

EMPLOYERS' ALERT

October 2007

Employer successfully argues "after acquired cause" following post-termination discovery of employee conflict of interest

WHAT'S NEW AT RUBIN THOMLINSON LLP

Janice Rubin discussed "Creating a Fair Work Environment" at the Construction Institute's Ethic Workshop on October 1, 2007. The next day, she addressed the Power Workers Union on investigation harassment complaints, at their Annual General Meeting.

At our RT breakfast on October 2, 2007, Christine Thomlinson facilitated a very interesting discussion on age discrimination in violation of Human Rights Code in Ontario.

Christine Thomlinson also co-chaired the Annual HRPAAO conference in Toronto on October 4, 2007, and on October 29, 2007, she spoke at the Canadian Institute's Advanced Forum on Employment Law. Christine discussed bullying and personal harassment, with emphasis on finding the appropriate response to incidents that occur in the workplace.

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.

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.

It is well known to anyone with even a passing knowledge of employment law that successfully asserting a case of termination for just cause is extremely difficult to do. At the time of termination, most employers considering this path, review the facts and make a call, hopefully with the assistance of employment counsel. But what happens if the employer does not find out all the facts until after the termination? In this case, where the misconduct is serious, and would otherwise support a termination for cause, the employer may rely on the "after acquired cause" principle.

These types of cases are few and far between. However, a recent case decided by Mr. Justice Echlin of the Ontario Superior Court illustrates how an employer can correctly assert after acquired cause. The plaintiff, Mr. Rodrigues, had worked for the Central Ontario Regional Council of Carpenters, Drywall and Allied Workers ("CORC") as a Senior Business Representative of CORC. He reported to Mr. Powell, the Executive Secretary-Treasurer.

In 2000, Rodrigues concluded that in the Greater Toronto Area there were problems with non-unionized drywallers coming into Toronto to work. For that reason, he began to take steps to try to create a province-wide drywall council. The creation of a new council would have drastically weakened the presence of CORC. At no time did Rodrigues disclose to Powell that he was trying to create a new council, notwithstanding that his activities were clearly at odds with his activities and the CORC's interests.

In 2003, the CORC decided to terminate Rodrigues for business reasons. It was only after his termination, that it discovered Rodrigues' efforts to create a new council. When Rodrigues challenged his termination, CORC claimed it had "after-acquired cause" to terminate Rodrigues' employment without notice.

Cont'd...

Upcoming Events

James Heeney will be speaking at the Learning Forum on the latest developments in absenteeism and terminations, on November 1, 2007 in London, Ontario and in Burlington on November 8, 2007.

Christine Thomlinson and David Whitten will be conducting a seminar on "Managing Risk at Work: The Legal Implications" at the HRP AO on November 8, 2007.

David Whitten and James Heeney will also be at the HRP AO on the November 15th conducting a seminar on "Managing Terminations".

Janice Rubin will be speaking at the 8th Annual Employment Law Summit at the Law Society of Upper Canada on November 21, 2007. Janice will be a part of a panel of speakers discussing "Best Strategies for Presenting the Case".

It's back – The Newly Revised and Expanded How to Conduct a Workplace Investigation Training Seminar

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 focuses on the techniques we write about in the book, is a must for any human resources professional charged 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 7th and 8th 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.

It's coming back – The Law of Termination of Ontario

This book, written by Janice Rubin in 1995, was an employment law bestseller. It is now, sadly, out of print. We are pleased to announce that Janice will be revising this book for Canada Law Book in 2008, and we hope to see it published at the end of that year.

EMPLOYERS' ALERT

In reviewing the facts, Mr. Justice Echlin concluded that to establish that the employee acted in conflict of interest with the employer, the employer did not need to prove actual damage. Rather, he relied on case law which held that a potential harm to the employer by the employee's conduct is sufficient to evidence a conflict of interest. In finding that Rodrigues' actions could have had "devastating" effects on the CORC, Justice Echlin stated:

It is incredible to believe that Rodrigues, who was being paid by CORC, and who owed a duty of loyalty, good faith, honesty and the avoidance of conflict of duty and self-interest, would devote over two years of his career with CORC promoting secession...from CORC.

In fact, according to Mr. Justice Echlin, it was incumbent on Rodrigues to:

...make free and frank disclosure of his actions to his employer. If he was advised that he must not pursue such endeavours, he must stop or resign and continue from outside of his employment with CORC. He did neither.

As a result, Rodrigues lost his case for wrongful dismissal.

What does this mean for employers?

- Employees have a duty of loyalty, good faith, honesty and the avoidance of conflict of duty and self-interest

Employees are required to inform employers of potential conflicts of interest. Where employees act in conflict with their employer without the employer's consent, just cause may exist.

- Employees should be reminded of their duty of loyalty
Employers should remind employees at the time of their hire, preferably in an employment agreement, of their obligation not to act in conflict of interest with the employer.

- After acquired information can constitute just cause

While employers should allege cause for dismissal at the time of termination where the information to support such a claim is known, employers are permitted to claim just cause after termination where they discover information after termination that could justify it.