The 12 Most Important HR Compliance Cases of 2020

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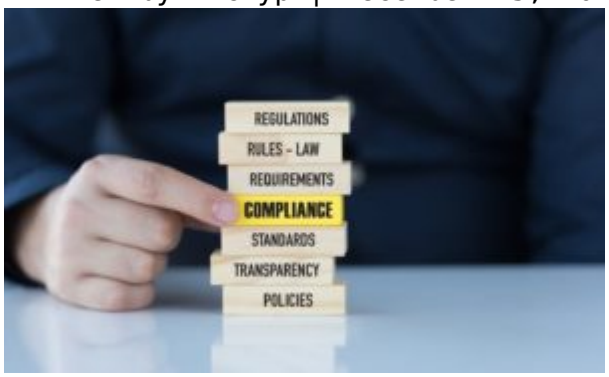

Termination notice limits, drug testing and unionization rights were central themes in HR.

COVID-19 might have shut down businesses, but courts and arbitrators remained open during 2020 and handed down some extremely significant and far-reaching decisions. Here's a summary of what we believe are the most impactful cases of the year.

1. Supreme Court Okays Uber Drivers' $400 Million Class Action Lawsuit

One of the most significant cases of 2020 involved a January 2019 Ontario Court of Appeal decision allowing a $400 million class action by Uber and UberEATS drivers to go forward and finding that the boilerplate contract clause requiring all disputes to be arbitrated in Holland, including those involving events in Canada, was an illegal attempt by Uber to contract out of its ESA overtime, minimum wage and vacation pay obligations. The Supreme Court of Canada upheld the ruling, but on different grounds, finding that Uber's methods of requiring drivers to accept contract terms through their app was unconscionable and effectively stripped drivers of their rights to arbitrate their claims. Editor's Note: The ruling just means the case may proceed as a class action in a Canadian court; the drivers will still have to prove that their claims against Uber at trial [*Uber Technologies Inc. v. Heller*, 2020 SCC 16 (CanLII), June 26, 2020].

2. BC Union Loses Bid to Organize Uber and Lyft Drivers

Uber fared better in a March case by a union asking the BC Labour Relations Board to officially declare that Uber and rival Lyft committed unfair labour practices by treating drivers as independent contractors and signing contracts acknowledging that they're not employees. The drivers are really "dependent contractors," and thus entitled to union representation under the law, the union claimed. While agreeing that it had jurisdiction, i.e., legal authority to rule on the case, the Board sided with Uber and Lyft. Even if the drivers were employees under the labour relations laws, the union didn't show evidence that the companies violated any of their collective bargaining rights [*Lyft Canada Inc. v United Food And Commercial Workers International Union, Local 1518*, 2020 BCLRB 35 (CanLII), March 11, 2020].

3. Labour Board Gives 'Gig Economy' 'Dependent Contractors' Greenlight to Organize

Unlike employees, independent contractors aren't allowed to unionize. In the middle are "dependent contractors" who work for themselves but rely heavily on a single

client and thus *are* allowed to unionize. And in a landmark February ruling, the Ontario Labour Relations Board applied these rules for the first time to the so called "gig economy" in which independent workers rely on smartphone apps and social networking to land temporary work assignments or gigs, e.g., car service drivers, by finding that food couriers who deliver a customized meal assigned by an algorithm without any direct communication or direct payment with the customer are dependent contractors. Food couriers are more like employees than independent contractors, reasoned the OLRB, because, among other things they can't subcontract, the employer supplies the App, they don't deal directly with the restaurant or customer, they're subject to discipline, they don't control their shifts and they have no direct stake in the business or its financial success [*Canadian Union of Postal Workers v Foodora Inc. d.b.a. Foodora*, 2020 CanLII 16750 (ON LRB), Feb. 25, 2020].

4. Newfoundland Court Draws a Tough New Line on Marijuana Testing

Newfoundland has been the site of some of the country's most significant drug testing cases, including this blockbuster question whether an employer may refuse to hire a safety-sensitive construction worker who admitted to legally vaping medical marijuana containing high THC levels after work to manage pain related to Crohn's disease. The arbitrator said the worker was entitled to accommodations, but that letting him do a safety-sensitive job would be undue hardship, especially since there's no test capable of detecting current impairment. One appeal later, the Newfound Court of Appeal reversed the decision. The basic issue was who should the lack of a conclusive test denoting **current** marijuana impairment favour? If the presumption was that in case of doubt, don't hire, all an employer would have to show is that the worker who tests positive is safety-sensitive. The standard should be higher, the court reasoned. Maybe there were other ways to determine the worker's fitness for duty, like a daily pre-shift functional assessment. At the end of the day, the burden should be on the employer to prove that it considered these alternatives and explain why they were rejected. So, the court sent the case back down to the arbitrator to evaluate whether the employer had done that in this case [*IBEW, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc*., 2020 NLCA 20 (CanLII), June 4, 2020].

5. Reporting Non-Safety Sensitive Med Marijuana Worker's Drug Test Is Discrimination

Newfoundland was also the scene of another significant pro-employee drug testing case involving an applicant for a nursing position at an offshore oil platform who tested "non-negative" for THC. The applicant explained that he had spinal bone cancer and used legally authorized medical marijuana to treat the pain. The testing company, AOMS, a medical services company hired to provide nursing staff for the platforms, flagged the applicant as a safety risk and reported the results up the chain of command to the subcontractor and thence to the Husky, the energy company that owned the sites as the latter's drug policy required. The Newfoundland Human Rights Commission found AOMS guilty of disability discrimination. AOMS appealed but to no avail. The Husky policy required AOMS to report positive tests of applicants for safety-sensitive jobs. But the applicant didn't test positive; and the nursing job he was seeking **wasn't** safety-sensitive. **Result:** AOMS owed the applicant damages and a written apology [*Maharajh v Atlantic Offshore Medical Services Limited*, 2020 CanLII 49888 (NL HRC), July 14, 2020].

6. Wrongfully Dismissed Employee Entitled to Bonus Accrued During Notice Period

One of the most common themes in 2020 HR litigation was the refusal of courts to enforce contractual limits on termination notice, including this case involving a senior chemist who would have made a fortune under his long-term incentive plan (LTIP) had he still been with the nutrition company when it was acquired for $543

million. But since he had left 18 months earlier, the company didn't think it had to honour his LTIP rights when the "Realization Event" occurred. But the company turned out to be wrong. After ping-ponging around in the Nova Scotia courts, the Supreme Court of Canada ruled that the company had constructively dismissed the chemist and had to pay him the bonuses he'd have earned during the reasonable notice period. And since the Realization Event/acquisition did happen during the notice period he'd have gotten the LTIP bonus had he not been wrongfully dismissed. True, the LTIP plan purported to limit payments to "active" employees, but the Court said this language wasn't "absolutely clear and unambiguous" enough to strip the chemist of his benefits rights [*Matthews v. Ocean Nutrition Canada Ltd*., 2020 SCC 26, October 9, 2020].

7. Illegality of One Clause Renders Entire Termination Notice Limit Invalid

An Ontario sales director's contract included a termination provision with 2 clauses: Clause 1 provided no notice for termination "with cause;" and Clause 2 limited notice to the ESA minimum for termination "without cause." The director was fired without cause 8 months into the contract and got the ESA minimum notice of 2 weeks. Both sides agreed that Clause 1 was invalid and Clause 2 was okay. But the director claimed that Clause 1 poisoned the entire provision, including Clause 2. The employer claimed Clause 1 was irrelevant since the termination was without cause. But the Ontario high court disagreed. Employment agreements are a package deal and should "be interpreted as a whole and not on a piecemeal basis." **Result:** The whole provision was invalid and the Clause 2 limit didn't apply [*Waksdale v. Swegon North America Inc*., 2020 ONCA 391 (CanLII), June 17, 2020].

8. Ontario Court Refuses to Enforce 'Harsh and Oppressive' Stock Award Forfeiture

After 23 years of service, a senior Microsoft employee was terminated without cause. **The question:** Did the stock awards that had been granted to the employee but which hadn't yet vested at the time of termination vest during the notice period? No, argued Microsoft, citing language in the Rewards Policy that granted but unvested stock awards are forfeited upon termination. But while acknowledging that the language was clear and unambiguous, the Ontario court said the forfeiture provision was "harsh and oppressive" and refused to enforce it. The employee was totally unaware of the provision; and because it was so unfair, somebody at the company should have brought it to his attention [*Battiston v. Microsoft Canada Inc*., 2020 ONSC 4286 (CanLII), July 15, 2020].

9. CIBC Employees Win Massive Class Action Overtime Lawsuit

After nearly 16 years of class action litigation, an Ontario court ruled in August that Canadian Imperial Bank of Commerce violated its duty to pay overtime to roughly 31,000 tellers, personal bankers and other front-line employees. The Ontario court found that CIBC's policy of paying overtime only to employees with written permission to work overtime from a supervisor or manager violated the bank's *Canada Labour Code* duty to pay overtime to employees "required or permitted" to work more than 8 hours per day and 40 hours per week. It also found CIBC liable for not keeping records of actual hours worked each day as required by the CLC. Expect CIBC to appeal the decision once the court decides on damages, which could run into the millions with a class of that size [*Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 4288 (CanLII), August 10, 2020].

10. Offering Suitable Replacement Job Is Enough to Accommodate Injured Worker

A health agency notified a residential care worker that his work injury made it impossible to reinstate him to his old job. After the worker filed a discrimination complaint, the agency offered him an administrative position. But the worker

considered the job unsuited for his skills and rejected the offer. When the worker didn't show up for a settlement meeting, the agency sent him a letter asking him to clarify if he was taking the job. When the worker didn't respond, the agency terminated his employment. He claimed failure to accommodate but the Alberta human rights commission dismissed the case, finding that the agency had offered him suitable employment and accommodated the worker to the point of undue hardship, and that the worker refused to cooperate with the accommodations process. The case went all the way up to the Alberta Court of Appeal which found the commission's ruling reasonable and refused to enforce it [*Wojtasiewicz v Alberta (Human Rights Commission*), 2020 ABCA 23 (CanLII), Jan. 23, 2020].

11. Supreme Court Serves Up a Human Rights Stunner

Can a foreign national who suffers human rights violations in his own country while working for a Canadian company sue that company for money damages *in Canada*? A new case raising that question was brought in BC by 3 Eritrean miners who claimed they were forcibly conscripted into the Eritrean military and forced to work at a mine owned by state-owned subsidiaries of a Canadian company. The company tried to have the case dismissed since it was the Eritrean subsidiaries that dished out the alleged inhuman treatment the miners endured, but the BC courts refused. Finally, the case reached the Canadian Supreme Court, which ruled 5-4 that the miners had a valid case under what's called "customary international law." Bottom Line: Canadian companies with operations in countries where governments commit human rights abuses can be held liable to the victims of those abuses in a Canadian court [*Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 (CanLII), Feb. 28, 2020].

12. Firing Worker for Alcohol-Related Absenteeism Is Failure to Accommodate

A veteran mine worker with a history of attendance problems got fired for not showing up for 2 shifts in a row without notifying a manager at least an hour before the shift began in violation of his last chance agreement (LCA). But the Nova Scotia arbitrator found the LCA defective to the extent that making a person-to-person call to a manager of an underground mine is extremely difficult. More significantly, the LCA addressed just the absenteeism issues without dealing with their underlying cause, namely, the worker's alcohol dependence. True, the worker never acknowledged his dependence; but the employer had plenty of evidence and didn't take the trouble to explore and confirm its suspicions. As a result, enforcing the LCA violated the worker's rights to accommodation. So, the arbitrator reinstated the worker, but without compensation and on a conditional basis because of his failure to come forward and disclose his alcohol problem [*UNIFOR, Local 823 v K + S Windsor Salt Ltd (Pugwash Facility, Nova Scotia*), 2020 CanLII 64088 (NS LA), September 9, 2020].