Date: 20130103

File: 561-02-539

Citation: 2013 PSLRB 1

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

DAVID JOLIVET

Complainant

and

TREASURY BOARD
(Correctional Service of Canada)

Respondent

Indexed as
Jolivet v. Treasury Board (Correctional Service of Canada)

In the matter of a complaint made under section 190 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Kate Rogers, a panel of the Public Service Labour Relations Board

For the Complainant: Himself

For the Respondent: Vanessa Buchanan, Treasury Board

Decided on the basis of written submissions,
filed March 23, May 11, June 7, November 9, and November 13, 2012

I. Complaint before the Board

[1] David Jolivet ("the complainant") is an inmate in the Kent Institution ("the Institution"), which is a federal penitentiary in Agassiz, British Columbia. He filed a complaint on December 8, 2011, under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act (PSLRA)*, alleging that the Correctional Service of Canada ("the respondent"), denied him and other organizers for the Canadian Prisoners' Labour Confederation (CPLC) the right to sign up members in the Institution. The complainant alleged that, as the CPLC interim president, he requested permission on October 18, 2011, to access offenders in certain cellblocks so that they could sign cards in support of the CPLC's certification drive. On October 28, 2011, the warden denied the request on the grounds that the CPLC is not a recognized organization within the respondent and that only the representatives of certain recognized organizations have the kind of access sought by the complainant.

[2] The complainant and another individual filed this complaint on December 8, 2011. The complainant filed it on his own behalf, as the interim president of the CPLC. However, another inmate, using a pseudonym, also signed the covering letter attached to the complaint. The letter stated that both inmates were complainants, even though only one was properly identified and named on the complaint form.

[3] The Public Service Labour Relations Board (PSLRB) is a quasi-judicial tribunal. Its hearings are open to the public and all documents filed in proceedings before it are accessible to the public, consistent with the open court principle affirmed by the Supreme Court of Canada in such decisions as *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76; and *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41. Parties wishing to remain anonymous or to have documents sealed must make an application, which would be decided in accordance with the "Dagenais/Mentuck" rule. In this case, because only the complainant's name was on the complaint form, the complaint will proceed only in that name, making it unnecessary to deal with the issue of anonymity.

[4] The complaint filed on December 8, 2011, is a lengthy document that provides not only a statement of facts but also a memorandum of law. Attached to it were a number of exhibits in support of the complaint. On January 26, 2012, the respondent

filed a response to the complaint in which it objected to the PSLRB's jurisdiction to consider it on the grounds that, following *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, upholding [1989] 2 F.C. 633 (FCA) ("*Econosult*"), the complainant could not be considered an employee under the *PSLRA* because he did not meet the statutory definition. Consequently, it followed that the CPLC could not be considered an employee organization. The respondent requested that the complaint be dismissed without a hearing.

[5] On January 31, 2012, the complainant responded to the respondent's objection to jurisdiction and argued that the case law that it relied upon was outdated and not relevant. The complainant contended that he is employed by the respondent, which is a part of the public service to which the Public Service Commission (PSC) has exclusive jurisdiction to make appointments. The complainant requested that the PSLRB hold a hearing to determine the complaint, although he noted that the hearing would have to be held by way of video–conference, given his incarceration.

[6] After reviewing the complaint, the objection to jurisdiction and the complainant's response to the objection, I determined that the objection to jurisdiction could be dealt with by way of written submissions, according to a timetable arranged with the parties. The question to be resolved was whether the complainant falls within the relevant statutory definition of "employee" such that I would have jurisdiction over the complaint.

[7] On October 15, 2012, the complainant requested leave to submit an additional document in support of his complaint. As a decision had not yet been issued, I granted the request, on the understanding that the respondent would have the opportunity to provide any comments it felt necessary. On November 9, 2012, the respondent provided its response to the new document filed by the complainant.

II. Summary of the submissions

[8] The respondent filed its main submission and a rebuttal to the complainant's submission in addition to its original argument outlining its objection to jurisdiction. It attached no supporting documents to its submissions, other than a copy of a document from Human Resources and Skills Development Canada attached as Annex A to its submission of November 9, 2012. Aside from the complaint, which was a lengthy document containing a self-described memorandum of fact and law and

numerous supporting documents, the complainant provided a letter in response to the objection to jurisdiction in addition to his submission on the question of jurisdiction, which contained 21 exhibits. Rather than provide a detailed summary of each document submitted by the parties, since there was some repetition in their arguments, I have summarized the relevant issues, referring to specific documents when necessary. All the documents and submissions are on file with the PSLRB.

A. <u>For the respondent</u>

[9] The respondent submitted that the complaint, which was filed under paragraphs 190(1)(*g*) and 186(1)(*a*) and (*b*) of the *PSLRA*, should be dismissed because the complainant is not an employee in the federal public service and therefore could not be part of an employee organization.

[10] According to the respondent, an employee in the federal public service is someone who meets the statutory requirements of not just the *PSLRA* but also the *Public Service Employment Act (PSEA)*, enacted by sections 12 and 13 of the *Public Service Modernization Act*, S.C. 2003, c. 22, and the *Financial Administration Act (FAA)*, R.S.C. 1985, c. F-11, because all that legislation is interrelated. The respondent stated that, to determine if an employer-employee relationship exists between itself and inmates, it is necessary to refer to section 2 of the *PSEA*, which defines an employee as ". . . a person employed in that part of the public service to which the PSC has exclusive authority to make appointments." The respondent also noted that subsection 29(1) of the *PSEA* provides that the PSC has ". . . the exclusive authority to make appointments, to or from within the public service, of persons for whose appointment there is no authority in or under any other Act of Parliament." The respondent argued that those provisions make it clear that, to be considered an employee within the public service, a person must be appointed to a position by the PSC.

[11] The respondent argued that the *Econosult* decision established that, to meet the definition of "employee" in the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35, a person must be appointed to a position under section 8 of the former *PSEA*, now section 29. The Supreme Court held that there is no category of de facto employee; to be considered an employee, a person must have been appointed by the PSC. The respondent noted that that principle was followed in *Canada (Attorney General) v. Gaboriault*, [1992] 3 F.C. 566 (C.A.), in which the Federal Court of Appeal reiterated

that the status of a public service employee cannot be inferred from the circumstances but is the result of an express appointment authorized by law. The respondent submitted that *Econosult* continues to apply despite changes to the legislation, noting that, in *Nemours v. Deputy Head (Department of Veterans Affairs)*, 2009 PSLRB 47 (upheld in 2010 FC 158), at paragraph 65, the adjudicator stated the following:

> *. . . the decision of the Supreme Court of Canada in* Econosult *(S.C.C.) remains valid: employees of the federal public service form a special category of employees whose positions are established by the Treasury Board and where the right to appoint them to the public service is the exclusive right of the Public Service Commission.*

[12] The respondent noted that *Econosult* was also followed in *Public Service Alliance of Canada and Hubley et al. v. Parks Canada Agency and Halifax Citadel Regimental Association*, 2009 PSLRB 176 (upheld in 2010 FCA 305).

[13] The respondent argued that the *Corrections and Conditional Release Act (CCRA)*, S.C. 1992, c. 20, gives it the authority to establish programs designed to assist offenders successfully reintegrate into society. The *CCRA* also provides that offenders participating in those programs can be paid. That participation in no way constitutes an appointment to a position under the *PSEA*.

[14] The respondent argued that the Supreme Court decision in *Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438, cited by the complainant, is not relevant.

B. <u>For the complainant</u>

[15] The complainant argued that offenders incarcerated in federal penitentiaries retain the fundamental rights and privileges of all members of society, including the right to form and participate in a labour organization. He cited the United Nations *Universal Declaration of Human Rights*, the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act,* R.S.C. 1985, c. H-6, the *Canada Labour Code*, R.S.C. 1985, c. L-2, the *PSLRA*, the *PSEA,* and the *CCRA* in support of his assertion that it is settled law that offenders in federal penitentiaries have the right to form and participate in a trade union. He noted that the *Sauvé* decision confirmed that offenders retain the fundamental rights of all citizens, which include the right to organize and participate in a trade union.

[16] According to the complainant, an employer-employee relationship exists between offenders participating in employment programs within federal penitentiaries and the respondent. In support of that assertion, in the statement of fact and argument submitted with the complaint, he noted that offenders obtain employment by applying for posted positions. They must compete for jobs and only the best-qualified candidates are chosen. The work is supervised, and rigorous performance evaluations are prepared quarterly. He stated that offenders employed within federal penitentiaries receive wages subject to deductions for room and board and other living expenses, as well as any fines and court costs levied against them, in addition to other contributions. He noted that, in a 1989 letter to an offender, provided as Exhibit 17 to the submissions received May 11, 2012, the then Deputy Commissioner of Correctional Programs and Operations stated that the pay rate within federal penitentiaries was 15% of the federal minimum wage. The complainant argued that that supported the assertion that offenders working within the federal penitentiary system receive wages. In his submission of November 13, 2012, the complainant argued that Human Resources and Skills Development Canada recognized federal offenders as employees in its *Guide to Accident Compensation for Federal Offenders*.

[17] The complainant stated that there can be no doubt that employed offenders within the federal penitentiary system have an employer-employee relationship with the respondent. Offenders so employed are, by definition, employees in the federal public service, as defined in subsection 2(1) of the *PSLRA*.

[18] The complainant argued that it is evident that employees in the federal public service are different from public officers or public appointees and that the federal public service is different from the federal public administration. In support of those distinctions, the complainant noted that the *Public Service Superannuation Act (PSSA),* R.S.C. 1985, c. P-36, defines "public service" in subsection 3(1) as including "portions of the federal public administration," which, according to the complainant, means that they are different entities. Under the *PSSA,* persons employed within penitentiaries are deemed to be employed in the public service, but those persons in the federal public administration of penitentiaries, such as the Commissioner and Deputy Commissioner, are not.

[19] The complainant stated that persons in the federal public administration are public officers, not employees. They are the department heads who supervise employees in the public service. Public officers are different from ordinary employees in the public service and have different powers. Employees in the public service, or public servants, are not necessarily appointed but, rather, are hired.

[20] Offenders in federal penitentiaries are employees because they do not fit any of the exceptions listed in the definition of "employee" in subsection 2(1) of the *PSLRA*. However, according to paragraph 2(1)(*a*) of that definition, persons appointed by the Governor in Council are not employees. The complainant argued that, therefore, persons appointed to their positions are not employees.

[21] The complainant contended that, under the *PSEA,* persons must already be employees to be appointed through an internal appointment process, but it is not necessary to be employed in the public service to be considered for appointment under an external appointment process. The complainant also noted that the *PSEA* also provides that employees can be deployed or appointed but that an employee who is neither deployed nor appointed is nevertheless an employee. The complainant argued that those provisions clearly refute the respondent's assertion that it is necessary to be appointed an employee.

[22] The complainant argued that the word "employee" can take on many meanings in the context of labour relations and that it is open to the PSLRB to use the commonly understood meaning, as defined in the dictionary. He also noted that subsection 2(1) of the *CCRA* defines "staff member" as an "employee of the Service." Since the respondent's staff includes correctional officers, groundskeepers, maintenance workers, health care workers and others who are hired, not appointed, it is clear that it is not necessary to be appointed to be an employee.

[23] The complainant argued that the *Econosult* decision is not relevant to the issues in this complaint. He contended that *Econosult* was based on legislation that no longer exists and on legal principles that no longer apply. He suggested that, if the Supreme Court heard *Econosult* today, the decision would be different. He noted a strong dissent in *Econosult,* which should be followed.

C. Respondent's rebuttal

[24] In addition to reiterating its position with respect to the application of *Econosult* to this complaint, the respondent noted that the complainant misunderstood the nature of appointments in the federal public service. For example, Governor in Council appointees are not appointed to a position in the federal public service under section 15 of the *PSEA* and therefore are not employees. However, all those working as staff within the respondent were appointed by the deputy head under section 15 of the *PSEA* and therefore are employees in the public service. The complainant was not appointed to a position in the public service under section 15 and therefore is not an employee in the public service.

[25] The respondent also noted that the complainant misinterpreted the appointment process set out in the *PSEA*. In addition, by stating that it was not necessary to be employed in the public service to be appointed, he misstated the legislative requirements. The respondent contended that to be appointed in an internal appointment process, which exist for employees seeking promotions or transfers, a person must already be employed in the public service or, in other words, already be appointed to a position in the public service. External appointments exist for the purpose of allowing persons not in the public service to be considered for positions in the public service.

[26] The respondent also clarified that the employment programs for its offenders are managed by a program board which is chaired by the assistant warden of correctional programs. The program board is responsible for managing inmate assignments and pay levels, which are taken from the respondent's operating and maintenance fund and not from compensation. The money spent is considered to be a program expense rather than salary.

[27] Responding to the document submitted by the complainant on November 13, 2012, which the complainant said was proof that employed offenders within the respondent are employees, the respondent argued that the document must be read in context. There is no dispute that federal offenders who participate in approved programs are entitled to compensation similar to workers' compensation, but that does not transform their activities into employment in the public service.

III. Reasons

[28] The complainant is an offender incarcerated in a federal penitentiary. He is also the CPLC interim president. On October 18, 2011, he wrote to the Warden of Kent Institution to request permission to move freely within the cellblocks in order to sign up members as part of the CPLC's certification campaign. On October 28, 2011, the Warden refused the request on the grounds that the CPLC is not a recognized organization within the respondent and that only the representatives of certain recognized organizations within the respondent would be granted the freedom of movement that he sought.

[29] On December 8, 2011, the complainant filed this complaint under paragraph 190(1)(*g*) of the *PSLRA*, in which he alleged that the respondent interfered with his right to organize a lawful labour union, in violation of paragraphs 186(1)(*a*) and (*b*). As a remedy, the complainant requested an order compelling the respondent to allow him, as a representative of the CPLC, to sign up members and to form an employee organization. In addition, he sought an order prohibiting the respondent from retaliating against the individuals concerned and against the CPLC as a whole.

[30] The respondent objected to the PSLRB's jurisdiction to hear this matter on the grounds that the complainant is not an employee in the public service, as defined in the *PSLRA* and the *PSEA,* and therefore, the CPLC is not an employee organization. Consequently, there could be no violation of paragraphs 186(1)(*a*) and (*b*).

[31] The relevant provisions of the *PSLRA* provide as follows:

. . .

> ***185.*** *In this Division, "unfair labour practice" means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*
>
> ***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.*

. . .

> ***190.*** *(1) The Board must examine and inquire into any complaint made to it that*
>
> *. . .*
>
> *(g) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*
>
> . . .

[32] To come within the ambit of section 186 of the *PSLRA*, the complainant must be an employee and the CPLC must be an employee organization within the meaning of the *PSLRA*. "Employee" is defined in subsection 2(1) as ". . . a person employed in the public service," other than the listed exceptions. No suggestion was made that the complainant falls within any of the listed exceptions. "Employee organization" is also defined in subsection 2(1), as follows:

> *"employee organization" means an organization of employees the purposes of which include the regulation of relations between the employer and its employees for the purposes of Parts 1 and 2, and includes, unless the context otherwise requires, a council of employee organizations.*

[33] The complainant alleged that an employer-employee relationship exists between offenders employed within the federal penitentiary system and the respondent. In support of that position, he noted that offenders employed within the penitentiary must compete for a job and participate in a competition process in which only the best–qualified candidate is chosen and are subject to a rigorous performance appraisal system. He noted that wages are set at 15% of the federal minimum wage, in recognition of the fact that food and lodging are provided and that wages are subject to other deductions. He pointed to the fact that offenders injured while working are entitled to a form of compensation similar to workers compensation.

[34] The respondent countered the suggestion of an employer-employee relationship by stating that the employment engaged in by the complainant and other offenders within the federal penitentiary system is a part of a rehabilitation program under the *CCRA* designed to help offenders reintegrate into society. The wages paid to offenders are classified as program expenses, not salary. According to the respondent, benefits such as compensation for injured participants, identified by the complainant, in no

way transform the participation of offenders in work programs into an employment relationship with the respondent.

[35] The suggestion that inmates in a correctional institution might be employees for the purpose of collective bargaining is not as incongruous as it might seem at first glance. In fact, under Ontario labour legislation, an application for certification of a bargaining unit for employees working in an abattoir located in a provincial correctional institution was allowed. More than half the employees in the proposed bargaining unit were inmates of the correctional facility. They worked side–by–side with employees of the abattoir, doing exactly the same work under the same working conditions.

[36] Despite the rehabilitative aspect of the work performed by the inmates in that case, the Ontario Labour Relations Board (OLRB) found that an employer-employee relationship existed between the inmates and the owner-operator of the abattoir. The OLRB was influenced by the fact that the services provided by the inmates were integral to the operation, which was commercial. The OLRB also held that not including the inmates in the bargaining unit would have undermined the union's ability to represent the other employees in the proposed unit, for whom there was no objection to certification. It was noted that the inmates were, quite literally, a captive workforce that the employer could draw on in the event of a bargaining impasse and strike, which would tip the power balance in negotiations in favour of the employer. See *Amalgamated Meat Cutters and Butcher Workmen of North America v. Guelph Beef Centre Inc.,* 1977 CanLII 489 (OLRB).

[37] Although the OLRB applied the traditional common law tests to determine whether an employer-employee relationship existed in the *Guelph Beef Centre Inc.* case, it did so in the context of the legislative purpose of the provision under which the application for certification was made. It also considered the substance of the relationship between the owner of the business and the inmates of the correctional institution.

[38] Similar approaches have been followed to determine whether the inmates of rehabilitation centres were employees for the purposes of employment standards legislation. See, for example, *Kaszuba v. Salvation Army Sheltered Workshop et al.* (1983), 41 O.R. (2d) 316, and *Fenton v. British Columbia* (1991), 56 B.C.L.R. (2d) 170 (B.C.C.A.), application for leave to appeal to the S.C.C. dismissed, [1991] S.C.C.A. No.

346. In those cases, the courts considered the substance and purpose of the relationship at issue to determine whether it was employment or rehabilitation. In *Fenton,* the court held that the real test was whether the work provided real economic benefit to the institution such that the application of employment standards legislation was necessary to prevent the exploitation of the workers.

[39] It is clear from the foregoing that, for some purposes and in some circumstances, offenders in correctional institutions who participate in work programs could be found to be employees. Evidence of the nature and purpose of the work, the working conditions, and the work's integration into the employer's operations, among other factors, would be critical to such a determination. In this case, I do not believe that I have sufficient evidence that would allow such a determination to be made. For example, I have no real evidence of the nature of the work performed by offenders in federal institutions or the integration of that work into the respondent's operations. On the evidence before me, I could not conclude that offenders are employed rather than participating in work as rehabilitation.

[40] Furthermore, employee status in the federal public service cannot be inferred from the facts or on the application of the traditional common law tests. *Econosult* established that, because the governing legislation clearly defines "employee", the Public Service Staff Relations Board (the PSSRB, now the PSLRB) could not rely on other labour relations criteria, such as the traditional common law tests, to determine who is an employee. In its decision in *Econosult*, the Federal Court of Appeal explained that point in some detail, stating as follows:

. . .

> *It is well known that in the private sector the status of employee of a person acting for another, though involving a contract resulting from deliberate acts, is often in practice inferred from the circumstances which actually surround the doing of the work. The reason is that the employer-employee relationship is primarily a legal relationship which the law associates with a situation of fact: the contract of employment may not take any particular form and may result simply from the behavior of the parties concerned, hence the establishment of criteria by which such a contract can be identified behind appearances which may conceal it.*
>
> *In the public sector, on the contrary, as I understand the legislation, the status of an employee of her Her Majesty*

> *cannot be simply inferred from a situation of fact. The intention was simply, so to speak, to shield the Crown as employer from the actions of all its representatives vested with executive powers: otherwise, Parliament undoubtedly concluded, the situation would quickly become both uncontrollable and chaotic. Employment in the Public Service has been subject to a body of strict and rigid rules.*
>
> . . .

[41] As both the Supreme Court and the Federal Court of Appeal noted in *Econosult*, labour relations in the core federal public service can be understood only with reference to the three statutes that guide it. Those statutes today are the *FAA*, the *PSEA* and the *PSLRA*. Sections 11 to 13 of the *FAA* set out the Treasury Board's authority as employer and grant to it the power to create and classify positions, to manage labour relations, to discipline, to terminate employment, and to establish terms and conditions of employment, among other things. The *FAA* does not grant Treasury Board the power to hire. That power is granted exclusively to the PSC in subsection 29(1) of the *PSEA*. The *PSEA* establishes the PSC as the body empowered to make appointments based on merit to the positions created by the Treasury Board, according to staffing processes created and monitored by the PSC. Finally, the *PSLRA* regulates labour relations and collective bargaining between the Treasury Board and other included employers and their employees. The definition of "employee" in subsection 2(1) of the *PSLRA* can be understood only in relation to the grants of power in the other legislation. As the Federal Court of Appeal noted in *Econosult,* the authority of the PSSRB and, by extension, the PSLRB, ". . . applies only to public servants recognized as such by the provisions of legislation other than its enabling statute and by authority of a body other than itself."

[42] Contrary to the complainant's assertion that *Econosult* is not relevant in the face of changes to the legislation governing employment in the federal public service, the decision continues to apply and was followed in the *Parks Canada Agency v. Halifax Citadel Regimental Association* and *Nemours* cases, which were heard after the legislation was amended. The changes to the legislation did not affect the basis on which *Econosult* was decided. The PSC retains the exclusive authority to appoint employees in the public service, and the *PSLRA* continues to apply only to employees appointed under different legislation.

[43] It is evident from his submissions that the complainant does not entirely understand the internal processes of the federal public service, which are complicated. I do not propose to deal with each of his arguments in support of his contention that it is not necessary to be appointed an employee because that issue was resolved by *Econosult*. Since *Econosult,* it has been clear that employee status in the federal public service cannot be inferred from the circumstances but is a matter of statutory formality, of which there should be some evidence.

[44] For the reasons that I have given, I do not have sufficient evidence to determine that offenders in federal penitentiaries who participate in employment programs are employed. However, even if they are considered employed in the common law sense of the word, I cannot find that they are employees within the meaning of subsection 2(1) of the *PSLRA.* Following *Econosult,* it is clear that to be employed in the public service, a person must have been appointed by the PSC to positions created by the Treasury Board. The complainant presented no evidence that he was appointed to a position created by the Treasury Board in the public service; nor does he present any evidence to support his allegation that offenders working within federal penitentiaries are employees in the public service. Since I cannot find that they are employees within the meaning of the *PSLRA*, the CPLC is not an employee organization within the meaning of subsection 2(1). Therefore, there can be no violation of subsection 186(1). Given those facts, this complaint is outside the jurisdiction of the PSLRB.

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

(The Order appears on the next page)

IV. Order

[46] I order the file closed.

January 3, 2013.

Kate Rogers,
a panel of the Public Service
Labour Relations Board