Rise In Maternity Related Terminations Exposes Vulnerability Of Pregnant Workers



Issues ranging from demotions to terminations highlight need for stronger legal protections

In the often turbulent world of employment law, a dismissal during or after maternity leave is a stark reality many new mothers face. When an employee suddenly finds themself unemployed, they will often experience feelings of distress and disbelief. When that employee is a woman who is terminated after having disclosed her pregnancy, or during or after her maternity leave, there is an added element to the distress, since a new baby brings a host of other concerns about finances and the future.

Most of all, there is shock. Almost all of the recently fired new parents who come to our firm believe that the law precludes such dismissals from happening. Unfortunately not true. At our firm, anywhere from 10 to 20 per cent of cases filed by employees involve pregnancy related terminations or discrimination.

A pervasive myth persists that termination during or after maternity leave entitles an employee to automatic reinstatement in the same position. The legal landscape is more nuanced. The language of the legislation has only two requirements:

(1) An employee cannot be fired because of their pregnancy and does not restrict dismissals that are unrelated to that; and (2) the employer must reinstate the employee to the same position or a comparable position following their maternity leave. Many employees misunderstand these two points, causing unrealistic expectations on their part, often leaving them disillusioned.

Imagine this: you are relishing the early days of motherhood, or getting ready to return from maternity leave, when you receive a termination notice out of nowhere. Discrimination, masked in legal jargon, robs you of your livelihood and dignity and leaves you in an untenable position: struggling to access financial support, obtaining insufficient insurable hours for maternity benefits, and potentially facing discrimination in future job hunts due to your visible pregnancy.

Employers are not legally allowed to fire an employee for any reason relating to the employee’s sex or pregnancy. Nor can they treat them differently after learning of the pregnancy (such as demotion or removal of duties), or engage in any other discriminatory conduct. That said, we all know that the mere fact of illegality does not prevent an action from taking place – or, more accurately, it is the actual or

potential consequences of breaking a law, rather than the fact of the law, that deters inappropriate conduct and encourages compliance.

This does not mean that such inappropriate conduct does not happen. In fact, it is now happening with alarming frequency. And the protections have far more bark than bite – in most instances, the termination will stand, and the distressing effect on the employee will be severe. For the employer, most of the time, the only consequence of firing a pregnant employee is paying a little more money. There is no practical deterrence.

Our courts have acknowledged repeatedly the vulnerability of pregnant employees. As a result, they often award higher severance and additional damages when these cases reach the courtroom. The finding of peculiar vulnerability in pregnancy discrimination cases is rooted in the fact that new mothers are thrust back into the job market amidst a tumultuous period of navigating parenthood.

The statistics are sobering: a 2021 report revealed that 33 per cent of Canadian employees who had taken maternity leave experienced discrimination. Our firm has observed a troubling uptick in clients seeking advice on issues arising once their employer learns of their pregnancy or after the employee takes time off to raise children. These issues, ranging from demotions to terminations, highlights the need for stronger legal protections.

Key points for employees and employers:

- Employers should inform employees on maternity leave of any changes to their jobs and provide them the same opportunity to participate in work-related discussions or consultations as employees in the workplace.
- Employees on maternity leave should be made aware of available job opportunities so they can compete for them if they wish.
- Employees on maternity leave should be able to use any normally available medical, dental, and health benefits.
- Pregnant employees should not be provided less challenging tasks unless specifically requested.

Caveat for employers:

Employers should proceed with caution when considering terminating a pregnant employee. If the decision to terminate is unrelated to the employee's pregnancy, it is crucial to document the legitimate reasons for termination to mitigate the risk of legal repercussions. If the employee seeks legal recourse, and the court finds discriminatory treatment, there will be a higher cost to the employer – anywhere from two to three months' additional severance, plus human rights, bad faith and other damages.

Takeaways for employees:

If you believe that your pregnancy or maternity leave played a role in your termination, getting legal advice is essential in understanding your rights, exploring your options, and taking appropriate steps to seek representation and redress.

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.

Author: Howard Levitt, Madelena Viksne

Levitt Employment Law