

EMPLOYERS' ALERT

August, 2006

Recent Case Highlights Need for Employers To Be Clear on Commission Agreements

WHAT'S NEW AT RUBIN THOMLINSON LLP

◆ **"Help! I've got to Fire Someone!" – Sept. 14, 2006**

Learn how to complete this unpleasant but necessary task successfully at Rubin Thomlinson LLP's training workshop for employers, led by legal experts Janice Rubin and Christine M. Thomlinson. Register now – spaces are going fast!

◆ **"Respect at Work: The Business Case"**

Join us on the morning of **October 11th** for a discussion on how an effective "Respect at Work" policy can reduce costly legal problems. Stay tuned for invitations!

◆ Watch for **"The Guide to Workplace Investigations"**, written by our very own Janice Rubin and Christine M. Thomlinson, to be published shortly.

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

A recent case from British Columbia highlights the importance of clear commission agreements, and the liability employers may face if these agreements are poorly drafted.

In *Hill v. Johnson Controls LP*, a dispute arose between an employee and the company as to how the commission agreement should be interpreted following the employee's termination. When Mr. Hill was terminated, the Company took the position that he was not entitled to any outstanding commission. It relied on one provision in the agreement which said that commission was only paid once a contract for new work was signed. The Company claimed that there were no signed contracts which predated the termination. The employee, on the other hand, relied on another (seemingly inconsistent) provision in the agreement which said he would be paid commissions once a contract was "booked".

Adding insult to injury from the employee's point of view was that the employer planned his termination to take place on March 28th, three days before the end of the month when commissions were normally paid. The employer then relied on a provision in the commission agreement that said that an employee had to be employed at the time of payment to receive a commission payment, and refused the employee almost \$14,000 which he had clearly earned.

The central issue of the case was how to interpret an agreement that the trial judge described as "largely incomprehensible". Using the established legal principle that ambiguous agreements are interpreted against the interest of the party who drafts them, the judge concluded that the employee should receive outstanding commissions. Moreover, the judge determined that the timing of the termination was inconsiderate, given the negative impact it had on commissions the employee had clearly earned. Mr. Hill therefore received a small increase in damages for bad faith, although the trial judge did not specify the precise amount.

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Upcoming workshops offered by Rubin Thomlinson LLP:

- "Help! I've Got to Fire Someone!"
NEW – September 14, 2006
- "Respect at Work: Human Rights & Personal Harassment in the Workplace" – November 1, 2006
- "How to Conduct a Workplace Investigation" – December 4 & 5, 2006
- "Managing the Disabled Employee" – January 17, 2007

Please contact our office at 416.847.1814 or contact@rt-law.ca for additional information on any of the above workshops.

What this means for employers:

- **Use clear language in your agreement**

Your agreement should not only be clear and unambiguous to you, but also to someone else who knows nothing about your business. Make sure that there are clear definitions for all key terms, such as "clients", "prospective clients", and "revenue" so that everyone is on the same page.

- **Double check for inconsistent terms**

As the drafter of the contract, ambiguity is not your friend, and the easiest way for a judge to conclude that a contract is "ambiguous" is when contractual terms are inconsistent with one another. If a commission or bonus payment is due when business is booked, or when revenue is received for a piece of business, make sure this is what the contract says throughout. If you are drafting a contract by yourself, make sure someone else reviews it, ideally legal counsel.

- **Do not take unreasonable positions at termination**

In this case, the employer acknowledged that the employee had earned commissions up to the date of his termination, but relied on a provision that said that he had to be employed at the time of payment – i.e. the end of the month – to be eligible. Coming as it did three days before the end of the month, reliance on this provision looked self-serving and unreasonable, and in the end, the employer was punished for it by having to pay additional damages.

- **Pay undisputed amounts**

You may disagree with the amount of notice to which a terminated employee is entitled, but it does not help your position going into court if you have not paid money to which the employee is clearly entitled. This applies not only to outstanding commission payments, but vacation pay, wages, and statutory termination and severance pay.

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. No part of this publication may be reproduced without prior written permission of Rubin Thomlinson LLP.

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