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The relevance of these quotations to the present circumstances is that "equality before the law" as recognized by Dicey as a segment of the rule of law, carries the meaning of equal subjection of all classes to the ordinary law of the land *as administered by the ordinary Courts*, and in my opinion the phrase "equality before the law" as employed in s. 1(b) of the administration or application of the law by the law enforcement authorities and the ordinary Courts of the land...

#### RE ONTARIO HUMAN RIGHTS COMMISSION ET AL AND SIMPSON-SEARS LTD.

Supreme Court of Canada

[1985] 2 S.C.R. 536

Mrs. O'Malley, as a full-time sale clerk for Simpsons-Sears, was required to work Friday evenings on a rotating basis and on two Saturdays out of three. After a couple of years of employment she became a member of the Seventh-Day Adventist Church, a tenet of which is that the Sabbath, on Saturday, must be strictly kept. Unable to work Saturdays, she was discharged from her full-time position. Mrs. O'Malley brought a complaint to Ontario's Human Rights Commission alleging discrimination and a violation of s. 4(1)(g) of the *Ontario Human Rights Code*. When the case came before it, the Supreme Court of Canada considered what a commitment to equality demands when there has been a case of discrimination that is not only not intentional, but also seems justifiable on business grounds. This case helped to bring into our equality jurisprudence the notion of a "duty to accommodate".

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*Mrs. Justice McMurtry:*

The complaint, alleging discrimination in a condition of employment, based on her creed, came before Professor Edward J. Ratushny, appointed under the *Ontario Human Rights Code* as a board of inquiry to hear and determine the complaint. After outlining the facts, he succinctly stated the questions in issue in these terms:

Assuming (as in this case) that a general employment condition is established without a discriminatory motive and for legitimate business reasons, can there be discrimination under the *Ontario Human Rights Code* where that condition applies equally to all employees but has the practical consequence of discriminating against one or more of those employees on a prohibited ground such as creed?

If so, and if the general employment condition has such a practical consequence, how far must an employer go in accommodating

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the religious beliefs of such an employee in order to avoid a confrontation of the Code?...

The discrimination complained of in this case is said to be discrimination on the basis of the creed of the complainant, which is forbidden b. s. 4 (1)(g) of the *Ontario Human Rights Code* as it then stood. The relevant portions of s. 4 are set out hereunder:

s. 4. (1) No person shall... (g) discriminate against any employee with regard to any term or condition of employment, because of race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin of such person or employee.

It is asserted that the requirement to work on Saturdays, while itself an employment rule imposed for business reasons upon all employees, discriminates against the complainant because compliance with it requires her to act contrary to her religious beliefs and does not so affect other members of the employed group. The Board of Inquiry accepted this proposition, but it was firmly rejected in the judgment of the majority of the Divisional Court and in the Court of Appeal. It is the principal ground upon which this appeal is taken.

It will be seen at once that the problem confronting the court involves consideration of unintentional discrimination on the part of the employer and as well the concept of adverse effect discrimination. To begin with, we must consider the nature and purpose of human rights legislation....

...The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victim of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

Without express statutory support in Ontario, inquiry board chairmen and judges have recognized the principle that an intention to discriminate is not a necessary element of the discrimination generally forbidden in Canadian human rights legislation....

I do not consider that to adopt such an approach does any violence to the *Ontario Human Rights Code*, nor would it be impractical in its application. To take the narrower view and hold that intent is a required element of discrimination under the Code would seem to me to place a virtually insuperable barrier in the way of a com-

plainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive, and motive would be easy to cloak in the formation of rules which, though imposing equal standards, could create injustice and discrimination by the equal treatment of those who are unequal. Furthermore, as I have endeavoured to show, we are dealing here with consequences of conduct rather than with punishment for misbehaviour. In other words, we are considering what are essentially civil remedies. The proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination. It is my view that the courts below were in error in finding an intent to discriminate to be a necessary element of proof....

Where discrimination in connection with employment on grounds of a person's creed is found, is that person automatically entitled to remedies provided in the *Ontario Human Rights Code*? One of the arguments advanced in this court and in the courts below was based on the fact that the Code, while prohibiting discrimination on the basis of creed, contains no saving or justifying clause for the protection of the employer. Such a saving provision is found in s. 4(6) for cases concerning discrimination on the basis of age, sex, and marital status — the *bona fide* occupational qualification defence. This omission was said to create a vacuum in the Code and was relied on for the proposition that only intentional discrimination was prohibited because without some such protection the innocent discriminator would be defenceless. While I reject that argument as support for a limitation of the Code to intentional discrimination, I do not on the other hand accept the proposition that on a showing of adverse effect discrimination on the basis of religion the right to a remedy is automatic.

No question arises in a case involving direct discrimination. Where a working rule or condition of employment is found to be discriminatory on a prohibited ground and fails to meet any statutory justification test, it is simply struck down. In the case of discrimination on the basis of creed resulting from the effect of a condition or rule rationally related to the performance of the job and not on its face discriminatory, a different result follows. The working rule or condition is not struck down, but its effect on the complainant must be considered, and if the purpose of the *Ontario Human Rights Code* is to be given effect some accommodation must be required from the employer for the benefit of the complainant. The Code must be construed and flexibly applied to protect the right of the employee who is subject to discrimination and also to protect the right of the

employer to proceed with the lawful conduct of his business. The Code was not intended to accord rights to one to the exclusion of the rights of the other. American courts have met this problem with what has been described as a "duty to accommodate", short of undue hardship, on the part of the employers... In Canada, boards of inquiry under human rights legislation have adopted this concept and it was formulated by the board of inquiry in this case by Professor Ratushny as:

...the very general standard of whether the employer acted reasonably in attempting to accommodate the employee in all of the circumstances of the case as well as in the context of the general scope and objects of the Code.

The reasonable standard, referred to by Professor Ratushny, and the duty to accommodate, referred to in the American cases, provide that where it is shown that a working rule has caused discrimination it is incumbent upon the employer to make a reasonable effort to accommodate the religious needs of the employee, short of undue hardship to the employer in the conduct of his business. There is no express statutory base for such a proposition in the Code. Hence, the vacuum in the Code and the question: Should such a doctrine be imported to fill it?

The question is not free from difficulty. No problem is found with the proposition that a person should be free to adopt any religion he or she may choose and to observe the tenets of that faith. This general concept of freedom of religion has been well-established in our society and was a recognized and protected right long before the human rights codes of recent appearance were enacted. Difficulty arises when the question is posed of how far the person is entitled to go in the exercise of his religious freedom. At what point in the profession of his faith and the observance of its rules does he go beyond the mere exercise of his rights and seek to enforce upon others conformance with his beliefs? To what extent, if any, in the exercise of his religion is a person entitled to impose a liability upon another to do some act or accept some obligation he would not otherwise have done or accepted? To put the question in the individual context of this case: in the honest desire to exercise her religious practices, how far can an employee compel her employer in the conduct of his business to conform with, or to accommodate, such practices? How far it may be asked, may the same requirement be made of fellow employees and, for that matter, of the general public?

These questions raise difficult problems. It is not, in my view,

either wise or possible to venture an answer that would apply generally. We are, however, faced with the necessity of finding an answer at least for this case and, therefore, in the nature of the judicial process an answer for similar cases. In my view, for this case the answer lies in the *Ontario Human Rights Code*, its purpose, and its general provisions. The Code accords the right to be free from discrimination in employment. While no right can be regarded as absolute, a natural corollary to the recognition of a right must be the social acceptance of a general duty to respect and to act within reason to protect it. In any society the rights of one will inevitably come into conflict with the rights of others. It is obvious then that all rights must be limited in the interest of preserving a social structure in which each right may receive protection without undue interference with others. This will be especially important where special relationships exist, in the case at bar the relationship of employer and employee. In this case, consistent with the provisions and intent of the *Ontario Human Rights Code*, the employee's right requires reasonable steps towards an accommodation by the employer.

Accepting the proposition that there is a duty to accommodate such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer, it becomes necessary to put some realistic limit on it. The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer. Cases such as this raise a very different issue from those which rest on direct discrimination. Where direct discrimination is shown the employer must justify the rule, if such a step is possible under the enactment in question, or it is struck down. Where there is adverse effect discrimination on account of creating the offending order or rule will not necessarily be struck down. It will survive in most cases because its discriminatory effect is limited to one person or to one group, and it is the effect upon them rather than upon the general work force which must be considered. In such case there is no question of justification raised because the rule, if rationally connected to the employment, needs no justification; what is required is some measure of accommodation. The employer must take reasonable steps towards that end which may or may not result in full accommodation. 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.

...I would therefore allow the appeal with costs and direct that the respondent pay to the complainant as compensation the difference between the sum of her earnings while engaged as a part-time employee of the respondent from October 23, 1978 to July 6, 1979, and the amount she would have earned as a full-time employee during that period.

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