The Top 11 HR Compliance Cases of 2022 (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, like the recent Bill 88 *Working for Workers Act* in Ontario, 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 11 most significant HR cases of the year, along with a brief description of how they impact you.

1. Ontario High Court Upholds Termination for Single Act of Harassment

As usual, the first half of 2022 featured some key rulings on workplace harassment, perhaps the most significant of which was an Ontario Court of Appeal decision upholding termination of a senior manager with 30 years of service. The manager engaged in just one incident of sexual harassment, but it was an egregious one: he slapped a female co-worker in the behind in front of 4 other employees. The lower court agreed with the company's conclusion that the employment relationship had been broken beyond repair and that retaining the manager would send the wrong message to female employees. The Court of Appeal, found the ruling reasonable but did reverse the part of the decision denying the manager ESA termination notice [*Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310 (CanLII), April 20, 2022].

> **Takeaway:** Key reasons that the company in *ThyssenKrupp* won is that it had adopted a clear anti-discrimination and harassment policy and counted on the manager to enforce it while also setting a proper example for others in the workplace.

2. BC High Court OKs WestJet Flight Attendants' Class Action Harassment Lawsuit

To get around the workers comp bar on workers' suing their employers for harassment, a group of female flight attendants filed a class action contending 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 ruling and gave the green light for a class action [*Lewis v. WestJet Airlines Ltd*., 2022 BCCA 145 (CanLII), April 19, 2022].

> **Takeaway:** Workplace harassment class actions are a growing liability threat for large employers. *WestJet* is consistent with a recent federal court ruling allowing a $1.1 billion class action by a group of RCMP employees who claim they were harassed and bullied at work. The suit claims that the RCMP committed "systemic negligence" in allowing the behaviour to continue for decades [*Canada v. Greenwood*, 2021 FCA 186 (CanLII), September 21, 2021].

3. Federal Arbitrators Uphold Termination of Railway Workers for Workplace Impairment

A pair of federal cases confirm the principle that being impaired by drugs or alcohol while on the job is a fire-able offence for a safety-sensitive worker. Both cases involved railway workers. In the first, a track operations foreman got fired after a post-incident test came back positive for cocaine. While the foreman had never been disciplined for drug use during his 14-year tenure, being impaired while on duty was just cause to terminate for a first offence, the arbitrator concluded [*Teamsters Canada Rail Conference Maintenance of Way Employees Division v Canadian Pacific Railway Company*, 2022 CanLII 1064 (CA LA), January 3, 2022]; a month later, an arbitrator upheld CN's termination of a train engineer with 55 demerits and 15 years of service after he tested positive for cocaine while on duty. Unlike other cases where engineers got to keep their job due to ambiguity in the test results, the results in this case clearly proved that the engineer was impaired on duty [*Teamsters Canada Rail Conference v Canadian National Railway Company*, 2022 CanLII 5833 (CA LA), February 2, 2022].

> **Takeaway:** While workplace impairment is just cause to terminate a railway or other safety-sensitive worker, employers still must have and properly implement a legally sound drug and alcohol testing policy to provide evidence of impairment.

4. Courts Continue to Uphold Mandatory Vaccination

Continuing the trend that began last November, courts and arbitrators across the country have consistently rejected union challenges to mandatory vaccination

policies. Among the more than dozen cases reported so far, all but 2 have gone in the employer's favour. The 2 exceptions were policies providing for termination, rather than unpaid leave for refusing employees without evidence justifying the health and safety need for such draconian measures in that particular workplace [*Electrical Safety Authority v. Power Workers' Union*, Grievance ESA-P-24, November 11, 2021]; and [*Chartwell Housing Reit (The Westmount, the Wynfield, the Woodhaven and the Waterford) v Healthcare, Office and Professional Employees Union, Local 2220*, 2022 CanLII 6832 (ON LA), February 7, 2022].

> **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.

5. Arbitrator Limits How Long Employer Must Wait for Disabled Employee's Return

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.

6. Not Letting Injured Worker Return Gradually Is Failure to Accommodate, Says Sask. Court

Another case involving accommodation of injured workers involved a government administrator suffering headaches due to a non-work injury who twice failed in attempting to return to work. Her doctor reported she was capable of working part-time and devised a gradual return to work plan. But the agency rejected the plan, insisting that she return on a full-time basis. The administrator claimed disability discrimination. The Saskatchewan court agreed and awarded her nearly $130,000 in lost wages and damages. The agency's refusal to even consider, let alone support, a gradual return to work violated its duty to accommodate the administrator to the point of undue hardship [*Gronvold v Rural Municipality of*

Baildon No. 131 The Saskatchewan Human Rights Commission, 2022 SKQB 99 (CanLII), April 6, 2022].

> **Takeaway:** Managing the return to work process is a perennial headache for HR managers, particularly since the process is governed by workers comp and re-employment rules vary by province.

7. Wrongfully Dismissed Employee Gets COVID-19 Termination Notice Bump

While the worst of COVID-19 seems to be over, the wrongful dismissal lawsuits borne of the pandemic will continue for years. One of them is the case brought by the 55-year-old marketing manager with a spotless record and 6 years of employment who was fired without cause in May 2020 as the pandemic was beginning. The question: How much common law "reasonable notice" should she get? The employer offered 6 months but the New Brunswick court bumped it up to 10 months, given the diligent efforts the manager made to find new work and the uncertainty and adversity that COVID-19 inflicted on the job market in which she had to search [*Miller v. Luminultra Technologies Ltd.*, 2022 NBQB 60 (CanLII), March 27, 2022].

> **Takeaway:** The courts have split on whether employees who got wrongfully dismissed during the financially troubled times of the pandemic should get extra termination notice.

8. BC Employer Doesn't Have to Stop Using Allegedly Privacy-Invasive GPS App

The privacy implications of digital monitoring technology to track employees' whereabouts has become a frequent source of litigation. One key case involved an elevator construction and maintenance firm that issued employees a mobile device deploying global positioning satellite (GPS) technology to track their whereabouts during work hours. The union claimed the app violated employees' privacy and asked the BC arbitrator to order the firm to disable it until the grievance was resolved. The arbitrator refused. The harms employees would suffer if the GPS app was later found to be privacy-invasive could be repaired, the arbitrator reasoned; but the damage to the firm if the app was found valid would be significantly greater given the importance of the information and its investment in the devices. However, while allowing the firm to keep using the GPS app, the arbitrator ordered it to notify the union of the information it collected using the app [*Kone Inc. v International Union of Elevator Constructors, Local 82*, 2022 CanLII 1018 (BC LA), January14, 2022].

> **Takeaway:** New legislation in Ontario (Bill 88) requires employers to implement a written policy disclosing their use of monitoring technology. Look for other provinces to adopt similar laws. Either way, creating such a policy is advisable as a best practice.

9. Ontario Court Nixes Employee’s Vicarious Liability Sexual Harassment Tort

Workers comp arguably bars employees from suing their employers for sexual harassment. The normal remedy is to file either a workers comp or human rights claim in which big bucks are generally not handed out. Rather than pursue these channels, a flight attendant who claimed she was sexually harassed swung for the fences by suing her employer for over $1 million in damages. To justify bringing the case in a civil court, the attendant argued that the employer was vicariously liable under tort law for sexual harassment. The employer contended that such a tort doesn’t exist in Ontario. The Superior Court agreed and tossed the vicarious liability case, telling the attendant that if she wanted to go forward with her sexual 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 and other laws.

10. Alberta Court Rules that Duty to Reinstate Doesn’t Mean Reinstating to Same Position

Just 3 weeks into her job, a University library assistant learned that her brother had died tragically. Profoundly affected, her performance suffered. Within months, she was terminated. The Alberta Human Rights Tribunal found the University guilty of mental disability discrimination and awarded the assistant $20,000 in damages for injury to her dignity and self-respect and 18 months’ lost income. It also ordered the University to reinstate her, which it did by offering her an equivalent job. But the assistant wanted her old job back. But the court refused her request for an injunction and the province’s top court dismissed the appeal. The University’s obligation was to offer equivalent employment and there was no evidence that the alternative positions it offered weren’t equivalent or ill-suited for the assistant’s skills, concluded the Court of Appeal [*Mittelstadt aka Pratt v University of Alberta*, 2022 ABCA 36 (CanLII), February 2, 2022].

[Blockquote shaded text] Takeaway: The *Mittelstadt* case illustrates the importance of having a policy and process for accommodating employees with mental health issues.

11. BC Court Overrules Human Rights Tribunal by Tossing Family Discrimination Claim

A journeymen electrician and his wife, a journeyman welder worked the same 12-hour shift at the same plant. When their child was born, they asked to be put in separate shifts for childcare purposes. After initially refusing, the plant

offered to let them work opposite 12-hour shifts. But the couple wasn’t satisfied and sued for family discrimination. The BC Human Rights Tribunal nixed the plant’s motion to toss the case without a trial. The plant claimed the Tribunal used the wrong test to determine if reasonable accommodations were made. You can’t take the case to court until we issue a final ruling, the Tribunal argued. But the BC Supreme Court disagreed. Not only did it review the decision not to dismiss but it found that the decision was legally wrong and quashed it [*Gibraltar Mines Ltd. v Harvey*, 2022 BCSC 385 (CanLII), March 10, 2022].

> **Takeaway:** Each province has slightly different rules for family status accommodation and accommodating the childcare needs of working parents.