

EMPLOYERS' ALERT

October 2006

It's Not Always Three Strikes, You're Out: One Act of Inappropriate Conduct May Be Cause for Termination

Our employer clients often ask us:

- Can we terminate an employee with cause after only one act of misconduct?
- Can a culmination of different incidents provide just cause for termination?

A recent Ontario case suggests that the answer may be yes, depending on the circumstances.

In *Robertson v. Complex Services Inc.*, the Ontario Superior Court of Justice stipulated/clarified when misconduct would be considered "just cause" for termination, holding that one serious incident or a series of minor incidents can provide "just cause".

The employee concerned in the *Robertson* case was a table games supervisor at Casino Niagara. During a shift, the employee was seen blowing kisses, making vulgar comments, and making gestures simulating oral sex towards his male supervisor. This was done in an area where other employees and the public could hear him. Despite repeated requests by his supervisor to stop, the employee continued acting inappropriately. The employee was subsequently terminated by the employer for cause. The employer claimed it had just cause to terminate the employee based on this one incident of misconduct, or in the alternative, a culmination of incidents involving this employee.

The employee argued that his acts were done in a joking manner with a supervisor who had made similar jokes to the employee, and that neither the public nor other employees could see what occurred. A former employee testified on behalf of the employer that he had in fact overheard the comments made by the employee, and that they were loud enough for other employees and members of the public to hear.

The Court held that the employer had just cause to terminate the employee based solely on this one incident, as it was sufficient to "strike at the heart of the employment relationship". It found that "continuing the employment relationship was not reconcilable with this conduct".

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WHAT'S NEW AT RUBIN THOMLINSON LLP

Rubin Thomlinson LLP is very pleased to welcome **James D. Heeney, LL.B.**, as a new Associate in our firm.



The challenge of balancing employer rights with employee rights in the workplace is what drew James to practice employment law. He believes that optimal legal solutions derive from a consideration of both business realities and legal realities, and his counsel to clients responds to both.

James advises employers and employees on all areas of employment law, including employment contracts, wrongful dismissals, workplace policies, employment standards, and human rights in the workplace. He has experience in all phases of litigation.

James' academic background is exemplary. He won awards each year of his law studies, culminating in the Law Society of Upper Canada's prestigious Award of Excellence which recognizes the leading students in Ontario Law Schools. James earned his LL.B from Queen's University in 2003. He articulated with a national law firm, where he remained after being called to the Bar in Ontario in 2004.

At Ruben Thomlinson LLP, we work with employer clients and employee 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

Upcoming Events at Rubin Thomlinson LLP:

Two upcoming training sessions are designed to raise awareness of relevant employment law issues and trends, and strengthen participants' skill at applying this knowledge to their own workplaces:

- Respect at Work:: Human Rights and Personal Harassment in the Workplace", November 1, 2006
- "Managing the Disabled Employee", January 17, 2007

Watch for "The Human Resources Guide to Workplace Investigations", written by our very own Janice Rubin and Christine M. Thomlinson. Copies will be available shortly. To order, please contact Canada Law Book at 1-800-263-2037.

Please contact our office at 416.847.1814 or contact@rt-law.ca for additional information.

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

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The Court placed particular emphasis on the importance of great customer service to the Casino, demonstrated by its comprehensive rules and regulations about inappropriate conduct.

Even if this one incident was not sufficient to terminate the employee, the Court held that the combination of recent behaviour exhibited by the employee was sufficient to establish just cause. Prior to this incident, the employee had been disciplined for repeated lateness, improper etiquette and professionalism, and his overall performance.

What this means for employers:

One act of misconduct may be enough

- One act of misconduct, if serious enough, can be grounds for termination for cause, particularly where the conduct is in front of other employees and/or the public. However, remember the "proportionality" principle repeatedly referenced by the Courts: the punishment must suit the crime.

Always document negative employee conduct

- Even if one act of misconduct is insufficient to provide just cause for termination, continued acts of misconduct may be. When disciplining employees:
 - put it in writing;
 - describe in detail the inappropriate conduct
 - clearly stipulate the ramifications of continued inappropriate acts (i.e. from discipline through to termination).

This record may be useful to you if you are attempting to defend a "just cause termination" in the future.

Consider a policy on inappropriate behaviour

- Providing employees with a policy containing clear rules of behaviour, definitions of misconduct, and the absolute ramifications of misconduct, can help define the employment relationship for both parties. This will limit an employee's ability to claim that they were not aware that such conduct was inappropriate and/or that discipline could be imposed as a result.
- We recommend your policy includes specific examples of behaviour that will not be tolerated in the workplace, such as swearing, obscene language and gestures, shouting and name calling.