

Recent Human Rights Tribunal of Ontario Decision Recognizes Miscarriage as a "Disability": What does this mean for Employers?

May 02, 2016

In its recently released interim decision, *Mou v. MHPM Project Leaders*, 2016 HRTO 327, the Human Rights Tribunal of Ontario considered whether a woman's miscarriage constituted a "disability" within the meaning of the Ontario Human Rights Code ("Code").

Ms. Mou was an employee of MHPM Project Leaders. In 2013, she had a difficult year, experiencing both a slip and fall and a miscarriage, both of which caused her to have to take time off of work. As a result, she did not meet her 1,800 hour annual target and in both her interim and annual performance evaluations for 2013, Ms. Mou's supervisor specifically identified a need for her to improve on her ability to meet scheduled delivery objectives. Her employment was ultimately terminated in February 2014.

Ms. Mou commenced a human rights application alleging discrimination on the basis of disability. She alleged that her absences from work – caused by the slip and fall and her miscarriage – were factors in her employer's decision to terminate her employment. The employer brought a preliminary request to have Ms. Mou's application dismissed on the basis that both the slip and fall injury and her miscarriage did not constitute disabilities pursuant to the Code. The employer argued that in order for an injury or illness to constitute a disability, there must be an aspect of permanence and persistence to the condition. The employer further argued that the health issues experienced by Ms. Mou in 2013 were temporary in nature and she fully recovered from them. As such, they did not affect her participation in the workplace or in society.

In her decision, which ultimately found that a miscarriage is a "disability" within the meaning of the Code, Vice Chair Jennifer Scott reviewed the definition of "disability", noting that section 10(3) of the Code provides that a disability does not have to be permanent. While the Tribunal has consistently held that commonplace, temporary illnesses such as a cold or the flu are not disabilities because this would have the effect of trivializing the Code's protections, miscarriage is not a common ailment and it certainly is not transitory. Vice Chair Scott further relied on Ms. Mou's testimony that she continued to experience significant emotional distress from the miscarriage even to this day.

It is important to note that this is only an interim decision of the Tribunal and it has not yet been decided whether the employer MHPM Project Leaders violated the Code when it dismissed Ms. Mou. However, the decision makes it clear that if Ms. Mou's absences from work, which were caused by her miscarriage, were a factor in MHPM's decision to terminate her, even though the termination came approximately eight months following the absences, then this would breach the Code.

For employers, this decision will serve as confirmation that, if made aware that an employee is suffering from either physical or emotional complications arising from a miscarriage, this will trigger a duty to accommodate the employee's issues to the point of undue hardship and will require the employer not to discriminate against the employee on the basis of such issues. In most instances, accommodation will be in the form of providing time off work to heal or grieve. Certainly any adverse decisions that may be linked to the miscarriage or time off due to a miscarriage would constitute a violation of the Code.

By

[Naomi Calla](#)

Expertise

[Labour & Employment](#)

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2024 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.