The 8 Most Important HR Compliance Cases of 2019

1. Ontario High Court Says There's No Tort for Workplace Harassment

Employers dodged a liability bullet in March when the Ontario Court of Appeal reversed a lower court ordering management to pay an RCMP officer $966K in damages for the harassment he suffered at work. The key to the case was the finding that employees have a tort law right to sue their employers for work harassment. Although it sounds like legal jargon, the tort concept is of critical practical importance because it offers a way around the workers' comp bar on civil litigation and enables harassed employees to sue their employers for money damages. But the high court saved the day. There is no such thing as a harassment tort, the Court, reasoned in dismissing the lawsuit [*Merrifield v. Canada (Attorney General),* 2019 ONCA 205, March 15, 2019].

2. Court Finds No Discrimination in Nixing Medical Cannabis User for Safety-Sensitive Job

The clash between the disability rights of legal cannabis users and the employer's need to ensure workplace safety was the focus of this Newfoundland case involving an employer's decision to revoke a job offer to a construction worker after he disclosed that he used medical cannabis each night after work to treat his Crohn's disease. The arbitrator tossed the discrimination grievance, reasoning that while the worker was entitled to reasonable accommodations, letting him do a safety-sensitive job while he still had THC in his system would be undue hardship. The union appealed but to no avail [*IBEW, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc.*, 2019 NLSC 48 (CanLII), Feb. 22, 2019].

3. Court Keeps Ontario's Common Law Notice Cap at 24 Months

Under common law, i.e., court-made law, unless there are exceptional circumstances, 24 months is the unofficial maximum of reasonable termination

notice in Ontario. So, when a court awarded a 62-year-old insurance exec who was wrongfully fired after 37 years of service 30 months' notice, it raised eyebrows. But in June, the Ontario Court of Appeal restored order by knocking the award down to 24 months. Instead of relying on exceptional circumstances, the lower court modified the 24-months' rule citing "change in society's attitude regarding retirement." In addition to reaching a questionable conclusion, the court made an "error" in relying on his personal perceptions of social factors to determine reasonable notice [*Dawe v. The Equitable Life Insurance Company of Canada*, 2019 ONCA 512 (CanLII), June 19, 2019].

4. Constructively Dismissed Employee Needn't Return to Work to 'Mitigate Damages'

An important federal case handed down in March shed needed light on the "mitigation of damages" rule, which requires employees to make reasonable attempts to find new work after they get wrongfully dismissed or risk having their damages cut. Question: Does mitigating damages mean going back to work for an employer that constructively dismissed you? Answer: Yes, in some cases. But what really ticked off the employer in this case in which a constructively dismissed school employee declined an offer to return to work for the school, is that the arbitrator didn't even cite the leading case (*Evans v. Teamsters*) or factors in finding that the employee *did* mitigate his damages. But the federal appeals court refused to overturn the decision. Although the arbitrator didn't cite *Evans*, he was clearly aware of the issue and made a reasonable decision, the court ruled [*Kainai Board of Education v. Day*, 2019 FC 283 (CanLII), March 7, 2019].

5. Employee Class Actions Get the Greenlight in BC & Ontario

From a liability risk perspective, getting sued by a group of employees in a class action is a nightmare scenario for any employer. The key to defending a class action is to get the court to dismiss the case and require the claimants to sue individually. But once the class survives the motion to dismiss, the pressure and bargaining leverage switches dramatically in their favour. And that's exactly what happened to 2 major employers in 2019. First, the Ontario Court of Appeal allowed a $400 million class action by Uber drivers to go forward, finding that a boilerplate contract clause requiring all disputes to be arbitrated in Europe, including those involving events in Canada, was unconscionable and an illegal attempt by Uber to contract out of its ESA obligations [*Heller v. Uber Technologies Inc.*, 2019 ONCA 1 (CanLII), Jan. 2, 2019]. Less than 2 months later, the high court of BC allowed WestJet employees to bring a class action against the airline for allegedly violating its contractual obligation to protect them from workplace harassment [*Lewis v. WestJet Airlines Ltd.*, 2019 BCCA 63 (CanLII), Feb. 21, 2019].

6. Sask. Arbitrator Lets Government Keep Using Controversial Firefighter Fitness Test

In June 2018, the Sask. Court of Appeal upheld a union challenge to the government's Public Service Commission's requiring firefighter job applicants to

complete a rigorous fitness test within a specific time as potentially discriminatory against women and older men. The PSC's plan to keep using the test until the appeal was decided fell apart when the Canadian Supreme Court refused to take the case. After trying to negotiate a solution with the union, the PSC decided to stick to the plan and made 2019 season applicants take the test. In July, the Sask. Labour Relations Board rejected the union's request to stay, i.e., bar the PSC from implementing the policy until an arbitrator resolved the dispute, finding that if the policy was ultimately found illegal any harm done by allowing it to continue could be fixed later [*Sask. Government and General Employees' Union v Government of Sask., Public Service Commission*, LRB File No. 083-19, July 30, 2019].

7. Temp Fired for Lack of Availability Gets His Job Back

One of the year's most significant cases involved Canada Post's attempt to enforce a collective agreement clause authorizing termination of temps who fail to demonstrate "reasonable availability" in accepting work assignments. The temp in this case accepted only 57 of 151 work assignments offered to him over a 6-month period, a 37.8% acceptance rate was well below the 49.9% average for his peer group. After 2 losses, CP took the case all the way to the Ontario Court of Appeal. But the third time did not prove the charm. The finding that the availability formula CP relied on was mechanical and flawed was neither unreasonable nor inconsistent with other case rulings, the Court reasoned in dismissing the appeal [*Canada Post Corporation v. Canadian Union of Postal Workers*, 2019 ONCA 476 (CanLII), June 11, 2019].

8. Arbitrator Says Workplace Violence Investigation by Company Official Isn't 'Impartial'

In one of the first cases testing cutting edge new federal OHS rules requiring workplace violence complaints to be investigated by an "impartial" person, an arbitrator sided with the union in ruling that a Canada Post manager failed the test. In theory, managers who do internal investigations may be impartial; but the new rules say that the investigator must "be seen by the parties to be impartial." And since the union made it known that it didn't trust the manager's impartiality, the investigation didn't satisfy the requirements of the new rules [*Canada Post Corporation v. Canadian Union of Postal Workers*, 2019 OHSTC 5 (CanLII), Feb. 15, 2019].

'Disagree With Our Choices?

Drop me a line at glennd@bongarde.com *and let me know what you think was the biggest HR case(s) of 2019*