Recent Arbitral Decision Suggests There Are Objective Limits To An Employee's Right To Religious Accommodation

Increasingly, employers are being faced with requests from employees requesting religious accommodation on various grounds, including paid time off for religious holidays; extended religious leaves of absence for religious pilgrimages; and modification of scheduling requirements. With workplaces rapidly becoming more diverse and multicultural, it is often difficult for employers to ascertain whether or not they are required to accommodate such requests without facing significant human rights damages. A recent Ontario arbitral decision holds out a ray of hope for employers that there are indeed limits to establishing a *prima facie* case of discrimination on the basis of religion or creed.

In *Ontario Public Service Employees' Union, Local 560 v. Seneca College (Kaduri Grievance)*, 245 L.A.C. (4th) 264 ("Kaduri"), a Jewish community college teacher grieved the employer's refusal to schedule his classes in the afternoon as an accommodation to his religious conviction that he is required by his faith to "give back" to his community by teaching at a Jewish school in the mornings. For a number of years, the employer was able to accommodate this request, but in June of 2012, teachers were notified that it was going to implement a new automated scheduling system.

Under the new system, classes would be automatically scheduled in accordance with the demand for particular courses and the availability for teachers for those courses. In implementing the system, the employer informed its teachers that it would be prepared to accommodate its schedule for those with medical disabilities, but there was no indication that the same would apply for accommodation of religious requirements. The implementation of the new system would mean that the employer could no longer commit to accommodating the grievor's request to only be scheduled in the afternoon.

After being advised of this, the Union grieved the new requirement, arguing that the employer's failure to continue to accommodate the grievor's employment constituted a failure to accommodate his religious beliefs and constitutes discrimination on the basis of creed. In contrast, the employer raised a preliminary motion at arbitration arguing that the grievance should be dismissed on the basis that the grievor has failed to make out a *prima facie* case of discrimination on the basis of creed. Of importance was that there were many forms the grievor could have chosen to give back

to his community, and teaching at the Jewish school in the mornings is only one of several options he could have chosen to satisfy his religious requirement.

After reviewing the circumstances of this case, the majority of the arbitration board held that while the grievor does indeed have a sincerely held belief that “he must give back to the community”, and that this is worthy of protection, the question of whether that belief has been infringed must be assessed on the basis of an objective analysis.

Applying the Supreme Court of Canada decision in *S.L. and D.J. v. Commission scolaire de Chenes et al.*, [2012] 1 S.C.R. 235, the majority of the arbitration board held that in addition to the subjective component of the test which requires that the employees must hold a “sincere belief” regarding the belief or practice in question, proving the infringement also requires an objective analysis of the rules, events, or acts that interfere with the exercise of that freedom. After confirming the appropriate analytical framework, the majority of the arbitration board held that there were other avenues the employee could have pursued to “give back to his community”, and the employer did not prevent him from pursuing alternate opportunities.

As a result, the arbitration board found that the employee failed to make out a *prima facie* case of discrimination on the basis of creed. To quote Arbitrator Jesin, he found that “it is not the requirement to give back that is being infringed but the particular choice of how to fulfill it.”

On review of the reasoning, it appears that the arbitration board was not prepared to find there was a *prima facie* case of discrimination on the basis of creed primarily on the basis that the grievor had other avenues available to him to “give back” to his community, and teaching at a Jewish school in the mornings was only one of several options he could have chosen to fulfill this sincerely held belief.

It remains to be seen whether this approach will be adopted and applied by subsequent arbitrators, human rights adjudicators and the courts. In the interim, employers are well-advised to take seriously all requests for religious accommodation, and to document all the steps it has taken once an employee makes such a request.

Should your organization need assistance with navigating through the thorny and complicated issue of religious accommodation, the lawyers at CCP will be happy to assist. Click here for a list of lawyers from CCP who can provide assistance in the area of human rights compliance.

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