The Top 10 HR Compliance Cases of 2023 So Far & Their Impact on You

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

HR law comes from 2 major sources: legislation and court cases. While new legislation gets extensive reporting coverage, court cases often fly under the radar. Consequently, HR managers don't know about the cases that may have a direct and immediate impact on their HR program and organization. In addition to our monthly report, HR Insider provides regular briefings of the key HR cases that came down in the past 6 months. Here's a summary of what we see as the 10 most significant HR cases of the year, along with a brief description of how they impact you.

1. Alberta Court Establishes New Harassment Tort

The year's most impactful employment case is a stunning ruling making harassment a tort in Alberta. While it didn't happen in a workplace, the case would open the door for employees to bring money damages lawsuits against their companies for not protecting them against harassment. The victim was an Alberta Health Services health inspector targeted by a social media content creator and online talk show for an online harassment campaign deliberately designed to make her life miserable because she had the audacity to do her job and enforce COVID-19 health orders during the pandemic. The Court of King's Bench awarded the inspector $650,000 in damages, including $100,000 for being the victim of the tort of harassment, which it ruled occurs when a person: "(1) engaged in repeated communications, threats, insults, stalking, or other harassing behaviour in person or through or other means; (2) that he knew or ought to have known was unwelcome; (3) which impugn the dignity of the plaintiff, would cause a reasonable person to fear for her safety or the safety of her loved ones, or could foreseeably cause emotional distress; and (4) cause harm [*Alberta Health Services v Johnston,* 2023 ABKB 209 (CanLII), April 12, 2023].

> **Takeaway:** As a practical matter, the question of whether harassment is a tort 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 exposes you to liability under OHS, workers comp and other laws.

2. Ontario High Court Finds Imperial Oil Guilty of Citizenship

Discrimination

Another case with potentially disturbing implications for employers, at least in Ontario, was a ruling affirming that human rights laws make it illegal to discriminate on the basis of citizenship status. The case was filed by a foreign engineering student who had stellar credentials and a 3-year postgraduate work permit but wasn't offered a permanent position without assurance of eligibility to work in Canada on a "permanent basis." Imperial Oil denied committing discrimination, noting that its citizenship policy made exceptions for some noncitizens. But the Ontario Court of Appeal wasn't impressed. Policies that discriminate on the basis of a prohibited ground are not saved on the basis that they only partially discriminate," reasoned the Court of Appeal [*Imperial Oil Limited v. Haseeb*, 2023 ONCA 364 (CanLII), May 23, 2023].

> **Takeaway:** Take 2 steps to minimize risk of citizenship discrimination: i. Vet your HR policies to ensure they don't make Canadian citizenship, proof of eligibility to work in Canada on a permanent basis or Canadian work experience criteria for employment, retention, promotions, etc.; and ii. Be careful about how you phrase interview and job application questions designed to elicit information about an applicant's legal right to work in Canada.

3. BC Top Court Clarifies Employer Obligation to Accommodate Employees' Family Status

As in all provinces, BC requires employers to make reasonable accommodations in work schedules for parents with caregiving needs. A case clarifying how far the duty to accommodate goes involved a journeyman welder who worked the same shift at the same mine with her journeyman electrician husband. The welder tried to negotiate a revised schedule after the couple had its first child but the mine said no. So, the welder sued for family status discrimination and failure to make reasonable accommodations. We don't have to make reasonable accommodations, the employer responded, because we just want to continue the status quo and haven't made any actual changes to the terms of the welder's employment. The BC Court of Appeal ruled the welder had a valid claim. The employer's duty to make reasonable accommodations applies to **any** term of employment that interferes with a parental duty, even if that term hasn't changed[*British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd*., 2023 BCCA 168 (CanLII), April 21, 2023].

> **Takeaway:** Each province has slightly different rules on family status accommodation and the childcare needs of working parents. If you're in BC, recognize that the duty to accommodate kicks in even if you just want to maintain previous terms of employment. However, employees must show that the term of employment that they want changed "seriously" interferes with a "substantial" parental or family duty.

4. Québec Arbitrator Draws a Line on Employer's Duty to Accommodate Alcoholic Worker

Another significant case asking the question of whether an accommodation is reasonable or undue hardship went in the favour of employers. The case began when a mine train operator with an alcohol addiction suffered a short-term relapse. As a result, the mining company fired him for violating his last chance agreement. The

union claimed the company violated its duty to accommodate the engineer. We **have** accommodated him on several occasions but now he's out of chances, the company responded. The Québec arbitrator sided with the company, citing the support it provided during 2 unsuccessful rehab attempts. The operator didn't demonstrate any extraordinary reason for not being able to comply with the last chance agreement or exhibit any "real desire" to recover. In light of these circumstances, the company was reasonable in concluding that allowing him to continue doing this safety-sensitive job was undue hardship [*United Workers Transport (1843) v Rio Tinto (IOC Mining Company),* 2023 CanLII 13793 (QC SAT), February 27, 2023].

> **Takeaway:** While alcoholism and drug addictions are disabilities that employers must accommodate, employees also have a duty to cooperate in the accommodations process and work toward their own rehab, particularly when they're subject to a last chance agreement. Trying to help employees who won't help themselves is an undue hardship, rather than a reasonable accommodation.

5. Failing Pre-Employment Drug Test Is Grounds for Revoking Job Offer

As usual, there were important cases evaluating the legality of a company's drug testing policies and procedures. One key case began when a pipeline company offered an applicant the safety-sensitive job of Business Continuity and Emergency Management Advisor but then withdrew the offer after the applicant flunked his pre-employment drug test. The applicant admitted to having marijuana THC in his system but claimed it came from CBD oil he legally used to treat a respiratory ailment and sued the company for disability discrimination. The Alberta human rights tribunal dismissed the case because the company didn't know he was disabled. Nor did the company have a duty to inquire into whether he was disabled since the applicant, knowing that flunking the test might cost him the offer, never revealed his condition or the fact that he used CBD oil made from marijuana to treat it and there were no other reasonable grounds to suspect he had a disability [*Greidanus v Inter Pipeline Limited*, 2023 AHRC 31 (CanLII), March 13, 2023].

> **Takeaway:** The *Greidanus* case illustrates the importance of having and properly implementing a legally sound drug and alcohol testing policy, which may include pre-employment testing after offering applicants jobs that are safety-sensitive.

6. & 7. Courts Hit Employers with *Wallace* Damages for Bad Faith Termination

In 2 separate cases, courts handed out over $300,000 in *Wallace* damages against employers. One case took place in New Brunswick where just one week into his 5-year contract, a medical director received a written contract purporting to codify the terms of his oral agreement. But the clause giving the employer the right to terminate the director with just 12 months' during the first year of the agreement was never discussed, let alone accepted. Sure enough, the employer relied on the clause to terminate the director less than 4 months into the agreement. The director claimed the clause was unenforceable and the New Brunswick arbitrator agreed, noting that the clause wasn't part of the original deal. Nor was it a binding amendment since the director never received any consideration, or value, for accepting the term. Moreover, the bad faith it showed in announcing the director's termination at a public news conference in a way suggesting that he was responsible for an unfortunate

fatal medical accident at a hospital caused the director mental stress. **Result:** The arbitrator awarded him $200,000 in *Wallace* damages [*Dornan v New Brunswick (Health*), 2023 CanLII 10433 (NB LA), February 15, 2023].

The other case involved a BC airline employee who claimed that his employer subjected him to a "sustained pattern" of bad faith and abusive conduct against him that continued even after he was fired. In addition to over $100,000 in wrongful dismissal damages, he asked for another $100,000 in punitive damages. The BC court gave him what he wanted, citing his unfair demotion and reassignment from customer service to terminal work and accompanying 25% cut in salary, unwarranted discipline, unsupported accusations of time theft and other actions designed to humiliate and embarrass the employee [*Chu v China Southern Airlines Company Limited*, 2023 BCSC 21 (CanLII), January 5, 2023].

> **Takeaway:** Courts award *Wallace* damages when termination isn't simply wrongful but carried out in a bad faith way that causes an employee mental distress. That's why it's important to be sensitive when carrying out the termination process while recognizing and avoiding the 5 ways you can get socked with *Wallace* damages for bad faith termination.

8. Manitoba Court Imposes Fiduciary Duty on Rank-and-File Employee

The owner of a gas station and small convenience store fired a clerk for stealing lottery and scratch-off tickets. Upon investigating, the owner was appalled to learn that over a 4-year period, the clerk's lottery ticket thefts had cost the business over $425,000. The owner sued the clerk to recover the money and asked the Manitoba court to declare her a fiduciary of the business, meaning that the debt wouldn't be discharged if she were to file for bankruptcy. And that's precisely what the court did. The stunning part was the court's finding that the clerk owed a fiduciary duty to the business even though she was never anything more than a rank-and-file employee. However, the court declined to make the clerk pay the owner punitive damages [*5379904 Manitoba Ltd. v. Hallick et al*., 2023 MBKB 63 (CanLII), March 29, 2023].

> **Takeaway:** Fiduciary duties are generally imposed only on high-ranking employees occupying a position of trust within an organization. This case also highlights the importance of Implementing a legally sound anti-theft policy at your workplace.

9. Courts Continue to Wrestle with Issues of Time Theft

Using GPS data tracking the location of response vehicles, a gas company determined that a technician had billed and received payment for over 153 hours (23.4% of total hours) of work for which he didn't show up, leaving his partner to do all the work alone. The results confirmed an audit from an earlier period finding 46+ hours of billed but unperformed work. The union claimed the technician did nothing wrong—the work orders were safe and the technician didn't want to spend time in the vehicle with a co-worker due to fear of catching COVID and bringing it home to his vulnerable wife. Instead of firing him, the company should have recognized him as a hero willing to work during the pandemic, the union argued. While agreeing with that sentiment to some degree, the Ontario arbitrator found that the technician "went way too far by taking advantage of the situation while the Company and most employees were scrambling to maintain essential services to the public, at some risk to themselves."

Result: It found just cause to terminate [*Enbridge Gas Inc. v UNIFOR, Local 975*, 2023 CanLII 2937 (ON LA), January 24, 2023].

> **Takeaway:** The past decade has seen a significant rise in time theft litigation. Employers generally struggle to prevail in these lawsuits. While the *Enbridge Gas* case is an exception, the best way to deal with time theft is via prevention, not litigation. Specifically, there are 6 steps you can take to prevent your employees from committing time theft.

10. Off-Duty Sexual Assault Is Just Cause to Fire, Even Though It's a First Offence

A co-worker goes to a transit worker's place to test drive the car he's selling. During the drive, he tries to hold her hand. She lets him know in no uncertain terms that she's not interested in having a sexual relationship with a married man. He persists. She again delivers a clear NO. As the drive ends, she feels bad and wants to smooth things over. So, she reaches over to give him a hug. He grabs her breast in a sexual way and the case ensues. After hearing all of the witnesses, the Alberta arbitrator rules that the city had just cause to fire the transit worker for off-duty conduct, despite his 17 years of employment without prior discipline, finding that the violation was serious enough to warrant termination without progressive discipline [*Corporation of the City of Calgary v Amalgamated Transit Union, Local 583*, 2023 CanLII 20867 (AB GAA), March 7, 2023].

> **Takeaway:** Some offences are so serious that they warrant termination for a first offence without progressive discipline. Sexually assaulting a co-worker is one of them. The fact that the offence occurred while both employees were off-duty was no defence. A critical factor in such cases is ensuring that you implement a legally sound off-duty conduct policy at your company.

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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 2023