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Divisional Court holds that employers may require an Independent Medical Examination in "certain circumstances"

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Readers of Focus are familiar with the procedural and substantive components of an employer's duty to accommodate an employee's disability-related needs. The procedural component requires the employer to assess the employee's needs, and to investigate possible accommodation measures for that employee. The substantive component requires the employer to provide the necessary accommodations to the point of undue hardship. But to what degree must an employer accept the medical evidence presented on behalf of an employee? And under what circumstances will an employer be entitled to seek further medical information? The Divisional Court recently addressed these questions in *Bottiglia v. Ottawa Catholic School Board* (May, 2017).

By way of background, Mr. Bottiglia, a superintendent with the Ottawa Catholic School Board ("School Board"), had been off work for two years as a result of a depressive condition triggered by a conflict in the workplace. As late as June of 2012, his doctor wrote to the School Board stating that Mr. Bottiglia's condition was treatment resistant and that Mr. Bottiglia would require an extended period of time off work. Only a few months later, as the employee's sick leave was coming to an end, the doctor offered a much less guarded opinion on the employee's fitness to return to work. He proposed a gradual return to work of only 4 hours per day, 2 days per week, with a return to full hours and duties anticipated to take between 6 and 12 months.

Given the uncertainty in the employee's prognosis, the very lengthy proposed return to work period, and questions as to whether his treating physician understood the nature of the workplace and the employee's duties, the School Board notified the employee that it would require him to undergo an independent medical examination ("IME"). The employee initially agreed to take part in the IME, but later refused on the basis that the School Board had unduly influenced the process by providing the independent doctor with contextual information regarding the circumstances leading to his sick leave and requested return to work. In the employee's view, this information compromised the objectivity of the independent examiner and he refused to attend the IME. He then brought an application to the Human Rights Tribunal of Ontario alleging discrimination on the basis of disability.

The Tribunal dismissed the application holding that the School Board's request for an IME was reasonable in the circumstances and therefore that it had attempted to meet the procedural duty to accommodate. In the Tribunal's view, the School Board's questions around the reliability and accuracy of the doctor's opinion were reasonable and justified the request for a second opinion. The Tribunal also found that the School Board was not offside in providing information to the independent

examiner and that it was Mr. Bottiglia himself who terminated the accommodation process by failing to attend the IME. The Tribunal's decision was upheld on a Request for Reconsideration. Mr. Bottiglia applied to the Divisional Court for judicial review of the Tribunal's decision.

The Divisional Court dismissed the employee's application concluding that the Tribunal's decision was reasonable. The Divisional Court made it clear that employers do not have a free standing right to require an employee to undergo an IME, however, in certain circumstances an employer will be justified in requesting a second opinion. One such set of circumstances will include those where "the employer had a reasonable and *bona fide* reason to question the adequacy and reliability of the information provided by its employee's medical expert." The Divisional Court went on to note that an employer is not entitled to request an IME in order to second guess an employee's medical expert. Instead, an employer is entitled to request the second opinion where it cannot reasonably expect to obtain the information it needs to fulfill the procedural duty to accommodate from the employee's physician.

On the issue of whether Mr. Bottiglia was justified in refusing to undergo an IME, the Divisional Court applied the reasonableness standard of review and concluded that the Tribunal's finding on this issue fell within a range of defensible and acceptable outcomes and should therefore not be interfered with. Mr. Bottiglia's application for judicial review was dismissed and he was ordered to pay $30,000 in respect of the School Board's legal costs.

In our view

The School Board was represented by Paul Marshall and Raquel Chisholm of Emond Harnden. At every stage of the proceedings they were able to successfully show that the School Board's efforts to meet the procedural duty to accommodate were in good faith and that the request for an IME was warranted in the circumstances. The decision is very positive for employers and provides valuable insight into the procedural duty to accommodate and in particular, when a request for an IME is appropriate.

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