

# Dismissal of pregnant employee and employer's liability

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Dismissal of a pregnant employee is almost always a highly sensitive matter. Not handling it properly may open employers to civil as well as criminal claims for unlawful dismissal. While an employer is not absolutely prohibited from terminating the employment of a pregnant employee, the employer must carefully observe the statutory requirements and be aware of the consequences of unlawful dismissal.

## Dismissal of pregnant employees

### Is an employer allowed to dismiss a pregnant employee?

Subject to the exceptions of summary dismissal and probationary employment, it is an offence for an employer to dismiss a pregnant employee. By virtue of [section 15\(1\)](#) of the Employment Ordinance (Cap 57) (EO), the communication of notice of pregnancy by an employee to her employer will generally operate to protect the pregnant employee's employment from being terminated by her employer whether by notice or payment in lieu of notice. Such protection will last from the date on which she is confirmed pregnant by a medical certificate to the date on which she is due to return to work upon the expiry of her maternity leave.

There are two conditions in which a pregnant employee has to fulfil in order to enjoy the protection under [EO, s 15\(1\)](#):

- the employee must be employed under a continuous contract
- she has served a notice of pregnancy to the employer

#### Condition 1: Continuous contract of employment

An employee who has been employed continuously by the same employer for four weeks or more, with at least 18 hours worked in each week is regarded as being employed under a continuous contract. The contract can be made orally or in writing.

#### Condition 2: Notice of pregnancy

There is no prescribed form. Notice of pregnancy can be given orally or in writing, although written notice is always preferred in case where there is any dispute between the employer and the employee. A pregnant employee will usually present a medical certificate to her employer confirming her pregnancy, which shall be sufficient for the purpose of triggering the protection under [EO, s 15\(1\)](#).

If an employer dismisses a pregnant employee before she has served a notice of pregnancy, the employee is entitled to serve the notice immediately after being informed of her dismissal. Under such circumstances, the employer will have to withdraw the dismissal or the notice of dismissal.

# Circumstances where a pregnant employee may be lawfully dismissed

There are two exceptions to the protection under [EO, s 15\(1\)](#) that allow an employer to lawfully terminate a pregnant employee's employment contract.

## Exception 1: Summary dismissal

Termination of a pregnant employee's employment is lawful where the employee is summarily dismissed due to her serious misconduct pursuant to [EO, s 9](#). An employer may dismiss a pregnant employee without notice or payment in lieu if she:

- wilfully disobeys a lawful and reasonable order
- misconducts herself, such conduct being inconsistent with the due and faithful discharge of her duties
- is guilty of fraud or dishonesty, or
- is habitually neglectful in her duties

An employer may also summarily dismiss a pregnant employee on any other ground on which the employer would be entitled to terminate the contract without notice at common law. Employers should bear in mind that they have the burden to prove on the balance of probabilities that there is a valid reason for summary dismissal.

## Exception 2: Probationary employment

If the pregnant employee is on probation, dismissal for reasons other than pregnancy during the probation period is possible if the probation period does not exceed 12 weeks. For a probation period longer than 12 weeks, an employer may lawfully terminate the employment during the first 12 weeks of probation only.

# What are the consequences of unlawful dismissal of a pregnant employee?

An employer may attract both civil and criminal liabilities if he or she unlawfully dismisses a pregnant employee.

By virtue of [EO, s 15\(1B\)](#), an employer who terminates the employment of a pregnant employee shall be taken to have terminated the employment not in accordance with [EO, s 9](#), unless:

- the contrary is proved, or
- in the case of criminal proceedings, the employer proves that:
  - he or she purported to terminate the contract in accordance with [EO, s 9](#)
  - at the time of the termination of the employment, he or she reasonably believed he or she had a ground to do so

## Civil liabilities

If a pregnant employee's employment is terminated unlawfully, the employer is required to pay the following sums of money to the dismissed pregnant employee within seven days after the day of termination:

- payment in lieu of notice
- a further sum equivalent to one month's wages earned by the employee (during the period of 12 months immediately before the date of termination as compensation), and
- 10 weeks' maternity leave pay, if, but for the dismissal, she would have been entitled to such payment

The employee may also claim remedies or compensations from her employer if she is dismissed other than for a valid reason as specified in the EO.

## Criminal liabilities

It is a criminal offence for an employer to unlawfully dismiss a pregnant employee. The employer is liable to prosecution and, upon conviction, to a fine of HK\$100,000. Such offence is a strict liability offence, which means that it may be committed without any requisite knowledge on the part of an employer that an offence has been committed.

Any director or officer concerned in the management of the company who has consented to or connives the unlawful dismissal of the pregnant employee may be personally liable.

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Michael heads ONC Lawyers' employment practice and has acted for a wide range of clients, from local and international corporations to individual employers and senior employees. Michael regularly handles contentious and non-contentious employment matters, covering contract reviews, termination disputes, injunctive relief, discrimination and harassment claims, data privacy matters, as well as advice on matters relating to team moves, remuneration packages and employee incentive schemes. He has recently advised and successfully defended a statutory body against a highly litigious unreasonable dismissal claim brought by a former employee at the Labour Tribunal and the subsequent appeal at the Court of First Instance, and successfully applied for the dismissal of the former employee's application for leave to appeal to the Court of Appeal. He is a frequent author of employment articles in industry publications and presenter to employers, business groups and human resource professionals.

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