Date : 20030508

Docket: A-534-01

Neutral citation: 2003 FCA 215

CORAM : **DÉCARY J.A.**
LÉTOURNEAU J.A.
PELLETIER J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Plaintiff

and

STÉPHANE LIMOSI

Defendant

Hearing held at Québec, Quebec, on April 30, 2003.

Judgment rendered at Ottawa, Ontario, on May 8, 2003.

REASONS FOR JUDGMENT: LÉTOURNEAU J.A.

CONCURRED IN BY: DÉCARY J.A.
PELLETIER J.A.

Date : 20030508

Docket: A-534-01

Neutral citation: 2003 FCA 215

CORAM : **DÉCARY J.A.**
LÉTOURNEAU J.A.
PELLETIER J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Plaintiff

and

STÉPHANE LIMOSI

Defendant

REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] What meaning should be given to the words "*se voit donner* un avis de violation" in the sentence "Il y a violation lorsque le prestataire se voit donner un avis de violation" contained in s. 7.1(4) of the *Employment Insurance Act*, S.C. 1996, c. 23 ("the Act")? Will it suffice if the notice of violation is mailed, or must it be brought to the attention of the insured person for the provisions of s. 7.1 to take effect? In other words, will it suffice for the notice of violation to be issued, or must

it be delivered? How does the system of penalties set out in s. 7.1 work in practice? What legal consequences follow if the notice given is not received by the addressee? What are the guarantees of procedural fairness in such a case?

[2] The English text is not worded much better: it states “An insured person accumulates a violation if in any of the following circumstances the Commission *issues* a notice of violation to the person”. Apart from the fact that it is difficult to see how a person can “accumulate” a first violation, it should be noted that Parliament has used the words “issues a notice” rather than “notifies the person”.

[3] The question surrounding interpretation of s. 7.1(4) of the Act was submitted to this Court by an application for judicial review made by the Attorney General of Canada. I set out subss. (1), (4) and (5) of s. 7.1:

7.1 (1) The number of hours that an insured person, other than a new entrant or re-entrant to the labour force, requires under section 7 to qualify for benefits is increased to the number provided in the following table if the insured person accumulates one or more violations in the 260 weeks before making their initial claim for benefit.	**7.1** (1) Le nombre d’heures d’emploi assurable requis au titre de l’article 7 est majoré conformément au tableau qui suit, en fonction du taux régional de chômage applicable, à l’égard de l’assuré autre qu’une personne qui devient ou redevient membre de la population active s’il est responsable d’une ou de plusieurs violations au cours des deux cent soixante semaines précédant sa demande initiale de prestations.
. . .	. . .
(4) An insured person accumulates a violation if in any of the following circumstances the Commission issues a notice of violation to the person:	(4) Il y a violation lorsque le prestataire se voit donner un avis de violation parce que, selon le cas :

(*a*) one or more penalties are imposed on the person under section 38, 39, 41.1 or 65.1, as a result of acts or omissions mentioned in section 38, 39 or 65.1;	*a*) il a perpétré un ou plusieurs actes délictueux prévus à l'article 38, 39 ou 65.1 pour lesquels des pénalités lui ont été infligées au titre de l'un ou l'autre de ces articles, ou de l'article 41.1;
(*b*) the person is found guilty of one or more offences under section 135 or 136 as a result of acts or omissions mentioned in those sections; or	*b*) il a été trouvé coupable d'une ou plusieurs infractions prévues à l'article 135 ou 136;
(*c*) the person is found guilty of one or more offences under the *Criminal Code* as a result of acts or omissions relating to the application of this Act.	*c*) il a été trouvé coupable d'une ou plusieurs infractions au *Code criminel* pour tout acte ou omission ayant trait à l'application de la présente loi.
(5) Except for violations for which a warning was imposed, each violation is classified as a minor, serious, very serious or subsequent violation as follows:	(5) À l'exception des violations pour lesquelles un avertissement est donné, chaque violation est qualifiée de mineure, de grave, de très grave ou de subséquente, en fonction de ce qui suit :
(*a*) if the value of the violation is (i) less than $1,000, it is a minor violation, (ii) $1,000 or more, but less than $5,000, it is a serious violation, or (iii) $5,000 or more, it is a very serious violation; and	*a*) elle est mineure, si sa valeur est inférieure à 1 000 $, grave, si elle est inférieure à 5 000 $, et très grave, si elle est de 5 000 $ ou plus;
(*b*) if the notice of violation is issued within 260 weeks after the person accumulates another violation, it is a subsequent violation, even if the acts or omissions on which it is based occurred before the person accumulated the other violation.	*b*) elle est subséquente si elle fait l'objet d'un avis de violation donné dans les deux cent soixante semaines suivant une autre violation, même si l'acte délictueux sur lequel elle est fondée a été perpétré avant cette dernière.

(My emphasis.)

[4] It can be seen from reading these provisions that if there is a violation of the Act a person's threshold of eligibility for unemployment benefits is raised by increasing the number of insurable hours of employment required.

[5] A review of the principal facts is necessary for a clearer understanding of the case.

Facts and procedure

[6] On November 23, 1999, the defendant filed an application for unemployment benefits when his work for the employer Hectare Laforet ceased. At that time he had accumulated 595 insurable hours of employment. Analyzing this application in order to establish a benefit period, the Commission found that the claimant had been issued two notices of serious violations under s. 7.1(4) of the Act.

[7] The first notice was sent to the defendant on February 23, 1999, and a penalty claimed from him at the same time, for failing to report money earned working for Émondage Gaspé during the period April 3 to May 18, 1998. The notice increased the number of insurable hours required to 630. The defendant did not appeal this decision by the Commission, which concluded there had been misrepresentations resulting in a violation specified in s. 7.1.

[8] The second notice of violation, also sent by mail, was dated August 5 of the same year. It too was based on the fact that the defendant did not report money earned, working for Amtech this time, from October 8 to 22, 1998. This was the second violation in the 260 weeks preceding his application for benefits. The number of hours required was now set at 840. This decision by the Commission concluding that there had been misrepresentations was also not appealed.

[9] On November 30, 1999, the Commission informed the defendant he was not entitled to unemployment benefits since he had only completed 595 of the 840 hours required. On

December 3, 1999, the defendant appealed this decision by the Commission, alleging he had not received the second notice of violation. One month before his appeal was heard by the board of referees, he filed a new record of employment totalling 765 hours.

[10] On March 22, 2000, the board of referees allowed the defendant's appeal. In the opinion of the board, the defendant established that he had worked 765 hours and the number of hours required was 630, rather than 840. In coming to this conclusion, the board ignored the second notice because the defendant said he had not received it, because his mail was not easily accessible and the notice was not sent to him by registered mail.

[11] On appeal the umpire affirmed the board of referees' decision: hence the application for judicial review.

Analysis of s. 7.1 of Act

[12] Section 7.1(1) provides that an administrative penalty will be applied to an insured person who commits one of the violations mentioned in s. 7.1(4). As already indicated, this penalty consists of an increase in the number of insurable hours of employment required in order to receive benefits. As my brother judge Décary J.A. said in *Canada (Attorney General) v. Geoffroy* (2001), 273 N.R. 372, at 374, the increase is automatic. It occurs pursuant to the Act, without any intervention by the Commission, once an insured person is guilty of one of the violations mentioned.

[13] Décary J.A. quite rightly deplored the clumsy drafting of s. 7.1(4), which as he noted appeared to indicate that the very existence or origin of the violation depended on a notice of violation. The words "an insured person *accumulates a violation if* . . . the Commission *issues a notice of violation*" can, at first glance, give this impression; however, this part of the wording of s. 7.1(4) must be placed in the context of all the provisions of s. 7.1 and construed in accordance with those other provisions. Doing so results in the following principles and critical path.

[14] The administrative penalty mentioned in s. 7.1 is automatic. It originates and derives from a violation of the Act or a guilty verdict for *Criminal Code* offences in connection with actions relating to implementation of the Act. In the case at bar, the violation involved an incorrect statement about money earned by the insured person. This violation existed once the incorrect statement was made. After that point the insured person became responsible for this action and the s. 7.1 penalty took effect. The notice of violation mentioned in s. 7.1(4) is merely the procedural means by which the insured person is informed of the alleged violation by the Commission. The situation is no different from that in which a taxpayer commits an infringement, for example, of the speed limit and incurs a speeding ticket. The offence is the failure to observe the speed limit. It exists once the wrongful act has been committed. The purpose of the speeding ticket is to inform the offender of the act alleged against him so he can challenge it and avoid the related penalty.

[15] Under s. 114 of the Act a claimant may, within 30 days of the time a notice of the violation is communicated to him or her, challenge the wrongful acts alleged by the Commission by means

of an appeal. Prescription of the appeal deadline does not run as long as the Commission's decision alleging a violation has not been brought to the person's attention.

Appeals	*Appels*
114. (1) A claimant or other person who is the subject of a decision of the Commission, or the employer of the claimant, may appeal to the board of referees in the prescribed manner at any time within (*a*) 30 days after the day on which a decision is communicated to them; or (*b*) such further time as the Commission may in any particular case for special reasons allow.	**114.** (1) Quiconque fait l'objet d'une décision de la Commission, de même que tout employeur d'un prestataire faisant l'objet d'une telle décision, peut, dans les trente jours suivant la date où il en reçoit communication, ou dans le délai supplémentaire que la Commission peut accorder pour des raisons spéciales dans un cas particulier, interjeter appel de la manière prévue par règlement devant le conseil arbitral.

(My emphasis.)

This is how I understand my brother Décary J.A.'s reference, at para. 6 of *Geoffroy*, *supra*, to the fact that the automatic increase in the number of hours required can only be enforced against an insured person once the notice of violation has been issued by the Commission.

[16] In s. 7.1, read as I read it and interpreted as I see it, it is not really important to determine whether the words "issues a notice" mean "issue" or "deliver" the said notice. If the notice is both issued and delivered, it accomplishes its purpose, which is to inform the claimant of a violation alleged against him. On the other hand, if it is only issued the claimant is not thereby penalized since his right to challenge the alleged violation continues to exist so long as the notice or its contents have not been brought to his attention, and the 30-day appeal deadline has not expired.

[17] In practical terms, two situations may arise. The first involves a case in which the claimant has received the notice of violation. He must challenge the violation alleged against him within the specified deadline, otherwise the increased number of hours may be set up against him and becomes applicable. The second involves the notice not being received by the claimant unknown to the Commission, which on issuing it sent it to the person for whom it was intended. This is true in the case at bar of the second notice of violation, which the defendant maintained he never received. However, in such a situation the claimant will generally be informed of the violation alleged against him when he makes an application for unemployment benefits. He can then challenge the decision of the Commission which concluded that there had been a violation of the Act. This in part is what happened in the case at bar, where the defendant, once informed of the consequences of the second violation, filed an appeal to avoid having it applied to him. I say in part because, instead of challenging the conclusion regarding the violation itself, the defendant instead objected to the fact that it was not communicated to him and to the process by which the communication was to be made. This leads me to the umpire's decision and that of the board of referees, which was approved by the umpire.

Analysis of board of referees' and umpire's decisions

[18] The board of referees concluded, first, that the notice of violation should have been sent by registered mail. There is nothing in the Act to require or indicate that this procedure ought to be used. Further, although this method may sometimes be more valid, though it is not an answer to all

problems, as we have seen it is not really necessary since the claimant's rights of challenge are protected by s. 114.

[19] As to the reason relied on by the defendant and accepted by the board of referees, namely that it was too difficult for him to get his mail, this fact is not relevant and is not enough to offset the violation with which the defendant is charged, a violation which he chose not to challenge on the merits, preferring instead to object to the procedure used.

[20] Finally, the second notice of violation was communicated to the defendant when his application for unemployment insurance benefits was denied. It is a patently unreasonable error of fact to conclude, as the board of referees and umpire did, that the defendant did not receive this second notice or was entitled to the benefit of the doubt on this point. In concluding I would add that, in these circumstances, the defendant's allegation accepted by the umpire, namely that the postal code placed on the letter sent to him was wrong, has no bearing on the fact that the notice was ultimately communicated to him, still less on the fact that the violation was not challenged as such and therefore stands.

[21] For these reasons, I would allow the application for judicial review, set aside the umpire's decision and refer the matter back to the chief umpire or an umpire designated by him to be again decided on the basis that the Commission's appeal should be allowed.

"Gilles Létourneau"

J.A.

I concur.
Robert Décary J.A.

I concur.
J.D. Denis Pelletier J.A.

Certified true translation

Suzanne M. Gauthier, C. Tr., LL.L.

FEDERAL COURT OF CANADA
APPEAL DIVISION

SOLICITORS OF RECORD

FILE:	A-534-01
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. STÉPHANE LIMOSI
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	April 30, 2003
REASONS FOR JUDGMENT:	LÉTOURNEAU J.A.
CONCURRED IN BY:	DÉCARY J.A. PELLETIER J.A.
DATE OF REASONS:	May 8, 2003

APPEARANCES:

Paul Deschênes Montréal, Quebec	FOR THE PLAINTIFF

SOLICITORS OF RECORD:

Department of Justice Canada Montréal, Quebec	FOR THE DEFENDANT