

# EMPLOYERS' ALERT

ISSUE 37 • OCTOBER 2011

## WHAT'S NEW at RUBIN THOMLINSON LLP

**Chris Thomlinson** spoke to the Human Resources Professionals Association (HRPA) about workplace investigations on October 26.

**Janice Rubin** discussed investigation reports at the 12th Annual Employment Law Summit on October 27.

**Chris** co-chaired the HRPA's annual HR Law Conference on October 27.

**James Heeney** was featured in *Drug Testing 101* that aired on Global Toronto's evening newscast on October 19.

**Aaron Rousseau** appeared in *TTC Drug Testing?* that aired on CBC News Toronto's evening newscast on October 17.

**James** spoke about workplace human rights as part of the Osgoode Professional Development program on October 19.

**Janice** travelled to Winnipeg to speak at the CINUP conference about employment law on September 30.

**James'** most recent column for the CBC News website, *Don't get blindsided by workplace harassment, violence laws* was published on September 30.

**Cory Boyd** led the webinar *Insights on Human Rights Cases for Inclusive Employers* for the Conference Board of Canada on September 27.

We know that Courts do not encourage the use of repeated fixed term contracts in order for employers to avoid statutory and common law severance obligations. This is especially true for workers with multiple years of service. The Courts require unequivocal and explicit language in order to establish a series of enforceable fixed term contracts, and any ambiguities will typically be read against the employer. The Ontario Superior Court's decision in ***Van Mensel v. Walpole Island First Nation (2010 ONSC 6463)*** provides insight into the circumstances in which a series of fixed term contracts will be upheld and emphasizes the importance of properly drafted contracts.

## Fixed Term Contracts

Ms. Van Mensel provided computer training to students on the Walpole Island First Nation ("Walpole") for 11 years as an independent contractor pursuant to a series of fixed term contracts. Each contract ran from September until June of the following year. Every year, Ms. Van Mensel prepared a proposal, which included a fixed term, for Walpole to consider. The terms of the proposal were negotiated but the fixed term was not.

In 2008, Walpole decided to change Ms. Van Mensel's position to one of a permanent nature and put it up for tender. Ms. Van Mensel argued that she was an employee and sued Walpole claiming that she was entitled to reasonable notice of termination.

Justice Little concluded that there was no ambiguity within the contract on which he could rely to conclude

that Ms. Van Mensel was an employee. He based his findings on Ms. Van Mensel's knowledge that she was not an employee and the fact that she had included a fixed term into the yearly proposals that she had submitted to Walpole. The intentions and expectations of the parties had been to reach a fixed term agreement for the duration of the following school year. This intention was further emphasized by the fact that Ms. Van Mensel was paid for the duration of the school year and was not paid over a 12 month period as were the employees of Walpole. Also, there was no inequality of bargaining power between the parties.

Justice Little also pointed to the fact that Ms. Van Mensel was uncertain as to whether her contract would be renewed each year and did not

*Continued...*

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.

.....  
**"I am mindful of the danger of repeated "fixed term" contracts, but in this case the underlying reality of the employment was that the parties specifically knew they were entering into successive, independent contractor, fixed term contracts."**  
.....

## Fixed Term Contracts

Continued...

.....  
**“Fairness in contracting has caused courts to seek out possible contract ambiguities in the employment contract so as to impose equity.”**  
.....

assume that she would be returning to work in the fall until she was advised to do so.

Furthermore, Walpole had a hiring policy in place which dictated that non-aboriginal individuals could only be hired on fixed term contracts and not as indefinite term employees. In accordance with this policy, Ms. Van Mensel could only be employed as an independent contractor pursuant to a fixed term contract.

Ms. Van Mensel was found to be an independent contractor pursuant to a series of fixed term contracts.

### What does this mean for employers?

#### ***Hiring pursuant to a series of fixed term contracts can be done***

1. Although decisions such as *Van Mensel* are rare, courts may be willing to find that workers, even those with lengthy service, who have entered into a series of true fixed term agreements, are contractors as opposed to indefinite term employees. The key is in the underlying reality of

the relationship. However, employers will not be able to avoid liability for statutory and common law severance simply by labeling an indefinite employee relationship as one of a fixed term.

#### ***Contract negotiation***

2. Courts may be more inclined to find that a series of fixed term contracts exist if the terms of the contract are re-negotiated each time a new contract is offered and if the employee is the party who proposes the fixed term.

#### ***Carefully drafted contracts remain important***

3. Courts will interpret any ambiguities in a contract against the interest of the drafting party – since this is usually the employer, this makes the employer more vulnerable to a finding of indefinite employment in these circumstances. This underscores the need for unambiguous and properly drafted employment contracts that reflect the intentions and expectations of the parties. ●

## UPCOMING EVENTS

**James Heeney** will be discussing restrictive covenants at the Employment Law 2011 conference as part of the Osgoode Professional Development program on December 12.

### Breakfast Seminar The Employment Law Roundup January 16, 2012

Our breakfast seminar, *The Employment Law Roundup*, returns on January 16. This popular program looks at the most interesting legal developments of the year and key cases to consider for 2012. Discover what these decisions mean for employers; learn what our lawyers recommend; and enjoy the opportunity to meet other HR/legal professionals.

The seminar is complimentary for clients, and non-clients are welcome to attend for \$99.

Registration takes place via our [website](#). Please register early as space is limited.

### Workplace Investigation Training

Janice and Chris travelled to Halifax to conduct a successful session of Basic Workplace Investigation Techniques on October 18 - 20. For their first session in Atlantic Canada, they were joined by employees from government agencies, school boards and more.

Our December session of Basic Workplace Investigation Techniques is sold out. However, registration is now open for our first session of 2012, taking place February 14 -16. Visit our [website](#) for more information or call (416) 847-1814.