The 10 Most Important HR Compliance Cases of 2021 (So Far)

written by Rory Lodge | July 2, 2021

Key cases focused on COVID as well as drug testing, discrimination and other perennial HR issues.

Halfway through 2021, courts across Canada have issued a number of extremely important case rulings addressing not just COVID-19 but also perennial HR issues like drug testing, discrimination, wrongful dismissal and termination notice limits. Here's a rundown of the cases HR directors most need to be aware of.

1. Ontario Court Recognizes New Online Harassment Tort

Current laws don't expressly protect employees and others from internet harassment, unless it's based on sex, race, religion, age, disability, nationality and other protected characteristics under human rights laws. But if it holds up on appeal, an Ontario court ruling against an employee who engaged in a long running internet smear campaign against her former employers would change that. The new internet harassment "tort" that the court recognized applies only to conduct that goes "beyond all possible bounds of decency and tolerance." Since the victim in this case was an employer rather than an employee, it also remains unclear whether employee lawsuits would be barred by workers comp [*Caplan v. Atas*, 2021 ONSC 670 (CanLII), January 28, 2021].

2. BC Tribunal Rules Out Workers Comp Benefits for COVID-19 Mental Stress

An unreported case from BC sheds crucial light on a literally multi-billion dollar question about whether workers comp covers the mental stress experienced by essential workers who had to come to work during the COVID-19 outbreaks while everybody else was hunkering down at home. The central character was a food service worker at a prison facility who filed a workers comp claim for the mental stress she said she developed as a result of having to not only come in but work extended hours due to COVID. The claim was denied. Mental stress benefits are reserved for traumatic events, reasoned the BC Review Division, and don't cover the kind of stress employees feel when their work conditions change or their jobs are in jeopardy [*Review Reference #R0269567*, Unreported].

3. Arbitrator Upholds Mandatory COVID-19 Testing of Retirement Home Employees

Unlike in the US, a Canadian court has yet to rule on whether employers can require

employees to receive the COVID vaccination. However, an important case from Ontario confirms that they can require COVID testing. Significantly, the employees in this case worked in a retirement home for elderly residents particularly susceptible to the virus. The union claimed the mandatory testing policy was unnecessary and privacy-invasive and urged the arbitrator to evaluate it like a drug and alcohol testing policy. But to the arbitrator, that would be an apples-to-oranges comparison. The stakes were much more deadly with COVID. While less vulnerable than nursing home residents, people living in retirement communities are still elderly and at great danger if they catch coronavirus. Besides, the arbitrator reasoned, a positive COVID test isn't "culpable conduct" subject to discipline the way a positive drug/alcohol test is [*Christian Labour Association of Canada v. Caressant Care Nursing & Retirement Homes* (D. Randall), (unreported)].

4. BC Government Socked with Record-High Injury to Dignity Damage Award

The BC Human Rights Tribunal found that a government corrections officer was subjected to a poisoned work environment due to his race and colour. The evidence showed that he was stereotyped as slow and lazy and referred to as a "lazy black man." After 9 years of litigation, the Tribunal handed out the bill—damages of $974,167. While most of that money was to compensate for lost salary, the Tribunal also included $176,000 for injury to dignity, feelings and self-respect, the biggest award of that type ever handed out in BC [*Francis v. BC Ministry of Justice (No. 5*), 2021 BCHRT 16 (CanLII), January 28, 2021].

5. Alberta Court Clarifies Duty to Accommodate Employees' Childcare Schedule Needs

An important case addressing the standard of family discrimination in Alberta involves an ER nurse who asked to remain in her current 12 hours per day for 4 days in a row followed by 4 days off rotation because the proposed new shift interfered with her childcare obligations. The Labour Board ruled that the nurse was entitled to accommodations, but only after she first tried to make alternative childcare arrangements. Since she didn't make such "self-accommodation" efforts, she had no case. After the Court of Queen's Bench reversed, the case landed in the province's top court. The Board got it wrong, the Court of Appeal found. Family status discrimination laws do **not** require employees to try and make other reasonable childcare arrangements before seeking scheduling accommodations from their employers, it reasoned [*United Nurses of Alberta v Alberta Health Services*, 2021 ABCA 194 (CanLII), May 25, 2021].

6. Supreme Court Leaves Controversial *Waksdale* Ruling Intact

In June 2020, the Ontario Court of Appeal handed down a controversial ruling called *Waksdale v. Swegon North America Inc*. striking down a contract clause purporting to limit the notice an employee would get if he were terminated because the part of the provision that applied to termination with cause violated the ESA. What made the *Waksdale* case so controversial is that the employee was actually fired without cause, meaning the tainted language was basically irrelevant. But the Ontario Court treated the entire provision as a package deal and held that if **any part** of it was rotten, the whole thing must fall. Convinced that the Court had to be wrong, the employer took its case to the Canadian Supreme Court. But now the nation's top court has refused to take the appeal, meaning the *Waksdale* ruling stands [*Swegon North America Inc. v. Waksdale,* 2021 CanLII 1109 (SCC), January 14, 2021].

7. Positive Marijuana Test Doesn't Prove Employee Was High at Time of Accident

As usual, some of the most important HR cases in 2021 have addressed alcohol and drug testing. Among the key rulings is a federal case involving a machine operator who got fired for testing positive for THC after backing his Cat Loader into a pole. The arbitrator reinstated him without loss of pay and $5,000 in damages to boot. For one thing, the company didn't give the union all of the necessary evidence before doing the post-incident test. Just as importantly, the THC levels weren't enough for the company to prove that the operator was impaired **at the time of testing** [*Canadian National Railway Company v United Steelworkers*, Local 2004, 2021 CanLII 30111 (CA LA), April 15, 2021].

8. Failure to Disclose Medical Marijuana Use Is Just Cause for Termination

Another important testing case went in the employer's favour involving a driver who claimed he disclosed his medical marijuana use before undergoing post-incident testing. So, he claimed the company violated its duty to accommodate by firing him for testing positive for marijuana. The company claimed he was fired not for not disclosing his medical marijuana use as required by the company's drug policy. The Alberta Human Rights Commission sided with the company after finding no evidence that the driver ever mentioned or that the company ever knew about his medical marijuana use until after the lawsuit. And since failure to disclose was the real violation, the actual test results were irrelevant [*Bird v Lafarge Canada Inc.,* 2021 AHRC 50 (CanLII), February 23, 2021].

9. Québec Court Sheds Light on Employer Duty to Accommodate Telecommuters

A case raising the question of how far employers must go to accommodate employees who want to work from home during COVID involved a professor who wanted to stay in Hawaii after finishing his sabbatical because of the health risks being in Canada would pose to his kid. You can work remotely, the university responded, as long as you do it in Canada. The Québec arbitrator found the no-telework-from-abroad policy reasonable given the tax and insurance difficulties and sympathized with the university's wish not to set a dangerous precedent of letting employees work from wherever in the world they want. However, it ruled that the university should also be prepared to consider exceptions to the policy, especially where: i. teleworking is mandatory under COVID rules; ii. employees don't need to be physically present to do their work duties; iii. the time zone difference wouldn't affect the quality of their work; and iv. the request is based on the health of the employee's child [*Syndicat des professeurs et professeures de l'Université Laval (SPUL) and Université Laval*, January 28, 2021].

10. BC Court Nixes Sex Harassment Class Action by WestJet Flight Attendants

Because sex harassment is something typically experienced by individuals, it's hard for victims to combine their claims into a class action lawsuit. But WestJet flight attendants found a way around that barrier: Instead of damages to individuals, they focused on the airline's broader contractual duty to provide all employees a harassment-free workplace. And it almost worked. The BC court agreed that the duty existed and that systemic failure to meet it would be grounds for class action. The problem is that if the attendants did prove those claims, they'd have to come up with a fair way to award damages to the individuals in the class. This would require an assessment of each attendant's experience, the court reasoned. As a result, a class

action in court wasn't the best choice and justice would be better served if the attendants brought their claims individually [*Lewis v WestJet Airlines Ltd*., 2021 BCSC 228 (CanLII), February 12, 2021].

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Drop me a line at glennd@bongarde.com and let me know what you think was the biggest HR case(s) of 2021 so far