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EMPLOYER'S RIGHT TO REQUIRE AN INDEPENDENT MEDICAL EXAMINATION

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A. INTRODUCTION

On August 25, 2017, the Ontario Court of Appeal denied the leave to appeal application brought by Marcello Bottiglia (the "Applicant"), who sought leave from that court to appeal the Ontario Superior Court of Justice (Divisional Court) (the "Court") decision in *Bottiglia v Ottawa Catholic School Board*[1] released on May 19, 2017. A previous decision of the Human Rights Tribunal of Ontario (the "HRTO") dated September 4, 2015,[2] and a subsequent request for reconsideration at the HRTO,[3] had dismissed the Applicant's application for discrimination on the basis of disability, for being required to undergo an independent medical examination ("IME") at the request of his employer, the Ottawa Catholic School Board (the "OCSB"). The Court's May 19, 2017 decision denied the application for judicial review and, for the most part, confirmed the findings of the HRTO. This decisions of both the HRTO and the Court clarify when it is appropriate for an employer to require an employee to attend an IME, and when an employee can refuse to participate. The decision is relevant to charities and not-for-profits, as employers, with respect to this challenging issue of accommodating employees who may be suffering from illness or disability.

B. BACKGROUND

The Applicant worked as the Superintendent of Schools for the OCSB, having started as a teacher with its predecessor in 1975, until he left on paid sick leave on April 16, 2010. At the time he went on sick leave

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[1] *Bottiglia v Ottawa Catholic School Board*, 2017 ONSC 2517 (Div Ct).
[2] *Bottiglia v Ottawa Catholic School Board*, 2015 HRTO 1178.
[3] *Bottiglia v Ottawa Catholic School Board*, 2015 HRTO 1599.

the Applicant had accrued 465 paid sick days to his credit.[4] On August 16, 2012, the Applicant approached the OCSB informing them that he was ready to go back to work, provided certain accommodations were made regarding his work hours. He followed this request with a note from his doctor, dated August 31, 2012, confirming the Applicant could go back to work.

However, the OCSB was concerned about the "subjective nature" of the doctor's opinion and the fact that only five months prior, the same doctor had advised that the recovery would take a "prolonged period of time." Moreover, the OCSB claimed it could be premature for the Applicant to go back to work in consideration of the demanding nature of certain aspects of the job and of the timing of the request, which coincided with the end of the Applicant's paid leave. These factors led them be skeptical of the motives behind the Applicant's request. In light of these concerns, as a condition of going back to work, the OCSB determined that a second medical opinion was warranted and, in accordance with the OCSB's Management Guide to Workplace Accommodation for Employees, asked the Applicant to complete an IME.

The Applicant and the OCSB both agreed that an IME would be obtained. However, on October 24, 2012, counsel for the OCSB sent a letter to the medical examiner indicating that the Applicant had left the workplace because of a personal dispute with the Director, and that his motive to return to work may have been based on the imminent expiry of his paid leave and not his health. The Applicant considered this communication as an act of bad faith on the part of the employer and refused to attend the IME.

The Applicant filed an application with the HRTO alleging that the OCSB had discriminated against him on the basis of disability by failing to accommodate his condition in order to return to work, in violation of sections 5(1) and 17(2) of the Ontario *Human Rights Code*[5] ("Code"). He further alleged that the OCSB provided misleading information to the medical examiner, justifying his refusal to participate in the IME. However, in dismissing the application, the HRTO found that there had been no discrimination, that the OCSB had acted reasonably in requiring an IME, and that the OCSB was not obligated to exhaust alternative measures before requiring that examination. A subsequent application for reconsideration before the HRTO was also dismissed.

[4] *Supra* note 1 at para 8.
[5] RSO 1990, c H.19.

The Applicant subsequently brought an application for judicial review before the Court. This application was also dismissed and, in this instance, with costs to the OCSB in the amount of $30,000. The Court found the HRTO decision was within a reasonable range of decisions available to it, and found that the duty to accommodate imposed by subsection 17(2) of the Code "brings with it the right in certain circumstances to request an independent medical evaluation."[6]

C. THE COURT'S ANALYSIS

In considering the application for judicial review, the Court considered whether or not the OCSB's request for an IME, as part of its accommodation process, was reasonable. In this regard, the Court stated that it was. Even though the Applicant was not contractually obligated to undergo an IME, the Court found that the duty to accommodate, imposed on employers under subsection 17(2) of the Code, in certain circumstances, included a right to request an IME as part of the accommodation process.[7] Subsection 17(2) of the Code states:

> No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person 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.

In responding to the Applicant's claim that the HRTO decision had granted employers a freestanding, unrestricted right to have their employees undergo an IME, the Court clarified that only where there was a "reasonable and *bona fide* reason to question the adequacy and reliability [of the] proposed accommodation by the employee" could an employer have an IME be part of the process.

The Court agreed with the Applicant's statement that it is the employer who bears the onus of proof to justify a request for an IME as part of the accommodation process for any particular employee.[8] However, the Court also agreed with the analysis of the HRTO concerning the "employee's duty to co-operate in the accommodation process" by providing his employer with information about his physical and/or mental work restrictions and disability-related needs to enable the employer to assess whether and how best to

[6] *Supra* note 1 at para 67.
[7] *Supra* note 1 at paras 59, 67.
[8] *Supra* note 1 at para 61, with reference to *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU),* [1999] 3 SCR 3.

accommodate the employee's needs. This duty has been outlined in prior decisions by the Court and the HRTO, as well as by the Supreme Court of Canada in *Central Okanagan School District No. 23 v Renaud*.[9]

Both the HRTO and the Court found the above conclusions were consistent with the Ontario Human Rights Commission' policies:

> There may be instances where there is a **reasonable and bona fide basis** to question the legitimacy of a person's request for accommodation or the adequacy of the information provided.[10] (emphasis added).
>
> The IME should not be used to "second-guess" a person's request for accommodation. Requests for medical examinations must be warranted, take into account a person's particular disability-related needs, and respect individual privacy to the greatest extent possible. […] No one can be made to attend an independent medical examination, but **failure to respond to reasonable requests** may delay the accommodation until such information is provided, and may ultimately frustrate the accommodation process.[11] (emphasis added).

The Court also considered whether the Applicant's refusal to continue the accommodation process was justified. In this regard, the Court decided the Applicant's refusal was not justified. The Court held that even though an employer may contact the examiner before an IME, the employer must consider the employee's right to privacy and communicate only that information which is required to determine the appropriate accommodation.[12] It further stated that:

> When providing the examiner with information, it is my view that the employer must be careful not to impair the objectivity of the examiner. Where an employer has provided information to an examiner which might reasonably be expected to impair that examiner's objectivity, it is my further view that an employee is justified in refusing to attend the IME.[13] (emphasis added).

In this regard, the Court found that when the OCSB advised the medical examiner of its suspicions regarding the motivations of the Applicant in seeking accommodation, that communication "ran a realistic risk of impairing the objectivity" of the doctor.[14] However, the HRTO found the communication did not

[9] [1992] 2 S.C.R. 970, 1992 CanLII 81.
[10] OHRC, "Policy and Guidelines on Disability and the Duty to Accommodate", online: Ontario Human Rights Commission < http://www.ohrc.on.ca/sites/default/files/attachments/Policy_and_guidelines_on_disability_and_the_duty_to_accommodate.pdf>.
[11] OHRC, "Policy on Ableism and Discrimination Based on Disability, online: Ontario Human Rights Commission < http://www.ohrc.on.ca/sites/default/files/Policy%20on%20ableism%20and%20discrimination%20based%20on%20disability_accessible_2016.pdf>.
[12] *Supra* note 1 at para 91.
[13] *Supra* note 1 at para 92.
[14] *Supra* note 1 at para 93.

vitiate the process in this case. The Applicant was therefore not justified in walking away from the IME. Although the Court disagreed with this finding of fact, it held that it was within a reasonable spectrum of opinions available to the HRTO and should not be set aside on judicial review.

As such, based on the Court's findings, an employer may request an IME in certain circumstances, provided there is a reasonable and *bona fide* basis to question the accommodation proposed by the employee. However, the employer bears the onus of proof regarding this request, not the employee. Where an employee requests accommodation, the employee has a duty to cooperate with a reasonable request by the employer for IME. Further, an employer who has requested an IME must be careful not to interfere with the objectivity of the medical examiner. In this regard, an employee may be justified in refusing an IME request when the employer has impaired the objectivity of the medical examiner.

D. CONCLUSION

Charities and not-for-profits faced with an employee who requests accommodation in accordance with subsections 5(1) and 17 of the Code therefore may have a right to request that the employee be subjected to an IME in certain circumstances, provided there is a reasonable and *bona fide* basis for doubting the accommodation proposed by the employee. In this case, for the reasons noted, the employer was found to have a justifiable basis for questioning the adequacy and reliability of the information provided by the Applicant's physician. However, as each request for workplace accommodation is different, employers need to make sure that before a decision is made to require an employee to undergo an IME they have considered that request in light of cases such as *Bottiglia*. Employers that require independent medical examinations without having a legitimate basis to do so may be subject to human rights complaints and the associated legal costs and potential damage awards.