

Can You Terminate An Employee Who Is On A Leave?



Terminating an employee almost always comes with risks for employers to consider. These risks may even exist if an employee is terminated during or shortly after a legally protected leave of absence.

Types of Leaves

There are several types of leaves that employees can take that are protected by law. These include, among others, maternity/parental leave, bereavement leave, or medical leaves such as critical illness or serious injury/illness leave.

The *Employment Standards Code* (the *Code*) places a high value on protecting the employment of individuals who need to take a legally protected leave. Specifically, section 60 of the *Code* prohibits employers from laying off or terminating the employment of an employee because they are pregnant or because they intend to take/are taking a leave outlined in the *Code*. In addition, the *Code* requires that employers reinstate employees to the same or a comparable position with the same wage upon return from their leave.

However, the *Code* is also clear that these principles do not apply if an employer lays off, terminates, or fails to reinstate the employee for reasons that are unrelated to the leave.

Termination During Leave

Oftentimes, an employer's reasons for wanting to terminate an employee have nothing to do with an employee's leave. Perhaps the organization has undergone a significant restructuring, the business is closing, or there have been historical performance issues on the part of the employee. If an employee is on a protected leave or has recently come back from one, a termination in such instances may be risky.

The Manitoba Labour Board's (the Board) decision in [*Pratt McGarry*](#) is a stark example of the precarious situation an employer may find themselves in having dismissed an employee who is on leave.

In this case, the employee was terminated prior to the conclusion of her maternity/parental leave, ostensibly for reasons of restructuring. In a finding for the employee, the Board recognized several important principles, some of which

warrant further comment.

First, the Board affirmed that the initial burden of proof for this type of claim rests with the employee. If an employee can prove that they were pregnant or they took a protected leave, and their employment was either terminated or they were not reinstated to the same or a comparable position, there is a rebuttable presumption that the *Code* has been violated.

Once an employee establishes this presumptive violation of the *Code*, the onus then shifts to the employer to provide evidence that the termination or the failure to reinstate was not a violation of the *Code*.

The reason for this shifting onus is that it is the employer, not the employee, who is in possession of the pertinent knowledge and facts. It is only where an employer can establish that its reasons for terminating or otherwise denying reinstatement are wholly unrelated to the leave, will a violation of the *Code* not be found.

Finally, and to emphasize the burden faced by employers, the Board indicated that the decision to terminate an employee “in close proximity to [their protected] leave is subject to strict scrutiny.” That is, there is a “heavy onus” placed on the employer to justify its conduct and avoid liability.

In another recent decision, [*Nikan Awasisak Agency Inc.*](#), an employee similarly argued that the termination of their employment was related to having commenced a medical leave a few days prior to their dismissal. As might be anticipated, the employer denied the allegations, taking the position that the decision to terminate the employee was made before the leave had even begun.

After a review of the evidence, the Board determined that the employee was not on a legally protected leave at the time of her termination. Relying on an earlier decision, the Board held that not all medical leaves fall under the category of “serious injury or illness” protected by the *Code*.

Although the employee had presented a medical note, the Board found that this did not constitute a leave for “serious injury or illness.” Had the employee wanted to access the leave, she should have advised the employer of her intention to do so and provided more than a generic report from her doctor.

While this decision shows that a contextual analysis is required to determine whether an employee was terminated because of a leave, it is important to note that an employee may still be protected by human rights legislation even if they do not strictly qualify for one of the leaves under the *Code*.

Takeaways for Employers

The most significant takeaway for employers is that if you are considering terminating an employee during or shortly after a legally protected leave, it is necessary to ensure that the reasons have nothing to do with the leave itself.

When the decision to terminate is made, the importance of documentation cannot be overstated. Maintaining a clear documentary record demonstrating that there were valid performance, business or organizational reasons to terminate the employee will be instrumental in showing that the termination would have occurred regardless of the employee being on leave.

If an employer cannot meet the onus of proving that the termination was not related to the leave in any way, not only may it be liable for a violation of the *Code*, but it could also face a human rights complaint as well.

Conclusion

The law rightfully places a high value on protecting the employment of individuals who need to take a leave outlined in the *Code*. At the same time, the law recognizes that employers may have legitimate and unrelated reasons for terminating an employee on or shortly after their legally protected leave.

If employers find themselves in this situation, they should make sure that the termination is unrelated to the leave, and they should carefully document their decision-making process. These steps are about more than just reducing an employer's liability – they ensure that employees who need to take a leave that is protected by the *Code* are treated with dignity and respect.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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