

# Dismissing staff on parental leave 'quite common'

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For Law Times

**A**n increasing number of employers are defying the conventional wisdom that they can't fire an expectant or new parent on maternity or parental leave, say employment lawyers dealing with the fallout from such cases.

"People tend to think there's no right to let them go, but it is in fact quite common," says Sean Bawden, an Ottawa-based employment lawyer.

A recent study commissioned by a British law firm found one in every seven women surveyed in that country lost their job while on maternity leave, with around 40 per cent returning to find their jobs had changed in some way. While there are no similar studies on Canadian women, Bawden says there's no reason to expect the situation is much better here.

"I'm not saying it's right, but it happens far more than most people would assume," Bawden adds.

Reshma Kishnani, who practises at Basman Smith LLP in Toronto, says the popular view

about the implausibility of termination while on maternity leave is simply wrong.

"Legally, you are able to terminate an employee who is on leave, provided the reasons for termination are wholly unrelated to the leave, such as downsizing or restructuring," she says. "At our firm, we have seen an increasing number of cases where an employer terminates an employee while on maternity leave with the termination being effective when they return. It's viewed by the partners as a growing phenomenon in the employment industry."

However, Allison Greene, a lawyer at employment law boutique Karimjee Greene LLP, says that in practice, employers are still taking a significant risk when terminating an employee on some form of parental leave.

"The problem, of course, is that the onus is on the employer to prove that the decision to terminate was based solely on reasons unrelated to the leave," she says.

"Under Ontario's Human Rights Code, it doesn't matter how many other factors there are in the termination. If the pregnancy is one of them, then

the decision is tainted by discrimination."

Aside from the clear cases where an employer terminates pregnant employees along with the entire workforce in catastrophic business failures, termination of those on parental leave will always attract "additional scrutiny" because the "optics" are often poor, according to Kishnani.

"Having the additional stress of worrying about the security of their job should not be necessary because those who are on parental leave have the right to be reinstated to their position or to a comparable position when their leave is over. It is important to treat them fairly."

For those employers with genuinely non-discriminatory reasons for terminating employees on leave that are willing to battle through the inevitable bad optics, Greene says documentation is critical at every stage of the process.

"Sometimes, employers will want to terminate for performance reasons. If discipline only starts after the employer found out about the pregnancy without sufficiently documented decision-making before then,

that's going to be an issue. If the termination is as a result of restructuring, tribunals will be looking for documentation to show that it was considered or in motion before the news about the pregnancy."

Once they've made the decision to terminate, Greene says many employers struggle with the best time to let the employee know. Some seek to hold off for as long as possible for fear of detrimentally affecting the health of the employee at a sensitive time. But early notice means employees will have more time to secure alternate employment and it's less likely they'll have gone through the challenging task of securing childcare for their anticipated return to work.

Greene says many of her clients are victims of the anti-stacking provisions of the Employment Insurance Act. The effective date of termination for many employees falls on the day they were due to return from a leave so they can continue to collect employment insurance benefits right up until the end. However, they can't go on to collect regular benefits after that date because they'll have hit their cap and won't have worked

enough insurable hours to qualify for more.

"That is an issue that comes up quite frequently," says Greene. "I think for the employer and the employee, it's better if it's possible to terminate after the employee has returned and accrued enough hours to avail themselves of regular employment insurance benefits. It will also help alleviate the concern that the employer terminated because of the leave if there's a period of re-employment after the leave."

According to Kishnani, simply talking through the reasons for a justified termination with an employee can help reduce the chances of a lawsuit.

"Employees, justifiably, often feel wronged, which is what can prompt the desire to take legal action," she says. "If they are treated fairly and the employer takes the time to explain the reasons for termination, including what their severance package consists of, and provided it is in line with the employee's entitlement pursuant to the law, employees may feel more respected than if they were simply dismissed without any discussion."

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