



# Religious Accommodation in the Workplace

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*Religious tolerance is a very important value of Canadian society ...*

– Supreme Court of Canada, in *Multani* (2006)

## Introduction

Private sector employers are not required to meet *Charter* obligations. Apart from minimum regulated standards for pay and working conditions, the only human right that employees in private companies enjoy is equality.

This extension of equality rights to the private employment sector facilitates social inclusiveness. A job created by private capital serves the common good. Because it supplies the means of livelihood and self-esteem for most people, a job is a life essential. In our multicultural society, jobs cannot be offered or withheld on the basis of permanent, visible, personal attributes that have nothing to do with performance. It is unimaginable, for example, that all people over age 45 would be denied jobs solely because of their age.

These equality rights in the private sector are not purely constitutional; they are also found in regular provincial and federal human rights legislation. As ordinary legislation, these rights can be amended by simple legislative majority. Nevertheless, in our current rights-sensitive era, no one would propose to weaken these legislative equality rights.

## General Legal Principles

Section 7(1)(b) of the *Alberta Human Rights Act* serves as a representative example of legislated workplace equality rights in the private sector: “No employer shall discriminate against any person with regard to employment or any term of condition of employment ... because of the race, **religious beliefs**, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or of any other person.” [emphasis added]

This article examines religious equality. What does accommodation of religion look like in the workplace?

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### Who is an Employer

Due to his religious beliefs, electrician Devinder Wadhwa did not shave his face. Syncrude contracted with a subsidiary company, Casca Ltd., for the supply of clean-shaven union electricians, pursuant to Syncrude's safety handbook, to Syncrude's site on a cost-plus basis. All electricians technically remained employees of Casca Ltd. although Syncrude controlled their work on the site. Was Syncrude an "employer" for purposes of the *Alberta Human Rights Act*?

The Alberta Human Rights Tribunal said "employ" should be given broad interpretation, akin to "utilize," to advance the purposes of human rights legislation. Since these electricians provided services vital to Syncrude's operations, Syncrude was held to be an "employer" within the jurisdiction of the Act.

### What Constitutes Protected Religious Beliefs

Legal protection, and corresponding duty of accommodation, covers "religious beliefs" which presumably are broader than "religion." The term "religious beliefs" is undefined in most legislation perhaps so as not to limit it.

Religion refers to an identifiable system of belief, worship, and conduct, including Native spirituality. According to the Supreme Court of Canada in *Amselem* (2004), religion is "about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to his or her self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection

with the divine or with the subject or object of that spiritual faith."

Personal moral, ethical, or political beliefs are not protected, nor are beliefs that promote violence or hate towards others, or that are unlawful. When religious discrimination at work is alleged, human rights commissions consider the beliefs claimed on a case-by-case basis. Religious beliefs have been the subject of numerous court and human rights commission cases.

### Bona Fide Occupational Requirement Exemption

An employer must not intrude upon any employee's religious beliefs or practices at work unless it can demonstrate that a "bona fide occupational requirement" of the job necessitates such discrimination. For example, a religious denominational school may legitimately reject non-adherent teachers when hiring. In the 1982 case of *The Canadian Human Rights Commission v. Etobicoke*, the Supreme Court of Canada that the employer must show that the term or condition of employment that is discriminatory was made in good faith and is integral to carrying out the functions of a specific position.

In the case of *Bhinder v. CN* three years later, company policy required the employee to wear a hard hat on the job. Bhinder was a Sikh whose religion called for a turban at all times. The employer tried to accommodate Bhinder by offering him other work for which hard hats were not mandatory. He refused and was dismissed. The Supreme Court of Canada said the hard hat rule, for employee safety purposes, was a bona fide occupational requirement made in good faith.

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### Religious Practice and the Workplace

An employee's religion may call for prayer at specific times during the day or worship and assembly on a certain day of the week. Work and break schedules may be shifted to accord with prayer, assembly, holy days, or religious fasting. A quiet place may be set aside on site.

Another common scenario is flexibility toward a uniform dress code. Employers may relax requirements relating to head coverings and facial hair, and may permit religious dress that departs from corporate dress policies.

Some religious beliefs may conflict with the performance of some job duties. For example, a Christian

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physician or pharmacist may object to counselling or facilitating abortions. Some pastors might want to decline presiding over same-sex marriages. Muslims and Jews may object to handling pork. Some people object to consumption of alcohol on religious grounds. Accommodation can be as simple as implementing a conscience clause at work to allow the religious objector to opt out and be excused. It is not yet clear whether conscience clauses are an employee's legal right.

Religious employers, however, will have a harder time extending their religious beliefs and practices to their employees. Christian Horizons, a faith-based charity with a Christian mission asked employees to sign a "Lifestyle and Morality Statement" barring, among other things, "extra-marital sexual relationships (adultery), pre-marital sexual relationships (fornication), reading or viewing pornographic material [and] homosexual relationships..." Earlier this year, an Ontario court found the religious employer to have transgressed a gay employee's equality right based on sexual orientation. *Bona fide* occupational qualification only exceptionally attaches to the employer claiming religious belief on proof of the job's needs, whereas equality for religious beliefs remains the norm for all employees. Religious employers may not be able to demand employees adhere to their faith beliefs when they provide secular services.

### Reasonable Accommodation

Discrimination does not have to be intentional. Workplace religious discrimination occurs whenever employer policies or actions inhibit essential religious activity, even if the policies were in place before the employee was hired. The discriminatory effect of the behaviour is important: one does not have to be singled out for harm. The employer must reasonably accommodate the religious practices of the employee.

Theresa O'Malley was a Seventh-day Adventist employed by Simpsons-Sears. Her religion forbade her working from sundown Friday to sundown Saturday. As no full-time shifts were available that did not require work on Friday or Saturday, O'Malley was dismissed. Simpsons-Sears claimed this was a neutral rule imposed on all employees. In 1985, the Supreme Court ruled that the discriminatory intent of the employer is irrelevant in determining unlawful discrimination. Rules imposed upon employees for good economic or business reasons can still be unlawfully discriminatory. The Court said that employers have a duty to accommodate religious employees to the point of undue hardship on cost, health, safety, or other impacts.

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Larry Renaud was a school custodian and a Seventh-day Adventist in British Columbia in 1992. His work schedule, by collective agreement, had him working Friday shifts from 3 p.m. to 11 p.m. He was dismissed, after he and his employer failed to reach a compromise. The employer blamed the collective agreement, which set out terms for all employees. The Supreme Court sided with Renaud, ruling that one cannot contract out of human rights law, so this could not be a *bona fide* occupational requirement. Both the union and the employer have the duty to accommodate. Unions may approve exemptions from the collective agreement for religious employees. Allowing Mr. Renaud to work Sunday to Thursday instead of Monday to Friday would not have caused the employer undue hardship.

In 1990, Jim Christie was an Alberta dairy employee who joined the Worldwide Church of God, which expected him to take certain days off work. His employer refused his request to take Easter Monday off for religious observance. Christie took the day off work and was replaced the next day. In this *Central Alberta Dairy Pool* case, the Supreme Court of Canada found for Christie but refused to precisely define "undue hardship", preferring that it be decided on a case by case basis. Relevant factors will include the employer's size, workforce safety, restructuring flexibility, and disruption to business operations.

Canadian protection of religion in the workplace goes much farther than comparable U.S.

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law. In a virtually identical case to *Renaud*, an American employee was dismissed for not working a shift on his Sabbath. In *Trans World Airlines, Inc. v. Hardison*, the Supreme Court of the United States approved the dismissal on the ground that accommodating the religious employee's request would punish the other employees asked to take his shift. In the U.S., employer accommodation is expected, but not to anything approaching undue hardship.

Does the employee have to be paid for holy days off work? Two Christian holidays (Christmas Day and Good Friday) are also statutory holidays in Canada. Some employers argued that because these paid "secularized" holidays are statutory, the employer has no obligation to accommodate employees by paying for other religious holidays. In the 1994 case of *Commission Scholaire regionale de Chambly v. Bergevin* the Supreme Court of Canada disagreed. In that case, three Jewish teachers employed by a Catholic school board were denied paid leave to observe Yom Kippur, although they could have taken the day off without pay. The Court said the employer's offer of unpaid leave to the Jewish teachers was insufficient accommodation. Paid leave would not cause undue hardship to the school board.

Gurbaj Multani, a 12-year-old Sikh student in Montreal, was forbidden to wear his ceremonial kirpan dagger to school due to a "no weapons" policy. The school board feared the kirpan presented safety issues, but Multani's family said that banning the kirpan violated his religious rights. In 2006, the Supreme Court of Canada unanimously ruled that his religious rights had been infringed. Ontario had decided in the 1990 case of *Pandori v. Peel Bd. of Education* that the kirpan was allowed as long as it was a reasonable size, worn under clothing, and secured with a stitched flap so it

could not be removed from its sheath. The fact that there were no incidents of misuse of a kirpan in Ontario schools persuaded the Supreme Court. If kirpans are permitted in schools, they will likely be permitted at work.

Jennifer Burgess, a pregnant Mormon dental assistant, was dismissed after receiving four reprimand letters. She had failed to sterilize instruments, was absent from work without notice or explanation, and failed to attend scheduled meetings with her employer and other staff. Claiming her absence was due to her pregnancy and church attendance, she argued that her employer failed to properly accommodate her. The Alberta Human Rights Tribunal in 2009 found that the employer did not know of her pregnancy or of her religious beliefs. Her complaint was dismissed. Employees must inform employers of accommodation needs where they are not obvious.

## Conclusion

Overall, employers will find religious accommodation to be one of the least complicated and burdensome equality obligations. More claims arise from the other enumerated prohibited grounds of discrimination. Religious belief and practice is generally clear and understood. Accommodation responses, where necessary, are often readily apparent. In any case, employees should provide information about their religious beliefs and requested accommodations so that employers can assess and respond.

Canadians do not have to choose between getting and keeping our employment of choice on the one hand, and subscribing to our religious beliefs and practising them on the other hand. We do not have to choose between job and religion. We can have both.

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