

MANAGEMENT COUNSEL

Employment and Labour Law Update



Call To the Bar

Note To Our Readers: In the spirit of the holiday season, our first piece is a little different and a lot festive! We hope that you will enjoy our tongue-in-cheek look at the employer/host's responsibilities during a holiday party. That said, we remind everyone that if you must drink, please do not drive. Have and safe and happy holiday!

'Though 'tis is the season to be jolly,
Reckless partying remains pure folly.
In *Childs**, the Supreme Court did find,
Party rules all hosts should mind.

That common sense shall prevail,
While observing guests' consumption of ale.
Which isn't to mean, the Court did say,
That heavy tipplers themselves won't pay.

Indeed the guest's at fault,
Said the Court,
For harming others,
For committing a tort!

But back to the host, trying to make merry,
Is the Court recommending serving punch with no sherry?
No! Take practical measures sayeth the Court on high,
Consider alternatives, serve coffee and mince pie.

As for those guests we see stumble and crouch,
Steer away from the bar, direct to the couch.

For while it's the guest who owes a duty of care,
To unsuspecting others his carelessness ensnares,



“Though 'tis is the
season to be jolly,

Reckless partying
remains pure folly.”

Call continued from p.1

The social hostess may herself be cursed,
For exacerbating risk - for making matters worse.

So lest we assume she's off the hook,
Gather closer to the hearth, re-examine the book!

If the party has a purpose that is not merely social,
Such as a company gathering, an aspect that's commercial,
The Court warns - - and here's the catch,
For a commercial host different rules will attach.

A commercial host owes a duty of care,
To members of the public, should negligence impair.

So as we don our festive apparel,
Steeling ourselves for yet another carol,
Pay heed, we beseech you, to what the Court doth say,
Don't contribute to the problem - avoid harm's way.

* In *Childs v. Desormeaux*, 2006 S.C.C. 18, a unanimous Supreme Court of Canada concluded that a social host who serves alcohol at a private party does not, as general rule, owe a duty of care to members of the public who may be harmed by the actions of a guest. However, if the host's conduct "becomes implicated in the creation or enhancement of a risk

sufficient to give rise to a *prima facie* duty of care to third parties", such as by continuing to serve a visibly inebriated guest, the host may be liable for any resulting damage. In so finding, the Court contrasted a social host of a private party, with a commercial host, the latter which, because he/she either exercises a public function or engages in a commercial enterprise that includes implied responsibilities to the public at large, is subject to "special duties" and must act to prevent foreseeable harm to others.

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YOU
KNOW?**

Ontario's minimum wage will increase to
\$8.00 per hour effective February 1, 2007.
There are certain exceptions, including students
and employees who serve liquor. For more
information, give us a call.

Paid Time Off to Observe Religious Custom

We are often asked what steps an employer must take to “accommodate” an employee who is seeking paid time off to observe religious customs or practices. While this question is particularly relevant as we approach the traditional holiday season in Canada, we all know from experience that the issue is relevant throughout the year.

HUMAN RIGHTS LEGISLATION

Most Canadians are familiar with human rights legislation which protects individuals from discrimination on the basis of specific, prohibited grounds listed in the legislation. The grounds may vary across the jurisdictions. However, the intention of the legislation is consistent throughout Canada - to recognize and preserve the inherent dignity of every person and ensure the removal of barriers which may prevent individuals from participating in, and contributing to, the community.

In Ontario, the *Human Rights Code* (the “Code”) includes “creed” as a prohibited ground. “Creed” is not specifically defined in the Code. However, the Ontario Human Rights Commission (the “Commission”) has interpreted creed to mean “religious creed” or “religion” - in other words, a professed system and confession of faith, including beliefs and observance or worship. Significantly, a belief in God or gods, or a single supreme being or deity is not essential. Similarly, the Commission recognizes non-deistic bodies of faith, such as the spiritual faiths/practices of aboriginal cultures and newer religions which are *bona fide*.

That said, “religion” does not include secular, moral or ethical beliefs or political convictions. As well, the Code does not extend protection to religions which incite hatred or violence against other individuals or groups, or to practices and observances that purport to have a religious basis but which contravene international human rights standards or criminal law.

THE TRADITIONAL VIEW

Traditionally, courts have accepted the argument that the calendar used in Ontario is secular and as such not discriminatory - the reason being that the calendar is a schedule of work, with no religious objective. As such, courts have held that the calendar is neutral and not directly discriminatory against non-Christians - this, despite the fact that two Christian holy days – Christmas Day and Good Friday – are statutory holidays.

THE CONTEMPORARY VIEW

The Commission, and some courts, has taken the analysis one step further. They have looked at the *effect* of the calendar,

rather than merely its *objective*.

The result has been recognition that while employees of the Christian faith are able, if they choose, to celebrate two Christian holy days without using vacation days, *lieu* days or taking unpaid leave, there is no equivalent statutory entitlement for non-Christians. In other words, while the objective of the calendar may not be directly discriminatory, the effect appears to be.

THE COMMISSION'S POLICY

The Commission has adopted a policy on creed and the accommodation of religious observances (the “Policy”). The Policy attempts to level the playing field by requiring employers to accommodate employees who request time off to observe holy days. Specifically, all non-Christian employees seeking to observe religious customs or practices are entitled to two days of paid leave.

Significantly, this Policy is not legally enforceable. It merely represents the Commission’s interpretation of the Code. Only the Code itself (and the way in which it has been interpreted by the Commission and the courts) can determine the rights and obligations of individuals and employers.

“...a belief in God or gods, or a single supreme being or deity is not essential ... the Commission [also] recognizes non-deistic bodies of faith, such as the spiritual faiths/practices of aboriginal cultures and newer religions which are *bona fide*...”

WHAT THE COURTS SAY

The courts have not gone as far as the Policy in terms of granting employees an automatic right to two paid holidays for religious observance. Rather, the decisions reinforce that the obligation rests with the employer to accommodate an employee’s request for leave for religious observance, to the

Religious Custom continued from p.3

point of undue hardship.

The question is therefore, what is undue hardship? Not surprisingly, there is no one right answer for all employers, nor for all employees. The one constant is that the employer must be flexible in its approach, taking reasonable steps to accommodate the employee, while at the same time take into consideration all the circumstances of the workplace. Within this context, it is important to note that merely providing an employee with the opportunity to take two days unpaid leave for religious observance will not, except in the rarest of circumstances, satisfy the duty to accommodate to the point of undue hardship.

Some of the factors the Commission and courts have considered when assessing what constitutes undue hardship include:

- Size of the employer's operation
- Financial cost
- Disruption of a collective agreement
- Impact on morale of other employees
- Interchangeability of work force and facilities
- Flexibility of the workplace schedule
- Whether safety is at issue

If you would like to discuss your organization's rights and responsibilities as they relate to this issue, please contact any member of our team.

Next in our series of employment and labour law updates:

TOPIC: Occupational Health And Safety In Ontario:
What You Don't Know Can Hurt You.

In this timely refresher, learn about:

1. "The duty to take every precaution reasonable" and other obligations imposed by the *Act*
2. Health and Safety policies and programs
3. Powers of Ministry of Labour Inspectors
4. Penalties faced by employers
5. Bill C-45 update

DATE: Tuesday, January 30, 2007, 7:30 a.m. – 9:00 a.m. Program to start at 8:00 a.m., breakfast provided.

VENUE: The Toronto Board of Trade Airport Centre, 830 Dixon Rd., Toronto, ON 416.798.6811

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