



Employer rights in the event of pregnancy and during maternity leave

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Does a job applicant need to disclose her pregnancy status to an employer? May an employer take disciplinary action against an employee who at the time of appointment failed to disclose her pregnancy? Or lied about it? May an employee who is on maternity leave be dismissed for genuine performance, disciplinary or redundancy reasons?

In terms of both the Employment Equity Act and the Labour Relations Act, pregnant employees may not unfairly be discriminated against because of pregnancy or any reason related to it. This means, amongst others, that an employer may not exclude someone from employment merely because she's pregnant. By the same token, an employee may not be dismissed simply because she's pregnant or taking maternity leave. The Labour Court decision in *Memela and Another v Ekhamanzi Springs (Pty) Ltd* provides a good illustration of the principle.

Ms Memela and a colleague worked for the employer at its spring water bottling business, which is located in the premises of a mission station. They breached the mission's code of conduct by falling pregnant outside wedlock and were subsequently denied entry onto the premises by mission security. As a result they were unable to reach their work place. They tried to get the plant manager to intervene but he refused. The court found that preventing them from working not only amounted to a dismissal but to an "automatically" unfair one, entitling them to either reinstatement (with backpay) or double the normal maximum compensation level of 12 months' remuneration. The court noted further that an employer may not abdicate its responsibility of protecting the jobs of its single women employees when they fall pregnant and hide behind the code of conduct of the mission. It had an obligation to protect them irrespective of their marital status and had to make the necessary arrangements with its landlord to protect its pregnant employees, irrespective of their marital status.

Swart v Greenmachine Horticultural Services (A division of Sterikleen (Pty) Ltd) involved a situation where the employee failed to disclose the fact that she was pregnant at the time of her appointment. She was eventually dismissed for insubordination, poor performance, and "omission of critical information at time of application of employment regarding pregnancy". The employee in question, Ms Swart, had failed to inform the employer at the time of her appointment that she might be pregnant. After this became known she was subjected to harassment by her manager, ostensibly because of a breakdown of trust and inability by the employee to cope with her job. Despite the employer's denials about a link between the employee's dismissal and her pregnancy, the court found that the link was clear and that her dismissal therefore was automatically unfair. The court added:

It is trite that a pregnant employee has no legal obligation to disclose her pregnancy other than as required for purposes of the Basic Conditions of Employment Act [i.e., for maternity leave



purposes]. This obligation extends to both an actual or planned pregnancy. The employee is the arbiter, in consultation with her doctor, of when it would be necessary for her to commence maternity leave and her health and that of her baby is the primary consideration in this regard. Although the timing of her leave may in certain instances be subject to operational requirements, this is not an issue as long as she exercises her choice in this regard and does not do so at the expense of her health. The employer is not required by law to consent to maternity leave – every female employee has a statutory entitlement of four months unpaid leave under the BCEA. Maternity leave, like annual leave, is a legal right not a privilege.

De Beer v SA Export Connection CC t/a Global Paws provides a good illustration of how ignorant employers could be about their obligations towards pregnant employees. Ms De Beer was not only denied her full four month maternity leave (being given one month instead) but also dismissed for not returning to work within the period provided by the employer (her twins suffered from colic) and, the court found, possibly as a mark of disapproval for having fallen pregnant outside wedlock.

Based on this and similar cases, employers will act contrary to the law if they take disciplinary or other adverse action against employees for being pregnant or for not disclosing their pregnant status. Ample, asking a female applicant if she's pregnant is not permissible. In fact, the case law seems to suggest that she would be quite entitled to refuse the question or even lie about her status. The only time when this kind of question would be permissible is if the employer can draw a genuine link between the nature of the job and the employee's pregnancy, for example, if the conditions of work are potentially harmful to the foetus or mother.

May an employer initiate disciplinary or retrenchment action against an employee during maternity leave? Provided that the employer has genuine reasons for doing so, there is nothing in law that prevents an employer from taking the required action. Of course, it will have to allow the employee an opportunity to state her case (in writing, or perhaps even telephonically). The employer should consider holding back on further action until the employee's return, but if it can demonstrate that time is of the essence, there should be no problem in continuing with any processes. There is also nothing in law that prevents the employer from terminating the employee's services (for good reason and after procedural compliance) before the end of her maternity leave. The employee might allege that her dismissal is related to her pregnancy. It will be for the employer to prove that the real reason is not pregnancy but a genuine disciplinary, performance or operational requirement.

