

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

KENNETH J. FOSTER

Grievor

and

**TREASURY BOARD
(National Defence)**

Employer

Before: J. Barry Turner, Board Member

For the Grievor: Michael Tynes, Public Service Alliance of Canada

For the Employer: Harvey Newman, Counsel

Heard at Halifax, N.S.,
October 29, 1996.

DECISION

Kenneth Foster was an employee of the Department of National Defence, FR-1 classification, Base Fire Department, CFAD Bedford, Nova Scotia. His employment was terminated effective 17 May 1993 (Exhibit G-1) by operation of law pursuant to section 748 of the Criminal Code of Canada following his conviction of an indictable offence for which he was sentenced to imprisonment for a term exceeding five years.

Section 748 of the Criminal Code reads:

748. (1) *Where a person is convicted of an indictable offence for which he is sentenced to imprisonment for a term exceeding five years and holds, at the time he is convicted, an office under the Crown or other public employment, the office or employment forthwith becomes vacant.*

(2) *A person to whom subsection (1) applies is, until he undergoes the punishment imposed on him or the punishment substituted therefor by competent authority or receives a free pardon from Her Majesty, incapable of holding any office under the Crown or other public employment, or of being elected or sitting or voting as a member of Parliament or of a legislature or of exercising any right of suffrage.*

(3) *No person who is convicted of an offence under section 121, 124 or 418 has, after that conviction, capacity to contract with Her Majesty or to receive any benefit under a contract between Her Majesty and any other person or to hold office under Her Majesty.*

(4) *A person to whom subsection (3) applies may, at any time before a pardon is granted to the person under section 4.1 of the Criminal Records Act apply to the Governor in Council for the restoration of one or more of the capacities lost by the person by virtue of that subsection.*

(5) *Where an application is made under subsection (4), the Governor in Council may order that the capacities lost by the applicant by virtue of subsection (3) be restored to him in whole or in part and subject to such conditions as he considers desirable in the public interest.*

(6) *Where a conviction is set aside by competent authority, any disability imposed by this section is removed.*

Mr. Foster grieved his termination to the Public Service Staff Relations Board. The adjudicator found that he did not have jurisdiction in the matter (Exhibit G-2). This decision was subsequently upheld by Mr. Justice Joyal of the Federal Court of Canada, Trial Division, in a decision dated August 20, 1996 (Court file T-1323-95) (Exhibit G-3).

Mr. Foster is now grieving the employer's decision to deny him severance pay. His grievance reads:

I grieve management's decision to withhold payment of severance pay, which is in violation of section 9, article 24.01(f) of the PSAC Master Agreement.

Clause M-24.01(f) of the Master Agreement between the Public Service Alliance of Canada and the Treasury Board reads:

M-24.01 Under the following circumstances and subject to clause M-24.02, an employee shall receive severance benefits calculated on the basis of the employee's weekly rate of pay:

...

(f) Release for Incapacity or Incompetence

(i) When an employee has completed more than one (1) year of continuous employment and ceases to be employed by reason of release for incapacity pursuant to the provisions of Section 31 of the Public Service Employment Act, one (1) week's pay for each complete year of continuous employment with a maximum benefit of twenty-eight (28) weeks.

(ii) When an employee has completed more than ten (10) years of continuous employment and ceases to be employed by reason of release for incompetence pursuant to the provisions of Section 31 of the Public Service Employment Act, one (1) week's pay for each complete year of continuous employment with a maximum benefit of twenty-eight (28) weeks.

The grievor is requesting the following corrective action:

I request immediate and full severance pay for 28 years of service as a federal employee.

No witnesses were heard in this matter. The parties agreed that the facts were not in dispute. Five exhibits were admitted on consent. Mr. Newman said at the outset that he was not questioning the timeliness of this grievance. Mr. Tynes informed me that, even though the grievor was unable to attend the hearing, Mr. Foster had advised Mr. Tynes to proceed with the case in his absence. Mr. Tynes also advised me that reference to section 9 in the grievance was an error and was to be ignored.

I am being asked to decide if the denial of severance pay by the grievor's employer was justified.

Position of the Parties

Mr. Tynes argued that the grievor should have received severance pay under the provision of clause M-24.01(f) in the Master Agreement, especially in light of the employer's letter to the grievor on 25 August 1993 (Exhibit G-4) that categorized his termination as an "involuntary resignation" and indicated on page two of this letter that he was to be entitled to severance pay. He also referred me to a "Minute Sheet" regarding "Notice of Termination" dated 27 August 1993 (Exhibit G-5) that refers, under reason for termination, to the grievor's "involuntary release" and made the same argument.

He argued that, since the employer deemed the grievor to be incapable of performing his duties under section 748 of the Criminal Code, the conditions for receiving severance pay under clause M-24.01(f) - Release for Incapacity or Incompetence - should apply to Mr. Foster. He argued the only way an employee cannot receive severance pay is under discharge for disciplinary reasons. He also argued that, if Mr. Foster had been sentenced to a term of imprisonment of less than five years, he would have been released for incapacity under section 31 of the Public Sector Employment Act. Mr. Foster qualified for severance pay because he had served more than ten years in the Public Service.

Mr. Newman argued that from an equitable position this grievance has some merit since the grievor was not terminated for disciplinary reasons. He said that one level of management initially recommended Mr. Foster be granted leave but then the employer denied it (Exhibit G-1). Since the grievor had a good record of employment, the employer initially felt he could have performed his duties after his prison term but

because of section 748 of the Criminal Code his employment became vacant. Mr. Newman concluded that even though the parties dealt with various severance pay circumstances in the Master Agreement under specific items (a) to (f) in clause M-24.01, it does not deal in general terms with a situation such as the one before me under the Criminal Code. He agreed that this case is an “anomalous one” as Mr. Justice Joyal stated in Exhibit G-3, and that neither the Public Service Employment Act nor the Financial Administration Act are applicable in the case before me, as Mr. Justice Joyal also concluded in his decision. Mr. Justice Joyal wrote:

...In this regard, I would agree with the respondent's submission that both the employer and the adjudicator were left without discretion in this matter, since the established mechanisms for dismissal in the Federal Public Service were not engaged. Generally speaking, it is seen that the Public Service Employment Act and the Financial Administration Act provide the legal bases for such termination. While the first statute provides for termination respecting term appointments, resignations, rejections on probation and lay-offs, the second statute provides for terminations for disciplinary and non-disciplinary reasons. However, it seems obvious to me that neither of the statutes is applicable in the case at bar, since no termination action was taken by the respondent, either for disciplinary or non-disciplinary reasons.

He went on to say in his conclusion:

...It may be observed, therefore, that in the experience of the Public Service of Canada and in the context of the discrete statutes to which reference has been made, the applicant's position is an anomalous one...

Mr. Newman argued that the employer did not take any termination action in this case but merely recognized the law under the Criminal Code and had no choice in doing so. He agreed that Mr. Foster is actually “left in the cold in this matter” and that the Department struggled with how to classify his loss of employment. This explains why the employer referred to his job loss as an “involuntary resignation” and “involuntary release” in Exhibits G-4 and G-5, respectively, neither of which is found in the Master Agreement. He concluded that during a new round of collective bargaining the issue before me can be addressed but under the relevant provisions of the Master Agreement the employer is not under any obligation to pay Mr. Foster severance pay.

In rebuttal argument, Mr. Tynes said that I could interpret incapacity to mean not only illness or loss of a credential such as a driver's licence or a trade certificate for a tradesman that renders someone incapable of doing his or her job, but under the unique circumstances before me, I could deem Mr. Foster to be incapable of doing his job and therefore award him severance pay.

Reasons for Decision

The case before me arises out of the Foster decision (Board file 166-2-26267) issued by adjudicator Tarte on May 24, 1995.

Section 748 of the Criminal Code effectively terminates the employment of a public servant who, following conviction of an indictable offence, is sentenced to imprisonment for more than five years. A termination under section 748 of the Criminal Code occurs automatically by operation of law. The employer is without discretion in such a case.

In my opinion, the employer struggled with the expressions "involuntary resignation" and "involuntary release" because it could not find a more appropriate expression or an accurate reference in the Master Agreement to describe Mr. Foster's loss of employment.

Mr. Tynes is asking me to add new meaning to the Master Agreement reference under clause M-24.01(f) - Release for Incapacity - as it applies within the legal confines of section 748 the Criminal Code. I can not do that. Alternatively, he is asking me to rewrite the Master Agreement to include reference to section 748 of the Criminal Code. I can not do this either.

As regrettable as this situation is for Mr. Foster, he is as Mr. Newman described unfortunately "left in the cold" even though he had more than ten years of employment in the Public Service. The Treasury Board may wish to exercise its discretion by making an *ex gratia* payment to Mr. Foster but I have no authority to order it to do so.

For all these reasons, his grievance is denied. I do suggest, however, that the parties explore a solution to this problem with the resumption of collective bargaining as a similar situation could arise at some future date.

**J. Barry Turner,
Board Member**

OTTAWA, November 19, 1996.