## Case In Point

# IMEs and the Scope of an Employer's Communications with IME Examiners

**Date:** September 11, 2017

The Ontario Court of Appeal has denied leave to appeal a judicial review of a Human Rights Tribunal of Ontario (Tribunal) decision that found an employer's request for an Independent Medical Examination (IME) as part of the accommodation process reasonable in the circumstances. This case further provides helpful guidance with respect to the scope of an employer's communications with IME examiners.

The Applicant, Mr. Bottiglia, was a superintendent of schools with the Ottawa Catholic School Board (Board). Shortly after not being considered for the vacant Director of Education position at the Board, the Applicant went on sick leave as a result of a mental health disability. For approximately two years the Applicant provided medical information which stated that he was unable to work. In June of 2012, the Applicant's psychiatrist provided correspondence (dated March 2012) to the Board which stated the Applicant's condition was resistant to treatment, that a return to work entailed a risk of relapse and that he required an extended period of time off work. However, some two months later (August 2012), the Applicant's psychiatrist informed the Board that the Applicant was ready to return to work, with restrictions. The restrictions included working four hours per day for two days per week with no evening meetings. The psychiatrist also indicated that the "work hardening" process would take six to twelve months.

The Board was concerned with the psychiatrist's August 2012 information and ultimately requested that the Applicant attend an IME for the following reasons:

- the Board was of the view the psychiatrist was recommending accommodation without an objective understanding of the workplace and the essential duties of the Applicant's senior position
- the August 2012 information directly contradicted the psychiatrist's recommendation in March
- the psychiatrist recommended an uncommonly lengthy period of work hardening.

Ultimately, the Applicant agreed to attend an IME, subject to certain conditions: the parties had to agree on the identity of the examiner and neither party had the right to communicate with the examiner in the absence of the other party.

The Board wrote to the examiner, indicating among other things that it was concerned the

Applicant's return to work was premised on the fact his salary was ending, not his fitness to return to work. It also asked the examiner to advise whether the Applicant had been receiving treatment for a psychiatric condition, and if so to provide a diagnosis and to prescribe any treatment. Counsel for the Applicant objected to the letter, stating among other things that it prejudiced the Applicant by misrepresenting why he wished to return to work and that the request for psychiatric information exceeded what was permitted by law. The Applicant then refused to attend the IME but indicated he would provide any medical information to which the Board was entitled and that he would attend an IME if the Board respected the conditions previously agreed to. The Applicant was not satisfied with the Board's response. In November 2012, he brought an Application before the Tribunal asserting that the Board failed to accommodate his return to work. He then resigned in February 2013.

The Tribunal dismissed the Application, finding the Board was proceeding in good faith with the accommodation process when the Application was filed and that it fulfilled its procedural duty to accommodate. The substantive duty to accommodate had not been triggered, as the Applicant failed to participate in the Board's reasonable request for an IME.

At the Divisional Court, the Applicant argued that the Board had no lawful right to require him to undergo an IME. The Court disagreed and provided the following helpful guidance:

[70] In my view, the Tribunal's decision in this respect was reasonable. As the Tribunal member pointed out, Dr. Levine had done an about-face within a span of roughly five months with respect Mr. Bottiglia's ability to work. This provided a reasonable and bona fide basis for the [Board] to question the adequacy and reasonableness of Dr. Levine's opinion, because he had been writing for two years that Mr. Bottiglia was unable to resume his duties at all.

[76] In my view, the Tribunal's decision on this issue was a reasonable one. In certain circumstances, the procedural aspect of an employee's duty to accommodate will permit, or even require, the employer to ask for a second medical opinion. Without attempting to define all of those circumstances, they will include the circumstances that the Tribunal reasonably found existed here, 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.

[77] As the OHRC says in its Policy, an employer is not entitled to request an IME in an effort to second-guess an employee's medical expert. An employer is only entitled to request that an employee undergo an IME where the employer cannot reasonably expect to obtain the information it needs from the employee's expert as part of the employer's duty to accommodate.

The Applicant also argued that the Board, prior to proceeding to an IME, should have requested further information from the Applicant's treating psychiatrist. The Court disagreed because it found the Board had legitimate concerns regarding the reliability of the Applicant's treating psychiatrist.

With respect to the Board's communications with the IME examiner, the Court found they had a realistic risk of impairing the objectivity of the examiner. However, the Court refused to overturn the Tribunal's decision that the communications were appropriate, because the Tribunal decision was within a range of "reasonableness." Commenting on the scope of an employer's communications with an IME examiner, the Court noted the following:

[92] When providing the examiner with information, it is my view that the employer must be careful not to impair the objectivity of the examiner. Where an employer has provided information to an examiner which might reasonably be expected to impair that examiner's objectivity, it is my further view that an employee is justified in refusing to attend the IME. In such a case, the accommodation process will not have failed as a result of the employee's refusal to attend the IME. Instead, the process will have broken down as a result of the employer's actions in potentially impairing the examiner's objectivity.

[94] …An IME should not devolve into a contest for the sympathies of the examiner. Surely, efforts by both the employer and the employee to persuade the examiner of the merits of their position runs at least the same risk of compromising the examiner's objectivity as a one-sided effort by the employer.

This case confirms that an employer can be justified in requesting an IME in appropriate circumstances. Here, the Board had legitimate concerns regarding the inconsistent information it received from the Applicant's physician and, in particular, the unusually lengthy work hardening recommendation. Because the Board's request was reasonable, the Applicant breached his obligations in the accommodation process when he refused to attend the IME. When communicating with IME providers, employers should take particular care to ensure that the examiner's objectivity is preserved, as the ultimate goal of an IME is to obtain independent and objective information to support the accommodation process.

*Bottiglia v Ottawa Catholic School Board*, 2017 ONSC 2517 (CanLII), leave to appeal denied, *Bottiglia, Marcello v. Ottawa Catholic School Board et al* (M47940), August 25, 2017.