

# EMPLOYERS' ALERT

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## WHAT'S NEW at RUBIN THOMLINSON LLP

We are thrilled to announce that we have been nominated for the 2008 RBC Canadian Women Entrepreneur Awards. This national award recognizes the business success and achievements of Canadian women entrepreneurs, including their contributions to the Canadian and global economies and to their communities. In our sixth year of business, we are deeply honoured to be included in the company of such a select group of successful Canadian women entrepreneurs. Winners will be announced at the gala ceremony this December.

**James Heeney** spoke at the 4th Annual Learning Symposium that was hosted by CuSource on Monday June 9. James discussed workplace accommodation and just cause terminations.

On Tuesday June 10, **Rubin Thomlinson LLP** hosted another breakfast seminar entitled "When Overworked Means Overtime: Staying Out of Legal Trouble". Chris Thomlinson was the speaker for the morning.

**David Whitten** was one of four panelists that discussed 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.

David also spoke at the 26th Annual Conference and Trade Show that was hosted by the Canadian Payroll Association on Thursday June 12. David discussed the differences between employees and independent contractors.

**Chris Thomlinson** spoke at the Law Society's annual "Six-Minute Employment Lawyer" program on Thursday June 12. Chris spoke about recent updates to just cause terminations.

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.

When we think of employment related litigation, we immediately imagine an employee who has taken action against his or her employer. However, there are cases that demonstrate that employers can also use litigation to advance their interests. The recent decision in *Wellington v. Health 2000*, successfully argued by James Heeney of our firm, provides a perfect example of this. Here, the employer obtained interim relief from the Court, on a matter of significant financial importance, well before the matter went to trial.

## Employers Can Use the Courts to Protect Their Rights Too

Wellington was hired by Health 2000 on January 3, 2005, as an independent contractor earning \$39,600.00/year. While Health 2000 was located in Ontario, Wellington's work was to be performed in Jamaica. Health 2000 did not have an office in Jamaica.

In January 2006, Health 2000 provided Wellington with an interest-free loan in the amount of \$24,760.00 USD to assist him in paying off his car loan. Health 2000 agreed to provide this loan in exchange for the plaintiff's agreement that he repay it at the rate of \$500.00 USD per month. The loan agreement was in writing.

In December 2006, Wellington's contract was terminated by Health 2000 with six weeks notice, despite the contract only requiring thirty days notice.

In response, Wellington commenced a claim for wrongful dismissal arguing he was an employee rather than an independent contractor. Despite only having worked with Health 2000 for two years, Wellington sought damages in

excess of \$100,000.00. This was equal to more than two and a half years of salary. Further, Wellington also stopped making payments on the loan.

As a result, Health 2000 counter-claimed for the amount outstanding on the loan, namely \$21,960.00 USD.

Health 2000 immediately moved for summary judgment on the loan rather than wait for the trial. Health 2000 also asked the Court to order that Wellington post money as security (a court-administered trust) in the event that costs were ordered against him at trial. The company argued that since Wellington resided outside Ontario (he lived in Jamaica), if Health 2000 was successful at trial, it would be difficult to enforce any cost award ordered against Wellington, whose assets were all located in Jamaica.

Health 2000 won its motion for summary judgment in its entirety. The Court ordered that the company was entitled to the outstanding money on the loan immediately. In addition, the Court ordered that Wellington post security for costs in the amount of \$10,000.00. *Continued*

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## Employer's Can Use the Courts to Protect Their Rights Too

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The Court was persuaded by the facts that Wellington was a resident of Jamaica and that it was possible that Wellington's claim was in the wrong jurisdiction given the amount he was seeking.

### What does this mean for employers?

#### Courts aren't just for employees

Through the motion, Health 2000 was able to secure immediate repayment of the loan provided to Wellington. Furthermore, Wellington was required to post security of \$10,000.00 in case he was unsuccessful at trial and ordered to pay costs to Health 2000. If Wellington fails to comply with any of the terms of the order, he will be precluded from moving forward with his claim for wrongful dismissal.

#### Consider interim litigation steps when they are strategic

While we don't believe that litigation is the optimal solution for every employment related problem, here, litigation, particularly the bringing of an interim motion, was the most strategic option for the client. If the

company had waited until trial, it might have won its case, but it might not have had recourse to costs, and there may have been little prospect of recovering the outstanding loan. With its win of the motion, the employer has now protected its financial interests, and faces the prospect of going to trial in a much more secure position.

#### Put your agreements in writing

Employers often enter into unique arrangements with their employees. While contracts do not have to be in writing to be enforceable, when litigation occurs, parties often dispute the terms.

In the above case, the fact that the parties entered into a loan agreement in writing demonstrated to the Court that not only was this a separate issue from Wellington's claim for wrongful dismissal, but also clearly outlined the terms of repayment. The written agreement was critical in having the Court order the payment of the loan immediately, rather than to wait for the trial, which saved a significant amount of time and legal fees in the collection of this debt. ●

## UPCOMING EVENTS

### Look for our Termination Survey—Coming July 2008

With speculation that the economy is taking a turn for the worse, and that we are heading into a recession, we are curious to know from you, what your company's plans are regarding its workforce. Will your company be terminating employees before year end? Is there a freeze on hiring? Will bonuses be reduced or even paid at all? To find out the answer to these questions, along with a number of others, we will be posting an online survey in mid July, to which we will ask members of the Employers' Alert audience to respond. The survey can be answered on a confidential basis, and results will be discussed at our next firm breakfast, "Termination for Tough Times" on September 11th. Look for notification of this survey in the next few weeks.

#### July 9

Janice Rubin will be speaking on July 9th at the webinar series, "Wednesday's with WXN". This series is being hosted by the Women's Executive Network. Janice will be discussing toxic workplaces and bullying in the workplace. This webinar is one of many webinars held on Wednesday's.

#### September 11

Our next breakfast seminar will take place on September 11. The topic for the morning will be "Termination for Tough Times". If you would like to attend, please contact us at (416) 847-1814 or [breakfast@rt-law.ca](mailto:breakfast@rt-law.ca) to register.

#### September 15

Janice Rubin will be speaking at the Credit Union Managers' Association's Silver Anniversary Conference on September 15. She will be discussing what you need to know to manage your workplace effectively and legally.

#### September 23 & 24

The third session of **Conducting Internal Workplace Investigations** will take place on September 23 & 24. If you would like to attend, please contact us at (416) 847-1814 or [contact@rt-law.ca](mailto:contact@rt-law.ca) to register. There are only a handful of spots left!

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](mailto:contact@rt-law.ca).

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