

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140107

Docket: A-192-13

Citation: 2014 FCA 1

**CORAM: SHARLOW J.A.
MAINVILLE J.A.
NEAR J.A.**

BETWEEN:

DAVID JOLIVET

Applicant

and

**TREASURY BOARD (CORRECTIONAL
SERVICE OF CANADA)**

Respondent

Heard at Ottawa, on January 7, 2014.

Judgment delivered from the Bench at Ottawa, Ontario, on January 7, 2014.

REASONS FOR JUDGMENT OF THE COURT BY:

SHARLOW J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Ottawa, Ontario, on January 7, 2014)

SHARLOW J.A.

[1] The applicant Mr. Jolivet is a member of the Canadian Prisoners' Labour Confederation (CPLC), an organization of inmates of federal correctional institutions. The objective of the CPLC is to compel the Correctional Service of Canada to engage in collective bargaining with respect to the terms and conditions under which inmates participate in institutional work programs.

[2] When officials of the Correctional Service of Canada denied Mr. Jolivet and other organizers of the CPLC the right to sign up members at Kent Institution, Mr. Jolivet submitted a complaint to the Public Service Labour Relations Board under section 190 of the Public Service

Labour Relations Act, S.C. 2003, c. 22, alleging a contravention of subsection 186(1) of the Act, which reads as follows:

186. (1) Neither the employer nor a person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall

(a) participate in or interfere with the formation or administration of an employee organization or the representation of employees by an employee organization; or

(b) discriminate against an employee organization.

186. (1) Il est interdit à l'employeur et au titulaire d'un poste de direction ou de confiance, qu'il agisse ou non pour le compte de l'employeur :

a) de participer à la formation ou à l'administration d'une organisation syndicale ou d'intervenir dans l'une ou l'autre ou dans la représentation des fonctionnaires par celle-ci;

b) de faire des distinctions illicites à l'égard de toute organisation syndicale.

[3] The Board dismissed the complaint without considering it on the merits. Mr. Jolivet now seeks judicial review of that decision. Having carefully reviewed the record and considered Mr. Jolivet's written and oral submissions, we have concluded for the following reasons that this application for judicial review must be dismissed.

[4] The Board concluded that it has no jurisdiction to entertain the complaint because inmates of a federal correctional institution who participate in an institutional work program are not, by virtue of that participation, "employees" as defined in subsection 2(1) of the Act because they are not appointed by the Public Service Commission to a position created by the Treasury Board. In reaching that conclusion, the Board followed a consistent line of jurisprudence, including the leading case of *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614 (referred to as the "Econosult" case).

[5] Mr. Jolivet has raised numerous arguments in support of his application for judicial review, but essentially his position is twofold. First, he argues that the Econosult case is no longer good law. Second, he argues that the Board's dismissal of his complaint without considering the merits is inconsistent with many important legal and constitutional principles, including his rights under the Canadian Charter of Rights and Freedoms to freedom of association and freedom of expression.

[6] The Act defines the legal authority of the Board. It is axiomatic that the Board has the legal authority to consider Mr. Jolivet's complaint on the merits only if it falls within the Board's statutory mandate.

[7] Mr. Jolivet's complaint is based necessarily on the premise that he and other inmates who participate in institutional employment programs are within the scope of the Act. The Board found that premise to be incorrect, based on the definitions of "employee" and "employee organization" in subsection 2(1) the Act. Based on that finding, the Board was compelled to conclude that it does not have the legal authority to consider the complaint on its merits, or to address Mr. Jolivet's constitutional arguments. That conclusion must stand unless this Court has a legal basis for setting it aside.

[8] The parties do not agree on the standard of review to be applied in this case. In our view, we do not need to determine this point because the outcome is the same under either the correctness or reasonableness standard.

[9] We agree with the Board’s decision and its reasons. Specifically, we find that the Board’s understanding of the facts was open to it on the evidence before it, and the Board’s analysis of the jurisprudence and the relevant statutory provisions is well explained and soundly reasoned. We find specifically that the principles from the *Econosult* case upon which the Board relied are binding on the Board and this Court.

[10] Although the legislation relating to employment in the public service has evolved since the *Econosult* case was decided, the fundamental principle that employment in the public service is subject to specific legislated formalities remains valid. Inmates participating in work programs organized by the Correctional Service of Canada have not been appointed to a position in the federal public service. As a result, they are not “employees” within the meaning of the Act.

[11] The Crown has not asked for costs. However, Mr. Jolivet has asked for costs in any event of the outcome. In this Court, costs are awarded to an unsuccessful party only in exceptional cases. We are not persuaded that this is such a case.

[12] The application for judicial review will be dismissed without costs.

“K. Sharlow”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-192-13

(APPEAL FROM DECISION NO. 2013 PSLRB 1 OF KATE ROGERS, A PANEL OF THE PUBLIC SERVICE LABOUR RELATIONS BOARD, DATED JANUARY 3, 2013, DOCKET NO. 561-02-539.)

STYLE OF CAUSE: DAVID JOLIVET v. TREASURY BOARD (CORRECTIONAL SERVICE OF CANADA)

PLACE OF HEARING: OTTAWA

DATE OF HEARING: JANUARY 7, 2014

REASONS FOR JUDGMENT OF THE COURT BY: SHARLOW J.A.
MAINVILLE J.A.
NEAR J.A.

DELIVERED FROM THE BENCH BY: SHARLOW J.A.

APPEARANCES:

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