

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



Empower Simcoe v. JL, 2022 ONSC 5371

Ontario Superior Court of Justice, Corbett, Stewart, and Kurke JJ, 22 September 2022

An appeal from a decision of the Human Rights Tribunal of Ontario that a disability accommodation provider had discriminated against a resident by adopting restrictive visitation policies during the pandemic.

Key words: Ontario, Canada, Appeal, Housing, COVID-19, Discrimination, Disability

1. The judgment was delivered by Stewart J, with the other justices concurring.
2. Empower Simcoe is a multiservice residential facility publicly funded by the Ontario Ministry of Children, Community and Social Services (MCCSS). It provides housing support for children and adults with intellectual disabilities.
3. JL has, since the age of seven, lived in a group-living home operated by Empower Simcoe, receiving around the clock care, as he has multiple disabilities, including intractable epilepsy and global developmental delay, being non-verbal, but using gestures and vocalizations to communicate.
4. Both JL's parents have continued to visit and parent him.
5. In March 2020, when JL was 14, Empower Simcoe, at the beginning of the COVID -19 pandemic, adopted and communicated a temporary policy that it would not permit any visits to its group-living homes other than by essential personnel. Although it permitted families of residents to take residents outside the facility to be cared for at home, in such a situation, the resident would not be permitted to return until the circumstances of the pandemic had resolved sufficiently to do so safely.
6. The policy was based upon the recommendations of the Chief Medical Officer of Health for Ontario (MOH) and MCCSS.
7. From the outset, JL's family pressed to be able to visit JL and be provided with PPE.

8. Empower Simcoe advised that it did not have adequate supplies of PPE, stood by the reasonableness of its policy, and offered the family video conference visits and in-person visits with JL separated by a gate.
9. JL's family rejected those suggestions on the basis that, in their opinion, JL required physical contact to engage in any meaningful communication, and these were, therefore, not appropriate or adequate options.
10. A complaint was lodged with the Human Rights Tribunal of Ontario (HRTO) on behalf of JL, as Empower Simcoe had not permitted JL to engage in in-person interaction involving physical contact and touch with his family. The complaint was that this was discrimination founded on the prohibited ground of his disability.
11. Shortly afterwards, JL's parents were permitted to make arrangements with the parents of another child residing at the group home to create an exclusive social circle in accordance with then-prevailing public health guidelines, and to facilitate the organization of short stays. From that point on, JL had short stays with his parents without physical distancing requirements. This arrangement was supported by Empower Simcoe and local public health authorities.
12. HRTO held that Empower Simcoe had prima facie discriminated against JL and had failed in its duty to accommodate him, and awarded \$10,000.00 in damages to him as a result.

13. HRTO found (at [33]):

[Empower Simcoe] has failed to establish that allowing the applicant's parents to visit from June to August with no physical distancing in place, but with screening, masking and hygiene followed, would present an unacceptable safety risk to the applicant, his housemate and the staff that worked in the applicant's group home. The respondent did not call any medical evidence to establish this safety risk and it cannot be presumed by the sole fact of the pandemic. The evidence establishes the respondent had the discretion to apply the guidelines in a non-discriminatory way and it failed to do so.

14. Empower Simcoe appealed the decision on the basis that:

- a) Was the decision of the HRTO that Empower Simcoe discriminated against JL unreasonable?
- b) Was the decision of the HRTO that Empower Simcoe had failed to satisfy its duty to accommodate JL unreasonable?

15. The parties agreed that the standard of review to be applied was one of reasonableness in accordance with the decision of the Supreme Court of Canada in [Canada \(Minister of Citizenship and Immigration\) v. Vavilov](#), 2019 SCC 65.

Was the decision of the HRTO that Empower Simcoe discriminated against JL unreasonable?

16. The Appeal Court found (at [44]-[45]):

I agree with Empower Simcoe that the HRTO's conclusion that JL experienced adverse effect discrimination when the usual in-person visits with his family were temporarily suspended by the Visitation Policy was unreasonable. In order to arrive at this conclusion, the HRTO made the leap of making the Visitation Policy the reason why JL did not visit with his family and found that JL could not visit meaningfully with his parents without physical touch when there was medical evidence to demonstrate that gestures, vocalizations and TechTalk for technology-assisted communication would have assisted with achieving this goal.

I also agree with Empower Simcoe that it was not reasonable for the HRTO to have concluded that JL had established that discrimination had occurred. In this case, there is no link between group membership and the impact on JL. Empower Simcoe's Visitation Policy was founded on sound medical, scientific and epidemiological evidence, and not on any presumed characteristics of persons suffering historical disadvantage.

17. The Appeal Court noted that Empower Simcoe's decision was not rooted in presumed characteristics of people like JL, but in the advice and expertise of public health and MCCSS officials.

18. Therefore, the Appeal Court set aside HRTO's decision. However, for completeness, it also considered the second issue.

Was the decision of the HRTO that Empower Simcoe had failed to satisfy its duty to accommodate JL unreasonable?

19. The Appeal Court found that Empower Simcoe had taken steps to meet the substantive aspects of its duty to accommodate JL. HRTO had unreasonably applied the knowledge acquired in August 2020 retrospectively to June 2020 to determine that Empower Simcoe could and should have deviated from MOH and MCCSS guidelines as of that point in time.

20. The Appeal Court decided that it would also have allowed the application on this ground.

IMPLICATIONS



The Appeal Court was sympathetic to the understanding that at the time of the complained of activities the COVID-19 global pandemic required an immediate response in order to attempt to reduce the spread of a potentially deadly virus in circumstances in which full and complete information was not available, but the well-founded fear of a worst-case scenario prompted a swift and firm response from public health officials and the institutions which they are responsible to advise.

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