HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Savo Markovic

Complainant

-and-

Ontario Human Rights Commission

Commission

-and-

Autocom Manufacturing Ltd.,
Barry Grime, Darryl Goodwin and Christa Matheson

Respondents

INTERIM DECISION

Adjudicator: Sherry Liang

Date: September 3, 2008

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Autocom Manufacturing Ltd., Barry Grime, Darryl Goodwin, Christa Matheson, Respondents	)	Christopher G. Riggs and Catherine Peters, Counsel
Ontario Human Rights Commission	)	Prabhu Rajan, Counsel

BACKGROUND

[1] This case is about the obligations of an employer to accommodate employee requests for time off for religious holidays. The complainant, Savo Markovic, is a member of the Serbian Orthodox Church which celebrates Christmas on January 7. He is employed by Autocom Manufacturing Ltd. ("Autocom"), a manufacturer of auto parts.

[2] Mr. Markovic made a complaint to the Ontario Human Rights Commission alleging that Autocom discriminated against him on the basis of his creed by failing to pay him when he took time off for Eastern Orthodox Christmas on January 7, 2004. The complaint has been referred to the Tribunal for a hearing.

[3] The complainant wishes to raise certain additional issues but the complainant, the respondents and the Commission have agreed to refer a preliminary question of law to the Tribunal, on the basis that a decision on the question of law will dispose of the main issues in dispute in the complaint. The Tribunal agreed to this process after hearing the submissions of the parties.

[4] Since the time that Mr. Markovic made his complaint, Autocom developed a policy for responding to requests to take time off for religious holidays. The question of law concerns whether this policy meets Autocom's obligations to accommodate such requests under the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the *"Code"*) and the applicable jurisprudence.

[5] The parties jointly filed a Question of Law and an Agreed Statement of Facts, followed by written and oral submissions before me.

QUESTION OF LAW AND AGREED STATEMENT OF FACTS

[6] The Question of Law submitted by the parties is:

> Is the corporate respondent's proposed "Procedure for Accommodation of Religious Observances", attached hereto as

Schedule A (the “Policy”), contrary to the *Code* and the jurisprudence regarding accommodating employee requests for time off for religious holidays or does it meet its obligations under the *Code* and the applicable jurisprudence?

[7] It is useful for the purposes of this decision to set out the Policy in its entirety:

SCHEDULE A

PROCEDURE FOR ACCOMMODATION OF RELIGIOUS OBSERVANCES

Autocom's Employee Handbook prohibits discrimination and harassment, as defined under the Ontario *Human Rights Code,* and confirms Autocom's expectation that all employees will be treated with dignity and respect.

Autocom recognizes that in ensuring that employees have a right to equal treatment without discrimination in employment on the basis of creed, accommodation measures may be required to facilitate the practice of religious observances.

Autocom is committed to accommodating employees in accordance with its obligations under applicable legislation and its policies.

Application and Scope

This procedure applies to all employees of Autocom.

The procedure applies to all situations where an employee's religious observance affects his/her ability to attend work for all or part of a working day.

Policy Statement

Autocom will accommodate employees who, by reason of a *bona fide* religious obligation, must be absent for all or part of a working day, up to the point of undue hardship. Accommodation will be determined on a case by case basis.

Procedure

1. An employee who requires time off work to accommodate religious observances must make a request for that

accommodation, in writing, to her/his supervisor. The request should identify the religious observance(s) for which accommodation is needed, the nature of the accommodation required (including the frequency and duration of any absences from work), and the employee's preferred form of accommodation under paragraph 4 below.

2. The supervisor will not question the sincerity of the religious beliefs of an employee requesting time off work for religious observances. However, the supervisor may require the employee to provide reasonable evidence to verify the legitimacy of the request for time off and/or to confirm that the employee's religious observances legitimately require time off work on the dates or at the times requested.

3. Employees should make requests for accommodation far enough in advance of the date(s) when they require the time off, so as to allow their supervisor sufficient time to assess the request and make an appropriate determination. If the religious observance is a regular, recurring holiday, the employee should make the request as soon as the specific dates are known, eg. make a request for time off for holidays in a year at the beginning of every year. Supervisors must respond to requests within a reasonable time period, based on particular circumstances.

4. An employee requesting time off work to accommodate religious observances may indicate his/her preferred form of accommodation from the following menu of options at the time accommodation is requested:

   (a) the employee may make up the time on a later date when the employee would not ordinarily be scheduled to work, in which case the employee will be paid for the substituted shift or working hours;

   (b) subject to the *Employment Standards Act,* the employee may make up the time by working on a secular holiday when the facility is operating, in which case the employee will be paid for the substituted shift at his/her regular rate;

   (c) the employee may arrange to switch shifts with another employee, in which case the employee will be paid for the substituted shift;

(d) where possible, the employee's shift schedule may be adjusted;

(e) the employee may use any outstanding paid vacation to be paid for the time off;

(f) the employee may take a leave of absence without pay.

5. The supervisor will determine whether accommodation can be provided without incurring undue hardship and, if so, what form that accommodation will take. The supervisor will consider the employee's preference and will make this determination in a manner consistent with the menu of options set out in paragraph 4 and Autocom's operational needs. Supervisors should consult with the Employee Relations Manager concerning requests for accommodation of religious observances.

6. Employees who are not satisfied with the decision of their supervisor have a right to appeal through the Fair Treatment/Open Door Policy.

7. Further information regarding the accommodation of religious observances is available from your Employee Relations Manager or from the Ontario Human Rights Commission's website at *http://www.ohrc.on.ca.*

[8] Autocom is prepared to institute the above Policy. Currently, it does not grant all non-Western Christian observant employees requesting time off for religious observances two days of leave with pay to parallel the statutory holidays on Good Friday and Christmas Day. No such direction is found in the Policy, or in any other written or unwritten policy of the company. The Autocom facility is generally closed on the statutory holidays Good Friday and Christmas Day (December 25). Work is thus not available on those days.

THE COMMISSION'S POSITION ON THE QUESTION OF LAW

[9] The Commission's position is that the Autocom Policy is not consistent with the *Code* and the related jurisprudence in that it fails to provide employees with the option of up to two days of paid leave for religious observance. In its written submissions, the

Commission asserts that Autocom is required to provide non-Western Christian employees with up to two paid days off for religious observances. Only if providing up to two paid days of religious leave would cause Autocom undue hardship, and for any religious leave in excess of two days, may feasible scheduling changes be considered. If scheduling changes are not viable, Autocom, in the Commission's submission, should permit an employee to use his or her vacation days or other available paid leave time. If those options are not practicable, Autocom should then permit the employee to take unpaid leave.

[10] During the course of oral argument, the Commission indicated that it was amending the position taken in its written materials. Commission counsel stated that he was not arguing that two paid days off is required in the first instance, short of undue hardship. He submitted that, as part of an individualized accommodation process, two paid days off should simply be one of the options available, although it must be a choice available to an employee on an equal basis with other choices.

[11] In its submissions, and referring to the provisions of the *Employment Standards Act, 2000*, S.O. 2000, c. 41, which defines "public holiday" to include Christmas Day and Good Friday, the Commission states that Ontarians are subject to a calendar that has its roots in Western Christian observance. The principal holy days of that faith are mandated as holidays for everyone regardless of their respective religion. A work calendar that pays employees for not working on Christmas and Good Friday, but not for other religious holidays, has a discriminatory impact on members of minority faiths.

[12] The accommodation process was described as a shared dialogue that requires both an employee and the employer to fully consider proposed accommodation measures. Autocom, as with all employers, has a duty to reasonably accommodate an employee's needs up to the point of undue hardship. The Commission states that the accommodation process requires that the most appropriate accommodation in the circumstances be first determined and then undertaken short of undue hardship. In the case of time off for religious observances, the most appropriate accommodation is two paid days.

[13] In its written submission, and relying on the Supreme Court of Canada decision in *Commission scolaire régionale de Chambly v. Bergevin*, 1994 CanLII 102 (*Chambly*), the Commission states that Autocom has a duty to accommodate its non-Western Christian employees by providing them with up to two paid days off for their religious observances unless to do so would cause it undue hardship. By failing to include paid religious days off as the first accommodation or as an option at all, Autocom's Policy is contrary to the *Code* and the applicable jurisprudence, specifically the *Chambly* decision.

[14] The Commission submits that unless there would be undue hardship, failure to entitle non-Western Christian employees to at least two paid days off for their religious observances is discriminatory for a variety of reasons, including:

- Making up time as the default for accommodating *Code*-related needs does not achieve equality of outcome. If employees are required to make up time, in essence they are accommodating themselves, with the employer only being required to be flexible to allow this.

- Non-Western Christians have to engage in a process of negotiating their entitlement to their days of observances rather than having it automatically recognized. This may require them to unnecessarily and uncomfortably delve into their personal circumstances.

- Western Christians are able to plan their daily lives without being concerned with alternating work schedules and working extra time and are not faced with practical considerations such as childcare arrangements and transportation issues.

- Negotiating accommodation has an impact on human dignity for persons of minority faiths not experienced by those belonging to the majority religion.

- It is inconsistent with the notion of universal and inclusive design, as articulated in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (S.C.C.) (*Meiorin*), to require re-arranging work schedules as a first option. A workplace schedule that is based on the majority faith, but then requires everyone else to negotiate their own accommodation, is not consistent with *Meiorin* principles.

[15] The Commission also referred to decisions of labour arbitrators on employers' obligations to accommodate religious observances, such as *Ontario (Ministry of Government Services) and O.P.S.E.U. (Kimmel/Leaf)* (1991), 21 L.A.C. (4th) 129 and *Toronto District School Board v. Canadian Union of Public Employees, Local 4400 (Rzepa Grievance)*, [2003] O.L.A.A. No. 216, as well as the dissenting opinion in *Richmond v. Canada (Attorney General)* (C.A.), [1997] F.C.J. No. 305.

[16] The complainant supported the Commission's position on the question of law.

AUTOCOM'S POSITION ON THE QUESTION OF LAW

[17] Autocom submitted that its Policy reflects the prevailing "menu of options" approach to accommodating the religious needs of a diverse workforce. The *Code* and the applicable jurisprudence do not require an employer to provide two paid days of religious leave to mirror the public holidays on Christmas Day and Good Friday as the first option, or any option, in its menu of accommodation options. Rather, an employer is entitled to provide employees with a variety of accommodation options – including scheduling adjustments, use of earned entitlements, and unpaid leave – without first establishing that providing two paid days of leave would cause undue hardship.

[18] In its written submissions, Autocom notes that the Tribunal does not have to address the application of the Policy to individual cases in order to determine the question of law. A company-wide policy cannot address every possible eventuality; it can only provide a framework for addressing any issues that arise in individual cases. Autocom acknowledges that questions may arise in individual cases about the application of the Policy in individual cases, and whether accommodation has been provided to the point of undue hardship. Where such questions arise, employees may choose to deal with them through the company's internal mechanisms for appeal, or may institute proceedings under the *Code*.

[19] The company submits that the general starting point in determining the question of law must be a recognition that the public holidays on Christmas Day and Good Friday

are secular pause days. Although having origins in Western Christian observance, a work calendar which incorporates those holidays should be considered neutral or non-discriminatory on its face.

[20] Autocom acknowledges that although neutral on its face, such a work calendar may have a discriminatory effect on employees whose religious holy days do not coincide with these collective pause days. Referring to *Chambly* and the decision in *Ontario (Ministry of Community and Social Services) v. O.P.S.E.U. (Tratnyek)*, [2000] O.J. No. 3411 (Ont. C.A.) (QL), Autocom states that the discriminatory effect will arise if "[i]n the absence of some accommodation by their employers", such employees "must lose a day's pay to observe their holy day". Where, however, an employer institutes a policy which provides for individual accommodation enabling an employee to avoid the loss of a day's pay to observe a religious holy day, no such discriminatory effect will arise.

[21] The company submits that in *Tratnyek*, the Ontario Court of Appeal held that, in the case of religious observances, an employer fulfils its obligations by instituting a corporate policy which provides a menu of options for accommodating the individual needs of members of a variety of religious faiths. This is what Autocom has done. Its Policy was designed to apply to a diverse group of current and future employees with a wide range of accommodation needs, and promotes equality by providing a menu of accommodation options suited to the differing religious needs of its diverse workforce. Further, if a case arises where an employee's accommodation needs cannot be met using the options set out in the Policy, that case can be addressed on an individualized basis to ensure that accommodation is provided to the point of undue hardship.

[22] Autocom states that the menu of options approach is consistent with the general principle of human rights law that the duty to accommodate requires the removal of barriers to equal participation in the workforce (where that can be done short of undue hardship) so that members of protected groups have an equal opportunity to earn employment income. The duty, it is said, does not require an employer to pay for work when no work has been performed.

[23] The company disagrees with the Commission's argument that the process of negotiating time off for religious observances is an unfair burden. In its submission, the process of negotiating accommodation is an entirely appropriate mechanism to resolve issues of accommodation, and goes hand in hand with the idea of an individualized response.

[24] Autocom also rejects the Commission's characterization of *Chambly* and other leading decisions on this issue. It states that no Canadian court or tribunal has ever accepted that non-Western Christian observant employees are automatically entitled to two days of paid leave to mirror the public holidays on Christmas Day and Good Friday. Further, it submits that Courts of Appeal in Ontario (in the *Tratnyek* decision) and in the federal jurisdiction (in *Richmond*), have rejected the contention that *Chambly* requires paid leave for religious observance, preferring a menu of options approach to accommodating time off work for religious observance.

[25] Autocom also relies on the decisions in *Re Toronto (City) and C.U.P.E., Local 79* (2003), 117 L.A.C. (4th) 363 (Tacon) ("*City of Toronto*") and *Re Turning Point Youth Services and C.U.P.E., Local 3501* (6 February 2008, Herman) ("*Turning Point*"), in which arbitration boards rejected the argument that *Chambly* requires employers to provide paid leave to mirror Christmas Day and Good Friday.

DECISION

[26] Under section 5(1) of the *Code*, every person has a right to equal treatment in employment without discrimination on the basis of certain grounds, including creed. "Creed" is not defined in the *Code* but encompasses, at the very least, organized religion that is accompanied by established practices and observances.

[27] Sometimes the requirements of employment conflict with the ability of employees to practice their religion, often through the establishment of work schedules which, although adopted for valid business reasons, unintentionally impinge on religious practices. There is a significant body of court and tribunal decisions which have dealt

with resolving the conflict between the demands of employment and the freedom to practice religion. Many years ago the Supreme Court of Canada, in *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 (*Simpsons-Sears*), established that an employer has a duty to take reasonable steps to accommodate an employee who is unable, because of religious beliefs, to work in accordance with the established work schedule.

[28] More recently, in *Chambly*, above, the Supreme Court upheld the decision of an arbitration board ordering a school board to permit Jewish teachers to use days of paid absences provided under a collective agreement, for observance of Yom Kippur. Some decisions have required employers to permit employees to use special leave or earned sick leave credits for the purpose of religious observance, pursuant to the terms of the applicable collective agreements (*Kimmel/Leaf*; *Rzepa*, above).

[29] Other decisions have denied employees paid leave for religious observance where options were available to permit time off without loss of pay. In *Richmond*, for instance, the court found that the employer met the duty to accommodate employees wishing to take time off for religious holidays through a policy allowing for the use of annual or compensatory leaves, shift exchanges, variable hours of work or individual arrangements for make-up time, on a case-by-case basis. In the *Tratnyek*, *City of Toronto* and *Turning Point* decisions, scheduling changes were considered to fulfill an employer's obligations to accommodate employees requiring time off for religious observances.

[30] A review of these decisions and the others to which I was referred, as well as the general principles of the duty to accommodate, leads me to the following conclusions.

[31] Although the public holidays on Christmas Day and Good Friday originated in Western Christian observances, they are now considered secular pause days. As expressed by the Supreme Court of Canada in *R. v. Edwards Books and Art Ltd*., [1986] 2 S.C.R. 713:

> It is beyond doubt that days such as Sundays, Christmas and Easter were celebrated as holidays in Canada historically for religious reasons. The celebration of these holidays has continued to the present partly because of continuing, though diminished, religious observances of the largest denominations of the Christian faith, partly because of statutory enforcement under, inter alia, the now unconstitutional *Lord's Day Act*, and partly because of the combined effect of social inertia and the perceived need for people to have days away from work or school in common with family, friends and other members of the community. These, in my view, are the social facts which explain the selection by individuals, businesses, school boards, and others of particular days as holidays.

[32] A schedule of work based on holidays recognized under the *Employment Standards Act* is secular in nature and thus non-discriminatory on its face (see *Chambly*, p.19). However, it has also been recognized that a work calendar which permits observant Christians time off to celebrate the two most important Christian holidays, Christmas and Good Friday, but which requires work on holy days of other religions, is discriminatory in effect:

> In my view, the calendar which sets out the work schedule, one of the most important conditions of employment, is discriminatory in its effect. Teachers who belong to most of the Christian religions do not have to take any days off for religious purposes, since the 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. They, as a result of their religious beliefs, 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. (*Chambly*, p.19)

[33] It is important to note that the discriminatory effect arises from the *work schedule*. For non-Western Christians, the discrimination consists of the requirement to work on holy days, a requirement not imposed on Western Christians, at least with respect to Christmas and Good Friday. Following on this, the duty to accommodate discussed in

Chambly and other decisions concerns the search for a solution that permits time off for religious observances, without adverse employment consequences.

[34] In this context, a number of courts and tribunals have concluded that an employer that provides an employee with options for achieving the time off through scheduling changes (that do not result in a loss of pay) can satisfy its duty to accommodate religious differences. To put it simply, where the "problem" is the need for time, the solution is the enabling of time.

[35] I do not read any of the decisions in this area as requiring an employer to accommodate religious observances by giving non-Western Christian employees two days of paid leave to mirror the public holidays on Christmas Day and Good Friday, short of undue hardship. Moreover, I find that the decision of the Court of Appeal in *Tratnyek* is compelling authority on this point.

[36] The Commission submitted that the *Tratnyek* decision is not applicable because of its factual circumstances. In *Tratnyek* the employer was the Ministry of Community and Social Services. Under the applicable collective agreement, members of the Ontario Public Service Employees Union (OPSEU) were allowed to use special and compassionate paid leave for religious holidays, to a maximum of two paid days. Beyond that, accommodation was available through scheduling changes such as re-arranging shifts, or using compressed work week days. An employee, Tratnyek, wished to use his special and compassionate paid leave to observe an additional nine days of religious holiday. It was in this context that the Court of Appeal made its finding that the employer met its duty to accommodate through the provision of scheduling options. In the view of that Court:

> A review of the relevant authorities leads me to conclude that employers can satisfy their duty to accommodate the religious requirements of employees by providing appropriate scheduling changes, without first having to show that a leave of absence with pay would result in undue economic or other hardship. Indeed, in some instances, scheduling changes may provide the fairest and most reasonable form of accommodation. (para.37)

[37] On my review of the decision, none of the Court's key findings is premised on the pre-existing entitlement to two days leave. The Court carefully reviewed the leading Supreme Court of Canada decisions on the duty to accommodate, and its application to religious differences. It concluded that the provision of scheduling changes was consistent with the principles established by the *Meiorin* decision. I am satisfied that the *Tratnyek* decision is persuasive authority on the issue of an employer's obligations to accommodate religious observances in the workplace.

[38] I view the conclusions of the Court of Appeal to be consistent with another principle woven into the cases in this area, which is that the duty to accommodate co-exists with the regular contract of employment [see *Hydro-Québec v. Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 (CanLII)]. The regular contract of employment is based on the exchange of services for pay. Typically, the duty to accommodate is about the design and modification of workplace requirements to enhance the ability of certain employees to participate in the workplace without, at least in the first instance, dislodging the assumption of services for pay.

[39] In the case of religious observances, it has been recognized that, where available, adjustments to work schedules provide an appropriate accommodation at least partly because they do not require an alteration of this aspect of the essential employment bargain. This is, in my view, what is expressed by the Court of Appeal in the following passage from the *Tratnyek* decision, where it discusses the use of a compressed work week:

> If feasible, it enables employees to observe their religious holy days without loss of pay and without having to encroach on pre-existing earned entitlements, while at the same time completing their assigned hours of work, thereby relieving the employer from having to pay them for days on which they provide no service.
> ….
> Viewed this way, I am satisfied that to the extent Mr. Tratnyek could have used the days off available under the compressed work week schedule to observe his religious holy days, the policy did not have a discriminatory effect upon him. To the contrary, it

> promoted equality and fairness in the workplace by recognizing his right to be different and providing him with a means of fulfilling his religious commitments without adverse consequences. (paras.51-52)

[40] Another conclusion that I draw from the decisions in this area is that an employer policy which provides employees with a menu of options to accomplish the goal of taking time off for religious observances does not impose an undue burden on those employees. The Commission argued in its written materials that the menu of options approach imposes an unfair burden on employees wishing to take time off for religious observances. Among other things, it requires those employees to negotiate for their time, rather than having it "served" to them as a recognized public holiday. In my view, the court in *Tratnyek* has recognized that the provision of options for scheduling changes is an appropriate response to the duty to accommodate. A menu of options such as that proposed by Autocom does require some dialogue and potentially negotiation between an employee and the employer But it is in the very nature of the accommodation process that there is dialogue between employers and employees. There is nothing nefarious about this, and the process envisioned by a menu of options approach is no more burdensome that any other process in which an employee is seeking accommodation of differences under the C*ode*.

[41] The provision of options for scheduling changes is also consistent with the individualized nature of the duty to accommodate and supportive of autonomy of choice. As expressed by the Supreme Court of Canada in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréeal*, [2007] 1 S.C.R. 161:

> The importance of the individualized nature of the accommodation process cannot be minimized. The scope of the duty to accommodate varies according to the characteristics of each enterprise, the specific needs of each employee and the specific circumstances in which the decision is to be made. Throughout the employment relationship, the employer must make an effort to accommodate the employee. However, this does not mean that accommodation is necessarily a one-way street. In *O'Malley* (at

> p. 555) and *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, the Court recognized that, when an employer makes a proposal that is reasonable, it is incumbent on the employee to facilitate its implementation. If the accommodation process fails because the employee does not co-operate, his or her complaint may be dismissed. As Sopinka J. wrote in *Central Okanagan*, "[t]he complainant cannot expect a perfect solution" (p. 995). The obligation of the employer, the union and the employee is to come to a reasonable compromise. Reasonable accommodation is thus incompatible with the mechanical application of a general standard. (para.22)

[42] As I have indicated, during oral argument, the Commission modified its position so that objection was not taken to the "menu of options" approach as such, as long as one of the options on the menu is a paid leave of up to two days for purposes of religious observance and as long as it is an option which is equally available as any other option. The Commission maintained its concern that a process based on options may place unfair pressure on an employee, but acknowledged that the provision of options is consistent with the individualized nature of the accommodation process. In the Commission's submissions, an employee may opt not to take the option of paid leave but if he or she chooses to, the employer may only reject it if it causes undue hardship.

[43] On reflection, it is not apparent to me that the Commission's modification to its position is significant. Although the Commission accepts the "menu of options" approach, even under its modified position Autocom is obliged to provide up to two days of paid leave at the option of an employee, unless undue hardship is shown. I have concluded that the duty to accommodate does not require this.

[44] In its submissions, the Commission states that the "fundamental purpose of accommodation is to, in so far as is possible without creating undue hardship, avoid discrimination and achieve equality of outcome." In its submission, this "equality of outcome" requires providing non-Western Christian employees to at least two paid days off for religious observances. In my view, "equality of outcome" is not a helpful standard to apply in a case like this. If, for instance, equality is a matter of pay, then it must be

recognized that all workers regardless of religious differences are provided with the same paid holidays under the *Employment Standards Act*. It is not only those observing Christmas Day and Good Friday who are paid for those rest days.

[45] The concept of "equality of outcome" does not fully capture the nature of the obligation to accommodate religious differences in a workplace. In this context, I prefer to return to the Supreme Court's elaboration of the employer's duty to accommodate in *Meiorin*:

> Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals... To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. The standard itself is required to provide for individual accommodation, if reasonably possible. A standard that allows for such accommodation may be only slightly different from the existing standard but it is a different standard nonetheless. (para.68)

[46] As well, I find useful the following comments, with respect to accommodation of disabled persons:

> Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which the disabled will never be able to gain access. It is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not prevent the disabled from participation, which results in discrimination against the disabled. (*Eaton v. Brant County Board of Education*, 1997 CanLII 366, para.67)

[47] Applying the above to the circumstances of this case, the obligation on the employer is to design its workplace standards in a way that recognizes differences in religion amongst its individual employees, and accommodates those differences. The task is to mesh its workplace rules with the needs of a diverse workforce, with the goal of enhancing participation and inclusion. In the case of religious observances, those

goals can be met through the provision of options for scheduling changes that do not result in loss of pay.

[48] That is not to say that scheduling changes will always provide the reasonable accommodation required. *Chambly* is an example of a case in which scheduling changes were not available, because of the nature of the employment. In the absence of the option of scheduling changes, the solution in C*hambly* was to require the employer to permit the use of paid absences provided for under the collective agreement, for the purpose of religious observances. As I have indicated, one of the key elements in the Commission's position is its view that the *Chambly* decision establishes the principle that employers have a duty to provide up to two paid days off for religious observances, unless to do so would cause undue hardship. The failure of the Policy, in its submission, lies in the absence of paid time off as an option.

[49] I find that the decision in *Chambly* does not support that result. On my review, two important features of the workplace led to the decision in that case to permit employees access to paid leaves for the purpose of religious observance. The first was the schedule of work, which was fixed and therefore did not permit scheduling adjustments as an option for accommodation. As discussed by the Court:

> With regard to accommodation it must be remembered that the entire annual salary of the teachers in this case was based upon 200 working days. *It is of course impossible for Jewish teachers to make up for a lost day by working for example, on Saturday, Sunday, Christmas or Easter. A teacher can only teach when the school is open and the pupils are in attendance.* If five days or a week's work was missed, there is no doubt that it would constitute a significant loss to the teacher. There is no difference in principle in the loss of one day's pay. Family budgets and financial commitments are based upon the total annual salary. The loss of a whole day's pay *when that cannot be made up*, is of very real significance to teachers and their families. (p.21) [emphasis added]

[50] Another important feature of this workplace was a collective agreement that provided employees with a right to a paid special leave of absence of up to three

working days. Historically, employees were permitted to use this special leave in order to observe Yom Kippur; however, the employer changed its practice and took the position that employees were required to take a leave of absence without pay. The Supreme Court found that these paid leaves of absence could be used for the purpose of religious holidays, without undue hardship to the employer.

[51] The result in *Chambly* is in my view consistent with the principles I have expressed above. Absent the option of scheduling changes, the most appropriate solution was the use of a special leave provided for under the collective agreement. The Court of Appeal in *Tratnyek* concluded that the result in *Chambly* would have been different had reasonable scheduling changes been available (see *Tratnyek*, para.49), and I agree with its understanding of the *Chambly* decision. The Supreme Court did not establish as a general principle that employers must pay employees for time off for religious observances.

[52] I find, therefore, that *Chambly* does not require the employer in this case to include the option of two paid days off for religious observances in its Policy.

[53] The *Chambly* decision is an example of a workplace where scheduling changes could not provide a reasonable accommodation of religious observances. It must also be acknowledged that even in a workplace where scheduling changes are available, such as at Autocom, there may be individuals for whom none of the scheduling options on Autocom's menu of options will be suitable and other options for accommodation must be explored. Counsel for Autocom identified the employer's overriding obligation to accommodate to the point of undue hardship as governing the solution in that event. In his submission, in a given circumstance the outcome may or may not be to provide days off with pay.

[54] It is not possible and not necessary for me to canvass every eventuality. The parties have agreed to frame the question of law as an issue about the Policy in general, and not about its application to any particular individual. The company has acknowledged that if questions arise about whether the application of the Policy results

in discrimination in a particular instance, an employee may resort to internal procedures for appeal or make a complaint under the *Code*.

[55] The question of law before me is whether the Policy is contrary to the *Code* and applicable jurisprudence, or whether it meets the employer's obligations. I find that by providing a process for employees to arrange for time off for religious observances through options for scheduling changes, without loss of pay, Autocom's menu of options is appropriate and consistent with the *Code* and the jurisprudence.

[56] Given my decision, I will provide the parties with an opportunity to resolve the outstanding issues between them before setting dates for further steps in these proceedings. The Tribunal will contact the parties, not before September 30, 2008, to set a further Pre-Hearing Conference.

Dated at Toronto, this 3rd day of September, 2008.

"Signed by"

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Sherry Liang
Vice-Chair