

EMPLOYERS' ALERT

August 2007

Supervisor's Defamatory Conduct after Termination Creates Liability for the Employer

Given the abundance of case law on termination practice in recent years, employers are well aware of the risks of liability resulting from the manner in which an employee is terminated. Inappropriate conduct by an employer at termination can lead to an extension of the reasonable notice period through "Wallace" damages, as well as the awarding of damages for mental distress and punitive damages. Nevertheless, we continue to come across cases where employers have clearly missed the mark.

The recent Saskatchewan decision of *Benko v. Scott* is a case in point. The case clearly demonstrates the risks to employers where comments regarding the dismissed employee are defamatory.

Ms. Benko, a former employee of Scott's Concrete Lawn Ornaments, was terminated after two years of employment. After her termination, Benko alleged that another employee, Ms. Oppeboen, sent defamatory letters to Benko's sister-in-law and two other former employees. The letters stated that Benko was terminated for cause relating to the theft from the workplace and that there was video surveillance to prove these allegations.

Benko also alleged that Oppeboen made similar oral statements to current employees prior to and after Benko's termination.

As a result, Benko sued the employer as well as Oppeboen for wrongful dismissal and defamation.

At trial, Oppeboen admitted that the statements made in the letters and to the employees were untrue and false.

The trial judge ordered that Benko receive one month's pay in lieu of notice. In addition, the judge found that the employer was vicariously liable for the oral statements made by Oppeboen to current employees. As a result, Benko was awarded bad faith damages which amounted to an additional month's notice of termination.

With respect to the defamatory letters, the trial judge found Oppeboen was personally liable. No liability was attached to the employer because the actions were found to be beyond the scope of Oppeboen's duties.

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WHAT'S NEW AT RUBIN THOMLINSON LLP

Christine Thomlinson will be moderating a Law Society of Upper Canada Teleseminar on Workplace Investigations on September 18, 2007. For more detail please visit www.lsuc.om or call (416) 947-3300.

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Janice Rubin will be speaking at The Conference Board of Canada's webseminar, "Creating Inclusive Work Environments: Legal Updates You Want to Know" on September 26, 2007. Please visit www.conferenceboard.ca or call (613) 526-3280 for further detail.

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.

Upcoming Events

HRPAO's Annual HR Law Conference
October 4, 2007

Christine Thomlinson will be co-chairing the "Annual HR Law Conference" on October 4, 2007 with Malcolm MacKillop of Hodgson Shields LLP. Featuring 19 lawyers and 3 judges, the one day conference will be held in the North building at the Metro Toronto Convention Centre. For details visit www.hrpa.org/HRPAO/events or call (416) 923-2324.

Mark the date!

Don't forget to mark October 2, 2007, in your calendar as the date for the next RT breakfast. Christine Thomlinson will be discussing the legal issues associated with employing an aging workforce – there are many, and we think you'll be surprised by some of them. Invitations will be sent via e-mail in September. These events sell-out very fast, so be sure to let us know if your e-mail changes before then. We look forward to seeing you.

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.

The trial judge held:

"I accept the evidence of the defendant Scott [the owner] that he neither authorized them [the letters] or knew about them. I also find that the sending of these letters was entirely outside the scope of the defendant Oppeboen's responsibilities...The sending of such letters was so bizarre that an employer could not reasonably be expected to have safeguarded against such actions. The letters were handwritten and unsigned. They were not on paper that identified the business."

Oppeboen was ordered to pay damages in the amount of \$7,500.00 to Benko.

What does this mean for employers?

- Employers may be Responsible for their Employees
While the owner in the above case had no idea of the conduct of Oppeboen, the employer was nonetheless held vicariously liable for some of Oppeboen's conduct. While the amount of damages in this case was nominal because of the short length of employment, employers should be mindful of their liability for acts of their employees.
- Plan for Communications Regarding Departure
Employers should plan communications regarding employee departures. Poor or inaccurate communications regarding the reason for an employee's departure could lead to claims for bad faith damages, mental distress damages and even defamation. When an employee is terminated, an employer should:
 - Treat the communication like it was your own termination. Other employees should not be told why the employee was terminated or even the fact that the employee was terminated. Communications should simply state that the employee is no longer with the employer;
 - Consider discussing the content of the communication with the terminated employee. Often employees will be willing to discuss an agreeable communication which could avoid future disputes; and
 - Employers should designate one individual to deal with reference requests for the terminated employee. Employers should discuss with the employee what will be said if a reference is sought to avoid potential future issues, and obtain the employee's consent.