious holy days without loss of pay and without having to encroach on pre-existing earned entitlements, while at the same time completing their assigned hours of work, *thereby relieving the employer from having to pay them for days on which they provide no service*".[37] However, it is not clear whether the Court of Appeal was suggesting that there are circumstances in which an employer may be required to pay for days when an employee does not provide services because of a religious holiday. In addition, the Court of Appeal's decision in *Tratnyek* did not have to address the application of the undue hardship standard in situations where (unlike *Chambly*) the collective agreement does not provide for paid time-off entitlements available to be used for religious holidays, and (like *Chambly*) no reasonable scheduling changes could be made — *e.g.*, if Tratnyek had not worked a compressed work week.

What does appear clear, however, from the decisions in both *Chambly* and *Tratnyek* is that if they are available, employers must permit, and indeed can require, employees to use at least some kinds of entitlement to paid time off under the collective agreement.

Outside of the judicial arena, three recent decisions reveal the extent to which adjudicators have been, directly or indirectly, affected by *Orillia Soldiers* in considering claims for paid time off to observe religious holidays. In *Toronto District School Board and C.U.P.E., Local 4400, Unit B*,[38] Arbitrator Whittaker dealt with a claim by a teacher who had requested three days' paid leave in order to celebrate Passover; the Board provided leave, but without pay. The parties agreed that in the particular circumstances of the grievor's job as a teacher of English as a Second Language, his work — as in *Chambly* — could not be assigned or performed in a different way so as to permit him to make up the time. As Arbitrator Whitaker pointed out, it is "well established that where an employee must forgo wages to observe religious holidays . . . this is on the face of it, discrimination contrary to ss. 5 and 11 of the *Code*". Thus, the issue before him was whether the employer was required to

---

[36] *Ibid.*, at para. 46.

[37] *Ibid.*, at para. 51 [emphasis added].

[38] [2008] O.L.A.A. No. 692 (QL), 178 L.A.C. (4th) 182 (Whitaker).

provide paid leave without receiving labour in return, as an appropriate accommodation to address what would otherwise be discrimination.

Following *Chambly*, Arbitrator Whitaker readily concluded that the employer's practice was discriminatory on its face. However, relying on *Orillia Soldiers*, he noted that requiring labour in exchange for wages was, in general, a reasonable and *bona fide* occupational requirement:

> [W]hether employer accommodation is directed to the needs of a disabled employee or an employee seeking to participate in religious observance, the goal and objective should generally be the same. That goal is to assign work in such a manner and to support and enable the employee to provide labour — in return for wages. The goal or objective is not to provide income continuation where no work can be performed.
>
> . . .
>
> In dealing with claims for accommodation arising from disability, it is well accepted that an accommodated employee who cannot work a full schedule of hours is not entitled necessarily to be paid for those hours which cannot be worked. Why should it be different if the employee cannot work because of religious obligations rather than disablement?
>
> The employer's obligation is not to pay for unearned wages, but rather to reconfigure the work and/or its assignment, to the point of undue hardship.
>
> . . .
>
> I conclude from this overview that the goal of accommodation in employment is to permit the employee to work and to obtain the benefit of compensation for work. The most essential feature of the wage/labour relationship is this exchange of two things of value — labour from the employee to the employer — and wages from the employer to the employee.
>
> In the grievor's circumstances this must mean that the employer is obliged to accommodate by doing whatever is possible to rearrange or reassign the grievor's work so that he can work the full number of days that remain to be worked in the long-term assignment for which he has posted — while being given the time off to attend to his religious observance.
>
> Accommodation is not the payment of wages for no work in exchange, but rather the facilitation of the opportunity to work all of the time available for the performance of work. It is the ability to earn full wages and to take the holy days off of work.[39]

Arbitrator Whitaker went on to hold that, in light of the agreement between the parties that the grievor's work could not be reassigned or rescheduled in such a way as to permit him to make up the time, the obligation to accommodate up to the point of undue hardship had been met. As a result, the grievor was not entitled to paid days off for religious leave, since the exchange of labour for

---

[39] *Ibid.*, at paras. 43, 45-49.

compensation was a BFOR in accordance with s. 11(1)(a) of the *Human Rights Code*.

One of the cases reviewed by Arbitrator Whitaker was *Markovic v. Autocom Manufacturing Ltd.*,[40] a decision of Ontario Human Rights Tribunal Adjudicator Sherry Liang. That case involved a member of the Serbian Orthodox Church, who alleged that his employer had discriminated against him by refusing to provide paid leave for his observance of the Eastern Orthodox Christmas (which occurred in January). On behalf of the employee, the Human Rights Commission argued that two days of paid leave from work must constitute one of the options made available to an employee on an equal basis with other scheduling options. According to the Commission, an employer could avoid offering the two days of paid leave only if providing those days would cause the employer to suffer undue hardship.

Holding that a schedule of work based on holidays recognized under the *Employment Standards Act* is secular in nature, but discriminatory in effect, the Tribunal found that the duty to accommodate must "co-exist" with the regular contract of employment, which is based on the exchange of services for pay.[41] Thus, although the Tribunal did not make reference to *Orillia Soldiers*, it applied its conception of the fundamental workplace *quid pro quo* — services in exchange for pay. In the result, the Tribunal held that the duty to accommodate could be met by providing employees with options for scheduling changes that did not result in any loss of pay to the employee, including making up time when the employee was not otherwise scheduled to work, working on a secular holiday if the employer operated on that day, switching shifts with another employee, or where possible otherwise adjusting the employee's shift schedule. As the Tribunal concluded, "where the 'problem' is the need for time, the solution is the enabling of time".

As for *Chambly*, the Tribunal emphasized that in that case, not only were scheduling changes unavailable, the required accommodation was simply to obligate the employer to permit the use of paid absences already provided for

---

[40] [2008] O.H.R.T.D. No. 62 (QL) (Ont. H.R. Trib.).

[41] In this respect, both *Toronto District School Board* and *Markovic* also refer to the Supreme Court of Canada decision in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000*, [2008] S.C.J. No. 44 (QL), 2 S.C.R. 561. In that case, in considering the issue of an employer's duty to accommodate a disabled employee's long-term absence from work, the Court stated, at paras. 14-15 (echoing *Orillia Soldiers*): "The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship. . . However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration". As the *Markovic* tribunal put it: "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". *Ibid.*, at para. 38.

in the collective agreement. According to the Tribunal, the decision in *Chambly* did not support the Commission's position that an employer has a duty to provide up to two paid days off for religious observances, unless to do so would cause undue hardship. Rather, it was the combination of collective agreement provisions and the fixed work schedule that led to the *Chambly* Court's conclusion. For this reason, *Chambly* did not establish as a general principle that employers must pay employees for time off for religious observances. As the Tribunal concluded:

> The result in *Chambly* is in my view consistent with the principles I have expressed above. Absent the option of scheduling changes, the most appropriate solution was the use of a special leave provided for under the collective agreement. The Court of Appeal in *Tratnyek* concluded that the result in *Chambly* would have been different had reasonable scheduling changes been available (see *Tratnyek*, para. 49), and I agree with its understanding of the *Chambly* decision. The Supreme Court did not establish as a general principle that employers must pay employees for time off for religious observances.[42]

However, significantly, the Tribunal did state that other accommodation options would have to be considered where scheduling changes were not available, or where scheduling changes were available but were not suitable. The Tribunal did not identify what would or would not constitute undue hardship in such circumstances.

Finally, in *Turning Point Youth Services and C.U.P.E., Local 3501*,[43] a board of arbitration considered a grievance challenging the denial of two days off with pay to celebrate the Jewish holidays of Rosh Hashanah and Yom Kippur. The employer, though refusing the request for pay, had offered various options for addressing the issue of pay for the days, none of which were acceptable to the grievor. Those options included working a compressed work week, using earned entitlements under the collective agreement (such as vacation or float days), and changing the grievor's schedule so that she would not have to work on the two days.

Reviewing the case law, Arbitrator Herman concluded that courts and arbitrators subsequent to *Chambly* have held that payment for days off required for religious purposes is not the only reasonable method of accommodation. Although he did not consider *Orillia Soldiers*, the arbitrator accepted the Court of Appeal's decision in *Tratnyek* as binding authority for the proposition that "an employer need not establish that it would cause undue hardship to pay employees for the day off before offering other options for reasonable accommodation, options that can in given circumstances include scheduling changes".[44]

---

[42] *Supra*, note 40, at para. 51.
[43] [2008] O.L.A.A. No. 83 (QL), 169 L.A.C. (4th) 388 (Herman).
[44] *Ibid.*, at para. 14.

Conclusion

Based on the law as it currently stands in Canada, the duty to accommodate to the point of undue hardship applies to employees who, because of their religious beliefs, cannot work on certain non-Christian religious holidays. The duty to accommodate applies not only because Christian employees receive two paid days off for Christmas and Easter but, more generally, because of the discriminatory effect of a majoritarian work schedule on employees with non-Christian religious beliefs.

Under the case law to date, it seems clear that the duty to accommodate to the point of undue hardship does not automatically require that an employer pay employees for days when they take non-Christian religious days off work, at least where reasonable alternatives are available. Courts, arbitrators, and tribunals generally consider the availability of reasonable scheduling changes and the existence of discretionary collective agreement entitlements to paid time off as reasonable accommodations of employee religious beliefs. Standing alone, this does not seem objectionable. Where employee religious beliefs can be accommodated in a manner that is objectively reasonable, and that does not impose a hardship or material inconvenience for them, without imposing a loss of pay, then even in the absence of undue hardship on the employer, this would appear to be a reasonable accommodation, and there would not seem to be any compelling reason to obligate an employer to go further.

What has not yet been satisfactorily addressed, however, is the application of the undue hardship standard in other situations, for example, where scheduling changes are not available, where no scheduling change can be made or an employee has a reasonable basis for objecting to proposed scheduling changes, or where the collective agreement does not contain provisions permitting discretionary paid leave that can be utilized to accommodate the employee's interest in not losing pay. In those cases, can the employer meet its obligation to accommodate short of undue hardship simply by invoking the *Orillia Soldiers* principle of "no work, no pay" (as, for example, Arbitrator Whitaker appears to have done in the *Toronto District School Board* case)?

As discussed above, there is certainly considerable support for the proposition that payment for time not worked is inconsistent with the fundamental nature of the employment relationship, and thus with the existence of the duty to accommodate in employment. On this view, just as disabled employees cannot claim that they have a right under human rights legislation to be paid when they are unable to work, so too religious employees should not be able to claim the protection of human rights legislation in order to be paid for their religious holidays when they are unable to work.

At the same time, it is difficult to reconcile this approach with the individualized approach to undue hardship that the duty to accommodate is supposed to, and normally does, require (and as it did in *Chambly*, where the Supreme Court of Canada explicitly took into account the lack of evidence that the

employer would face any significant increase in costs or inconvenience if it paid employees for taking Yom Kippur off). As a result, where no reasonable or suitable scheduling or collective agreement alternatives are available to accommodate an employee, it should not automatically be deemed to be undue hardship on an employer that it be required to pay the employee for time off to observe a religious holiday. Instead, the determination of that issue should depend on weighing and assessing the actual evidence relating to such factors as the employer's size, the size of the functional unit in question, the number of employees who request the leave, the number of days of leave sought, the duties of the employees seeking leave, the potential disruptions to work flow or productivity, the potential risks if any to others, whether the employer would incur additional costs as a result of the employee's absence, steps taken by the employee in requesting the paid leave, and steps the employee could take to assist in the accommodation of the leave request.[45] In other words, instead of a blanket rule that paid leave can never be required, the employer should have to establish, as it does in other accommodation contexts, that there would be a serious impact on it and its overall operations.

In this respect, the supposed analogy to the approach taken in *Orillia Soldiers* to disability-based discrimination is not particularly strong. Unlike the application of the *quid pro quo* principle of "no work, no pay" in the case of disability, in the case of religious holidays there has been a societal and legislative determination to provide paid time off for at least two Christian holidays. As a result, observant Christian employees do not face the same prospect of losing pay in order to observe their religious holidays, as do non-Christian employees. In other words, the principle of "no work, no pay" has already been abrogated for at least two Christian holidays. It seems disingenuous, to say the least, to purport to extend it to non-Christians, at least to the extent of two paid days off or religious holidays per year.

Even beyond two days, the fact that as a society we pay followers of the majority Christian religion for two of their most significant holidays seems to diminish the applicability of the *Orillia Soldiers* principle to non-Christian religious holidays, whether there are two such signficant holidays, or more.[46] Merely because adherents of the majoritarian Christian religion receive paid

---

[45] Some of these points were identified by Arbitrator Whitaker in an earlier decision in *Seneca College of Applied Arts & Technology and O.P.S.E.U., Local 561*, [2000] O.L.A.A. No. 926 (QL), 93 L.A.C. (4th) 355, where he considered the factors to be taken into account in the application of a collective agreement provision requiring that requests for paid leave of absence for, *inter alia*, religious purposes would not be unreasonably denied.

[46] It may be argued that granting non-Christian employees more than two paid days off for religious holidays would be "reverse discrimination" of some kind. However, it would be to return to the most formal notion of equality to suggest that Christian employees suffer unacceptable discriminatory treatment. The purpose of accommodation is not to equalize the number of paid religious holidays among employees with different religious beliefs, but to advance freedom of religion, short of imposing undue hardship on the employer or other employees. Furthermore, while the effect on employee morale is a legitimate concern in assessing undue hardship, that concern cannot itself be rooted in discriminatory attitudes.

time off for two religious holidays, when it is expected that they will be absent from work to engage in religious observance, does not mean that equal treatment without discrimination will be achieved if adherents of other religions, in which there may be more than two days when such an expectation arises, are limited to two days off with pay to observe their holy days.

This is not to say that non-Christians are *entitled* to paid time off for all of their holidays, but only to suggest that employers should not be given a blanket exemption from the requirement to meet the undue hardship standard in cases of paid leave for non-Christian religious holidays. As Justice Cory stated in *Chambly*:

> I recognize that other cases may demonstrate circumstances which would make reasonable accommodation impossible. For example, if the religious beliefs of a teacher required his or her absence every Friday throughout the year, then it might well be impossible for the employer to reasonably accommodate that teacher's religious beliefs and requirements. However, that is far from the situation presented in this case.[47]

Accordingly, to the extent that the analysis in *Orillia Soldiers* has clouded the appropriate approach to be taken in cases involving alleged religious discrimination arising from a denial of paid leave in respect of religious holy days, the issue calls for a principled re-examination by courts and tribunals.

---

[47] *Chambly*, *supra*, note 2, at para. 44.