

WHAT'S NEW at RUBIN THOMLINSON LLP

We Are Finalists!

We are thrilled to announce that we have been selected as finalists 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 on December 9, 2008.

James Heeney spoke at the 8th Annual Advanced Forum on Employment Law, which was hosted by the Canadian Institute on October 15. James spoke about how to conduct terminations effectively.

Chris Thomlinson spoke at the Canadian Institute's 8th Annual Advanced Forum on Employment Law on October 17. Chris discussed managing violence, bullying and harassment in the workplace.

Chris also Co-Chaired the Annual HRPA HR Law Conference on October 22. Chris hosted a session entitled "Employment Law Updates".

Janice Rubin spoke at the Barrie and District HRPA Annual Conference on October 29. Janice spoke about conducting workplace investigations.

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.

With the holiday season fast upon us, we are receiving calls from clients regarding employees' request for days off that are not statutory holidays for religious observance. With this in mind, we thought it was important to provide answers to the most common questions.

Time Off During the Holiday Season: To Give or Not to Give

First, we are often asked whether employers are required to give employees days off for religious observance which are not statutory holidays. In most cases, the answer is YES.

Under the *Human Rights Code*, employers have a duty to accommodate employees' religious observances to the point of undue hardship. As such, unless the employer can establish that the request for accommodation would unduly burden the employer, it is likely that requests for days off for religious observance will have to be granted.

Second, employers often ask whether these days would have to be paid days off. While the answer to this question is generally NO, it depends on the terms of the employee's employment.

This issue was recently addressed in the decision of *Markovic & Ontario Human Rights Commission v. Autocom Manufacturing Limited*. In this case, the employee filed a complaint when he was not provided with paid time off for the Eastern Orthodox Christmas. Under the terms of the

employer's policy on applicable leaves, it gave the employee a number of options on how to structure the time off, including taking it as unpaid time or making up the time by working weekends or a statutory holiday.

The Human Rights Tribunal determined that the policy was NOT discriminatory. It was held that the duty to accommodate did not require the employee to be paid for the religious observances.

The decision that the employer's policy was not discriminatory was made with reliance on the Supreme Court of Canada decision in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* in which it was held

"[T]he obligation on the employer is to design its workplace standards in a way that recognizes differences in religion amongst its individual employees, and accommodates those differences. The task is to mesh its workplace rules with the needs of a diverse workforce, with the goal of enhancing participation and inclusion. In the case of religious observances, those goals can be met through the provision of options for scheduling changes that do not result in loss of pay."

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Time Off During the Holiday Season: To Give or Not to Give

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“...the employee was given a “menu” of options to have the time off...as a result, the employer had taken reasonable steps to accommodate the employee. ”

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One issue of particular focus in the *Markovic* decision was the fact that the employee was given a “menu” of options to have the time off, including options which allowed the time to be paid. As outlined, this included the option of making up the time after hours or by working on a statutory holiday. It was held that as a result, the employer had taken reasonable steps to accommodate the employee. Further, it was held that it was not discriminatory as all employees received the same number of paid days off.

Employers are not always able to justify their practice. In another decision relating to this issue, the employer’s policy provided employees with paid days off for “special circumstances”. The employer denied employees a request to take paid time off for religious observation, although paid time off had been given to other employees for different reasons (i.e., family emergencies).

The Supreme Court of Canada held that to deny an employee paid time off for religious observation, when paid time off was given to employees for other reasons, was discriminatory. In this regard, it was held that the terms of the employment relationship provided differential treatment in which the employer was selecting who could have paid time off based on their own assessment of whether the request was a “special circumstance”.

The situation was different than the facts in *Markovic* where the policy was applied equally among all employees, and thus, not discriminatory.

What does this mean for employers?

- Time off for religious observation is generally required unless undue hardship can be established.
- Generally, provided the employee is given options relating to the time off (i.e., work an alternative day), employers are not required to pay employees for the time off.
- Similar principles apply to requests for time off during the day to attend to religious observation, such as praying.
- In some circumstances, it might be held that the terms of the employee’s employment provide for paid time for religious observation. For example, it would be considered discriminatory to provide paid days off for religious observance outside of statutory holidays for one employee and not another. Additionally, if employees have traditionally been paid for time off for religious observation, it may be considered a term of their employment which cannot be altered by the employer. ●

UPCOMING EVENTS

November 12

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

November 13

David Whitten and James Heeney will be speaking at the HRPAA on November 13. David and James will be discussing how to manage terminations effectively.

November 24 – 25

Chris Thomlinson will be speaking at the Canadian Institute’s “Conducting Internal Workplace Investigations” course on November 24 and 25. Chris will be discussing harassment, bullying and other employee misconduct.

November 25

Chris Thomlinson will be speaking at the Law Society’s “Employment Law for the General Practitioner” conference on November 25. Chris will be speaking about the enforceability of restrictive covenants.

December 3 & 4

The fourth session of **Conducting Internal Workplace Investigations** will take place on December 3 and 4. This session is currently full, however if you would like to attend our next session on January 20 and 21 please contact us at (416) 847-1814 or contact@rt-law.ca to register.

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.