

## EMPLOYERS' ALERT

April 2007

### A Negative Performance Review made in Good Faith is NOT Constructive Dismissal!

*Ata-Ayi v. Pepsi Bottling Group (Canada) Co.*

In 2000, in a case called *Shah v. Xerox*, the Ontario Court of Appeal interpreted an employers' issuance of a performance review as a factor that led to the employee's constructive dismissal. As a result, employers became concerned that negative performance reviews could create liability for the company and that employees would claim constructive dismissal every time they received information critical of their performance at work.

While the risk of a constructive dismissal remains when a review is unsubstantiated or made in bad faith (as was the case in *Shah*), a recent Ontario case has affirmed that employers still have the right to provide negative performance reviews and institute discipline, provided the steps taken are made reasonably and in good faith.

In *Ata-Ayi v. Pepsi Bottling Group (Canada) Co.*, the plaintiff, Mr. Ata-Ayi, commenced a claim for constructive dismissal. Ata-Ayi had been employed by Pepsi for 24 years. The plaintiff had received satisfactory reviews, termed "on target", in all but 4 years of his career. Each time the plaintiff received "below target" reviews he was shocked and upset.

In 2004, he was given a "below target" review by a new supervisor and refused to sign it. He subsequently wrote to his superior requesting early retirement. He alleged that the work environment had been poisoned by racism and that his review was not indicative of his work performance over 24 years service. Pepsi refused to rescind the review, and the plaintiff left his employment, alleging constructive dismissal.

At trial, Mr. Justice Echlin dismissed the action in its entirety. He held that the plaintiff did not meet the onus of establishing that he was subjected to a poisoned work environment. The allegations advanced were held to be vague, unsubstantiated and without foundation.

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### WHAT'S NEW AT RUBIN THOMLINSON LLP

Rubin Thomlinson LLP is very pleased to welcome Kevin Robinson, LL.B, as a new Associate in our firm.



Kevin's interest in employment and labour law was first sparked by his economics professor's stories about arbitrating/adjudicating workplace issues. He became intrigued with the idea of managing the workplace in a way that would benefit the daily lives of both employers and employees. Kevin has spent the past 10 years pursuing that ideal.

Kevin articulated with and then joined the labour and employment department of a prominent Toronto law firm where he focused almost exclusively on litigation and advice involving labour and employment issues for employers, employees and trade unions. Kevin left the law firm to gain corporate experience and a different perspective by joining CBC as legal counsel, responsible for labour and employment issues.

Kevin earned his LL.B from Osgoode Hall Law School in 1997 and was called to the Bar of Ontario in 1999. He has a Bachelor of Arts (Economics) from York University and is currently pursuing his Master of Laws in Labour and Employment.

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).

### What's New at Rubin Thomlinson LLP

Janice Rubin and Christine Thomlinson each delivered lectures at The Law Society of Upper Canada's Special Lectures 2007. Christine discussed consideration in employment contracts, and presented her paper, "EMPLOYMENT CONTRACTS: Enhancing Enforceability Through Drafting and Implementation". Janice discussed constructive dismissal. She presented her paper, "A Remedy for the Abused Employee: The Evolution of the Law of Constructive Dismissal".

– ALSO –

This past Saturday April 28 at 6:30 pm (EST) Christine Thomlinson was a guest on The Michelle Higley show on Newstalk 980 in Regina, Saskatchewan. Host, Michelle Higley, invited Christine to discuss and comment on the implications for managers and supervisors with respect to the proposed provincial changes to laws dealing with harassment and bullying.

### Upcoming Events at Rubin Thomlinson LLP

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

- First Time Offered, "Help! I've Got to Hire Someone!", May 30, 2007

Please contact us at 416.847.1814 or by email at [contact@rt-law.ca](mailto:contact@rt-law.ca) for additional information on any of our workshops or other events.

*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.*

The trial judge held that the employer was entitled to bring legitimate concerns to the plaintiff's attention, and in fact, could institute discipline where it was done in good faith. The plaintiff's review was held to have contained criticism, but it was legitimate criticism.

The trial judge also held that, while the plaintiff was entitled to withdraw his services from the workplace by resigning, he was not entitled to damages for doing so. He also reiterated that the determination of constructive dismissal is an objective standard in which the actions of the parties are compared based on how a reasonable person would act.

In this case the plaintiff believed that he had been victimized. However, his views were held to be not in accord with an objective assessment of the actual state of affairs.

### What this means for employers:

- **Negative Performance Reviews Are Permitted**  
Provided the criticism is objectively reasonable and made in good faith, a claim for constructive dismissal will fail. That being said, performance reviews which are inaccurate, made in bad faith, or which are presented in a manner that is objectively inappropriate or unreasonable, may in some circumstances, trigger a constructive dismissal.
- **Steps Can be Taken to Reduce Risk when Providing Negative Performance Reviews**  
Prior to giving a negative performance review, an employer should:
  - Ensure they have all the facts regarding the issue to ensure the evaluation is accurate;
  - Ensure that the written review is drafted in a civil and decent manner; and
  - Ensure that the review is discussed with the employee and that the employee is given an opportunity to respond to the issues presented to him/her.
  - If an employee presents the employer with new information about their performance, the employer should keep an open mind and consider revising the review if appropriate.