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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

NATHAN SURGESON

Grievor

and

PARKS CANADA AGENCY

Employer

Indexed as
Surgeson v. Parks Canada Agency

In the matter of individual grievances referred to adjudication

Before: Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Chantale Mercier, Public Service Alliance of Canada

For the Employer: Elizabeth De Guerre, Parks Canada Agency

Decided on the basis of written submissions, filed January 15, June 7 and 27, and August 15 and 20, 2024.

REASONS FOR DECISION

I. Overview

[1] Nathan Surgeson was convicted of indictable offences under the *Criminal Code* (R.S.C., 1985, c. C-46) and sentenced to more than two years' imprisonment. Subsection 750(1) of the *Criminal Code* says that public employees vacate their employment upon conviction of an indictable offence and being sentenced to at least two years' imprisonment. Mr. Surgeson did not tell his employer, the Parks Canada Agency ("Parks Canada"), about his conviction and sentencing. When Parks Canada found out, it suspended Mr. Surgeson briefly while it obtained more information and then terminated his employment. Mr. Surgeson grieved his suspension and termination and referred both grievances to adjudication with the Federal Public Sector Labour Relations and Employment Board ("the Board", which in this case refers to the current Board and any of its predecessors).

[2] Parks Canada objects to the Board's jurisdiction to hear these grievances. I agree that the Board has no jurisdiction to hear them. Mr. Surgeson's employment came to an end by operation of law as of the date of his sentencing. The Board has no jurisdiction to set aside that legal consequence of his conviction and sentencing. My reasons follow.

II. Background facts to the grievances

[3] The important facts for the purposes of this preliminary objection are not in dispute.

[4] On August 9, 2022, Mr. Surgeson was convicted of five counts of sexual assault, contrary to s. 271 of the *Criminal Code*, and four counts of sexual interference, contrary to s. 151 of the *Criminal Code*. On March 6, 2023, four of those counts were stayed on the basis of the rule in *Kienapple v. R.*, [1975] 1 S.C.R. 729, prohibiting more than one conviction for the same criminal wrong. Mr. Surgeson was then sentenced to five years' imprisonment for the remaining charges, in one sentence of two years consecutive, one of three years consecutive, and then three other sentences of three years concurrent. Mr. Surgeson has appealed and was obviously released pending his appeal (explaining how he could attend work for over three months after his sentencing). His appeal has not yet been scheduled but is expected to take place at the end of 2024.

[5] Mr. Surgeson did not tell Parks Canada about his conviction. Parks Canada found out about his conviction sometime during the week of June 4, 2023. It suspended his reliability status and suspended him from employment on June 9, 2023, investigated briefly, and then terminated his employment on June 14, 2023.

III. The Board has no jurisdiction to hear these grievances

[6] Mr. Surgeson grieved both his suspension and termination of employment. Parks Canada denied both grievances, and he referred them to adjudication under ss. 209(1)(a) and (b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). He states that his suspension and termination were disciplinary (and thus fall within s. 209(1)(b) of the *Act*) and that they violated article 15 of the collective agreement between Parks Canada and Public Service Alliance of Canada, ("the collective agreement"), dealing with certain disciplinary procedures (and thus fall within s. 209(1)(a) of the *Act*).

[7] Parks Canada objects to the Board's jurisdiction to hear these grievances. Parks Canada argues that Mr. Surgeson never raised article 15 of the collective agreement during the grievance procedure, and therefore, he cannot do so now because of the principle set out in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.). Parks Canada also argues that Mr. Surgeson's suspension and termination were not disciplinary in nature because both flowed from an administrative decision to suspend and then remove his reliability status. The Federal Court of Appeal's decision in *Canada (Attorney General) v. Heyser*, 2017 FCA 113, stands for the proposition that the Board has jurisdiction to hear a case flowing from the removal of a reliability status or security clearance under s. 209(1)(c)(i) of the *Act* because such actions amount to a suspension or termination of employment, regardless of being characterized as administrative. However, s. 209(1)(c) of the *Act* does not apply to Parks Canada. Therefore, Parks Canada argues that *Heyser* does not apply to it and that employees have no recourse to adjudication when their reliability status or security clearance is removed, even if that results in the suspension or termination of their employment.

[8] I do not need to address these two arguments because I can decide this case on a simpler ground advanced by Parks Canada.

[9] Subsection 750(1) of the *Criminal Code* automatically terminates the employment of any public servant when the public servant has been convicted of an indictable offence and sentenced to at least two years' imprisonment. The relevant provisions of s. 750 of the *Criminal Code* read as follows:

Public office vacated for conviction	***Vacance***
750 (1) *Where a person is convicted of an indictable offence for which the person is sentenced to imprisonment for two years or more and holds, at the time that person is convicted, an office under the Crown or other public employment, the office or employment forthwith becomes vacant.*	***750 (1)*** *Tout emploi public, notamment une fonction relevant de la Couronne, devient vacant dès que son titulaire a été déclaré coupable d'un acte criminel et condamné en conséquence à un emprisonnement de deux ans ou plus.*
When disability ceases	***Durée de l'incapacité***
(2) *A person to whom subsection (1) applies is, until undergoing the punishment imposed on the person 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.*	***(2)*** *Tant qu'elle n'a pas subi la peine qui lui est infligée ou la peine y substituée par une autorité compétente ou qu'elle n'a pas reçu de Sa Majesté un pardon absolu, une personne visée par le paragraphe (1) est incapable d'occuper une fonction relevant de la Couronne ou un autre emploi public, ou d'être élue, de siéger ou de voter comme membre du Parlement ou d'une législature, ou d'exercer un droit de suffrage.*
…	[…]
Removal of disability	***Disparition de l'incapacité***
(6) *Where a conviction is set aside by competent authority, any disability imposed by this section is removed.*	***(6)*** *L'annulation d'une condamnation par une autorité compétente fait disparaître l'incapacité imposée par le présent article.*

[10] Subsection 750(1) of the *Criminal Code* applies automatically and without a public employer (such as Parks Canada) needing to take any administrative or disciplinary steps. In other words, Mr. Surgeson's position became vacated on March 6,

2023, as soon as he was sentenced, and "until undergoing the punishment imposed" he was incapable of holding any position at Parks Canada by virtue of s. 750(2) of the *Criminal Code*. By concealing his conviction from Parks Canada for three months, he improperly and illegally continued to hold that position. However, once Parks Canada discovered his conviction, it took the steps necessary to ensure that his position became vacated and that he no longer worked for it.

[11] In *Foster v. Treasury Board (National Defence)*, [1995] C.P.S.S.R.B. No. 48 (QL), (upheld in [1996] F.C.J. No. 1107 (T.D.)(QL)), a federal public servant lost his employment after being convicted of an indictable offence and sentenced to more than five years imprisonment (which was the threshold at the time, instead of the current two-year threshold). He grieved and referred his grievance to adjudication. The Board and Federal Court agreed that he had no right to do so because his end of employment was the inevitable result of the operation of the *Criminal Code* and not because of any action taken by the employer. In a later case involving Mr. Foster in which the Board denied him severance benefits as well (*Foster v. Treasury Board (National Defence)*, [1996] C.P.S.S.R.B. No. 81 (QL)), the Board summarized its earlier ruling by stating at paragraph 16 that "[a] termination under section 748 [currently s. 750] of the Criminal Code occurs automatically by operation of law. The employer is without discretion in such a case."

[12] The same result applies in this case. Mr. Surgeson's employment came to an end on March 6, 2023 by operation of law. Parks Canada had no discretion to continue Mr. Surgeson's employment, and I have no jurisdiction to hear a grievance about the end of his employment either. Parks Canada's decision was not disciplinary, so I have no jurisdiction under s. 209(1)(b) of the *Act*, and its decision cannot have triggered article 15 of the collective agreement because that article is about the process of discipline.

[13] Mr. Surgeson argues that since Parks Canada described this as an administrative action in its submissions, it has conceded that the termination of his employment was not merely an operation of law. I am not sure why that argument helps him, as Parks Canada is not covered by s. 209(1)(c)(i) of the *Act*, and therefore, Mr. Surgeson's termination of employment must be disciplinary and not administrative for the Board to have jurisdiction over it. In any event, I am not bound by the wording used by either

party in their submissions. Just because the employer calls an action administrative in its submissions does not make it so.

[14] Mr. Surgeson argues that the stated reason for his termination lacks credibility because Parks Canada suspended him instead of terminating his employment immediately, that the decision to suspend his reliability status was made by an official without the authority to do so, and that this entire process was disguised discipline. To be blunt, even if true, none of that matters. Parliament has decided that being convicted of an indictable offence and sentenced to two years' or more imprisonment renders one unfit for public office until they serve their sentence. Neither Parks Canada nor the Board have the jurisdiction to say otherwise.

[15] I have considered whether the Board has the jurisdiction to hear a grievance against the suspension even if it does not have the jurisdiction to hear the grievance against the termination of employment. I have concluded that it does not, because the suspension came after the conviction and sentencing. Mr. Surgeson's employment became vacant as of the date of his sentencing. He cannot claim the benefit of his own refusal to disclose that fact to Parks Canada, and he cannot claim that Parks Canada treated him unfairly by suspending him without pay for five days (two of which were a weekend) while it made sure that the information about his conviction and sentencing was accurate.

IV. No adjournment of preliminary objection

[16] Finally, Mr. Surgeson asked that this preliminary objection be adjourned until after his criminal appeal. I have concluded that his pending appeal is irrelevant to the case before me.

[17] I reach that conclusion despite acknowledging that the employer in *Foster* did not terminate Mr. Foster's employment until after his appeal was over, placing him on leave instead. In this case, Parks Canada did not wait for the appeal. However, it did not have to. Subsection 750(1) of the *Criminal Code* says that the public servant's employment becomes vacant "forthwith" — which means immediately. It also says that it operates "… at the time that person is convicted …". It does not say that the employment becomes vacant after an employee has exhausted their appeal rights or that it applies only after a person is convicted and any appeal rights have been exhausted.

[18] Also, s. 750(2) of the *Criminal Code* says that a person is barred from holding public office "… until undergoing the punishment imposed on the person …". This applies specifically to people like Mr. Surgeson who have been released pending their appeal. The consequences of a successful appeal are set out in s. 750(6) of the *Criminal Code*. If Mr. Surgeson is successful in his appeal, the bar in s. 750(2) no longer applies to him. However, s. 750(6) does not state that the impact of s. 750(1) is set aside or changed in any way. In other words, if he wins his appeal, Mr. Surgeson is free to apply for public service positions; however, that does not undo the impact of s. 750(1), which happened "forthwith" after his conviction and sentencing. Parliament turned its mind to the impact of a successful appeal or pardon and decided that those events would mean that a person was no longer incapable of holding public office. It did not state that a successful appeal or pardon undoes s. 750(1). Therefore, his appeal is irrelevant to the case before me and a successful appeal would change nothing.

[19] Mr. Surgeson relies upon *McBeath v. Canada (Attorney General)*, 2015 FC 830 to say that if an appeal reduces his sentence, it will affect the application of s. 750(1) of the *Criminal Code*. That reliance is misplaced. In that case, an employee of the Correctional Service of Canada pled guilty to 4 criminal counts and was sentenced to 38 months' imprisonment. With a credit on a 1:1 basis for his 8 months' pre-trial custody, his remaining custodial sentence was 30 months. The British Columbia Court of Appeal subsequently reduced his sentence to 36 months less one day and increased his credit for pre-trial custody to 12 months. Mr. McBeath applied to get his job back, arguing that the reduced sentence less the pre-trial custody credit amounted to 1 day shy of 2 years, and therefore, he fell outside the scope of s. 750(1) of the *Criminal Code*.

[20] The Correctional Service of Canada did not give Mr. McBeath his job back. It made two arguments explaining why it did not: that pre-trial custody counted toward the sentence in s. 750(1) of the *Criminal Code*, and alternatively that reducing a sentence on appeal does not matter because s. 750(6) of the *Criminal Code* refers to setting aside a conviction, not reducing the sentence for it. The Federal Court agreed with the first argument and did not have to consider the second.

[21] Neither of those two issues is raised in this case. The issue before me is whether s. 750(1) of the *Criminal Code* takes immediate effect. It does. *McBeath* is about what may happen if Mr. Surgeson's sentence is reduced on appeal and he asks for his job

back. I also note that *McBeath* involved a grievance that was judicially reviewed. Mr. McBeath did not attempt to refer that grievance to adjudication. If anything, *McBeath* supports the proposition that a grievance relating to the operation of s. 750 of the *Criminal Code* is outside the Board's jurisdiction.

[22] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[23] The grievances are denied.

October 25, 2024.

Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board