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Pregnant women have a number of ways to claim job rights, but are they effective?

By Shaun O'Brien

Anecdotal evidence suggests that, in spite of the job protection provided by the *Employment Standards Act* (ESA), women are increasingly being dismissed during or at the end of their pregnancy leaves, or are being offered inferior positions on their return from leave.

This breach of rights occurs at a time when women are particularly vulnerable, having been out of the workplace, on a reduced income and struggling with childcare responsibilities. The Supreme Court of Canada has recognized pregnancy discrimination as key in protecting the equality of women,

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yet in many cases employer's actions are clear breaches of ESA protections. In Ontario, while non-unionized returning mothers have several fora to enforce their rights – through the ESA, under the *Human Rights Code* or in court – the question remains where they can obtain the most advantageous remedy. Employees will want to maximize their recovery, both for their own sakes and to deter employers who treat the breach of these rights as a cost of business.

Both the ESA and the *Human Rights Code* provide significant remedies for the breach of rights upon return from pregnancy leave. To begin with, both processes offer reinstatement as a potential remedy, which is rarely if ever available through the courts. They also both offer damages in lieu of reinstatement, which are not limited by the reasonable notice period offered at common law. Under the ESA, the damages include lost wages up to the date of the hearing, damages for the loss of the reasonable expectation of continued employment and an award for emotional pain and suffering. While not tracking the same jurisprudence, the loss of the reasonable expectation of continued employment alone will for many women approximate the amount of a reasonable notice period. Moreover, this award is granted effective the date of the award, not the date of termination (as with reasonable notice) and, accordingly, the employee is also entitled to all lost wages up to the date of the award. The emotional pain and suffering awards are typically low (approximately $1,000 to $1,500), but, because of the loss of continued employment award, the total damages available through this process are significant.

The *Human Rights Code* also has the power to grant extensive damage awards and these have been increasing as of late. These include general damages, damages for mental anguish and for lost wages to the date of the award, even where an employee had a short period of service (see *Impact Interiors v. Ontario (Human Rights Commission)*, [1998] O.J. No. 2908 (C.A.). In egregious circumstances, the general damage and mental anguish awards in human rights cases can be significant, with general damage awards being as high as $25,000 in some cases. Aggrieved employees can also seek broader systemic remedies, such as requiring an employer to develop an appropriate policy addressing its duty to accommodate. On the other hand, the human rights cases do not clearly set out an entitlement to damages for the reasonable expectation of continued employment, which can be an important award in the ESA cases. In sum, on the right facts, it may be worthwhile to pursue the human rights process, seeking a high general damages award and potentially broader policy remedies, with the hope that the Tribunal will recognize damages for the reasonable expectation of continued employment. Where a high mental anguish or general damages award is unlikely, the ESA may be the safer route to ensure entitlement to continued employment damages.

Although a complete discussion of the pros and cons of both processes, beyond the question of remedy, is outside the scope of this article, it may be helpful to note that both can be pursued without legal counsel. In addition, while

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the ESA traditionally has been a more expeditious process than a complaint to the Human Rights Commission, with the pending human rights reforms, we may see a more efficient human rights process as well. Finally, both processes provide similar job protections to returning mothers — the ESA through clearly stated protections and the *Human Rights Code* with its purposive protections against discrimination and requirement of accommodation short of undue hardship.

Returning mothers may also consider pursuing a claim for wrongful or constructive dismissal in the courts. Usually this will not be the most advantageous route. The typical remedy will be reasonable notice; however, the relevant *Bardal* factors for notice, such as age, length of service and seniority, tend to favour senior, older, longer-serving employees, while many new mothers are in their 20s and 30s and do not meet the most advantageous criteria. A court may award a *Wallace* extension to the notice period, but these extensions are typically only a proportion of the notice granted under the *Bardal* criteria. In rare cases, a court may also award a high punitive damage award (see, at the extreme, *Keays v. Honda Canada Inc.*, [2005] O.J. No. 1145 (S.C.J.), but these are the exception and are more likely in cases of long-serving employees where the employer's egregious conduct has spanned many years. Therefore, unless the case has facts which make it unusually appropriate for a high punitive award, one of the other fora will likely provide a better result.

In pressing for the full range of remedies in the appropriate forum, returning mothers have the opportunity to maximize their recovery. If enough cases yield expansive awards, over time employers may be deterred from continuing to deprive mothers of these important legal rights.

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