The 11 Biggest HR Compliance Cases of 2021 & Their Impact on You

written by Tina Tsonis | December 27, 2021

The court cases most likely to directly affect your HR program and policies.

While new legislation always gets the lion's share of attention, many (if not most) of the most impactful changes to HR laws come from court cases. This was especially true in 2021, when COVID-19 dominated and the job of drawing the legal boundaries for everything from mandatory vaccination to workers comp coverage of infection fell to the courts and arbitrators. Of course, the courts also addressed drug testing, constructive dismissal, transgender discrimination, termination notice limits and countless other non-COVID issues.

Here's a summary of what we see as the 11 most significant HR cases of the year, along with a brief description of how they impact you and a link to resources on the HRI website that you can utilize to deal with the issue within your own organization.

1. Courts Uphold Mandatory Vaccination

In November, courts and arbitrators finally began weighing in on the legality of mandatory vaccination policies. Among the 4 cases, all but 1 upheld the challenged policy. The lone exception was an Ontario arbitration ruling finding that the employer failed to show its particular workplace needed such a draconian policy given that there were no outbreaks and the success of previous safety measures in preventing workplace outbreaks [*Electrical Safety Authority v. Power Workers' Union*, Grievance ESA-P-24, November 11, 2021]. By contrast, a Québec court went as far as finding that a mandatory vaccination didn't violate the Charter rights of union employees [*Electrical Safety Authority v. Power Workers' Union*, Grievance ESA-P-24, November 11, 2021].

> **Takeaway:** Courts are likely to uphold your mandatory vaccination policy if you: i. can show that you did a hazard assessment determining the need for such a drastic safety measure at your own workplace; and ii. make necessary accommodations for the disabled and others protected by human rights laws.

2. Courts Split on Whether Workers Comp Bars Constructive Dismissal for

Harassment

Employees who suffer workplace harassment may be entitled to workers comp benefits for the mental health injury they incur. And that raises a question: Does the workers comp bar on suing employers for damages related to work injuries take away a harassment victim's right to sue his/her employer for constructive dismissal? In a strange coincidence, 3 different courts issued rulings on this issue in 2021. Two of them held that workers comp **doesn't** bar constructive dismissal based on harassment: [*Morningstar v. WSIAT*, 2021 ONSC 5576 (CanLII)], and *Dahlen v Avenue Living Communities Ltd*, 2021 ABQB 797 (CanLII)]; however, another Ontario court found that the bar **does** apply to constructive dismissal [*Chen v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2021 ONSC 7625 (CanLII)].

> **Takeaway:** While significant, the question of whether workplace harassment is the basis for constructive dismissal shouldn't have any impact on your determination to maintain a harassment-free, psychologically safe workplace since failure to do so not only poisons the work environment but also exposes you to liability under OHS and other laws.

3. Ontario Courts Split on Constructive Dismissal Rights of Employees on IDEL

Speaking of constructive dismissal and split courts, there was a series of important cases addressing the Ontario regulation temporarily barring employees on infectious disease emergency leave (IDEL) from suing for constructive dismissal. In *Coutinho v. Ocular Health Centre Ltd*., (2021) ONSC 3076, the court ruled that an employee on IDEL could still sue for constructive dismissal under common law, i.e., law outside the ESA statute. But shortly after that, another court said *Coutinho* was wrong and that a Tim Hortons' employee on IDEL couldn't sue for constructive dismissal [*Taylor v. Hanley Hospitality Inc*., 2021 ONSC 3135 (CanLII), June 7, 2021]. That very same week, a third Ontario court adopted the *Coutinho* view, finding that a recruiter placed on IDEL was constructively dismissed and entitled to over $178,000 in damages, including 15 months' notice and $25,000 in punitive damages [*Fogelman v. IFG*, 2021 ONSC 4042, June 2, 2021].

> **Takeaway:** The IDEL cases are also relevant outside Ontario because of the universal risk that employees placed on temporary COVID-19 layoff will sue for constructive dismissal.

4. Federal Court Won't Pull Plug on RCMP Employees' $1.1 Billion Harassment Lawsuit

A group of RCMP employees who claim they were harassed and bullied at work filed a $1.1 billion class action against their employer for "systemic negligence" in allowing the behaviour to continue for decades. In 2020, the federal court ruled that the employees could bring the lawsuit as a class action. The RCMP appealed, contending that the employees had to pursue their complaints via the internal grievance system rather than a lawsuit. But the federal appeal court found that the lower court's finding that the RCMP's internal resolution processes were beset with widespread, system problems was reasonable and refused to overturn it. Result: Barring Supreme Court reversal, the employees will get the chance to prove their claims at trial [*Canada v. Greenwood*, 2021 FCA 186 (CanLII), September 21, 2021].

> **Takeaway:** In February, a court in BC took the opposite position by disallowing WestJet flight attendants to bring their harassment cases collectively as a class action. Sexual harassment is a personal experience that must be decided on the basis of each individual case, the court reasoned.

5. 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].

> **Takeaway:** Workplace harassment is morphing into a cyber offence that your HR harassment policies must specifically address. After all, you can't fight digital harassment with an analog policy.

6. Nova Scotia Court Refuses to Subtract CERB from Wrongful Dismissal Damages

One key subject of 2021 HR litigation is whether wrongfully dismissed employees should get less damages if they received federal CERB benefits after losing their jobs? The courts have split on this question. One notable case was brought by a highly sympathetic employee with a long service record that was coldly let go without warning at the start of the pandemic. Why should the employer get a windfall from a government program to help unemployed workers in the form of a reduced damage award, the Nova Scotia court asked, in awarding the employee 22 months' termination notice, just 2 below the maximum allowed [*Slater v. Halifax Herald Limited*, 2021 NSSC 210 (CanLII), June 17, 2021].

> **Takeaway:** The *Slater* case is a bit of an anomaly. Most of the courts that have addressed the question have ruled that CERB benefits can be subtracted from wrongful dismissal damages. Workplace harassment is morphing into a cyber offence that your HR harassment policies must specifically address. After all, you can't fight digital harassment with an analog policy.

7. Using He/She Pronouns with Transgender Co-Worker Costs BC Employer $30K

A bar manager used he/she pronouns, along with gendered nicknames like "sweetheart" and "honey" to refer to a non-binary, gender fluid, transgender co-worker on their first day of work. They asked him to stop and use they/them pronouns instead. Four days later, they were fired for coming off "too strong too fast." and being "militant." The BC Human Rights Tribunal found the restaurant guilty of discrimination and awarded the employee $30,000. "Using correct pronouns communicates that we see and respect a person for who they are, especially for trans, non-binary

or other non-cisgender people," the Commission explained [*Nelson v. Goodberry Restaurant Group Ltd. dba Buono Osteria*, 2021 BCHRT 137 (CanLII), September 29, 2021].

> **Takeaway:** The *Nelson* case illustrates the importance of having an HR policy for preventing harassment and discrimination on the basis of not only sexual orientation but gender status and identity.

8. 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. The Canadian Supreme Court refused to take the appeal, meaning the *Waksdale* ruling stands [*Swegon North America Inc. v. Waksdale,* 2021 CanLII 1109 (SCC), January 14, 2021].

> **Takeaway:** Contract clauses seeking to limit employees fired without just cause to employment standards termination notice amounts remain extremely difficult to enforce and must be painstakingly drafted by an experienced and knowledgeable lawyer.

9. Ontario Employer Must Count Non-Canadian Employees in ESA Payroll Severance

Section 64(1)(b) of the Ontario ESA requires employers to pay not just termination notice but also severance pay if the employee was employed for 5 years or more and the employer has a payroll of $2.5 million or more. An important new case clarifying which employees count began when a small Canadian subsidiary of an international steel firm based in Germany laid off a veteran employee. Going against previous cases, the Divisional Court held that the Section 64(1)(b) payroll calculation isn't limited to Ontario employees but includes employment outside of Canada [*Hawkes v. Max Aicher (North America) Limited*, 2021 ONSC 4290 (CanLII), June 15, 2021].

> **Takeaway:** The *Hawkes* case means that smaller Ontario employers with Canadian payroll of under $2.5 million may be required to pay statutory severance under the ESA if they hire non-Canadian employees.

10. Québec Court Says Workers Comp Covers COVID-19 Infection at Work

Is coronavirus infection a work-related injury under workers comp? One of the first cases to address this crucial question involved a truck driver who had to be in confined spaces where he couldn't maintain social distancing from other workers. Five of those workers tested positive for COVID and the driver contracted the virus. The Québec court said the infection was work-related and thus covered by workers comp [*Lamarche v. Consolidated Fastfrate Inc.*, 2021 QCTAT 4580 (CanLII), September 23, 2021].

> **Takeaway:** The reason the infection was work-related wasn't simply because of the driver's exposure at work but the fact that he was exposed to undue hazard, namely, exposure in a confined space where social distancing couldn't be maintained. Employers can still defeat a claim by by showing that they implemented an infection control program incorporating all safety measures required by COVID protocols and thus that the hazard to which the employee was exposed wasn't undue.

11. Alberta Tribunal Finds Failure to Disclose Medical Marijuana Use Just Cause for Termination

One of the year's most important drug testing cases a driver who claimed the company violated its duty to accommodate by firing him for testing positive for marijuana. The company claimed he was fired not for testing positive but failing to disclose 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].

> **Takeaway:** *Bird* is consistent with other court rulings allowing for termination because of an employee's failure to disclose. The moral is that requiring or at least offering employees the chance to come forward and disclose their drug and alcohol problems is a more effective strategy than seeking to catch and discipline them after the fact.