FTR Now

Mandatory Retirement Upheld for Suppression Fire Fighters: HRTO Clarifies Accommodation Obligations

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In its recent decision, *Corrigan v. Mississauga (City)*, the Human Rights Tribunal of Ontario ("HRTO") considered whether a municipal employer had a positive obligation to consider requests for individual exceptions to the mandatory retirement policy of age 60 for suppression fire fighters and to work with those fire fighters to develop a medical fitness testing regime. The Tribunal found that it did not; rather, the onus is on the individual fire fighter to come forward with a request for accommodation including evidence of an extremely low or negligible risk of cardiac event. The decision provides greater clarity to the scope of a municipality's obligations to accommodate requests by suppression fire fighters to work in suppression past age 60. In this *FTR Now*, we discuss the *Corrigan* decision, its background and its implications for municipalities.

BACKGROUND

In 2008, the HRTO rendered its decision in *Espey v. London* (*City*) ("*Espey*"), [1] in which it held that mandatory retirement of suppression fire fighters at age 60 was a *bona fide* occupational requirement. In that decision, then Vice-Chair David Wright made the following comment:

[100] However, I do not foreclose the possibility that where an individual firefighter initiates a request for an exception to the mandatory retirement date based upon his or her individual risk of cardiac events and medical evidence suggests an extremely low or negligible risk of cardiac events in that individual, accommodation may be required. […]

The findings in *Espey* were upheld in 2012, again by HRTO Associate Chair David Wright, in *Gill v. Hamilton Professional Fire Fighters' Association* ("*Gill*").

After *Espey* was rendered, the *Fire Protection and Prevention Act* ("FPPA") was amended in 2011 by Bill 181. That amendment permitted mandatory retirement of suppression fire fighters at age 60 notwithstanding the *Human Rights Code* ("*Code*") and subject to the duty to accommodate.

Following *Espey* and the FPPA amendments, the City of Mississauga and the Mississauga Fire Fighters' Association agreed to incorporate mandatory retirement at age 60 into the collective agreement. Platoon Chiefs were also made subject to a mandatory retirement policy. Several fire fighters, upon being notified that they had to retire, requested that the City provide "individual exceptions" for them, "offering in general terms to comply with reasonable physical and medical

testing rationally connected to their job duties." The City offered them non-suppression positions, which they declined. They brought several applications under the *Code* against the City and the Association, alleging the City failed to accommodate them in suppression positions. Two Platoon Chiefs also brought applications alleging that *Espey* and the Bill 181 amendments did not apply to them. All applications were considered in this decision.

THE DECISION

The City and the Association sought summary dismissal of the applications. Following the summary hearing, the applications were dismissed as having no reasonable prospect of success by Associate Chair David Wright, who upheld his previous findings in *Espey* and *Gill*. Referring to the principal argument of the suppression fire fighters that "even where mandatory retirement in a collective agreement is valid, an employer must investigate and institute a testing protocol following a request such as that made by counsel in this case," Associate Chair Wright stated:

[24] The difficulty with the applicants' argument, however, is that para. 100 of *Espey*, and the duty to accommodate in s. 53.1(4), do not impose an obligation on an employer to develop a testing regime for each employee, even on request. The basis of the decision in *Espey* and s. 53.1(2) is that mandatory retirement is justified as a *bona fide* occupational requirement ("BFOR") and that an employer can require employees to retire at age 60. *Espey* left open the possibility of accommodation in suppression where an individual presented particular medical evidence to the employer of his or her extremely low or negligible risk of cardiac events. The applicants did not do that, and neither *Espey* nor s. 53.1(4) requires an employer or association to research and engage in a search for individual testing protocols each time an employee makes a general request. […]

Interpreting paragraph 100 of *Espey*, the Tribunal held that "this paragraph contemplates the possibility that an individual who comes forward with medical evidence of an unusually low risk despite their age can request an exception from mandatory retirement. The law also suggests a duty to accommodate in positions outside fire suppression." It did not, however, impose a positive obligation to "develop and implement a testing regime for a group of fire fighters or an individual."

Here, Associate Chair Wright held that the requests made by the applicants did not fall within the exception contemplated by paragraph 100 of *Espey*, in that an exception was not requested on the basis of "low or negligible risk of cardiac events. Rather, they made a general request for the establishment of a testing regime." Because there was no obligation to investigate accommodation within suppression in the absence of evidence of low or negligible risk of a cardiac event, there was no procedural breach of the duty to accommodate. The Associate Chair also held that the same analysis as that set out in paragraph 100 of *Espey* applied to the Platoon Chiefs.

IMPLICATIONS

Corrigan is a welcome decision because it provides further helpful guidance and certainty

respecting the extent of a municipality's obligations to accommodate requests by suppression fire fighters to continue working **within suppression** past the mandatory retirement age of 60. It is now clear that there is no positive obligation on a municipality to create or develop a testing regime to determine fitness for duties. Rather, the onus rests squarely with the individual fire fighters to present evidence of "low or negligible cardiac risk." It remains important to remember that the duty to accommodate in an available position for which the fire fighter is qualified **outside suppression or elsewhere within the municipality** still exists where a fire fighter wishes to work past age 60.

For further information about this decision, contact Lauri Reesor, who successfully represented the City of Mississauga in this case and the City of Hamilton in *Gill*, at 416.864.7288, Mark Mason at 416.864.7280 or your regular Hicks Morley lawyer.

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[1] For a discussion of the *Espey* decision, see our *FTR Now* of December 2008, "Human Rights Tribunal Upholds Mandatory Retirement at age 60 for Firefighters."
