CITATION: Bottiglia v. Ottawa Catholic School Board, 2017 ONSC 2517
DIVISIONAL COURT FILE NO.: 16-DC-2180
DATE: 2017/05/19

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Marrocco A.C.J.S.C., Heeney R.S.J., Ellies J.

B E T W E E N:	
MARCELLO BOTTIGLIA	*P. Santini* and *S. Bawden*, for the Applicant
Applicant	
- and -	
OTTAWA CATHOLIC SCHOOL BOARD and HUMAN RIGHTS TRIBUNAL OF ONTARIO	
Respondents	*P. Marshall* and *R. Chisholm*, for the Respondent Ottawa Catholic School Board
	J. Tam, for the Respondent Human Rights Tribunal of Ontario
	HEARD: February 24, 2017 at Ottawa

REASONS FOR DECISION

ELLIES J.

OVERVIEW

[1] The applicant, Marcello Bottiglia, worked for the Carleton Roman Catholic Separate School Board, and then for its successor, the Ottawa Catholic School Board (the "OCSB") from 1975 until he went on sick leave in April, 2010. Over the course of his employment, he progressed from working as a teacher to being the Superintendent of Schools.

[2] Mr. Bottiglia resigned from his employment in 2012, without ever returning to work. In November of that year, he commenced an application under the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "*Code*"), in which he alleged that the OCSB had discriminated against him by failing to accommodate his return to work. He maintained that the OCSB improperly required him to attend an independent medical examination ("IME") before it would permit him to resume the duties of his position, then breached the terms upon which he had agreed to do so by providing the examiner with misleading information. He alleged that the OCSB had left him with no choice but to resign to begin drawing upon his retirement pension.

[3] The application to the Human Rights Tribunal of Ontario (the "Tribunal") was dismissed.

[4] In this application for judicial review, Mr. Bottiglia seeks to set aside the Tribunal's decision. He submits that the Tribunal was wrong not to consider evidence of events occurring after his application was brought and that the Tribunal's decision to dismiss his application was unreasonable. The application requires us to consider the scope of an employer's right to request that an employee undergo an IME and the corresponding duties of an employee with respect thereto.

[5] For the reasons that follow, I would dismiss the application. The Tribunal's decision not to rely on evidence of events occurring after Mr. Bottiglia filed his application was not only reasonable, but was required to meet the Tribunal's duty of procedural fairness towards the OCSB. The Tribunal's decision regarding the request to attend an IME was likewise reasonable in the circumstances of this case, which gave rise to a legitimate concern on the part of the OCSB about the accuracy and the reliability of the information it received from Mr. Bottiglia's treating physician. Finally, although I would have found otherwise, the Tribunal's conclusion that Mr. Bottiglia was not justified in refusing to attend the IME was within the range of reasonable outcomes and, therefore, should not be set aside.

BACKGROUND

[6] The applicant began teaching for the Carleton Roman Catholic Separate School Board in 1975. The Carleton Board amalgamated with the Ottawa Roman Catholic Separate School Board in 1998 to form the OCSB. In 1999, Mr. Bottiglia became the Superintendent of Schools. As superintendent, Mr. Bottiglia was a busy man. He was responsible for the implementation, review and evaluation of curriculum, for continuing

and community education programs, and for supervising three families of schools. His work day often extended into the evening.

Events Leading to Mr. Bottiglia's Absence from Work

[7] In early 2010, the OCSB appointed James Hanlon as its Director of Education, when the position became vacant due to retirement. Mr. Bottiglia had been interested in competing for that position, and was upset that the Board relied on an appointment process rather than holding an open competition. He felt distraught, betrayed and upset by this decision. According to Mr. Bottiglia's testimony before the Tribunal, his strong feelings about the matter eventually triggered the depression which led to his extended absence from work.

[8] The applicant's last day of work was April 16, 2010. By that date, he had accumulated approximately 465 paid sick days. Because he had so many sick days to his credit, Mr. Bottiglia had opted out of the OCSB's long-term disability plan in 2005 and no longer paid premiums for it by the time he went off sick. While he was on sick leave, he continued to accumulate paid sick days and vacation days. Taking into account all of these sick days and vacation days, Mr. Bottiglia's paid time off of work would come to an end on October 17, 2012.

[9] At the time he went off sick, Mr. Bottiglia was being treated for anxiety and stress by his family doctor. In May 2011, he began to see a psychiatrist, Dr. Levine. Dr. Levine diagnosed Mr. Bottiglia as suffering from unipolar depressive disorder with anxiety features. In his evidence before the Tribunal, Dr. Levine testified that, unlike a bi-polar depressive condition, there are no "highs" associated with unipolar depressive disorder, only "lows". He testified that Mr. Bottiglia's condition was moderately severe, that it was persistent, and that it could become resistant to treatment.

Information Received by the OCSB

[10] Throughout his absence, the OCSB received information concerning Mr. Bottiglia's condition. Initially, this information was provided by Mr. Bottiglia and his psychiatrist directly. Later, it was provided through Mr. Bottiglia's lawyer, John Paul Zubec.

[11] In June 2011, the OCSB received a note from Dr. Levine, advising that Mr. Bottiglia required medical leave until further notice.

[12] In a letter dated February 13, 2012, Mr. Bottiglia wrote to the OCSB's Director of Education, Julian Hanlon, to advise that his latest medical assessment indicated "that a full recovery will take a prolonged period of time."

[13] In June 2012, the OCSB received a copy of a letter from Dr. Levine dated March 19, 2012, via Mr. Zubec. In his letter, Dr. Levine stated that Mr. Bottiglia's condition had been relatively treatment resistant, that Mr. Bottiglia required an extended period of time off work, and that a return to Mr. Bottiglia's current workplace entailed a risk of relapse and the loss of the gains that Mr. Bottiglia had made to that date.

[14] Approximately two months later, on August 16, 2012, Mr. Zubec wrote to counsel for the OCSB, Paul Marshall. In his letter, Mr. Zubec stated that Mr. Bottiglia's condition was improving and that Dr. Levine believed Mr. Bottiglia would be able to return to modified work sometime in the next two months. Mr. Zubec requested that a meeting be set up between the parties and their lawyers to discuss issues surrounding Mr. Bottiglia's return to work.

[15] On September 7, 2012, Mr. Zubec again wrote to Mr. Marshall. Enclosed with his letter was a letter dated August 31, 2012, from Dr. Levine and a one-page document entitled "Five Point Plan for Resumption of Career", which had been prepared by Mr. Bottiglia in consultation with Dr. Levine. Contrary to the opinion expressed in his March 2012 letter, the letter from Dr. Levine stated that Mr. Bottiglia was ready to return to work that fall. He recommended that Mr. Bottiglia work only two days per week for four hours each day, with no evening meetings. He proposed that this schedule be maintained until Mr. Bottiglia's condition warranted increased hours of work per day and days of work per week. He indicated that he expected this "work hardening" process would take six to twelve months and that Mr. Bottiglia might not be able to return to full-time capacity even over that length of time. The Five Point Plan identified five areas of concern regarding Mr. Bottiglia's return to work and strategies to address those concerns.

The OCSB Decides to Seek an IME

[16] Mr. Hanlon testified before the Tribunal that he was concerned with Dr. Levine's recommendation and with the Five Point Plan. He was of the view that Dr. Levine was recommending accommodation without an objective understanding of Mr. Bottiglia's workplace or the essential duties of a supervisor, which duties had changed since Mr. Bottiglia went off sick. He was concerned that Dr. Levine's August 31, 2012, recommendation contradicted his recommendation of March 2012, in which he stated that Mr. Bottiglia ought not to return to work. He also expressed concern that it was premature for Mr. Bottiglia to return to work in light of the demanding nature of the superintendent's job and the uncommonly slow start suggested by Dr. Levine. He also expressed concern about the subjective nature of Dr. Levine's opinion and the fact that Dr. Levine had provided no clear prognosis. Finally, he expressed skepticism about the fact that Mr. Bottiglia's return to work coincided exactly with the cessation of his paid leave.

[17] Mr. Hanlon testified that, as a result of these concerns, the OCSB was of the view that a second medical opinion was warranted and that it would rely on the OCSB's Management Guide to Workplace Accommodation for Employees (the "Management Guide") to request that Mr. Bottiglia undergo an IME.

[18] On September 21, 2012, Mr. Marshall wrote to Mr. Zubec advising that the OCSB wanted Mr. Bottiglia to undergo an IME "as permitted by the Board's 'Management Guide' … in order to assess his current health status and his ability to conduct… supervisory duties… and any relevant accommodation which may be necessary for a successful return to work."

[19] Mr. Zubec responded by letter suggesting, among other things, that the OCSB could simply have requested more information from Dr. Levine and expressing his opinion that the Management Guide did not give the OCSB any contractual authority to force Mr. Bottiglia to undergo an IME. Notwithstanding his position, however, Mr. Bottiglia agreed to attend an IME provided that certain conditions were met. Those conditions were set out in the same letter from Mr. Zubec. They included a condition that the parties agree on the identity of the independent medical examiner (two of whom were suggested by Mr. Bottiglia) and that neither party had the right to communicate with the examiner in the absence of the other party.

[20] The OCSB agreed to all of the conditions, with one exception. That condition related to paying Mr. Bottiglia's salary from September 26, 2012 (the date of Mr. Zubec's letter), until the assessment period was complete. With respect to that condition, the OCSB indicated that it would revisit the issue following completion of the IME, which was scheduled for October 31, 2012, with Dr. Ken Suddaby, one of the two psychiatrists suggested by Mr. Bottiglia.

[21] On October 11, 2012, the OCSB received another letter from Dr. Levine, dated October 10, 2012. In the letter, Dr. Levine set out his opinion that Mr. Bottiglia was capable of returning to work immediately and could begin working two and one-half days per week.

The OCSB Writes to the Examiner

[22] On October 24, 2012, Mr. Marshall wrote to Dr. Suddaby on behalf of his client. He asked that Dr. Suddaby examine Mr. Bottiglia and provide a report to assist the OCSB to determine if Mr. Bottiglia could return to work. He asked that Dr. Suddaby provide an opinion as to Mr. Bottiglia's current limitations and restrictions. He indicated that Mr. Bottiglia had left the workplace following a dispute with the then Director of Education over the appointment of the Director's successor. Mr. Marshall also set out his client's position that the slow pace at which Dr. Levine had proposed that Mr. Bottiglia return to full-time employment would make accommodation a virtual impossibility.

[23] Of particular importance to this application, in my view, is the fact that Mr. Marshall also indicated to Dr. Suddaby that his client was concerned that Mr. Bottiglia's return to work was premature and was based on the imminent expiry of his pay, rather than his actual fitness for the job he sought to resume. Lastly, Mr. Marshall requested that Dr. Suddaby advise if Mr. Bottiglia had been receiving treatment for a psychiatric condition, that he provide a psychiatric diagnosis, and that he prescribe any treatment necessary.

[24] Mr. Zubec received a copy of Mr. Marshall's letter to Dr. Suddaby on October 26, 2012[1]. After he received it, he wrote to Mr. Marshall on October 30, 2012. On behalf of his client, he made a number of specific complaints about Mr. Marshall's letter. One of them was that the letter had prejudiced Mr. Bottiglia by misrepresenting the reason why Mr.

[1] The letter does not indicate that a copy was sent to Mr. Zubec. However, at para. 121 of his reasons, the Tribunal member states that the failure to send a copy to opposing counsel was inadvertent on the part of Mr. Marshall.

Bottiglia left the workplace and by implying that Mr. Bottiglia's return to work was motivated by the fact that he had run out of paid sick leave, neither of which Mr. Zubec said were true. Mr. Zubec also complained that, by asking Dr. Suddaby if Mr. Bottiglia had been receiving treatment for a psychiatric condition, the OCSB had requested information which exceeded that to which it was lawfully entitled during the accommodation process and that the OCSB had breached the conditions that the parties had agreed upon by communicating with Dr. Suddaby in the absence of the other party.

Mr. Bottiglia Refuses to Attend the IME

[25] As a result of these and the other concerns expressed in his letter, Mr. Zubec advised Mr. Marshall that Mr. Bottiglia would not be attending any IME with Dr. Suddaby. He also advised, however, that his client continued to be willing to provide any medical information to which the OCSB was lawfully entitled and to attend an IME, if the OCSB respected the conditions previously agreed upon and if the IME was "fair and objective".

[26] That brought matters to a standstill. According to the Tribunal, Mr. Marshall responded the same day[2], disagreeing with the position adopted by Mr. Zubec on behalf of his client and saying that the OCSB was prepared to provide Dr. Suddaby with any supplemental information that Mr. Bottiglia might wish him to have. Mr. Marshall indicated that if Mr. Bottiglia continued to refuse to attend the IME as scheduled, the OCSB would simply wait until an IME provided answers to the questions it had put to Dr. Suddaby.

[27] The applicant filed his application with the Tribunal on November 22, 2012.

Post-application Events

[28] Between the end of October 2012, and the beginning of February 2013, Mr. Bottiglia made attempts to access his retirement pension, for which he had qualified since 2011. Issues arose as to whether Mr. Bottiglia was, in fact, resigning and with respect to his entitlement to additional paid sick days. These issues are not relevant to the issues in this application.

[29] On February 1, 2013, Mr. Zubec wrote to Mr. Marshall to propose that a health care company (the TRAC Group) be retained by the OCSB and to advise Mr. Marshall that Mr. Bottiglia would be willing to attend an IME if that company deemed it necessary.

[30] By way of a letter dated February 7, 2013, Mr. Marshall responded that the OCSB was not willing to retain any third party "to determine what, if any, medical information the Board requires to fulfill its duty to accommodate."

[31] On February 20, 2013, Mr. Bottiglia tendered his resignation, effective February 28, 2013.

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[2] I am unable to find this letter in the record.

The Tribunal's Decision

[32] The application proceeded to a hearing before Tribunal Member Whist. During the hearing, Mr. Bottiglia sought to rely on evidence of the events that occurred after he filed his application. The Tribunal refused to consider that evidence on the issue of accommodation, but considered it with respect to the issue of reprisal.

[33] For reasons dated September 4, 2015 (2015 HRTO 1178), the Tribunal dismissed the application. The Tribunal member summarized his decision at para. 161 of those reasons as follows:

> In summary, the OCSB and [the] applicant were engaged in an accommodation process from August 7, 2012, when the applicant announced an interest in returning to work, until November 22, 2012, when the applicant filed his Application alleging that the OCSB's (*sic*) was not acting in good faith during this process. It is unfortunate that this process broke down but I do not find that the OCSB was acting in bad faith. I find that the OCSB's efforts during this period to meet its procedural duty to accommodate the applicant were reasonable and that it fulfilled the procedural aspect of any duty it would have had to accommodate the applicant. The substantive aspect of any duty to accommodate would not have been triggered because the applicant ultimately failed to participate in what I have concluded was the OCSB's reasonable request for medical information by means of an IME (see, for example, *Simcoe Condominium Corporation No. 89 v Dominelli*, 2015 ONSC 3661, at para. 62-63). As the applicant has not met his onus to show that he was discriminated or reprised against, his Application is dismissed.

ISSUES

[34] The applicant raises three issues in this application:

(1) Did the Tribunal member err by declining to consider any evidence of events occurring after Mr. Bottiglia filed his application as those events relate to the issue of accommodation?

(2) Did the Tribunal member err by finding that the OCSB acted reasonably in requiring Mr. Bottiglia to undergo an IME as part of the accommodation process?

(3) Did the Tribunal member err by finding that Mr. Bottiglia terminated the accommodation process by failing to attend the IME?

STANDARD OF REVIEW

[35] One might argue that the first question listed above raises an issue of procedural fairness. Such issues may be reviewable on a correctness standard: *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at para. 43. See, however, *Manpel v. Greenwin Property Management* (2005), 200 O.A.C. 301, 2005 CanLII 25636 (Div. Ct.), at para. 16 and *Forestall v. Toronto Policy Services Board* (2007), 228 O.A.C. 202 (Div. Ct.), at para. 38.

[36] However, Mr. Bottiglia characterizes this issue as one of evidentiary misapprehension. He argues that, by failing to consider the post-application evidence, the Tribunal misapprehended the evidence by finding that it was Mr. Bottiglia, and not the OCSB, that caused the accommodation process to fail. Characterizing the issue this way, Mr. Bottiglia and the other parties all agree that this issue is reviewable on a standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[37] The second and third issues listed above concern the Tribunal's factual findings and the interpretation and application of the *Code* to those facts. As such, the Tribunal's decision is entitled to a high degree of deference. As the Court of Appeal stated in *Shaw v. Phipps*, 2012 ONCA 155, at para. 10:

> Deference is maintained unless the decision is not rationally supported. The ultimate question is whether the result falls within the *Dunsmuir* "range of possible, acceptable outcomes which are defensible in respect of the facts and the law"…

[38] This point will be an important one to bear in mind when I address the Tribunal's findings in this case regarding the OCSB's communication with Dr. Suddaby.

ANALYSIS

Issue 1: Evidence of Post-Application Events

[39] As mentioned above, the Tribunal member refused to consider the events that took place after Mr. Bottiglia filed his application on November 22, 2012, with respect to the issue of accommodation. He set out his reasons for doing so at para. 102 of his decision:

> It is important to state here that in considering the allegations of discrimination based on disability and the issue of whether the OCSB met a duty to accommodate the applicant I am considering the actions of the parties up until November 22, 2012, at which point the applicant filed his Application. I recognize that a duty to accommodate does not necessarily end when the person seeking accommodation files an Application with the Tribunal and there may be an issue, under these circumstances, as to what allegations are properly before a Tribunal panel. However, I note that in April 2013 the applicant requested that his Application be amended to

> include allegations related to events after November 2012. These additional allegations were only in relation to the issue of reprisal. The applicant raised no further allegations about the OCSB's actions in relation to the accommodation process. Accordingly, I see no basis for considering events after November 22, 2012 in relation to the OCSB's duty to accommodate.

[40] Mr. Bottiglia contends that, by failing to consider the evidence of events occurring after his application was filed, the Tribunal reached the decision it did based on a misapprehension of the evidence. Counsel for Mr. Bottiglia makes three related submissions. First, pointing to the Tribunal's acknowledgement of the continuing nature of the duty to accommodate, counsel for Mr. Bottiglia submits that the evidence of what occurred after the application was filed is "highly relevant". Relying on cases such as *R. v. Alboukhari*, 2013 ONCA 581, he submits that a failure to consider relevant evidence on a material issue is a misapprehension of the evidence. Finally, he submits that, had the Tribunal considered the post-application evidence, it would not have concluded that Mr. Bottiglia was the reason the accommodation process broke down.

[41] I am not able to accept this argument. In my view, the first submission conflates a proper *refusal* to admit evidence on an issue with an improper failure to consider *admitted* evidence. The third submission misinterprets the decision the Tribunal made on the evidence that it did admit.

Misapprehension of the Evidence

[42] As its name implies, *Alboukhari* was a criminal case. In *Abloukhari*, the Court of Appeal allowed an appeal from conviction and ordered a new trial. The court in *Abloukhari* applied its earlier decision in *R. v. Morrissey* (1995), 22 O.R. (3d) 514, in which it held that a misapprehension of evidence includes "a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence" (p. 538). However, the court in *Morrissey* and the many cases that have since applied it, including *Alboukhari*, were dealing with failures or mistakes relating to evidence that had been admitted, not to evidence that had been excluded. None of these cases stand for the proposition that a failure to consider evidence that has been excluded amounts to a misapprehension of the evidence.

[43] The Tribunal in this case admitted and considered the evidence of post-application events on the issue of reprisal. The fact that the post-application evidence was admitted on the reprisal issue does not require the Tribunal to consider it on the accommodation issue. Courts and other quasi-judicial decision makers routinely admit evidence for limited purposes. I need cite no authority for the proposition that evidence admitted for *any* purpose is not evidence admitted for *every* purpose.

[44] Even if Mr. Bottiglia had framed his argument to address the admissibility question squarely, I would not give effect to it. From a procedural perspective, the Tribunal was correct to refuse to consider the post-application evidence, in my view.

[45] The HRTO has consistently defined a hearing's scope by the allegations contained in the application: *Gorgiev v. Peel Condominium Corporation No. 542*, 2012 HRTO 1874, at para. 13; *McLennon v. York University*, 2013 HRTO 721, at para. 12. If an applicant wishes to add new allegations to an application before the Tribunal, he is required to make a Request for an Order During Proceeding (Form 10) to amend his application, under Rule 19 of the Tribunal's Rules of Procedure. The applicant did that in this case. In April 2013, Mr. Bottiglia requested permission to amend his application. However, his request was for an order "permitting him to amend his Application to include claims that the [OCSB] violated s. 8 of the *Ontario Human Rights Code*" (which prohibits reprisals). No amendments were sought by Mr. Bottiglia with respect to his allegations of discrimination under s. 5(1) of the *Code*.

[46] Further, in his Request, Mr. Bottiglia specifically identified the evidence upon which he sought to rely, such as the allegation that the OCSB prevented him from accessing his pension benefits while awaiting reinstatement. No reference was made in the Request to evidence of his willingness to attend an IME after filing his application on November 22, 2012. Indeed, in reviewing the Request, one is left with the impression that Mr. Bottiglia would *not* be relying on any facts arising after November 22, 2012, with respect to his allegations under s. 5(1). For example, at para. 4, clause (d) of Schedule "A" to the Request, in which Mr. Bottiglia sets out the details of his request, counsel for Mr. Bottiglia wrote:

> Mr. Bottiglia filed the within application after having no success convincing the Board to engage in the accommodation process in good faith.

[47] The impression left by this statement is that Mr. Bottiglia was of the view that the OCSB had failed in its duty to accommodate his disability *before* he filed his application, making what happened afterwards irrelevant.

[48] Perhaps more to the point is what is found at para. 28 of Schedule "A" to the Request, which reads:

> It is further submitted that adding the reprisal allegations will not expand the scope of the Application to include new allegations or distinct forms of discrimination.

[49] The OCSB did not oppose Mr. Bottiglia's request, which was ultimately granted. However, based on that request, it would have been reasonable for the OCSB to believe that it would not have to deal with evidence of events that occurred after the application was filed as far as the issue of accommodation was concerned.

[50] In my view, it would have been procedurally unfair to the OCSB to allow Mr. Bottiglia to rely on post-application evidence with respect to the duty to accommodate. The Tribunal member was correct in refusing to allow him to do so.

The Effect of the Post-Application Evidence

[51] I turn now to Mr. Bottiglia's argument that the result would have been different had the post-application evidence been considered on the accommodation issue. In making this argument, Mr. Bottiglia relies on the evidence of his willingness to find "a way forward", for example by suggesting the involvement of the TRAC Group. However, there is nothing in the findings the Tribunal made on the evidence it did consider that would support the contention that the Tribunal would have found differently had it considered the post-application evidence. Indeed, the inference is to the contrary.

[52] Mr. Bottiglia's post-application suggestion to the OCSB was that he would participate in an IME if a third party required him to do so. However, the Tribunal found that the OCSB had a legitimate reason to request an IME well before the application was filed. At para. 113 of his reasons, the Tribunal member wrote:

> I agree that conferring with Dr. Levine rather than insisting on an IME or prior to a possible IME were reasonable options for the OCSB to consider. However, as noted, I am satisfied, based on the facts and circumstances of this case, that the OCSB had sufficient reason to question the adequacy and reliability of the information that had been provided about the applicant's condition, needed accommodations and ability to return to work. I find the OCSB's decision to immediately pursue a different option namely a further medical opinion by means of an IME was reasonable.

[53] Given the Tribunal's finding that it was reasonable for the OCSB to request an IME, it seems unlikely that the Tribunal would have been persuaded that the ball was back in the OCSB's court when Mr. Bottiglia suggested that he undergo an IME only if a third party recommended it.

[54] For these reasons, I would dismiss this ground of review.

Issue 2: The OCSB's Request for an IME

[55] As he did before the Tribunal, Mr. Bottiglia submits that the OCSB had no lawful right to require him to undergo an IME. He argues that, before an employer can make such a request, it must have either statutory or contractual authority to do so. In support of his argument, he relies on the decision in *Re. Thompson and Town of Oakville*, [1964] 1 O.R. 122, 1963 CanLII 254 (Ont. H.C.), in which McRuer C.J.H.C. held:

> The right of employers to order their employees to submit to an examination by a doctor of the choice of the employer must depend on either contractual obligation or statutory authority.

[56] On behalf of Mr. Bottiglia, counsel argues that neither contractual nor statutory authority existed here.

[57] I agree that the OCSB had no contractual right to request an IME. However, I disagree with the submission that, in the absence of contractual authority, an employer may only request an IME when expressly authorized by statute. In my view, Mr. Bottiglia seeks to carry the decision in *Thompson* too far by applying it to the accommodation process required under the *Code*. In certain circumstances, an employer will be justified in requesting an IME as part of the duty to accommodate imposed upon employers under the *Code*.

[58] I will deal first with the issue of contractual authority.

Contractual Authority

[59] In addition to relying on the provisions of the Management Guide itself, the OCSB called evidence concerning the OCSB's practice in relation to requesting second medical opinions, including IMEs. Mr. D'Amico, the Superintendent of Human Resources at the time, testified that he was aware of 13 occasions upon which the OCSB had requested an IME, including two instances involving a supervisory officer and a superintendent. The Tribunal member relied on this evidence in finding that the Management Guide permitted the OCSB to request an IME. At para. 115 of his reasons, the member wrote:

> I do not find that the applicant has provided clear, cogent and convincing evidence that he is exempt from the Management Guide. I do not find his claim that he is exempt on the basis that his employment contract does not explicitly state that he is subject to Board policies which would include the Management Guide to be persuasive evidence of this supposed exemption. I prefer Mr. D'Amico's testimony that the Management Guideline applied to all employees up to and including the Director of Education, and that this was evidenced by the fact that IMEs have been conducted in the past with senior OCSB supervisory staff, including a superintendent.

[60] Mr. Bottiglia submits that the Tribunal's decision was not reasonable. With respect, I agree.

[61] The Tribunal appears to have reversed the onus of proof on the issue of the employer's right to request an IME. As the Tribunal member stated at para. 98 of his reasons, it is the employer, not the employee, who bears the onus with respect to measures undertaken to accommodate the employee: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3 ("*Meiorin*").

[62] More importantly, however, even if Mr. Bottiglia had the onus, it was met here as far as the OCSB's reliance on the Management Guide was concerned. The Management Guide provides:

> 2. The Principal or Supervisor or other employer representative has the right to request additional information from the employee when there is insufficient information provided by the employee relating to a request for accommodation.
>
> …
>
> 4. *Where a Collective Agreement and/or Terms and Conditions of Employment permit*, the employer may request (through the Human Resources Department) a "request for a second medical opinion" where the employer has been unable to obtain from the employee's own health practitioner information concerning the employee's own limitations and/or restrictions on his/her essential duties of his/her position, the employee's medical prognosis related to the accommodation request and any recommendations with respect to the accommodation or where, in the opinion of the employer, circumstances warrant a second opinion. [Emphasis added.]

[63] By virtue of clause 4, the OCSB's right to request additional information, including a second medical opinion, is conditional upon such a right being contained in a collective agreement or an employment contract. Mr. Bottiglia was not subject to any collective agreement. Although he was subject to an employment contract, the entire contract consisted of five clauses contained in three pages of text. None of those clauses makes any reference to anything remotely similar to an IME, nor do they make any reference to the Management Guide. Clearly, nothing in writing required Mr. Bottiglia to submit to an IME.

[64] In my respectful view, it was not reasonable for the Tribunal to rely on the evidence of witnesses such as Mr. D'Amico as to their interpretation of the Management Guide. Even if opinion evidence was admissible on the issue, nothing qualified Mr. D'Amico to give it. Further, the fact that IMEs had been conducted in the past with other supervisory staff was completely irrelevant to the issue of contract interpretation in this case. While, in some cases, evidence of acts of a party to a contract may be admissible as circumstantial evidence to show that one party acted in accordance with another party's interpretation of that contract, the evidence here was of acts on the part of supervisory staff *other than* Mr. Bottiglia. As such, it was incapable of proving anything relating to an agreement between the parties to this dispute.

[65] If the Management Guide was the only basis upon which the Tribunal concluded that the OCSB acted reasonably in requesting an IME, I would allow the application on this basis. However, it was not.

Statutory Authority

[66] Section 17(2) of the *Code* imposes a duty on an employer to accommodate an employee's disability to the point of undue hardship. It reads:

> No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

[67] In my view, the duty imposed by this section brings with it the right in certain circumstances to request an IME. It is clear from the Tribunal's reasons that this was one of the grounds, perhaps the most important ground, upon which it held that the OCSB acted reasonably in requesting an IME.

[68] The Tribunal member began his analysis by referring to s. 17(2) and to the procedural and the substantive components of an employer's duty to accommodate: see the reference at para. 97 of the reasons to the decision in *Meiorin*. He also referred to the employee's duty to co-operate in the accommodation process, making specific reference to the Supreme Court of Canada's decision in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, this court's decision in *Adga Group Consultant's Inc. v. Lane* (2008), 91 O.R. (3d) 649, and the Tribunal's decision in *Baber v. York Region District School Board*, 2011 HRTO 213.

[69] After referring to these cases, the Tribunal member concluded, at paras. 106 to 109:

> Based on all the evidence before me I find it reasonable that after receiving the applicant's initial medical information and return to work proposal the OCSB determined that it wanted additional information about the applicant's medical condition, prognosis, restrictions and potential accommodations. I find it reasonable that the OCSB wanted to obtain the information by means of an IME.
>
> The applicant had been off work for almost two years when he communicated in February 2012 that he was unable to return to work and that his recovery would take a prolonged period of time. In June 2012, his counsel wrote to the OCSB to provide the OCSB with a letter from the applicant's doctor stating that the applicant was unable to attend work and that a return to the OCSB might place the applicant at a serious risk of a relapse. Then in August 2012, the OCSB was told that the applicant was capable of returning to work on a limited basis sometime in the next two months. I find it reasonable, given the significant and unexpected changes in the applicant's stated ability to return to work, that the OCSB would want further information about the applicant's medical condition and ability to return to work.

> The OCSB was clearly concerned that the applicant's proposed return to work plan would involve the applicant initially working for eight hours a week with no evening meetings and that the work hardening process for the applicant would take 6-12 months and that the applicant might not return to full time duties in this time period. It is reasonable, in my view, for the OCSB to question whether the proposed return to work plan was adequate or appropriate or possibly premature given the nature of the proposed accommodation, the OCSB's experience with work hardening and given the duties of a superintendent.
>
> I agree with the OCSB that Dr. Levine provided only a tentative and uncertain prognosis for the applicant and that it was not evident, based on the proposed accommodations, what knowledge Dr. Levine had of the workplace and the essential duties of a superintendent. I find it reasonable that the OCSB was also concerned with the fact that the applicant's proposed return to work after an absence of over two years coincided with the end of his paid leave. In my view this is a case in which the OCSB had a reasonable and bona fide reason to question the adequacy and reliability of the information the applicant provided and the legitimacy of the applicant's proposed accommodation and to consequently seek an independent medical assessment in order to meet its obligations to appropriately accommodate the applicant.

[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 OCSB 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.

[71] I do not accept that *Thompson* stands for the proposition that employers may only request an IME where expressly authorized by statute. *Thompson* was a case involving police officers who were dismissed because they refused to undergo a medical examination by a doctor of their employer's choosing. The medical examination was a requirement of the continued employment of the officers, and other municipal employees. The issue in *Thompson* was whether the officers in question could be dismissed under the *Police Act*, R.S.O. 1960, c. 298 for failure to comply with a lawful order of a superior. The case is distinguishable on these facts, alone. In *Thompson*, the only statute at issue was the *Police Act*.

[72] On a more general basis, however, *Thompson* was a case in which the employer required the employees to undergo a medical examination in order to determine that they were under *no* disability related to their employment. It was not a case, as is the present one,

where the employer was requesting a medical examination in order to determine how to *accommodate* one.

[73] Contrary to the submission made on behalf of Mr. Bottiglia, the Tribunal's ruling does not mean that employees must submit to an IME as part of the accommodation process. The Tribunal did not hold that employers have a freestanding, unrestricted right to request an IME. Rather, the Tribunal held that, in certain circumstances, an employer will be justified in requesting that an employee attend an IME as part of the employer's duty to accommodate.

[74] The Tribunal's decision is in keeping with the policies of the Ontario Human Rights Commission (the "OHRC"), both at the time of the decision and at present. The Tribunal member referred to the OHRC's Policy and Guidelines on Disability and the Duty to Accommodate at para. 105 of its reasons, which provides:

> There may be instances where there is a reasonable and bona fide basis to question the legitimacy of a person's request for accommodation or the adequacy of the information provided. In such cases, the accommodation provider may request confirmation or additional information from a qualified health care professional to obtain the needed information. No one can be forced to submit to an independent medical examination, but failure to respond to reasonable requests may delay the provision of accommodation until such information is provided.

[75] Section 8.7 of the OHRC's present Policy on Ableism and Discrimination Based on Disability (approved by the OHRC June 27, 2016) provides:

> Where there is a reasonable basis to question the legitimacy of a person's request for accommodation or the adequacy of the information provided, the accommodation provider may request confirmation or additional information from a qualified health care professional to get the needed information.
>
> …
>
> In the rare case where an accommodation provider can show that it legitimately needs more information about the person's disability to make the accommodation (as opposed to just the needs related to the disability), it could ask for the nature of the person's illness, condition or disability (for example, is it a mental health disability, a physical disability, a learning disability?), as opposed to a medical diagnosis.
>
> …

> Where someone's needs are unclear, they may be asked to attend an independent medical examination (IME). However, there must be an objective basis for concluding that the initial medical evidence provided is inaccurate or inadequate. The IME should not be used to "second-guess" a person's request for accommodation. Requests for medical examinations must be warranted, take into account a person's particular disability-related needs, and respect individual privacy to the greatest extent possible.
>
> …
>
> No one can be made to attend an independent medical examination, but failure to respond to reasonable requests may delay the accommodation until such information is provided, and may ultimately frustrate the accommodation process.

[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.

[78] Mr. Bottiglia also argues that, before the OCSB could reasonably require him to attend an IME, it first had to try to obtain the information it wanted by less intrusive means. He submits that the OCSB ought to have asked Dr. Levine for more information before asking him to attend an IME. In support of his argument, Mr. Bottiglia relies both on jurisprudence developed by a number of different tribunals and on the terms of the Management Guide itself.

[79] The Tribunal member rejected this submission. He held that the OCSB acted reasonably in requesting that Mr. Bottiglia attend an IME, instead. His decision with respect to the human rights-related jurisprudence focused on the unreliable nature of the information the OCSB had previously received from Dr. Levine. He wrote, at paras. 112 and 113:

> The issue of when an IME is warranted is an issue that has not been particularly examined by the Tribunal although it is clearly an issue that has been regularly addressed in labour arbitration decisions, two of which were put before me by the OCSB;

> *Complex Services Inc. v. OPSEU Local 278* (2011-0278-0015) (Re) (2012), 110 CLAD 49, 2012 CLB 6273, and *Hamilton Health Services and ONA* (2007), 167 LAC (4th) 122, 91 CLAS 228. The issue in these cases was resolving the competing interests of an employer's right to information in order to manage an accommodation process and employees wanting to restrict access to their medical information on the basis of personal privacy. However, this is not the focus of the case before me. Rather, the applicant's principal contention in opposing the IME was that if the OCSB wanted more information it should have conferred with Dr. Levine as was suggested by the applicant's counsel in his August 18, 2012 and September 7, 2012 letters and by Dr. Levine in his August 31, 2012 letter. The applicant submitted this was the appropriate and reasonable step for the OCSB to take rather than the OCSB insisting on an IME, which the applicant characterized as intrusive, subject to abuse and a process that should be employed only as a last resort. The applicant further argued that even if the OCSB was potentially interested in an IME it should have first conferred with Dr. Levine.
>
> I agree that conferring with Dr. Levine rather than insisting on an IME or prior to a possible IME were reasonable options for the OCSB to consider. However, as noted, I am satisfied, based on the facts and circumstances of this case, that the OCSB had sufficient reason to question the adequacy and reliability of the information that had been provided about the applicant's condition, needed accommodations and ability to return to work. I find the OCSB's decision to immediately pursue a different option namely a further medical opinion by means of an IME was reasonable.

[80] With respect to the Management Guide, Mr. Bottiglia relied on clause 4, which provided that the OCSB could request a second opinion "where [the OCSB] has been unable to obtain the information from the employee's own health practitioner". The Tribunal member held that attempting to obtain further information was an option, not a requirement. He held that the Management Guide could not trump the OCSB's statutorily imposed duty of accommodation. At para. 117, of his reasons, he wrote:

> While policies such as the OCSB's Management Guide are important tools to promote fairness and consistency in terms of compliance with Code-related obligations, they should also not be seen as either fettering or limiting an employer's obligation to conduct an individualized accommodation process. It has been said many times that the obligation to accommodate disability-related needs is specific to each individual; this implies not only individualized obligations for an employer, but necessarily also the

> ability to exercise reasonable discretion in terms of management-based decisions, on a specific and individualized basis.

[81] In my view, it was reasonable for the Tribunal to decide that the OCSB was not required to try to obtain further information from Dr. Levine, whose reliability the OCSB had legitimate reasons to question.

[82] For these reasons, I would dismiss this ground of review.

Issue 3: Mr. Bottiglia's Refusal to Attend the IME

[83] The applicant argued before the Tribunal that the OCSB breached the conditions upon which he had agreed to attend the IME and tried to influence the examiner, Dr. Suddaby, by writing to him and by providing misleading information. The Tribunal member disagreed. He held, at para. 120:

> I do not find the fact that the OCSB's counsel provided Dr. Suddaby with background information and a series of questions in his October 24, 2012 letter was, in itself, unreasonable or in conflict with the parties' agreement for the IME process. The OCSB's counsel had previously stated in his September 29, 2012 letter that he would be providing Dr. Suddaby with relevant data and setting out the scope of the IME. The applicant did not object to the OCSB doing this.

[84] The Tribunal member found that Mr. Marshall had been straightforward with Mr. Zubec about his intentions to write to Dr. Suddaby, to provide him with relevant data, and to set out the scope of the IME. He noted that there had been no objection to this proposal by Mr. Zubec.

[85] The Tribunal member held that most of the information that was provided was factual background information. He acknowledged that some of those facts were disputed, but did not find that the OCSB's act of providing the information was unreasonable or part of a deliberate attempt to mislead Dr. Suddaby.

[86] The Tribunal member also acknowledged that some of the information provided by Mr. Marshall to Dr. Suddaby was his client's opinion and not fact. However, he held that there was no agreement between the parties that precluded the OCSB from expressing its opinion in an effort to put the need for the IME into context. He also held that it was reasonable for the OCSB to do so.

[87] Finally, he pointed out that Mr. Bottiglia was free to communicate his own opinions to the examiner. At para. 127, he wrote:

> I further note that the fact the OCSB provided Dr. Suddaby with some of its views would not preclude the applicant from the opportunity to present his views, including on such topics as his

> relationship with [the Director of Education] and a superintendent's hours of work and the reasons for his return to work.

[88] Ultimately, the Tribunal found that the accommodation process broke down as a result of the failure by Mr. Bottiglia to attend the IME.

[89] Mr. Bottiglia did not press his argument about improper communication before us. Instead, he argues that the Tribunal's finding that the OCSB's request for an IME was reasonable is, in itself, unreasonable. He relies on the submission that the OCSB had no right to request an IME and argues that, if the OCSB had no such right, it cannot be unreasonable for him to have refused to attend.

[90] I have already dealt with the argument that the OCSB had no right to request the IME in this case. However, I wish to add some commentary on the scope of that right as it relates to communications with the examiner conducting an IME.

[91] I agree with the Tribunal that, where an employer is justified in requesting an IME, the employer is entitled to provide the examiner with information relevant to the issue of accommodation and to request such information from the examiner. However, as the OHRC sets out in its Policy, when requesting information, the employer must respect as much as possible the employee's right to privacy and be restricted to information required to determine the degree to which the employee requires accommodation.

[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.

[93] The Tribunal in this case found that the information provided by Mr. Marshall and the opinions he expressed on behalf of his client were not improper and did not extend beyond a reasonable expression of the OCSB's concerns. With respect, I would not have reached the same conclusion on these facts. The OCSB's opinion that Mr. Bottiglia's return to work was motivated more by money than by fitness for the job ran a realistic risk of impairing the objectivity of Dr. Suddaby. I cannot see how this information could have assisted the examiner. It adds nothing about the nature of Mr. Bottiglia's employment or the events leading up to Mr. Bottiglia's absence from employment. If the examiner felt it was important information, he was free to ask Mr. Bottiglia during the examination about his motives for returning to work.

[94] In my view, it is of little comfort to an employee facing the risk of an examination by a biased examiner to be told that he can also express his opinion to the examiner. 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.

[95] Nonetheless, the fact that I would have found differently in this case does not mean that the application must succeed. As I stated when I addressed the standard of review, our role is to determine whether the Tribunal's finding was reasonable, not whether alternative findings might be more reasonable. As the Supreme Court of Canada said in *Dunsmuir*, at para. 47:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[96] In my view, the Tribunal's finding on this issue falls within a range of acceptable, defensible outcomes. It was open to the Tribunal to find that the OCSB acted reasonably in providing all of the information it did to Dr. Suddaby, including information about the expiry of Mr. Bottiglia's paid absence, even if I would not have arrived at the same conclusion.

[97] For these reasons I would not give effect to this ground of review.

CONCLUSION

[98] The Tribunal's decision not to permit post-application evidence was not only reasonable, but required as part of the duty of procedural fairness owed to the OCSB.

[99] The Tribunal's finding that the OCSB was justified in requesting an IME without seeking further information from Dr. Levine was also reasonable in light of its legitimate concern about the adequacy and reliability of the information it had previously received from him. Finally, the Tribunal's decision that the accommodation process broke down as a result of Mr. Bottiglia's failure to attend the IME fell within the range of acceptable outcomes, defensible in respect of the facts and the law and is, therefore, also reasonable.

[100] For these reasons, the application must be dismissed.

COSTS

[101] The OCSB was successful in the application. I see no reason to depart from the usual rule that the successful party should be awarded its costs.

[102] At the conclusion of the hearing, the parties provided the court with their costs outlines. The OCSB seeks costs in the amount of $55,464.36, including assessable disbursements in the amount of $2,416.81 and HST. In my view, this is excessive. Costs awards must be fair and reasonable and should reflect what the losing party might reasonably expect to

pay: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (Ont. C.A.), at para. 38. In his costs outline, Mr. Bottiglia seeks costs on a partial indemnity basis in the all-inclusive amount of $32,055.35. In my view, the costs of a responding party such as the OCSB should be somewhat less than those of an applicant, who must gather the record and frame the issues.

[103] Having regard to these principles, I would award the OCSB costs in the amount of $30,000, all-inclusive.

Ellies J.

I agree

Marrocco A.C.J.

I agree

Heeney R.S.J.

Released: May 19, 2017

CITATION: Bottiglia v. Ottawa Catholic School Board, 2017 ONSC 2517
DIVISIONAL COURT FILE NO.: 16-DC-2180
DATE: 2017/05/19

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Marrocco A.C.J.S.C., Heeney R.S.J., Ellies J.

MARCELLO BOTTIGLIA

Applicant

– and –

OTTAWA CATHOLIC SCHOOL BOARD and
HUMAN RIGHTS TRIBUNAL OF ONTARIO

Respondents

REASONS FOR DECISION

Released: May 19, 2017