

What's New at Rubin Thomlinson LLP

Janice and **Chris** conducted Basic Workplace Investigation Techniques and the Report Writing Workshop in Winnipeg for the first time from March 28-30. It was a great success. They were joined by members of government agencies, financial institutions and more for the three day training session.

Janice and Chris will also be in Halifax from October 18-20, 2011 conducting workplace investigation training. To find out more about our sessions in Halifax or Toronto, please visit our [website](#).

Did you miss out on registering for our latest teleseminar, **Temporary Foreign Workers and the Law**? [Contact us](#) to order an audio copy of this session, or any of our previous teleseminars, for \$99. Topics include:

- A Legislative and Case Law Update on Psychological Harassment;
- An Update on Social Networking and Internet Use;
- Job Offers and Alternative Work Arrangements;
- Workplace Violence and Harassment Essentials;
- Are you ready for Bill 168?

60 Minutes with RT will return on June 16 with **An Update on Family Status and Accommodation**. Keep an eye on our website for details and registration.

Janice was a guest on the CBC Radio One program Ontario Today on April 6. Janice discussed privacy and the workplace.

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.

A recent case of the Ontario Superior Court of Justice, *Disotell v. Kraft Canada Inc.*, provides insight into how an employer's failure to address incidents of harassment and its subsequent failure to investigate those incidents properly, can lead to a successful claim of constructive dismissal. It also demonstrates the level of scrutiny courts now apply to the conduct of internal workplace investigations.

The Courts continue to scrutinize the conduct of workplace investigations

Mr. Disotell worked the night shift at one of Kraft's factories. He claimed that he was the victim of harassment in the workplace and was constructively dismissed due to Kraft's failure to address his complaints.

More specifically, Mr. Disotell alleged that he was subjected to approximately 100 sexually inappropriate and offensive comments by four employees. Mr. Disotell's supervisor had been a witness to some of the offensive comments and "showed amusement at the comments being made."

Mr. Disotell complained about the harassment to his supervisor multiple times and each time his supervisor indicated the solution was that "he should not demonstrate to his co-workers that these comments were getting to him". The shift supervisor did, on one occasion, speak with the harassing employees. However, when the behaviour did not subsequently stop, Mr. Disotell indicated to his supervisor that he wanted to file a formal written complaint. The shift supervisor warned Mr. Disotell that if he filed a written complaint:

1. He should seek a transfer out of the department;
2. It could result in his termination; and
3. He would not support the written complaint and that he was "on his own".

Mr. Disotell eventually went on sick leave and claimed constructive dismissal.

After Mr. Disotell went on sick leave, Kraft conducted an investigation into Mr. Disotell's complaints. In the course of the investigation, they met with:

- Mr. Disotell's supervisor;
- An employee who worked on another shift in the plant who Mr. Disotell had a negative history with for three years prior;
- A supervisor who was with Mr. Disotell in the plant for 30 minutes per day; and
- One other supervisory employee who had no connection to the incidents being complained of.

Kraft did not speak to any of the four co-workers named by Mr. Disotell as harassing him. Further, they did not interview any other night shift employee working with or near the Plaintiff.

During the meeting with Mr. Disotell's supervisor, he confirmed at least two employees made inappropriate comments to Mr. Disotell. However, Kraft still opted not to interview these employees because the supervisor indicated that they were just "picking on him" and Kraft determined, based on Mr. Disotell's statements, the conduct did not amount to harassment.

Commenting on the quality of the workplace investigation, the judge stated: The H.R. investigation, in my opinion, demonstrates the inherent difficulty of in-house investigations between

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The Courts continue to scrutinize the conduct of workplace investigations

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“The HR investigation, in my opinion, demonstrates the inherent difficulty of in-house investigations between employees of longstanding relationships, especially when there are conflicting reports between supervisory and first level employees.”

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employees of longstanding relationships, especially when there are conflicting reports between supervisory and first level employees. Kraft has clearly invested much time and effort in creating and disseminating a zero tolerance harassment policy. That policy however is only as effective as the individuals who administer it. The judge also stated, “My conclusion on the evidence is that Kraft was not conducting a serious investigation.”

Further the judge found, “the circumstances of this case as viewed objectively would result in a reasonable person in the position of the Plaintiff, not being expected to persevere in these employment conditions.”

Mr. Disotell’s claim for constructive dismissal was successful and he was awarded 12 months pay in lieu of notice. ●

WHAT DOES THIS MEAN FOR EMPLOYERS?

1. This case illustrates that courts continue to scrutinize the conduct of workplace investigations, and will attribute liability to the employer when the investigation is found to be flawed. In order to overcome what the Court has referred to as the “inherent difficulty of in-house investigations” employers should ensure that their investigations:
 - a. Are conducted by an unbiased and skilled investigator;
 - b. Include the interviews of all relevant witnesses; and
 - c. Do not include evidence that is irrelevant and/or unnecessarily prejudicial to the parties.
2. It is crucial that managers, supervisors and human resources staff be able to identify potential cases of harassment in the workplace even when an employee uses language other than “I am being harassed”. They must also understand that as agents of the employer they have an obligation to intervene to stop the harassing behaviour, and their intervention must be meaningful, not perfunctory.
3. A respectful workplace policy is only as strong as those implementing it. If you do not follow it, it can and will be used against you.

UPCOMING EVENTS

The third edition of [For Better or For Worse: A Practical Guide to Canadian Employment Law](#), co-authored by **Justice Randall Scott Echlin** and **Chris Thomlinson** and published by Canada Law Book, is now available.

May 3

Chris will be co-hosting a Canadian HR Reporter webinar entitled “Hiring and Firing Foreign Workers”.

May 13

Sharaf Sultan will be a guest on the CBC Radio One program, Ontario Today, where he will be discussing diversity in the workplace.

May 17

Janice Rubin will be leading a webinar for the Certified General Accountants entitled “Hiring and Firing Employees: How to avoid the most common pitfalls”.

June 9

Take your workplace investigation skills to the next level with **Advanced Workplace Investigation Techniques**. Call (416) 847-1814 or visit our [website](#) to register.

June 20

Chris will be co-chairing the popular Law Society of Upper Canada program, The Six-Minute Employment Lawyer.