

# EMPLOYERS' ALERT

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## WHAT'S NEW at RUBIN THOMLINSON LLP

### Last Chance to Register "60 Minutes with RT on Bill 168"

We know how important it is for you to stay on top of changes that affect the workplace and how valuable your time is. Our solution: 60 Minutes with RT - a short, snappy and informative teleseminar for you and your team that will keep you up to date without ever leaving your office.

Our first program on April 8th is on Bill 168. We'll provide practical guidance on risk assessments, policies, training and more.

The \$99 fee allows an unlimited number of people from your office to listen in and includes materials and an audio recording.

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

**Christine Thomlinson** spoke at the Ontario Bar Association conference, Navigating the International Work Assignment Maze, on February 16.

Our first Report Writing workshop took place on February 24 and was a success, attracting people from as far afield as Newfoundland. Our next session of the Basic Workplace Investigation and Report Writing workshops will take place May 12 to 14. If you are interested in attending, please contact us at (416) 847-1814 or [seminars@rt-law.ca](mailto:seminars@rt-law.ca).

**Christine** also spoke at the Essential Elements and Critical Updates of Key Business Agreements conference, presented by the Canadian Institute, on February 25.

**Hena Singh** discussed Bill 168 at the Workplace Violence and Harassment conference at the Law Society of Upper Canada on March 12.

**Christine** spoke about bullying and violence in the workplace at the Western Canada Business Forum in Kananaskis on March 23.

**Janice Rubin** was featured in the Globe and Mail on March 24 in an article about Bill 168.

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 a specific 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.

Conflict often arises between employers and employees with respect to bonus entitlements on termination. A recent Ontario Superior Court of Justice (the "Court") decision provides further insight into the factors which courts take into account in calculating bonus entitlements in these circumstances.

## Bonus Entitlements in the Workplace

### Calculation of bonus entitlements

The issue of calculating bonus entitlements often arises in the circumstance of termination. An employer and their former employee may have diverging opinions with regard to how to calculate entitlements owed for the notice period. The recent Ontario decision of *Mathieson v. Scotia Capital Inc.* [2009] O.J. No. 4879 ["Mathieson"] specifically addressed the issue of determining the precise bonus amount to which a former employee was entitled during the notice period in the face of competing evidence.

Mathieson was terminated in 2007 after working as an investment banker with Scotia Capital Inc. ("Scotia Capital") for over 30 years. The employee claimed that he was entitled to between 32 and 36 months of notice. In addition, the employee claimed that he was treated unfairly in his employment and accordingly should have been entitled to a higher bonus amount for 2006. The Court determined that a 24-month notice period was fair and reasonable in the circumstances. The Court also dismissed the employee's claim with respect to the 2006 bonus, stating that the amount awarded for that year was fair in the circumstances.

A major task for the Court was to determine the precise bonus amount to award the employee for the full 24-month

notice period. In doing so, the Court entered into a lengthy analysis of the various factors which the Court found to be relevant in determining the appropriate bonus amount to be provided to the employee. These factors included the employee's historical bonuses awarded over the last seven years, evidence pertaining to the performance of the particular group with whom he worked, as well as the size of the bonus pool and/or size of bonuses awarded during the last three years of employment. The Court however, concluded that there was not enough information with respect to these factors in order to determine an appropriate bonus amount to be provided to the employee for the full 24-month notice period.

The Court also refused to use a three year running average of bonuses provided in 2004, 2005, and 2006 as a basis for determining the appropriate amount to be provided for the notice period. The Court specifically stated that using such an approach to determine the bonus amount to be awarded for the notice period was inappropriate given that it failed to take into account fluctuations in bonus amounts common to the investment banking industry.

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## Bonus Entitlements in the Workplace

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Based on an analysis of the above-noted factors, the Court found that there was scant satisfactory evidence to conclusively determine an appropriate bonus amount to award the employee for the full notice period. Continuing the analysis, the Court refused to include the bonus amount awarded to the employee in 2006 (\$360,000) in determining the appropriate bonus to be awarded as this was deemed to reflect a bad year for both the employee and Scotia Capital. The Court also found relevant the fact that the employee was becoming increasingly difficult to work with towards the end of his employment, and determined that this would likely have had a negative effect on his bonus entitlements over the 24-month notice period.

Taking into account all of these factors, the Court ultimately concluded that a bonus of \$460,000 for each year of the notice period would be both fair and reasonable. The Court's analysis indicates that there was no precise formula for determining bonus entitlements owed to employees or former employees. Rather, in the absence of unequivocal evidence with regard to bonus entitlements, courts will determine a quantum, if any, based on a range of factors which they deem to be relevant in the circumstances.

### What does this mean for employers?

#### Unpredictability of results

This case illustrates how unpredictable results can be when issues relating to variable compensation are left for the courts to decide. In our view, the result in Mathieson would have been difficult to assess prior to trial, as the judge considered a multiplicity of factors in deciding the bonus amount. This is something to keep in mind next time you are deciding whether to settle or proceed to litigation.

#### Careful use of employment contracts

To avoid this unpredictability, consider the use of an employment contract that clearly sets out how the departing employee's entitlement to a bonus will be calculated. We also suggest adopting a reasonable and rational standard, such as historical average or a certain percentage of a pool. This approach will be more defensible legally (and internally) than a provision that says a terminated employee gets nothing. ●

## UPCOMING EVENTS

#### April 5

**Janice Rubin** will be talking about Bill 168 on CBC television's The National.

#### April 14

**Hena Singh** will be speaking at the Managing Mental Health in the Workplace conference, put on by the Canadian Institute. Her topic is Navigating the Landscape of Bill 168.

#### April 15

**Christine Thomlinson** will also be speaking at the Managing Mental Health in the Workplace conference. Her topic is Proving or Disproving a Mental Health Claim, A Step by Step Guide.

#### April 16

**Hena** returns to the Managing Mental Health in the Workplace conference to discuss Gearing up for Reform: Bill 168.

#### April 16

**Sharaf Sultan** will be speaking about diversity in the workplace as part of the DiverseCity Fellows program.

#### May 7 - 8

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

#### May 19

**Janice** will be taking place 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.ali-aba.org](http://www.ali-aba.org)

### 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.

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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).