

EMPLOYERS' ALERT

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WHAT'S NEW at RUBIN THOMLINSON LLP

WELCOME SHARAF SULTAN!

In a world becoming more and more of a global marketplace, Sharaf offers a unique perspective. He has valuable international experience with two prestigious organizations, both based in Geneva: The International Labour Organization and the Aga Khan Foundation.



Sharaf had his first international experience in the middle of studying Commerce at the University of Toronto. He spent a year abroad, studying at the American University of Cairo, where he learned firsthand that the world of business now transcended local, regional and national boundaries.

He returned to Canada to complete his studies, and then headed directly to Geneva with his Masters of Development Economics (MDE) in hand. There he worked with the Aga Khan Scholarship Program, conducting research for various Aga Khan Foundation initiatives.

While based in Geneva, he was recruited as a consultant to the International Labour Organization, spending two years involved in projects such as the development of an international labour standards manual and a study on forced labour. He learned about the many different labour standards, policies, codes and systems used in different countries around the world.

It was this experience that ignited Sharaf's interest in employment law. Economics had taught him that there are two components essential to running an efficient economy: labour and capital. He decided to focus on labour, specifically on work-related issues, and made a deliberate shift from policy to advocacy. He returned to Canada to study law at the University of Ottawa.

Sharaf articulated with a leading employment law firm in Ottawa, where he was involved in terminations, arbitrations, mediations, human rights issues and collective bargaining negotiations. He was called to the Bar in June 2008.

As a valued member of the Rubin Thomlinson team, Sharaf supports both employee and employer clients with legal counsel and research on a wide variety of employment law issues.

You can reach Sharaf at Sharaf@rt-law.ca or (416) 847-1814 x111.

When is an employee's effort to find another job enough and when does the employee fail to mitigate his or her damages? Two recent cases shed light on this issue.

An employee's duty to mitigate: How much effort is required?

In *Link v. Venture Steel Inc.* [2008] O.J. No. 4849 an employee, Mr. William Link, sued his former employer, Venture Steel Inc. ("Venture"), for wrongful dismissal. Following his dismissal, Mr. Link took no steps to look for another position for a full year. He stated that he did not look for a job because he was afraid of violating a non-competition clause and thereby jeopardizing a potential entitlement to millions of dollars.

The Court, while recognizing that Mr. Link had a genuine concern about violating his contract, believed that employment alternatives existed outside the steel industry which would not have violated his contract. Nevertheless, the Court ruled in favour of Mr. Link because the employer did not adequately demonstrate that he did not do enough to find alternate employment. The Court made it clear that the obligation of establishing that an employee did not dispose of their obligation to mitigate damages lies squarely with the employer.

In this case, Venture failed to lead any evidence of the availability of comparable employment within or outside of the steel industry.

By way of comparison, *Hart v. EM Plastic & Electric Products Ltd.*

(c.o.b. EM Plastics) [2008] B.C.J. No. 316 involved a 25-year employee who had worked with a plastics company. He was dismissed without notice or explanation from his job as a customer service manager. The employer offered severance payment equivalent to 8 ½ months' base salary which included 8 weeks notice required by the provincial *Employment Standards Act*. The employee declined the offer and initiated a wrongful dismissal action against the employer. Following his termination he was offered alternate employment with other companies but turned them down to pursue a career in real estate.

Although the Court found the appropriate notice period to be 15 months, the quantum of damages was reduced because the employee was viewed not to have carried out his duty to mitigate damages. The Court consequently declined to award him any compensation beyond the statutory minimum that he had already received. It noted that:

- The employee had rejected two full time jobs directly comparable to his old job to pursue a new career in a completely unrelated field.
- The real estate business is risky and that the employee was likely to fail without adequate experience or contacts.

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"...the employer did not adequately demonstrate that he did not do enough to find alternate employment."

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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What does this mean for employers?

Be prepared to show that there were jobs that the terminated employee could have taken

The *Link* decision shows that it is not enough for an employer to show that the employee's job search was lackluster. Rather, the employer must show that there was a job that the terminated employee could have taken. Be prepared to lead evidence from your industry as to specific jobs that were available and advertised for

which the employee was qualified if you wish to go down the failure to mitigate route.

Keep employees accountable in a salary continuation scenario

As the Hart case shows, there are some circumstances that do trigger a failure to mitigate, such as a failure to accept a comparable job. When placing a terminated employee on salary continuation, consider placing ongoing obligations to report on job search efforts, and whether offers of re-employment have been received. ●

From Our Desk

We would like to introduce a new column to our Employers' Alert called "From Our Desk". This section will highlight a challenging issue that one of our clients have faced, and how we worked with them to find an optimal solution. We hope that these examples will help you think creatively on how to solve some of the more pressing issues in your day to day operations.

Long service and highly employable

We recently faced a situation which involved the termination of an employee with a long period of service. As a result, he was entitled to a significant period of notice. The employer believed that the employee was highly employable and would likely receive an offer of employment within a relatively short period of time. We suggested that the employer provide the minimum amount of notice required under the *Employment Standards Act* with a willingness to discuss further notice should the individual not receive employment within that time period. This strategy proved extremely effective since the former employee, as predicted, received a job offer in short order and the employer did not have to incur any further costs.

UPCOMING EVENTS

February 3

Janice Rubin will be speaking at the OBA's Corporate Counsel session entitled, "Love and Marriage? An Employment Law Refresher". Janice will be discussing employee privacy and what medical information employers are able to access concerning their employees.

February 11 and 12 - SPACES STILL AVAILABLE

The sixth session of **Conducting Internal Workplace Investigations** will take place on February 11 and 12. We are still accepting registrations for this session. If you are interested in attending please contact us at (416) 847-1814 or seminars@rt-law.ca to register.

April 2

James Heeney will be speaking at the Canadian Institute's 9th Annual "Winning HR practices of the Best Employers in Canada" on April 2. James will be discussing best practices for accommodating employees.

Webinars Now Available!

The HRPAs has a collection of webinars that are now available online. We have assisted the HRPAs in producing several of these webinars for human resources professionals. They include, "When Overworked Means Overtime: Staying Out of Legal Trouble" and "Personal Harassment: What it is and How Do You Respond". Feel free to check them out by visiting the HRPAs website at www.hrpa.ca.

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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