

# The Most Important OHS Compliance Cases of 2021 (So Far)



Although COVID-19 continues to command the attention of OHS regulators, courts across Canada have also issued a number of significant non-pandemic OHS compliance rulings in the first 6 months of the year. Here's a rundown of the cases most likely to have an impact on your own OHS program, particularly if your company operates in the jurisdiction in which the case was decided.

## 1. Ontario Court Says Constructor Can Be Charged as 'Employer' for OHS Violation

A case with major liability implications for companies that act as 'constructors' (called 'prime contractors' in many jurisdictions) at multi-employer work sites arose from the tragic death of a pedestrian struck by a road grader while crossing an intersection at a municipal construction site. The city was charged as both an employer and constructor with failing to ensure that a signaler was in place. The lower court found that the city was neither an employer nor a constructor and dismissed the charges. But the Ontario Court of Appeal reversed. In contracting with the companies that carried out the work and deploying its own inspectors to oversee it, the city was 'virtually in the position of an insurer who must' ensure compliance with all OHS requirements before the work begins, according to the Court. So, the case had to go back down to trial to determine whether the city exercised due diligence [*Ontario (Labour) v. Sudbury (City)*, 2021 ONCA 252 (CanLII), April 23, 2021].

## 2. Arbitrators Uphold Terminations for Dangerous and Distracted Driving

In the past 7 months, we've noticed a pattern of cases in which arbitrators sided with employers in termination cases for dangerous and distracted driving while on work duty:

- **Alberta:** Eating rice from a bowl with both hands while driving the bus was

just cause, especially given the driver's disciplinary record, his failure to apologize and the city's consistent record of firing other drivers for distracted driving [*Corporation of the City of Calgary v Amalgamated Transit Union Local 583*, 2020 CanLII 100556 (AB GAA), December 9, 2020];

- **BC:** A driver used his cell phone to show that the vehicle's warning lights were defective; but the strategy backfired when the photo also showed that he snapped off the shots while the vehicle was moving, a termination-worthy offence, especially since the driver had been previously disciplined for other distracted driving offences [*Sysco Canada, Inc. v Teamsters Local Union No. 213*, 2021 BCLRB 4 (CanLII), January 8, 2021];
- **Ontario:** Deliberately speeding his heavy truck to 'blow by' a yellow school bus, red lights flashing, that had stopped to pick up a young girl was just cause to terminate, given the driver's false denial and 3 previous speeding tickets [*Power Workers' Union v Halton Hills Hydro*, 2021 CanLII 33012 (ON LA), April 19, 2021].

### **3. BC Tribunal Says Workers Comp Doesn't Cover COVID-19 Mental Stress**

An unreported case from BC sheds crucial light on a literally multi-billion dollar question about whether workers comp covers the mental stress experienced by essential workers who had to come to work during the COVID-19 outbreaks while everybody else was hunkering down at home. The central character was a food service worker at a prison facility who filed a workers comp claim for the mental stress she said she developed as a result of having to not only come in but work extended hours due to COVID. The claim was denied. Mental stress benefits are reserved for traumatic events, reasoned the BC Review Division, and don't cover the kind of stress employees feel when their work conditions change or their jobs are in jeopardy [*Review Reference #R0269567*, Unreported].

### **4. Worker Can't Sue for Reprisal After Signing a Severance Agreement**

Do those severance agreements that many workers sign in exchange for termination benefits bar them from later asserting their OHS reprisal protection rights. The Alberta Labour Relations Board in this case said they did and tossed the retaliation claim of a worker that had signed a severance release granting 52 weeks' pay and 15 weeks of benefits. The release was clearly worded and fair and the company gave him ample opportunity to review it and run it by a lawyer, the Board reasoned [*Winters v. Finning Canada*, Alberta Labour Relations Board File No. OHS2019-16, February 5, 2021].

### **5. Contractor Worker Can't Sue Plant Owner for**

## Negligence

A case from Ontario tests the limits on workers comp ban on injured workers' negligence suits. The case was brought by a poultry worker hired by a contractor to work at a plant owned by another company who fell in the facility's parking lot on her way to work. The WSIB shot the suit down. Even though the contractor hired her and paid her wages, the owner was the employer for purposes of workers comp because it exercised 'substantial control' over her work. The worker appealed but to no avail [*Chen v. Workplace Safety and Insurance Appeals Tribunal*, 2021 ONSC 1149 (CanLII), February 16, 2021].

## 6. Ontario Arbitrator Okays Mandatory COVID Testing of Retirement Home Employees

Another important case from Ontario confirms that employers can require workers to undergo COVID testing. Significantly, the workplace in this case was a retirement home for elderly residents particularly susceptible to the virus. The union claimed the mandatory testing policy was unnecessary and privacy-invasive and urged the arbitrator to evaluate it like a drug and alcohol testing policy. But to the arbitrator, that was an apples-to-oranges comparison. The stakes were much more deadly with COVID. While less vulnerable than nursing home residents, people living in retirement communities are still elderly and at great danger if they catch coronavirus. Besides, the arbitrator reasoned, a positive COVID test isn't 'culpable conduct' subject to discipline the way a positive drug/alcohol test is [*Christian Labour Association of Canada v. Caressant Care Nursing & Retirement Homes* (D. Randall), (unreported)].

## 7. Positive Marijuana Test Doesn't Prove Worker Was High at Time of Accident

As usual, some of the most important OHS cases in 2021 have addressed alcohol and drug testing. Among the key rulings is a federal case involving a machine operator who got fired for testing positive for THC after backing his Cat Loader into a pole. The arbitrator reinstated him without loss of pay and \$5,000 in damages to boot. For one thing, the company didn't give the union all of the necessary evidence before doing the post-incident test. Just as importantly, the THC levels weren't enough for the company to prove that the operator was impaired **at the time of testing** [*Canadian National Railway Company v United Steelworkers, Local 2004*, 2021 CanLII 30111 (CA LA), April 15, 2021].

## 8. Saskatchewan Court Finds No Grounds for Post-Incident Drug Testing

A safety-sensitive refinery worker admitted to commandeering a truck for personal use but denied responsibility for the damage to its bumper. But the

employer insisted he undergo post-incident testing and fired him after the test came back positive for marijuana. The Saskatchewan arbitrator knocked the penalty down to a 6-month suspension. The employer had no evidence that the driver was the one who banged up the truck, other than its mere suspicions, which weren't enough to justify testing. But since the worker lied about his marijuana use, he'd be subjected to random testing for 12 months after his return [*Gibson Energy (Moose Jaw Refinery Partnership) v Unifor, Local (Mike Chow)*, 2021 CanLII 16446 (SK LA), February 16, 2021].

### **Disagree With Our Choices'**

*Drop me a line at [glennd@bongarde.com](mailto:glennd@bongarde.com) and let me know what you think was the biggest OHS case(s) of 2021 so far*