

## EMPLOYERS' ALERT

February 2008

### Just Cause: Still the "Capital Punishment" of Employment Law

#### WHAT'S NEW AT RUBIN THOMLINSON LLP

Janice Rubin was one of six facilitators at the Law Society's "Advanced Roundtable in Employment Law" session on February 13<sup>th</sup>. This program was designed specifically for senior practitioners to engage in facilitated advanced employment law discussions with their peers.

Janice was also a guest on Canada AM on February 20<sup>th</sup> where she discussed the Supreme Court of Canada's hearing of the Honda vs. Keays case.

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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).

The first major case on just cause of the year was released by the Superior Court of Justice in Ontario on January 11, 2008. In the decision, the Court re-affirmed the requirement to provide an employee an opportunity to fully respond to allegations of misconduct prior to termination. The Court also reiterated that termination for cause is the "capital punishment" of employment law.

In *Puhl v. Katz Group Canada Ltd.*, the plaintiff Mr. Puhl sought damages against the Katz Group for his dismissal as Vice-Chair, a position he held under the terms of a four-year fixed-term employment contract.

The Katz Group argued that it had just cause to terminate Mr. Puhl's employment, based on an accumulation of acts and omissions of negligence, incompetence, misrepresentations, breaches of fiduciary duty and a general failure to carry out his duties.

The Company complained that during his tenure Mr. Puhl failed to exercise the judgment and skill required of him in his position. Katz Group stated that Mr. Puhl did not implement fundamental policies and practices in critical areas including inventory, human resources, loss prevention, real estate, strategic accounting and information technology. More specifically, the Company argued that:

- Mr. Puhl was negligent and incompetent in preparing and approving misleading financial projections;
- Mr. Puhl acted in his own best interests by negotiating a rich stock option agreement for him and his executive team; and
- Mr. Puhl accelerated a stock option payout to his executive team.

In coming to its decision, the Court reviewed the actions of Mr. Puhl to determine whether just cause or the "capital punishment" of employment law existed.

First, it was determined at trial that Katz Group was advised by its legal counsel to meet with Mr. Puhl prior to his termination to allow him an opportunity to respond to the allegations. Katz Group failed to do that and the Court was very critical that Mr. Puhl was never given an opportunity to respond to any of the allegations prior to his termination.

## Upcoming Events

On March 5<sup>th</sup> David Whitten will be speaking at the Canadian Payroll Association's webinar entitled "Employee or Independent Contractor: Where to Draw the Line". David will be discussing the importance of differentiating between an employee and an independent contractor in light of recent developments in the Courts.

David will also be speaking at the Ontario Bar Association's 7<sup>th</sup> Annual Current Issues in Employment Law on March 6<sup>th</sup>. He will be discussing damages and future trends.

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### Conducting Internal Workplace Investigations

Our training seminar entitled "Conducting Internal Workplace Investigations" sold out in record time for the second time in a row. Our upcoming session on May 29<sup>th</sup> & 30<sup>th</sup> is full. Due to popular demand we have decided to hold another session on September 23<sup>rd</sup> and 24<sup>th</sup>. This session has not been publicized formally, so please contact our office at (416) 847-1814 if you are interested in attending and we can register you before the session is advertised.

*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.*

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Second, the Court stated that there was no legal obligation for a CEO of a major company to be perfect. The standard of care of a CEO, Director or Officer of a company is one of prudence on a "reasonably informed basis".

In reviewing the decisions of Mr. Puhl, the Court found that his decisions were made in good faith although some were ultimately not correct. The Court noted that the decision to compensate his employees for rolled over vacation and stock options, was based upon legal advice. Further, the Court was also found that his projections were made in good faith based on the information available.

Finally, while the Court noted that Mr. Puhl negotiated a significant stock option agreement for himself and other executives, the Court relied on the fact that Mr. Puhl was given the task of representing this group in the negotiations. In this regard, the Court held that it was the decision of Katz Group to allow Mr. Puhl to be involved in this process on behalf of himself and other employees.

Overall, the Court held that the Katz Group had a duty to consider alternatives to summary dismissal and had a duty to give Mr. Puhl an opportunity to answer to its complaints. It failed to do so and the Court held that Mr. Puhl was entitled to damages for wrongful dismissal. He was ordered to receive his compensation to the end of his fixed term contract, which totalled \$1,534,027.00.

### What does this mean for employers?

- **Employers must consider alternatives to a just cause termination**

The Court was clear that an employer has a duty to consider all other forms of discipline prior to termination. In this case, the employee had an unblemished employment record and had never been warned prior to his termination. While one significant incident may be just cause, generally, employers will have to show a pattern of behaviour which was not condoned by the employer. Employers who fail to raise performance issues with employees will not be able to later rely on them to establish cause.

- **An employee has a right to respond**

Where an employee is alleged to have committed misconduct, employers should provide employees with the specific allegations as well as time to prepare a response. Discipline should not be instituted until this occurs and failure to do so may be fatal to proving cause, even when employee misconduct is serious.