

WHAT'S NEW at RUBIN THOMLINSON LLP

Chris Thomlinson spoke at the Western Canada Business Forum on Tuesday April 1 in Kananaskis, Alberta. The Forum was hosted by the International Council of Shopping Centers'. Christine spoke about employment law for times of economic uncertainty.

Chris was also featured in the March 21—April 3 edition of *Women's Post* in an article called "Working to Improve the Workplace".

David Whitten spoke at Miller Dallas on Thursday April 3 about executive employment contracts.

Janice Rubin was quoted in the *Globe and Mail* on Thursday April 17 about a recent wrongful dismissal case involving just cause.

Janice was also quoted in the *New Brunswick Telegraph-Journal* on Saturday April 26. Janice commented on what employers are doing to retain and attract older workers.

A recent case of the Ontario Court of Appeal is a good example of how carefully courts consider the overall context of a termination to determine whether an employee is entitled to bad faith damages. As this case shows, these damages are not automatic, and an employer may have an acceptable explanation for its conduct even when the employee is vulnerable.

Terminating an Employee on Sick Leave Does not Automatically Lead to Bad Faith Damages

Ms. Mulvihill was employed by the City of Ottawa. Ms. Mulvihill received an email from a co-worker in which the co-worker used inappropriate language.

In response, Ms. Mulvihill filed an internal harassment complaint. The complaint was investigated and the co-worker was reprimanded for the use of inappropriate language. However Ms. Mulvihill refused to return to work, demanding a transfer, and provided a sick note. She admitted that she was home because of her son's needs, but also stated that she would not return to work until she was transferred.

Ms. Mulvihill sought a further investigation against the co-worker which was completed and dismissed. Ms. Mulvihill accused the investigator of bias, suggested her co-worker was incompetent and refused to return to work. The City terminated her for just cause on the grounds of insubordination, even though she was still on sick leave.

Ms. Mulvihill commenced a wrongful dismissal action. Just prior to trial, the City withdrew its just cause

defence. At trial Ms. Mulvihill was awarded 4.5 months of salary as well as bad faith damages of an additional 5.5 months. The bad faith damages were for the "unwarranted cause allegation" and for terminating Ms. Mulvihill while she was on sick leave.

The City appealed the decision and was successful in having the award for bad faith set aside. The Court of Appeal found that the City, in terminating for cause, had "a reasonable belief" that Ms. Mulvihill's actions were insubordinate. It was held that where cause is alleged based on a "reasonable belief", bad faith damages are not appropriate.

Secondly, the Court held that the mere fact that Ms. Mulvihill was on sick leave at the time of termination did not necessarily mean the dismissal was conducted in an unfair or egregious manner. It was held that there must be other evidence of bad faith, unfair dealing or "playing hardball", to justify a bad faith award. The Court reviewed the facts of the case and found that Ms. Mulvihill had always been accommodated in the past when she

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This alert is prepared as a service for our clients and other persons dealing with employment issues. It is not intended to be a complete statement of the law or an opinion on any subject. Although we endeavour to ensure its accuracy, no one should act upon it without a thorough examination of the law after the facts of a specific situation are considered, and without seeking the advice of legal counsel. No part of this publication may be reproduced without prior written permission of Ruben Thomlinson LLP. This has been sent to you courtesy of Ruben Thomlinson LLP.

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needed accommodation with respect to her son’s disability. Considering the entirety of the circumstances, the Court concluded that there was no evidence that Ms. Mulvihill was terminated because of her sick leave or as a reprisal for filing a harassment complaint. As a result, the award of 5.5 months of damages for bad faith was set aside.

What Does This Mean for Employers?

Terminating an employee on sick leave may not be bad faith

Simply because an employee is on sick leave when they are terminated does not automatically entitle the employee to bad faith damages.

The Court will assess the decision to terminate as well as all the facts surrounding the dismissal. If the decision to terminate was in any way related to a disability or the request for accommodation, bad faith damages may be ordered. If, on the other hand, the employer acted

reasonably, bad faith damages may not be awarded.

Employers should seek legal advice prior to terminating an employee on sick leave, as the onus is on the employer to establish that it was not inappropriate to do so. These can be very challenging situations and it is crucial that employers not take any steps that could create legal liability, particularly because it is difficult to quantify in a case like this.

A failed allegation of just cause may not be bad faith damages

In the decision, the Court held that where cause is alleged based on a “reasonable belief”, it is not appropriate to award damages for bad faith. However, whether a decision to terminate for just cause is made with a “reasonable belief” that the discipline was appropriate is a question of fact left to the trial judge. As such, employers should remain cautious when alleging that the employee’s conduct was sufficient to justify cause. ●

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UPCOMING EVENTS

May 20

David Whitten and James Heaney will be speaking at the Human Resources Association of Ontario on Tuesday May 20 on managing employee terminations.

May 29 & 30

The second session of **Conducting Internal Workplace Investigations** will take place on May 29 and 30. This session is full, however we are accepting registrations for our fall session, which is being held on September 23 and 24. If you would like to attend, please contact us at (416) 847-1814 or contact@rt-law.ca to register.

June 9

James Heaney will be speaking at the 4th Annual Learning Symposium that is being hosted by CuSource on Monday June 9. James will be discussing workplace accommodation and just cause terminations.

June 12

Chris Thomlinson will be speaking at the Law Society’s annual “Six-Minute Employment Lawyer” program on Thursday June 12. Chris will be speaking about recent updates to just cause terminations.

June 11

David Whitten will be one of four panelists discussing employment law litigation under Bill 107 at the Ontario Bar Association—Law Society of Upper Canada’s joint program called “Representing Clients in Ontario’s New Human Rights System” on Wednesday June 11.

June 12

David Whitten will be speaking at the 26th Annual Conference and Trade Show that is being hosted by the Canadian Payroll Association on Thursday June 12. David will be discussing the differences between employees and independent contractors.

We work with employer clients to provide optimal legal solutions to their challenging workplace issues. If you would like to know more about our practice, please do not hesitate to contact us at (416) 847-1814 or via e-mail at contact@rt-law.ca.

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