The Top 11 HR Compliance Cases of 2022 & How They Affect You

The court cases most likely to directly affect your HR program and what to do about each.

While new legislation and regulations draw most of the attention, case law generates many if not most of the significant new developments in HR and employment law each year. Such was the case in 2022. Major issues in HR litigation during the year included workplace harassment, probationary employment, constructive dismissal, drugs and alcohol testing and, of course, mandatory vaccination and other COVID issues. Here are what we at HR Insider believe to be the 11 most significance cases of 2022, along with a practical lesson you can take from the case to address the HR issue the particular case involved at your own workplace.

- **1 & 2**
- **3**
- **4**
- **5**
- **6**
- **7**
- **8 & 9**

- **10**

- **11**

- **1 & 2**

Courts Green Light Workplace Harassment Class Action Lawsuits

While workplace harassment is a perennial focus of HR litigation, 2022 raised a novel issue with massive liability consequences for employers: Whether multiple harassment victims from the same workplace can combine their claims into a class action lawsuit. In previous years, courts have frowned on harassment class actions largely due to workers comp laws barring employees from suing their employers for work injuries. But things were different this year with courts okaying class actions against WestJet and the RCMP on the basis of contract claims.

The WestJet Case: To get around the workers comp bar, a group of female flight attendants contended that WestJet's failure to protect them from harassment was a breach of contract entitling them to money damages. The judge refused to certify the case as a class action and said that the attendants had to pursue their claims individually with the Canadian Human Rights Commission. But the attendants got the last laugh when the BC Court of Appeals reversed the lower court and gave the green light for a class action [*Lewis v. WestJet Airlines Ltd.*, 2022 BCCA 145 (CanLII), April 19, 2022].

The RCMP Case: In another high-profile case, the Federal Court ruled that current and former RCMP Members could bring a class action lawsuit against the agency for violating their obligation under the collective agreement to provide them a work environment free from bullying, intimidation and harassment. The class includes Members who worked for the RCMP without a collective agreement over a period beginning on Jan. 1, 1995, except for individual Members that expressly opt out of the lawsuit.

> **Takeaway:** By treating the employer's duty to provide a workplace free of harassment as a contractual duty, courts have opened the door to lawsuits for money damages, including class actions. This makes it even more imperative to create and consistently enforce a clear workplace anti-discrimination and harassment policy.

- **3**

Ontario Court Nixes Employee's Vicarious Liability Sex Harassment Tort

It wasn't all bad news for employers as far as workplace harassment litigation goes. In March, a flight attendant sought to blaze another path around the

workers comp bar by contending that employers who fail to protect their employees from harassment are vicariously liable for money damages under tort law. That's a big deal because tort damages in civil courts are typically much higher than discrimination damages awarded by human rights tribunals and workers comp benefits for mental stress and injury. But the Ontario Superior Court said no dice and tossed the attendant's $1 million lawsuit, finding that there is no vicarious liability harassment tort, at least not in Ontario. **Result:** If the attendant still wanted to go forward with her sex harassment claims, she'd have to file a discrimination complaint with the human rights tribunal [*Incognito v. Skyservice Business Aviation Inc*., 2022 ONSC 1795 (CanLII), March 22, 2022].

> **Takeaway:** While significant, the question of whether workplace harassment is the basis for a lawsuit for money damages in civil court 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, human rights and other laws.

- **4**

Alberta Human Rights Commission Imposes Record-High General Damages for Harassment Complaint

While it's far less than what WestJet and RCMP may have to pay, $50,000 is one of the highest general damage awards ever handed out by the Alberta Human Rights Commission. Not surprisingly, it was for harassment. The victim was an OHS officer who got fired after accusing the owner of the company of sex harassment. The owner's alleged conduct was truly cringeworthy, including:

- Calling the officer "Supertits";
- Arranging to share an open-concept suite with her during a business trip, despite her objections about being uncomfortable with the arrangement; and
- Grabbing her breast and hip as she awoke from a nap.

Getting fired for complaining about the harassment was the cherry on the liability sundae. In addition to the $50,000 in general damages, the Commission ordered the employer to pay the officer $13,000 in lost wages [*McCharles v Jaco Line Contractors Ltd*., 2022 AHRC 115 (CanLII), October 11, 2022].

> **Takeaway:** This case is a sad reminder that egregious sex harassment remains a major problem even in the 21st century. Rather than resolving the problem, telecommuting and remote work have merely caused it to migrate to electronic settings. That's why it's essential to give your analog harassment policy a digital makeover.

5

Courts Continue to Uphold Mandatory Vaccination

COVID-19 was a major theme in 2022 HR litigation, with mandatory vaccination the focal point. Continuing the trend that began last November, courts and arbitrators across the country consistently rejected union challenges to mandatory vaccination policies. With over 3 dozen cases in the books, courts have been upholding mandatory vaccination at a rate of roughly 6 to 1. Rare exceptions occur when employers terminate employees for defiance, rather than putting them on unpaid leave, or fail to accommodate an objecting employee's sincerely held religious beliefs.

> **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.

- **6**

Forcing Vaccine Refuser to Take Unpaid Leave Is Not Constructive Dismissal

In September, a BC court handed down Canada's first ruling on what has become a crucial COVID-related HR issue: whether placing employees on unpaid leave for refusing to get vaccinated is constructively dismissal. The Court said no, finding that the company's mandatory vaccination policy was reasonable, given the unprecedented health challenge posed by COVID, and that it was the employee who repudiated the contract by refusing to get vaccinated and putting her colleagues in peril [*Parmar v Tribe Management Inc.*, 2022 BCSC 1675 (CanLII), September 26, 2022].

> **Takeaway:** COVID-19 and constructive dismissal have become entwined. The *Parmar* ruling establishes an important precedent on the unpaid leave issue—at least in BC. However, an even bigger question is whether taking away employees' right to work from home constitutes constructive dismissal. Be sure not to cross the constructive dismissal line if you're requiring your own employees to return to work.

- **7**

Employer Fined $125,000 for Not Isolating COVID-Infected Worker

- Another challenge that COVID poses to HR managers and programs are the health

and safety compliance issues. In July, Ontario imposed what may be the nation's highest OHS fine for failing to protect workers from infection. On the receiving end was a Norfolk County farming operation. A COVID outbreak occurred in May 2020, when 196 of the 216 agricultural workers on the farm tested positive for the virus, one of whom eventually died. Public health authorities blamed the outbreak on the farm's failure to follow guidelines by isolating the first worker to test positive for 14 days, leaving him to spread the virus to the others [*Scottlynn Sweetpac Growers Inc*., MOL Press Release, July 12, 2022].

> **Takeaway:** While COVID-19 public health orders have been peeled back, taking steps to safeguard the workplace from infectious illness risks remains an imperative, especially with monkeypox on the loose and flu season beginning. So, be sure to implement an exposure control plan at your workplace.

- **8 & 9**

Arbitrators Strike Down Post-Incident Drug Testing

As usual, drug and alcohol testing was a major focus of HR litigation in 2022. Two of the most significant cases raised the question of whether a relatively minor incident was enough to justify post-incident testing under an existing test policy. In each case, the union won.

The first case took place in Alberta and began when a worker had to undergo post-incident testing after a chemical spill in the bed of the truck she was driving caused some minor equipment damage. The test came back positive for marijuana and the worker was fired. While acknowledging the legality of the testing policy, the union challenged the way the company applied it in this case. The arbitrator agreed, finding that the incident wasn't serious enough to justify the privacy intrusion inflicted by urine drug testing. As a result, the company committed wrongful dismissal and had to pay the worker money damages [*Fort Mckay Logistics LP, Fort Mcmurray Division v General Teamsters,local Union No. 362*, 2022 CanLII 78227 (AB GAA), August 26, 2022].

In the other case, which came from BC, a shipyard supervisor ordered a safety-sensitive worker who caused an aerial work platform incident to submit to 3 kinds of substance abuse tests: oral swab, breathalyzer and urine testing. The union objected, claiming that the incident wasn't a "significant event" justifying post-incident testing under the company's drug testing policy. The BC arbitrator agreed. The incident didn't result in any serious injury or property damage; the worker did a full hazard assessment before operating the platform; he moved the platform at a speed of less than 1 km per hour; there was no evidence that the worker was impaired; and the testing methods were highly privacy-invasive [*Vancouver Shipyards Co. Ltd. v CMAW, Local 506 Marine and Shipbuilders,* 2022 CanLII 51909 (BC LA), June 6, 2022].

> **Takeaway:** It's crucial for employers to establish and properly implement legally sound workplace substance abuse and drug and alcohol

testing policies, particularly now that recreational marijuana has been legalized.

- **10**

Court Nixes Arbitrary Termination of Probationary Employee

An important case addressing probationary employment involved a hospital's decision to terminate a probationary medical technologist occupying a highly sensitive surgical position. While conceding that the hospital didn't need just cause, the union contended that the decision to terminate was arbitrary. The Ontario arbitrator agreed. Although the hospital acted in good faith and with honest concerns about the technologist's suitability, its conclusion that she couldn't perform the job "was based solely on unquestioned second and third-hand reports from personnel from another facility." While these reports came from "a trusted source," they weren't enough to meet an employer's duty not to make arbitrary decisions about whether to permanently hire a probationary employee [*Ontario Shores v Ontario Public Service Employees' Union, Local 331*, 2022 CanLII 94918 (ON LA), October 11, 2022].

> **Takeaway:** Follow the appropriate rules and procedures when terminating probationary employees. Although you don't need just cause the way you do to terminate permanent employees, the *Ontario Shores* case serves as a reminder that limits still apply and the decision can't be arbitrary.

- **11**

The human rights law duty to accommodate requires an employer to give a disabled employee a reasonable opportunity to return to work. But just how long does an employer have to wait? A Québec arbitrator shed some light on that perennial question when it ruled that an employer didn't commit disability discrimination when it exercised its right under the collective agreement to terminate an employee for an absence lasting more than 36 months. Although the employee, a class 3 office clerk, wanted to come back and resume regular attendance, the medical evidence suggested that she didn't have a very good chance to do so. And after an absence of 3 years and no reasonable prognosis for a return any time soon, maintaining the clerk's employment wasn't a reasonable accommodation but the imposition of undue hardship [*Union of Workers of the CISSS de la Montérégie-EST-CSN c Integrated Health and Social Services Center of Montérégie-Est*, 2022 CanLII 11200 (QC SAT), February 17, 2022].

> **Takeaway:** How long is too long to wait for a disabled employee to return from an extended absence? The *CISS* case is consistent with other decisions that address this question.