May a Québec Employer Require That a Candidate Undergo a Pre-Hiring Medical Examination Without Making a Conditional Offer of Employment?

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More and more employers in Québec have been requiring job applicants to submit to a medical examination as part of the recruitment process — provided, of course, that the sought-after position entails medical requirements justified by the duties of the job, within the meaning of the *Charter of Human Rights and Freedoms* (the "Charter"). This practice has led a number of employers to wonder whether they are entitled to refuse to hire a candidate on the basis of the results of a pre-hiring medical exam.

For several years in Québec, the Human Rights and Youth Rights Commission (the "*Commission des droits de la personne et des droits de la jeunesse*" — the "Commission") has held that an employer must make an offer of employment conditional upon the job applicant's success in a medical examination before requiring that the applicant undergo the exam. The Commission contended that it wished to avoid allowing employers the freedom to hire only candidates who are in "exemplary", or even "perfect", health.

In a recent decision rendered by the Québec Human Right and Youth Rights Tribunal (the "*Tribunal des droits de la personne et des droits de la jeunesse*" — the "Tribunal"), *Commission des droits de la personne et des droits de la jeunesse* c. *Bathium Canada inc.*[1], one of the issues in dispute was whether the administration of a pre-hiring medical examination by the Bathium company, without its having first made any formal conditional employment offer, had jeopardized the candidate's right to a hiring process free from discrimination, as per the Charter.

By concluding that it is not compulsory for a pre-hiring medical examination to be preceded by a conditional offer of employment, the Tribunal has set aside the position traditionally upheld by the Commission.

More particularly, in this decision, the Bathium company was actively seeking qualified candidates to meet its increased needs for the development, manufacture and marketing of materials.

Following an interview, Bathium invited Mr. Genewicz to report to a medical clinic for the second stage of the hiring process, a medical examination. Bathium justified the medical exam by the fact that certain technical skills and good manual dexterity were required to do the job concerned. At that stage of the recruitment process, no offer of employment, conditional or otherwise, had been made.

The medical certificate issued by the clinic indicated that the candidate was in excellent health, but that he was suffering from "morbid obesity". A few weeks later, Bathium advised Mr. Genewicz that his application had been rejected. Convinced that the rejection was based on his personal medical condition, as discovered in the medical exam, Mr. Genewicz filed a complaint with the Commission, claiming discrimination.

In Québec, it is not mandatory to precede a pre-hiring medical examination by a conditional employment offer.

After having examined the human rights legislation of other provinces, as well as the parliamentary deliberations recorded in the *Journal des débats*, the Tribunal concluded that the administration of a pre-hiring medical examination by Bathium, without its having first made an official offer of employment conditional on positive results of that exam, did not jeopardize the job applicant's right to a discrimination-free hiring process. Such an examination may therefore form part of an extended interviewing process, in order to confirm the candidate's qualifications.

It would therefore appear that the state of the law in Québec, pursuant to the interpretation by the Tribunal in this recent decision, allows employers to analyze the necessary and required medical information about applicants before making them any job offer.

The Tribunal further held that Bathium ordinarily called on one particular medical clinic that was well aware of the physical requirements of positions with that employer. Since that service provider was not available to complete Mr. Genewicz's examination, Bathium had engaged another medical clinic to conduct his medical exam. That clinic sent the employer the full results of the medical examination, rather than simply informing the company whether the candidate's health was compatible with the requirements of the position for which he was applying.

The Commission sought a mandatory order that Bathium's existing practice was discriminatory. It failed to obtain that order. It also sought a condemnation of $10,000 in moral damages and $10,000 in punitive damages. The Tribunal held that taking account of “morbid obesity”, which is a perceived disability, the clinic, as an agent of the company, engaged the employer's liability. For that reason, the Tribunal condemned Bathium to pay the candidate an amount of $2,000 in moral damages, since, in its view, there had been a lack of vigilance in awarding the contract for services to its alternate service provider that disclosed the content of the desired medical examination. The Tribunal, however, dismissed all the other remedies applied for by the Commission.

To sum up, this decision confirms that in Québec an employer may collect only the medical information considered to be relevant and necessary for the purposes of the

position concerned and that the request to undergo a pre-hiring medical examination need not be conditional upon any prior offer of employment. Québec employers may therefore require a candidate to be examined to obtain an expert medical report confirming his or her physical capacity to do the job properly.

[1] 2015 QCTDP 13.

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