Cassels

# Independent Medical Examination Ordered to Prove Alleged Inability to Mitigate

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In *Marshall* v. *Mercantile Exchange Corporation* (2024 CanLII 71128 (ON SC) (*Marshall*)), the Ontario Superior Court of Justice was asked to consider whether an employee claiming wrongful dismissal damages from his former employer could be ordered to attend an independent medical examination (IME). In an unusual decision in the employment world, the Court found that an IME could be appropriate.

Marshall had been employed as a courier by the Mercantile Exchange Corporation (Mercantile) for over 25 years. At the time his employment was terminated, he was 58 years old and earned $52,000 per year. He claimed that he was entitled to 26 months of reasonable notice of termination, which is generally considered to be at or close to the maximum period of notice awarded by Ontario courts. In the litigation, Marshall took the position that he may not be able to mitigate his damages at all during the claimed notice period because he was suffering from stress and depression caused by the termination of his employment. In response, the defendant brought a motion seeking an IME.

Marshall objected to the request for the IME for the following reasons: (i) the impact of his medical condition on his ability to mitigate was not the primary issue in the proceeding; (ii) his medical condition was not the basis for his claim for damages; (iii) Courts have recognized that it is common for employees to experience mental health issues after being dismissed without the necessity of an IME; and (iv) if the Court ordered an IME on these facts, employers could use such requests as “a weapon” in wrongful dismissal claims.

In response, Mercantile argued that the cases where the Court took notice of the impact of dismissal on mental health were different from this matter because, in those cases, the mental health issues were alleged to have prevented the employee from seeking new work for only a limited period of time. Here, Marshall was alleging that he would have no duty at all to mitigate for up to 26 months. The defendant also noted that the mental condition of the plaintiff had been put into question by his own choice. Given the potentially significant impact on the value of the claim, Mercantile argued that it must be permitted to test the validity of the plaintiff’s claim.

Ontario’s *Courts of Justice Act* gives our Courts the discretion to order an IME where “the physical or mental condition of a party to the proceeding is in question.” Here, the Superior Court of Justice agreed with the defendant employer Mercantile that the mental condition of the plaintiff was at issue in the proceeding and that its impact went “well beyond the usual adjustment period that courts afford plaintiffs to overcome the shock of dismissal before being obliged to mitigate their damages." (para 11) The Court also took notice

of the fact that the plaintiff was taking the position that he had no obligation to mitigate in the context of relatively high employment rates and when his role at Mercantile had been a relatively low income level, suggesting that a significant number of comparable jobs might be available.

In the end, the Court ordered that if Marshall took the position that he was still unable to mitigate after 12 months had passed, he would be required to submit to an IME. The Court held that this struck a fair balance between giving the employer the right to test allegations of an inability to mitigate without opening up potential abuse of IMEs as a litigation tactic. “None of that is to say that the plaintiff is not suffering from a condition that prevents him from mitigating. It is merely to say that if someone takes a position as unusual as the plaintiff is taking, they should be prepared to subject themselves to an independent medical examination in order to test the assertions they are making.” (para 16)

Notably, the Court did not mention if the plaintiff had already put his own medical evidence on the record regarding his condition. It is relatively common for plaintiffs in wrongful dismissal claims to include medical information from their own doctors confirming that they have experienced physical or mental distress as a result of the termination of this employment. It would be interesting to see if the Court would still order an IME on the basis that the plaintiff’s medical condition was in question if other medical evidence was available or if the defendant would also have to show that the medical assessment of the plaintiff’s own physician was unreliable or incomplete. Regardless, the decision in *Marshall* provides employers with helpful guidance on when it might be appropriate to insist on an independent assessment of an employee’s medical condition in litigation.

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