EMOND HARNDEN
LABOUR & EMPLOYMENT LAW
DROIT DU TRAVAIL ET DE L'EMPLOI

Pregnancy a factor in determining reasonable notice, Ontario court rules

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Should the impact of pregnancy on a dismissed employee's ability to find work be considered in the calculation of the notice period? In *Ivens v. Automodular Assemblies Inc.* (June 20, 2002), a panel of Ontario judges held that it should.

The case involved a labourer who was dismissed for excessive absenteeism without notice or compensation after just two months' employment. The labourer, Roben Ivens, was pregnant at the time of her dismissal.

Ivens commenced an action and was successful in convincing the trial judge that she had been wrongfully dismissed. However, her victory was hollow, as she was awarded only $543.60, one week's salary. Ivens was unable to persuade the court that it should factor her pregnancy into the calculation of the notice period. In rejecting Ivens' arguments, the trial judge gave three reasons:

- Ivens and Automodular would not have agreed to including this as a factor in the notice period, had the matter been raised when her employment contract was being negotiated.
- It would impose an unreasonable burden on employers and would discourage hiring persons with disabilities.
- Including pregnancy as a factor would be based on the assumption that another employer would break human rights law by not hiring Ivens because of her pregnancy. Therefore, lengthening the notice period would have the effect of making Automodular pay for another employer's unlawful conduct.

The trial judge's decision on the notice period was overruled by a panel of the Divisional Court. Noting that the purpose of reasonable notice is to give dismissed employees the opportunity to find new employment, the court held that Ivens' pregnancy was an appropriate factor to consider in determining the notice period. It held further that, while a reviewing court should be reluctant to change a trial judge's award of notice when the award is in an acceptable range, one week's notice was outside this range.

Accordingly, the court held it was appropriate to vary the notice period. It awarded Ivens eight weeks' notice, amounting to $4,348.80, based on her pregnancy, the nature of her employment, the fact that she was a probationary employee, her age, training and experience, and her length of service.

In Our View

Employers should note that this case also raises an issue that we pointed to in another decision currently being reported in our *FOCUS* alerts, *Mesgarlou v. 3XS Enterprises Inc.* (see « »A Wolf by the ear »: dismissed employee ordered to pay employer's legal costs » on our What's New page), a case successfully argued by Jock Climie of our firm. The issue is that an employer may recover many of its court costs when it has made an offer to settle for more than the plaintiff is awarded by the court. In this case, Automodular had offered $7,000 to Ivens, well in excess of what she won in court, although representing far less of a discrepancy than in *Mesgarlou*. As the court in *Mesgarlou* stated:

> « The awarding of costs in civil actions is intended to compensate the successful party for some of its legal costs. Given the result at trial and the offers to settle, there can be no doubt that the defendant is the successful litigant. The degree to which such compensation is awarded may be increased where it appears that the unsuccessful party has proceeded to trial in the face of a *bona fide* offer to settle which would have been to his ultimate advantage. »

Lawyers from our firm can advise you whether a settlement offer can serve as the basis for the recovery of legal costs in a wrongful dismissal action.

For further information, please contact André Champagne, at (613) 940-2735.