

WHAT'S NEW at RUBIN THOMLINSON LLP

Janice Rubin was quoted in the Globe and Mail article "What you need to know about employment contracts" on January 7.

James Heeney was quoted in the article "Fired over Facebook" that appeared in the January 2011 edition of Investment Executive.

Our annual breakfast seminar, The Employment Law Roundup, took place on January 21. The seminar covered notable cases and issues from 2010. If you would like to receive a copy of the material, please email breakfast@rt-law.ca.

Winnipeg Bound! Workplace Investigation Training in Winnipeg March 28-30, 2011

Manitoba is set to amend its *Workplace Safety and Health Act* on February 1, 2011 with respect to violence and psychological harassment in the workplace. This change means human resources professionals will need to know how to conduct thorough and fair workplace investigations.

Don't know where to start? Uncertain what types of behaviour constitute psychological harassment? No idea what triggers the legal requirement to conduct an investigation or how to write a report?

We can help. We literally wrote the book on conducting workplace investigations ([Human Resources Guide to Workplace Investigations](#)).

Over the past few years we have trained hundreds of HR professionals in Ontario and beyond.

Join our inaugural training sessions in Winnipeg, Manitoba for **Basic Workplace Investigation Techniques** on March 28 and 29 and the **Report Writing Workshop** on March 30. Please register early as registration is limited to 25 people.

Please email seminars@rt-law.ca or visit our website www.rubinthomlinson.com for more information.

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.

Human rights legislation places an obligation on employers to provide reasonable accommodation to an employee who can demonstrate that he or she has experienced discrimination based on a prohibited ground. The employer must provide accommodation to the employee unless doing so would cause the employer undue hardship. A recent decision of the Canadian Human Rights Tribunal (the "Tribunal") involves an employer that provided reasonable accommodation to an employee with a disability, and is useful in providing further insight into the extent of the employer's duty to accommodate.

Reasonable Accommodation

In *Breast v. Whitefish Lake First Nation #128*, [2010] C.H.R.D. No. 10, the complainant, Mr. Breast, had worked for Whitefish Lake First Nation #128 ("Whitefish") for approximately 13 years as the driver of a water truck and a school bus. In January of 2007, Mr. Breast temporarily lost his vision in his right eye as a result of diabetes, and he was given a leave from work. Because water delivery was considered an essential service, Whitefish filled the position when they became aware that Mr. Breast would not be returning to work for some time.

In April of 2007, Mr. Breast asked to return to work and claimed that his vision had returned. Before allowing him to do so, Whitefish requested medical information in support of Mr. Breast's request. After receiving the required medical documents, Whitefish offered to bring Mr. Breast back to work in the position of a sewer truck driver on the following four conditions:

1. Test his blood sugar level daily and at least every four hours while on the job;
2. Not drive if he had low blood sugar levels and report any hypoglycemic condition to his supervisor immediately;
3. Keep an emergency food kit in the truck at all times; and
4. Provide an annual medical and diabetic report required by Alberta Driver.

Mr. Breast declined this offer and refused to accept the position of sewer truck driver, despite the fact that he claimed that he was already taking the necessary steps to comply with the conditions.

The Tribunal dismissed both Mr. Breast's claim that Whitefish discriminated against him based on family status because his position was given to the former chief's brother, as well as Mr. Breast's claim that he had been constructively dismissed. However, the Tribunal carefully considered Mr. Breast's claim that Whitefish discriminated against him based on his disability and failed to provide him with proper accommodation.

Finding first that Mr. Breast had established a *prima facie* case of discrimination because he had shown that his vision loss was a factor in Whitefish's decision vis-à-vis returning him to work, the Tribunal then turned to consider the issue of whether Whitefish had properly accommodated Mr. Breast.

Mr. Breast specifically argued that Whitefish's offer to place him in the position of sewer truck driver was not reasonable because that position was of lower status

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"There is no duty of instant or perfect accommodation,
only reasonable accommodation."
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Reasonable Accommodation

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“The reasonableness of the employer’s accommodation must be evaluated considering the knowledge of the employer, together with the cost, complexity and expense of any physical accommodation required, and other similar factors.”

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and involved being occasionally exposed to bad smells. He argued that Whitefish offered him the job with the belief that he would not accept it.

The Tribunal held that Whitefish had in fact offered Mr. Breast a reasonable accommodation, especially given the fact that Mr. Breast’s previous position and the position of sewer truck driver both had the same wages and benefits. The Tribunal further held that Mr. Breast’s refusal to take the position of sewer truck driver was not reasonable and that he could not simply “hold out” for his previous position which he preferred. Mr. Breast’s conduct failed to facilitate the accommodation process and his complaint was dismissed.

What does this mean for employers?

1. Start by obtaining a clear understanding of an employee’s restrictions and abilities

Employers have an obligation to obtain all relevant information, including medical information, about an employee’s disability if it is readily available in order to ascertain the employee’s restrictions

and limitations. However, it is equally important to note that the employee also has a duty to cooperate with the employer in the accommodation process by complying with reasonable requests for medical information.

2. Consider jobs which are available that satisfy the employee’s needs

The duty to accommodate is ongoing and requires that the employer find the best accommodation possible without incurring undue hardship. When assessing the various positions available to offer to an employee as an accommodation, employers should consider both the monetary benefit to employees as well as the non-monetary benefits that may exist.

3. Employees are not entitled to “perfect” accommodation

Similarly, employees are not entitled to their preferred accommodation or job, simply because it is their preference. An employer is obligated to provide reasonable accommodation and, if they do so, the obligation has been fulfilled. ●

UPCOMING EVENTS

The second edition of A Practical Guide to the Law of Termination in Ontario, co-authored by **Janice Rubin** and **Hena Singh** and published by Canada Law Book, is now available. [Click here to order your copy.](#)

60 Minutes with RT

Did you miss out on registering for our latest teleseminar, **What’s New on Psychological Harassment: A Legislative and Case Law Update?** [Contact us](#) to order an audio copy of this session, or any of our previous teleseminars, for \$99. Topics include:

- An Update on Social Networking and Internet Use;
- Job Offers and Alternative Work Arrangements;
- Workplace Violence and Harassment Essentials;
- Are you ready for Bill 168?

60 Minutes with RT will return in the spring with a new series of teleseminars. Keep an eye on our [website](#) for details and registration.