Date: 20140919

File: 566-34-4484

Citation: 2014 PSLRB 86

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ANTON PAUL ANDRES

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Andres v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: John G. Jaworski, adjudicator

For the Grievor: Steve Eadie, Professional Institute of the Public Service of Canada

For the Employer: Sean Kelly, senior counsel

Heard at London, Ontario,
March 28, 2014.

I. Individual grievance referred to adjudication

[1] Anton Paul Andres ("the grievor") is employed at the Canada Revenue Agency ("CRA" or "the employer") as an auditor in the London, Ontario, Tax Services Office (TSO).

[2] On April 24, 2009, the grievor grieved as follows:

> *I grieve that I was not given paid leave to observe Orthodox Good Friday and Orthodox Easter Monday on April 17, 2009 and April 20, 2009, respectively.*
>
> *Paid leave is given for observance of Western/Catholic Good Friday and Easter Monday. Therefore, under Article 43.01, of the collective agreement, paid leave should be given as well to Orthodox Christians so that they may observe Orthodox Good Friday and Easter Monday.*

[3] As relief, the grievor requested paid leave for time taken off work to observe Orthodox Good Friday and Orthodox Easter Monday on April 17, 2009, and April 20, 2009.

[4] The employer denied the grievance and noted that the grievor had requested and had been granted annual leave for the days in question.

II. Summary of the evidence

[5] The grievor testified on his behalf, and the employer called one witness, James Taylor, who is the auditing manager of the Audit Division of the CRA in the London TSO. The grievor reported to Alan Ball, who in turn reported to Mr. Taylor.

[6] The grievor has been employed with the CRA since 1992 and is an HST auditor. He works a regular Monday-to-Friday workweek, a seven-and-a-half (7.5) hour workday, or thirty-seven-and-a-half (37.5) hour workweek.

[7] The grievor is an Orthodox Christian. The grievor explained that one of the differences between Orthodox Christian and Western Christian rites is the date of certain holy days. The Orthodox Christian rites follow the Julian or "old" calendar, while Western Christian rites follow the Gregorian or "new" calendar. The "new" or Gregorian calendar is the calendar normally used in North America and Western Europe for days, months and years.

[8] Clause 12.01 of the Agreement between the Canada Customs and Revenue Agency and the Professional Institute of the Public Service of Canada for the Audit, Financial and Scientific Group signed on August 22, 2005, and expiring on December 21, 2007 ("the collective agreement"), sets out 12 designated paid holidays ("DPH"). Two of these are Good Friday and Easter Monday.

[9] In 2009 Good Friday and Easter Monday, according to Western Christian rites, fell on April 10 and April 13, respectively. In the Orthodox Christian rite Good Friday and Easter Monday fell one week later, on April 17 and April 20, respectively.

[10] Clause 17.19 of the collective agreement is entitled Religious Obligations and states as follows:

> ***17.19 Religious Obligations***
>
> *(a) The employer shall make every reasonable effort to accommodate an employee who requests time off to fulfill his religious obligations.*
>
> *(b) Employees may, in accordance with the provisions of this Agreement, request annual leave, compensatory leave or leave without pay for other reasons in order to fulfill their religious obligations.*
>
> *(c) Notwithstanding clause 17.19(b), at the request of the employee and at the discretion of the Employer, time off with pay may be granted to the employee in order to fulfill his religious obligations. The number of hours with pay so granted must be made up hour for hour within a period of six (6) months, at times agreed to by the Employer. Hours worked as a result of time off granted under this clause shall not be compensated nor should they result in any additional payments by the Employer.*
>
> *(d) An employee who intends to request leave or time off under this Article must give notice to the Employer as far in advance as possible but no later than four (4) weeks before the requested period of absence.*

[11] Exhibit G-2 is a three-page document containing a series of different emails. The first page is an email dated April 9, 2009, from the grievor to Mr. Ball that states "I would like to take vacation time for April 17th and 20th."

[12] The second page of Exhibit G-2 is an email dated April 14, 2010 (after Western Good Friday and Easter Monday), from the grievor to Mr. Ball that states as follows:

. . .

> *This Friday and following Monday are Good Friday and Easter Monday for the Orthodox Church, and, as you know, I am a member.*
>
> *Article 17.19 of our collective agreement allows for <u>unpaid</u> leave for religious obligations. However, article 43.01, states, "There shall be no discrimination, …by reason of …religious affiliation …". Therefore, I would like to request that I be granted paid leave, rather than vacation leave already granted, for this Friday April 17th and Monday April 20th.*

. . .

[13] The third page of Exhibit G-2 is an email chain starting with an email on April 16, 2009, at 11:32 a.m. from the grievor to Mr. Ball which states as follows:

. . .

> *Thank you for meeting with me today regarding my request for paid leave this Friday and Monday to observe Orthodox Good Friday and Easter Monday.*
>
> *This email is to confirm management's response to not allow my request as the collective agreement allows for unpaid leave for religious obligations per article 17.19.*
>
> *I am not going to request unpaid leave per 17.19 but will continue to take Friday and Monday off as vacation leave as previously approved.*

. . .

[14] On April 16, 2009, at 1:08 p.m., Mr. Ball responded to the grievor's email of 11:32 a.m., stating, "To be complete, article 17.19(b) also provides for annual leave or compensatory leave."

[15] The grievor testified that he originally requested vacation time for Orthodox Good Friday and Easter Monday, hence his email of April 9, 2009. He stated that in the past he had made up the time off taken; however, with a family he felt that it was easier to take vacation time. The grievor testified that, when he sent his second email, on April 14, 2009 (the day after Western Easter Monday), he had asked himself, "Why should I take vacation time when those who don't celebrate Orthodox Easter don't have to use earned vacation time to observe Western Good Friday and Easter Monday?"

[16] The grievor stated that, in April 2009, he was aware of clause 17.19 of the collective agreement and that, in years prior to 2009, he used clause 17.19(c) of the collective agreement and made up the two paid days off that he received for Orthodox Good Friday and Easter Monday.

[17] The grievor acknowledged in cross-examination that he met with his team leader, who is also a member of the PIPSC, and confirmed that he was offered all the options with respect to religious obligations in clause 17.19(c) of the collective agreement, and he told his team leader that he wasn't interested in taking Orthodox Good Friday and Easter Monday off with pay and making up the time. I was not given the date of this discussion.

[18] The grievor also acknowledged that his email dated April 14, 2009, stated that he was requesting paid leave for Orthodox Good Friday and Easter Monday, rather than using vacation leave credits for those dates. He also acknowledged that in his grievance, Exhibit G-1, he did not ask for reimbursement of his vacation leave credits, but requested paid leave for those days. In his testimony, the grievor stated that this was the only way he could think of to ask for reimbursement.

[19] The grievor testified in chief that if he celebrated Western Easter, he would not have to use two vacation days; he stated that he wanted to celebrate Orthodox Easter without having to use vacation days. He stated that he felt it would be appropriate, given that he did not celebrate Western Easter, that he be allowed to work on Western Good Friday and Easter Monday, in exchange for not working but receiving paid leave for Orthodox Good Friday and Easter Monday. He felt that this would be a fair compromise.

[20] In response to the question put to him by his representative as to why he worded his grievance in the manner that he did, he stated that he had been denied the option of working Western Good Friday and Easter Monday, and he had taken vacation time to observe Orthodox Good Friday and Easter Monday, and this was the only way he could claim the time.

[21] The grievor acknowledged in cross-examination that neither in Exhibit G-2 nor in his grievance did he mention working on Western Good Friday and Easter Monday in exchange for getting Orthodox Good Friday and Easter Monday off. The grievor acknowledged that what he asked for was what was written in the documents. The

grievor stated that he had made his request a long time ago and he couldn't remember how he had made his request, but he did recall that he wanted to have the time off and be paid.

[22] The grievor is a union steward and agreed in cross-examination that he believed that his understanding of the collective agreement was better than that of most employees. He confirmed that he was aware that, when an employee works on a DPH, it triggers the payment of a premium.

[23] The grievor acknowledged in cross-examination that, during the grievance process, he asked for paid leave under clause 17.19 of the collective agreement. The grievor further confirmed that he could not recall whether or not he had explained to the employer representative the reason that the options under clause 17.19 were not acceptable to him.

[24] In re-examination, the grievor confirmed that the request found at Exhibit G-2, the email dated April 16, 2009, was the only request he had made. He then stated that he made the request after he had asked to work on Western Good Friday and Easter Monday in exchange for getting Orthodox Good Friday and Easter Monday off.

[25] The grievor stated that options for working on Western Good Friday and Easter Monday included working from home or having the office opened for him (and any other employee who wished to work on Western Good Friday and Easter Monday) in exchange for getting Orthodox Good Friday and Easter Monday off with pay.

[26] The grievor testified that in the past he had worked from home and, as an auditor, he would work outside the office, travelling to the places of business of taxpayers. In addition, when working outside the office, after visiting a taxpayer's place of business, he and other auditors would often go home and finish their work there rather than return to the office, if the timing was such that it would not make sense to return to the office. Mr. Taylor confirmed that this practice did occur. Mr. Taylor also stated that when auditors went on the road to go to a taxpayer's place of business, they would usually use their own vehicle, although in some circumstances a CRA vehicle was made available to them.

[27] The grievor and Mr. Taylor testified that working at home as a rule was not encouraged and that, as of 2009, working from home was seldom allowed. The grievor

testified that he had not worked from home in the six months prior to or after April 2009.

[28] Mr. Taylor explained the reason that working on Western Good Friday and Easter Monday was not feasible. On Western Good Friday and Easter Monday the London TSO was closed and there was no access to it. Although there was a Commissionaire on duty, access to the building was restricted. To gain access during off-hours, authorization had to be obtained from a director. Employees were not given keys, and the floors were alarmed. In addition, no director or team leaders would be available for the employees. According to Mr. Taylor, the nature of the work done by auditors such as the grievor required that they work extensively with their team leaders, so the team leaders had to be available to the auditors when the auditors were working.

[29] Mr. Taylor explained the reason that working at home was rare. In addition to needing access to the team leader, Mr. Taylor stated that there were also safety and security issues with working at home. According to Mr. Taylor, the workplace was governed by Part II of the *Canada Labour Code*, so that the employer was responsible for employee safety. With respect to security issues, auditors such as the grievor were dealing with private and sensitive taxpayer information, and it was therefore imperative that this information remain secure.

[30] Mr. Taylor testified that he had never discussed this matter with the grievor, even though the grievor did report to him indirectly in the organizational chain. Mr. Taylor testified that the grievor would have submitted leave requests to Mr. Ball, and then he and Mr. Ball would have discussed them.

[31] Mr. Taylor testified that working on a DPH would have required the payment of a premium under the collective agreement.

[32] Mr. Taylor agreed on cross-examination that the building could be opened on the DPH and, as well, there could be a situation where other people were authorized to be in the building working outside the normal Monday-to-Friday work hours. He also stated that they had never had the office open or employees working on a DPH and that he could not see it happening.

[33] The grievor testified that, in his understanding, the security requirements for working from home included having a private work area and a locked cabinet. Mr. Taylor confirmed in cross-examination that these were necessary security requirements.

[34] Mr. Taylor stated that he was familiar with accommodation plans and agreed that an agreement or understanding could be reached wherein an agreement could be entered into between the employer, employee and bargaining agent for an accommodation plan for religious obligations; however, he stated that he was unfamiliar with any accommodation plan outside of the collective agreement.

[35] As set out at paragraph 9 of this decision, Western Good Friday and Easter Monday in 2009 fell on April 10 and April 13, respectively; however, this fact was not in any of the evidence put forward during the hearing, either through documents or oral testimony. The date of Easter in any given year is a matter of public record.

III. Summary of the arguments

A. For the grievor

[36] The grievor's argument is based on four areas:

1. Discrimination;
2. What constitutes reasonable accommodation; what are the boundaries of undue hardship;
3. What steps were taken to accommodate the grievor; and
4. Remedy.

[37] The grievor's position is that this is a case of adverse discrimination and the employer has failed to accommodate the grievor under subsection 7(b) of the *Canadian Human Rights Act* (the "*CHRA*"); the prescribed ground, as set out under section 3 of the *CHRA*, being religion. The grievor states that clause 43.01 of the collective agreement provides for the same protection against discrimination and states as follows:

> ***43.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practised with respect to an*

> *employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, marital status, mental or physical disability, conviction for which a pardon has been granted, or membership or activity in the Institute.*

[38] The grievor stated that there was a failure to engage in a meaningful discussion, which is why he maintains that he is entitled to have his vacation credits reimbursed to him and receive leave with pay for Orthodox Good Friday and Easter Monday.

[39] The grievor is not arguing that he is out of pocket or that, by virtue of his religious obligation, he is entitled to leave with pay absolutely; it is the failure to accommodate him that should give rise to the payment. The grievor maintains that he put forward a reasonable accommodation and there was no reason provided to him as to why that accommodation was not reasonable.

[40] According to the grievor, a scheduling change allowing him to work on Western Good Friday and Easter Monday and then receiving the Orthodox Good Friday and Easter Monday off would have been a simple and direct way of dealing with the accommodation. He should have been allowed to observe his own Easter instead of someone else's, which is the goal of accommodation.

[41] The grievor referred me to *Ontario Human Rights Commission and Theresa O'Malley v. Simpsons-Sears Limited* [1985] 2 S.C.R. 536 (*"O'Malley"*), which defines adverse effect discrimination, where it states at paragraphs 16 and 18 as follows:

> ***16*** *The idea of treating as discriminatory regulations and rules not discriminatory on their face but which have a discriminatory effect, sometimes termed adverse effect discrimination, is of American origin and is usually said to have been introduced in the* Duke Power *case…*
>
> ***18*** *… It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.*

[42] The grievor stated that his situation fits the definition of adverse effect discrimination as defined by *O'Malley*. His religion differs from the DPHs for Good

Friday and Easter Monday and, although the rule may be neutral, it discriminated against him, in essence saying "take the designated days or pay for your own religious observance." Clause 12.01 of the collective agreement does not differentiate between Easters; however, its application affects him differentially. All employees under the collective agreement are entitled to 11 DPHs with pay, and the grievor's position of switching the days worked would not go beyond the 11 days.

[43] The grievor referred me to *Syndicat de l'enseignement de Champlain, Joseph Kadoch, Louise Elbraz and Jacob Lahmi v. Commission scolaire régionale de Chambly* [1994] 2 S.C.R. 525 ("Chambly"). In *Chambly*, the facts involved teachers who were of the Jewish faith, who, due to the school calendar, would be required to lose a day with pay if they wished to take a work day off to observe a religious day of obligation. The Court stated that "the idea that because the effect of the discrimination is not great no steps need be taken in order to make a reasonable accommodation is unacceptable.

[44] The grievor argued that there should have been discussions between him and the employer on the impact of taking certain steps to accommodate him and on the effect on the employer of the proposed schedule changes. The public service is a large workforce, as is the London TSO of the CRA. The grievor relied on *Alberta Human Rights Commission v. Central Alberta Dairy Pool, and the Canadian Human Rights Commission, Canadian Jewish Congress and Seventh-day Adventist Church in Canada* [1990] 2 S.C.R. 489 ("*Alberta Dairy Pool*") to support his argument on what would constitute undue hardship. At paragraph 62 of *Alberta Dairy Pool*, the Supreme Court stated as follows:

> *I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. . . . financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. … Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This 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.*

[45] According to the grievor, the magnitude of the risk was minimal and vague; things were not considered. The employer recognized the discrimination and then merely relied on clause 17.19 of the collective agreement. Clause 17.19 is not an exhaustive list and does not exclude other accommodations. The employer's behaviour demonstrates that its mind was made up and it was not prepared to consider other options. The grievor stated that his proposal, allowing him to work on Western Good Friday and Easter Monday, falls under clause 17.19 of the collective agreement, although it is not specifically listed there.

[46] The grievor argued that accommodation is a tripartite engagement that involves the employee, the bargaining agent and the employer. An agreement can be reached wherein special circumstances can be agreed upon by the parties that would allow for accommodation without breaching the collective agreement. Accommodation plans get negotiated, and as such the collective agreement and premium payments for working on DPHs, can be dealt with.

[47] The employer cannot be absolved from its legislative duties by hiding behind the collective agreement.

[48] The grievor asked for vacation, then asked for a switch to receive other paid leave, and then went back to asking for vacation days. He is asking as a remedy to be reimbursed his used vacation credits and granted paid leave for Orthodox Good Friday and Easter Monday.

[49] The grievor also suggests that paragraph 17.23(b) of the collective agreement is also an option when considering the issue. Paragraph 17.23(b) states as follows:

> ***17.23 Leave With or Without Pay for Other Reasons***
>
> *At its discretion, the Employer may grant:*
>
> *(a) …*
>
> *(b) leave with or without pay for purposes other than those specified in this Agreement.*

[50] The grievor relied on *Ontario Public Service Employees' Union, Local 571, v. Toronto Hospital and Dev Olshansky* [1997] O.L.A.A. No. 921 ("*Olshansky*") for the proposition that an employer is required to take such reasonable steps to

accommodate an employee's request for time off work for religious observance as are open to the employer without causing undue hardship.

[51] In *Markovic v. Ontario Human Rights Commission, and Autocom Manufacturing Ltd., Barry Grime, Darryl Goodwin and Christa Matheson* [2008] O.H.R.T.D. No. 62 at paragraphs 34 and 55, the Ontario Human Rights Tribunal stated as follows:

> ***34** . . . 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.*
>
> ***55** . . . I find that by providing a process for employees to arrange for time off for religious observances through options for scheduling changes, without the loss of pay, Autocom's menu of options is appropriate and consistent with the Code and the jurisprudence.*

[52] The grievor argued, however, that paragraph 34 of *Markovic* is not the entire issue; an employee should not have to use their "earned" vacation time; and the answer to this is found at paragraph 51 of *Markovic,* where the Tribunal stated as follows:

> *Absent the option of scheduling changes, the most appropriate solution was the use of a special leave provided for under the collective agreement.*

[53] The grievor referred me to *Her Majesty the Queen in Right of Ontario (Ministry of Community and Social Services) v. Grievance Settlement Board and Ontario Public Service Employees Union* [2000] O.J. No. 3411 (Ont. C.A.) ("*Tratnyek*"). According to the grievor, earned vacation time should not be encroached upon. At paragraph 37, the Ontario Court of Appeal stated as follows:

> ***37** 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. Central Okanagan School District no. 23 v. Renaud (1992), 95 D.L.R. (4th) 577 (S.C.C.) is a case on point.*

[54] It is the grievor's position that the employer rejected out of hand the scheduling change the grievor proposed, and in fact there was no discussion. The employer held rigidly to clause 17.19 of the collective agreement and showed no flexibility. The grievor stated that the change he was suggesting, namely working on Western Good Friday and Easter Monday and taking Orthodox Good Friday and Easter Monday off, would not have caused undue hardship.

[55] The grievor has also requested that I direct the employer to allow the grievor, as a possible option for accommodation, to work on Western Good Friday and Easter Monday in exchange for having Orthodox Good Friday and Easter Monday off as a paid holiday for religious observance.

B. <u>For the employer</u>

[56] The employer argued that this is a simple case; the question that I have to answer is whether the employer reasonably accommodated the grievor to allow him to fulfill his religious obligations. The employer stated that either it has properly accommodated the grievor or the grievor has failed in his role in the accommodation process.

[57] The employer stated that it recognizes its duty to accommodate employees and to accommodate employees of different religions. However, the employer and the grievor disagree on how this is to be done.

[58] *Renaud v. Board of School Trustees, School District No. 23 (Central Okanagan) and the Canadian Union of Public Employees, Local 523 and British Columbia Council of Human Rights* [1992] 2 S.C.R. 970 ("*Central Okanagan")* sets out the now well-recognized principles in cases regarding the duty to accommodate. At paragraphs 43 and 44, the court stated as follows:

> ***43*** *. . . 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 an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.*
>
> ***44*** *. . . 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.*

[59] In *Campbell v. Attorney General of Canada* [2009] F.C.J. No. 1603, the complainant had a bad back and the allegation initially before the Canadian Human Rights Commission and then before the Federal Court was whether the efforts to accommodate her were too little, and too late. The allegation of a failure to accommodate was dealt with by the court at paragraphs 51 and 52, as follows:

> ***51*** *The issue was not whether having the two workstations was a perfect solution. Clearly it was not. Nor was the issue whether the employee wanted an electric sit/stand workstation. The issue was whether she was adequately accommodated. The investigator found that she was. The solution provided as acceptable to the CRA ergonomist and to Health Canada. The Commission accepted the investigators report and in so doing acted reasonably.*
>
> ***52*** *The law requires reasonable accommodation, not perfect accommodation* (Central Okanagan School District No. 23 v. Renaud, *[1992] 2 S.C.R. 970.*

[60] In *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)* [2008] 2 S.C.R 561 the court was asked to assess the scope of the duty to accommodate. The duties of the employer are set out at paragraphs 15 and 16, as follows:

> ***15*** *. . . the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration. . . .*
>
> ***16*** *The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.*

[61] *Hydro-Québec* was considered in *Canadian Union of Public Employees, Local 4400, Unit B v. Toronto District School Board (Bashari Grievance)* [2008] O.L.A.A. No. 692. *Bashari* incorporates the concept that the duty to accommodate should not at first glance negate the fundamental basis of the relationship, which is that an employee provides work for pay. At paragraph 49 the arbitrator states that

accommodation is not payment of wages for nothing, but is the facilitation of the opportunity to work all of the time available for the performance of work. It is the ability to earn full wages and take holy days off work.

[62] The employer argued that *Richmond v. Canada (Public Service Commission)* [1997] 2 F.C. 946 (F.C.A.) (which upheld the Public Service Staff Relations Board (PSSRB) decision [1995] C.P.S.S.R.B. No. 43) is on point with the grievor's case. *Richmond* deals with a grievance filed by a number of employees who grieved the employer's refusal of their request for discretionary leave with pay to celebrate the Jewish religious holidays of Rosh Hashanah and Yom Kippur in 1992 and Rosh Hashanah in 1993 which fell on scheduled working days. The grievor's alleged that the refusal constituted discrimination on the basis of their religion. The PSSRB held that while there is a need to accommodate, there is no need to accommodate "up to the point of undue hardship" if there is another means of accommodation available. The PSSRB, in rendering its decision, commented on the SCC decision in *Chambly,* stating that a careful reading of *Chambly* does not reveal any need for an employer to suffer hardship in order to accommodate an employee in fulfilling his or her religious obligations.

[63] The Federal Court of Appeal in *Richmond* upheld the PSSRB decision and stated at paragraph 2 as follows:

> *2 . . . The doctrine of undue hardship does not, however, in view of the collective agreements as they stand, extend so as to compel the employer to use the discretionary provisions of those collective agreements in such a way as to make it mandatory for the employer to grant leave with pay to the appellants for religious purposes. The doctrine, in my view, stops short of this.*

[64] The employer argues that the *Richmond* case is strikingly similar to this case and suspects that the provisions at clause 17.19 of the collective agreement likely had its genesis in the aftermath of *Richmond*. The employer is required to accommodate, not accommodate to the point of undue hardship if undue hardship is not necessary to achieve accommodation. In *Richmond* the grievors asked for only one thing and when they didn't get it they grieved that they were not accommodated. This appears to be similar to the argument of the grievor in this case.

[65] The employer need not suffer hardship to accommodate; undue hardship only comes into play if there are no other available options for accommodation.

[66] At paragraph 25 of *Richmond* the Federal Court of Appeal directly addresses the argument of exchanging holidays put forth by the grievor in the instant case. The Court stated as follows:

> ***25*** *It may very well be that observants of the Jewish faith may prefer to work during the two days of Christmas Day and Good Friday, and enjoy two days of leave with pay to attend festivities related to their own faith. But it would be a breach of the collective agreements and the Canada Labour Code to expect the employer to open its offices on Christmas and Good Friday for a number of employees of the Jewish faith, since these paid holidays apply to all and all are entitled to them. Make-up time, as offered by the employer to the grievors, is accumulated by working extra hours during the day or working on Saturdays. Generally speaking, working longer hours to make up time is common in many trades and professions. However, making up time so as to attend religious observances, while being obligated to take statutory holidays for religious days one is indifferent to, may become a difficult and frustrating experience.*

[67] The employer also relied on *Tratnyek* at paragraphs 51 and 52, which talks about the compressed work week option as being an accommodation mechanism which, properly categorized, is a full-time scheduling alternative provided for in a collective agreement available to employees who require time off work to fulfill their religious commitments. Depending on the circumstances, this option may represent the most reasonable form of accommodation. 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. This concept is also set out in *Toronto (City) and C.U.P.E., Loc. 79* [2003] O.L.A.A. No. 795, as well as *Turning Point Youth Services v. Canadian Union of Public Employees, Local 3501* (2008) O.L.A.A. No. 83.

[68] The employer submitted that the grievor initially requested two days of annual leave to observe Orthodox Good Friday and Easter Monday. The documents produced as evidence in the hearing support that fact. The grievor acknowledged in his testimony that the employer offered him all the options under clause 17.19 of the collective agreement, including clause 17.19(c), to take time off with pay and make up

the time; all the options were refused by the grievor. What is unclear is whether there was ever a rationale for the refusal. The only comment made by the grievor in his testimony was that it was not convenient, behind which the employer submits the grievor cannot hide. It is incumbent on the employee, when faced with viable options of accommodation, to state why the options offered are not acceptable.

[69] The pith and substance of the grievance is about money, the leave with pay. The grievor simply wants to be paid for the Orthodox Good Friday and Easter Monday without having to use earned vacation days or make up the time by working at other times. None of the documents presented, including the grievance, make reference to working on Western Good Friday and Easter Monday in exchange for having Orthodox Good Friday and Easter Monday off as paid holidays. There is no evidence that the option of working on Western Good Friday and Easter Monday in exchange for having Orthodox Good Friday and Easter Monday off with pay was ever discussed before the request for vacation leave was made.

[70] The employer is not suggesting that the option of working on Western Good Friday and Easter Monday in exchange for having Orthodox Good Friday and Easter Monday off with pay is an undue hardship.

[71] With respect to the grievor's argument about using clause 17.23(b) of the collective agreement, the employer submitted that using this clause would be inappropriate, since clause 17.19 exists and directly addresses the matter at issue. The parties have specifically turned their minds to how to address the issue of religious observance and that is clause 17.19.

[72] With respect to the request by the grievor for an order that his suggestion that working on Western Good Friday and Easter Monday in exchange for having Orthodox Good Friday and Easter Monday off as paid holidays is an option, the employer argued that this would be analogous to altering the collective agreement which an adjudicator does not have the authority to do.

[73] The employer also provided me with *Ontario Public Service Employees Union v. Ontario (Ministry of Community Safety and Correctional Services)* [2011] O.G.S.B.A. No. 107 and *Attorney General of Canada v. Bronwyn Cruden and the Canadian Human Rights Commission* [2013] F.C.J. No. 599, to address the grievor's argument with respect to process.

[74] The employer argued that there is no separate duty of procedural accommodation when it comes to accommodation issues. If an accommodation is offered and the accommodation is found to be reasonable in all the circumstances, the fact that the process to achieve that accommodation was not procedurally fair does not somehow negate the accommodation and lead to some separate head of damages.

C. Grievor's reply

[75] The heart of the grievor's case is whether or not people should have to pay for their religious observance.

[76] *Richmond*, although an important case, has been left in the wake of *Tratnyek*. In *Richmond* the grievors were insisting on being paid for the days off.

[77] The grievor states that one cannot have accommodation without a process. The employer in this case has ignored process. The employer alone cannot dictate what is reasonable.

[78] While people can choose to use earned leave (vacation) that is only one option and people are not obligated to use it.

IV. Reasons

[79] The grievor submits that he has been subject to adverse discrimination by the employer in violation of clause 43.01 of the collective agreement, because employees who observe Western Good Friday and Easter Monday receive those days off with pay as DPHs, while he, as an Orthodox Christian, is required to use his earned vacation days to observe Orthodox Good Friday and Easter Monday. At the hearing, he stated that he wanted to be accommodated through working on Western Good Friday and Easter Monday and be paid, and in turn receive paid leave for Orthodox Good Friday and Easter Monday.

[80] The burden is on the grievor to prove on a balance of probabilities that the employer has breached the collective agreement.

[81] There is no dispute in the present case as to the employer's obligation to accommodate the grievor on religious grounds. There is also no dispute that the collective agreement contained provisions to address accommodation for religious

reasons. The sole issue before me is whether or not the employer met its obligation to do so.

[82] I find that the employer complied with the wording of the collective agreement. The provision agreed upon by the bargaining agent and the employer for the accommodation of religious obligations (clause 17.19 of the collective agreement) provided for a menu of options as to how religious obligations could be accommodated. That list of options for the accommodation of religious obligations included annual leave, compensatory leave, leave without pay for other reasons, and at the employer's discretion, time off with pay that are made up by the employee, hour for hour within a period of six months. Essentially, the collective agreement provision set up a number of options to accommodate requests for religious observances. That provision did not include the possibility of additional paid leave for religious observances, but included options that did not involve a loss of vacation time, or leave without pay, such as compensatory leave and discretionary time off to be made up by the employee. The grievor was not forced to select the option of vacation leave. He was well aware of the choices he had. In addition, when he made his request for additional paid leave after Western Easter Monday and was refused, he was reminded of the possibility of the other options, including compensatory leave. The grievor also alleged that he ought to have been allowed to work on the Western Good Friday and Western Easter Monday in order that he could avoid taking vacation time on the Orthodox Good Friday and Orthodox Easter Monday. For the reasons I have outlined below, there is insufficient evidence before me to find that this request was actually made.

[83] On the day before Western Good Friday, April 9, 2009, at 1:40 p.m., (only a few hours before the four-day long weekend started), the grievor emailed his supervisor and asked to take vacation time for Orthodox Good Friday and Easter Monday. The email stated simply, "I would like to take vacation time for April 17th and 20th. Paul." There is nothing in the email to indicate that the grievor had made any request about working on Western Good Friday and Easter Monday in exchange for having Orthodox Good Friday and Easter Monday off with pay.

[84] On Tuesday, April 14, 2009 (the day immediately after the Western Easter weekend), the grievor sent a second email to his supervisor that read as follows:

> *This Friday and following Monday are Good Friday and Easter Monday for the Orthodox Church, and, as you know, I am a member.*
>
> *Article 17.19 of our collective agreement allows for unpaid leave for religious obligations. However, article 43.01, states, "There shall be no discrimination, … by reason of … religious affiliation …." Therefore, I would like to request that I be granted paid leave, rather than vacation leave already granted, for this Friday April 17th and Monday April 20th.*

[85] Sometime after sending his email of April 14, 2009, the grievor met with his supervisor, Mr. Ball, and the outcome of that meeting was that Mr. Ball was not prepared to change the vacation leave, already granted, to other paid leave. At this juncture the grievor told Mr. Ball that he was not prepared to take leave without pay for Orthodox Good Friday and Easter Monday, and he confirmed that he would continue to take those days as vacation days.

[86] The grievor did take Orthodox Good Friday and Easter Monday off and did use two vacation days.

[87] While the grievor does state in his evidence that he had a discussion about working on Western Good Friday and Easter Monday in exchange for having Orthodox Good Friday and Easter Monday off with pay, the details of this discussion are sketchy. There is no record of that request being made. If there was a meeting to discuss that request, there is no record of it. The grievor does not state in his evidence the person with whom he had this discussion, the date of the discussion, or the extent of the discussion. Mr. Taylor testified that he never had a discussion about the possibility of the grievor working on the Western Good Friday and Easter Monday, either with the grievor or with Mr. Ball. When the grievor gave his evidence he stated that he had originally requested vacation time for Orthodox Good Friday and Easter Monday, which is why he sent the email of April 9, 2009.

[88] In cross-examination it was pointed out to the grievor that the wording of his original request on April 14, 2009, and the subsequent email exchange on April 16, 2009, never mentioned working on Western Good Friday and Easter Monday in exchange for getting Orthodox Good Friday and Easter Monday off with pay. The grievor acknowledged that what he had asked for is what is written in the documents and that it was a long time ago that he made his request and he could not remember

how he made his request, but he did recall that he wanted to have the time off and be paid.

[89] The case law in this area is quite settled. One of the seminal cases on accommodation in this country is *Central Okanagan,* which states that the search for accommodation is a multi-party inquiry involving the employer, the union and the employee. An employee seeking accommodation has a duty to assist in obtaining an appropriate accommodation. In determining whether the duty to accommodate has been fulfilled, the conduct of the complainant must be considered. This is in addition to the conduct of the employer as well as the union. In addition, the Supreme Court also stated that an aspect of the duty of the employee is to accept a reasonable accommodation. In *Campbell*, the Federal Court in opining on *Central Okanagan* stated that the law does not require a perfect accommodation.

[90] The Supreme Court in *Central Okanagan,* in opining on accommodation, had already addressed the issue of adverse discrimination in *O'Malley* in dealing with a rule regarding working at times that are inconsistent with an employee's religious faith. Adverse discrimination is described in *O'Malley* and arises when an employer, for genuine business reasons, adopts a rule or standard that, on its face, is neutral and applies equally to all employees, but has a discriminatory effect on a prohibited ground on an employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the workforce.

[91] The grievor has argued that there can be no accommodation without a process, and there was no process. He submitted that there should have been discussions between himself and the respondent on the accommodation and its potential impact. As noted earlier in my reasons, the collective agreement did in fact set out a process. As set out in *Central Okanagan*, accommodation is a multi-party inquiry. The extent of this multi-party inquiry is dependent on the facts of each individual case. At one end of the spectrum, the inquiry can be as short, simple and straightforward as an employee identifying the need for an accommodation and the employer granting it. At the other end of the spectrum, the inquiry may be much more complex and involved and requiring the involvement of many different parties over a much longer period. While I agree with the grievor that there needs to be a process, that process starts with

the grievor. If the employer does not know that the grievor needs or is seeking an accommodation, it cannot very well respond to it.

[92] The duty to accommodate is not absolute. In *Tratnyek*, (at para 37) it is noted 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." As noted by the Ontario Court of Appeal, in some instances, scheduling changes may provide the fairest and most reasonable form of accommodation. (at para 37).

[93] The grievor complained that he was not accommodated. His requested accommodation, which he suggested was a straightforward solution, was simply to allow him to work on Western Good Friday and Easter Monday, receive his normal pay, and take Orthodox Good Friday and Easter Monday off as the DPH. He would not lose any regular pay, nor would he be required to use his vacation credits. I do not accept this argument, as it is not in line with the facts presented in evidence.

[94] The evidence presented indicates that the grievor first asked for Orthodox Good Friday and Easter Monday off mere hours before the Western Good Friday and Easter Monday long weekend began. I have heard no evidence that the solution that the grievor argued before me (working Western Good Friday and Easter Monday and getting Orthodox Good Friday and Easter Monday as DPHs) was ever raised before that email. If the grievor does not tell the employer that he needs or wants an accommodation, a solution cannot be implemented by the employer, since it does not know that accommodation is being requested. For this reason alone the grievance must fail.

[95] I also do not accept the argument of the grievor that this case is about whether people should have to pay for their religious observances. This is not what was presented in the grievance or in the hearing. The central issue in this case was whether or not the grievor had been accommodated and whether or not the parties met their respective obligations in the accommodation process. As I have discussed above, the grievor did not make his request known to the employer at a point where the employer could respond to it; as such, the grievor did not meet his obligation. In addition, not everyone who is employed gets paid for DPHs.

[96] Many of the DPHs, but not all, coincide with statutory holidays observed across the country. Some of the DPHs have their origin in Christian religious beliefs, such as Christmas and Easter, while others are purely secular. Of the DPHs, Christmas, Good Friday and Easter Monday, appear to have a discriminatory effect upon a prohibited ground because of the characteristic of those employees whose religious faith does not recognize those days. In effect, the employees whose faith recognizes those days receive a day off work with pay, and do not have to take time away from work to observe the tenets of their faith.

[97] The situation in which the grievor found himself with respect to the observance of Orthodox Good Friday and Easter Monday is not unlike the situation that many other employees who are not observers of Western Christian religions. This is not something new and has been dealt with by both this Board, its predecessor, the PSSRB and the courts.

[98] The relationship between the employer and employee has become increasingly complex over time. While the employer maintains much of the control over the workplace, this control is constrained by legislation and collective agreements. I agree with the reasoning in *Bashari*, which states that accommodation should not override the fundamental basis of the relationship, which is that an employee provides work for pay. The provisions contained in collective agreements are not employer-imposed rules, but terms and conditions negotiated for certain employees by their bargaining agent (in this case the PIPSC) for the benefit of those employees in the unit. Much of what is contained in the collective agreement addresses compensation for the work being carried out by the employee for the employer. It is in this vein that the DPHs have come to be. All employees who fall within the terms and conditions set out in the collective agreement are entitled to the DPHs set out in the collective agreement. The key characteristic of the DPH is that the employees bound by the collective agreement shall be entitled to have those days off work and still receive pay for them, as if they had worked those days. If an employee who is entitled to a specific DPH is required to work on that DPH, clause 12.05 of the collective agreement requires the employer to pay that employee a premium, at the overtime rates set out at article 9 of the collective agreement. At the same time clause 12.02 of the collective agreement disentitles any bargaining unit member from the benefit of the DPH if that member is absent from work the full working day before the DPH and immediately after the DPH.

[99] The grievor has suggested that the employer, the grievor and the bargaining agent certainly could have entered into an agreement whereby the grievor worked the DPH of Western Good Friday and Easter Monday for regular pay, not premium pay, and received Orthodox Good Friday and Easter Monday off with pay. In theory this is correct; however, there is no evidence that this discussion ever took place, let alone in a timely manner such that it could be considered or, if acceptable, implemented.

[100] I also agree with the reasoning of the PSSRB in *Richmond*, which was upheld by the Federal Court of Appeal. While there is a need to accommodate, there is no need to accommodate up to the point of undue hardship if there is another reasonable means of accommodation available. The right that must be respected is that of an employee fulfilling a religious obligation. The Federal Court of Appeal in upholding the PSSRB's decision stated the following at paragraph 2:

> *The doctrine of undue hardship does not, however, in view of the collective agreements as they stand, extend so as to compel the employer to use the discretionary provisions of those collective agreements in such a way as to make it mandatory for the employer to grant leave with pay to the appellants for religious purposes. The doctrine, in my view, stops short of this.*

[101] Clause 17.19 addresses the issue of religious observances for those employees who require time away from work to observe or fulfill their religious obligations and the employer and bargaining agent have clearly recognized the potential for adverse effect discrimination, as there appears to be a solution that they have negotiated in the form of Article 17.19 of the collective agreement. Clause 17.19 of states as follows:

> ***17.19 Religious Obligations***
>
> *(a) The employer shall make every reasonable effort to accommodate an employee who requests time off to fulfill his religious obligations.*
>
> *(b) Employees may, in accordance with the provisions of this Agreement, request annual leave, compensatory leave or leave without pay for other reasons in order to fulfill their religious obligations.*
>
> *(c) Notwithstanding clause 17.19(b), at the request of the employee and at the discretion of the Employer, time off with pay may be granted to the employee in order to fulfill his religious obligations. The number of hours with pay so granted must be made up hour for hour within a period of*

> *six (6) months, at times agreed to by the Employer. Hours worked as a result of time off granted under this clause shall not be compensated nor should they result in any additional payments by the Employer.*
>
> *(d) An employee who intends to request leave or time off under this Article must give notice to the Employer as far in advance as possible but no later than four (4) weeks before the requested period of absence.*

[102] The Federal Court of Appeal, in reviewing the PSSRB decision in *Richmond,* addressed an alleged discrimination situation in which the proposed solution was remarkably similar to the one being proposed here. In that regard the court stated the following at paragraph 25 of their decision:

> ***25*** *It may very well be that observants of the Jewish faith may prefer to work during the two days of Christmas Day and Good Friday, and enjoy two days of leave with pay to attend festivities related to their own faith. But it would be a breach of the collective agreements and the Canada Labour Code to expect the employer to open its offices on Christmas and Good Friday for a number of employees of the Jewish faith, since these paid holidays apply to all and all are entitled to them. Make-up time, as offered by the employer to the grievors, is accumulated by working extra hours during the day or working on Saturdays. Generally speaking, working longer hours to make up time is common in many trades and professions. However, making up time so as to attend religious observances, while being obligated to take statutory holidays for religious days one is indifferent to, may become a difficult and frustrating experience.*

[103] What the Federal Court of Appeal stated in *Richmond* appears to have been put into place by the employer and bargaining agent at clause 17.19 of the collective agreement. Although I am prepared to accept the grievor's argument that clause 17.19 is not necessarily the only solution available to parties in cases of religious discrimination and accommodation, I agree with the Supreme Court of Canada in *Central Okanagan* when it states that a party requiring accommodation need not be provided with the perfect accommodation. As reflected in *Tratnyek*, *City of Toronto v. C.U.P.E., and Turning Point Youth Services*, a reasonable form of accommodation is satisfactory. Clause 17.19 of the collective agreement includes appropriate options to satisfy the requirement to allow the grievor to fulfill his religious freedom. In my view, given the state of the law, if none of the options as set out in the collective agreement could be achieved, it would be incumbent on the grievor to demonstrate why.

[104] The grievor referred me to the decision in *Chambly*. The situation in *Chambly* is unique and inconsistent with the facts here. In *Chambly*, the grievor's were teachers and their functions were such that it would be impossible for them to exchange the Jewish days of observance for Christmas and Easter or working later or on weekends given that the children they were teaching would not be in school. Given the facts of that situation, working longer hours teaching to make up the lost time was not feasible. I also agree with the observation made in two of the decisions referred to by the grievor that the result in *Chambly* would have been different had reasonable scheduling changes been available. The Supreme Court did not establish, as a general principle, that employers must pay employees for time off for religious observances. (See *Markovic*, at para 51, and *Tratnyek* at para 51).

[105] With respect to the grievor's argument regarding the use of clause 17.23(b) of the collective agreement, I agree with the employer's submissions that this clause is not applicable in the circumstances. Clause 17.19 deals with leave for religious obligations and clause 17.19(b) specifically provides that the employer has the discretion to grant an employee leave without pay for religious obligations. Clause 17.23(b) gives the employer discretion to grant leave without pay for purposes other than those specified in the collective agreement. Since religious obligations are specifically set out in the collective agreement at clause 17.19 and discretion to grant leave without pay for that purpose is set out therein, clause 17.23(b) is not applicable.

[106] As I have found that the grievor has failed in his role in the accommodation process and that the accommodation offered by the employer satisfies the tests stated by the Supreme Court of Canada, Federal Court of Appeal, and other jurisprudence, I need not address the employer's submission regarding the fairness of the accommodation process.

[107] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[108] The grievance is dismissed.

September 19, 2014.

John G. Jaworski,
adjudicator