

CITATION: Barrette v. Bombardier Transportation Canada, 2024 ONSC 4886
COURT FILE NO.: CV-23-0158-00
DATE: 2024-09-04

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Nicole Barrette)
) *Mackenzie Irwin, for the*
) *Plaintiff/Responding Party*
)
Plaintiff/Responding Party)
)
– and –)
)
Bombardier Transportation Canada)
) *Mari Maimets, for the Defendant/Moving*
) *Party*
)
)
Defendant/Moving Party)
)
)
) **HEARD:** August 19, 2024, Thunder Bay,
Ontario

2024 ONSC 4886 (CanLII)

The Honourable Mr. Justice S. J. Wojciechowski

Reasons on Motion

Introduction

[1] The plaintiff, Nicole Barrette (“Barrette”), was terminated from her employment with the defendant, Bombardier Transportation Canada Inc. (“Bombardier”) on May 12, 2022.

[2] Barrette is seeking damages for alleged wrongful dismissal by Bombardier. Several additional claims are set out in her Statement of Claim (“SOC”), including Bombardier’s alleged

refusal to accommodate her disability, and its discriminatory conduct contrary to the *Human Rights Code*, R.S.O. 1990, C. H.19, as amended.

[3] Barrette’s SOC was issued April 20, 2023. Bombardier’s Statement of Defence (“SOD”) is dated May 24, 2023. A Reply, dated July 18, 2023, also forms part of the pleadings.

[4] On October 16, 2023, Barrette attended at a discovery to answer Bombardier’s questions. While most of the questions were answered, counsel for Barrette took some questions under advisement, and Barrette refused to answer others.

[5] Since completing Barrette’s examination for discovery, counsel for both parties have discussed the refusals, as well as those questions taken under advisement. Bombardier brings this motion today to address these questions, which it maintains are relevant and have not yet been answered.

[6] The second part of Bombardier’s motion seeks to engage s.105 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as well as Rule 33 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, both as amended, and compel Barrette to undergo a medical examination to assess whether she is disabled, and/or has a mental disorder.

Summary of Decision

[7] Barrette will be required to answer some questions which have to date gone unanswered.

[8] Barrette will also have to present herself to Dr. Ashley Bender for the purposes of a medical assessment.

Background

[9] Barrette's employment commenced on February 8, 2013. After working for Bombardier for approximately nine years and two months, Barrette's employment ended on May 12, 2022.

[10] The relevant period of events leading to Barrette's termination took place during the months of March, April, and May 2022.

[11] After work on Wednesday, March 23, 2022, Barrette states that she was kidnapped, robbed, and drugged over a period of several days. Because of this traumatic event, she missed work on Thursday, March 24 and Friday, March 25, 2022. Still dealing with the aftermath of this event, Barrette was unable to return to work and had to stay home on Monday, March 28, 2022.

[12] On Tuesday, March 29, 2022, Barrette went to work and immediately had a meeting with her supervisor, advising what had happened and explaining why Barrette had missed three days of work. After determining Barrette was still experiencing the effects of the assault, her supervisor sent her home for the day.

[13] When Barrette returned to work on Wednesday, March 30, 2022, Bombardier maintains that she smelled of alcohol and was therefore sent back home. This also triggered Bombardier's employee assistance program such that Barrette was not permitted to return to work until April 5, 2022, which was the first day counseling arrangements could be made.

[14] In addition to counseling, Barrette agreed to report to her supervisor each morning before work to be assessed fit for work.

[15] This arrangement of counseling and fit for work assessments continued from April 5, 2022, to May 3, 2022. On May 3, 2022, Barrette complied with a request from Bombardier to undergo a drug test. This test came back on May 4, 2022, with a preliminary “non-negative result”, which led to Barrette being suspended from work with pay. This suspension was in place until the final results of the May 3, 2022 drug test were known, which came back on May 7, 2022, as positive for cocaine consumed within one hour to five days before the sample was provided.

[16] When the drug test was administered, Barrette initially denied having consumed any alcohol or drugs. However, when the non-negative result was determined she admitted to using cocaine on the previous Friday evening after work.

[17] Based on this positive test result, and her failure to be truthful about her substance use, Barrette’s employment was terminated by Bombardier. Bombardier claimed to have just cause on account of Barrette breaching its drug and alcohol policy.

Statement of Claim

[18] The starting point for any consideration of whether a party should answer questions at an examination for discovery is the pleadings, which identify the relevant issues.

[19] Paragraph 1 of Barrette’s SOC provides an outline of the relief being sought, which includes the following:

- (i) A declaration that Barrette was wrongfully dismissed resulting in damages which includes pay in lieu of notice, lost bonus and benefit entitlements, lost pension contributions, and an accounting for lost vacation and lieu days;
- (ii) A declaration that the decision of Bombardier to terminate Barrette involved elements of discrimination based upon disability or perceived disability;

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- (iii) Damages arising from a breach of the *Human Rights Code*;
 - (iv) Damages for the bad faith manner of termination; and
 - (v) Punitive damages.

[20] While the total amounts claimed by Barrette exceed \$250,000, this matter is a Rule 76 simplified procedure matter, and, as such, Barrette has agreed to waive any amounts exceeding \$200,000 in damages.

[21] At paragraph 6 of her SOC, Barrette describes herself as a diligent and loyal nine-year employee who attended to her duties and responsibilities in a competent and professional manner. Further, at paragraph 14, Barrette denies having ever being guilty of willful misconduct, or willful neglect of duty, which was not trivial or condoned by Bombardier.

[22] In the section of the SOC under the heading Human Rights Damages, paragraph 21 maintains that Barrette should have been accommodated due to a “medical disability”. Paragraph 23 also asserts that Barrette’s disability should have been accommodated and supported. Paragraph 24 of the SOC further alleges that Bombardier had a duty to determine if any alleged performance issues were as a result of Barrette’s disability.

[23] Similar allegations regarding Bombardier’s failure to accommodate her disability, thereby entitling her to moral damages, are made throughout paragraphs 28 to 31 of the SOC.

[24] Finally, in addressing her duty to mitigate, Barrette states at paragraph 24 that she has acted diligently.

Statement of Defence

[25] Bombardier's SOD denies Barrette's allegations, including the relief sought at paragraph 1 of the SOC.

[26] Paragraph 5 of the SOD states that Barrette was terminated for just cause on May 12, 2022. Bombardier's defence relies on its drug and alcohol policy as described in paragraphs 10 to 16 of the SOD.

[27] Based on what occurred during the latter part of March 2022, including the allegation at paragraph 23 that Barrette showed up late for work while smelling of alcohol, Bombardier required Barrette to attend substance use counselling as described at paragraphs 24 to 26 of the SOD.

[28] The alleged reasons for termination are described in paragraphs 28 to 30, as well as paragraphs 37 to 38, of the SOD. These include Barrette's breach of Bombardier's drug and alcohol policy, and her dishonestly in maintaining she was fit for duty.

Discovery Refusals of Barrette

[29] Bombardier is seeking the answers to the following questions, which were refused by Barrette during her examination for discovery and for which refusals are maintained within this motion:

QUESTION NUMBER	DESCRIPTION
270	Prior to March of 2022, did Ms. Barrette ever breach the Drug and Alcohol Policy of Bombardier?

288	At any point from April 2017 to April 2022, had any friends or family members expressed concern about Ms. Barrette's substance use?
291	Who of Ms. Barrette's friends and family expressed concern about her substance use?
292	When did a friend or family member express concern about Ms. Barrette's substance use?
293	In what circumstances did Ms. Barrette's friends and family members express concern about her substance use?
297	Undertaking to provide the clinical notes and records of each facility and individual care provider who saw or treated Ms. Barrette for substance use issues.
303	Is it correct that in the spring of 2022, prior to March 24 th of 2022, Ms. Barrette was using cocaine three to four times per week?
327	How much cocaine was Ms. Barrette consuming on the weekends prior to March 24, 2022?
340 to 341	If Rebecca Crawford Bell gives evidence that she was not aware that Ms. Barrette had a substance abuse problem prior to the 24 th of March, 2022, would Ms. Barrette say she's not telling the truth?
595, 599, 610	Provide a list of Ms. Barrette's cleaning clients limited to the timeframe of May 12, 2022 to the end of the claimed notice period, and their last known contact information.
599	Provide a copy of the agenda documenting all appointments that Ms. Barrette had with cleaning clients after May 12, 2022 and for the duration of the notice period she's claiming in this litigation.

[30] While additional refusals and under advisements were provided during Barrette's discovery, those enumerated above are the refusals which remain outstanding today, and which Bombardier seeks to have answered by bringing this motion.

Independent Medical Examination

[31] Bombardier seeks to have Barrette examined by a psychiatrist, Dr. Ashley Bender, to assess

Barrette and express an expert opinion on the following questions:

- (a) Did the Plaintiff, between March 23, 2022 and May 12, 2022, have a “disability” as that term is defined in the Human Rights Code (Ontario), and in particular, did the Plaintiff have a “mental disorder”;
- (b) If the answer to (a) is yes, please describe the mental disorder and its impact on the Plaintiff’s functioning in the March-May 2022 time period. Please specifically address whether the Plaintiff’s disability prevented her from complying with the Defendant’s Drug and Alcohol Policy in the period from March 23, 2022 to May 12, 2022, in particular, by:
 - a. being “Fit for Duty” (i.e. “able to, safely and acceptably, perform assigned duties without limitations resulting from alcohol, drugs and/or medications, the misuse or failure to take medications as directed and/or extreme fatigue caused by the use of drugs or alcohol”) at all times while working or while on the Defendant’s property;
 - b. refraining from using alcohol or drugs (including specifically cocaine) at any time reasonably likely to create the risk of a positive test at work;
 - c. refraining from attending at work while not “Fit for Duty”;
 - d. taking any and all necessary measures to disclose and/or obtain assistance for a drug or alcohol addiction prior to a breach of the Defendant’s Drug and Alcohol Policy; and
 - e. complying with reasonable accommodation measures implemented by the Defendant, specifically a protocol whereby the Plaintiff would have to report to Human Resources each morning prior to her shift and to confirm that she had not consumed any drugs or alcohol and was “Fit for Duty”.
- (c) If the answer to (a) is yes, did the Plaintiff’s mental disorder prevent her from being truthful with the Defendant about her drug and alcohol consumption in the period between April 5, 2022 and May 12, 2022.

Scope of Discovery

[32] Rule 31.06(1) of the *Rules of Civil Procedure* provides that questions seeking knowledge, information or belief of a party shall be answered if they are relevant to any matter in issue within an action.

[33] When determining whether a question is relevant it is necessary to refer to the pleadings, as they define the scope of a discovery: see *Ontario v. Rothmans Inc.*, 2011 ONSC 2504, 5 C.P.C. (7th) 112, at para. 129. Furthermore, as set out at para. 33 of *R. v. Pilon*, 2009 ONCA 248, 243 C.C.C. (3d) 109, “[e]vidence is relevant if, as a matter of common sense and human experience, it makes the existence of a fact in issue more or less likely”.

[34] Overall, as stated by Perell J. in *Ontario v. Rothmans Inc.*, the extent of discovery is not unlimited, and the court is entitled to keep the ambit of questioning within reasonable and efficient bounds in an effort to control the process.

[35] I must then determine, with reference to the pleadings, which questions are relevant and whether the answers will assist the trial judge in determining the issues outlined by the pleadings.

Defence Medical Examination Considerations

[36] Section 105 of the *Courts of Justice Act* outlines the court’s discretionary power to order a physical or mental examination of a party where that party’s mental or physical condition is in question. This section goes hand in hand with Rule 33 of the *Rules of Civil Procedure*, which provides a mechanism for one party to bring a motion seeking the physical or mental examination of an adverse party.

[37] If the factors identified in s. 105 exist such that the physical or mental condition of a party to a proceeding is in question, then in most cases a first medical examination is granted as a matter of right: see *Harris v. Canada Life Assurance Company* (2002), 59 O.R. (3d) 123, at para. 5.

Decision on the Refusals

Question 270

[38] Bombardier submits that Barrette, in her SOC, claims to have been a diligent, competent employee who acted professionally without ever being guilty of willful misconduct or willful neglect of duty. Bombardier argues that this claim provides the basis for questions regarding Barrette's prior conduct within her employment.

[39] Barrette submits that past conduct, in which the drug and alcohol policy of Bombardier may have been breached, is irrelevant to the consideration of Barrette's termination because Bombardier's reasoning is based on Barrette's conduct between March and May 2022, not on any previous misconduct.

[40] Bombardier agrees that it is not asserting after acquired cause. However, Bombardier argues that question 270 addresses the nature and extent of Barrette's disability, and an affirmative response could potentially support Barrette's position. In addition, Bombardier relies on questions put to it during its discovery, which raise the same issue as question 270.

[41] Specifically, questions 380 to 382 of Bombardier's discovery attempt to address whether Barrette violated Bombardier's drug and alcohol policy on occasions other than the May 3, 2022 incident which produced a positive test result for cocaine. Bombardier was not entirely certain of the answer, and an undertaking was requested by Barrette to confirm same.

[42] Barrette shall answer question 270 because the allegations in paragraphs 6 and 14 of the SOC render Barrette’s conduct and quality of work relevant. This relevance is further confirmed by Barrette’s questions to Bombardier regarding the same issue.

Questions 288 to 293

[43] These questions relate to Barrette’s alleged disability, and whether there was any evidence to support the existence of Barrette’s substance use disorder before March 2022. Bombardier submits that these questions are relevant, and follow up Barrette’s answer at her discovery that family members had expressed concern about her behaviour. If the answer to that question is relevant, then the answers to the questions which follow must also be relevant.

[44] Barrette maintains that family members’ concerns are not relevant to establishing her disability, nor the issue of accommodation. Barrette further submits that clinical notes and records (“CNRs”) from the relevant time period were produced which specifically address the relevant issues.

[45] I agree with Barrette that family members’ concerns are not going to help the trial judge determine whether or not Barrette has a disability on the basis of a substance use disorder. Family members might be disinterested in Barrette’s health and welfare, or they could be hypervigilant with respect to these same issues. Without being able to assess the specific background and circumstances of each family member and their concerns, it is doubtful that the answers to these questions would assist the trial judge in addressing the relevant issues in this matter.

[46] However, when initially asked the question, Barrette provided an answer which confirmed that one or more family members had expressed concern about her substance use. When the

question was framed within the period of time of April 2017 to April 2022, it was refused because the time frame was too broad, not because it was irrelevant. When the question was subsequently limited to the time period when Barrette held her last position with Bombardier, and after clarifying the question with “[u]p until April?” and Bombardier clarifying “[u]p until April of 2022, yes.”, Barrette answered “[y]es.”

[47] This opens the door to further questions seeking to identify who specifically expressed concerns, when those concerns were raised, and the context within which those concerns were expressed. As such, Barrette shall provide answers to these questions.

Question 297

[48] During the parties’ submissions, the issue arising from this question was whether or not CNRs exist and are available from a Sault St. Marie institution at which Barrette attended for substance use treatment. Barrette has made inquiries of the institution, which confirmed that all records from the applicable time period of treatment have been destroyed. Bombardier is now seeking confirmation of this, or alternatively, a supplementary affidavit of documents with an updated Schedule C.

[49] Evidently, Barrette sought and obtained treatment for substance use in Sault Ste. Marie for some period of time. She also agreed to produce any existing records reflecting this treatment. Presumably then, Barrette agrees that these CNRs are relevant, otherwise no request for the same would have been made.

[50] If CNRs no longer exist because of the institution’s retention policy, then confirmation of the destruction of the records from the institution could be provided to Bombardier. There is no

suggestion by Bombardier, however, that the records might still exist, which could easily be determined by asking the institution directly for details of its retention policy. Accordingly, Barrette is directed to comply with the *Rules of Civil Procedure* and produce a supplementary affidavit of documents with an amended Schedule C to reflect the status of these CNRs.

Questions 303 and 327

[51] Bombardier is seeking historical information relating to Barrette's cocaine use in the spring of 2022, before March 24, 2022.

[52] Barrette's position is that her substance use prior to March 24, 2022 was not part of Bombardier's decision to terminate her employment, and that any substance use during her personal time is irrelevant to her substance use disorder.

[53] The decision to terminate Barrette is clearly based on the results from the drug test administered on May 3, 2022, and the information which Barrette withheld from Bombardier regarding her substance use. As such, I agree that historical information relating to Barrette's use of substances before March 24, 2022 is irrelevant to the matter of just cause.

[54] However, this historical information is relevant to Barrette's substance use disorder generally, and the extent to which this disorder impacted Barrette during and immediately before the months of March, April, and May of 2022.

[55] If an employee shows up for work and is intoxicated, and that state of intoxication is due to poor judgment on the part of the employee, then the employer's response could be markedly different than a situation where the employee's intoxication is due to substance use disorder.

[56] It is possible that Barrette's substance use disorder stems from the traumatic events which took place between March 23, 2022 and March 25, 2022. Alternatively, the substance use disorder might have existed prior to March 2022 without Barrette's recognition or acknowledgement. In the further alternative, Barrette's conduct between March and May 2022 could have nothing to do with substance use disorder, and instead be the result of other factors.

[57] Exploring the extent to which Barrette was experiencing substance use disorder in the spring of 2022, something which Barrette is alleging affected her to a disabling degree and warranted accommodation, is relevant to the issues raised in this litigation.

[58] Barrette is to provide answers to questions 303 and 327.

Questions 340 to 341

[59] These questions seek to clarify Barrette's position at trial. Bombardier maintains that its employee, Rebecca Crawford Bell, did not know that Barrette had a substance use problem prior to March 24, 2022. If Barrette's position is different, and if she plans to provide evidence contrary to Bombardier's position, then Bombardier wants to know that before trial.

[60] One of the purposes of discovery is to clarify the parties' positions before proceeding to trial. This allows the parties to focus on outstanding issues, effectively streamlining the litigation process and preventing the waste of the trial judge's time.

[61] Bombardier maintains that Rebecca Crawford Bell did not know Barrette suffered from substance use disorder. Obviously, if Bombardier did know this about Barrette, then it will have to address the degree to which it accommodated, or failed to accommodate, Barrette's disability at trial.

[62] Barrette must advise Bombardier if she has any evidence in her possession demonstrating that Rebecca Crawford Bell knew Barrette had a substance use problem before March 24, 2022.

Questions 595, 599, and 610

[63] These questions all relate to Barrette's mitigation efforts following the termination of her employment.

[64] Bombardier has the onus of proving Barrette's failure to mitigate damages and, in assessing her mitigation efforts, Bombardier is looking for underlying evidence to support Barrette's position.

[65] Barrette's mitigation efforts include a cleaning business she started after her employment with Bombardier ended. Her evidence is that she maintains a list of her cleaning clients, as well as an agenda documenting the dates and times when she provided cleaning services to her clients.

[66] While banking and income tax return documents have been provided to support the monies earned from Barrette's cleaning business, Barrette also stated during her discovery that in some instances, cash payments were made which were not deposited into her bank account. Barrette

then estimated that the unrecorded cash receipts represented approximately 5% of her income during the relevant time period, and stated that she spent all of the cash received.

[67] In other words, 95% of Barrette's mitigation income was deposited into her bank account, and this income is documented through banking records. 5% of her mitigation income was paid in the form of cash, and there are no documents supporting this income since it was spent, and not deposited.

[68] If Bombardier is to assess Barrette's mitigation efforts, it will need to review the relevant evidence. To the extent such evidence is available in an agenda, or through a client list which can be compared to the income generated by Barrette's cleaning business, Bombardier should have access to this information.

[69] Barrette submits that her clients' information is private, and is not relevant to the mitigation issues. I am persuaded that, at this stage, personal information of Barrette's cleaning clients need not be provided to Bombardier. Instead, any existing client list or agenda, and any details with respect to income during the period of reasonable notice claimed, can be redacted to remove last names and contact information, such as home, business, and email addresses, as well as phone numbers. Bombardier can then review the information and compare it with Barrette's banking records and income tax returns for the same relevant time period to either confirm or disprove the position that there is a 95/5% split in e-transfers and cash for mitigation income.

[70] If, upon review of the information provided, the evidence does not match up as anticipated, then Bombardier may have additional follow up questions seeking clarification. While this could lead to circumstances where the personal information of Barrette's clients becomes relevant, the

principles of proportionality will likely come into play in determining whether additional evidence of the personal lives of third parties should be disclosed.

IME by Dr. Ashley Bender

[71] In the face of what appears to be a clear entitlement to a medical examination, as provided by s. 105 of the *Courts of Justice Act* and Rule 33 of the *Rules of Civil Procedure*, Barrette maintains that her clinical notes and records provide all the evidence necessary to assess the issue of her substance use disorder. Barrette resists the request for a “hands on” examination on the basis that any information obtained would not be useful, since the relevant events occurred more than two years ago. Furthermore, she suggests that going through such a process would be counterproductive to her recovery.

[72] In addition, Barrette argues that the request for a medical examination is too late, and that granting such an order would undermine the litigation process given the trial is scheduled to proceed in November 2024.

[73] Finally, Barrette submits that some of the questions which Dr. Bender is being asked to answer are beyond the scope of a proper expert opinion and therefore infringe upon the trial judge’s decision-making process.

[74] Section 105(2) of the *Courts of Justice Act* provides a court with discretion to order a physical or mental examination where the physical or mental condition of a party is in question. In the present case, Barrette maintains that she was entitled to accommodation within her employment due to her substance use disorder. Bombardier is entitled, in response, to assess that

position through examination by an expert who can comment upon the existence of Barrette's substance use disorder and the degree to which it may have impacted upon her employment.

[75] Section 105 makes no distinction between personal injury matters and wrongful dismissal actions. If the physical or mental condition of a party is in issue, s. 105 is engaged, which is the case for the present dispute.

[76] While Bombardier's actions appear to support the existence of Barrette's substance use disorder – requiring her to obtain counseling before she could return to work, mandating compliance with the drug and alcohol policy, subjecting Barrette to daily assessment of her fitness for work, and random drug testing – Bombardier is nevertheless entitled to have an expert review the circumstances of Barrette's mental condition and its impact on her employment.

[77] I acknowledge the arguments put forward by Barrette that the timing of Dr. Bender's assessment could potentially impact the conclusions and opinions to be reached. In addition, I acknowledge that there may be information in Barrette's clinical notes and records which reflect the issues she was managing and, which it was argued, should be sufficient for Dr. Bender to rely upon in coming to his opinions. However, neither of these arguments persuade me not to exercise my discretion in ordering a s. 105 assessment. And while Barrette's CNRs no doubt contain many relevant health-related details, the evidence of Dr. Bender, which was filed in support of this motion, clearly outlines his views that a paper review is no substitute for a personal interaction with Barrette.

[78] I also understand the argument Barrette puts forward that this exercise will require her to revisit her situation in the spring of 2022, which she asserts would not be beneficial to her current

mental health situation. Nonetheless, Barrette will have to relive her experiences during the trial, a process which she has initiated, and Bombardier is entitled to assess her position in a fulsome manner before proceeding to trial.

[79] The last issue raised by Barrette is the timing of the request for an examination. This is perhaps the most compelling reason not to permit an assessment by Dr. Bender to proceed.

[80] While this matter deals with facts that occurred in the spring of 2022, the action was not commenced until April 2023. This litigation has been active for 17 months, a relatively short period of time for civil litigation matters. It was also identified as a case which could be placed on a virtual blitz list for the Northwest Region's trial list, and tentatively scheduled for a simplified trial to proceed via Zoom in November 2024.

[81] I am cognizant of the fact that granting the relief sought by Bombardier would mean this matter would not be ready for a trial in November 2024. It will take a month or so for Dr. Bender to undertake his assessment and then prepare a report. Barrette would then need time to review the report and have an opportunity for her own litigation expert to provide an opinion.

[82] If this action had been around for years instead of months, I might have been persuaded by Barrette's submission that justice delayed is justice denied. However, with one of the central issues in this litigation being the nature and existence of Barrette's substance use disorder, the trial judge deciding the case would benefit from an expert assessment in this matter.

[83] I also note that Barrette has produced a letter from her physician, in which her substance use disorder is described and asserted as part of the medical evidence. The letter of Dr. Ruthanne

Williams, Barrette's family doctor, is dated June 11, 2024. In the letter, Dr. Williams references heavy alcohol consumption and cocaine use, possibly related to the traumatic event which occurred at the end of March 2022 which in turn may have caused post-traumatic stress. The family doctor's opinion also confirmed that Barrette sought assistance with her addictions and mental health, including attending detox, counseling, and AA meetings.

[84] Dr. Williams concludes the following with respect to Barrette's substance use:

Individuals struggling with addiction or other mental health issues, may display a lack of insight, impaired judgement and a reluctance to share openly about their condition. Even when motivated to abstain from substance use, relapses may occur.

[85] This report from Barrette's treating physician is dated June 11, 2024 - less than two months before the return date of Bombardier's motion - and addresses several aspects of the main issue in this litigation, namely whether Barrette was suffering from substance use disorder and its impact upon her. It would be unfair to expect Bombardier to respond to this report without having its own expert spend time with Barrette, similar to what Dr. Williams was able to do.

[86] I do agree with the submissions of counsel for Barrette that some of the questions proposed by the defence are improper in that they involve questions of fact and/or law which the trial judge must decide.

[87] Dr. Bender cannot provide opinion evidence at trial as to whether or not Barrette's mental condition is a disability pursuant to the *Human Rights Code*. That is a question to be determined solely by the trial judge, not a psychiatrist.

[88] Obviously, Dr. Bender can provide an opinion as to whether Barrette was suffering from substance use disorder, and the impact that might have had upon her employment. To the extent that these are issues which Dr. Bender will be addressing, Barrette is ordered to cooperate with arrangements to set up a s. 105 assessment.

[89] In this regard, to ensure this matter moves forward on a timely basis, Barrette shall make herself available to be assessed by Dr. Bender on or before September 30, 2024. Dr. Bender's report shall be delivered on or before October 15, 2024. If Barrette determines a responding report is necessary, this shall be delivered on or before November 15, 2024.

[90] If the parties are unable to comply with these timelines, and cannot reach an agreement on a revised set of timelines which do not jeopardize the pre-trial and trial dates set out below, then they can make an appointment before me to discuss same.

Trial Management

[91] At the end of the motion hearing, I made it clear to counsel that I had not made any decisions with respect to the motion. However, in the event that I saw fit to compel Ms. Barrette's attendance at an IME, I asked whether the parties would agree that I be appointed the trial management judge in this matter and that the trial be scheduled before me during the February 2025 sittings.

[92] Counsel agreed that trial management made sense, and that if Dr. Bender was permitted to assess Barrette, subject to Dr. Bender's opinions, Barrette might need time to obtain a responding expert opinion which would mean this matter would not proceed to a trial in November 2024.

[93] Based upon my decision, this matter will be removed from the November 2024 trial schedule and placed on the February 2025 running list for the Northwest Region, scheduled for the weeks of February 3, 10, and 17, 2025. Given this matter is proceeding under Rule 76, the trial shall proceed for no more than five days. I will also act as the trial management judge for this matter between now and then, such that any additional motions shall be brought before me.

[94] In addition to any trial management conferences which may be scheduled, the speak to date for the February 2025 sittings is December 3, 2024 at 9:00 a.m. EST via Zoom. The trial confirmation date is January 29, 2025 at 9:00 a.m. EST via Zoom. Both parties shall attend these dates to advise whether the matter has resolved and, if not, to confirm it will be proceeding in February 2025.

[95] At present, there is a pre-trial hearing scheduled for this matter on September 10, 2024. This date shall be vacated to provide time to obtain expert opinion evidence which will play a meaningful role in the outcome of this matter. The parties are directed to contact the trial coordinator for the purposes of setting up another pre-trial appointment, to be scheduled no later than December 20, 2024.

[96] The parties are then directed to schedule a trial management hearing before me in either late December 2024 or early January 2025, for the purposes of identifying outstanding steps to be taken to ensure the matter is ready to proceed during the February 2025 sittings.

Costs

[97] At the request of the parties, I will not address costs with reference to the bills of costs which were filed. Instead, if the parties cannot agree on the issue of costs, the moving party shall

serve and file its position in writing within fifteen days following the release of these reasons, with the responding party providing its position within ten days following receipt of the moving party's position. Submissions shall be limited to five pages plus a bill of costs, which shall include docketts and supporting documents for any disbursements claimed.

“Original signed by”

The Hon. Justice S.J. Wojciechowski

Released: September 4, 2024

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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Nicole Barrette

Plaintiff/Responding Party

– and –

Bombardier Transportation Canada

Defendant/Moving Party

REASONS ON MOTION

Wojciechowski J.

Released: September 4, 2024