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Christmas and Good Friday: Must Non-Christians Receive Two Additional Paid Days Off?

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In a recent decision, the Human Rights Tribunal of Ontario ("Tribunal") confirmed that employers are not necessarily obliged to provide employees who do not observe Christmas and Good Friday with two days of paid religious leave to mirror those public holidays (*Markovic v. Autocom Manufacturing Ltd.*). This decision is particularly helpful to employer's whose workforces are becoming increasingly diverse.

The Facts

The Complainant, Mr. Markovic, was a member of the Serbian Orthodox Church, which celebrates Eastern Orthodox Christmas roughly two weeks after Western Christmas. Mr. Markovic made a complaint to the Ontario Human Rights Commission ("Commission") alleging that his employer, Autocom, discriminated against him on the basis of his creed by failing to pay him when he took time off to observe Eastern Orthodox Christmas.

Subsequent to Mr. Markovic's complaint, Autocom developed a policy to address requests for time off for religious observance. The policy provided employees with a "menu of options" that primarily allowed for scheduling changes, including:

- taking time off and making up time at a later date when the employee would not ordinarily be scheduled to work
- taking time off and making up time by working on a secular holiday when the workplace is operating, subject to the *Employment Standards Act, 2000*
- switching shifts with another employee
- adjusting the employee's shift schedule where possible
- applying outstanding paid vacation time
- taking a leave of absence without pay

The question before the Tribunal was whether Autocom's policy was contrary to the *Human Rights Code* ("Code") and case law regarding religious accommodation.

A key argument against Autocom's policy was the fact that the Commission had a long-standing, non-binding, policy of its own entitled *Policy On Creed and the Accommodation of Religious Observances*. This *Policy* requires employers to provide to employees who are members of non-Western Christian religions at least two days paid leave to mirror the public holidays on Christmas Day and Good Friday. The Autocom policy offered a range of options to non-Western Christian employees. However, the policy did not offer two days *paid* leave as required by the Commission's *Policy*.

The Tribunal's Decision

The Tribunal upheld Autocom's policy, finding that it was not contrary to the *Code* or applicable case law.

The Tribunal's decision is based on two key findings: First, the Tribunal found that the public holidays of Christmas Day and Good Friday "*although [they] ... originated in Western Christian observances ... are now considered secular pause days*". As such, the Tribunal concluded, it is not discriminatory that these specific days are public holidays. However - and this is the Tribunal's second finding - a *work schedule* which permits Western Christians time off to celebrate two of the most important Christian holidays, but which requires non-Christians to work on *their* holy days, *is* discriminatory. In other words, the discrimination arises out of the *work schedule*.

The solution, said the Tribunal - relying on the Court of Appeal's decision in *Ontario (Ministry of Community and Social Services) v. O.P.S.E.U. (Tratnyek)* - is to provide an opportunity for non-Western Christians to observe their holy days without a loss of pay. This does not necessarily require an employer to grant two days paid leave: "*To put it simply, where the "problem" is the need for time, the solution is the enabling of time*". Adjustments to work schedules could in most cases provide an appropriate accommodation).

Lessons Learned

An employer has an obligation to design workplace standards that recognize and accommodate workplace diversity. In the case of religious observance, the Tribunal confirmed that this goal can be met by providing employees with a range of options that do not result in loss of pay (e.g. the majority of Autocom's menu of options).

That is not to say that scheduling changes will always be a reasonable and appropriate accommodation. The nature of some jobs and occupations may not allow for the rearrangement of an employee's schedule. In those cases, the solution may be that the employer must offer a paid day off.

To learn more, or to discuss how the Tribunal's decision may apply to your workplace, please contact a member of our team.

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