HR Compliance

Your Plain Language Guide to
Hiring, Firing, Human Rights, Benefits & Privacy

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TALK TO US

The *Insider*'s goal is to help HR professionals do their jobs better and more easily. So tell us what you need! For example, are you unsure what the HR laws require you to do for a certain violation in your Company Code of Conduct? Share your pressing safety compliance problems with us by calling 800.667.9300 or emailing rickt@bongarde.com

Rick Tobin
Senior Product Manager

PRIVACY: VERIFYING EMPLOYEE DISABILITIES

THIS STORY WILL HELP YOU

Collect the private medical information you need about your employees to administer health, disability and other benefits plans

It's often necessary to get personal information about your employees' medical condition, e.g., to determine their eligibility for benefits or ability to perform job tasks when returning from injury. But personal privacy laws restrict the employer's right to use, collect and disclose private health information about their employees. Here's what HR directors need to know to reconcile these seemingly contradictory legal obligations.

WHAT THE LAW SAYS

Employees have privacy rights vis-à-vis their employers via:

- Personal privacy laws like PIPEDA (*Personal Information Protection and Electronic Documents Act* which applies to employees of federally regulated companies) or provincial

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TERMINATION: 2012 "JUST CAUSE" SCORECARD

THIS STORY WILL HELP YOU

Determine if you have just cause to fire an employee without notice

Figuring out if you have "just cause" to terminate an employee isn't just about law. Thousands and even tens of thousands of dollars may be on the line. That's because if termination is for just cause, you don't have to provide notice, wages in lieu of notice and other termination payments required by employment standards laws. If you don't have just cause, termination is wrongful and you may have to pay not just notice but damages.

HR directors play a leading role in deciding if employee misconduct rises to the level of "just cause." Unfortunately, the employment laws provide only vague definitions and

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HR Compliance™
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MANAGING EDITOR:
GLENN S. DEMBY

CONTRIBUTING WRITERS:
PAULA SANTONOCITO
SHERYL SMOLKIN

PRESIDENT AND CEO: ROB RANSOM

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equivalents in Alberta, BC and Québec;

- Their individual or collective employment contract; and/or
- Under common law, i.e., case law made by judges in court cases.

But employee privacy is subject to limitations. For one thing, employers are allowed to collect employees' personal information as long as they:

1. Request the information so they can perform a legitimate business or employment-related functions; AND
2. Request only the amount and type of information they need to perform that function.

Of course, knowing the rules is one thing. Here's what you need to know to be able to apply them to the real-life situations you face when collecting personal medical information from your own employees.

1. What's a Legitimate Employment Function?

It's not illegal to ask an employee for personal health information if you need it to carry out a legitimate business or employment function. But what's a legitimate business function? According to Privacy Commission rulings, it includes:

Verifying employee eligibility for sick leave. You can't force employees to "consent" to the collection, use or disclosure of their personal information. Consent must be voluntary. But the federal Privacy Commission found that a telecommunications employer *could* require an employee on extended sick leave to consent to his doctor's release of medical information to the employer. The Commission said this was a "legitimate and appropriate purpose" because the employer needed information about the employee's illness to verify his eligibility for leave *[PIPEDA Case Summary No. 118].*

Determining how to accommodate disabled employee. Employers might need health information about a disabled employee to decide what kind of accommodation to make under human rights laws. The federal Privacy Commission has indicated that verifying the need for accommodations and the kinds of accommodations necessary is a legitimate purpose for collecting, using and disclosing employee medical information *[PIPEDA Case Summary No. 284].*

Determining employee's fitness to work. Employers might need reports from physicians or results of medical exams showing if injured employees are physically or mentally capable of performing job functions so they can evaluate whether the employee can return to work. This, too, is a legitimate function. For example, the Commission ruled that it was appropriate for a trucking company to ask a doctor about an injured employee's medical condition, restrictions related to his job function and

expected date of return to work *[PIPEDA Case Summary No. 135]; [See also, PIPEDA Case Summary No. 287].*

Verifying eligibility for disability benefits. Employers may collect, use or disclose personal health information to verify if an injured employee is eligible for long- or short-term disability benefits, the Privacy Commission has ruled *[PIPEDA Case Summary No. 233].*

Filing a workers' compensation claim. It was okay for an employer to include medical information about an injured employee in a claim filed with the Workers' Compensation Board (WCB). Disclosing the information to the WCB without the employee's consent wasn't just appropriate but required by provincial workers' compensation law, the Commission noted *[PIPEDA Case Summary No. 191].*

AT A GLANCE

5 Privacy/Benefits Rules to Keep in Mind

1. You may collect, use and disclose private medical information about your employees to carry out legitimate employment functions.

2. Such functions include:

- Processing claims for disability, health and other benefits;
- Determining if an employee is entitled to medical or disability leave; and
- Verifying if employees have physical/mental disabilities and, if so, what accommodations they require.

3. You can't collect, use or disclose more information than what you minimally need to carry out the function.

4. Seeking a medical diagnosis is problematic but not automatically illegal.

5. If possible, try to get the employee's consent to the collection, use and disclosure of the information.

2. Is the Type and Amount of Information the Minimum Necessary?

Employers may ask for only the amount and type of information they need to carry out the legitimate business or employment function. For example, if an employee calls in sick, you can ask her for a doctor note to verify that she was really ill. But asking for a diagnosis would be problematic because it would exceed the scope of the information to which you're entitled. Making her take a physical exam or submit to a complete medical history because of one day's illness would also be inappropriate because it's more information than you need.

There have been at least half a dozen cases where employees claimed that the employer was asking for more medical information than it needed to carry out a legitimate employment function.

Employer Loses: An employer's policy required employees on sick leave to get a doctor's certificate that lists a medical diagnosis. An employee complained that the policy violated her privacy. The employer, a transportation company, claimed that it needed a diagnosis because its drivers often work alone, put in long hours and need physical strength, agility and alertness to do their jobs. It was a fair point. The problem was that the employee in this case wasn't a driver but an office worker. Consequently, the Privacy Commission ruled that asking for a diagnosis crossed the line and violated the employee's privacy *[PIPEDA Case Summary No. 233].*

However, under some circumstances, it might be okay for an employer to request a medical diagnosis from or about an employee. For instance, the case with the transportation company might have ended differently if the employee who complained had been a driver rather than an office worker.

Employer Wins: In fact, employers have been allowed to seek a medical diagnosis from an employee in cases where the issue was verification of a disability or medical condition for the purpose of determining the right to receive benefits.

For example, a telecommunications company required any employee going on sick leave—even for one day--to submit a medical certification including a diagnosis. An employee complained that the policy was unnecessary and illegal. But the Commission disagreed. The company was administering both short- and long-term disability plans for its employees. Eligibility for both plans was based on the employee's diagnosis. So the company needed to know each employee's diagnosis so it could run the plans *[PIPEDA Case Summary No. 191]*.

COMPLIANCE DO'S & DON'TS

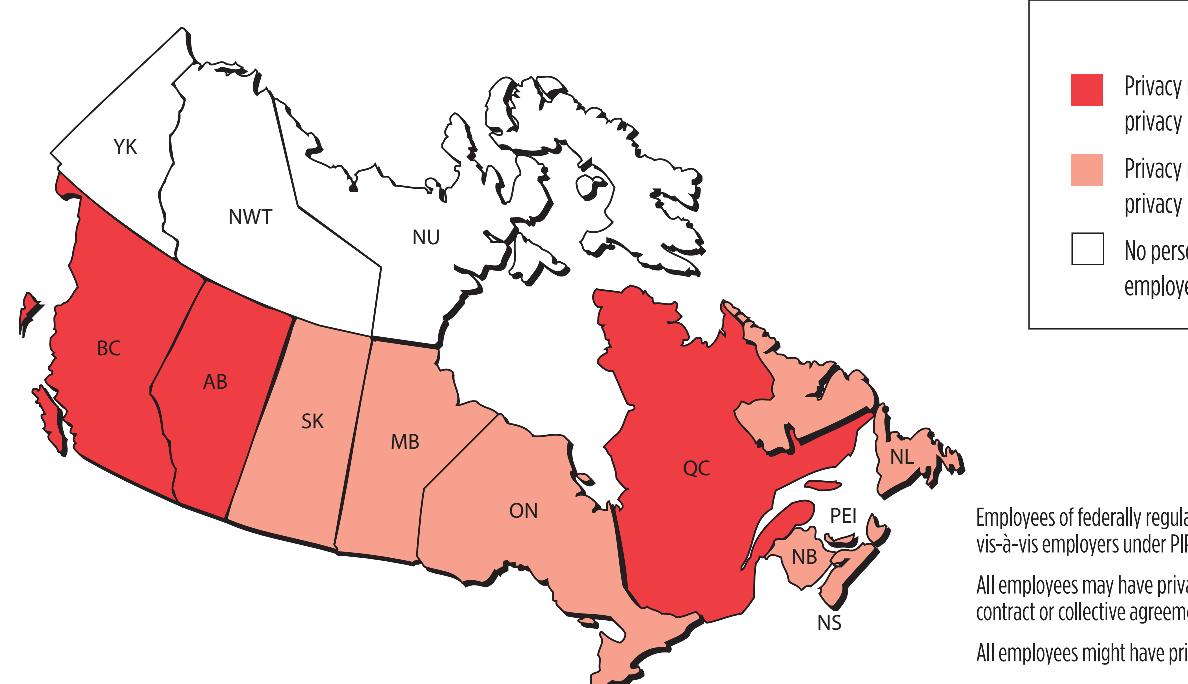
Here are some other general principles that apply when you collect personal health information from your employees:

- **Don't** contact the doctor directly to discuss an employee's case without first getting the employee's permission *[See, for example, PIPEDA Case Summary No. 287];*
- **Do** refer to the terms of your collective agreement if your workforce is unionized. Many agreements include specific language saying when employers can request medical information [See, for example, *York County Hospital Corp. and Service Employees' International Union, Local 204,* (1992) 25 L.A.C. (4th) 189]; and
- **Don't** stray from your usual procedures and policies for collecting information from employees, especially to the extent that you've described those policies and procedures in your consent form or notice of privacy practices.

Conclusion

Keep in mind that what we've described are general principles based on cases, not hard and fast rules set in ink. Personal privacy is one of those new areas of law and it would be naïve to think that we can figure out all the rules on the basis of a few years worth of cases. Even if we had a larger sample, we couldn't necessarily predict how one commission would decide a case in the future based on what another one did in the past—especially when you consider that there are subtle differences among the privacy laws of the various provinces. ❖

LAWSCAPE: EMPLOYEE PRIVACY RIGHTS VIS-À-VIS THEIR EMPLOYER



LEGEND

- Privacy rights under provincial personal privacy law
- Privacy rights under provincial medical privacy law
- No personal privacy legislation covering employees vis-à-vis employers

Employees of federally regulated companies have privacy rights vis-à-vis employers under PIPEDA

All employees may have privacy rights under their employment contract or collective agreement

All employees might have privacy rights under case law

AB has enacted both a personal and health information privacy law

EMPLOYEE BENEFITS

Do Brand New Employees Get Family Leave?

SITUATION

Faith Fullchild moves back home to Ontario to be closer to her 82-year-old dad. 2 weeks after she begins her new job, dad gets hit by a minivan and is hospitalized for a week. He can no longer care for himself and has only months to live. Faith asks her new employer for 8 weeks of family medical care leave to care for her dad and provides a doctor's certificate stating that he has a serious medical condition with a significant risk of death and will need daily care for 2 months. Faith asks her sister, Wanda to take over caring for dad after her 8 weeks are up. But Wanda has also started a new job in Québec the week before and under the province's law won't be entitled to any family medical leave in 8 weeks. Faith and Wanda have each worked at least 600 insurable hours over the previous 12 months; and each sister's employer provides only minimum family medical leave required under employment standards laws.

QUESTION

Which, if either, sister qualifies for unpaid family medical leave?

A. Neither has worked long enough for their current employer to qualify for leave.

B. Both because they've both worked at least 600 insurable hours in the past 12 months.

C. Only Faith because she works in Ontario.

D. Only Wanda because she work in Québec.

ANSWER

C. Faith can take 8 weeks of family medical leave now but Wanda can't take leave until she's been in the job at least 3 months.

THE EXPLANATION

Employment standards laws allow employees to take unpaid family medical leave (sometimes called "compassionate care leave") to care for an ill or injured family member. But rules vary by jurisdiction. This example, which is purely hypothetical, illustrates one of the key differences: whether new employees can take leave.

Some jurisdictions require employees to put in a minimum period of continual service with the employer before accruing the right to take family medical leave. Thus, in Québec, employees must have at least 3 months of uninterrupted service to qualify for compassionate care leave. Other provinces allow for new employees to take unpaid family medical leave *regardless of previous service*. Thus, in Ontario, new employees get up to 8 weeks leave as long as they is get a "qualified health practitioner" to certify in writing that the family member has a serious medical condition involving threat of death.

Result: Although both sisters have been with their new employers for only a short time, Faith, who works in Ontario qualifies for family medical leave and Wanda, who works in Québec, doesn't.

WHY WRONG ANSWERS ARE WRONG

A is wrong because under Ontario law, Faith is entitled to 8 weeks of family medical leave even though she's only worked for her new Ontario employer 4 weeks when her dad gets out of the hospital.

B is wrong because the requirement that employees work a minimum of 600 insurable hours affects only their entitlement to compassionate care benefits under Employment Insurance, not to unpaid leave under provincial employment standards law.

D is wrong because by the time Faith's 8 week leave ends, Wanda will have been with her current employer only 9 weeks—3 weeks short of the minimum 12 weeks required to qualify for family medical leave in Québec.

SHOW YOUR LAWYER

- *Québec Labour Standards Act* § Div. V.1
- *Ontario Employment Standards Act* § 49.1

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court cases where courts, arbitrators and labour boards (which we'll refer to as "courts") decided if an employer had just cause in a particular situation. Gathering up and analyzing the literally hundreds of cases decided each year requires a herculean effort. And hiring a lawyer to do it for you is an option very few employers can afford, especially in this economy.

That's why the *Insider* invented the Just Cause Scorecard. We reviewed hundreds of wrongful termination cases from all parts of Canada decided in 2012 and assembled what we considered to be the most useful ones into the Scorecard that begins below. The Scorecard will explain what happened in each case, tell you if the employer had just cause to terminate and explain why or why not.

JUST CAUSE BASICS

Before we get to the results of the Scorecard, let's review some basics about the law of just cause. (If you have a solid grasp of "just cause" principles, you can skip this section.)

Unlike in the U.S., under Canadian employment standards laws, employers must provide employees notice or wages in lieu of notice upon termination. There's one notable exception: Employees fired for "just cause" don't get notice or other ESA benefits guaranteed to employees upon termination. But, firing an employee without notice for what you think is just cause is risky. If the employee sues for wrongful dismissal and wins, you can be liable not just for notice and ESA payments but other kinds of damages, including in extreme cases, *Wallace* damages if you're found to have acted in bad faith.

That's why it's so crucial for HR directors to understand what is and isn't just cause to terminate. Just cause is generally defined as an act or omission that irreparably undermines the employment relationship and the trust and confidence on which it's based. But definitions are one thing; applying them to real life situations is something altogether different. The real challenge for HR directors is judging whether the infractions committed by their own employees fit the definition of just cause in the case at hand.

The Analysis

How is an HR director supposed to know which offences rise to the level of just cause and justify termination without notice (or wages in lieu of notice)? Although each case is different, there are certain kinds of conduct or omissions that courts generally regard as constituting just cause, including:

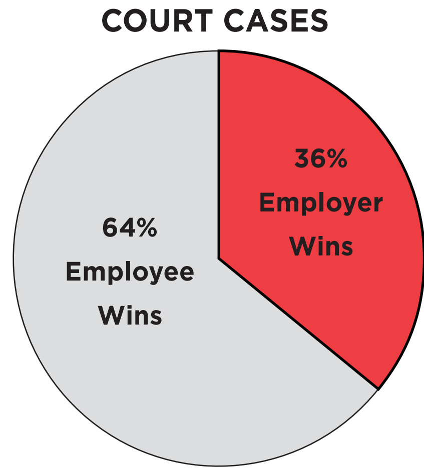
- Workplace violence;
- Serious financial misconduct, such as embezzlement or fraud;
- Habitual and serious neglect of duty;
- Incompetence;
- Conduct incompatible with the employee's duties or prejudicial to the employer's business, such as leaking confidential information; or
- Wilful disobedience of the employer's orders in a matter of substance.

Of course, many cases fall in the gray areas. So it often falls to judges to decide if the employer had just cause.

THE SCORECARD

Many times the issue of just cause isn't disputed by the parties or, for other reasons, the court doesn't focus on the just cause aspect of the case when making its decision. Our 2012 Scorecard includes only reported court cases in which just cause was the pivotal issue. From these cases, we selected a sample of cases that represent an array of instructive and typical patterns.

This year's version of the Scorecard runs from Jan. 1 to Dec. 1, 2012. Just cause for termination was a pivotal



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HR MONTH IN REVIEW

A Roundup of Important New Legislation, Regulations, Court Cases and Board Rulings That Happened Recently

CASE OF THE MONTH: ONTARIO COURT NIXES ANGER ISSUES AS DISABILITY REQUIRING ACCOMMODATION

Violent, disruptive and insubordinate actions committed by employees who can't control their temper are grounds for discipline.

Or are they? Human rights law require employers to accommodate employees with "disabilities." Do anger management issues constitute a "disability" requiring accommodations under the law? Here's how an Ontario court answered this crucial question.

THE CASE

What Happened: May 22, 2008 was a bad day for one particular Ottawa police officer. When he got to work in the morning, he learned that he had failed his use of force test and had to hand in his gun.

A gentleman of ill temper in normal times, the bad news caused the officer to erupt in anger and cause a scene. Apparently, going home did little to allay his anger. That night, police had to respond to a 911 domestic violence call at the officer's home. They found him in a froth of rage and spewing threats. It took 4 officers and a taser to subdue the officer. Later, the officer pleaded guilty to violating the Police Services Act. So he was fired. He appealed, claiming that his misconduct was the product of anger management problems and that those issues constituted a "disability" that the police department had a duty to accommodate.

What the Court Decided: The Ontario Superior Court of Justice disagreed and upheld the termination.

How the Court Justified Its Decision: A nasty temper isn't a disability under human rights laws, said the court. Although "disability" is a broad concept, it doesn't apply to every physical and mental condition affecting behaviour.

The officer also claimed that he suffered from alcoholism and drug addiction. These conditions clearly are disabilities under human rights law. But the officer didn't produce enough evidence to prove that he actually did have an addiction. As a result, he couldn't make out a valid claim that he was entitled to accommodations. Accordingly, his outbursts and arrests for violent behaviour were just cause to fire him.

Gulick v. Ottawa (City) Police Service, [2012] O.J. No. 4621, Oct. 3, 2012.

ANALYSIS

The most important aspect of the Gulick case is the rejection of the argument that anger management is a disability. To have found otherwise would have opened the way for employees with self-control and temper issues to use the discrimination laws to avoid discipline—a ruling that would have undermined efforts of employers to eliminate violence, intimidation and harassment from the workplace.

There were also other factors at work: First, the violent behaviour that cost the officer his job occurred at his home while he was off duty. Normally, these would be considered "mitigating" factors warranting a less severe penalty. But the mitigating factors were more than offset by an important "aggravating" factor: The fact that the employee was a police officer. Although not acceptable from any employee, violent conduct is particularly egregious and apt to irrevocably breach an employer's trust when it's committed by a police officer.

The fact that the court didn't simply reject his discrimination case but ordered the officer to pay $10,000 to cover the department's legal fees is also telling. Courts don't require the loser to pay the winner's legal fees in close cases. Courts only demand that plaintiffs, i.e., person bringing the lawsuit, when they think they've acted in bad faith or asserted a frivolous claim that they knew had no real legal merit. ❖

ALBERTA

LAWS & ANNOUNCEMENTS

Workplace Safety - Nov. 28: Alberta Human Services is considering performing stricter review of the certificate of recognition (COR) of employers who get hit with an OHS ticket or administrative penalty. Employers with a valid COR are eligible for 5% to 20% in workers' comp rebate premiums. So tougher review of COR could cost employers a lot of money.

Pensions - Nov. 20: Bill 10, the pension reform bill, passed but hasn't yet taken effect. Highlights:

- Coordinate Alberta pension rules with BC
- Extra time to fund DB deficits
- Establish new target benefit plans, a more flexible version of DBs where benefit amount is defined but subject to revision
- Establish new jointly sponsored plans in which members and employers share plan costs
- Immediate vesting of DB benefits rather than after 2 years
- Lock in based on minimum dollar amount rather than years of service.

Human Rights - Nov. 20: The Alberta Human Rights Commission issued its 2011-2012 annual report. Highlights: 1,119 new discrimination complaints were filed, last year, up 16% from the previous year. 85% of complaints were for employment discrimination. Leading grounds:

- Physical disability: 33%
- Gender: 20%
- Mental disability: 15%
- Race/Colour: 8%
- Ancestry/Origin: 7%
- Age: 5%
- Family status: 4%
- Religion: 3%
- Marital status: 2%
- Sexual orientation: 1%.

Privacy - Nov. 14: According to the Alberta Privacy Commissioner, there were only 253 new PIPA (*Personal Information Protection Act)* privacy complaints in 2011-2012, a decline of 5%.

Key privacy issues in the employment area:

- Use of video surveillance in the workplace
- Giving bad references about former employees
- Collecting too much medical information from employees
- Not letting employees have ample access to the personal information in the organization's files.

Workers' Compensation - Dec.: Reminder to employers: You'll need to get your 2013 premium rate statement electronically from the WCB starting in mid-December. The old paper statements are going away for good.

Collective Bargaining - Nov. 16: After 20 months of negotiation, the government and Alberta Medical Association has agreed to the following pay increases for doctors:

- One-time 2.5¢ lump sum per doctor payment based on 2011-2012 billings
- Annual increases tied to Cost of Living Adjustment for 2013 to 2016
- Continue one-year $12 per patient increase for Primary Care Networks to end of 2015-2016
- Extend Business Cost Program additional year thru end of 2013
- End Retention Benefit Program in March 2013.

CASES

OK to Fire Meat-Packer for Fighting with Co-Workers - An arbitrator upheld the firing of a meat packing worker for getting into a fight with his co-workers. The worker started the fight after co-workers complained about his returning late from breaks. The company had a clear, strict no-fighting policy, a necessity in a workplace involving extensive use of knives. The worker had been disciplined for fighting twice before but never apologized or took responsibility for his actions [*XL Foods (Lakeside Packers) v. United Food and Commercial Workers, Local 401 (Trawere Grievance),* [2012] A.G.A.A. No. 57, Nov. 5, 2012].

Careless Host Must Repay Employer of Injured Worker - A truck driver got workers' comp benefits for injuries he suffered slipping on ice making a delivery to another company. The trucking company blamed the driver's injury on the other company and sued it for damages. The visiting company was negligent, said the Appeals Board. It was "reasonably foreseeable" that a visitor like the driver would slip on ice; so the visiting company's failure to sand or take other actions to prevent falls was negligence. Result: The visiting company had to pay the full costs of the injury [*Decision No: 2012-968*, [2012] CanLII 68325 (AB WCAC), Oct. 30, 2012].

Making Obese Employee Lose Weight ≠ Discrimination - A trucking company required an employee with an injured back to undergo intense physical rehab and shed 85 pounds as part of his return-to-work plan. The union claimed disability discrimination but the arbitrator disagreed. The employer's demands were based on solid medical evidence that the employee's obesity increased the risk of re-injury. So insisting that the employee lose the weight was reasonable and didn't violate the employer's duty to accommodate [*Teck Coal Ltd. v. United Mine Workers of America, Local 1656*, [2012] CanLII 71111 (AB GAA), Nov. 6, 2012].

BRITISH COLUMBIA

LAWS & ANNOUNCEMENTS

Labour Market - Nov. 29: Job Options BC–Urban Older Workers provides $6 million to fund job creation for workers 55 and over in Vancouver, Victoria, Nanaimo and Kelowna–urban areas with the highest population of older workers. In phase 1, workers will get 6 weeks of classroom training followed by placement with employers participating in the program for up to 6 months.

PharmaCare - Nov: A new pricing regulation for generic drugs will take effect next spring. On April 1, 2013, generic drug prices will be cut to 25% of name brand prices; exactly one year after that, generics will be priced at 20% of name brands. Currently, generics are priced at 35% of name brand prices.

Immigration - Nov. 10: BC temporarily suspended the Fast Track nomination option in the business immigration stream of the Provincial Nominee Program pending the results of an investigation confirming that Fast Track is actually working to support job creation.

Disability Assistance - Jan. 1: Reminder: The first phase of annualized earnings exemptions enabling individuals on disability assistance to use their earnings exemptions on an annual rather than monthly basis takes effect. Annualized exemption limits for 2013:

- $12,000 for 2-adult families where only 1 adult designated PWD
- $9,600 for one-adult families where adult designated PWD
- $19,200 for 2-adult families where both adults designated PWD.

Domestic Violence - Nov. 21: A new law that takes effect on March 18, 2013 requires individuals involved in preventing and sorting out family disputes, including mediators, parenting co-ordinators and family violence screeners - to meet stricter training standards to qualify to ply their trade in BC.

Workers' Compensation - Nov. 2: BC is increasing 2013 workers' comp premium rates to $1.63 per $100 of assessable payroll, the first increase in 9 years. Meanwhile, WorkSafeBC is looking into whether to beef up workers' comp premium incentives to employers for meeting injury prevention targets.

Workplace Safety—New Apps - Nov.: WorkSafeBC issued 18 free, interactive e-books for the iPad containing training information on asbestos, confined spaces, fall protection, WHMIS and other OHS topics. The e-books, which can be downloaded from iTunes, and make it easier to deliver safety information to workers.

Workplace Safety—New Laws - Nov. 7: WorkSafeBC approved changes to work safety requirements that will take effect on Feb. 3, 2013 covering the following sections of the OHS regulations:

- Part 12, Tools, Machinery and Equipment
- Part 13, Ladders, Scaffolds and Temporary Work Platforms
- Part 16, Mobile Equipment
- Part 19, Electrical Safety
- Part 23, Oil and Gas
- Part 26, Forestry Operations and Similar Activities.

MANITOBA

LAWS & ANNOUNCEMENTS

Minimum Wage - Dec. 3: Manitoba is getting ready to end an employment standards law exemption that allows employers to pay disabled employees less than minimum wage. The 20 government permits currently in effect approving below minimum wage for the disabled will be the last of their kind.

Employment Standards - Nov. 23: Manitoba tabled Bill 3, which would give employees with at least 30 days of employment unpaid leave. Highlights:

- Up to 37 weeks to care for critically ill child for employees
- Up to 104 weeks for parents of child who died where probable cause of death is result of a crime
- Up to 52 weeks for parents of child who disappeared where probable cause of disappearance is result of a crime.

Workers' Compensation - Nov. 30: Average workers' comp rates in 2013 will be $1.50 per $100 of assessable payroll. About 38% of Manitoba employers will pay lower WCB assessment rates, 11% will pay more and 49% will pay the same. The maximum assessable earnings cap for 2013 will rise to $111,000.

Pensions - Nov. 27: The Manitoba Office of the Superintendent issued a pair of updated pension policy bulletins:

- Policy Bulletin #3: One-time transfers of up to 50% of Life Income Funds (LIF) or pension plans to Prescribed Registered Retirement Income Fund
- Update #10-03, Changes to one-time transfer [of funds in an LIF] effective May 31, 2010.

NU

LAWS & ANNOUNCEMENTS

Public Health - Dec. 3: Bed bugs have migrated north. Nunavik's director of public health has appeared before the Kativik Regional Government council meeting to appeal for support to prevent the critters from spreading.

NB

CASES

Dairy Plant Fined $5,000 for Worker's Electrical Burns - A dairy plant worker suffered third-degree burns to his hand and arm as a result of being electrocuted. The plant pleaded guilty to allowing an unauthorized worker to work on electrical equipment and was fined $5,000 [*Dairytown Products Ltd.*, Govt. News Release, Nov. 23, 2012].

NFLD

LAWS & ANNOUNCEMENTS

Skilled Trades - Nov. 14: Newfoundland launched a new $2 million Journeypersons on Mentorship Program offering small and mid-sized employers incentives to hire and train apprentices so that they achieve the skills and experience necessary to become senior journeypersons. Preference will be given to women, Aboriginal persons and disabled in high demand trades.

Labour Relations - Nov. 20: Newfoundland gave third reading to Bill 31 which would ensure that government employees in bargaining unit positions keep their status as a bargaining unit after being transferred to the Human Resource Secretariat. The change is a technical tweak made as part of a government organization reshuffling.

CASES

Contractor, Supervisor Fined $10,000 for Safety Violations - A Newfoundland construction contractor pleaded guilty to OHS violations including not having an adequate written fall protection program and failing to train its health and safety representative and was fined $10,000. A supervisor was also fined $500 for not providing adequate supervision. The violations occurred at commercial construction site [*DET Enterprises Ltd.*, Govt. News Release, Nov. 28, 2012].

NWT

LAWS & ANNOUNCEMENTS

Workers' Compensation - Dec. 14: The WSCC wrapped up its survey of employers, workers and other stakeholders in an effort to figure out how well it's doing and what it can do to improve performance.

Income Assistance—Dec. 1: Individuals getting payments under Impact Benefits Agreements, land settlements or treaties can now claim a $500 per household member exemption for Income Assistance eligibility purposes.

CASES

OK to Fire Employee for Violating Client's Confidentiality - The program director of a social agency that helps disadvantaged individuals find low-cost housing was concerned about a client whom she thought posed a threat to others. But instead of reporting her concerns to management, she used her position to dig up personal information about the client and went directly to the government to lobby for the client's removal. When the agency found out, it fired the director. The Labour Standards Board agreed that violating her contractual obligation to keep client information confidential was just cause for termination [*YWCA v. Bruce*, 2012 CanLII 70559 (NWT LSB), Aug. 6, 2012].

NS

LAWS & ANNOUNCEMENTS

Disabilities - Dec. 3: Nova Scotia plans to hold public consultations to find out what it can do to improve programs and services designed to help the disabled and promote accessibility and inclusion.

Health Care - Nov. 22: A newly proposed bill would make the following changes to Nova Scotia's 39-year-old health services laws:

- New board to hear patient appeals
- Ban queue jumping, extra billing and user fees
- Restrictions on direct billing of patients
- Eliminate reimbursements for services provided outside MSI plan.

Human Rights—Transgender - Nov. 20: A bill proposed today would make Nova Scotia the fourth jurisdiction to add transgendered individuals to the list of persons protected from discrimination under the human rights laws (Ontario, Manitoba and Northwest Territories are the others).

Human Rights—Education - Dec.: The Human Rights Commission will hold a one-day workshop for employers in Halifax on Jan. 23, 2013. Cost: $150 per person. Go to the Commission's website to find out more.

Workplace Safety - Nov. 21: In 2010, Nova Scotia changed its OHS law to allow for the imposition of extra fines, called Administrative Monetary Penalties (AMPs) for safety violations. Since then, the government has received complaints about how AMPs are being handed out. So the government has decided to take a look at the AMPs scheme to ensure it's working as part of its overall 5-year review of the current OHS system..

Workers' Compensation - Nov. 27: A proposed amendment to the Workers' Compensation Act would allow coal miners with at least 20 years' experience who are diagnosed with lung disease to keep receiving full benefits for life even if their health conditions subsequently change. The change is being made in response to a court case earlier this year and applies to the roughly 40 to 50 miners filing benefits appeals.

Immigration - Nov. 14: The federal government agreed to raise the province's 2012 immigration nominee cap from 500 to 700. In other words, Nova Scotia will be able to process 200 more skilled immigrants via its Provincial Nominee Program this year.

ONTARIO

LAWS & ANNOUNCEMENTS

Salary & Wages - Jan. 1: Changes to the law requiring public agencies to disclose the salaries of high ranking officials took effect. The changes affect what counts as "salary" that must be disclosed starting in 2012, including:

- Per diem payments for duties as a director
- Per diem payments for duties as elected or appointed office holder
- Retainers for agreeing to perform duties as director or office holder.

Pensions—Unlocking - Jan. 7: Today is the deadline to comment on new rules making it easier for pension plan members to withdraw money from locked-in accounts for financial hardship. Highlights:

- Members apply directly to bank using form approved by OSFI
- Limit of one application per year
- Member must get spouse's written consent
- Minimum withdrawal $500 + withholding tax
- Maximum withdrawal varies depending on nature of financial hardship for which money is being taken out.

Pensions—DB Funding - Jan. 1: Employers can now use letters of credit (LC) to fund up to 15% of a DB plan's solvency deficit. LCs must:

- Contain specific information listed in the regulation
- Be consistent with the terms of the plan
- Be an irrevocable and unconditional standby LC
- Have an effective date on or before first special payment is due under Sec. 5(1)(e) or payment date under Sec. 12(2) of Reg. 909
- Have an expiry date no later than one year after the effective date.

Privacy - Dec. 3: The Ontario Privacy Commissioner published a paper called "Operationalizing Privacy by Design: From Rhetoric to Reality" setting out a framework for organizations to design and implement effective IT privacy policies and practices.

CASES

Employee's Damages Cut for Blabbing about Case on Facebook - A fast food employee agreed to take her discrimination claim to mediation and won a $2,000 award. Despite agreeing to keep the details of the process and award confidential, the employee couldn't resist making posts about the mediation on Facebook—"Well court is done didn't get what I wanted but I still walked away with some." Although it refused to toss it out entirely, the Ontario Human Rights Tribunal chopped $1,000 off the award to penalize the employee for breach of confidentiality [*Tremblay v. 1168531 Ontario Inc.*, 2012 HRTO 1939 (CanLII), Oct. 31, 2012].

Which Spouse Gets Plan Member's Pension? - The contenders: The common-law wife the member was living with for 8 years when he died and the legally married wife from whom he had separated but named as his beneficiary under the plan. The trial court sided with the common-law wife but the Court of Appeal reversed. Neither woman was entitled to the pre-retirement benefit as the member's spouse, the Court explained. In essence, the competing spousal claims cancelled each other out. The legally married wife won because the member had named her as his beneficiary [*Carrigan v. Carrigan Estate,* 2012 ONCA 736 (CanLII), Oct. 31, 2012].

Board Reinstates Employee Fired for Refusing Dangerous Work - An auto parts store fired an employee for performance and bad attitude. The employee claimed that he was fired as a reprisal for engaging in a valid work refusal—not lifting bins that he claimed were dangerously overloaded. In a close case, the Labour Relations Board ruled that the employee had shown "on a balance of probabilities" that the firing was in retaliation in violation of his refusal rights under (Sec. 50 of) the Ontario OHS Act and reinstated the employee with full salary and benefits dating from the termination date [*Wilken v. Hotspot Auto Parts*, [2012] CanLII 72730 (ON LRB), Nov. 19, 2012].

PEI

LAWS & ANNOUNCEMENTS

Workers' Compensation - Nov. 29: The 2013 average assessment rate will be $1.97 per $100 of payroll, 2¢ below last year. WCB premiums in Prince Edward Island have steadily declined since 2004.

Prescription Drugs - Jan. 21: PEI added 9 new drugs to its formulary, including:

- 3 different AIDS/HIV medications
- Asmanex for asthma
- Firmagon for prostate cancer

QUÉBEC

LAWS & ANNOUNCEMENTS

QPP - Jan. 1: 2013 QPP limits and rates:

AMOUNT/	2012	2013
Maximum Pensionable Earning	$50,100	$51,100
Basic Exemption	$3,500	$3,500
Contribution Rate	5.025%	5.100%
Maximum Employee & EmployerContribution	$2,341.65	$2,427.60
Maximum Employer Contribution	$4,683.30	$4,855.20

Pensions—LIFs - Dec. 4: MRQ announced that the 2013 life income fund reference rate for 2013 will be 6%.

Pensions—Supplemental Plans - Nov. 30: The government proposed a bill that would allow certain companies in the pulp and paper sector to establish target-benefit pensions, i.e., newfangled defined contribution and defined benefits hybrids.

Workplace Safety - Nov. 29: A CSST investigation blamed fatigue and mismanagement on the crash of a heavy vehicle, noting that the driver had slept only 7 hours and 23 minutes (non-consecutively) in the 29 hours before the fatal crash in July. The driver's employer faces potential fines for OHS violations.

Tax - Jan. 1: Québec provincial taxes in 2013 (excluding taxes on tobacco and alcohol) will be indexed at a rate of 2.48%. The same indexation rate applies to social assistance rates.

SK

LAWS & ANNOUNCEMENTS

Minimum Wage - Dec. 1: Saskatchewan's minimum wage increased 50¢ to $10.00 per hour. Minimum call-out pay also rose to $30.00.

Workers' Compensation - Jan. 1: 2013 average premium rates in Saskatchewan will decrease to $1.58 per $100 assessable payroll. This is the sixth year in a row that workers' comp rates have fallen.

Workplace Safety—Fines - Jan. 1: Saskatchewan government officials can now issue summary offence tickets to employers, contractors, owners, suppliers, supervisors, the self-employed and employees that commit OHS violations. 71 types of safety violations are ticketable offences, with fines ranging from $250 to $1,000.

Workplace Safety—Late Night Retail - Jan. 1: New regulations designed to protect employees who work at late night retail establishments like gas stations and convenience stores take effect. Employers whose workplaces are open to the public between 11:00 p.m. and 6:00 a.m. must conduct hazard assessments, implement a check-in systems and procedures and furnish emergency transmitters to employees who work alone late at night. BC is the only other province with similar regulations.

CASES

Radio Station Can Prevent Ex-Marketing Manager from Competing - Sometimes employers do actually win their non-compete cases against ex-employees. Exhibit A is a recent ruling out of Saskatchewan ordering a senior advertising employee to stop competing against the radio station where he used to work. The employee had gained a lot of confidential contacts and market knowledge in his 9 years with the station and was in a position to use these critical assets to put a major dent in the station's business. Besides, the court added, the non-compete applied to a very narrow geographic area—Saskatoon and a 100 kilometer radius [*Rawlco Radio Ltd. v. Lozinski,* 2012 SKQB 460 (CanLII), Nov. 6, 2012].

YUKON

LAWS & ANNOUNCEMENTS

Public Health - Dec. 4: Although flu season doesn't peak until late February or early March, 7 cases of flu have been confirmed in 2 communities so far. The unusually large number of early cases suggests that flu activity will be up this year and the government is calling on Yukoners to get their free flu vaccine.

Collective Bargaining - Nov. 28: The Yukon Teachers' Association ratified a new 3-year agreement. Highlights:

- 5.75% salary increase over 3 years—2%, 1.75% and 2%
- Higher salary range for educational assistants
- 8 weeks' compassionate care leave to care for critically ill family members.

FEDERAL

Laws & Announcements

CPP - Dec.: Here are the proposed 2013 CPP rates:

AMOUNT/	2013	2012
Maximum pensionable earnings	$51,100	$50,100
Basic exemption	$3,500	$3,500
Employer/Employee contribution rate	4.95%	4.95%
Self-employed contribution rate	9.9%	9.9%
Maximum employer/employee contribution	$2,356.20	$2,306.70
Maximum self-employed contribution	$4,712.40	$4,613.40

Pensions - Dec.: 2013 federal pension rates:

AMOUNT/	2013	2012
Money Purchase limits	$24,270	$23,820
RRSP limit	$23,820	$22,970
YMPE	$51,100	$50,100
DPSP limits (1/2 MP limit)	$12,135	$11,910
Defined Benefit limits	$2,696.67	$2,646.67

Labour Relations - Dec.: The government has proposed changes to regulations governing operations of the Canada Industrial Relations Board, i.e., the tribunal that deals with collective bargaining and labour disputes. The changes affect the procedures used to implement Board proceedings, apply for union certification, reply to complaints, etc.

Deductions & Remittances - Nov. 19: CRA issued the revised T4001 (E). Key changes:

- Extension of $1,000 (maximum) one-time hiring credit for small businesses for 2012
- New rules for calculating deductions for wage loss replacement plans
- Direct deposit now available for payroll accounts via Form RC366, *Direct Deposit Request*
- New CRA video about payroll rules for owners of small business.

Workplace Violence - Nov. 25: The Canadian Standard Association decided not to publish the final version of its workplace psychological health and safety standard until early in 2013. CSA Z1003/BNQ 9700 calls on employers to establish a psychological health and safety management system to ensure that all people in the workplace are treated with dignity and respect. Although it's a voluntary standard, it may become a benchmark for legislation and a best practice that courts refer to in judging if employers have done enough to protect employees from bullying, harassment and other forms of psychological violence and abuse.

CASES

CP Workers Don't Get Extra Pay for Attending Safety Training - 28 CP workers demanded $15 per hour in extra pay for attending 90 minutes of training on safe lifting. Safety training isn't a daily duty covered by their route wages, the union claimed. The arbitrator disagreed, noting that *providing* such training was a duty of CP and that receiving the training to ensure their health and safety was a necessary and integral part of their daily work. And there was no evidence that attending training caused any of the workers to exceed their normal workday or workweek hours [*Canadian Union of Postal Workers v. Canada Post Corp*., [2012] C.L.A.D. No. 307, Nov. 1, 2012].

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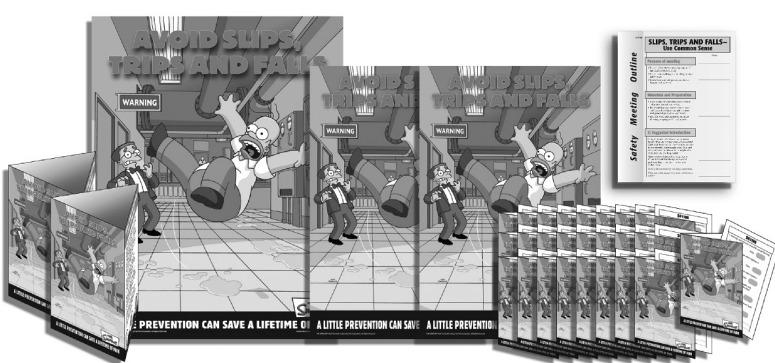

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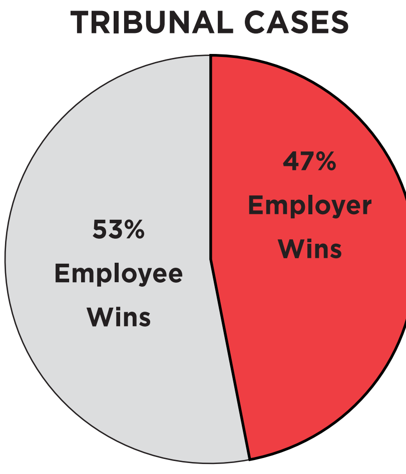
CONTINUED INSIDE ON PAGE 6

issue in 206 reported wrongful dismissal cases. Employers won only 92 of those cases—about 45% of the time. That's up slightly from 2011 where employers won 41% of the cases. In fact, other than 2010, which featured a highly abnormal 65% winning percentage for employers, 45% is in line with what we've seen in 5 of the 6 years that we've been doing the Scorecard.



As in previous years, the tribunal in which the case was decided had an impact on the outcome. Generally speaking, employers tended to fare better.

Qualifier: Losing on "just cause" didn't necessarily mean not being allowed to discipline at all. That's because we counted as "wins" cases where employers were allowed to terminate for just cause. Cases where the court or arbitrator reduced termination to a less severe penalty like suspension counted as "losses." Roughly 65% of "losing" employers who weren't allowed to terminate were found to have just cause to impose a lesser penalty. In only 25% of the employer "loses" cases did losing on just cause for termination result in not being able to discipline the employee at all.

Conclusion

The Scorecard below gives you the key details of 22 cases—11 where just cause was found and 11 where it wasn't. We tell you exactly what happened in each case, who won and why. We deliberately chose cases that involve the typical fact patterns that you're most likely to encounter at your organization.

JUST CAUSE SCORECARD

Here's a synopsis of 22 typical cases from the past year in which just cause was the decisive issue. In each case, a Canadian court had to decide if an employer had just cause to fire an employee without notice or compensation in lieu of notice. **For a synopsis of 30 cases, go to HRInsider.ca/just-cause-scorecard-2012.**

EMPLOYER WINS

Ontario: Offences Continue Despite Progressive Discipline (*Chandra*)

What Happened: A forklift operator is disciplined for failing to follow operating procedures, absence without permission and not recording changes in his break times. The offences continue and the most recent transgression causes a customer to complain. The operator then makes racist comments to his supervisor and threatens to "fix a couple of guys here." So he's fired.

Why There Was Just Cause: The company was patient and stayed with its progressive discipline process but the operator just didn't respond. On the contrary, his most recent offences were of a more serious nature. The arbitrator finds that operator's conduct left the employer "little choice" but to terminate [*Chandra v. Sim-Tran (Ontario) Inc.*, [2012] CanLII 51999 (ON LA), Sept. 14, 2012].

Alberta: Failure to Cooperate during Drug Test (*Finning*)

What Happened: An employee is asked to take a drug and alcohol test the day after destroying costly equipment in a careless forklift accident. Although he shows up at the lab, he's fired for acting in an obnoxious, obscene, belligerent and aggressive way during the testing—at one point even trying to sabotage the test.

Why There Was Just Cause: The employee's conduct was totally unacceptable and an embarrassment that no employer should have to tolerate. Acting in that manner damaged the employment relationship beyond repair,

the arbitrator reasoned [*Finning (Canada) v. International Association of Machinists and Aerospace Workers, Local Lodge 99,* [2012] CanLII 12066 (AB GAA), March 3, 2012].

Saskatchewan: Receiving a Package Containing Drugs on the Job (*Tiger Courier*)

What Happened: Because it reeked of marijuana, a manager takes the liberty of opening a registered package personally addressed to a courier. Sure enough, it contain pot and the courier is fired. The courier denies knowing anything about the package.

Why There Was Just Cause: The package was mailed by the courier's brother and the fact that he was a driver made receiving it at work unacceptable. Tolerating drug use by drivers could lead to criminal charges and destroy the company's business, the court reasoned. [*Den Hollander v. Tiger Courier Inc.,* [2012] S.J. No. 10, Jan. 6, 2012].

Federal: Disparaging Supervisors on Facebook (*Facebook Postings Grievance*)

What Happened: After 31 years of service, Canada Post fires a postal clerk for posting derogatory things about her supervisors and CP on Facebook.

Why There Was Just Cause: The posts weren't private correspondence and constituted gross insubordination and were hurtful—causing one supervisor to miss significant time for mental distress—and damaging to CP's public reputation. The fact that the clerk was unapologetic made the offence even worse [*Canada Post Corp. v. Canadian Union of Postal Workers* (*Discharge for Facebook postings Grievance*), *CUPW 730-07-01912, Arb. Ponak*, [2012] C.L.A.D. No. 85, March 21, 2012].

BC: Urinating in the Sink (*X v. Y*)

What Happened: A female bakery worker tells her supervisor that she saw a male co-worker urinating into a floor sink in a janitor's room. After denying the charge, the employee admits that it's true. Although his doctor writes the company a note, he's still fired.

Why There Was Just Cause: The employee could very easily have relieved himself in the nearby washroom. The doctor's note said the employee needed frequent bathroom breaks, not that he needed to urinate in the sink. Using the sink was not only unnecessary but ignored the basic rules of "civilized behaviour," which was especially troubling for an employee in the food industry [*X v. Y (Termination Grievance)*, [2012] B.C.C.A.A.A. No. 103, July 23, 2012].

Nova Scotia: Care Worker Abuses Nursing Home Residents (*Saulnier*)

What Happened: A residential care home fires a care worker for allegedly abusing residents.

Why There Was Just Cause: Residential care work is a sensitive position requiring sensitivity and a high sense of appropriateness. After receiving 7 separate reports of abuse from co-workers and residents, the home was justified in concluding that it could no longer trust her to live up to these standards. The care worker's apparent lack of remorse did little to help her case, the arbitrator added [*Saulnier Grievance*, [2012] N.S.L.A.A. No. 12, Oct. 19, 2012].

Ontario: Throwing Things at Co-Workers (*Walker Exhausts*)

What Happened: An employee gets angry with his co-workers and hurls a steel pipe in their direction. Although nobody is hit, the employee is suspended on the spot. He storms out but not before throwing his gloves and arm sleeves toward the supervisor. As a result, he was fired.

Why There Was Just Cause: This wasn't just an isolated incident. The employee had a long history of quick tempered outbursts, failure to complete anger management and unwillingness to apologize or express remorse for his actions, the arbitrator noted [*Walker Exhausts v. USW (Local 2894)*, [2012] CanLII 42290 (ON LA), July 19, 2012].

BC: Disloyalty of Corporate Director (*Carlsen*)

What Happened: The founder of a dietary supplement company sells a majority interest in the firm and signs an employment agreement to stay on for 3 years as director. But disagreement with the board over business decisions ensue and get so bad that the founder sues the board and company for oppression of the shareholders. The founder is then fired.

Why There Was Just Cause: The decision to sue the company violated the founder's

duty of loyalty and constituted just cause for dismissal, said the court [*Carlsen v. Enerex Botanicals Ltd.*, [2012] B.C.J. No. 1840, Sept. 5, 2012].

New Brunswick: Theft by Employee with Criminal Record (*W.G. Grievance*)

What Happened: A hospital catches a veteran maintenance employee stealing cleaning supplies. In addition to getting fired, the employee is stripped of his $15,000 retiring allowance.

Why There Was Just Cause: Theft alone isn't automatically just cause to terminate especially when committed by a long serving employee. But other factors made the offence more serious, like the employee's prior criminal conviction for theft and his failure to express remorse. Besides, even though he'd been with the hospital a long time, nobody contended that he was a "model employee" or even that he had "a good work record" [*W.G. Grievance*, [2012] N.B.L.A.A.,Oct. 10, 2012].

Ontario: Drunk Driving of Company Vehicle (*Dziecielski*)

What Happened: An employee driving a company truck drunk and without permission gets into an accident and totals the vehicle.

Why There Was Just Cause: Although the employee had been with the company 23 years and this was a single and isolated incident, it involved serious and criminal misconduct. And even though he had drank off premises while visiting a client, he was on duty at the time and had signed the employee handbook which specifically barred employees from consuming alcohol off premises while conducting business [*Dziecielski v. Lighting Dimensions Inc.*, [2012] O.J. No. 1305, March 22, 2012].

Saskatchewan: Harassment and Bullying by Supervisor (*CUPE, Local 47*)

What Happened: A city decides to depart from its progressive discipline procedure and immediately fire a supervisor for bullying and harassing behaviour. The supervisor claims the penalty is too severe but the arbitrator disagrees.

Why There Was Just Cause: The city did a thorough investigation and turned up evidence that the supervisor had engaged in a pattern of disrespectful, confrontational, humiliating and threatening behaviour toward not just co-workers but superiors. Attempts by management to counsel him failed to change his behaviour or even get him to acknowledge that it was inappropriate [*Saskatoon (City) v. Canadian Union of Public Employees, Local 47*, [2012] CanLII 12086 (SK LA), March 8, 2012].

BC: Relocating to Mexico without Permission (*Ernst*)

What Happened: A software company fires its highest paid executive about 18 months into his term for moving to Mexico without permission. The executive claims he was fired without cause, noting that his employment contract provided that he would "initially work out of his own home." But the court disagrees.

Why There Was Just Cause: "Home" meant either Alberta, where the executive was living at the time he inked the deal, or Vancouver, where he was eventually expected to relocate. Mexico wasn't part of the deal. So unilaterally moving there was a repudiation of the contract and just cause for termination, said the court [*Ernst v. Destiny Software Productions Inc.*, [2012] B.C.J. No. 734, April 16, 2012].

Ontario: Insolence and Insubordination (*Bennett*)

What Happened: Six months into the job, the associate of a one-woman law firm writes a nasty letter to the boss criticizing her competence, professionalism and integrity. She's fired for insolence.

Why There Was Just Cause: After 10 years of litigation and numerous appeals, the Ontario Court of Appeal ruled that the letter was indeed insolent. More precisely, it upheld the trial court's judgment that the associate showed insolence and insubordination irreparably damaging the employment relationship. The trial court heard the witnesses, reviewed the evidence and made a judgment about the facts that the appeals court had no business second-guessing [*Bennett v. Cunningham*, [2012] O.J. No. 3839, Aug. 17, 2012].

EMPLOYER LOSES

Federal: Termination Too Harsh for First Safety Offence (*Reid Grievance*)

What Happened: A shipping operator fires a barge worker for committing what all acknowledge is a "gross safety violation," i.e., smoking on a tug during unloading operations.

Why There Was No Just Cause: The worker knew he was violating the company's no smoking policy and that smoking could cause an explosion. But because of his clean record, the arbitrator decided termination was too harsh and substituted a lengthy suspension and loss of a year's seniority [*Island Tug and Barge Ltd. v. Canadian Merchant Service Guild (Reid Grievance)*, [2012] C.L.A.D. No. 255, Sept. 6, 2012].

BC: Chronically Late Employee Could Still Be Redeemed (*Viterra*)

What Happened: A grain operator who's constantly late for work is allowed to keep his job under a last chance agreement. When he shows up late again, though, the company decides he's a lost cause and fires him.

Why There Was No Just Cause: The reason the employee was always late was that he had family problems to deal. The employee was diligently working to address these problems, the court noted, and He had a solid excuse for showing up late in the culminating incident—he overslept because a crisis with his troublesome son kept him up the entire night [*Viterra v. Grain Workers' Union, Local 333*, [2012] B.C.J. No. 493, March 12, 2012].

Québec: Tough Economic Times Is Not Just Cause (*Snow*)

What Happened: After 17 years of loyal service, an engineering firm employee is laid off. The firm claims it's experiencing "unexpected economic hardship" that have forced it to terminate not just him but 37 other employees.

Why There Was No Just Cause: Hard economic times don't count as just cause to terminate without notice, said the court. So it awarded the employee 18 months' notice—rougly $49,000 [*CMP Advanced Mechanical Solutions Ltd. v. Snow*, [2012] Q.J. No. 8955, Sept. 20, 2012].

Ontario: Failure to Investigate Dooms Case to Fire for Drunkedness (*Nagra Grievance*)

What Happened: A lead hand and forklift driver who's been disciplined for being intoxicated at work once before is fired for being drunk on the job. The arbitrator orders that be reinstated.

Why There Was No Just Cause: The employee's position was safety-sensitive and the employer's policy clearly stated that proven use of workplace drugs or alcohol would result in termination, the arbitrator acknowledged. But there was no evidence the employee was actually intoxicated during this second incident because the employer didn't conduct a full and fair investigation before firing him [*Chep Canada Inc. v. Communications, Energy & Paperworkers' Union, Local 2003 (Nagra Grievance)*, [2012] O.L.A.A. No. 449, Sept. 4, 2012].

Ontario: Alcohol Smell Justifies Sending Employee Home, Not Firing Him (*McIlroy Grievance*)

What Happened: Supervisors smell alcohol on an employee's breath and send him home. Later, he's fired. The employee denies that he was intoxicated and protests that he hasn't drank his last beer for at least 11 hours before starting work.

Why There Was No Just Cause: The supervisor had reasonable cause to believe the employee had been drinking and to send him home for safety reasons, said the arbitrator. However, there wasn't enough evidence of actual impairment to justify termination under the collective agreement [*Toronto Transit Commission v. Amalgamated Transit Union, Local 113 (McIlroy Grievance)*, [2012] O.L.A.A. No. 8, Jan. 9, 2012].

BC: Employer Can't Prove Employee Smoked Marijuana (*BC Maritime Employers Assoc.*)

What Happened: A foreman smells pot in the dock office of a bulk terminal. The only person inside at the time is a deep sea labourer. So the company decides he must be guilty and fires him.

Why There Was No Just Cause: The labourer denied the charge; there were no witnesses who saw him smoking; and nobody searched his car for drugs or paraphernalia. So the arbitrator rules there wasn't enough evidence to conclude the labourer was smoking dope [*BC Maritime Employers Association

v. International Longshore and Warehouse Union, Canada, [2012] CanLII 5484 (BC LA), Jan. 23, 2012].

Newfoundland: Remorse, Lack of Selfish Motive Help Employee Save Her Job (*Butler Grievance*)

What Happened: A hospital fires a clerical worker for improperly accessing private patient medical information via the computer system. The arbitrator knocks the penalty down to an 8 month suspension.

Why There Was No Just Cause: Although the clerical worker committed a serious breach of patient privacy, there were also "mitigating factors" calling for a penalty less severe than termination—the fact that she did it not for personal gain but because she thought nurses had asked her to pull the patients' information. Upon learning that her actions were wrong, she immediately accepted responsibility and expressed remorse for what she'd done [*Butler Grievance*, [2012] N.L.L.A.A. No. 9, July 30, 2012].

BC: Employee Never Warned He Could Be Fired for Using "F" Word (*Boyko Grievance*)

What Happened: An employee is fired for using the "f" word while discussing the denial of his short-term disability benefits claim with the case manager. The arbitrator upholds the union's grievance and orders the employee reinstated.

Why There Was No Just Cause: The employer relied on the case manager's account of what happened during the incident without conducting its own investigation. Moreover, even if the allegations were true, the incident wasn't by itself enough to justify termination. The employee should have gotten a written warning first [*Teamsters Local Union No. 213 v. Canplas Industries Ltd. (Boyko Grievance)*, [2012] B.C.C.A.A.A. No. 47, April 28, 2012].

Ontario: Failure to Get Dr.'s Note Not Serious Enough Offence to Fire Senior Employee (*Yellow Pages*)

What Happened: A Yellow Pages sales consultant takes short term disability leave for hypertension and work-related stress. But his doctor doesn't return the medical forms the company's disability insurer needs. So the company terminates his benefits and insists that he either furnish the documentation or return to work by March 3. He does neither. So after 20 years of spotless service, he's fired.

Why There Was No Just Cause: Although Yellow Pages might have followed the letter of the law with regard to notification and warning, firing a senior employee for such a minor offence was disproportionate and a new arbitrator would have to decide if the penalty was warranted [*Canadian Office & Prof. Employees v. Yellow Pages Group Co.*, [2012] O.J. No. 2880, June 26, 2012]. ❖

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