

Pregnancy and the HRTO

Written By: Lee-Anne Moore, Partner at Cochrane Moore LLP

Edited By: Jonathan Thibert, LL.B.

Fake scenario:

STATEMENT OF FACTS

Jenna Jones, a 35 year old graduate of a second career program at a local college was hired by Happy Reading Publishing Office. Shortly after lunch on her first day of employment, Mrs. Jones divulged to her trainer, Natasha Persaud, that she was three months pregnant. Mrs. Jones informed Ms. Persaud that she would be eager to return to work as quickly as possible afterwards, and mentioned the possibility of working from home. On her second day of employment Mrs. Jones was called into a meeting with Ms. Smith, her employer, who congratulated her on her pregnancy, informed her she would be unable to accommodate her desire to work from home, and then terminated her. At this point in time, Mrs. Jones was only 12 weeks pregnant. No other reason for termination was given.

LEGAL ISSUES

1. Whether the *Ontario Human Rights Code* c.53 s.5, 9, 10(2) was violated by Happy Reading Publishing Office for discrimination against Mrs. Jones based on sex and or pregnancy.
 - a. If so, is she entitled to non-pecuniary losses for damage to dignity, feelings and self-respect?
2. Whether Happy Reading Publishing Office violated s.46 of the *Employment Standards Act* and s.12 *Employment Insurance Act* (S.C. 1996, c. 23) by terminating Mrs. Jones for her pregnancy.
 - a. If so, is she entitled to special damages for lost wages?

BRIEF ANSWER

As summarized in *Ong v. Poya Organics & Spa Ltd.*¹, ¹ termination for pregnancy will not be tolerated in the province of Ontario, as it violates the *Human Rights Code of Ontario*². It is therefore likely that Happy Reading Publishing Office will be held liable for non-pecuniary losses for damage to dignity, feelings and self-respect and special damages for lost wages.

Issue 1: Ontario Human Rights Code

ANALYSIS

The Law

The applicable statute law is s. 5(1), 9, and 10(2) of the *Human Rights Code* which states:

5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation,

¹ *Ong v. Poya Organics & Spa Ltd*, (2012) HRTO 2058 (CanLII)

² *Human Rights Code of Ontario* RSO (1990), c H19, s5(1), 9, 10(2)

gender identity, gender expression, age, record of offences, marital status, family status or disability.

9 No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

10(2) The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

In *Vestad v. Seashell Ventures Inc*³, the British Columbia Human Rights Tribunal (“BCHRT”) explained that the burden of proof on the Applicant with respect to wrongful termination on the basis of pregnancy:

The Complainant must prove, on a balance of probabilities, that her pregnancy was a factor in the change in the terms and conditions of her employment, and that, because of her pregnancy, the Respondent refused to continue to employ her. Pregnancy does not have to be the only factor in the decision to change the terms and condition of employment to constitute discrimination

Although the BCHRT is not binding on the Ontario Human Rights Tribunal, the Ontario Court of Appeal has provided a three step process for proving a case of *prima facie* discrimination in *Shaw v. Phipps*⁴:

The three elements of the *prima facie* test are:

1. That he or she is a member of a group protected by the *Code*;
2. That he or she was subjected to adverse treatment; and
3. That his or her gender, race, colour or ancestry was a factor in the alleged adverse treatment.

In the strikingly similar case of *Maciel v. Fashion Coiffures*⁵, the Applicant was employed for only one day before her intermittent nausea required she use the restroom. The plaintiff then divulged her pregnancy to her trainer, who then urged her to speak with the salon owner immediately to prevent the news from reaching her through secondary sources. After disclosing her pregnancy to her employer, Ms. Maciel was congratulated on her pregnancy, sent home, and terminated the following day.

To establish damages to be awarded for injury to dignity, feelings and self-respect, it is best to examine *Arunchalam v. Best Buy*⁶ [2010 HRTO 1880 \(CanLII\)](#), at paras. 52 to 55, which outlined that there are

two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination: see, in particular, *Seguin v. Great Blue Heron Charity Casino*, [2009 HRTO 940](#) at para. 16 (CanLII).

The first criterion recognizes that injury to dignity, feelings, and self respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.

The second criterion recognizes the applicant's particular experience in response to the discrimination. Some of the relevant considerations in relation to this factor are discussed in *Sanford v. Koop*, 2005 HRTO 53 (CanLII) at paras. 34-38.

*ADGA Group Consultants Inc. v. Lane*⁷ Ontario Superior Court of Justice, Divisional Court stresses the importance of affording reparations to those whose rights have been violated:

This court has recognized that there is no ceiling on awards of general damages under the Code. Furthermore, [page688] Human Rights Tribunals must ensure that the quantum of general damages is not set too low, since doing so would trivialize the social importance of the Code

Moreover, in *Arunachalam v. Best Buy Canada*⁸ the Human Rights Tribunal of Ontario recognizes the importance of equivalent compensation:

Cases with equivalent facts should lead to an equivalent range of compensation, recognizing, of course, that each set of circumstances is unique. Uniform principles must be applied to determine which types of cases are more or less serious...

Despite the brevity of her employment, in *Maciel v. Fashion Coiffures*,⁹ the Tribunal awarded \$15,000 for compensation for injury to dignity, feelings and self-respect.

Furthermore, in *Ong v. Poya Organics & Spa Ltd.*,¹⁰ the applicant learned she was pregnant after five weeks of employment, and was terminated upon informing her employer. She was found to be less vulnerable than others in her situation, as she was not the sole provider for her household, and was therefore awarded \$12,000 for injury to her feelings, dignity and self-respect.

In the 2013 case of *Tekyi-Annan v. 2191214 Ontario Inc.*,¹¹ the Human Rights Tribunal of Ontario awarded \$10,000 for injury to dignity, feelings and self-respect. The plaintiff had been employed for only 11 days prior to her employer discovering that she was five months pregnant. She was terminated 4 days later.

In *Guay v. 1481979 Ontario*¹², the applicant's employment was terminated after 20 days. The Human Rights Tribunal of Ontario ordered the respondent to pay \$10,000 in compensation for injury to dignity, feelings and self-respect.

Synthesis

From case law, the factors which determine a violation of the Human Rights Code are: (1) the plaintiff must prove she was pregnant; (2) the plaintiff must prove she was subject to adverse treatment; (3) the plaintiff must prove on a balance of probabilities her pregnancy was a factor in her termination; and (4) that this termination resulted in injury to her dignity, feelings and self-respect.

Application of Law to Our Situation

We can now establish that Mrs. Jones was in fact 12 weeks pregnant at the time of her termination. As in *Maciel*, Mrs. Jones was congratulated on her pregnancy and terminated the following day, leading us to believe Happy Reading Publishing Office was aware of Mrs. Jones pregnancy prior to her termination. The brief discussion with her trainer, Ms. Persaud, regarding working from home will not be enough evidence to claim Mrs. Jones was unwilling to perform her duties, and will in fact solidify the argument that her pregnancy played a role in her termination.

As with *Tekyi-Annan* and *Guay*, despite the brevity of her employment with Happy Reading Publishing Office, given the circumstances surrounding the termination of Mrs. Jones and the testimony of interested witnesses, it is likely the Human Rights Tribunal of Ontario will be moved to provide her for non-pecuniary losses for damage to dignity, feelings and self-respect in an amount between \$10,000 and \$15,000.

Consequently, the familial situation of Mrs. Jones is similar to that of Ms. *Ong*, neither were the sole breadwinners for their respective families, and, therefore, the expectations for non-pecuniary losses for damage to dignity, feelings and self-respect for Mrs. Jones must be lowered.

Issue 1: Loss of Future Earnings

ANALYSIS

The Law

The applicable statute law is s. 46 of the *Employment Standards Act*,¹³ 2000 S.O. 2000, C.41 and the *Employment Insurance Act*¹⁴:

Pregnancy leave

46. (1) A pregnant employee is entitled to a leave of absence without pay unless her due date falls fewer than 13 weeks after she commenced employment. 2000, c. 41, s. 46 (1).

Maximum — special benefits

12(3) The maximum number of weeks for which benefits may be paid in a benefit period

(a) because of pregnancy is 15;

In *Cameron v. Nel-Gor Castle Nursing Home*¹⁵, the award for general damage should be decided as follows:

An inherent, but separate, component of the general damage award should reflect the loss of the human right of equality of opportunity in employment. This is based upon the recognition that, independent of the actual monetary or personal losses suffered by the complainant whose human rights are infringed, the very human right which has been contravened itself has intrinsic value. The loss of this right is, itself, an independent injury ...

While examining the case of *Maciel v. Fashion Coiffures*,¹⁶ Ms. Maciel was only employed by Fashion Coiffures for 2 days prior to termination; however the Human Rights Tribunal of Ontario found the following:

[64] The respondents are jointly and severally order to pay to Jessica Maciel the following amounts within 30 days of this Order:

- (1.) \$9,060.00, minus applicable statutory deductions, as compensation for her loss of employment income;
- (2.) \$11,659.00, minus applicable statutory deductions, as compensation for her loss of maternity leave and parental leave benefits;

In *Golan v. Sparkling Distribution Inc.*,¹⁷ Ms. Golan had been employed by Sparkling for 4 months and had shifted from full-time employment to part-time as business needs shrank. Ms. Golan informed her employer that she was eight weeks pregnant two weeks prior to termination. The tribunal decided that Mrs. Golan's termination was a direct result of her pregnancy, which prevented her from seeking maternity leave under the *Employment Insurance Act*. The tribunal ordered the following:

[50] I order Sparkling to pay Golan the following:

- (1) the amount of salary she was deprived of between August 4, 2006 and the birth of her child or the date she would have reasonably commenced her leave, whichever is earlier;
- (2) the amount her salary lost between the end of her statutory pregnancy leave period under the Act, February 17, 2008 and the commencement of her employment in May of 2008;

In *Ong v. Poya Organics & Spa Ltd.*,¹⁸ Ms. Ong was employed for five weeks prior to termination; the tribunal found that:

[55] ... the applicant is entitled to lost wages to July 26, 2011 when she stopped looking for work. In coming to this conclusion while I understand the applicant's frustration with her treatment by the respondents and her inability to find work, it remains that for a claim to ongoing wages to be maintained there is a corresponding ongoing duty to mitigate

[57] The applicant was terminated effective May 13, 2011 and the last job application was July 26, 2011. I find that the applicant is entitled to lost wages of \$480 per week from May 13, 2011 to July 29, 2011 a period of 11 weeks, (\$5280) less deductions required by law. It follows from this conclusion that the respondent is not responsible for any shortfall in the applicant's Employment Insurance Entitlement.

Contrary to these cases, in *Tekyi-Annan v. 2191214 Ontario Inc.*,¹⁹ the plaintiff had been employed 15 days prior to being terminated for her pregnancy; however the tribunal found, at paragraph 125, that "The evidence is insufficient to support a finding of lost wages."

Synthesis

From case law, it has been demonstrated that there are two factors to consider when determining loss of wages for wrongful termination on the basis of pregnancy: (1) It must first be established that were it not for termination, the plaintiff would have been employed for more than 13 weeks prior to requesting maternity leave and (2) the plaintiff mitigated their loss by attempting to seek alternative employment.

Application of Law to Our Situation

We can now establish that Mrs. Jones had intended to remain with Happy Reading Publishing Office until the end of her pregnancy and that she had made statements expressing her eagerness to return to work as soon as possible. As no other reason for termination was given, it is likely that Mrs. Jones would have remained with Happy Reading Publishing Office for more than the 13 weeks required by s. 46 of the *Employment Insurance Act* (S.C. 1996, c. 23), and would have exceeded the 600 hour requirement for maternity leave.

As we have no information outlining the actions taken by Mrs. Jones to mitigate the loss of employment, it is our responsibility to inform her that she must attempt to seek alternative employment.

CONCLUSION

It is likely that Happy Reading Publishing Office will be found to have violated s. 5, 9, 10(2) of the *Ontario Human Rights Code* c.53, s.46 of the *Employment Standards Act* and s.12 *Employment Insurance Act* (S.C. 1996, c. 23 for terminating Mrs. Jones for no other reason than her pregnancy.

Despite the brevity of her employment, if it can be reasonably assumed that the plaintiff would have continued to work until the *Employment Insurance Act* s. 12(3)(a) provided her with maternity leave, and therefore Happy Reading Publishing Office will be held liable for compensating for injury to dignity, feelings and self-respect as well as loss of wages.

Based on case law, it is likely Mrs. Jones will be awarded \$10,000 in non-pecuniary losses for damage to dignity, feelings and self-respect, and special damages for lost wages from the date of termination to what would have been the start date of her 15 week maternity leave. Should Mrs. Jones mitigate her termination by seeking alternative employment, and not finding it, she may also be able eligible to receive compensation from Happy Reading Publishing Office for the maternity leave she is no longer eligible to receive, due to their discrimination against her.

While this provides a brief overvie, the law can be very complex, and many aspects are case specific. If you have an issue, call Cochrane Moore LLP for a free consultation.

(905) 240-4529

Last updated March 15, 2017