



## The new workforce "untouchables" in an era of corporate restructuring.

*Not preserving a pregnant employees job can cost employers a lot of money.*

by Alan Ridded, LL.B.

Most employers know that it is illegal to discriminate against a female employee because she either is or intends to become pregnant. Such discrimination has been illegal in Canada for some time. What many employers - and even some lawyers - do not realize that it is now no longer enough to refrain from discriminating against pregnant employees. By treating your pregnant employees just as you treat your other employees, you may now be breaking the law.

Recent changes to the Employment Standards Act now impose on the employer a positive obligation to provide its employee who returns from maternity leave with a position which is comparable to her former position,

even if that job has disappeared during a corporate restructuring, and even if this means laying off other employees who may not be pregnant. Employers and their legal counsel must realize that the financial consequences of dismissing a pregnant employee or failing to preserve her job during a corporate restructuring will substantially exceed the financial consequences normally associated with wrongful dismissal claims.

Decisions by arbitrators appointed under the Employment Standards Act have held that employers who dismiss pregnant employees or fail to preserve their position during their maternity leave are liable to indemnify the employees for all financial losses actually sustained, and not just for pay in lieu of notice. As a result, failing to preserve an employee's position, while she is away on maternity leave, may end up costing an employer tens of thousands of dollars more than would the wrongful dismissal of any other employee in the company.

### The employers new obligations

The recently amended Employment Standards Act, as amended, makes it illegal for an employer to suspend, lay-off, penalize or do any other thing which intimidates an employee because the employee takes, or intends to take pregnancy leave or parental leave. As a result, it is now illegal for an employer to lay-off a female employee after she has announced her intention to take pregnancy leave at some future date, regardless of whether she has actually already become pregnant.

Where an employer lays-off such an employee, in the normal course of a restructuring of its workforce, the onus is on the employer to show that the lay off had absolutely nothing to do with the employee's announced intention to take pregnancy leave. Similarly, an employer may place himself in breach of the Act by demoting or transferring a female employee, in a manner which prejudices her career advancement, after she has announced her intention to bear children at some future date.

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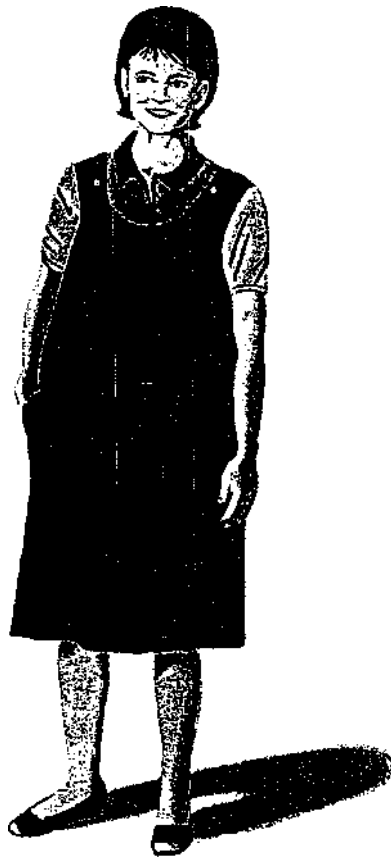
For example, a senior manager who is worried about the possible impact which the pressures of motherhood may bring to bear on his secretary's ability to continue keeping up her previous long hours and excellent attendance record following her return from maternity leave, may contravene the law if he transfers her to a less demanding clerical position working in the typing pool or to one of his more junior colleagues. To do so might be construed as imposing a penalty, or partially suspending her duties.

In section 43, an employee who returns from maternity leave has an absolute right to the position which she held at the time of her departure, if it still exists. If the employer underwent a restructuring of its workforce while the employee was away on maternity-leave, resulting in the disappearance of the employee's job, that employer has an absolute obligation to create a "comparable" position for her upon her return. A "comparable" position is a position at the same salary and with similar responsibilities to the position which she held when she left on maternity leave,

Nothing short of suspending operations and closing its business will relieve the employer of this obligation. Even if the employer's business happens to have suffered during the maternity leave period, thereby necessitating a significant downsizing in its work force, it is still obliged to create a comparable position for the returning female employee. It is irrelevant that the employer has no intention of discriminating against the female employee, and is in fact treating her no differently from other employees whom it is also transferring or laying

off as part of the downsizing. What this means is that employers are obliged, if need be, to start laying-off permanent employees to make room for the employee who is returning from maternity leave.

Employers are not free of their duty to reinstate the returning employee to her old position simply by creating a "comparable" position. The returning



employee has an absolute right to displace whoever has been filling her position since her maternity leave and cannot be forced to accept a new but comparable position where the old position still exists. This means that the employer cannot transfer the returning employee to an equivalent or senior position if it discovers during the course of her absence on maternity

leave that her successor is better suited for the job or is somehow more competent than she is.

Nor can the employer circumvent these obligations by reinstating the returning employee to her former position, waiting a few months and then laying-off or transferring the employee once she has technically ceased to be a 'pregnant' or 'returning' employee. Recent arbitral decisions have held that such "after the fact" lay-offs or transfers are just as illegal where they occur a few months after an employee's return from maternity leave as when they occur on or before that date.

Sections 43 and 44 have the effect of making working mothers and mothers-to-be the veritable "untouchables" of the workforce, from the moment they announce their intention to go on maternity leave to as much as six months after their return to work. The employer exposes itself to a serious risk of legal action if it tampers with their positions during this period, no matter how genuine its need to downsize and no matter how superior the quality of the remaining employees who must otherwise be laid off, transferred or demoted.

### **The legal consequences**

Even though it may cost a lot of money for an employer to honour its legal obligations under sections 43 and 44, the cost of failing to do so can be many times greater. The price of thumbing one's nose at this particular law can end up exceeding many times over the cost of wrongfully dismissing most other employees. When an employer is found to have wrongfully dismissed an employee, without just cause, it is normally obliged either to give the employee reasonable notice or to pay

*"Employers are obliged, if need be, to start laying-off permanent employees to make room for the employee who is returning from maternity leave."*

the employee salary in lieu of notice. In the absence of a collective agreement, a non-unionized employer cannot be ordered to reinstate an employee, no matter how wrongful the dismissal and no matter how great the employee's seniority. However, where an employer breaches its statutory obligations to a female employee under sections 43 and 44 of the Employment Standards Act, the employer may be obliged both to reinstate her and to pay her a large financial settlement

In practice, this financial settlement will be significantly greater than what the employer would have to pay in normal wrongful dismissal cases, particularly in the case of relatively new, or junior, employees of child-bearing age. Very recent arbitration decisions have suggested that where the employer has breached its duty to a female employee under sections 43 or 44, it is obliged to indemnify her for the totality of the economic loss which she has actually suffered as a result of the illegal termination of her position. These arbitral decisions habitually include the following sums in the indemnification which the employer must pay the employee if it breached these sections of the Act:

a) all out-of-pocket expenses incurred by the employee in attempting to find a new job and suing her employer, including the costs of babysitting and legal advice;

b) financial compensation for the shock and emotional upheaval caused by the illegal termination of her employment;

c) all wages lost during the period from the date of termination to the date she finds an alternative position;

d) where the employee is not to be reinstated, an additional lump sum payment, usually ranging from \$2,000 to \$10,000 for the loss of the job itself (to compensate the employee, in part, for the loss of future earnings from her former position).

An employer who breaches sections 43 and 44 of the Employment Standards Act therefore does so at its peril. Even in the case of a very junior employee, who has only been with the employer for a very short period of time, the indemnification package which the company may be ordered to pay can reach into the tens of thousands of dollars. Given the significant amounts of money involved, and the relative ease with which employer may breach its legal obligations under the amended Act, employers are well advised to obtain sound legal advice prior to restructuring their work forces in a manner which impacts employees who are either returning from or intend to take maternity leave. 1\*1

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