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Divisional Court Finds Breach of Sunset Clause Does Not Necessarily Render Employer Discipline Null and Void

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In a decision dated April 17, 2018, the Divisional Court has invited arbitrators to reject the so-called *"void ab initio"* doctrine that in the past has often resulted in discipline imposed by management being rendered null and void due to the breach of a sunset clause or other similar provisions. Learn more in this *FTR Now*.

In *Ontario (Metrolinx – Go Transit) v. Amalgamated Transit Union, Local 1587*, the Court found that the decisions of two different Vice-Chairs of the Grievance Settlement Board (GSB) involving Metrolinx were both incorrect and unreasonable in holding that they were constrained to apply the doctrine by a 1983 Divisional Court decision (*BFCSD v. Molson's Brewery (Ontario) Ltd.* ("*Molson's*")). The Vice-Chairs had both concluded that the only remedial order available to them once they determined management had breached a sunset clause was to find the employers' disciplinary response null and void. The decisions were quashed and the matters were remitted to the GSB for further consideration of the appropriate penalty.

By way of background, the Divisional Court in *Molson's* had considered the results of a full arbitration hearing in which an employee was dismissed for misconduct in the workplace. He had a disciplinary record for similar misconduct but the sunset clause in the applicable collective agreement prevented the employer from considering that misconduct. It was clear that the employer's investigator and the manager who recommended termination "considered the discipline record of the employee without any limitation as to the period of the record which they considered."

The arbitrator viewed the sunset clause in the Molson's collective agreement as directory, not mandatory, in nature. The Court found that the sunset clause was in fact mandatory and that the "respondent company had no right under the collective agreement to discipline or discharge the grievor in circumstances in which it attached significance or weight to his prior discipline record." It stated that "in the circumstances of this case" the company could not discipline or discharge the grievor for the incident in question and, referring the matter back to the arbitrator, indicated that reinstatement with full compensation was the only remedy. On appeal, the Court of Appeal varied the decision to the extent that it should be the arbitrator who determined the appropriate compensation, in accordance with the decision of the Divisional Court.

The Metrolinx judicial reviews arose in the context of two decisions resulting from preliminary motions brought before the GSB on whether the sunset clause in the Collective Agreement had been breached in the termination of two Metrolinx Transit Safety Officers. The sunset clause required the removal of records of disciplinary action or any adverse notations after 18 months, and the removal of any letters of counsel after 12 months, as long as the employee's record remained free of discipline over that time.

The first motion related to Mr. Jessett. In the course of arresting a 70-year old woman with mental health issues, he put her up against a wall to handcuff her and applied two full knee strikes to her. As a result his employment was terminated.

The second motion related to Mr. Jebamoney, who was dismissed from his employment "for using profane, rude, abusive and disrespectful language towards a Metrolinx passenger while effecting an arrest."

Both Jessett and Jebamoney were dismissed by a Metrolinx manager, Mr. Weir, who had worked with both grievors and was aware of their prior disciplinary history.

In the *Jessett* decision, Vice-Chair Misra found that Weir had taken into account information he had about Jessett's prior conduct in his dismissal decision. That information was in the form of a counselling letter which Weir in fact had written, but

which had been expunged from the personnel file.

The Vice-Chair found Weir to be an honest witness. While she concluded Weir had not actually reviewed the existing workplace copy of the counselling letter, he had it "in mind" in making the decision to terminate: "as a decision maker, Weir had no right under the Collective Agreement to give any consideration or weight to those issues because they had come off Jessett's record." The sunset clause had therefore been breached. Finding herself constrained by *Molson's*, she rejected the employer argument that she should "carve out" the inappropriate consideration of the expired records and consider the appropriate remedy in light of Jessett's conduct. She reinstated Jessett with full compensation and no discipline.

In the *Jebamoney* case, Vice-Chair Abramsky found that Weir was aware of prior complaints related to Jebamoney, including two complaints about use of excessive force that were now excluded from his file. The Vice-Chair stated that "while information 'cannot be erased from a person's mind' it cannot be relied upon." She concluded that the sunset clause was breached and followed the reasoning in the *Jessett* decision and *Molson's* in reinstating Jebamoney with full compensation and no discipline.

On judicial review, the Divisional Court noted that in the Metrolinx decisions, the *Molson's* decision had been understood by the GSB to mean that the "only issue remaining for the arbitrator upon the breach of a sunset clause is the amount of compensation paid to the employee."

However, the Court accepted the arguments of the employer that the *Molson's* decision was rendered "in accordance with the circumstances of this case" only and that it did not "prescribe an automatic outcome once a sunset clause is breached." It noted that the arbitrator and the Court in *Molson's* had the benefit of a full arbitration hearing and the resulting fact finding.

The *Jessett* and *Jebamoney* decisions were rendered after preliminary motions and did not deal with, among other things, the difficulty of when a manager has knowledge of an employee gained from working history and memory, not from a deliberate review of the discipline records, as was the case in *Molson's*.

The Court stated that while some of the circumstances in the *Jessett* and *Jebamoney* cases were touched upon, the Vice-Chairs effectively treated the breach of the sunset clause as the only relevant circumstance. This distinguished the Metrolinx cases from *Molson's*.

More generally, the Divisional Court emphasized the analytical deficiencies of the "*void ab initio doctrine*", stating:

[53] Although the phrase "void ab initio" was not used in *Molson's*, it has been used to describe the *Molson's* remedy […]. The phrase is not used in the ordinary contract sense of treating a contract as invalid from the outset. It is used to describe a remedy that, effectively, treats the conduct of the grievor giving rise to the discipline as if it had never happened. This is problematic. It is contrary to the ordinary principles of contract law, which have been applied in the labour context. A remedy for breach of contract is intended to put the party in the position it would have been in if the contract had been complied with, not to punish a party for breach or provide a windfall […]

[60] As for the use of the term "*void ab initio*" in some of the above decisions, I note that this term was not used in *Molson's* and I find it an unhelpful moniker to the extent that it has been used.

The Court also considered the subsequent arbitral treatment of *Molson's* and the common finding that the breach of a sunset clause renders an employer's discipline *void ab initio*. The Court stated that none of the cases relied on by the union included a full consideration of the relevant circumstances, as had been done in *Molson's*. It concluded that the Vice-Chairs in Jessett and Jebamoney should have considered all relevant circumstances in determining whether *Molson's* had a constraining effect and it was both unreasonable and incorrect not to do so.

In response to the union's argument that it was impossible to know with precision what the employer would have done had it acted in compliance with the sunset clause, the Court stated that the Vice-Chairs were not limited in fashioning a remedy to

what the employer would have done.

The union argued that, from a policy standpoint, if a breach of a sunset clause only resulted in a reconsideration of the discipline based on proper factors, there would be nothing to stop employers from deliberately breaching their sunset clauses, with no consequences. The Court rejected this “floodgates” argument, observing that the *Jessett* and *Jebamoney* cases did not suggest this type of deliberate practice and that the impact of a practice of deliberate breach would be a circumstance that could be considered by an arbitrator in an appropriate case.

Finally, the Court observed that neither of the two GSB Vice-Chairs had considered whether, rather than relying on *Molson’s*, they could instead exercise their statutory power under s. 48(17) of the *Labour Relations Act, 1995* to modify (rather than nullify) the penalty imposed by the employer. The Court held that the union could not rely on *Molson’s* to argue for the avoidance of the exercise of statutory discretion. The issue of the exercise of the discretion under s. 48(17) was remitted to the two GSB panels for further consideration.

The Court quashed the decisions and remitted them to the GSB to be determined in accordance with its reasons.

The Metrolinx cases are not confined in their effect to situations involving sunset clauses, but may also be relied on in other contexts (such as a failure to provide mandatory union representation during discipline) where the “*void ab initio doctrine*” has traditionally been applied.

For more information on this decision, please contact Michael A. Hines, who successfully argued the case on behalf of Metrolinx, at 416.864.7248 or your regular Hicks Morley lawyer.
