

EMPLOYERS' ALERT

ISSUE 30 • DECEMBER 2010

WHAT'S NEW at RUBIN THOMLINSON LLP

Did you miss our most recent Teleseminar "An Update on Social Networking and Internet Use"? [Contact us](#) to order an audio copy of this session, or any of our previous Teleseminars, for \$99. Topics include:

- Are you ready for Bill 168?
- Workplace Violence and Harassment Essentials
- Job Offers and Alternative Work Arrangements

60 Minutes with RT will return February 3, 2011 with "A Legislative and Case Law Update on Psychological Harassment" hosted by Janice Rubin and Christine Thomlinson.

Manitoba is set to amend its *Occupational Health and Safety Act* on February 1, 2011 with respect to violence and harassment in the workplace, making it the fourth province to enact this type of protection for employees. Join Janice and Christine to discover how these amendments are changing the workplace.

Christine Thomlinson spoke at the HRPA's Certificate Program for the Certified General Accountants on Ontario on December 14. She discussed the most significant employment law issues of 2010.

James Heeney spoke at the 5th Employer's Duty to Accommodate conference hosted by Federated Press on December 15.

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.

Employers are often concerned about the business activities of former employees due to the highly competitive nature of the marketplace and the fact that employees can be in a position to compromise the business interests of a former employer. Specifically, employers are often concerned that employees will use specific information or take away clients in a manner that can cause harm to the business. As a result, employers regularly include restrictive covenants, including non-competition, non-solicitation and non-disclosure of confidential information clauses, in employment contracts.

Restrictive Covenants: They can work

Courts generally view restrictive covenants unfavourably, especially non-competition clauses, because of the restrictions that they place on a former employee's ability to earn a livelihood. However, the recent case of ***Mason v. Chem-Trend Limited Partnership, 2010 ONSC 4119*** demonstrates that, when a restrictive covenant is properly drafted for the particular business needs of an organization, the covenant can prevail.

Mr. Mason had been employed by Chem-Trend Limited Partnership ("Chem-Trend") for 17 years when his employment was terminated. He claimed that he had been wrongfully dismissed from his position as a technical sales representative with Chem-Trend. Chem-Trend counterclaimed against Mr. Mason, claiming that he had breached the restrictive covenant that he had signed when he commenced employment in 1992 by using the knowledge and experience that he gained while employed at Chem-Trend to obtain business opportunities for himself. Mr. Mason argued that the restrictive covenant was unreasonable and too broad and also that he should be able to take advantage of business prospects in light of his unemployment.

Chem-Trend was a worldwide manufacturer of chemical specialty products that were sold throughout the United States, Canada and

many other countries. The restrictive covenant in question included a one-year non-competition clause and non-solicitation clause which prohibited Mr. Mason from soliciting business from any customers of Chem-Trend or from soliciting employees. The areas of the company in which Mr. Mason worked were limited geographically and his knowledge and exposure only applied to a small part of the business. However, as part of Mr. Mason's position, he was familiar with Chem-Trend's customers, their businesses and needs, and also familiar with Chem-Trend's products.

The Court held that, although the wording of the covenant was broad, it was not ambiguous. The Court also noted that, when Mr. Mason signed the documents which contained the restrictive covenant, he negotiated other parts of the agreement which were of concern to him. The Court found that this demonstrated that he had read and understood the documents and could have raised any concerns he had about the covenant at this time. Although the Court acknowledged that Mr. Mason did not foresee the circumstances which he now faced, i.e. unemployment, it was further held that this did not help him.

With respect to the reasonableness of

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"Mr. Mason negotiated the terms of his vacation...He obviously did not foresee the circumstances he now finds himself in, being without employment, but that does not help him."
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Restrictive Covenants: They can work

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“I find that the geographic scope and activity restricted are necessary in the circumstances of Chem-Trend’s business and bearing in mind Mr. Mason’s employment and his knowledge of Chem-Trend’s business, products and customers. To the extent that such restrictions are more onerous than the norm, they are balanced by the fact that the covenant is only in place for one year.”

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the covenant, Chem-Trend not only admitted that the covenant was very broad in general but also that it was broad in geographic scope. Chem-Trend argued that, given the fact that it was a global company with customers in every country and that there was overlap in operations between different parts of the world and its customers, the covenant was required to protect its business interests. During Mr. Mason’s employment with Chem-Trend, he was able to transfer between countries and he had worked in various regions in both Canada and the United States.

The activity restricted by the covenant was also very broad, however, the Court held that it was not unreasonable in the circumstances given the position that Mr. Mason held and the significant access to information he had. It was held that the information, Mr. Mason’s technical knowledge and his presence in Canada and the United States, were all factors that could be used against the business and could ultimately cause harm.

The Court held that the scope of the geographic restrictions and the activity were necessary in the circumstances and, to the extent that the covenant was onerous in these respects, the fact that the covenant was only in place for one year balanced it out. The restrictive covenant was held to be reasonable and enforceable.

What does this mean for employers?

When drafting a restrictive covenant, give careful attention to its scope

Restrictive covenants that are carefully drafted and which are only as restrictive as they need to be in order to meet the specific business needs of an organization, are much more likely to be upheld. In order to increase the likelihood that a restrictive covenant will be upheld, careful attention should be given to assessing the actual protection needed from a restrictive covenant and drafting it accordingly. The use of standard clauses with all employees is strongly discouraged.

Even broad restrictive covenants can be enforceable

Although courts do not generally like restrictive covenants, and especially do not like overly broad restrictive covenants, the courts are willing to uphold a well drafted, restrictive covenant that is tailored to the needs of the business it is protecting. If, after a careful analysis, an organization decides that a broad restrictive covenant is necessary to protect their business interests from the activities of former employees, a broad restrictive covenant can be used. ●

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.](#)

January 20

Janice Rubin will be leading a seminar entitled “The Life Cycle of the Employment Relationship” as part of the Certified General Accountants of Ontario Professional Development Program.

January 21

Our annual breakfast seminar, The Employment Law Roundup, is taking place on January 21. The seminar will cover notable cases and issues from 2010. To register please contact us at (416) 847-1814 or breakfast@rt-law.ca.

Workplace Investigation Training 2011

For those of you who need to brush up on your workplace investigation skills, we have a series of hands-on, interactive and practical workplace investigation training sessions scheduled for 2011. Sessions include:

- **Basic Workplace Investigation Techniques**
- **Report Writing Workshop**
- **Advanced Workplace Investigation Techniques**

We can also provide customized workplace investigation workshops. For more information, please email seminars@rt-law.ca or visit our website www.rubinthomlinson.com

Winnipeg Bound! Workplace Investigation Training in Winnipeg March 28-30, 2011

Janice Rubin and Christine Thomlinson will be leading three days of workplace investigation training in Winnipeg. Join Canada’s leading experts on workplace investigations for Basic Workplace Investigation Techniques on March 28 and 29 and the Report Writing Workshop on March 30. Please email seminars@rt-law.ca or visit our website www.rubinthomlinson.com for more information.

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.