

EMPLOYERS' ALERT

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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 special two-hour session entitled "**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.

Hena Singh was quoted in the article *CN asks court for judicial review of decision*, that appeared in the November 8 edition of Canadian Occupational Health and Safety News.

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.

Although the recession may have diverted attention away from the demand for foreign workers in the last few years, we know that the number of employees working across jurisdictions both within and outside of Canada increases along with the increase in global trade. Canada's aging workforce and low birth rate are also contributing to the rise in the demand for foreign workers. These long-term trends mean that Canada will be increasingly dependent upon foreign workers in order to maintain a robust and growing labour force. However, a recent case suggests that the standard severance rules may need to be somewhat more flexible to address the needs of foreign workers.

Extra Severance for Foreign Workers?

Nishina v. Azuma Foods (Canada) Co. Ltd. involved a Japanese citizen, Maki Nishina, who worked with Azuma Foods International Inc. ("Azuma"), a company focused in specialized food production. Ms. Nishina initially began working with Azuma at its Haywood, California, location in June of 2001 and continued to work at that location until August of 2005 when she was transferred to Vancouver, British Columbia. Azuma sponsored Ms. Nishina in order to facilitate her securing a work permit and the permit was subsequently extended until August, 2008. Azuma also told Ms. Nishina that if she continued working in Canada they would support her in returning to California and applying for permanent residence status there. Despite this, Ms. Nishina was terminated for just cause in October, 2007. She sued Azuma for wrongful

dismissal in the Supreme Court of British Columbia and, on the issue of cause, the Court found that there was not sufficient evidence to support the employer's claim. This left the Court to determine Ms. Nishina's proper severance entitlement.

Notwithstanding the fact that Ms. Nishina had worked just over six years with Azuma, only two of which were in Canada, the Court awarded her 12 months' pay in lieu of notice. A major factor for the Court in awarding this long period of notice was the fact that Ms. Nishina had a work permit that restricted her to working only with Azuma. The Court found this situation analogous to one in which an employee is terminated while working within a "one-employer" town. In other words, in

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"It is important that Azuma Foods knew that as long as Ms. Nishina was in Canada she could work for no other employer." (Madam Justice Loo)
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Extra Severance for Foreign Workers?

Continued

assessing damages, the Court took into account its view that the restrictive work permit would seriously inhibit Ms. Nishina's ability to find alternate employment.

The Court also took Ms. Nishina's immigration status into account when considering whether to award additional damages for mental distress. The Court held that Azuma breached its obligation to act in good faith since it ought to have known that its behaviour would have caused Ms. Nishina great difficulties, particularly in light of her immigration status. Ultimately, mental distress damages were not awarded because of insufficient evidence of quantifiable loss. However, the Court did award \$20,000.00 for punitive damages because it felt that Azuma acted inappropriately in terminating Ms. Nishina for cause.

Although decided in British Columbia, the case serves as a warning to employers looking to hire foreign workers. If the decision is truly suggestive of a trend towards higher severance for foreign workers whose re-employment options are limited by virtue of their immigration status, then employers may wish to keep the following recommendations in mind:

What does this mean for employers?

Pay attention to the immigration

process

Azuma prepared Ms. Nishina's work permit and included the restrictive conditions which left her with so few employment options following her termination. Employers may wish to leave employees more flexibility in the preparation of similar documents if they want to avoid the risk of increased severance.

Invest in well-drafted employment contracts

Employers can help to reduce the uncertainty relating to potential disputes with foreign workers through well-designed employment contracts. A contract can anticipate contentious issues in advance, such as termination, and help establish who will be liable in such circumstances.

Be particularly wary of vulnerable employees

Where an employer takes over an employee's affairs concerning their immigration and employment, such that the employer is able to use its power and discretion to affect the employee's legal and practical interests, the employer could also be found to be a fiduciary. In so doing, the employer could expose itself to additional liability if it does not exercise proper care with respect to the employee. ●

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.](#)

December 14

Christine Thomlinson will be speaking at the HRP's Certificate Program for the Certified General Accountants. She will be discussing the most significant employment law issues of 2010.

December 15-16

James Heeney will be discussing Accommodating the Older Worker at the 5th Employer's Duty to Accommodate conference hosted by Federated Press.

December 15-17

The next session of [Basic Workplace Investigation Techniques](#) is sold out, however places remain for our [Report Writing Workshop](#) on **December 17**. If you are interested in attending please contact us at (416) 847-1814 or seminars@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

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You can also have our Alerts delivered right to your inbox so that you can stay up-to-date with changes in employment law. Don't worry about subscribing via email. Your details will never be passed on to a third party.

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.

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