The Top 12 HR Compliance Cases of 2024

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 directors may not 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 12 most significant HR cases of the year, along with an explanation of their real-life impact and the practical measures HR directors can take to safeguard their own company.

1. BC High Court Opens Door to *Wallace* Damages for Bad Faith During Employment

In a year where so many of the biggest HR court cases have involved newly emerging employment issues like social media and telecommuting, it's rather ironic that the most significant new ruling may be the one involving bedrock principles of contract law. It began when the B.C. government terminated a senior official for her role in an investigation into the alleged misuse of private healthcare data by Ministry of Health employees that led to several controversial terminations. The official, who had received "glowing performance reviews" during her tenure, claimed she had been scapegoated and sued for wrongful dismissal and breach of good faith both at termination and on an ongoing basis during her employment. While acknowledging that it didn't have just cause to terminate, the government contended that the employer duty to show good faith exists **only at time of termination** and asked the court to toss the claim. The court refused and the case reached the BC Court of Appeal, which held that a case could, in fact, be made that the duty of good faith applies not only at the end but also **during** the employment contract and that the official deserved a chance to prove her claim at trial [*British Columbia v. Taylor*, 2024 BCCA 44 (CanLII), February 6, 2024].

> **Takeaway & Impact on You:** Employers that exhibit bad faith in terminating employees may be hit with extraordinary damages known as *Wallace* damages. The *Taylor* ruling sets the stage for bad faith damages lawsuits against B.C. employers arising out of how they behave **during** the employment relationship and not just how they end it. For example, employees may assert bad faith claims against employers that pass them over for discretionary bonuses, pay increases, or promotions. To avoid such liability risks, employers must be extra sensitive to the risk of poison work environments and as transparent and honest as possible, particularly

when making decisions or taking actions that have an economic impact on employees.

2. Manitoba High Court Okays Gig Workers' Class Action Lawsuit Against SkipTheDishes

Class action lawsuits by gig workers who don't qualify as "employees" protected by employment standards laws represent the new wave of HR litigation. Taking a page from their Uber brethren, couriers working for SkipTheDishes Restaurant Services filed a class action against their employer. The company asked the court to dismiss the case, citing the provision of individual courier contracts banning class actions and providing that all disputes would be resolved via arbitration. The lower court found the arbitration clause unconscionable and unenforceable because the company forced the contract on couriers without any negotiation by making them click YES to accept the terms to keep getting gigs from the company. Manitoba's highest court, the Court of Appeal, upheld the ruling and ordered Skip to pay the costs of the appeal [*Pokornik v SkipTheDishes Restaurant Services Inc*, 2024 MBCA 3 (CanLII), January 12, 2024].

> **Takeaway:** As many as 20% to 30% of all Canadian workers engage in some form of "gig work," like driving, freelance writing, developing websites, and pet-sittting. So it's only a matter of time before your company partakes in the new gig economy, if it doesn't already. As HR director, it's incumbent on you to ensure that your employment relationships with gig workers comply with applicable legal requirements. The stakes are high, as exhibited by the *SkipTheDishes* suit and other major class actions. To ensure compliance, you need to understand the current state of the law on gig employment in Canada, a full briefing on which you'll find on the HR Insider site.

3. Employer Needn't Investigate Ex-Employee's Harassment Claim, Says Ontario Tribunal

As usual, workplace harassment was a heavily litigated issue in the first 6 months of 2024. One significant case that has flown under the radar took place in Ontario. It was brought by a fitness worker who complained to her employer about being sexually harassed by a co-worker. The problem is that she didn't do so until more than 6 months after being terminated. Consequently, the employer contended it had no obligation to investigate the complaint. The Ontario Human Rights Tribunal agreed and dismissed the harassment complaint. Failure to investigate a harassment complaint is normally a violation of a worker's right to be free from discrimination in the workplace, the Tribunal reasoned; but that's not the case when the worker is longer in that workplace [*Rougoor v. Goodlife Fitness Centres Inc.*, 2024 HRTO 312 (CanLII), February 28, 2024].

> **Takeaway & Impact on You:** Workplace harassment has become an increasingly common basis for OHS enforcement action and litigation. Failure to properly investigate violence and harassment complaints is a key issue in many of these cases. The *Rougoor* case is among the first to address how this duty applies when the person who complains no longer works for the company. Even so, it's crucial for employers to implement an effective workplace violence and harassment policy that provides for prompt, thorough, and fair investigation of employee complaints.

4., 5. Arbitrators Offer Clarification on Employment Rights of Telecommuters

As telecommuting takes root, courts and arbitrators are facing a growing volume of lawsuits involving the rights of employees who work remotely. And now the unions are getting involved. There were 2 significant rulings on telecommuter grievances, with the union winning one and losing the other.

The former case raised the question of whether it was reasonable for Canada Post to apply its mandatory COVID-19 vaccination policy to employees who work remotely during the pandemic. The federal arbitrator said no, at least with regard to those who worked **exclusively** from home and thus not expected to come to the office to do any of their job duties. The arbitrator cited other federal cases finding that mandatory vaccination is unreasonable for fully remote work but reasonable for those occupying jobs requiring occasional in-person attendance for meetings, training, or other specific employment functions [*Union of Postal Communications Employees (PSAC) v Canada Post Corporation,* 2024 CanLII 38829 (CA LA), May 6, 2024].

In the other case, the union contended that a city's work from home policy making employees responsible for the costs of preparing and maintaining their home workspace was unreasonable and in violation of the employer's collective agreement obligation to pay for the costs of the physical workplace and necessary work materials. The Ontario arbitrator disagreed, noting that the city allowed employees to take the necessary technology and office chairs from their workplace to their home space. The city struck a reasonable balance to deal with an unprecedented and challenging situation during a pandemic. And the savings on commuting more than offset the incremental costs employees incurred for pencils, pens, and other minor supplies [*The Corporation of the City of London v London Civic Employees Local 101*, 2024 CanLII 28841 (ON LA), March 22, 2024].

> **Takeaway & Impact on You:** There are no current laws that expressly give employees the right to telecommute. Such arrangements exist only to the extent that employers agree to them. Employers are also entitled to dictate the terms and conditions of the arrangement; in a unionized workplace, those terms and conditions may be subject to collective bargaining. In either case it's essential for employers to establish and implement a clear, thorough, and specific written policy for telecommuting agreements.

6. Ontario Court Refuses to Go Over 24 Weeks' Termination Notice Cap

As in the rest of Canada, 24 weeks is considered the maximum for termination notice when an employee is wrongfully dismissed. However, courts will occasionally go over the 24-weeks' limit when there are "exceptional circumstances." A 58-year-old employee with 22 years of service who had given up his engineering training to take a nonmanagement strategic director position at a software development firm played the "exceptional circumstances" card and asked for 30 weeks' notice after getting terminated without cause. But the Ontario court didn't buy it. Despite his long employment, age, the specialized nature of his job, and the fact that he was terminated during the pandemic, the court said 24 weeks was appropriate based on other cases where wrongfully dismissed employees in similar positions lost their "exceptional circumstances" claims [*Gazier v. Ciena Canada, ULC*, 2024 ONSC 865 (CanLII), February 8, 2024].

> **Takeaway & Impact on You:** Terminating an employee without cause can be not

only an emotional but financial ordeal for a company. That's because, unlike in the US where employment is at will, Canadian employment standards laws require employers to provide terminated employees certain payments, including notice or wages in lieu of notice based on how long their employment has lasted. Failure to comply with termination notice requirements is a frequent source of litigation. That's why you should implement a legally sound strategy to keep your termination practices compliant with employment standards and other laws.

7., 8. Courts Continue to Side with Employers in Social Media Use Discipline Cases

After over a decade of class law, it's become clear that employees' use of social media isn't just a private matter when it has a harmful impact on productivity or the workplace. There were 2 notable cases affirming an employers' right to discipline employees for inappropriate social media use. The first began when an HR director investigating an unrelated matter learned that employees had made comments on WhatsApp suggesting that a co-worker performed sexual favours to advance her career. The company then found other instances of sexist and derogatory remarks about co-workers made by employees in WhatsApp group chats. By the time it was all said and done, 5 employees were fired. The arbitrator ruled that the investigation was flawed since some of the witnesses refused to cooperate with the investigation and none of them were willing to file a formal complaint against any of the employees. So, it ordered the company to reinstate the employees. The Ontario Divisional Court found the ruling unreasonable, faulting the arbitrator for failing "to recognize that while some victims of workplace harassment are reluctant to report harassment or participate in the resulting investigation, their employer remains obligated to investigate such behaviour and protect the workplace from a hostile or demeaning work environment." As a result, the case had to go back down for retrial [*Metrolinx v. Amalgamated Transit Union, Local 1587,* 2024 ONSC 1900 (CanLII), April 2, 2024].

In the other case, a manager noticed that a real estate advisor had a habit of rapidly closing her computer browser windows each time he stepped into her office as if to hide what she was viewing. The company surreptitiously installed spyware on her computer to monitor her use and confirmed that she was, in fact, using the company computer to browse sites of personal interest during work hours for an average 70 minutes per workday. That average increased after she began working from home during the pandemic. Combined with using her personal email to transfer documents containing confidential information and other computer use transgressions, the company determined that it could no longer trust the advisor and terminated her. The Québec arbitrator agreed that this was serious misconduct justifying termination and rejected the union's grievance [*Union of Municipal Professionals of Montreal v City of Montreal*, 2024 CanLII 6432 (QC SAT), February 2, 2024].

> **Takeaway & Impact on You:** Employers need to establish and implement a written policy to regulate employee social media use and curb abuses that can harm the company or its business. Make sure your policy is realistic. Simply banning employees from using social networking sites or blogging altogether is impossible to enforce, especially to the extent it applies to what employees do off-duty.

9., 10., 11., 12. Cases Split on Post-Incident/For Cause Drug Testing

Drug and alcohol testing is essential to maintaining a sober workplace where all

employees are fit for duty. The 2024 cases shed light on a crucial aspect of the issue, namely for cause testing in response to safety incidents or other indications of drug or alcohol use. There have been 4 such cases already this year, yielding mixed results.

Employer Loses: In the first case, a company went too far in carrying out post-incident testing. It began when a power line technician suffered serious leg injuries while skidding wooden poles. The employer sent supervisors to the hospital to escort the technician to a test site where he'd have to climb a flight of stairs. The technician and his family protested and the company appeared to back off. But it later sent its operations supervisor to the victim's home to warn him of the consequences of refusing a drug test. The union filed a grievance contesting the company's right to test and claiming it invaded the technician's privacy. The Alberta arbitrator basically agreed and awarded the technician $7,500 in damages [*ATCO Electric Ltd. (ATCO) v Canadian Energy Workers Association (CEWA*), 2024 CanLII 37038 (AB GAA), April 26, 2024].

Employer Wins: A month later, a federal arbitrator reached a different decision in another case involving an Air Canada flight attendant who was asked to go to submit to reasonable cause hair follicle drug testing after crew members reported that he was acting strange and had made disturbing remarks about hijacking a plane. After begrudgingly giving their consent to collecting the sample and sending it to the lab, the flight attendant and union sued to prevent the company from relying on the test results. The federal arbitrator denied the cease-and-desist order, finding that the company had legitimate safety concerns about the flight attendant and that follicle testing was the least intrusive mode available in the circumstances. The union could file a grievance later once the test results came back and the company decided what, if any, discipline to impose [*Air Canada v CUPE, Air Canada Component,* 2024 CanLII 46083 (CA LA), May 21, 2024].

Employer Wins & Loses: Less than a month after the *Air Canada* case, a BC arbitrator handed down a mixed ruling in a case involving a mine worker who drove a company pickup truck containing a co-worker passenger in the rear into a prohibited zone where blasting operations were carried out. The company required both workers to undergo post-incident drug and alcohol testing. Both tested non-negative. The union cried foul. The arbitrator found that the company had grounds to test the driver but not the passenger. The driver's 35 years of service didn't excuse his failure to pay proper attention to where he was driving. While the passenger also had some degree of responsibility, he was basically just along for the ride [*Teck Highland Valley Copper Partnership v United Steelworkers, Local 7619,* 2024 CanLII 63093 (BC LA), June 14, 2024].

Employer Loses: The final case involved a railway that fired a driver for refusing to take a reasonable cause drug test after running his hi-rail truck through a switch. The union claimed that the railway didn't have grounds for testing since the driver was just following the foreman's orders to proceed and wasn't at fault. It demanded reinstatement, $50,000 in damages, and an apology. The federal arbitrator said yes to the first demand. The incident wasn't serious enough to justify testing since there were no fatalities, serious injuries, significant loss or damage to equipment, or environmental implications. And since there were no grounds for testing, there were no grounds for disciplining the driver for refusing the test. However, the arbitrator declined to award the driver damages or order the railway to issue a written apology [*IBEW, System Council No. 11 v Canadian Pacific Kansas City Railway*, 2024 CanLII 60992 (CA LA), July 3, 2024].

Takeaway: These and other cases illustrate the importance of having and

properly implementing a legally sound drug and alcohol testing policy, including procedures and protocols for testing employees in response to safety incidents or in other circumstances where there are reasonable grounds to suspect that an employee is impaired.

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Drop me a line at glennd@bongarde.com and let me know what you think were the biggest HR cases of 2024.