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## Feature

# Independent Medical Examinations & the Duty to Accommodate

*Helpful instruction for employers*

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All Canadian human rights laws require employers to accommodate disabled employees to the point of undue hardship. However (much to employers' chagrin) none directly address the employer's right to medical information in the context of accommodation. All are silent about questions like: Is an employer entitled to seek medical information from an employee who seeks accommodation or who misses work as the result of a disability? What medical information are they entitled to request from an employee? And in particular, can an employer require an employee to undergo an independent medical examination?

Fortunately, there is helpful guidance for employers on how to manage the accommodation process, particularly with respect to IMEs. The recent Ontario Divisional Court decision of *Bottiglia v. Ottawa Catholic School Board* clarifies that employers are not only permitted to seek IMEs in accordance with applicable human rights legislation, but IMEs are sometimes required for employers to effectively meet their duty to accommodate. While the Court doesn't spell out all of the circumstances in which IMEs might be necessary, inadequate or unreliable medical information is certainly one reasonable justification. But even when an IME is justified, employers should be careful not to "tip the scales" when providing information to the independent medical examiner, or else risk undermining the accommodation process.

**The Circumstances.** Bottiglia was a school board employee with thirty-five years of service who went off on sick leave in 2010. For about two years, the employer received information from the employee's psychiatrist indicating only that Bottiglia would be off on medical leave until further notice, and a full recovery would take a prolonged period of time. Eventually, Bottiglia gave the employer a "Five Point Plan for Resumption of Career," which he had prepared with his psychiatrist's help. The Plan stated Bottiglia could return to work, but was limited to working two days per week for four hours each day, with work hardening over a period of six to twelve months. The employer, however, believed an IME was warranted based on some inconsistencies between the "Five Point Plan" and previous fitness to work assessments that Bottiglia's psychiatrist provided, and the fact his return to work date coincided exactly with the end of his entitlement to paid leave.

**The Complaint.** Bottiglia initially agreed to attend the IME. But he later refused because the employer, when providing background information to the IME doctor, expressed its suspicion that Bottiglia's return to work was premature and based on the imminent expiry of his pay rather than his actual fitness for the job. Bottiglia ultimately resigned, and filed a human rights complaint claiming his employer discriminated against him on the basis of disability. He argued his employer improperly required him to attend an IME before it would permit him to resume his duties, then breached the terms on which he had agreed to do so by giving the IME doctor misleading information.

**The Decision.** The Ontario Human Rights Tribunal dismissed Bottiglia's claim, and the Ontario Divisional Court agreed the Tribunal's decision was reasonable. The Court confirmed the employer wasn't restricted by any contract from requiring an IME. In fact, the employer's policy clearly provided for such recourse. The Court also found that the statutory duty to accommodate can, in some instances, require employers to request an IME in order to properly ascertain an employee's ability to work. But that doesn't mean employees must always submit to an IME when the employer asks; the request must still be reasonable and justifiable based on the facts of the particular case. In this case, the inadequate and unreliable medical information provided by the employee was a sufficient basis for the employer to request a

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## Feature continued

"second opinion." And while the Court ultimately upheld the Tribunal's dismissal of Bottligia's discrimination complaint, it also noted that employers must be careful with regards to the information they provide to an IME doctor to ensure the process is fair and objective. Here, the Court found the employer's suspicions about Bottligia's motivation for returning to work could be of no value to the medical examiner, and could only serve to colour their judgement. And in such circumstances, an employee may be justified in refusing to attend the IME.

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