

EMPLOYERS' ALERT

November 2007

A Failure to Consider All Accommodation Options can be Costly

WHAT'S NEW AT RUBIN THOMLINSON LLP

James Heeney was well received at the Learning Forum where he discussed the latest developments in absenteeism and terminations in London, Ontario and Burlington, on November 1st and 8th respectively.

Christine Thomlinson and David Whitten presented "Managing Risk at Work: The Legal Implications" at the HRPAAO on November 8th.

David Whitten and James Heeney also presented at the HRPAAO on November 15th. They conducted a seminar entitled "Managing Terminations".

Janice Rubin was a part of a senior practitioner's panel on November 21st at the 8th Annual Employment Law Summit at the Law Society of Upper Canada. The panel discussed "Best Strategies for Presenting the Case".

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.

When an employee suffers from a disability, he/she often seeks accommodation from their employer to return to the workplace. The decision by the British Columbia Human Rights Tribunal in *Datt v. McDonald's Restaurants of Canada Ltd.* provides an example of the lengths employers must go to consider their duty to accommodate and the liability for failing to do so.

Ms Datt had been an employee in a McDonald's restaurant for 23 years. She always received very good performance reviews.

In January 2002, she started to develop a skin condition which became progressively worse and which precluded her from following the employer's hand washing policy. As a result, she eventually went on disability leave. Ms Datt tried to return to work on a number of occasions, but her condition returned and she was forced to return to her leave.

During her repeated attempts to return to work, McDonald's made no attempts to assess the workplace to determine if her return could be accommodated.

In November 2003, Ms Datt's doctor informed her insurance provider that she could not work in the "restaurant business". Again, no inquiries were made regarding this statement or if Ms Datt could return to McDonald's with certain accommodations, such as wearing surgical gloves, or in a different position, and whether this would have changed the prognosis.

On November 8, 2004, Ms Datt's employment was terminated as McDonald's believed she could not be accommodated. Ms Datt filed a human rights complaint.

The Tribunal held that there was little or no evidence that McDonald's "turned its mind to the possible ways" it might accommodate Ms Datt. They did not seek any further information from her doctor nor did they attempt to determine if her job duties could be changed/modified.

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Upcoming Events

Christine Thomlinson will be conducting the "Advanced Issues in Employment Law" seminar at the HRPAO on December 4, 2007.

It's back - The Newly Revised and Expanded How to Conduct a Workplace Investigation Training Seminar - ONLY 4 SPACES LEFT

Since the publication of our book, the *Human Resources Guide to Workplace Investigations* earlier this year, we have been inundated with requests to bring back our workplace investigation training seminar. This seminar, which uses the techniques we write about in the book, is a must for any human resources professional charges with conducting or supervising workplace investigations. The training seminar has not been offered since the spring of 2006 and we have revised much of its content. The first session of 2008 will be held on February 7, 2008 and given the highly interactive training approach we use, is limited to 20 participants. Should you wish to register, please contact us at (416) 847-1814.

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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McDonald's argued that it did not have an obligation to create a position for Ms. Datt or to place her into a position for which she was not qualified. In the Tribunal's opinion, this was not the issue. The Tribunal held that the issue was whether, given the jobs that were available, those jobs could have been modified or differently organized for Ms. Datt. The Tribunal held that McDonald's could have considered her for part-time work, offered her shorter shifts that would have met her hand-washing restrictions or allowed her to work only at the Drive Thru. Further, it was held by the Tribunal:

"Given the size of McDonald's, and the resources available to it, I am at a loss to understand why McDonald's did not take more steps to try and accommodate Ms Datt, a 23-year committed employee...It may be that, at the end of the day, Ms Datt could not have been accommodated at McDonald's because she simply could not meet its hand-washing policies doing any job or combination of jobs, but based on the evidence before me, I find that McDonald's failed to take all the necessary steps to make this final determination.."

It was ordered that Ms Datt be paid all lost wages from 2004 until the date of the hearing in 2007, less the monies she earned when she found alternative employment. She was also awarded \$25,000.00 for injury to dignity, feelings and self-respect.

What does this mean for employers?

- **The duty to accommodate is a significant responsibility**

The duty to accommodate is a very high standard. An employer's decision not to accommodate will only be accepted when it is supported by reliable, objective and persuasive evidence showing that its concerns are well-founded.

- **Employers must keep an open mind**

An employer must consider all accommodation requests with an open mind and take reasonable steps to assess and respond to them, even if the accommodation requests seem difficult or impossible to meet on first review. This case clearly shows that it is an employer's process in analyzing an accommodation request that will be scrutinized, not just the end result.