

EMPLOYERS' ALERT

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WHAT'S NEW at RUBIN THOMLINSON LLP

Chris Thomlinson spoke to the Citizenship and Immigration/Labour and Employment Law section at Ontario Bar Association on November 12. The session covered employment and taxation law issues for immigration lawyers.

David Whitten and James Heeney spoke at the HRPAs on November 13. David and James discussed how to manage terminations effectively.

Chris spoke at the Canadian Institute's "Conducting Internal Workplace Investigations" course on November 24 and 25. Chris discussed harassment, bullying and other employee misconduct.

Chris also spoke at the Law Society's "Employment Law for the General Practitioner" conference on November 25. Chris spoke about the enforceability of restrictive covenants.

Janice Rubin appeared on the Gary Doyle Show, 570 News on December 2. Janice discussed terminations with radio listeners.

Janice was also a guest on Ontario Today on CBC Radio on December 3. Janice spoke about terminations.

Our fourth session of **Conducting Internal Workplace Investigations** was held on December 3 and 4. The session was a success and participants were impressed with the knowledge and experience of the trainers and the relevance of the content to real life scenarios.

James spoke at Federated Press' "Duty to Accommodate" conference on December 4. James spoke about accommodating the older worker.

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 Rubin Thomlinson LLP. This has been sent to you courtesy of Rubin Thomlinson LLP.

As many of you know, various amendments to the *Human Rights Code* took effect July 1, 2008. These amendments included changing the nature of the way complaints are handled.

Changes to the Human Rights Code – Has It Really Changed?

Formerly, human rights complaints were filed with the Commission, and were investigated. Then a recommendation was made as to whether the complaint should proceed to the Tribunal. As of this past July, applications are made directly to the Tribunal, and the investigation process has been eliminated entirely. In addition, various caps on damages have been removed, and it now may be easier to include a human rights breach in a civil action.

It has now been six months since this legislative overhaul, and we thought that it would be helpful to take a look at what has really happened to the human rights system from a practical perspective. How have these changes affected the employers with whom we deal?

First, when an application is filed, the employer (respondent) is required to complete a new response form. It is on the Human Rights Tribunal's ("Tribunal") webpage. Previously, a respondent had some flexibility in how it fashioned its response. Now, the response form has a number of required questions which must be answered. One of the more interesting questions is whether the employer has a human rights policy and a complaint resolution policy and it requires these policies be attached to the response.

We have long been advocates for employers having these types of policies, as it gives them an opportunity

to solve human rights problems internally, in the hopes that the employer and the employee will not end up at the Tribunal. What is interesting here is that it is obvious that the existence of these policies are very significant to the Tribunal, and will likely play a central role in any defence an employer would want to mount. While not having a policy is not an admission that discrimination has occurred, employers who do not have a policy, or who have not updated their policy to make it consistent with applicable law, may be seen as not being committed to human rights by the Tribunal.

We have also been advocates of effective internal investigations. Again, it allows an employer to identify and solve the problem itself. In the new system, the Tribunal has placed a heavy emphasis on these investigations as well. In the response form, the employer is also asked to provide a copy of any internal investigation report that was completed if a complaint was made internally before the application was filed with the Tribunal. Given this disclosure requirement, employers need to be sure that their internal practices on how to manage, investigate and report on complaints are not only up to date, but also that managers are trained on how to deal with these situations. In addition, employers should be ensuring that their reports are documented in writing.

What about extensions for filing a response? Under the old system, employers could usually avoid filing a response for months, or even postpone the filing of a response until after mediation was

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attempted, in the hopes that the case would settle, and one would not be necessary. We have found that the Tribunal will grant extensions to file a response, but they are typically only for a couple weeks.

We have noticed that as was the intention when the changes to the Code were made, the process seems to be significantly quicker than under the previous model. For example, in August 2008, one of our clients received a human rights application from a former employee. A mediation date was set for November 2008, approximately 3 months after the application was filed.

In addition, the parties were advised that a hearing date would be set within 16 to 18 weeks of the mediation. This is dramatically faster than the previous model which may not have seen a hearing date for years after the complaint was started. At this point in time, at least until a backlog develops, it appears the parties will be before an adjudicator significantly faster.

Finally, settlement is being approached very differently. Mediations are now being conducted by adjudicators. This is different than under the old system when mediators were simply mediators. An adjudicator led mediation may ultimately be helpful, because they may be able to provide the parties with some insight into the legal pros and cons of their cases. This will be particularly helpful in frivolous cases brought by former employees of the employer

What Does This Mean for Employers?

- **Make Sure Your Policies and Training are Up to Date**

Given the requirements in the response form, outlined above, we think it prudent that human rights and complaint policies are in place and up to date, and training has been completed.

- **Conduct Good, Thorough, and Transparent Investigations and Record Them**

We think that solid investigations will play an increasingly important role in human rights adjudication. Given the need to disclose the results of your investigation, you should make sure that they are done within your organization once a complaint is received, and that there is a report recording what occurred, if anything, and how the matter was resolved internally.

- **The Process is Quicker – Be Ready**

Employers need to take immediate action as soon as they receive an application. They will be required to file a response within a very short time frame and may be required to include relevant supporting materials. Further, given that the entire process is substantially faster, employers may find themselves in hearings regarding matters within months of getting the application. As such, employers can no longer bank on the length of the process to give them time to prepare. ●

UPCOMING EVENTS

January 20 & 21

The fifth session of **Conducting Internal Workplace Investigations** will take place on January 20 and 21. We have 4 spots remaining. If you are interested in attending please contact us at (416) 847-1814 or seminars@rt-law.ca to register.

January 27

Chris Thomlinson will be speaking at the Canadian Institute's forum on the Duty to Accommodate on January 27. Chris will be providing legal updates in light of recent Supreme Court decisions.

January 29

Janice Rubin will be speaking at the Canadian Marketing Association's 2009 Business of Ideas Forum on January 29. She will be speaking about her involvement as Chair of the Canadian Women's Foundation's "Women Moving Women" campaign. To learn more about this campaign, please visit www.womenmovingwomen.ca.

January 30

The next **Rubin Thomlinson** breakfast seminar will be held on January 30. Janice Rubin will be the speaker for the morning and will be discussing 2008's top cases on Wallace damages, mitigation and accommodation. If you or a colleague are interested in attending, please contact us at (416) 847-1814 or breakfast@rt-law.ca to register.

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.