Rubin Thomlinson LLP
Optimal legal solutions to challenging workplace issues

EMPLOYERS' ALERT

ISSUE 39 • JANUARY 2012

We're Honoured

Rubin Thomlinson LLP has received an honourable mention on Canadian Lawyer magazine's list of Top 10 Labour and Employment Law Boutiques across the country. Our success is our clients' success.

New 2-day Onsite Program

Workplace Investigation Training

Looking to bring workplace investigation training to your team? We have developed a concentrated 2-day session which can be brought in-house to you and will give your team the needed skills to conduct workplace investigations internally. We have attractive pricing models to suit your organization. Please call (416) 847-1814 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.

A recent decision of the Ontario Court of Appeal has confirmed the existence of a new legal claim, the tort of "intrusion upon seclusion", which opens the door for an individual to seek damages when their privacy has been invaded. Prior to the case of *Jones v. Tsige*, and as the Court noted, the question of whether the common law should recognize a claim for invasion of privacy has been debated for the past 120 years.

Employers beware the new claim: Intrusion upon Seclusion

Both Sandra Jones and Winnie Tsige worked for the Bank of Montreal, albeit at different branches. Ms. Tsige was in a common-law relationship with Ms. Jones' ex-husband and, over a period of four years, accessed and reviewed Ms. Jones' personal banking records at least 174 times. This was contrary to Bank policy and when Ms. Jones began to suspect unauthorized access, she complained to the Bank. Ms. Tsige was suspended without pay for one week and denied a bonus. She also apologized for her actions. Ms. Jones was not satisfied and she sued Ms. Tsige, seeking damages for invasion of her privacy.

Ms. Tsige brought a preliminary motion and was successful in having Ms. Jones' claim struck on the grounds that no legitimate claim existed for invasion of privacy. Ms. Jones appealed to the Ontario Court of Appeal and the Court held that the time had come for the recognition of a new claim for "intrusion upon seclusion". To be successful in such a claim, the Court held that an individual would need to show:

1. That the defendant's conduct was intentional or reckless;
2. That the defendant invaded the plaintiff's private affairs or concerns without lawful justification;

"Recognition of such a cause of action would amount to an incremental step that is consistent with the role of this court to develop the common law in a manner consistent with the changing needs of society."

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3. That a reasonable person would regard the invasion as highly offensive; and
4. That distress, humiliation or anguish resulted.

The Court confirmed that the individual need not have suffered actual economic loss, although damages for non-monetary loss would be modest and capped at $20,000. The Court further held that the existence of such a claim should not result in an opening of the "floodgates" since the claim will only arise for "deliberate and significant invasions of personal privacy". In other words, claims from individuals who are sensitive or unusually concerned about their privacy are excluded. In this case, the Court held that it was appropriate to award Ms. Jones damages in the mid-range of $10,000.

What does this mean for employers?

Employers need to continue to be extremely mindful of use of and access to employees' personal information.

The Court of Appeal made clear that only intrusions into matters that, viewed objectively, could be described as offensive would satisfy the test, but the examples referenced in the decision, "financial or health records, sexual practices and orientation, employment, diary or private correspondence," include much information to which Ontario employers have day-to-day access.

Employers might wish to proactively review any internal practices which could arguably be considered an invasion of an individual's privacy.

One of the decisions referred to in the case involved a claim against McDonald's where damages were awarded to an employee when the company conducted a credit bureau check without his consent. Under the new tort of "intrusion of seclusion", such claims on the part of employees will likely be far easier to advance and prove. •

Teleseminar this Wednesday: The Employment Law Roundup

Miss our breakfast seminar *The Employment Law Roundup*? Join us on February 8 at 12 noon ET for the teleseminar version of this program.

Janice Rubin and Sarah Vokey will cover the most interesting legal developments of the year and key cases to consider for 2012.

This interactive hour-long session will include updates on:

- The impact of Bill 168 and cause termination
- Reasonable notice
- Psychological harassment
- Restrictive covenants
- Workplace investigations

Registration takes place via our website. The $99 fee includes written material.

What's New at Rubin Thomlinson LLP

Janice Rubin spoke to the Peterborough chapter of the HRPA about the top employment law cases and trends from 2011 on January 25.

Janice discussed mental health issues in the workplace for the Conference Board of Canada's Strategic Human Resources Management Council on January 25.

Christine Thomlinson chaired the Law Society of Upper Canada webinar, *Client Communication in Employment Law* on January 13.

Space is Limited

There are a few spots remaining for the February 14-16, 2012 session of Basic Workplace Investigation Techniques and the Report Writing Workshop. Contact us today to reserve your spot.

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