

Workplace Investigation Training in Halifax October 18-20, 2011

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, please visit our website www.RubinThomlinson.com.

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 Aaron: 416-847-1814 or info@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 Rubin Thomlinson LLP. This has been sent to you courtesy of Rubin Thomlinson LLP.

Many employers are familiar with the traditional scenario in which an investigation is initiated. In those situations, a formal complaint is filed by an employee under a human rights or respect at work policy. The employer, acting on its own, or through the use of an external investigator, obtains the details of the allegations by interviewing the complainant. The respondent is interviewed as well, after having been given the particulars of the allegations. Witness interviews may also be conducted.

Handling of Survey Results Contributes to Manager's Constructive Dismissal

However, what is the acceptable process when an employer commences an inquiry which is investigation like, but arises in a situation without a formal complaint? A recent case, *Chandran v. National Bank*, [2011] O.J. No. 1895, gives us insight into problems employers may face when proceeding in these types of circumstances, particularly when the outcome is potentially prejudicial to an employee whose conduct may become the subject matter of the inquiry.

In this case, a Senior Manager was given a mandate to improve employee performance at one of the Bank's branches because it was performing below expectations. In order to do so, he asked the Manager of Human Resources to conduct an employee satisfaction survey as there were perceived problems with employee morale at the location.

The survey consisted of interviewing the employees at the branch. At the end of the process, the Manger of Human Resources provided the Senior Manager with the results of her survey. She told him that 9 of the 11 people she had interviewed had commented that the Senior Manager at the Branch, Mr. Chandran, had made condescending remarks, exhibited volatile behaviour, embarrassed employees in front of others and had engaged in bullying behaviours. Mr. Chandran had been employed by the Bank for 18 years.

The Senior Manager concluded that based on this information, Mr. Chandran's supervisory duties should be removed. Before making the final decision, both he and the Manager of Human Resources met with Mr. Chandran and informed him about the general allegations against him. At trial, Mr. Chandran testified he denied the general allegations but asked for particulars of the substance of the allegations so that he could be able to defend himself. The Bank refused.

Mr. Chandran then received a disciplinary letter, which provided him the option of choosing between two non-supervisory roles. He was also warned that further behaviour of the kind conducted would be grounds to terminate him for cause.

Mr. Chandran argued that the Bank had reached its conclusions about his conduct without having conducted a proper investigation, and without having given him an opportunity to properly respond to the allegations. This resulted in his constructive dismissal. He left the Bank's employ and sued for damages. On its part, the Bank argued that under these circumstances, it had no obligation to investigate, since the subject matter of the allegations was not related to its human rights policy. It also argued that because Mr. Chandran had been offered continued...

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two similar positions, no constructive dismissal had occurred. It also asserted that Mr. Chandran failed to mitigate his damages when he refused to accept the alternative positions offered to him.

The Court agreed with Mr. Chandran. It stated that:

"Mr. Chandran testified that he has lost all trust in the Bank to deal with him in a fair and professional manner...I find that the actions of the Bank in reaching such serious findings of misconduct, the

imposition of discipline and the mandatory transfer to alternate positions (with lesser terms and conditions of employment) goes to the root of the employment contract and a fundamental breach of the employment agreement, which constitutes a constructive dismissal."

Mr. Chandran was awarded eighteen months pay in lieu of notice, reduced to fourteen months as a result of his mitigation. ●

WHAT DOES THIS MEAN FOR EMPLOYERS?

- 1. In this case, a finding of fact regarding Mr Chandran's behaviour was made without having given him the substance of the allegations against him and an opportunity to respond. This turned out to be an unreliable factual foundation on which to proceed to discipline him. If an employer wishes to act based on information it has received regarding inappropriate employee behaviour, particularly when such actions will have significant impact on the employee in question, it is prudent for the employer to provide detailed allegations of the behaviour to the employee for response, before taking such action.
2. Employers who engage in survey like inquiries should be prepared to change course to a more formal type of investigation if the survey reveals alleged behaviour that is contrary to its policies, and identifies an individual or individuals who are allegedly responsible for such behaviour.
3. Employers may still wish to conduct surveys or 360 reviews and provide participants with promises of confidentiality. Employers must be very cautious in how they use the information that comes to them as a result of these processes, and if it relates to an alleged employee breach of policy, not to jump to factual conclusions.

What's New at Rubin Thomlinson LLP

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

Chris Thomlinson led the CGA webcast What You Need to Know About Contractors, Term Contracts, and Work-Sharing Arrangements on August 25.

Sarah Vokey's article Building on Family Status Support appeared in the August 2011 issue of Lead Magazine.

Janice Rubin chaired the Law Society of Upper Canada conference Ethical Issues in Employment Negotiations on September 15.

Cory Boyd lead the Conference Board of Canada's webinar, Insights on Human Rights Cases for Inclusive Employers on September 27.

Chris Thomlinson was a course leader at the Federated Press 2nd Workplace Mental Health Conference on September 26 & 27. Her topic was Accommodation strategies for workplace mental health issues.

Janice Rubin spoke at the CINUP conference in Winnipeg on September 30. Her topic was Employment Law 101.

October 19, 2011

James Heeney will be discussing Equity, Diversity and Accommodation: Human Rights at Work as part of the Osgoode Certificate in HR Law for HR Professionals.

October 27, 2011

Janice will be speaking at the Law Society of Upper Canada's 12th Annual Employment Law Summit. Her topic is How to Use an Investigation Report.