



HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Reva Landau

Applicant

-and-

Metropolitan Toronto Condominium Corporation #757

Respondent

DECISION

Adjudicator: Bruce Best

Date: January 27, 2021

File Number: 2018-34639-I

Citation: 2021 HRTO 76

Indexed as: **Landau v. Metropolitan Toronto Condominium Corporation #757**

APPEARANCES

Reva Landau, Applicant)	Self-represented
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Metropolitan Toronto Condominium Corporation #757, Respondent)	David Elmaleh, Counsel
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INTRODUCTION

[1] This Application alleges discrimination with respect to accommodation (housing) because of creed contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the “Code”).

[2] The applicant is the resident of a condominium unit in a building in Toronto. In November or December 2017, decorations were put up in the common areas of the building, including white lights placed on an evergreen hedge outside the building and on an artificial plant in the common room, and red poinsettias in the lobby. The board of directors for the respondent (the “board”) also sent around a solicitation for owners to contribute to a “thank you fund” for staff “as the holiday season is fast approaching”, which included images of candy canes and a mouse or teddy bear in a Santa hat.

[3] The applicant takes the position that the tree, lights, poinsettias, candy cane and Santa hat were associated with and evocative of Christmas, and that they were as such Christian religious symbols. She argues that their display in the common areas of the building made her feel, as a non-Christian, like a second-class citizen. She further claims that, though there was some acknowledgment of other religious holidays over the course of the year, these were not given equal prominence or recognition. She argues that the respondent’s actions overall amount to discrimination against her on the basis of creed.

[4] For the reasons below, the Application is dismissed.

FACTUAL BACKGROUND

History of Decorations in the building

[5] Though this Application is only with respect to incidents that occurred in the year prior to its being filed on November 1, 2018, I permitted the applicant to provide evidence with respect to older events, to put the timely incidents in context.

[6] The applicant testified that the building had always been non-denominational. She testified that when she moved in in 1993, there were no Christmas trees or “Happy Holidays” signs posted, though there had always been poinsettias in the lobby. Starting in 2010, the applicant described a number of incidents which she considered to be moving the building away from its non-denominational history, and which she considered to be giving preference or prominence to Christianity.

Bushes

[7] In 2013, some residents, including the applicant, raised a concern with the board about two Christmas trees, small pine trees with lights, that had been placed in planters outside the entrance to the building. The lights and the trees were removed in response to these concerns. From 2014 to 2016, white lights were instead placed in the bare branches of deciduous trees. The applicant took no issue with this, based on her view that such lights could be interpreted as simply brightening up the front of the building during winter, and were not necessarily a religious symbol.

[8] In mid-December 2017, white lights were put on a long, low evergreen bush or shrubbery which, from the photograph submitted as evidence, appeared to be approximately 5 metres in length by 1 metre in height. The applicant takes the position that, when put on an evergreen, the lights became evocative of and associated with Christmas, which, she argues, in turn means they were a Christian religious symbol.

[9] Paul Hornsby, the treasurer of the board, testified on behalf of the respondent. He indicated that the board recognized the objection in 2014 to the trees in the planters out front, and agreed that those could be considered “Christmas trees”, as they were conical evergreens. However, he disagreed that the white lights on the artificial tropical tree in the party room, or the white lights on the low evergreen hedgerow or shrubberies, could be considered “Christmas trees”.

[10] One of the applicant’s objections was the length of time the “Christmas” decorations would be up. She claimed that acknowledgment of other cultural or religious

events would occur only for a day or so, but that the lights that were put up in early December would stay up for six to ten weeks. Mr. Hornsby noted that the lights would stay up until February because it was winter, and noted that such lights were common on buildings all over the city.

Party Room Tree

[11] In the common/party room of the building, there had always been what the applicant described as a “tree with artificial green leaves”. Though the respondent described it as a tropical or ficus tree, which the applicant did not concede, there was no suggestion that this was an artificial pine or other type of coniferous tree. Images of the plant submitted as evidence at the hearing showed an oval, multi-stemmed broad-leaved shrub in a pot with white lights.

[12] In November 2017, the applicant saw staff members putting white lights on the tree. She was told that it was for a private party. The tree was also moved to a more prominent location. The applicant wrote building management raising concerns about the “Christmas Tree” in the common area. The building manager responded that it was not a Christmas Tree. The applicant responded that “[t]he tree clearly is a Christmas tree. It is an evergreen with lights.” She also referred to it in her evidence as an ersatz or “wannabe” Christmas tree, and argued that people seeing the tree would generally recognize that, however imperfectly, it was supposed to represent a Christmas tree. The applicant further indicated that, when approaching from outside, it looked like a Christmas tree.

[13] When asked in cross examination about the “Christmas tree” in the party room, Mr. Hornsby indicated that most people he spoke to considered the suggestion that the party room tree was a Christmas tree was “laughable.”

[14] What other people might have said about the tree to either the applicant or Mr. Hornsby is not evidence before me. It is, in both cases, unattributed, opinion, and hearsay. I am, however, prepared to accept that there can be different views over what label or symbolism can or should be taken from a particular decoration.

[15] I also do not find the differing opinions of the applicant and Mr. Hornsby to be inconsistent. This was an artificial broad-leafed green shrub in a pot with some white lights on it. I accept that some people could consider this an attempt, however imperfect, to be reminiscent of a Christmas tree. I also accept that some people would not. In either case, however, whether or not the party room tree could be considered a “Christmas tree” or could be evocative of Christmas does not answer the question of whether it was, as the applicant maintains, a Christian religious symbol.

Poinsettias

[16] The applicant testified that there had always been red poinsettias in the lobby, which she considered to be symbols of Christmas. When she was a board member she recommended the purchase of yellow poinsettias as well, a suggestion which was apparently implemented for a few years. The purpose of this request was, as she noted, to make the display of flowers in the lobby less “Christmassy”. She testified that at some point there were no longer any yellow poinsettias.

Thank You Fund

[17] In 2002, the board decided to collect donations to be distributed amongst building staff. This was originally called a “Christmas and Holiday Fund”, but the name was subsequently changed to the “Thank You Fund”. In 2010, the “Thank You Fund” was renamed the “Holiday Gratuity Fund”. The applicant felt that the use of the word “Holiday” was moving back to a less inclusive name, given that not everyone was necessarily celebrating a religious holiday at that time of year, so she wrote the board in 2010 urging them to change the name back. The board agreed, and changed back to the “Staff Thank You Fund”.

[18] In 2016 and 2017, the “Staff Thank You Fund” letter circulated to members of the condominium included the line “With the holiday season fast approaching”. The letter also included images of an evergreen bush with snow on it, a red ribbon, and a mouse or teddy bear wearing a Santa hat and holding a candy cane. The applicant also noted that, when

she looked at the computer directory listing for the thank you fund letters, the file name for the document was changed in 2016 and 2017 from “Staff Thank You Fund” to “Staff Holiday Fund”.

Religious Holiday Signs

[19] The applicant testified that signs were posted for some religious holidays, but not others. When they were posted, she argued that signs for Christian holidays were given preference or priority. The example she gave was a sign was put up in March 2018 which recognized both Easter and Passover, but, according to the applicant’s testimony, the sign was left up only until Easter Monday, though Passover continued for another four days. In contrast, she claimed that a sign respecting Christmas was left up for eight days, though in her view Christmas was a two-day holiday.

[20] The applicant further noted that the 2018 Easter/Passover sign stated "we wish everyone a holiday weekend". She argues that this was not inclusive, and argued that it assumed everyone in the building was celebrating either Passover or Easter. She acknowledged that signs were also put up for other religious holidays, including Chanukah, Eid-ul-Fitr, and Holi, though she claimed that the acknowledgement of these events was brief in comparison to the recognition of Christian holidays, which she claimed had associated symbols such as the lights, present for six to ten weeks. The applicant also testified that no signs had been put up for other religious holidays, such as Rosh Hashana / Yom Kippur, Diwali, or Buddha’s Birthday.

[21] The respondent's evidence was that the board had researched proactively posting for all religious holidays, and noted that based on the Ontario government list of holy days, there was a religious celebration almost every day of the year. The board decided to post signs for holidays it was aware of and which were celebrated within the building. It also determined that if it received a request to acknowledge another religious holiday, that request would be considered in good faith. The applicant acknowledged, in cross examination, that she had never requested that any particular holidays be recognized in the building, nor was she aware of anyone else making such a request and being refused.

[22] The respondent's evidence was that the objective was to be inclusive, reasonable, and neutral when acknowledging religious views within the building, but that it did not attempt to erase all references to religion, holidays or celebrations.

[23] Respecting the length of time for which signs were posted, Mr. Hornsby testified that the board did not give staff any particular direction as to how long a sign would stay up. He also noted that Christmas, as a religious observance, would have 12 days, not two.

LEGAL FRAMEWORK

[24] The relevant provisions of the *Code* are as follows:

2. (1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status, disability or the receipt of public assistance.

...

9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

...

11. (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or

(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

(2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for

accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

...

45.5. (1) In a proceeding under this Part, the Tribunal may consider policies approved by the Commission under section 30.

(2) Despite subsection (1), the Tribunal shall consider a policy approved by the Commission under section 30 in a proceeding under this Part if a party to the proceeding or an intervenor requests that it do so.

***Prima Facie* test**

[25] The onus is on the applicant to establish a *prima facie* case of discrimination. The test for *prima facie* discrimination as set out by the Supreme Court can be summarized as follows:

- The applicant has a protected characteristic under the *Code*;
- The applicant suffered disadvantage or adverse impact; and
- The protected characteristic was a factor in the disadvantage or adverse impact.

See *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, at para. 86, *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, at para. 69, *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, at para. 35, and *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

[26] In *Garofalo v. Cavalier Hair Stylists Shop Inc.*, 2013 HRTO 170, at para. 155, the Tribunal further noted:

... The ultimate issue is whether the applicant has proven, on a balance of probabilities, that a violation of the *Code* has occurred. Although an evidentiary burden to rebut discrimination may shift to the respondent, the onus of proving discrimination remains on the applicant throughout. See *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 at paras. 112 and 119.

[27] As noted in *Peel Law Association v. Pieters*, 2013 ONCA 396 (“*Pieters*”), at paras. 82-84, in a case where there has been a full hearing on the merits, the *prima facie* analysis is not necessarily required. *Pieters* at para. 83, stated:

. . . After a fully contested case, the task of the tribunal is to decide the ultimate issue whether the respondent discriminated against the applicant. After the case is over, whether the applicant has established a *prima facie* case, an interim question, no longer matters. The question to be decided is whether the applicant has satisfied the legal burden of proof of establishing on a balance of probabilities that the discrimination has occurred.

[28] The *prima facie* analysis may, however, as further noted in *Pieters* in para. 84, be useful as an analytic tool to consider whether the applicant has been able to establish discrimination.

ANALYSIS

Creed-based Discrimination

[29] Discrimination on the basis of creed can arise in different scenarios. In some cases, the issue will be how the neutral or otherwise non-religious conduct of the respondent impacts the respondent because of their creed. In other cases, creed is engaged where the respondent's actions impose a form of religious observance on a person who does not share the respondent's beliefs. See *Freitag v. Penetanguishene (Town)*, 2013 HRTO 893 (“*Freitag*”), at paras. 21-22.

[30] The first scenario will generally give rise to a case of constructive discrimination, where a respondent may have a requirement or policy that does not itself raise any *Code* issue, but may have an adverse impact on an individual because of their creed. For example, an employer may have a work schedule for all its employees which include working certain shifts on Saturday for business reasons. Such a rule would engage the ground of creed for an employee whose faith required observance of a Saturday sabbath. Such a situation would engage the duty to accommodate those religious beliefs under s. 11 of the *Code*.

[31] Adverse impact discrimination was also engaged in the British Columbia Human Rights Tribunal case *Jones v. C.H.E. Pharmacy Inc.*, 2001 BCHRT 1 ("*Jones*"). The employer expected the applicant to put out Christmas decorations, in particular red poinsettias, as part of his job. The applicant refused because decorating for Christmas was contrary to his faith as a Jehovah's Witness. The fact that the respondent was putting out the decorations for the purposes of marketing, and not for any religious reason, was irrelevant, as it was the applicant's beliefs that raised creed as a *Code* issue.

[32] In cases such as *Jones* where it is the applicant's religious beliefs that are at issue, the Tribunal has required an applicant to demonstrate that the practice or belief is experientially religious in nature. See *Barker v. St. Elizabeth Health Care*, 2016 HRTO 94 ("*Barker*") and *Clipperton-Boyer v. RedFlagDeals.com*, 2014 HRTO 1796 ("*Clipperton-Boyer*"), relying on the Supreme Court decision in *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 at para. 69 ("*Amselem*"). In *Clipperton-Boyer*, for example, the Tribunal determined that the use of a Christ fish avatar on an online discussion forum was not protected under the ground of creed, as it was "not rooted in any religious belief or practice."

[33] The second scenario, where it was the actions of the respondent that gave rise to a *Code* issue, arose in *Streeter v. HR Technologies*, 2009 HRTO 841 ("*Streeter*"). The Tribunal found discrimination in that case where the employer had created a religious atmosphere in which the applicant felt compelled to participate as a condition of employment. The finding in that case was based on the extent of the religious messaging, including the applicant being given a Bible, being asked to attend a "10 minute time of prayer and acknowledgment of God in our company", Bible study groups in the office, being asked to lead a prayer at a business meal in a public place, and an explicit request by the president of the company for the applicant to become involved in his religious teachings. The issue of creed was engaged as the respondent imposed his religious beliefs on his employees. The belief or creed of the employee was not relevant. *Freitag* was also in this category (see para. 22), though I note that the applicant in *Freitag* also

took the position that being present during the prayer was also contrary to his own belief system.

[34] I am unaware of any cases which have addressed discrimination on the basis of creed which do not involve either the respondent imposing its religious observances or rules on the applicant (such as *Streeter*), the respondent imposing a neutral requirement that is inconsistent with the applicant's beliefs (such as *Jones* or *Barker*), or both (such as *Freitag* or *Clipperton-Boyer*).

[35] The applicant in the present case is not claiming that the precepts of her creed are contrary to the decorations in question, as in *Jones*. Rather, her claim is based on the position that the actions of the respondent in allowing Christian religious symbols as decorations in the common areas of the condominium exclude her because she is not Christian. In that respect, the applicant alleges that she experienced differential treatment on the basis of creed. However, in order to show discrimination on the basis of creed, the applicant would have to establish that the decorations in question are, as she claims, Christian religious symbols.

Proposed Evidence

[36] The applicant sought to introduce into evidence a number of documents, including excerpts from websites, Wikipedia entries, news articles, academic papers, pictures of Church notice boards, and cartoon strips to support her position that decorations such as Christmas trees, poinsettias, and candy canes were Christian religious symbols.

[37] The respondent objected to this evidence. It noted that no expert was being called to testify on the issue, and that it would be highly prejudicial to permit these documents to be put in as evidence, as there was no opportunity to test the evidence, or cross examine the authors. The applicant argued that it was simply a matter of weight, and that I should consider the articles to assist me in determining the question of what was or was not a religious symbol, or to what extent the celebration of Christmas is a religious event. She noted that the articles showed that there was a discussion on the issue.

[38] I refused to allow the proposed evidence. Though the Tribunal has broad discretion to admit documents under s. 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990 c.S.22, this does not mean that the Tribunal should accept every document put forward by a party, and then decide how much weight it should be given. Though it may be appropriate to admit media articles or excerpts from websites where they relate to a minor issue, or an issue not in dispute, the Tribunal should be more constrained in what documents are admitted when they are, as in this matter, relating to a key evidentiary issue.

[39] Whether the decorations in question are Christian religious symbols and engage the *Code* ground of creed is central to this case, and is contested by the respondent. It is not appropriate, in my view, for such evidence to come from secondary sources such as media reports or websites, which cannot be tested, and it is not simply an issue of how much weight these documents should be given. It is, rather, not appropriate to consider them at all.

Religious Symbols

[40] The main incidents of alleged discrimination are, as set out above, respecting the lights on the bushes and the party room tree, the red poinsettias, and the "Thank You" fund letter, which include the candy cane and Santa hat images and the reference to the "holiday season."

[41] The respondent argues that there is no evidence before me on which I could find that these decorations are Christian religious symbols, and, failing such evidence, I cannot find that the ground of creed has been engaged. It notes that the only evidence the applicant purported to put forward in this respect was, properly, refused.

[42] The applicant takes the position that it is enough that they are all associated with or evocative of Christmas, a Christian holiday, to raise an issue of discrimination on the basis of creed against individuals, including herself, who are not Christian.

[43] The assumption underlying the applicant's position is that Christmas is a religious holiday, and that anything associated with or evocative of Christmas is therefore itself a religious symbol. However, the courts have held that Christmas is as much a secular holiday as it is religious. See *Islamic Schools Federation of Ontario v. Ottawa Board of Education*, 1997 CanLII 17805 (Ont. Div. Ct.) (leave to appeal refused [1997] O.J. No. 3165 (CA) (QL)) ("*Islamic Schools Federation*"), at para. 4, where the Divisional Court noted that certain holidays, including Christmas, though historically selected for Christian religious reasons, are now secular holidays, to the point that, absent evidence to the contrary, the court would not assume that the fact that school holidays were scheduled at Christmas were for a religious purpose.

[44] Similarly, decorations may be associated with or evocative of Christmas without being Christian religious symbols. The question of whether a particular decoration is secular or a Christian religious symbol is not something of which I can take judicial notice. I am not prepared, as the applicant asks, to assume that an evergreen bush with lights, red poinsettia, Santa Claus hat, or candy cane, simply by being associated with or evocative of Christmas, makes them Christian religious symbols which would engage the ground of creed. Such a determination would require evidence that the decoration in question is in fact religious in nature. The applicant has not provided that evidence in this case.

[45] The applicant further takes the position that there is "ample evidence" before the Tribunal that the "wannabe" Christmas tree and lights on bushes are, in fact, Christian religious symbols. She points to her communication with the respondent where she indicated that she saw these as being religious symbols, and that the answers she got recognized that the decorations raised diversity and inclusiveness issues. The applicant's argument, as such, appears to be that because concerns had been expressed about whether the decorations raised a human rights issue, and the respondent had acknowledged that this may be the case, that the decorations were therefore religious in nature.

[46] I disagree. This is simply evidence that the applicant had raised the issue, and that her concerns were acknowledged by the respondent.

[47] The applicant also argues that *Jones* is authority for the position that red poinsettias are Christian religious symbols. I do not agree. The objection to decorations such as red poinsettias in *Jones* was not that they were religious symbols, but that they were, according to his beliefs, pagan. See *Jones*, at para. 7. The creed element in that case was that of the applicant, by asking him to put out Christmas decorations, they were asking him to do something he believed was contrary to his faith. See *Jones*, para. 30. As noted above, the fact that a decoration or plant may be evocative of or associated with Christmas does not make it a Christian religious symbol.

[48] The applicant further considered any reference to "holiday" to be a reference to the Christian religious celebration of Christmas, on the basis that there is no other holiday in December which involves lights on evergreens. As noted in *Islamic Schools Federation*, Christmas is a secular as well as religious holiday. I do not agree that the use of the term "holiday" should be interpreted, as the applicant appears to do, as necessarily meaning "religious holiday".

Holiday Signs

[49] The other issue raised by the applicant was that signage for different holidays was inconsistent, and that a preference was shown for Christian holidays.

[50] The applicant points to the Ontario Human Rights Commission "Policy on preventing discrimination based on creed", which states that an organization has a responsibility to treat all people equally based on their creed. The applicant interprets the policy as requiring that either the respondent acknowledge no religious holidays whatsoever, or provide equal recognition and inclusion to every religious holiday. She claims that this was not done, citing the fact that there were a number of religious holidays for which no signs were posted. The applicant argued that the respondent's display of

signs "did not fulfil the requirements that religious symbols of all religions, and of those with no religion, must be displayed equally".

[51] I have considered the Commission policy, as required under s. 45.5(2) of the *Code*, and though I agree with the Commission, and the applicant, that such a policy may be a "best practice", Commission policy is not a legal "requirement", and that the examples are indicative of what "may" result in discrimination. It is not determinative that discrimination has, in fact, occurred. See, for example, *Ogunyankin v. Queen's University*, 2011 HRTO 1910 at paras. 118-119, and *Konesavarathan v. Wellington-Dufferin-Guelph Public Health*, 2017 HRTO 1628, at paras. 42-45.

[52] For those holidays that were acknowledged by signs, namely Chanukah, Christmas, Passover, Easter, Eid-ul-Fitr, and Holi, she takes the position that recognition was not equal. The only evidence on this point was the applicant's testimony that the 2018 sign acknowledging Easter and Passover was removed after Easter, despite the fact that Passover continued for another four days.

[53] She also claimed that this notice, by wishing "all residents a Happy Holiday weekend", assumed that everyone was celebrating a religious event that weekend. I am, however, not persuaded that the sign made any such assumption. As noted above, I do not accept that the use of the word "holiday" should be interpreted as synonymous with "religious holiday". Whether or not a resident was observing a particular religious holiday, it was nonetheless a statutory holiday weekend, which could be enjoyed by anyone, regardless of creed, who would otherwise have to work. The fact that the sign also recognized two particular creeds who had a religious holiday, Judaism and Christianity, does not mean the sign was not inclusive. I do not agree that the reference to a "Happy holiday" carries with it a religious subtext that could amount to discrimination on the basis of creed under the *Code*.

[54] I agree that if there was a policy or practice that allowed recognition of one creed but not others, that this could establish differential treatment under the *Code*. See *R.C. v. District School Board of Niagara*, 2013 HRTO 1382, at para. 47. However, there was no

evidence that any creed had been excluded, and I accept the respondent's evidence that it was open to recognition of other holidays.

[55] With respect to the applicant's claim that the 2018 Easter / Passover sign was taken down after Easter but before Passover was over, I find that the applicant has not been able to establish that this amounts to an incident of discrimination on the basis of creed. Mr. Hornsby testified that the respondent did not give direction on when signs would be taken down. The applicant herself indicated in her submissions that signs for Christmas could be up for eight days. Though she considered Christmas to be a two-day religious holiday, as Mr. Hornsby noted some may celebrate 12 days of Christmas. In both cases, it appears that the signs were taken down after the statutory secular holidays, rather than religious holidays, were over.

CONCLUSION

[56] The onus is on the applicant to prove her case. She has not provided evidence on which I can find that the decorations in question are religious symbols, nor that the respondent has discriminated against her by unequal recognition of religious holidays. She has, as such, not been able to establish discrimination on the ground of creed.

ORDER

[57] The Application is dismissed.

Dated at Toronto, this 27th day of January, 2021.

"Signed by"

Bruce Best
Vice-chair