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Employers Not Required to Provide Paid Leave to Accommodate Observance of Religious Holidays

As the Canadian workforce becomes increasingly multicultural, employers are faced with issues that may not have been raised in the past. In many cases, employees' religious holidays do not mesh with the statutory holidays provided by the *Employment Standards Act*, and employers may be left wondering to what extent they must accommodate their non-Christian employees, especially when the Human Rights Commission's policies and guidelines clearly provide that accommodation and "equality of treatment" requires that non-Christian employees should be provided with two paid days off to observe religious holidays to compensate for statutory holidays that are also Christian holidays.

Paid time off to observe religious holidays was recently addressed by the Human Rights Tribunal of Ontario in *Markovic & Ontario Human Rights Commission v. Autocom Manufacturing Limited*, [2008] O.H.R.T.D. No. 62. In *Markovic*, an employee filed a discrimination complaint on the basis of creed when his employer failed to provide him paid time off on January 7, the Eastern Orthodox Christmas. After the complaint was filed, the employer initiated a policy for responding to time off requests for religious observance called the "Procedure for Accommodation of Religious Observances." The parties sought a preliminary ruling from the Ontario Human Rights Tribunal as to whether the policy was consistent with the employer's obligations under the *Human Rights Code* and any applicable jurisprudence.

The policy espoused the employer's pledge to "accommodate employees who, by reason of a bona fide religious obligation, must be absent for all or part of a working day, up to the point of undue hardship." Any leave request was required to be submitted in writing, identify the holy day in question, and indicate the employee's preferred form of accommodation from a menu of options which included, *inter alia*, making up the time, working on a secular holiday, switching shifts with another employee, using outstanding paid vacation days or taking a leave of absence without pay. All the options, excepting the option allowing a leave of absence without pay, did not involve a loss of pay (although one option did require use of a vacation day and, thus, a lost vacation day). In any event, the policy did not provide two paid days off for religious observance to parallel payment for the statutory holidays that fall on Good Friday and Christmas Day. In this respect, the employer's facility was generally closed on those holidays, rendering work unavailable on those days.

During the hearing, the Commission, supported by the complainant, argued that the duty to accommodate required that employers provide two paid days off to non-Christian employees who did not receive paid time off during their religious holidays. In this respect, the Commission argued that the outcome, that non-Christian employees had to make up time and negotiate entitlement to religious holidays, was inherently discriminatory. In response, the employer argued that the duty to accommodate did not mandate that employers should pay employees for work not done, and that the duty to accommodate religious freedom was restricted to providing protected groups with an equal opportunity to earn employment income.

Ultimately, the Tribunal held that the employer's policy was consistent with human rights legislation and jurisprudence. Although the Tribunal found that employees are entitled to observe their respective holy days, there was no authority to support the position that an employer must provide non-Christian employees with two days paid time off to mirror the Christian holidays of Christmas and Good Friday. In short, the Tribunal held that where the issue was the need for time, the solution was the enabling of time, which was addressed by the employer's policy. Further, the Tribunal, following previous case law found that requiring non-Christian employees to choose from a menu of options as to how they would make up time was not unfair or discriminatory; the accommodation process inherently requires employers and employees to work together to determine how best to accommodate an individual such that the accommodation does not result in a loss in pay.

This decision provides two salient points. First, the duty to accommodate religious holidays does not require employers to provide paid time off. Second, it is important to note that the Tribunal did not recognize the validity of the Commission's stated policy that accommodation and equality of treatment required employers to provide non-Christian employees with two paid days off to parallel the Christian statutory holidays. Thus, employers should be aware that the Commission's policies, although they may be used as guidelines in some circumstances, are not necessarily accurate statements of law.

The Youth Criminal Justice Act and Police Testimony in Human Rights Tribunal Proceedings

In a recent decision, the Human Rights Tribunal of Ontario (the "Tribunal") has commented on the circumstances in which police officers may testify before the Tribunal with respect to encounters between police officers and young persons. Specifically, the issue before the Tribunal was whether or not the *Youth Criminal Justice Act*, S.C. 2002, c.1 (the "YCJA") applied to the circumstances in this case such that the police officers could not testify until such time as a youth justice court judge issued an order permitting them to do so.

In 2005, a student, by his litigation guardian, filed a complaint with the Ontario Human Rights Commission (the "Commission") against a school board (the "Board") and others (the "Respondents") alleging that the Respondents had

discriminated against him on the basis of race and colour with respect to disciplinary measures. One of the issues in the case relates to a master key for the high school that was found in the possession of a student. The student had obtained the key from the complainant's brother. After discovering the master key was in the student's possession, various school administrators and two police officers were involved in questioning the complainant's brother. The experience of the brother of being interviewed by two police officers is being relied upon by the complainant and the Commission in various ways as evidence in support of the complainant's allegations of racial discrimination.

Before the hearing commenced, the Respondents notified the Tribunal and all parties that the police officers would be subpoenaed to testify. During the examination-in-chief of the complainant's brother by Commission counsel, counsel for the complainant raised an objection as an officer of the court as to whether evidence about the witness's involvement with the police was being given in violation of the *YCJA*. This immediate issue was resolved on the basis that the witness had now obtained the age of 18 years, and therefore could choose to publish any information that would identify him as having been dealt with under the *YCJA*: see s.10(3). The complainant had already testified regarding his brother's interview by the police officer and the day after the complainant's brother testified, the complainant's mother testified regarding her son's interview by the police officers.

The Tribunal requested submissions from the parties as to whether or not the testimony of the police officers would be in violation of the *YCJA*. The complainant's counsel took the position that the evidence would be in violation of the *YCJA* and that the Respondents needed an order of the youth justice court judge permitting the police officers to testify. The *YCJA* provides that except in certain circumstances, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as having been dealt with under the *YCJA*.

Shibley Righton LLP argued on behalf of the Respondents that the complainant's brother was not a *young person dealt with under the YCJA* because the young person had never been arrested or charged by the police. In the alternative, if the young person had been dealt with under the *YCJA*, then the police officers could testify pursuant to one of the exceptions because the publication through the officers' testimony would be made in the course of the administration of justice. Further, in the alternative, because the complainant's brother was over 18 years of age, he may publish or cause to be published information that would identify him as having been dealt with under the *YCJA*. In addition, it would be unfair not to permit the police officers to testify as to their version of events.

Accordingly, the Tribunal was required to consider whether the officers could testify and whether such testimony, without an order from the youth court would violate the *YCJA*. The Vice-Chair of the Tribunal voiced "serious doubts" about whether the proposed evidence of the police officers fell within the scope of the complainant's brother having been "dealt with under this Act" as no charges were laid against the young person nor did it appear that the laying of charges was even contemplated by the police. However, in allowing the officer's testimony, the Tribunal relied upon subsection 110(3) of the *YCJA* and found that in his view, by testifying and putting these allegations in issue in the proceeding, the complainant's brother had "caused to be published" any relevant evidence required to respond to those allegations, including the testimony of the police officers by whom he was questioned and any notes and records that may have been made in relation to the questioning. Accordingly, the Tribunal would allow the police officers to testify without the Respondents' first obtaining an order of a youth justice court judge.

CASES

The Saskatchewan Court of Queen's Bench dismissed an application by parents who sought to enjoin the Sun West School Division from closing a school despite the School Board's failure to comply with certain time requirements as set out in the *Education Act*. *Hanna v. Sun West School Division No. 207*, [2008] S.J. No. 480.

The Ontario Superior Court of Justice allowed an application brought by the Association of Part-Time Undergraduate Students of the University of Toronto for a determination of entitlement to declaratory relief and a mandatory order against the respondents University of Toronto Mississauga Students' Union and Erindale Part-time Undergraduate Students' Association regarding a referendum which had unilaterally changed membership and fees and directly impacted on the Applicant and its members. *Assn. of Part-Time Undergraduate Students of the University of Toronto v. University of Toronto Mississauga Students' Union*, [2008] O.J. No. 3344.

The British Columbia Court of Appeal allowed, in part, an application by the Canadian Union of Public Employees for intervenor status regarding in an appeal from a preliminary arbitration award; the Union was granted intervenor status only in respect of members who were working at the University of British Columbia and therefore had a direct interest in the outcome of the proceedings. *Faculty Assn. of the University of British Columbia v. University of British Columbia*, [2008] B.C.J. No. 1823

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