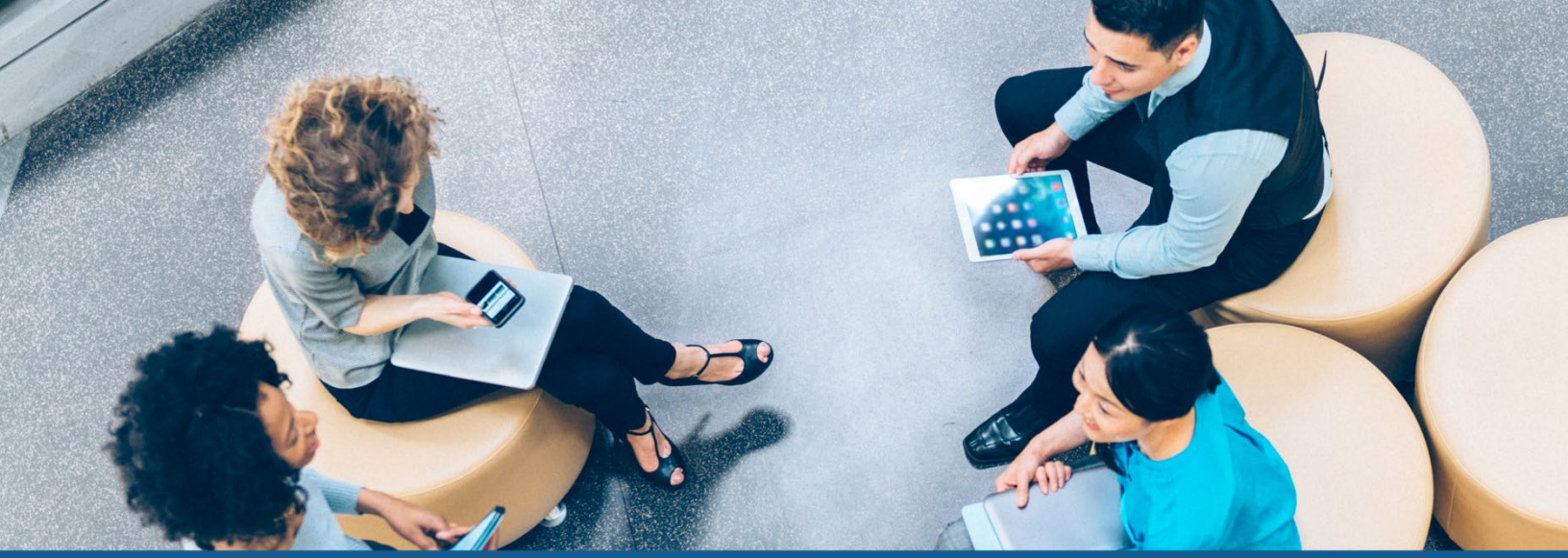

What's New in HR Law

Denying Service to a Patient Presumed to have COVID-19 is Not Discriminatory – This Time

December 15, 2021

Bottom Line

In the recent case of *Jacobs v. MyHealth Centre*, 2021 HRTO 1009 ("*Jacobs*"), the Human Rights Tribunal of Ontario found that the denial of services to a patient who was potentially exposed to COVID-19 did not amount to discrimination under the Ontario Human Rights Code (the "*Code*").

Background:

In July of 2020 the applicant, Steven Jacobs, attended at the respondent's medical clinic (the "Clinic") to have an x-ray performed. Upon arrival Mr. Jacobs was asked to fill out a COVID-19 screening questionnaire. This questionnaire was put in place in accordance with the Ministry of Health's COVID-19 Guidance for Independent Health Facilities and its Patient Screening Guidance (collectively referred to by the Tribunal as the "MOH Guidance"), both of which applied to the Clinic.

Mr. Jacobs responded affirmatively to several of the screening questions which caused him to be labeled as "presumptive positive" for carrying COVID-19. The Clinic advised Mr. Jacobs that he

would have to either defer his appointment to a later date, or visit a different hospital to have the x-ray performed.

Mr. Jacobs filed an application under the *Code*, alleging that the Clinic discriminated against him based on disability by denying him service on the basis that he had potentially been exposed to COVID-19.

The Clinic took the position that COVID-19 did not amount to a disability under the *Code* and that, even if it did, the act of refusing service to someone in accordance with health guidance does not amount to discrimination.

Application of the Divisional Court's Decision in *Sprague*:

The central issue before the Tribunal was whether a medical clinic that follows MOH Guidance and refuses to treat a patient who is a "presumptive positive" has acted in a discriminatory manner.

In making its decision, the Tribunal relied on the recent Divisional Court case *Sprague v. Her Majesty the Queen in right on Ontario*, 2020 ONSC 2335 ("*Sprague*") in which the Court considered whether a "no-visitor" policy implemented by a Toronto hospital in accordance with a memorandum issued by the Chief Medical Officer of Health for Ontario, was discriminatory.

The hospital's no-visitor policy in *Sprague* caused the applicant, Mr. Edward Sprague, to be denied in-person access to visit his elderly father who had recently been admitted to the hospital. Mr. Sprague filed an application for judicial review of the policy, alleging that it violated his father's rights under the Canadian Charter of Rights and Freedoms.

The Divisional Court disagreed with Mr. Sprague, stating that the no-visitor policy was not discriminatory because it did not create a distinction on the basis of an enumerated or analogous ground and did not reinforce, perpetuate, or exacerbate a disadvantage. The Court also noted that the no-visitor policy was not rooted in any presumed characteristics of patients or visitors at all, but rather was based upon the determinations of medical and public health professionals who were exercising their professional judgment.

Mr. Jacobs in the within application argued that the facts in *Sprague* could be distinguished from his own. The Tribunal disagreed, finding that both sets of facts were actually parallel to each other – both involved respondents who were engaged in the health care field, and who had both received guidance form the MOH regarding COVID-19 screening that was specific to their operations and intended to prevent the spread of COVID-19 as much as possible in order to save lives. The Clinic specifically had received guidance to stop a screening and defer an appointment after one affirmative answer to the screening questionnaire, and this is exactly what it did with Mr. Jacobs.

The Tribunal found that the analysis from *Sprague* applied and that the Clinic had not acted in a discriminatory manner by refusing service to Mr. Jacobs once he replied affirmatively to the questionnaire.

No Substantive Discrimination:

The Tribunal also stated that even if it was incorrect in finding that the *Sprague* analysis applied, Mr. Jacobs' allegations would still have no reasonable prospect of success because they did not amount to substantive discrimination under the *Code*.

The Tribunal accepted that Mr. Jacobs was disabled for the purposes of the hearing, but found that the differential treatment that he received (i.e. the denial of services) was not related to his disability, or perceived disability. Rather, the differential treatment resulted from an individual assessment on the risk Mr. Jacobs posed by being "presumptive positive" and potentially having COVID-19.

The Tribunal found that this assessment was not discriminatory to Mr. Jacobs, as it did not create a disadvantage by perpetuating prejudice or stereotyping or by attributing stereotypical or arbitrary characteristics. Rather, it corresponded to the medical knowledge which indicates that a person with such history and symptoms is at an increased likelihood of carrying and transmitting COVID-19.

Contradictory Decisions – Divergence from *Empower Simcoe*:

One notable aspect of this decision is that differs, and arguably contradicts (as the Tribunal itself has acknowledged) the earlier decision of *JL v. Empower Simcoe*, 2021 HRTO 222 ("*Empower Simcoe*") which made news in March of this past year as the first substantive decision regarding the operation and applicability of an individual's human rights during the COVID-19 pandemic.

In *Empower Simcoe*, a young teenaged boy living in the respondent's care facility was unable to receive visits from his parents due to a visitation ban put in place to reduce the risk of COVID-19 transmission.

The applicant (via a litigation guardian) brought an application for discrimination based on disability under the *Code* which was ultimately successful. In coming to its decision, the Tribunal in *Empower Simcoe* noted that the guidance from the government was a recommendation, not a binding order or directive. Even though the visitation ban was based in medical opinion and had been put in place in good faith in order to protect the health and safety of patients and staff the respondent had still discriminated against the applicant by failing to consider his individual human rights when implementing the ban, amounting to a *prima facie* case of discrimination.

The Tribunal in Jacobs does not explicitly state why it diverged from *Empower Simcoe*, other than to say that it was "not persuaded" by the adjudicator's reasoning and would not be following the decision.

The divergence of these two decisions throw another question mark into the new legal landscape of COVID-19 jurisprudence, specifically as to how it relates to human rights and the *Code* in general.

Check the Box

Since the beginning of the pandemic in 2020, the measures put in place to protect against the spread of COVID-19 have raised allegations of discrimination across Ontario and Canada as a

whole. This case serves as a reminder that, to quote the Tribunal directly, “not all differential treatment is discriminatory. Discrimination in the human rights context requires more than simply “identifying a distinction based on a prohibited ground where a negative impact is the result”.

However, it remains important to consider every situation on an individual basis. As evidenced from the differing reasons and decisions in *Jacobs* and *Empower Simcoe*, there remains no guarantee that a medical professional will be immune to the *Code* as long as they are following medical guidance and policy.

Need more information?

For more information or strategic advice on litigation involving human rights claims, please contact Hayley Smith at 416.408.5513, or your regular lawyer at the firm.

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