

MANAGEMENT COUNSEL

Employment and Labour Law Update



What To Expect When They're Expecting

QUESTION:

What is the maximum monetary award an employer can face for violating an employee's pregnancy or parental leave rights?

ANSWER:

Possibly more than you may think.

What do we mean by this? We mean that there are no predefined limits as to the total compensation which can be ordered to be paid. To explain why, it is helpful to understand the conceptual framework behind pregnancy leave rights. An example may be of assistance. Consider the situation of one of the employees at your company, Sue the bookkeeper, age 33, earning \$39,000 per year.

On the completion of her 90 day probation period with you, although her performance was not stellar, it was modestly above average, so she was enrolled as a permanent employee. Unfortunately, in the eight months following her probation period her performance has become very spotty. She often makes personal calls on the telephone. She is prone to arrive late to work and returns late after lunch breaks almost every day. The company accountant regularly makes calls in order to sort out errors in the books. You have spoken to Sue informally but there is no improvement in her performance. As a result you conclude that there is no realistic possibility that Sue's performance will improve and resolve to terminate her employment.

You speak to a lawyer who informs you that it is often difficult, although not impossible, to prove cause on the grounds of poor performance. At the same time you are advised that Sue's entitlement, if you were simply to let her go without claiming cause, is in the neighbourhood of one to two months' pay - three months at the very outside. Your lawyer also inquires and confirms with you that, to your knowledge, Sue is neither pregnant nor does she have a disability within the meaning of the *Human Rights Code*.

You consider the challenges in proving cause and your lawyer's advice that in order to prove cause you would have to pursue further performance counselling, with targets and warnings, for a reasonable period of time. You have made the mistake before of retaining unsatisfactory employees for too long, so you make what you consider to be a rational decision that it is not worth investing more time and energy into Sue and you decide to offer her a month's pay. Because Sue's wedding is coming up next week, you defer further action until after the wedding.

When Sue returns after her wedding she announces to everyone's surprise that she is pregnant and expecting in seven months' time. Although feeling somewhat uncomfortable, you have a business to run and see no reason to cancel your plans. You had already made the decision to terminate employment before you had any idea she

continued inside...



“...in most circumstances it is the employer's right to terminate employment on provision of reasonable notice, or pay in lieu However, if the reason for termination runs afoul of a statutory protection the rules can be very different.”

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might be pregnant.

So you proceed with your plan to terminate employment and you offer her one month's pay in return for signing a release. Six weeks pass without any response. Just as the demands of business had pushed all thoughts about Sue into your mental backburner, you receive a letter from her lawyer. The letter claims that Sue was a fantastic employee about whom there was never any expression of dissatisfaction. The letter continues with some highly inflammatory language claiming that immediately upon your learning of Sue's pregnancy you proceeded with "cynical and conniving retribution" to "heartlessly uproot a hardworking, loyal and dedicated employee".

You do your best to think calm thoughts and you restrain yourself from taking the one month off the table altogether. Because the monetary compensation claimed in the lawyer's letter is so astronomically disproportionate to the one or two months' pay that you think she may be owed, you write a fair and direct letter in response that the termination of employment had nothing whatsoever to do with her pregnancy and that the previous offer was fair and reasonable. The letter states that she should seriously consider accepting the offer, as any legal proceeding brought would be vigorously defended.

Six more months pass without hearing anything from Sue and you have once again forgotten about her claim. Then you receive a registered mail package containing a handwritten complaint prepared by Sue and filed pursuant to the *Employment Standards Act*. It alleges that you have violated Sue's pregnancy and maternity leave rights and claims that you acted in reprisal to prevent her from exercising her rights.

You proceed to file a response on your own, setting out your position as to what actually happened and denying that you have done anything wrong.

Ten more months pass before you are summoned to a "fact finding" to be conducted by an Employment Standards Officer. When you arrive, 18 months after Sue's employment was terminated, you are gracious, congratulating Sue in that she is now quite visibly pregnant, expecting her second child.

During the fact finding you are compelled to make a number of admissions. No, you did not provide any written warnings to Sue regarding her performance. No, you did not make any notes at the time you verbally counselled her about her performance. Yes, you did give her a 3% raise after she had been with you for six months, although you clarify that this was an across-the-board minimum increase you gave your staff on account of the cost of living. And yes, to her credit, she may have on short notice once stayed an hour late at year end.

At the conclusion of the fact finding, although it has not been a pleasant experience, you feel satisfied that you held your own, maintained a calm demeanour and presented your case in a matter-of-fact, organized and professional manner. You feel that you have clearly demonstrated that the timing of the termination of Sue's employment was merely a coincidence and not a

violation of her rights.

Another six weeks goes by and nearly on the second anniversary of Sue's departure from your company you receive an official decision in the mail from the Employment Standards Officer of the Employment Standards Branch of the Ministry of Labour. The decision is a complete shocker. In disbelief you read that Sue's performance from all appearances was satisfactory and that you have failed to provide any corroborative evidence that her performance was in any way deficient. You read that you have failed to discharge the onus of proof which rests on you to demonstrate that no aspect of your decision to terminate employment was related to Sue's pregnancy. You read that you should have retained Sue in your employ until she commenced her pregnancy leave and offered her job back when she completed her leave one year later or a comparable job in the event her previous job no longer existed.

But this is not all. Although Sue is not claiming her "presumed entitlement to reinstatement", the Employment Standards Officer goes on to make an award of monetary damages against you:

<u>AMOUNT</u>	<u>EXPLANATION</u>
\$23,000	Loss of wages for the seven months until Sue gave birth to her first child, including raise she would have received
\$22,000	Loss of Employment Insurance benefits to which Sue would have been entitled during her pregnancy/parental leave
\$28,820	8.5 months' loss of wages following Sue's return-to-work date after having first child
\$22,000	Lost benefits during Sue's upcoming pregnancy and parental leave after having second child
\$20,080	Projected future loss of earnings after having second child (assuming six months of unemployment)
\$15,000	Compensation for loss of competitive position in the job marketplace due to extended unemployment
\$7,500	Compensation for hurt feelings
\$5,000	Legal Costs
\$143,400	Total Claim

You call up your lawyer to find out how the three months' maximum ended up looking more like a *Scratch and Win* jackpot. After reviewing the matter with you, your lawyer points out that the three months' maximum was expressed at a time when no one knew that Sue was pregnant, but by the time of termination the facts had

Beware of WSIB “Poster Scam”

On August 21, 2007, the Workplace Safety and Insurance Board ("WSIB") released a news bulletin regarding a scam that has affected various businesses across the province.

Several individuals have visited businesses aggressively attempting to sell what they claim is a WSIB poster. The individuals tell business owners that they will incur a fine if they do not purchase the poster.

However, according to the WSIB, these individuals are not affiliated with either the WSIB or the Ministry of Labour.

The only poster required by the *Workplace Safety & Insurance Act* to be displayed in the workplace is the poster entitled "In Case of Injury - 1234". This poster is provided free of charge to employers directly by the WSIB.

If you have any questions or concerns about this scam or any other WSIB requirement or procedure please do not hesitate to give us a call.

changed. Your lawyer explains that the three months' maximum was based on Sue's "common law entitlement to reasonable notice" which presumes that an employer has a right to terminate employment for whatever reason, with the sole condition that the employee receives reasonable notice of termination or pay in *lieu*.

Your lawyer further explains that in most circumstances it is the employer's right to terminate employment on provision of reasonable notice, or pay in *lieu*, or as specified in an employment contract. However, if the reason for termination runs afoul of a statutory protection the rules can be very different. If parental leave rights are violated the Ministry of Labour can award compensation based on making the employee "whole". In this case, "whole" meant awarding an amount equal to the losses suffered because you failed to maintain Sue's employment before and after her leave, and prevented her from collecting benefits throughout. "Whole" also meant compensation for Sue's hurt feelings, legal costs and damage to her employment prospects.

Do the above facts sound far-fetched to you? Unfortunately, for the most part, they are an amalgam of various actual cases we have seen come into our office. Termination of an employee in potential violation of parental or pregnancy leave rights can be very risky.

What can you do to protect yourself against such a situation?

- 1. Keep written records of performance issues with employees.** As you can see from Sue's situation, the employer lacked records to prove that there was any concern about Sue's performance. Even if the records are insufficient to prove just cause, they may assist in showing that the true motivation for termination was job performance.
- 2. Reconsider your business case before proceeding with a dismissal.** Sue was once a satisfactory performer. What you considered to be poor performance may have been caused by the stresses of her upcoming wedding. If you do not investigate the reasons for her problems at the time it will be too late

to later turn back the clock. Working to improve Sue's performance might have generated better results than you thought.

- 3. When considering a severance payment, be prepared to offer severance compensation at the higher end of the range.** In many cases, this will encourage the employee to accept the package and will still be less costly than a tribunal award against your company.
- 4. Consult with your employment lawyer.** If you are considering terminating employment or changing the position of an employee who is pregnant or returning from work after a parental leave, you should meet with an employment lawyer to ensure that what you are doing is permissible, that you understand the risks, and have a plan regarding how best to proceed.
- 5. Before you go to an Employment Standards hearing, obtain legal advice.** Claims which may appear minor can be much larger than you realize.

For more information please contact a member of the Sherrard Kuzz LLP team.

**DID
YOU
KNOW?**

An Act to amend the Human Rights Code ("Bill 107"), received Royal Assent in December 2006. Important sections dealing with civil remedies will come into force on June 30, 2008. For more information contact a member of our team.

Next in our series of employment and labour law updates:

TOPIC: *Workplace Audits: Employment Standards, Workers' Compensation, Occupational Health and Safety - Staying Ahead of the Curve.**

Self Audits

- Why perform a self audit?
- Key components of an effective self-audit.
- Now that you have the results, what do you do with them?

Ministry of Labour Audits

- Recent Ministry of Labour initiatives.
- Is your workplace a probable target?
- What to do when the auditor comes knocking.
- Best practices to ensure a smooth audit process.

HReview
Seminar Series

DATE: Tuesday, November 20, 2007, 7:30 – 9:00 a.m. Program to start at 8:00 a.m.; breakfast provided.

VENUE: The Country Club (formerly The Toronto Board of Trade), 20 Lloyd St., Woodbridge, ON 905.856.4317

RSVP: **By Monday, November 12, 2007 to 416.603.0700 or info@sherrardkuzz.com**

* HRP AO CHRP designated members should inquire at www.hrpa.org for certification eligibility guidelines regarding this *HReview Seminar*.



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