

## REVELATIONS IN ACCOMMODATION

*by Debra C. Curley and Robert M. Bell*

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The ease with which employees can seek religious protection and can invoke the duty to accommodate under the Ontario *Human Rights Code* was clearly demonstrated in *407 ETR Concession Company v. CAW-Canada, Local 414*, (Black et al), (2007) 158 L.A.C. (4<sup>th</sup>) 289 (Albertyn). Arbitrator Albertyn found that the duty to accommodate was triggered by the grievors' belief that using biometric scanners could impose the "mark of the beast" on them and would subject them to eternal damnation. The case illustrates that virtually any belief can trigger the duty to accommodate as long as the belief is sincerely held and has some connection to the worker's faith.

### FACTS

The 407 ETR Concession Company Limited is the operator and manager of Highway 407, a key artery serving the Greater Toronto area and Ontario's first toll highway. The Company has a corporate office in Woodbridge, Ontario, where more than 500 employees work. The employees belonging to the bargaining unit consist of two classifications: customer service representatives and video exception process operators. Customer service representatives work in two service centres in the building: a call-in centre for phone-in customers and a customer service desk for walk-in customers.

In order to improve security, the safety of its employees, and human resource administrative processes, the Company decided to install biometric technology at the Woodbridge office. The Company planned to install twenty-five biometric scanners in different locations to control access to various entrances and exits. In addition to controlling building access, the scanners were connected to the Company's employee attendance software, which would enable the Company to accurately record employee attendance and activities throughout the building.

The proposed biometric technology involved scanning an employee's right hand for identification purposes. The scanner produced a three-dimensional picture of the hand from which ninety-one measurements were taken. The biometric system converted these measurements into an algorithm of a nine-digit number, which was stored in the system and which was then used to identify the employee when his or her hand was scanned. Of note, the system did not mark, imprint, photograph, or X-ray the individual. No finger print or palm print was recorded, and other than the geometric numbers, no identification of the individual was entered into the scanner's databank.

The Company sought to introduce the biometric scanning system in a phased process, beginning with the customer service representatives working at the customer service desk. Of the nineteen employees working at the customer service desk, six objected to enrolling in the system on

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religious grounds. Specifically, the employees believed that using measurements of portions of the body for purposes of identification could impose the “mark of the beast” on them and would subject them to eternal damnation. Their beliefs were based upon literal interpretations of the apocalyptic text in the Book of Revelation of St. John the Divine found in the New Testament Bible. The Book of Revelation specifically encourages believers not to take the mark of the beast on their foreheads or on their right hands.

The beliefs espoused by the employees were not mandatory precepts of their faith; rather, whether they objected to the biometric scanning was a matter of individual conscience. Also of note, the grievors had driver’s licenses and passports, with digital photographs and numerical records of their names, addresses, and dates of birth kept in a government databank, however the employees did not believe that these processes invoked the “mark of the beast”.

The employer addressed employees’ religious objections by suggesting that they use their left hands rather than their right hands to enrol, or that they use tight-fitting gloves rather than their bare hands. Neither of these options was viewed as an acceptable alternative for three employees, who continued to refuse to enrol in the system. Faced with their refusal, the employer subjected the individuals to progressive discipline, and eventually discharged the three employees. The union filed policy and individual grievances asserting that the grievors had a right to be free from discrimination on the basis of the creed in which they believed, and should be accommodated to the point of undue hardship.

As a consequence of the grievances, the Company suspended its implementation of the biometric scanning security system without prejudice to its position that it was entitled to introduce it and intended to do so.

## **THE DECISION**

Arbitrator Albertyn upheld the grievance. He found the Company failed to accommodate the grievors’ sincerely-held beliefs to the point of undue hardship. The grievors were reinstated with full compensation.

Despite reservations, Arbitrator Albertyn followed the reasoning of the majority in the Supreme Court of Canada decision, *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551. He held that in order for the grievors’ beliefs to be afforded protection under the *Human Rights Code* on the basis of creed, the grievors need only demonstrate a sincerely-held belief that had a nexus to religion.

Arbitrator Albertyn held that the determination of whether a belief is sincerely held is limited to ensuring that an asserted religious belief is held in good faith and is not fictitious, capricious, or an artifice. The grievors were not obligated to prove either the objective validity of their beliefs or that the beliefs were shared by other members of the same religion. Moreover, it was irrelevant that church doctrine did not prohibit biometric scanning, and that subjecting oneself to biometric scanning was a matter of individual conscience. Finally, it was immaterial that a reasonable person might view the grievors’ beliefs as illogical and inconsistent. Based on the evidence before him, Arbitrator Albertyn concluded that the grievors’ beliefs were sincerely held and they had a nexus to religion. Accordingly, the grievors were entitled to protection from discrimination on the basis of creed under the *Human Rights Code*.

The analysis then turned to whether the grievors had been accommodated to the point of undue hardship. Arbitrator Albertyn found that the Company never seriously addressed the question of what it could do to accommodate the grievors. The Company took the position that if it had to accommodate the grievors in the manner they proposed, the entire biometric scanning system would have to be jettisoned, which would amount to undue hardship. Arbitrator Albertyn disagreed with the employer and held that it would not be an undue hardship to permit the grievors to use the biometric scanner with swipe cards and passwords, without adopting its biometric features. Consequently, the grievors were reinstated with full seniority and compensation.

### **IMPLICATIONS FOR EMPLOYERS AND UNIONS**

Although Arbitrator Albertyn followed the reasoning of the majority of the Supreme Court in *Amselem*, he was nonetheless clearly concerned that applying the subjective approach articulated by the majority imposed a significant burden on employers to accommodate religious beliefs that were too easily demonstrated by employees. He wrote:

The difficulty with the approach of the majority...is that it over-emphasises the purely individual nature of religious belief, allowing for an almost unlimited range of individual extrapolation on core religious beliefs. It means that virtually any belief, founded in some tenet of the worker's faith, sincerely held, will trigger the onerous duty to accommodate to the point of undue hardship.

He preferred the view of the minority of the Supreme Court that the individual must establish a reasonable nexus between his or her personal beliefs and the precepts of his or her religion. To rely on such a conscientious objection, the individual must demonstrate the existence of a religious precept, a reasonable belief that the practice dependent on the precept is mandatory, and the existence of a conflict between the practice and the rule imposed by the employer.

He held that if the minority approach was applied to the facts before him, the grievors could not have established, on an objective basis, a reasonable belief for refusing to participate in the biometrics program because the belief was not a mandatory precept of the Pentecostal church. Accordingly, applying the minority approach, they would not have succeeded in their contention that they had been discriminated against on the basis of their creed.

In considering both majority and minority decisions in *Anselem*, Arbitrator Albertyn demonstrated how easily an employee can establish that he or she is entitled to protection under the *Human Rights Code*, and how religious beliefs can impose a substantial burden on employers and restrict management's right to introduce new technology into the workplace. This decision demonstrates that employers and unions implementing new technology must be prepared to accommodate employees' sincerely-held religious beliefs, even if not based in a mandatory precept of a religion.

\*Debra Curley, Filion Wakely Thorup Angeletti LLP, (416) 408-5565, dcurley@filion.on.ca

Robert Bell, Filion Wakely Thorup Angeletti LLP, (416) 408-5564, rbell@filion.on.ca