

EMPLOYERS' ALERT

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WHAT'S NEW at RUBIN THOMLINSON LLP

Janice Rubin discussed the results of the Third Annual RT Employment Survey with CKPC FM radio in Brantford on September 13.

Chris Thomlinson discussed "Best Practices in Workplace Investigations of Alleged Employee Misconduct" as part of the Osgoode Professional Development program on September 15.

Janice spoke at the 31st Annual CINUP Workshop in Winnipeg on September 16. Her topic was "Establishing Effective HR Policies".

Sharaf Sultan talked about "Designing Employment Policies and Procedures" at the 2nd HR Compliance Conference on September 23.

James Heeny discussed employment law at the Ontario Dental Hygienists' Association's Provincial Conference on September 24.

We held another successful session of Basic Workplace Investigation Techniques and of our Report Writing Workshop on September 22-24. If you are interested in attending our December 15-17 training sessions contact us at (416) 847-1814 or seminars@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.

We can probably all agree that honesty and trust are integral components of the employment relationship. Perhaps this is why it seems so surprising that an employee can be found guilty of dishonesty with his or her employer and this still does not always allow the employer to terminate for just cause. The dishonesty must go to the core of the employment relationship in order to justify termination for cause. The recent case of *Leitner v. Wyeth Canada* provides a good illustration of the challenges that judges face when deciding how to treat employee dishonesty in the context of the employment relationship as a whole.

Dishonesty or lapse of good judgement?

In the recent case, *Leitner v. Wyeth Canada*, 2010 ONSC 579 (CanLII), Mr. Leitner was employed by Wyeth Canada, a pharmaceutical company. In his 8.5 years with the company, he rose up the ranks from Product Manager with a salary of \$80,000 per year to Group Product Manager with a salary of \$142,000 per year. His performance record was unblemished.

In February 2006, as a result of a random audit, Wyeth conducted an investigation into Mr. Leitner's expenses. Wyeth found three irregularities during the investigation and determined that Mr. Leitner had wrongly submitted information such as the reason for the expense claim, the people he was with at the time the expense was incurred, and the date of the expense. They also discovered that Mr. Leitner had submitted personal expenses for reimbursement. The discrepancies in the expense reports amounted to just under \$500.

Representatives from Wyeth confronted Mr. Leitner about his expenses but, in the words of the trial judge, his explanations were "lame". Mr.

Leitner insisted that the meetings for which he claimed expenses did take place, but admitted that he was mistaken about some of the details of the meetings. He also admitted that he really disliked completing expense reports and, as a result, did so irregularly. Shockingly, he further admitted that, when he could not find receipts and could not recall the times and places that expenses were incurred, he would use other receipts that he had on hand to help him to recover some money. He denied that he was trying to defraud the company. Wyeth considered that Mr. Leitner's dishonesty was severe enough to amount to fraud and Mr. Leitner was dismissed the day after the meeting for just cause.

The Court adopted the now well-accepted "contextual approach" for assessing whether firing someone for dishonesty is justified by looking at all of the surrounding circumstances. Although Justice Pitt found that Mr. Leitner's explanations of the irregularities were not acceptable, he

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"Dishonesty is never trivial, but human beings are not perfect."
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Dishonesty or lapse of good judgement?

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“When an employer determines that an employee is too dishonest to continue in its employment, the grounds for such a decision ought not to be three expense claims involving less than \$500.”

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found that the inconsistencies in the expense reports had been given disproportionate weight when measured against Mr. Leitner's long and unblemished service to Wyeth. Furthermore, the Court classified Mr. Leitner's actions as "reckless" rather than fraudulent and ultimately held that Mr. Leitner had been wrongfully dismissed since the test for just cause had not been met in this case. Justice Pitt suggested that, once the expense irregularities were discovered, it would have been more appropriate for Wyeth to talk to Mr. Leitner about the seriousness of his actions and let him know that any future incidents would not be tolerated. Mr. Leitner was awarded 10 months' salary in lieu of notice for wrongful dismissal.

What does this mean for employers?

1. When considering terminating a dishonest employee for just cause, employers should pay particular attention to the entire context of the individual's employment, such as years of service and performance history, as well as any mitigating factors such as the employee's explanation for the misconduct.

2. Employers should also ask

themselves whether the dishonest conduct is truly dishonest and/or fraudulent, or if the circumstances can be explained by a temporary lack of judgment or carelessness. As part of this assessment, the employer should ensure that they speak to the employee about the dishonest conduct and get his or her explanation.

3. Termination for cause is considered the "capital punishment crime" of employment law. Although one incident of dishonesty may be enough to justify dismissal for cause, the dishonesty must be serious enough to go to the core of the employment relationship. Employers should always consider whether a sternly written warning will have the desired effect of ensuring that the behaviour is not repeated.

4. Sometimes, in the heat of the moment, it is very difficult for employers to imagine that dishonesty could justify anything less than dismissal for cause. Employers can also consider seeking the independent advice of their employment law counsel to get a sense of what an objective third-party (like a judge) might think when presented with the same facts. ●

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.

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.](#)

October 5

Janice will be participating in the Legal Update webinar hosted by the Conference Board of Canada's Council on Inclusive Work Environments.

October 14

The next session of [Advanced Workplace Investigation Techniques](#) is sold out. If you are interested in attending our 2011 sessions, please contact us at (416) 847-1814 or seminars@rt-law.ca.

October 21

Christine Thomlinson will once again be co-chairing the HRPAs annual HR Law Conference. She will also be discussing, "Practical Issues Arising from Implementation of Bill 168".

October 28

Janice will be participating in a mediation demonstration entitled, "Advocating Your Client's Position Persuasively in Mediation", as part of the Law Society of Upper Canada's 11th Annual Employment Law Summit.

December 15-17

The next session of [Basic Workplace Investigation Techniques](#) takes place on **December 15 and 16**. We are also conducting a [Report Writing Workshop](#) on **December 17**. If you are interested in attending either session please contact us at (416) 847-1814 or seminars@rt-law.ca.

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