Employers May Request an Independent Medical Examination (IME) in Certain Circumstances

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On August 25, 2017, the Ontario Court of Appeal denied leave to appeal *Bottiglia v Ottawa Catholic School Board*, 2017 ONSC 2517 ("*Bottiglia*"), a judicial review of a Human Rights Tribunal of Ontario decision that confirmed that an employer may request an IME in certain circumstances.

In *Bottiglia*, the Human Rights Tribunal of Ontario ("HRTO" or the "Tribunal") concluded that the Ottawa Catholic School Board (the "OCSB") had not failed to fulfill its duty to accommodate the applicant, Mr. Bottiglia, by requesting that he attend an IME. The Court agreed with the Tribunal's finding that given the significant and unforeseen changes in Mr. Bottiglia's plan for returning to work, the OCSB had a *bona fide* reason to question the reliability and accuracy of the information provided by his psychiatrist. The request for an IME was therefore appropriate because the OCSB required the independent information to fulfill its procedural duty to accommodate the disability.

Background

Mr. Bottiglia was employed by the OCSB for 35 years, most recently in the position of Superintendent for Schools since 1999. On April 16, 2010, Mr. Bottiglia began a medical leave of absence using his 465 accumulated sick days. He was officially diagnosed with unipolar depressive disorder with anxiety features in June 2011 and at that time his psychiatrist, Dr. Levine, informed the OCSB of his inability to work until further notice.

In subsequent letters to the OCSB that were received in February 2012 and June 2012, Dr. Levine provided his medical opinion that Mr. Bottiglia was facing a long recovery from a treatment resistant condition and would require an extended period of time off work. In letters dated August 2012 and September 2012, Dr. Levine changed his opinion and recommended that Mr. Bottiglia return to work that fall on modified duties, which consisted of working two days per week for four hours each day, with no evening meetings. Further, he indicated that this "work hardening process" would take at least six to twelve months, without a guarantee that afterwards Mr. Bottiglia would return to full-time work.

The OCSB was skeptical of Dr. Levine's change in opinion and onerous accommodation plan. The OCSB requested that Mr. Bottiglia attend an IME. Mr. Bottiglia initially agreed to attend an IME provided that certain conditions were met, including that the parties agree on the identity of the independent medical examiner, and that neither party had the right to communicate with the examiner in the absence of the other party. Mr. Bottiglia later refused because of a letter sent by OCSB's counsel to the independent examiner. The OCSB provided their opinion that Mr. Bottiglia's return to work was premature and only recommended because his paid sick days were scheduled to end on October 17, 2012. The letter also requested the examiner's opinion on Mr. Bottiglia's diagnosis and treatment options.

Findings and the Court's Decision

The Superior Court of Justice upheld the HRTO's decision that the OCSB acted reasonably in requesting the IME for the purpose of determining how to accommodate Mr. Bottiglia's disability.

The Court affirmed the Tribunal's decision that in certain circumstances, the employer's procedural duty to accommodate under this section may permit the employer to request an IME. The Ontario Human Rights Commission's policies further elaborate on this point – the policies provide that the reasonableness of an IME request turns on the employer's basis for questioning the legitimacy or accuracy of the employee's proposed accommodation.

In finding that the OCSB's request for an IME was justified, the HRTO decided that the OCSB had legitimate reason to question Dr. Levine's evidence. First, Dr. Levine's opinion on Mr. Bottiglia's ability to return to work changed drastically between June 2012 and August 2012, after two years of very consistent opinions. The timing of Dr. Levine's new medical opinion corresponded with the end of Mr. Bottiglia's paid time off work. Further, the return to work plan was onerous on the OCSB given the demanding nature of the superintendent job. These onerous accommodations demonstrated that Dr. Levine was not sufficiently familiar with the duties of the superintendent position. The totality of these circumstances justified the OCSB's decision to request an additional medical assessment instead of obtaining further information from Dr. Levine.

Mr. Bottiglia also took issue on appeal with the Tribunal's decision that he terminated the accommodation process by failing to attend the IME. The Court agreed with Mr. Bottiglia's argument that the OCSB's comments to the examiner could have impaired the examiner's objectivity and therefore his refusal was justified. The Court nevertheless upheld the Tribunal's decision on this point because the standard of review on appeal is reasonableness and the Tribunal's decision fell within a range of acceptable, defensible outcomes.

Considerations for Employers

The *Bottiglia* decision provides employers with some guidance in determining when a request for an IME would be deemed appropriate. The Superior Court stressed that an employer's right to request an IME is not freestanding or unrestricted and it is not a right to second-guess the medical opinion. The circumstance of the employee's proposed accommodation must give the employer a *bona fide* reason to question the accuracy and reliability of the employee's own medical assessment already provided.

That said, the Court stated that where an employer provides information to the examiner which might reasonably be expected to impair that examiner's objectivity, an employee may very well be justified in refusing to attend the IME. As such, even where a request for an IME may be reasonable, employers must be careful with their communication to the IME examiner, so as not to impair the objectivity of the examiner.

By

Michelle S. Henry, Victoria Cistrone

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749