Can an employer insist that an employee have a medical exam?

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Employers have a duty under the Human Rights Code to accommodate disabled employees up to the point of undue hardship. This duty has two recognized components: a procedural duty and a substantive duty. Effectively, these duties require employers to ensure they follow reasonable procedures and assess information relating to the employee's abilities and restrictions in the context of the workplace. As part of the accommodation process, employers often request and receive medical notes from an employee's physician to better understand the nature of the disability (not diagnosis but prognosis), its anticipated duration and to seek confirmation with respect to whether the employee can resume work with or without accommodations. These notes often provide bare information and an employer must follow up in order to receive additional information upon which it can reasonably consider its accommodation obligations.

A recent case that was before the Divisional Court on judicial review from the Human Rights Tribunal of Ontario called *Bottiglia v. Ottawa Catholic School Board* addressed the issue of whether an employer could require an employee to undergo an independent medical examination ("IME"). The Divisional Court ultimately held that while there may not be a freestanding right to request an IME, absent an enforceable contractual provision, an employer may in appropriate circumstances ask an employee to provide such further and better information as part of the accommodation process under the statutory authority of the Code.

In this case, the employee who had held the position of Superintendent of Schools had been off work due to anxiety and stress beginning in April 2010. While the employee was absent from work the employer received information about his condition stating that he required a medical leave until further notice. In February 2012, the employee wrote to his supervisor to advise that the latest medical assessment he received indicated "that a full recovery will take a prolonged period of time". In June 2012, his doctor's assessment indicated that the employee's condition required an extended period of time off work and that a return to the workplace threatened a risk of relapse and the loss of the health gains he had made to date. However, shortly thereafter in

August 2012, the medical prognosis changed and indicated that the employee would be able to return to modified work in two months' time. The employee and employer continued ongoing discussions through counsel about modifications and a return to work plan over what the employer was advised would be a six to twelve month period, with no certainty that the employee would be in a position to return full time.

The employer was concerned about the return to work proposal for a number of reasons: (1) the doctor was recommending accommodation but did not have an objective understanding of the workplace or the essential duties of the employee's position; (2) the August 2012 medical recommendation appeared to contradict the June 2012 medical documentation; (3) the medical report was relatively subjective and it provided no clear prognosis; (4) the doctor recommended a particularly slow start to the employee's working hours and duties which were difficult considering the demanding nature of the position, raising concerns about a premature return to work; and (5) the employee's return to work date coincided with the exact period of the end of the employee's paid leave. As a result, the employer asked the employee to undergo an IME. The employer and employee agreed on the conditions associated with the employee's attendance at such an examination, but the employee ultimately refused to go to the IME because he took issue with a letter provided to the doctor by his employer. The employee argued that the letter prejudiced the IME because it misrepresented the reason the employee went off sick and implied that his return to work was motivated by the end of his sickness benefits.

At the hearing, the employee argued that his employer did not have a right to require him to attend an IME. The employee argued that there was no contractual or statutory authority for this requirement and, accordingly, that he could not be compelled to attend one; rather, it was contended that the employer ought to have asked for further information from the employee's doctor.

In reviewing this issue, the Tribunal found, however, that the necessary statutory authority for an IME might exist in the context of an employer's duty to accommodate under subsection 17(2) of the Code where an IME is justifiable and reasonable in the circumstances of the case. This view was upheld by the Divisional Court. The circumstances in this case included the fact that the employer was found to have had a reasonable and *bona fide* reason to question the adequacy and reliability of the information it had received from the employee's doctor given the concerns described above. In refusing to attend the IME the employee was found to have not cooperated in the accommodation process.

Therefore, when considering the adequacy of the information provided as part of an accommodation process, an employer may have the authority to request that the employee undergo an IME where the request is seen as reasonable in the circumstances of the case and where the information is legitimately necessary to an understanding of the employee's individual needs.