INTERNATIONAL HUMAN RIGHTS
LouvainX online course - prof. Olivier De Schutter

READING MATERIAL
related to: section 6, sub-section 4, unit 5: What is discrimination?

Supreme Court of Canada, *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 :

[Larry Renaud, a Seventh day Adventist, was a unionized custodian working a Monday to Friday job for the respondent school board (Board of School Trustees, School District No. 23 (Central Okanagan)). The work schedule, which formed part of the collective agreement, included a Friday afternoon shift from 3:00 p.m. until 11:00 p.m. during which only one custodian was on duty. Renaud's religion, however, prevented his working on his sabbath, which began on sundown Friday to end on sundown Saturday. Renaud was reluctant to accept a further alternative, that he work a four day week, as this would result in a substantial loss in pay. Although he proposed the creation of a Sunday to Thursday shift, something which would have been agreeable to his employer, such an accommodation involved an exception to the collective agreement and required union consent, which the union would not give. After further unsuccessful attempts to accommodate the appellant, the school board eventually terminated his employment when he refused to complete his regular Friday night shift. The appellant filed a complaint pursuant to s. 8 of the British Columbia Human Rights Act against the school board and pursuant to s. 9 against the union.]

The judgment of the Court was delivered by Sopinka, J.

The duty resting on an employer to accommodate the religious beliefs and practices of employees extends to require an employer to take reasonable measures short of undue hardship. In [*Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536], McIntyre J. explained that the words "short of undue hardship" import a limitation on the employer's obligation so that measures that occasion undue interference with the employer's business or undue expense are not required.

The respondents [the school board and the union] submitted that we should adopt the definition of undue hardship articulated by the Supreme Court of the United States in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). In that case, the court stated at pp. 84-85: 'To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship… to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion. By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off …

would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs'.

This definition is in direct conflict with the explanation of undue hardship in *O'Malley*. This Court reviewed the American authorities in that case and referred specifically to Hardison but did not adopt the "*de minimis*" test which it propounded.

Furthermore there is good reason not to adopt the "*de minimis*" test in Canada. *Hardison* was argued on the basis of the establishment clause of the First Amendment of the U.S. Constitution and its prohibition against the establishment of religion. This aspect of the *Hardison* decision was thus decided within an entirely different legal context. The case law of this Court has approached the issue of accommodation in a more purposive manner, attempting to provide equal access to the workforce to people who would otherwise encounter serious barriers to entry. The approach of Canadian courts is thus quite different from the approach taken in U.S. cases such as *Hardison* and more recently *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986).

The *Hardison* '*de minimis*' test virtually removes the duty to accommodate and seems particularly inappropriate in the Canadian context. More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship". These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case. Wilson J., in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, at p. 521, listed factors that could be relevant to an appraisal of what amount of hardship was undue as: '... financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations'. She went on to explain at p. 521 that "[t]his list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case".

The concern for the impact on other employees which prompted the court in *Hardison* to adopt the '*de minimis*' test is a factor to be considered in determining whether the interference with the operation of the employer's business would be undue. However, more than minor inconvenience must be shown before the complainant's right to accommodation can be defeated. The employer must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures. Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society.

[*The risks of hostile reactions or reprisals from other employees*]

The reaction of employees may be a factor in deciding whether accommodating measures would constitute undue interference in the operation of the employer's business. In *Central Alberta Dairy Pool*, Wilson J. referred to employee morale as one of the factors to be taken into account. It is a factor that must be applied with caution. The objection of employees based on well-grounded concerns that their rights will be affected must be considered. On the other hand, objections based on attitudes inconsistent with human

rights are an irrelevant consideration. I would include in this category objections based on the view that the integrity of a collective agreement is to be preserved irrespective of its discriminatory effect on an individual employee on religious grounds. The contrary view would effectively enable an employer to contract out of human rights legislation provided the employees were ad idem with their employer. It was in this context that Wilson J. referred to employee morale as a factor in determining what constitutes undue hardship.

There is no evidence in the record before the Court that the rights of other employees would likely have been affected by an accommodation of the appellant. The fact that the appellant would be assigned to a special shift may have required the adjustment of the schedule of some other employee but this might have been done with the consent of the employee or employees affected. The respondents apparently did not canvass this possibility. The union objected to the proposed accommodation on the basis that the integrity of the collective agreement would be compromised and not that any individual employee objected on the basis of interference with his or her right. In my opinion, the member designate came to the right conclusion with respect to this issue.

[*The duty of the complainant*]

The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in *O'Malley*. At page 555, McIntyre J. stated: 'Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment'.

To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.

This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *O'Malley*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

[The court concludes that the appellant Renaud was victim of discrimination and unlawful dismissal.]