What's New in HR Law

Employer's reliance on outdated discipline does not render terminations void

April 17, 2018

BOTTOM LINE

The Ontario Superior Court of Justice overturned the longstanding arbitral approach to sunset clause breaches in determining that an employer's breach of a collective agreement's sunset clause did not automatically render resulting terminations void.

Facts: Two employees terminated for significant misconduct

Metrolinx terminated Mr. Jessett and Mr. Jebamoney from their employment as Transit Safety Officers after each individual engaged in misconduct during the course of arrests.

Jessett was terminated after he shoved a 70-year old passenger with mental health issues against a wall and struck her twice with his knee. Jebamoney was terminated for using profane, rude, abusive, and disrespectful language towards a passenger.

The Manager for both employees was aware of a number of problems that each individual had over the course of their employment, including prior instances of discipline.

Both employees were subject to a collective agreement between Metrolinx and the Amalgamated Transit Union, Local 1587 (the "Union") which contained a "sunset clause." That

clause stated that any disciplinary action and/or any adverse notation was to be removed from an employee's file 18 months after the incident giving rise to the disciplinary action. The clause also prevented the employer from relying on older incidents for the purposes of progressive discipline.

Ontario Grievance Settlement Board Finding: Employer's reliance on outdated discipline rendered terminations void from the outset

In separate proceedings before the Ontario Grievance Settlement Board (the "OGSB"), the Union argued that the terminations could not stand because Metrolinx had relied on outdated discipline.

In each case, the OGSB found that even though the manager did not specifically review the employees' prior instances of discipline/misconduct, he nevertheless had these past instances in mind when determining the appropriate discipline. The OGSB determined that the manager did not have any right to "consider" instances that occurred before the sunset clause time period and that by doing so, the terminations were rendered *void ab initio* – that is, void from the outset.

In making this finding, the OGSB stated that it felt constrained by long-standing arbitral/Court caselaw which stood for the proposition that, notwithstanding the seriousness of an individual's actions, terminations were *void ab initio* when a sunset clause was breached.

The OGSB therefore reinstated the two individuals without any discipline and provided them with full compensation for earnings, benefits, and seniority.

Ontario Superior Court of Justice: Terminations not void from the outset

Metrolinx sought judicial review of the OGSB's decisions, arguing that the prior case law on breaches of sunset clauses in imposing discipline had been misinterpreted and misapplied.

The Court agreed with Metrolinx that the existing jurisprudence does not require an automatic outcome – invalidation of the disciplinary measure – upon the breach of a sunset clause. Rather, the Court determined that adjudicators should assess the relevant circumstances surrounding the discipline/termination if a sunset clause breach occurs.

The Court held that allowing a breach of a sunset clause to effectively treat conduct giving rise to discipline as if it never happened was more a penalty than a remedy. The Court stated that where a breach of a collective agreement occurs, the remedy is to place a party in the position that it would have been in had the contract been complied with, not punish the party for the breach.

The correct approach, according to the Court, is to assess what would have happened had the breach of the sunset clause not occurred by considering all of the relevant circumstances of the situation. This includes: the nature of the conduct giving rise to the discipline, the nature of the employment, and whether the conduct giving rise to the breach of the sunset clause was deliberate or inadvertent.

Ultimately, the Court determined that the OGSB should not have rendered the terminations void without considering the remaining circumstances surrounding the terminations. The Court remitted both matters back to the OGSB to be decided in accordance with its decision.

Check the Box

This decision overturns the longstanding arbitral approach to sunset clause breaches. However, the decision could be appealed, so unionized employers should remain cautious when imposing discipline under a collective agreement that contains a sunset clause. In that respect:

- Unionized employers should be aware of any sunset clause provisions in collective agreements and should be cautious not to rely on outdated discipline in issuing further discipline.
- Managers who are aware of employee prior discipline could be deemed to have considered the previous discipline, even where such outdated discipline was not specifically reviewed or considered. Managers should carefully document all considerations in imposing discipline to ensure no improper discipline has been considered.

Forum: Ontario Superior Court of Justice

Date: April 17, 2018

Citation: *Ontario (Metrolinx – Go Transit) v Amalgamated Transit Union, Local 1587*, 2018 ONSC 2342

Need more information?

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