



VENUS FLYTRAP: PREGNANCY AND MATERNITY IN THE WORKPLACE

Traditional views about pregnancy and maternity are often associated with prejudice. The law protects women against unfair discrimination arising from such prejudice. However, the protection that labour legislation affords could also give rise to opportunism. It has been said that one of the most lucrative business opportunities is for a visibly pregnant woman to apply for as many jobs as possible. Not because she might be able to choose the best of several job offers, but rather that some prospective employer will be foolish enough to deny her the job because of her pregnancy. Better still, she might receive a letter confirming that she did not get the job for this very reason: "It is with regret that we have to decline your application. Whilst we do not doubt your ability to do the job, the timing of your pregnancy is such that we are unable to appoint you."

Some argue that discrimination against a pregnant woman who applies for employment could be fair if there are sound operational reasons not to appoint the woman. This is, however, an issue on which judges cannot seem to agree. One only needs to read the divergent reasoning in the matter of Woolworths and Whitehead a few years ago. The matter was heard by one judge in the labour court and, subsequently, by three judges in the labour appeal court. Of the four judges, two found in favour of the employer and the other two in favour of the employee – and every judge arrived at his conclusion through different reasoning. This is not very comforting for the employer who seeks clear directives in the complicated area of labour disputes. But the plight of the pregnant woman goes beyond being denied a job opportunity. In the very recent case of Wardlaw vs Supreme Mouldings, the labour court was called upon to decide on the fairness of the dismissal of a woman soon after her return from maternity leave. On the very date of her return the employee was notified of a disciplinary hearing into several allegations of dereliction of duty.

The allegations arose out of incidents prior to her going on maternity leave. The employee was dismissed. She claimed that her dismissal was automatically unfair in terms of labour legislation. If she could prove this, she might be entitled to compensation equal to twenty-four months' remuneration. In this case the labour court found against her on the basis that she had failed to prove that her dismissal had anything to do with her pregnancy. The court also made an award of costs against her. The court also said that it did not have the jurisdiction to decide whether her dismissal had been unfair for any other reason. She could, however pursue this matter in the Commission for Conciliation Mediation and Arbitration.

Another alluring trap that employers are tempted to fall into arises when an employee on maternity leave is temporarily replaced. It is not uncommon for the employer to discover that the replacement is more competent, or that her job could be done by other employees. This leads to the temptation of denying the employee the opportunity to return to work, or to resume her previous job. Needless to say, the dangers of doing so should be apparent to those that have some knowledge of labour and employment law.

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