HR Insider

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TOP TEN HR CASES IN CANADA

Prepared for.
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The Top 10 HR Compliance Cases of 2023 & Their Impact on You

The courts and legal tribunals of Canada issue a number of crucial employment decisions that have a direct impact on companies and their HR programs every year. That's why it's critical for HR directors to keep up with the new cases that get decided through the course of the year. Unfortunately, that's easier said than done, especially if you're not a lawyer trained in legal research. That's why, in addition to our regular Month In Review, the HR Insider puts together a list of the most important employment cases that occurred in 2023 and their practical implications for your own HR program.

1. ALBERTA CASE OPENS THE DOOR TO HARASSMENT LAWSUITS FOR MONEY DAMAGES

The scariest HR case of the year actually happened in a non-workplace setting but has enormous implications for employment. The punchline is that, unless and until the ruling is overturned on appeal, harassment is now a tort in Alberta. Translation: Harassment victims can sue their harassers for money damages. The victim in this case 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. NEW BRUNSWICK COURT SLAMS THE DOOR ON SOCIAL MEDIA PRIVACY LAWSUITS FOR MONEY DAMAGES

It's almost always bad news for employers when courts recognize new torts the way the Alberta court in the Johnston case did. Luckily, another big 2023 case involving a tort for privacy violations went in the favour of employers. It began in New Brunswick when

a company took legal action to bar its former Director of Computer Program Development from sharing trade secrets with a competitor. To gather evidence, the company went into the Director's Facebook Messenger account and dug up his exchanges with other employers. Suddenly, the Director donned the role of victim by countersuing the company for constructive dismissal and breach of privacy. Awarding the Director money damages would have required the court to recognize a novel tort called "intrusion upon seclusion," which occurs when a defendant intentionally or recklessly invades a plaintiff's private affairs in a way that reasonable person would deem highly offensive, causing distress, humiliation or anguish. But the New Brunswick court refused to take the bait. Even if such a tort did exist, there were legitimate questions regarding whether the company's behaviour was highly offensive. and the Director's privacy expectations were reasonable, especially since he had shared his Facebook password with the company and didn't remove his Facebook account from his computer when he left, the court concluded [Unipco Ltd. v. Mullin, 2023 NBKB 200 (CanLII), November 22, 2023].

Takeaway: Implementing a clearly worded social media use policy for your employees is crucial. In addition to specifying permissible and impermissible uses of social media, such a policy should expressly state that social media communications that have an impact on your company, its products, services, reputations and clients are not privacy protected and that employees have no reasonable expectations of privacy in such communications, even if engaged in after hours and away from the workplace. Thus, the Mullin case might have gone the other way had the Director's expectations that his Facebook communications were privacy protected deemed to be reasonable.

3. FEDERAL COURT BARS RANDOM DRUG TESTING FOR NUCLEAR POWER PLANT WORKERS

As usual, there were several significant rulings on drug testing in 2023. Perhaps the most important case involved the ongoing legal battle between the Canadian Nuclear Safety Commission (CNSC) and the unions over new federal regulations requiring nuclear power plants to perform random, post-incident, reasonable cause and pre-assignment alcohol and drug testing on safety-sensitive and safety-critical workers. After losing in lower court, the unions won the latest round in October when the Federal Court of Appeal granted a stay banning CNSC from enforcing the regulations until the court's rule on their constitutionality. Allowing the drug testing to proceed would result in potentially irreparable harm without significantly reducing the risks of a nuclear incident, the court reasoned [Power Workers' Union v. Canada (Attorney General), 2023 FCA 215 (CanLII), October 27, 2023].

Takeaway: Keeping drugs and alcohol out of the workplace has become even more challenging since Canada legalized recreational cannabis. The bottom line: You have not only the right but also the duty to ensure workers don't perform their jobs while they're impaired, especially in a safety-sensitive workplace. But there must also be a legal foundation that's fair and respectful of workers' privacy and other legal rights. The key documents are a legally sound:

- Substance abuse policy; and
- Drug and alcohol testing policy and procedures.

4. SUPREME COURT EXPANDS OHS LIABILITY OF EMPLOYERS AT MULTI-EMPLOYER WORKSITES

The most important OHS court case in not just 2023 but a decade was a Canadian Supreme

Court landmark ruling with major liability implications for owners of construction and other work sites where workers of multiple employers work. Historically, owners have relied on arrangements designating a lead contractor as the so-called constructor or prime contractor to be in charge of overall safety at the site and assume principle liability for any OHS violations that occur. The case arose from the tragic death of a pedestrian struck by a road grader while crossing an intersection at a municipal construction site. Controversially, the Ontario top court ruled that the city could be charged as an employer for an OHS violation even though it had hired a constructor to oversee the work. In a split decision, the Supreme Court agreed that a project owner can be liable as an employer even if it's not the constructor in control of the project. Result: The city would have to answer the charge and prove that it showed due diligence to comply [R. v. Greater Sudbury (City), 2023 SCC 28 (CanLII), November 10, 2023].

Takeaway: The Greater Sudbury decision casts question on whether owners who bring multiple contractors and subcontractors to work at their sites will still be able to rely on constructor/prime contractor arrangements to limit their OHS liability as an "employer." This will make it even more essential for companies to ensure they have and effectively implement a strong OHS policy and program to safeguard against workplace injury and illness.

5. 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: You can 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.

6. QUÉBEC COURT UPHOLDS HYBRID WORK POLICY REQUIRING EMPLOYEES TO WORK IN THE OFFICE

Having gotten used to working from home during the COVID-19 pandemic, many employees have expressed reluctance to return to the office. This has given rise to a new line of litigation testing the limits of employee rights to telecommute. A key 2023 ruling took place in Québec involving an insurance company adopted a hybrid work policy after the pandemic requiring employees in certain customer services departments to work at the office one day a week. Employees objected and the union grieved, claiming that the new policy violated the collective agreement ban on taking away the right to telework except in limited circumstances where the employer could demonstrate the overriding client need that employees be at the office. At least that's how the union interpreted

the agreement. However, the arbitrator read the agreement as giving the employer broader discretion to require employees to be in the office, including "to promote interaction, facilitate the training of newcomers and the learning that comes with proximity." The new one-day-per-week-at-the-office policy met these needs, the arbitrator concluded [Union of employees of SSQ, General Insurance Company (CSN) v SSQ, Life Insurance Company inc. (BENEVA), 2023 CanLII 49448 (QC SAT), June 7, 2023].

Takeaway: Employees aren't born with telecommuting rights. Those rights must be granted by the employer. Such rights can arise by contract or implication where an employer waives its right to insist that employees come to the office by allowing employees to work from home without objection. In addition, ending a telecommuting arrangement could be deemed constructive dismissal. The key to managing liability risks is to establish a clear policy on telecommuting rights.

7. 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.

8. ONTARIO COURT UPHOLDS 30 MONTHS' NOTICE FOR WRONGFUL DISMISSAL

An engineer that was wrongfully terminated as part of a restructuring after nearly 40 years of service sued for 26 months' termination notice. The court awarded him 30 months instead. Although 24 months is the unofficial cap, the court concluded that the circumstances in this case were "exceptional," citing the engineer's highly specialized skills and limited employment opportunities, age, long service and productivity in generating 1 or 2 patents a year for the company. The case went all the way to Ontario's highest court, the Court of Appeal, which not only upheld 30 months' notice but also ordered the employer to pay $20,000 to cover the engineer's legal costs in defending the appeal [Lynch v. Avaya Canada Corporation, 2023 ONCA 696 (CanLII), October 23, 2023].

Takeaway: Termination notice remains a costly challenge for employers. The Lynch case isn't the first ruling to set the ceiling at 30 months in exceptional circumstances. It's crucial for HR directors to understand the termination notice

rules of their jurisdiction and implement a game plan to ensure compliance with them.

9. SUSPENSION IS CONSTRUCTIVE DISMISSAL & GROUNDS FOR WALLACE DAMAGES

A case from Nova Scotia addresses a fairly rare combination of 2 liability nightmares: constructive dismissal and Wallace damages for bad faith termination causing mental distress. The case involved a seasonal worker employed by a landscaping firm between June and December for 17 years. But what had felt like family turned sour when the company suspended him due to dissatisfaction with his work. He remained on layoff for 2 months. By the time he was recalled, he had taken work with another firm. The Nova Scotia court ruled that the worker was constructively dismissed and awarded him 12 months' termination notice and $15,000 in aggravated damages for acting in bad faith. Despite what the company told the worker, there was no shortage of work, and the layoff was performance-related and indicated the company's intention to no longer be bound by the contract. The Court of Appeal found all aspects of the ruling to be reasonable and refused to overturn it [Elmsdale Landscaping Ltd. v. Hiltz, 2023 NSCA 56 (CanLII), August 3, 2023].

Takeaway: Constructive dismissal occurs when an employer unilaterally makes significant and unfavourable changes to the terms of employment and forces employees to leave as if they had been fired. There are common constructive dismissal pitfalls that employers need to recognize and be careful to avoid. 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.

10. 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.

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