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Non-Christian Holidays and Your Legal Obligations

Alan Riddell and Kyle Van Schie



One of the big questions facing employers in 2016 is how far to go in accommodating the religious practices of devout Muslims, Jews and other religious minorities in the workplace. This is a potentially explosive issue, as witnessed by the passions raised in the last federal election, when the Harper government implicitly invited voters to weigh in on whether Muslim women ought to be permitted to wear niqabs to citizenship ceremonies.



Alan Riddell

Much the same question now extends into the workplace. As an employer, must you now permit Muslim employees to wear the niqab to work? Do you also have to give them time off work, several times a day, to perform their prayers, as all observant Muslims are encouraged to do in the *Qur'an*? Can your Jewish employees insist on your providing paid days off for Hannukah, and then working on Christmas or Easter?

Such is the dilemma now facing HR managers across Canada in 2016 just as the country seeks to integrate into its workforce some 25,000 Syrian refugees, most of them Muslims.



Kyle Van Schie

The Ontario *Human Rights Code* explicitly prohibits an employer from discriminating against Muslim, Jewish and other employees on the basis of "creed" or religion, unless it can show that such discrimination is necessary to prevent "undue hardship" to itself and its business. But in practice, trying to determine when a religious custom is really part of a "creed," and when accommodation for believers in that "creed" genuinely gives rise to "undue hardship" for the employer, can be a highly complex task for even the most legally sophisticated HR staff.

In 2016, that task facing HR managers will be further complicated by the highly subjective test traditionally adopted by Canadian courts for determining when an employee's personal beliefs or customs should be protected under the guise of "freedom of religion." That test is not whether the practice or custom is rooted in any recognized religious text, such as the *Qur'an* or the *Talmud*, but instead simply whether the employee sincerely believes that the custom is fundamental to his or her own interpretation of that religion. In other words, even an uncommon custom followed by a small handful of believers is protected by the *Human Rights Code*, if their convictions are sincere, even though that custom has been overwhelmingly rejected by most mainstream adherents of that same religion! Consider the following questions:

Can religiously devout employees be forced to follow a secular dress code at work?

Under the *Human Rights Code* there are strict requirements for employers seeking to enforce secular dress codes on religiously devout employees. To force a devoutly religious employee to abide by a dress code, in violation of her religious practices, you must be able to prove that your restrictions on what she wears are a *bona fide* occupational requirement of the job and that her failure to abide by them would result in health and safety issues.

However, even if there is a valid health and safety rationale for the dress restrictions you are seeking to enforce, the law still requires that you take steps to accommodate the employee up to the point of suffering 'undue hardship' in your business.

These protections cannot be stretched further than is required by the tenets of the employee's religion. By way of illustration, in *Audmax Inc. v Ontario Human Rights Tribunal*, the Muslim complainant insisted on wearing an exotically coloured hijab to

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Non-Christian Holidays and Your Legal Obligations

her work, in contravention of her employer's dress code. When her employer objected to her wearing that hijab to work on the grounds that it constituted a distraction to others, she filed a complaint against her employer under the *Human Rights Code*. Ultimately, the Divisional Court sided with the employer and dismissed her human rights complaint on the grounds that what the dress code prohibited was not her right to wear a hijab, but rather her right to wear a hijab of that particular type. The Court reasoned that since the dress code only prevented the employee from wearing a hijab of that flamboyant colour and shape, and not another hijab of more modest hue, there had not been any breach of her religious rights. According to the Court, a Muslim employee's religious freedom to choose to wear a hijab does not extend to guaranteeing her a choice of which colour or shape of hijab to wear.

In rendering this verdict, the Divisional Court upheld the legal right of employers to force even the most devout Muslims and Jews to fully comply with corporate dress codes to the extent that this does not impinge on their core religious beliefs.

Must you give non-Christian employees extra days off to celebrate their own religious holidays?

Employers are now required to allow devoutly religious employees to take days off to celebrate their own religious holidays. In *Markovic v Autocom Manufacturing Ltd.*, the Ontario Human Rights Tribunal stated that the adherents of all faiths must be permitted to observe their own particular holy days by not working those days. The Supreme Court of Canada has further ruled that it is now unlawful for employers to adopt a work calendar which gives Christian employees time off at Christmas and Good Friday without permitting employees from other religions to similarly take time off to observe their own separate holy days.

The law is murkier on the issue of whether employers are required to pay their non-Christian employees for the days on which they absent themselves from work to celebrate their religious holidays. Both the Courts and the Ontario Human Rights Tribunal have ruled that employers have no legal obligation to actually remunerate non-Christian employees on those religious holidays unless their employment agreement provides for general paid leave which can potentially be used, at will, for absences from work. However, they have ruled that employers must provide those employees with scheduling options to enable them to take off those days without losing salary. The following are examples of options suggested by the Courts and the Tribunal:

- Permitting the devout employee to switch work shifts with employees of other religious faiths;
- Permitting him or her to work overtime, or through a series of lunch hours for the purpose of subsequently attributing that banked paid overtime to the day of their religious holiday;
- Permitting him or her to use any unused paid sick leave or compassionate care entitlement which he or she may have.

In *Markovic*, the Tribunal expressly rejected the position that employers are required to give non-Christian employees two additional paid days off to mirror the Christian holidays of Christmas and Good Friday. But in *Commission scolaire régionale de Chambly v Bergevin* the Supreme Court ruled that an employer cannot bar an employee from using paid discretionary leave days to celebrate their holy days.

Must you modify the daily work schedule of non-Christian employees to accommodate their religious practices?

Your legal duty to accommodate the religious practices of your employees requires you to show flexibility in their work schedules. By way of illustration, a devout Muslim must be given time off to pray several times per day; similarly, during the winter, devout Jews must be permitted to leave work early enough each Friday afternoon to safely reach home before sundown. This principle was emphasized by the Ontario Human Rights Tribunal in *Qureshi v G4S Security Services*, where the Tribunal found an employer had breached the Human Rights Code by having failed to accede to a scheduling change request from one of its Muslim employees who wanted time off to pray on Fridays. The Tribunal stated that the employer had a legal duty to change the schedule so that the employee could attend Friday prayers.

Do non-Christian employees have a right to insist on working during the Christmas and Easter holidays?

For the moment, non-Christian employees do not have the legal right to insist on working on Christmas and Good Friday. In *Markovic*, the Tribunal stated that although Christmas and Good Friday were traditionally Christian holidays, they have now become secular pause days in modern society. The *Employment Standards Act* defines these days as public holidays, and under the Act no employer can be forced to do business, or permit its employees to work on those days just because they wish to do so. Since staff who elect to work on those public holidays must be paid premium pay equal to approximately 2.5 times their salary, the financial repercussions on all employers could be very severe if non-Christians were allowed to insist on working on those days.

Moreover, given that the *Retail Business Holidays Act* prohibits many retail businesses from carrying on business on Christmas and Good Friday, allowing non-Christian employees, in that sector, to insist on working on those days could put their employer into contravention of that Act.

In 2016, employers would do well to tread carefully when dealing with requests for religious accommodation from employees who are of Muslim, Jewish and other non-Christian backgrounds. Failure to accommodate the religious practices of these employees to the point of undue hardship will cause you to run the risk of a costly lawsuit, harmful to your organization's public image and financial bottom line.

In this area, the caselaw is in constant and rapid evolution. For that reason, a wise HR manager who wishes to minimize the risk of such a lawsuit ought to consult an experienced employment and human rights lawyer, before responding to the accommodation requests from any of her religiously devout employees.

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