

SOCIAL BENEFITS TRIBUNAL

BETWEEN:

J. D.

Appellant

and

DIRECTOR OF ONTARIO DISABILITY SUPPORT PROGRAM

Respondent

WRITTEN SUBMISSION ON THE NATURE OF THE APPELLANT'S
HUMAN RIGHTS CODE CHALLENGE

1. This submission is made pursuant to the Tribunal's direction of December 1, 2014, in order to clarify the nature of the *Human Rights Code* challenge raised by this appeal.

2. In summary, the Appellant claims that the Respondent's denial of a special diet allowance because he lives in a supported group living residence for adults with "developmental disabilities" amounts to discrimination with respect to services because of disability under section 1 of the *Human Rights Code*.

A. Background to the Claim

3. The Appellant has been a recipient of income support from ODSP since May 1, 2010. He resides in a group home for adults with "developmental disabilities".

Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008, S.O. 2008, c. 14.

4. The Ontario Disability Support Program provides income support for persons with disabilities who cannot otherwise meet their most basic needs. The special diet allowance is available for recipients who have higher food costs because they have medical conditions requiring therapeutic diets. The allowance compensates for additional costs such as increased servings and special products like thickening fluids. According to the Human Rights Tribunal of Ontario, the allowance is "designed to assist in alleviating the disadvantage of persons with

disabilities and to support substantive equality by funding certain additional dietary costs that result from disability.” In other words, the special diet allowance is a form of accommodation of the particular needs associated with particular disabilities.

Ball v. Ontario (Community and Social Services), 2010 HRTO 360 [“Ball”], paras. 18, 88.

5. In order to qualify for the allowance, a recipient must submit an application form completed by a health care professional, in which the professional confirms that their patient has one or more of the medical conditions identified on the form and certifies that the patient requires the special diet as a result of the condition. The qualifying medical conditions and the amounts of the allowance attributed to them are fixed and set out in the ODSP Regulations.

O. Reg 222/98, s. 30(1)(4).

O Reg 562/05.

6. The Appellant has been diagnosed with osteoporosis and dysphagia requiring thickening fluids. Both of these conditions are identified as conditions requiring a special diet in the ODSP Regulation. The special diet allowance for osteoporosis is \$38 per month. The allowance for dysphagia requiring thickening fluids is \$125 per month.

O Reg 562/05, Schedule 1.

7. Under the ODSP Regulation, the special diet allowance is available to recipients with some exceptions, including if they are “residents of a supported group living residence” under the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*. If the Appellant resided in rental housing he would be entitled to a special diet allowance. However, because he resides in a group home for adults with “developmental disabilities”, he is excluded by the legislation from receiving a special diet allowance.

O. Reg 222/98, ss. 4(1)(9), 30(1), 32(2)(1).

8. The Appellant receives \$138 for his personal needs and \$960 for his other budgetary requirements for a total of \$1,098 monthly. This amount is paid directly to the group home which acts as his trustee. All of his needs must be met within this budget. Unlike non-institutional tenants, his ODSP benefits are not specifically allocated into specified amount for basic needs and for shelter. However, the amount is identical to what he would receive if he was residing in a

non-institutional rental arrangement. Significantly, income support for renters is broken down into \$479 for shelter and \$619 for basic needs (a total of \$1,098). The key difference for the purpose of this proceeding is that renters are eligible for the special diet allowance in addition to the \$1,098 they receive for income supports.

O. Reg 222/98, s. 32(1)(3).

9. For a brief period, the Appellant was nonetheless receiving a special diet allowance. However, ODSP cancelled that allowance effective March 31, 2013, on the grounds that he resides in a group home for adults with developmental disabilities and is therefore ineligible. The Director subsequently denied an internal review request on May 23, 2013.

O. Reg 222/98, s. 30(1)(4).

10. The Appellant appealed that decision to this Tribunal. He is challenging the denial on the grounds that denying him a special diet allowance because he lives in a supported group home is discriminatory and contrary to the *Human Rights Code* on the ground of his developmental disability

B. Discrimination Law and the Applicability of the *Ball* Test

11. Section 1 of the *Human Rights Code* provides that “every person has a right to equal treatment with respect to services ... without discrimination because of ... disability.” There is no dispute that “services” include the provision of benefits under the ODSPA.

Human Rights Code, RSO 1990, c H.19, ss. 1, 10(1).

Director (Ontario Disability Support Program) v. Tranchemontagne, 2010 ONCA 593.

Ball v. Ontario, 2010 HRTO 360.

12. The onus is the Appellant to establish discrimination on a balance of probabilities. An appellant must provide sufficient evidence to establish a *prima facie* case of discrimination. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the treatment/impact with defences and/or exemptions available under the *Code*. If there is no justification, discrimination will be found.

Moore v British Columbia (Education), 2012 SCC 61, at para. 33.

Director (Ontario Disability Support Program) v. Tranchemontagne, 2010 ONCA 593 at paras. 109, 111, 112.

Peel Law Association v Pieters, 2013 ONCA 396, at paras. 67-8.

13. An appellant can establish a *prima facie* case of discrimination by demonstrating that:
- (a) She has a characteristic protected from discrimination under the *Code*;
 - (b) She has experienced an adverse impact or treatment with respect to the service; and
 - (c) The protected characteristic was a factor in the adverse impact.

Moore v British Columbia (Education), 2012 SCC 61, at para. 33.

Peel Law Association v Pieters, 2013 ONCA 396, at paras. 55, 56.

14. Adverse impact or disadvantage can be described as “the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.”

Andrews v Law Society of British Columbia, [1989] 1 SCR 143 at para. 174.

Tranchemontagne, 2010 ONCA 593 at para 76.

15. The Human Rights Tribunal has adapted discrimination law principles in the context of special diet allowance cases that alleged ODSP discriminated by either under-funding or excluding certain kinds of medical conditions. The lead case emerging from this litigation, *Ball v. Ontario*, established a four-part test for proving discrimination. The *Ball* decision includes important legal principles that may be useful in this appeal. However, the Appellant agrees with the Tribunal’s suggestion that the four-part test is not itself applicable in the circumstances of this case because, as described below, the Appellant is not seeking to either increase the amount of his special diet allowance or have a medical condition added.

Ball v. Ontario, 2010 HRTO 360.

C. Nature of the Appellant’s *Human Rights Code* Challenge

16. The essence of the Appellant’s claim is that the denial of the special diet allowance to residents of group homes for people with developmental disabilities discriminates against him on

the basis of disability because the nature of his disabilities requires him to reside in a group home rather than in the private rental market.

17. A summary of the analysis establishing a *prima facie* case of discrimination is as follows:

- a) **Protected characteristic:** Disability under the *Code* is defined broadly and there is no dispute that the Appellant’s “developmental disability” and his diagnosed conditions of osteoporosis and dysphagia are disabilities protected by the *Code*.
- b) **Adverse Impact:** As a resident of a group home for adults with developmental disabilities, the Appellant is not eligible under the ODSP Regulation to receive a special diet allowance unlike non-institutional tenants who have osteoporosis and/or dysphagia. He does not receive \$136 per month in funding for additional dietary costs that result from his disabilities (osteoporosis and dysphagia), which is available to others who have qualifying disabilities living in non-institutional arrangements. The group home, in turn, does not receive funding to pay for the additional cost of his special dietary needs. The Appellant is adversely impacted by the withholding and denial of this benefit which has the effect of imposing a burden or disadvantage not imposed on others with qualifying disabilities for the special diet allowance.
- c) **Disability a factor in the adverse impact:** The Appellant has been denied a special diet allowance, which he would otherwise have qualified for, because of his “developmental disability”. The nature of his developmental disability is such that he requires full-time supports and residential care and therefore resides in a group home for adults with developmental disabilities.

18. The Appellant is prepared to adduce evidence in order to establish each of the above-described elements of the discrimination test.

D. Remedy Sought

19. The Appellant is seeking an order that:
- i. subsections 4(1)9, 30(1), 32(2) of O. Reg. 222/98 which exclude him from receiving a special diet allowance are contrary to the *Code* and do not apply to him; and
 - ii. the ODSP reverse its decision to terminate his special diet allowance and provide him with an ongoing allowance for osteoporosis and dysphagia and retroactive payment for the special diet allowance that he ought to have received.

All of which is respectfully submitted this 18th day of December, 2014,

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