

Under the Ontario *Human Rights Code*, discrimination because of religion (creed) is against the law. Everyone should have access to the same opportunities and benefits, and be treated with equal dignity and respect, regardless of their religion.

### SPECIFIC CASES

Dress codes, work schedules or shift work sometimes adversely affect individuals because of religious requirements. When this happens, the obligation to accommodate the individual, based on the needs of the *group*, is triggered under the *Ontario Human Rights Code (Code)*.

#### 1. Dress Codes

Workplaces, services and facilities frequently have rules about dress. These may take the form of having to wear a particular uniform, having to wear protective gear, or a requirement that no person may wear a head covering. These rules may come into direct conflict with religious dress requirements. When they do, there is a duty to accommodate the person, short of undue hardship.

**Example:** A school requires its students to wear a particular uniform that prohibits any head covering. A Muslim girl wears a head covering as part of her religious observance. The school authorities have a duty to accommodate such a student and to permit her to wear the head covering.

**Example:** Certain creeds do not permit men to cut their hair. Workplaces that prefer to employ men with short hair are acting in a discriminatory manner, unless they fall under a legal exception under the *Code*. It should be noted that for health and safety reasons, an employer may ask employees to contain their hair with a net or other appropriate head covering.

**Example:** A school principal tells the parents of a Sikh child that wearing a turban or kirpan to school is not allowed. However, the "five K's" and related religious rules that include the wearing of a turban by Sikh men are part of the Sikh faith. In similar cases, human rights tribunals have rejected arguments by schools based on safety, on the grounds that wearing a ceremonial kirpan does not raise sufficiently compelling safety concerns. Schools must modify their policies to accommodate children seeking to modify the application of the rule for religious reason<sup>[26]</sup>

#### Considerations when dealing with dress codes:

- What is the exact nature of the religious observance?
- What is the reason for the uniform or dress code?
- What measures can be taken to accommodate the person?  
Are there alternatives?
- Are there health or safety factors involved?
- If so, do they involve the health or safety of the employee alone or are there consequences for other employees?
- If so, has the employer shown that to accommodate the employee would create a health or safety hazard that would amount to undue hardship for the employer?

## FACT SHEET: Specific Cases - Religion (Creed) & the Duty to Accommodate

As a rule, uniforms such as school uniforms and work uniforms that have no health or safety rationale can be modified easily to permit the person concerned to wear the required item(s) of clothing. Clothing or gear with a health or safety rationale may constitute a reasonable occupational requirement. Nevertheless, the employer is obliged to accommodate the employee; for example, by seeing whether the gear can be modified to permit the person to wear the religious dress safely (subject to the undue hardship test), or by examining whether the employee can be transferred to another job that may be available in the company that does not require the clothing or gear.

### 2. Break Policies

Some religions require that their members observe periods of prayer at particular times during a day. This practice may conflict with an employer's regular work hours or daily routines in the workplace. The employer has a duty to accommodate the employee's needs, short of undue hardship.

Possible forms of accommodation include:

- a modified break policy
- flexible hours
- providing a private area for devotions.

### 3. Recruitment Procedures

A job applicant's religion cannot be used as a selection criterion for employment. There is an exception if the workplace qualifies as a "special interest" organization under the *Code* (that is, one that is a religious, educational or other social institution or organization that is primarily engaged in serving the interests of persons who are identified by their creed – s. 24(1)(a) of the *Code*). Subject to this exception, attempting to obtain information concerning the applicant's creed at the pre-interview stage of a recruitment process is not acceptable.

Consequently, invitations to apply for employment and job application forms *cannot* contain:

- questions about availability for work that are asked in a manner that reveals the applicant's creed
- questions designed to reveal that religious requirements may conflict with the prospective employer's work schedules or workplace routines
- inquiries as to religious affiliation, places of worship that are attended, or customs observed.

However, nothing prevents the employer from asking questions about creed at a personal employment interview, if the questions are otherwise permitted by the *Code*. For more information, consult the OHRC's publication, [Human Rights at Work](#), which is available on the OHRC's website: [www.ohrc.on.ca](http://www.ohrc.on.ca) .

**Example:** It is permitted at an employment interview to ask religious membership for a teaching position in a denominational school if the job involves communicating religious values to students.

If a person has been offered employment, the person has the obligation to notify the employer of any religious requirements that are relevant to the performance of his or her duties, and to request accommodation.

### 4. Religious Leave

When an employee requests time off to observe a holy day, the employer has an obligation to accommodate the employee. The extent of the accommodation required is an issue that comes up frequently. Does the person have to be paid? Until what point? What about unpaid leave?

Two Christian holidays (Christmas Day and Good Friday) are also statutory holidays in Ontario. This is sometimes held up as evidence of the "non-discriminatory" nature of these holidays. Some employers have argued that because these holidays are now statutory, the employer has no obligation to accommodate employees by paying for other religious holidays. The Supreme Court of Canada has stated that this approach is incorrect. In *Chambly*,<sup>[27]</sup> the Court examined the issue of whether the "secularized" nature of Good Friday and Christmas can excuse a policy alleged to be discriminatory based on religion because it is based on the Christian calendar. The Court wrote:

*Here the schedule of work is based upon the Catholic calendar of holidays. Nonetheless, I think the calendar should be taken to be secular in nature and thus neutral or non-discriminatory on its face. It will be remembered that the majority of the Court of Appeal determined that since the calendar did not have any religious aims, it was not discriminatory. With respect, I think this was an erroneous conclusion. It is true that this approach can properly serve to determine that there has been no direct discrimination. However, the analysis cannot stop there. Consideration must still be given to the effect of the calendar in order to determine if there is indirect or adverse effect discrimination.<sup>[28]</sup> [Emphasis in original.]*

In other words, the secularized nature of traditional Christian holidays may remove the taint of direct discrimination but not of constructive discrimination.

**Example:** In *Chambly*, three Jewish teachers employed by a Catholic school board were denied access to the special purpose paid-leave provisions in the collective agreement so that they could observe Yom Kippur. They were told instead that they could take the day off, but unpaid. The Court held that the school board's leave policy had an adverse effect on Jewish teachers despite the secularized nature of Good Friday and Christmas. The following is the analysis which led to the Court's finding of adverse effect:

*...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 ... [t]hey...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.<sup>[29]</sup>*

The Court then examined the nature of the accommodation that would be required to alleviate the adverse effect. It rejected the view that the school board's offer of unpaid leave to the Jewish teachers was sufficient accommodation. Mr. Justice Cory wrote:

*If a condition of work existed which denied all Asian teachers one day's pay, it would amount to direct discrimination . . . The loss of one day's pay resulting from direct discrimination would not be tolerated...and would fly in the face of human rights legislation. Similarly adverse effect*

## FACT SHEET: Specific Cases - Religion (Creed) & the Duty to Accommodate

*discrimination resulting in the same loss cannot be tolerated unless the employer takes reasonable steps to accommodate the affected employees.*<sup>[30]</sup> [emphasis added.]

The Court concluded religious leave should have been available under the special purpose paid-leave provision in the collective agreement. This did not cause undue hardship to the school board.

A number of general principles emerge from this case that are not limited in their application to the particular terms of the collective agreement examined in *Chambly*.

- The employer has a duty to consider and grant requests for religious leave, including paid religious leave, unless to do so will cause undue hardship.
- Equality of treatment requires at a minimum that employees receive paid religious days off, to the extent of the number of religious Christian days that are also statutory holidays, namely two days (Christmas and Good Friday).
- The number of paid days may be three under some collective agreements which also make Easter Monday a holiday.
- Beyond this point (i.e., two or three days), individuals may still seek accommodation.

For example, measures might include additional paid leave days such as floating days or compassionate leave days, if such exist under company policy or collective agreements, or through unpaid leave.

**The standard for *all* accommodation requests is undue hardship, which places a specific burden on the employer to produce evidence to the standard of undueness of the hardship and of its effect.**

### 5. Flexible Scheduling

The purpose of this measure is to allow a flexible work schedule for employees, or to allow for substitution or rescheduling of days when an employee's religious beliefs do not permit him or her to work certain hours. For example, Seventh Day Adventists and members of the Jewish faith observe a Sabbath from sundown Friday to sundown Saturday. Observant members of these religions cannot work at these times.

Flexible scheduling may include: alternative arrival and departure times on the days when the person cannot work for the entire period, or use of lunch times in exchange for early departure or staggered work hours. Where the person has already used up paid holy days to which he or she is entitled, the employer should also consider permitting the employee to make up time lost or use floating days off.

### 6. Rescheduling and the Employment Standards Act

In some workplaces, rescheduling may be a practicable accommodation measure. However, it may also pose a financial difficulty because of the requirement of paying wages at a premium rate, typically at one and a half times the regular rate, to people who work on Good Friday and Christmas. It should be noted that some employers may argue that the requirement of premium pay for work done on public holidays may present a financial obstacle to accommodation in that it may constitute undue hardship.

## FACT SHEET: Specific Cases - Religion (Creed) & the Duty to Accommodate

In Ontario, the *Employment Standards Act*, S.O 2000 c. 41 outlines various options relating to work and entitlements on a public holiday.

Source: The information in this fact sheet has been developed by the Ontario Human Rights Commission, and can be found at the following web site [Policy on creed and the accommodation of religious observances](#)

---

<sup>[26]</sup> *Sehdev v. Bayview Glen Junior Schools Ltd.* (1988), 9 C.H.R.R. D/4881 (Ont. Bd. of Inquiry); *Pandori v. Peel Board of Education* (1990), 12 C.H.R.R. D/364, aff'd (1991), 14 C.H.R.R. D/403 (Ont. Div. Ct.), leave to Ont. C.A. refused.

<sup>[27]</sup> *Commission scolaire régionale de Chambly v. Bergevin* (1994) 22 C.H.R.R. D/1 (S.C.C.).

<sup>[28]</sup> *Ibid.* at D/11.

<sup>[29]</sup> *Ibid.* at D/11 - D/12.

<sup>[30]</sup> *Ibid.* at D/12.

<sup>31</sup> "Public holiday" is defined in s. 1 of the ESA as including "New Year's Day, Christmas Day and the 26th day of December."

<sup>32</sup> *Supra*, note 21