

# EMPLOYERS' ALERT

ISSUE 22 • APRIL 2010

## WHAT'S NEW at RUBIN THOMLINSON LLP

### Upcoming Teleseminar "Workplace Violence and Harassment Essentials"

Our second Teleseminar on May 27 at 12 noon picks up where our last one left off. This program is designed to help you train your employees and managers to better understand and recognize workplace violence and harassment, and will help you to fulfill your obligations to train employees on Bill 168 in a cost-effective fashion.

We are also able to customize our programs, in the Teleseminar format or through on-site training, to meet the needs of your workplace.

The \$99 fee allows four people from your office to listen in and includes written materials.

For more information, please email [teleseminar@rt-law.ca](mailto:teleseminar@rt-law.ca).

**Hena Singh** discussed Bill 168 on the Jeff Allan Radio Show on AM 570 News on April 1.

**Janice Rubin** was on The National on CBC television on April 2 talking about Bill 168.

We held our first Teleseminar, 60 Minutes with RT on Bill 168, on April 8. If you missed the event and are interested in ordering an audio copy, please email [teleseminar@rt-law.ca](mailto:teleseminar@rt-law.ca).

**Christine Thomlinson** spoke at the Managing Mental Health in the Workplace conference on April 15. Her topic was Proving or Disproving a Mental Health Claim, A Step by Step Guide.

**Hena** also spoke at the Managing Mental Health in the Workplace conference on April 16 where she discussed Gearing up for Reform: Bill 168.

**Sharaf Sultan** spoke about diversity in the workplace as part of the DiverseCity Fellows program on April 16.

We are pleased to announce that **Janice** was included in the centenary edition of Canadian Who's Who.

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 Ruben Thomlinson LLP. This has been sent to you courtesy of Ruben Thomlinson LLP.

A recent decision of the British Columbia Human Rights Tribunal (the "Tribunal") has provided insight into the interaction between requirements to work overtime and the protected ground of family status. The case, **Falardeau v. Ferguson Moving (1990) Ltd., c.o.b. Ferguson Moving and Storage [2009] B.C.H.R.T.D. No. 727 (QL)** "Falardeau" involved the dismissal of a single father of a ten-year-old child. The employee had worked for the company for 17 years.

## Refusal to Work Overtime and "Family Status" Protection

The employee was terminated from his position as a mover after he refused to accept a work assignment which would have required a commitment to overtime hours. Immediately prior to his termination, the employee was told that the employer needed him to work overtime in connection to a particular assignment. Although the employee agreed to work overtime in order to finish the job in which he was currently engaged, he refused to commit to any further jobs requiring overtime on the basis that it would interfere with his ability to care for his son. In fact, he stated to the employer that he would assess his willingness to commit to specific assignments on a case-by-case basis depending on his parenting responsibilities and accompanying requirement to be available during evening hours. The employer shortly thereafter terminated the employee. Following his termination, the employee filed a complaint with the British Columbia Human Rights Tribunal. The complaint alleged that the employer's actions, including the termination itself, constituted discrimination on the basis of family status.

The Tribunal dismissed the complaint, holding that there is no human right to refuse to work overtime. The Tribunal specifically found that the employee had failed to establish any plausible justification to hold that the employer had

discriminated on the basis of family status. A key factor for the Tribunal was the fact that the workplace had a well-established pattern of requiring employees to work overtime. In the Tribunal's opinion, this fact was a clear indication of an understanding within the workplace that assignments often involved irregular hours, including overtime. The evidence demonstrated that the employee had worked overtime on hundreds of occasions throughout his years of service.

The Tribunal also noted as significant the fact that nothing leading up to the employee's termination had changed with respect to either his work expectations or the employee's childcare responsibilities. The employee also admitted that it was well understood at the time of his hiring that his work would involve both irregular and lengthy hours. Rather, the Tribunal held that the employee's obligations were no different from those of other parents with similar obligations towards their children. In fact, the Tribunal found that there were alternatives available to the employee, including daycare, to care for his son in the event that he was required to work overtime. The Tribunal consequently did not find a serious interference with any parental obligation. On this basis, the

...Continued

• • • • •  
**"The complaint alleged that the employer's actions, including the termination itself, constituted discrimination on the basis of family status."**  
 • • • • •

## Refusal to Work Overtime and “Family Status” Protection

Continued

.....  
“This case provides further content to the challenging interaction between family status protection and workplace obligations.”  
.....

Tribunal ultimately held that the employee did not successfully establish a prima facie case of discrimination on the basis of family status and that, accordingly, the employer was under no obligation to accommodate the employee.

This case provides further content to the challenging interaction between family status protection and workplace obligations. Not all the cases have been decided in the same way. As an example, **Rennie v. Peaches and Cream Skin Care Ltd., unreported, December 4, 2006 (Baergen)** is a case from the Alberta Human Rights Panel which upheld a prima facie claim of family status discrimination where an employee was fired for refusing to work an evening shift one day per week because her daycare did not provide evening care. On balance however, the trend in these cases is to avoid holding employers responsible for what are deemed to be “ordinary” parent-child obligations. Family status protection is accordingly applied much more regularly to extraordinary situations, such as where parents are caring for special needs children.

### What does this mean for employers?

Keep an open mind when determining which relationships are covered by family status protection. For example, the Ontario Human Rights Code defines family status as “the status of being in a parent and child relationship.” This definition however, has been liberally

interpreted by both courts and tribunals to include most parent and child “type” relationships including non-biological parent and child relationships and non-biological gay and lesbian parents. The Ontario Human Rights Commission has also taken the position that family status protection extends to individuals providing eldercare to aging parents. Given the aging population, employers should prepare for family status accommodation requests from employees who are looking after older parents with special needs.

### Approach with Caution

As with all accommodation requests, employers should specifically avoid a blanket approach to such claims and rather use a case-by-case analysis in order to respond appropriately and reduce the risk of liability associated with these claims. In particular, employers should ask employees why this type of accommodation is necessary, as well as ask about other options available to them.

### Well-designed contracts and/or policies

Employers should strongly consider carefully drafting both employment contracts and accompanying policies in a manner which clearly sets out expectations with respect to work. This approach can help to provide flexibility for employers while reducing the potential for employees to claim that a work process and/or practice has changed substantially. ●

## UPCOMING EVENTS

### May 7 - 8

**James Heeney** will be speaking to the Ontario Association of Architects in Windsor. His topic is Employment Law for Architects.

### May 12 & 13

Registration is full for the next session of Conducting Internal Workplace Investigations taking place on **May 12 & 13**. However, there is still room in our Report Writing Workshop on **May 14**. If you are interested in attending either session please contact us at (416) 847-1814 or seminars@rt-law.ca.

### May 19

**Janice** will be taking part in the teleseminar “Internal Investigations in the Real World: Attorney-Client Privilege, Work-Product Doctrine, and Beyond” presented by the American Law Institute and American Bar Association (ALI-ABA). For more information, please visit: [www.all-aba.org](http://www.all-aba.org)

## Sharaf Sultan to appear on Radio Canada International

An RT first - Sharaf Sultan will be interviewed in Arabic for Radio Canada International on April 30. Sharaf will be addressing Canadian employment law issues for listeners in the Middle East.

## Stay Up-To-Date with Rubin Thomlinson LLP

The workplace is changing and we want to keep you informed. Our website is a dynamic source for information about our firm and employment law.

Visit [www.rubinthomlinson.com](http://www.rubinthomlinson.com) and follow our blog or our Twitter account to find out about employment law updates, when new RT podcasts are posted, when a new Employers' or Workplace Investigation Alert is released or other interesting media mentions.

You can also have our Alerts delivered right to your inbox so that you can stay up-to-date with changes in employment law. Don't worry about subscribing via email. Your details will never be passed on to a third party.