Cassels

I Want a Second Opinion: When Can Employers Require an Independent Medical Examination?

Laurie Jessome

October 3, 2017

Many employers have found themselves in a situation where their employee has provided a medical note or doctor's recommendation that doesn't seem quite right. But how do you investigate further without invading your employee's privacy and without breaching your duty to accommodate under the Ontario *Human Rights Code* (the "*Code*")? A recent decision of the Ontario Divisional Court, *Bottiglia v. Ottawa Catholic School Board and the Human Rights Tribunal of Ontario* 2017 ONSC 2517 ("*Bottiglia*") provides some helpful guidance.

< p>In *Bottiglia*, the Divisional Court was asked to review a decision by the Human Rights Tribunal of Ontario (the "HRTO") to dismiss an application by Mr. Bottiglia alleging that he had been discriminated against by his former employer, the Ottawa Catholic School Board (the "OCSB"). Mr. Bottiglia resigned from his employment after the OCSB required that he attend an independent medical examination ("IME") as a condition of any return to work. At the time of the request, Mr. Bottiglia had been on a leave of absence for approximately two years. Throughout his leave, his treating physician had maintained that Mr. Bottiglia was completely disabled, that his condition was "treatment resistant" and that any return to work would likely cause Mr. Bottiglia's condition to worsen. The last such update was provided to the OCSB in March of 2012. In August of 2012, the same doctor recommended a return to work on the following schedule: 4 hours a day, 2 days a week, with no evening meetings permitted. The doctor further advised that this work hardening schedule would need to be in place for 6 to 12 months and that a return to full time status in that time period was not likely.

The OCSB had a few reasons to be concerned about this recommendation. First, there was no explanation whatsoever for the sudden change in Mr. Bottiglia's condition. In March, his doctor believed that a return to work would be harmful to Mr. Bottiglia. Only a few months later, he was recommending that Mr. Bottiglia return to the workplace. The HRTO found that this change was "significant and unexpected". The OCSB was also concerned because of the extremely limited scope of Mr. Bottiglia's proposed hours, which it believed was inconsistent with the nature of his job as a school superintendent and reflected a very tentative and uncertain prognosis for Mr. Bottiglia. The OCSB also had another reason to doubt the bona fides of Mr. Bottiglia's return to work plan; Mr. Bottiglia's paid sick leave was scheduled to expire in October of 2012, which was the same return to work date proposed by his doctor.

As a result of these concerns, the OCSB notified Mr. Bottiglia that it needed him to attend an IME as a condition of any return to work. Mr. Bottiglia initially agreed to the request but eventually declined to attend

the appointment after legal counsel for the OCSB wrote to the IME physician to advise of the reasons it had requested the IME, including its concern that Mr. Bottiglia's request to return to the workplace coincided with the end of his paid time off work. The OCSB also advised the IME physician that Mr. Bottiglia's leave of absence commenced after he did not have an opportunity to post for a position in which he was interested and further requested that the IME affirm if Mr. Bottiglia had been diagnosed with a psychiatric condition for which he was receiving treatment. Mr. Bottiglia took the position that this letter from the OCSB was an effort to interfere with the objectivity of the IME physician's assessment and eventually resigned from his employment in protest. He then initiated an application with the HRTO alleging that he had been subjected to discrimination on the basis of his disability and that the OCSB had no right to insist on an IME as a condition of any return to work.

The HRTO disagreed with Mr. Bottiglia and found that the employer's request for a second opinion was reasonable and necessary in the circumstances. The HRTO also found that Mr. Bottiglia had terminated the accommodation process. Mr. Bottiglia's application to the HRTO was thus dismissed. Mr. Bottiglia then sought judicial review of the HRTO's decision, alleging that the HRTO erred in finding that the OCSB acted reasonably in requiring him to undergo an IME as part of the accommodation process and in finding that he had terminated the accommodation process through his refusal to participate in the IME.

In considering Mr. Bottiglia's application, the Divisional Court noted that the HRTO is entitled to deference in its factual findings and its interpretation of the *Code*. Therefore, the Divisional Court could only set aside the decision of the HRTO if it was not rationally supported. The fact that the Divisional Court may have reached a different conclusion would not be sufficient for Mr. Bottiglia to succeed in setting aside the HRTO's decision.

In his application to the Court, Mr. Bottiglia argued that the OCSB had no lawful right to require an IME because it needed either contractual or statutory authority to do so. Since there was no law requiring an IME for school superintendents and since Mr. Bottiglia's contract of employment with the OCSB did not require IMEs as a condition of a return to work following a disability leave, Mr. Bottiglia argued that he had no obligation to submit to a medical evaluation by an independent physician. The Divisional Court rejected this position, finding that IMEs could be part of the employer's duty to accommodate disability under the *Code*. The Court also found that Mr. Bottiglia's doctor had provided inconsistent recommendations and information regarding Mr. Bottiglia's condition and that the OCSB's concerns were both reasonable and *bona fide*. Mr. Bottiglia also alleged that the OCSB was obligated to first ask his treating physician for more information regarding his recommendation rather than referring the matter to another doctor. This argument was also rejected by the Court, which found that OCSB had legitimate concerns regarding the reliability of Mr. Bottiglia's own doctor and that it would have been unreasonable to require them to forego a second opinion in favour of more information from the same, unreliable source.

Another argument advanced by Mr. Bottiglia was that the OCSB had improperly attempted to influence the IME physician by sharing its view that his leave of absence was prompted by the dispute regarding a

promotion and that his desire to return to work was motivated by the expiry of his sick leave. The argument was more sympathetically received by the Divisional Court but it ultimately deferred to the HRTO, which held that the OCSB had the right to share its view of the facts with the IME physician and that Mr. Bottiglia was free to counter their views in his session with the doctor. Mr. Bottiglia's application to the Divisional Court was thus dismissed.

So what are the takeaways for employers? First, employers do not need legislative or contractual authority to require that an employee submit to an IME. However, they must have reasonable and *bona fide* reasons for requesting the examination. Although the Court declined to provide examples of other circumstances that would be considered reasonable and *bona fide*, this decision shows that a sudden change in recommendations or diagnoses and an apparent lack of knowledge of the workplace can give rise to legitimate concerns regarding the reliability of the medical opinion. Second, when communicating with the proposed IME physician, employers would be well-advised to be measured and transparent. Although the Court declined to set aside the decision of the HRTO regarding the OCSB's communications with the IME physician, it did state clearly that the opinions expressed by the OCSB in its letter to the doctor could have impaired the objectivity of the IME and made it reasonable for Mr. Bottiglia to decline to attend the examination.

Even with this note of caution from the Court regarding communications with an IME doctor, the decision in *Bottiglia* is a welcome sign that the HRTO will support reasonable efforts by employers to obtain timely and accurate medical information regarding an employee's ability to work. As always, we recommend reaching out to your Cassels Brock Employment Law team if you are considering a complicated return to work plan or if you need guidance about how and when to request an IME.

For further information, please contact Laurie Jessome or any other member of the Employment & Labour Group.
