

WHAT'S NEW at RUBIN THOMLINSON LLP

Janice and **Chris** will be travelling to **Halifax** to conduct Basic Workplace Investigation Techniques and the Report Writing Workshop from October 18-20, 2011. Minimize the risk and protect your workplace by learning how to conduct thorough investigations with Canada's leading workplace investigation experts.

Make sure to register early as registration is limited to 25 people.

To find out more about our training in Halifax or our upcoming sessions in Toronto from December 12-14, 2011, please visit our [website](#).

Chris Thomlinson led the webcast "What you need to know about contractors, term contracts and work-sharing arrangements" for the Certified General Accounts of Canada on August 25.

James Heeney was quoted in the article "Bias problematic at human rights tribunal" that appeared in the August 15 issue of the Canadian HR Reporter.

Careers at RT

We are currently looking for an employment lawyer to join our workplace investigation group. If you are an experienced workplace investigator interested in joining our dynamic and growing practice, please contact hr@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 Ruben Thomlinson LLP. This has been sent to you courtesy of Ruben Thomlinson LLP.

The courts continue to remind us that determining reasonable notice of termination is an art and not a science. Deciding with any certainty on the appropriate amount of notice to provide to a dismissed employee in any given case is a struggle. This exercise is even more challenging with short service employees who seem to be entitled to notice periods which are disproportionate to their length of employment. The Ontario Court of Appeal has recently reminded us of some of the principles that must be considered in these cases.

Employees with Short Service: How Much Notice is Appropriate?

Paul Love worked as a Senior Vice President for Acuity Investment Management Inc., for just over two and a half years when his employment was terminated without cause. In a company of 90 people, he was one of only two senior vice presidents and reported directly to the CEO. Although he did not supervise other employees, he had sole responsibility for managing Acuity's institutional clients. At the time of his dismissal, he was 50 years old. Mr. Love was dissatisfied with Acuity's offer of severance and sued for wrongful dismissal. He was successful at trial and awarded five months' reasonable notice. Believing this amount of notice to be inadequate for someone at his level, Mr. Love appealed the decision.

The Ontario Court of Appeal released its decision earlier this summer and upheld Mr. Love's appeal, finding that he was properly entitled to nine months' reasonable notice. In doing so, reference was made to the so-often quoted passage from the 1960 court decision, *Bardal v. The Globe & Mail*,

which states:

"There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant."

In general, appeal courts show great deference to trial judges and are loathe to replace a reasonable notice period with one of their own. They will only do so where they believe the trial judge's assessment reflects an error in principle. Here, in increasing Mr. Love's award to nine months, the Court of Appeal pointed to three errors on the part of the trial judge.

First, in awarding five months' notice, the trial judge in this case placed too much emphasis on Mr. Love's length of *continued...*

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"...reference to case law in a search for length of service comparables must be done with great care...The risk is that length of service will take on a disproportionate weight."
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Employees with Short Service: How Much Notice is Appropriate?

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service. Although the Court confirmed that short service is certainly a factor to be considered, care must be taken when comparing cases with similar lengths of service, so as to avoid giving undue weight to this factor alone.

Second, and conversely, the trial judge failed to place sufficient weight on the character of Mr. Love's employment, and specifically the senior position that he held within the company and its consequent responsibilities. Reference was also made to his high level of compensation and the fact that he was a part owner of the business with a 2% equity share.

The Court lastly noted that the trial judge had given no consideration whatsoever to the factor relating to the availability of other employment. Considering Mr. Love's level of compensation and his equity interest, the Court held that finding other similar employment for someone like Mr. Love would be harder rather than easier. Taking all of the errors together, and after giving proper weight to all of the relevant factors, the Court of Appeal was prepared to substitute nine months' reasonable notice for the five originally awarded to Mr. Love.

What does this mean for employers?

1. Short service does not equal short notice

Love v. Acuity serves as a good

reminder that just because an employee has not worked for long does not necessarily mean a correspondingly short notice period. All factors relevant to determining how long it will take the employee to find a comparable job need to be considered, of which length of service is only one.

2. Executives and senior staff get more notice

Another relevant factor which will be considered is the position the employee holds in the organization. It is widely accepted in law that the more senior the employee, the more notice to which the employee is entitled, the theory being that there are less of these senior jobs available. As such, an employee in one of these positions will likely take longer to find another comparable position.

3. Make good use of written employment contracts

Because of the challenge that so often exists in determining notice periods for senior employees with short service, contractual termination provisions have enormous value in these situations. Even if the negotiation of these clauses finds employers agreeing to amounts somewhat higher than they may have expected, they will appreciate the certainty that comes with the agreement if they need to end the relationship sooner rather than later. ●

60 Minutes with RT

An Update on the Accessibility for Ontarians with Disabilities Act

September 16, 2011 12 noon - 1pm

As of January 1, 2012 private sector organizations will be required to comply with the "Accessibility Standards for Customer Service", as part of the Accessibility for Ontarians with Disabilities Act. Join Janice Rubin and Cory Boyd for an informative hour-long discussion that will help you and your workplace prepare for the changes.

Our interactive discussion will include:

- An overview of the AODA compliance framework;
- How to prepare and train your employees for compliance with the Accessibility Standards for Customer Service;
- Guidance on what your policies should include;
- What the reporting requirements are; and
- What resources are available to help your workplace become compliant.

Please visit our [website](#) to register. Train up to four employees for \$99. Registrants will receive written material in advance of the teleseminar. Please note that the \$99 fee allows access to one phone line only.

Welcome Aaron Rousseau!

We are pleased to announce that Aaron Rousseau has joined Rubin Thomlinson LLP to continue his practice in employment law and workplace human rights. As a valued member of the RT team, Aaron provides counsel to employers and employees on all areas of employment law, including employment contracts, wrongful dismissal, constructive dismissal, workplace policies, employment standards, and workplace human rights. Contact: 416-847-1814 x 114.

