FTR Now

City Did Not Breach Duty to Accommodate When it Declined Firefighters' Request for Exception to Mandatory Retirement Policy

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In a recent decision, Corrigan v. Corporation of the City of Mississauga [1], the Divisional Court dismissed an application for judicial review of a decision of the Human Rights Tribunal of Ontario (the "Tribunal"), which found that the City of Mississauga did not breach its procedural duty to accommodate when it declined to accommodate suppression firefighters in light of its mandatory retirement policy and the law. In this *FTR Now*, we discuss the Divisional Court decision, its background and its implications for municipalities.

BACKGROUND

In 2008, the Tribunal rendered its decision in *Espey v. London (City)*[2] ("*Espey*"), in which it held that mandatory retirement of suppression firefighters 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. […]

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 firefighters at age 60 notwithstanding the *Human Rights Code* ("*Code*") and subject to the duty to accommodate.

The findings in *Espey* were upheld in 2012, again by the Tribunal Associate Chair Wright, in *Gill v. Hamilton Professional Fire Fighters' Association*[3] ("*Gill*"). An application for judicial review of *Gill* was dismissed, as was leave to appeal to the Court of Appeal.

Following *Espey* and the FPPA amendments, the City of Mississauga and the Mississauga Fire Fighters' Association ("Association") agreed to incorporate mandatory retirement at age 60 into their collective agreement. Platoon Chiefs were also made subject to a mandatory retirement policy. Several firefighters, 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 and ought to have investigated and implemented a testing protocol to assess whether the applicants had an extremely low or negligible risk of cardiac events. Two Platoon Chiefs also brought applications alleging that *Espey* and the Bill 181 amendments did not apply to them.

The City and the Association sought summary dismissal of the applications, which the Tribunal consolidated into one summary hearing. Following the summary hearing, Associate Chair Wright dismissed the applications in *Corrigan v. Mississauga (City)* ("*Corrigan*") as having no reasonable prospect of success, upholding his previous findings in *Espey* and *Gill*. 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. […]

THE DIVISIONAL COURT DECISION [4]

The suppression firefighters and Platoon Chiefs (the "Applicants") sought judicial review of the Tribunal's decision to dismiss their applications on the basis that it was unreasonable. They argued that the City had a duty to accommodate them, the procedural aspect of which required the City to consider individual testing and to enter into a dialogue with them once they made a request for accommodation in a suppression firefighter position. They also argued that the Tribunal should not have dismissed their applications at a summary hearing stage, but should have allowed them to have a full hearing on the merits with evidence.

The Divisional Court rejected the Applicants' arguments. It noted that although *Espey* contemplated an exception to mandatory retirement, that exception was narrow and required an individual to come forward with a request to continue in suppression firefighting based on evidence that he or she is at an extremely low or negligible risk of cardiac events. In this case, the Applicants failed to bring forward any such evidence or indicate that it was available, and failed to suggest a possible testing regime that would elicit such evidence, including at the time they made the requests, at the Tribunal's summary hearing and at Divisional Court.

The Divisional Court also found that the expert evidence submitted by the Applicants at the Tribunal was not relevant, as it simply sought to challenge factual findings in *Espey* instead of demonstrating that the Applicants had extremely low or negligible risks of cardiac events.

The Divisional Court agreed with the Tribunal's conclusions in *Corrigan* that to require the City to investigate and develop an individualized testing regime in advance of particularized evidence from the Applicants would render meaningless the mandatory retirement regime endorsed in *Espey* and required in collective agreements by the FPPA.

IMPLICATIONS

The Divisional Court decision is a welcome decision because it emphasizes that mandatory retirement at age 60 for suppression firefighters is the norm in Ontario absent evidence of an "extremely low or negligible cardiac risk".

It is now quite clear that there is no positive obligation on a municipality to create or develop a testing regime to determine fitness for duties for suppression firefighters upon attaining age 60. Rather, the onus rests squarely with individual firefighters to present medical evidence of extremely low or negligible cardiac risks before a duty to accommodate in suppression firefighting is triggered. It remains important to remember that the duty to accommodate in an available position for which the firefighter is qualified outside suppression or elsewhere within the municipality still exists where a firefighter wishes to work past age 60.

For more information on this decision, please contact Lauri A. Reesor at 416.864.7288, Frank Cesario at 416.864.7355, Dianne E. Jozefacki at 416.864.7029 or your regular Hicks Morley lawyer.

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[1]2015 ONSC 236 (CanLII).

[2] 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."

[3]2014 ONSC 1840 (CanLII).

[4]Successfully argued by Hicks Morley's Frank Cesario and Lauri A. Reesor.

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