A-708-95

OTTAWA, ONTARIO, Friday, September 27, 1996.

CORAM: MARCEAU J.A.
DÉCARY J.A.
CHEVALIER D.J.

BETWEEN:

ATTORNEY GENERAL OF CANADA,

Applicant,

- and -

CHRISTINE DUNHAM,

Respondent.

J U D G M E N T

The application by the Attorney General of Canada is allowed; the decision *a quo* is set aside; and the matter is referred back to the Chief Umpire so that he or another umpire whom he may designate may dispose of the appeal, on the assumption that the appeal of the decision of the board of referees must be allowed in part and the matter referred back to the board of referees for it to hear the respondent and decide the question of whether the quantum of the penalty was determined by the Commission without regard for a relevant consideration.

"Louis Marceau"
J.A.

Certified true translation

C. Delon, LL.L.

A-708-95

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DÉCARY J.A.
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BETWEEN:

ATTORNEY GENERAL OF CANADA,

Applicant,

- and -

CHRISTINE DUNHAM,

Respondent.

Hearing held at Montréal, Quebec, on Thursday, September 19, 1996.

Judgment delivered at Ottawa, Ontario, on Friday, September 27, 1996.

REASONS FOR JUDGMENT BY: **MARCEAU J.A.**

CONCURRED IN BY: **DÉCARY J.A.**
CHEVALIER D.J.

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BETWEEN:

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- and -

CHRISTINE DUNHAM,

Respondent.

REASONS FOR JUDGMENT

MARCEAU J.A.

There are certainly few questions concerning the application of the *Unemployment Insurance Act* that have given rise to as many decisions by the courts and commentaries by legal authors, without completely resolving the debate, as the question raised in the appeal before the Court today. Once again, the issue is the definition of the respective roles assigned by the Act to the Employment and Immigration Commission, the board of referees and the umpire in applying the few provisions in which it assigns to the Commission, which is responsible for administering the Act, certain powers that it enables it to exercise, in certain circumstances, if the Commission deems appropriate. The issue, when stated more precisely and concretely, concerns the conditions on which and the manner in which the board of referees and the umpire may intervene in the Commission's exercise of

a power that Parliament has left to its discretion. There are not many such powers, but they are of not inconsiderable effect. They are defined in sections 24 (approval of job creation project), 25 (approval of work sharing agreement) and 26 (approval of program of instruction), and in subsections 30(1) (period of disqualification for loss of employment without just cause), 33(1) (penalty for false statement by claimant), 33(2) (penalty for false statement by employer), 41(10) (exemption from administrative requirement) and 79(1) (extension of time for appeal). This appeal involves the most prominent of these powers, the one defined in subsection 33(1), and I shall quote the text of the provision before summarizing the facts:

> Where the Commission becomes aware of facts that in its opinion establish that a claimant or any person on the claimant's behalf has, in relation to a claim for benefit, made statements or representations that the claimant knew to be false or misleading or, being required under this Act or the regulations to furnish information, furnished information or made statements or representations that the claimant or person knew to be false or misleading, the Commission may impose on the claimant a penalty in respect of each false or misleading statement, representation or piece of information, but the penalty shall not be greater than an amount equal to three times the claimant's weekly rate of benefit.

* * *

The respondent was working as a receptionist and taxi dispatcher when she lost her employment, on April 8, 1991. She made an initial application for benefits which was approved. She started to receive benefits a few days later, and continued to receive benefits, at the rate of $245.00 per week, until the end of the period that had been established for her. Long afterward, sometime in 1993, the Commission learned by chance, during an investigation, that the respondent had in fact worked for various employers for much of the period during which she had been paid benefits. The discovery was significant: the respondent had never reported these various jobs, and the earnings she received, in her weekly reports. When she was questioned by an officer, the respondent could not provide any explanation and simply said that she did not know what had happened. Obviously, the Commission had to respond. It determined that the respondent had received $5,145 to which she was not entitled, for 18 weekly claims supported by false statements. Since in its opinion the claimant knew that these statements were false, it claimed a penalty of $3,762.00 from the respondent, representing 18 times the amount of her weekly benefits, in addition to repayment of the overpayment, under the authority of subsection 33(1) of the Act, of course.

The board of referees heard an appeal from the determination made by the Commission, and it was an easy matter for the respondent's representative to persuade it that there were 17 false statements rather than 18, which obviously meant that the penalty was reduced by $245.00. However, the board declined to go any further and even refused to hear the respondent's testimony. In fact, it was of the opinion that once the deliberate false statements were found to have been made, the imposition of the penalties and the determination of the amount of those penalties were a matter for the Commission alone to decide; the board had no jurisdiction to intervene.

The umpire did not take the same view of the matter at all, and he proceeded to state his views in a lengthy decision. In his reasons, the umpire dealt

first with the principles, and disputed the position that the Commission may be seen as having sole jurisdiction to decide the penalties that it may impose under subsection 33(1). Like any discretionary power, the Commission's discretion must be exercised in good faith and having regard to all the relevant factors, and without being influenced by irrelevant factors, and it is the task of both the board of referees and the umpire to intervene and give the decision that should have been given if the Commission's decision was not the one that should have been given. The umpire then addressed the facts of the case, and found that the Commission's decision was not in fact the one that should have been given because the quantum of the penalty seemed to have been determined on the basis of guidelines that the authorities at the Commission had issued to the officers responsible for administering the Act, the effect of which was to prevent the officer in question in this instance from considering all the circumstances of the case. He therefore set aside the decision of the board of referees in so far as it affirmed the decision of the Commission in respect of the quantum of the penalty, and set a figure of $850.00 for the penalty.

It is this decision that the Attorney General is challenging in the application for judicial review, on the ground that the umpire exceeded his jurisdiction and erred in law when he made the decision.

* * *

Thus, as I indicated in my introductory remarks, the general question that arises directly and immediately is whether the board of referees and the umpire had the power to intervene in respect of a decision made by the Commission in the exercise of a discretion such as the discretion granted by subsection 33(1) of the Act.

This question, associated as it is with provisions that are applied on an everyday basis, could not have failed to arise as soon as the Act came into force. In

fact, I would reiterate, it has been raised on very many occasions, but it has always resurfaced in some form. The reason for its amazing powers of survival is undoubtedly the fact that there were conclusions in some of the initial decisions that were unclear, and there were ambiguous comments in some of the judges' reasons. However, in some of its recent decisions, particularly the most recent important decision to date, in *Morin v. Attorney General of Canada*, 134 D.L.R. (4th) 724 (April 1, 1996), the Court has got back on track and put an end to a number of these uncertainties and ambiguities. Thus the scope of the question has become significantly narrower today, circumscribed as it now is by firm principles. I see no purpose in reviewing the history of the to-ing and fro-ing in the case law, so often has it been done. What is important, to my mind, is to review the points that I consider to be settled, based on which it will perhaps be possible to determine what remains to be sorted out in order to completely clarify the situation.

1. There has never really been any doubt that the decisions made by the Commission in the exercise of its discretionary powers were no longer sheltered from challenge before the other two decision-making bodies created by the Act: the board of referees and the umpire. The clear and unreserved terms of the Act make it impossible to believe otherwise (sections 79, 80, 81). In principle, all decisions of the Commission are subject to appeal, and all decisions of the board of referees subject to review. Moreover, by expressly ruling out any right of appeal for certain specific decisions of the Commission, those made under sections 24, 25 and 26 — undoubtedly because they are in the nature of pure policy — Parliament left no room for any misgivings on this point.

2. Nor has there ever really been any doubt that the way to challenge a decision of the Commission before the board of referees was by way of an appeal resulting in a trial *de novo*, while the role of the umpire is to review the decision of the board of referees. Section 81 does give the umpire, among other possibilities, the option of giving the decision that the board of referees should have

given, but his or her powers to intervene as defined in section 80 are strictly the powers of a reviewing body. In another recent decision, *Purcell v. Attorney General of Canada*, [1996] 1 F.C. 644, this Court took on the task of clarifying the nature of these proceedings, and stressed the fact that an appeal to the board of referees is in the nature of a trial *de novo* and that such an appeal is important in terms of the spirit of the Act, as the pivot on which the system for protecting claimants' rights under the Law turns.

3. There is no reason to think that the *Unemployment Insurance Act* is unique and that the powers it confers on the agency given the task of administering it must be analyzed in isolation, without regard for the general principles of our legal system. The discretion given to the Commission is no different from the discretionary powers given to any other lower tribunal or body of the same sort. We are quite familiar with the situations in which a tribunal hearing an appeal or review of a discretionary decision of an authority subject to such review may intervene. A discretionary decision made on the basis of irrelevant considerations, or without regard for all of the relevant considerations, must be disapproved and set aside by the appeal or review tribunal. The Court has repeatedly stated that discretionary decisions of the Commission do not fall outside that rule.

The decision in *Purcell*, to which I referred earlier, does not express the powers of the appeal tribunal to intervene in the same way. The reason for this is that the case did not involve the exercise of discretion, properly speaking, but rather the exercise of the Commission's power to give effect to the "opinion" it may form as to whether a situation exists. The issue was whether the condition precedent for a penalty to be imposed under subsection 33(1), the provision in question therein, was present, i.e. that the Commission be of the opinion that the claimant knew that the statements were false. However, forming an opinion is not the same as exercising a discretion. The question of extraneous or relevant considerations cannot arise in that situation. As the Court said, the condition precedent for intervention in these cases

is simply a finding that the Commission formed the opinion to which it gave effect based on an incomplete view, or an inaccurate perception or interpretation, of the facts.

4. The decision in *Morin* put a definitive end to the only real debate in the literature and case law since *Attorney General of Canada v. Frank Von Findenigg*, [1984] 1 F.C. 65, on the specific point of whether the power of the board of referees and the umpire to intervene gave them jurisdiction to exercise the discretion granted to the Commission themselves. In *Morin*, the Court took a definitive position. In terms of the board of referees, it applied the general rule that an appeal tribunal has the power to exercise the discretion itself that, in its judgment, the lower tribunal exercised incorrectly. In terms of the umpire, it gave effect to the provisions of section 81, which formally provides that the umpire may give the decision that the board of referees should have given, making no distinction based on the nature of the decision. It is therefore settled today that the board of referees and the umpire have jurisdiction to exercise the discretion that the Commission exercised in a judicially incorrect manner. However, I would recall that in both cases, giving the decision that should have been given is merely a parallel option to the option of referring the matter back to the body that was initially empowered to decide it for a new decision, and that, in my view, the choice to be made between the two options requires serious thought. The decision should be made by the body that is best able to make it. In my opinion, this is to some extent what Thurlow J.A. had in mind in deciding *Findenigg*, the decision that triggered the whole misunderstanding because it has been generalized: it must be recalled that the issue in that case was the Commission's discretion under subsection 41(10) (now 51(10)), which allows it to exempt a claimant or group of claimants from purely administrative requirements, requirements that are designed strictly for the purposes of its own administration. I believe that it should have been realized sooner that while it is only reasonable that we should want to leave it up to the Commission to make final decisions in the case of the discretion granted by subsection 41(10), this is certainly not the case for a decision made under

subsection 30(1) or 33(1) which has nothing to do with administrative expertise, but is a punitive decision that depends on the subjective responses of the body making the decision, even where there are instructions deriving from a general policy.

These are the points that I believe to be settled in terms of determining the respective roles of the three levels of decision-making authorities that play a role in deciding individual cases involving the application of the provisions of the Act that grant discretionary powers. They cover most of the problems, but at least one problem, which to my mind the particular facts of the instant case now present, remains. That problem is the following, which I shall state in the form of a very simple question.

One of the essential conditions precedent in order that the board of referees may intervene and overturn a discretionary decision of the Commission is, as we have just seen, that it appear to the board of referees that the decision was made without regard for a relevant consideration. Very well. But in making such a finding, is the board restricted to looking at the facts that were before the Commission or may it base its decision on the evidence heard by the board itself? The importance of the question in terms of determining the true, full role of the board of referees is immediately apparent. My answer is as follows. Given that the Commission is exercising a purely administrative and not a quasi-judicial power; given the nature of the proceedings before the board of referees, the fact that it must hold a hearing *de novo* and the central role assigned to its decision; given the limits on the options and methods of verification open to the Commission's officers, in view of the number and diversity of individual cases; and given the vulnerability and lack of information on the part of the people involved in terms of knowing what facts may be relevant, I have no hesitation in believing that we would not be betraying the intention of Parliament if we said that the board of referees is not limited to the facts that were before the Commission. In assessing the manner in which the discretion was exercised, it may have regard to facts that come to its own attention. It must find that a relevant

consideration was ignored, in that it is not for the board simply to substitute its discretion for that of the Commission; it is essentially the Commission's discretion to which Parliament refers. The board, however, may find such an essential consideration, which the Commission ignored, in the material brought to its own attention. I do not believe that this conclusion goes directly against the basic principles in relation to the exercise of discretionary powers, and it seems to me that it is much more in harmony with the spirit of the system, which does not assign the board the role of merely checking what has been done by officers of the Commission but makes it the central body for protecting the rights of insured persons, which is necessary if the provisions of the Act are to be administered soundly. It may be that the option given to the board, of undertaking a fresh examination of the facts, will give rise to pointless appeals, but the case law that may then be developed around this point under the supervision of the umpire should put a rapid end to such appeals.

* * *

I now come to the decision that is before the Court. Having already explained my understanding of the applicable principles, I may keep my comments brief.

I have no reservations about some of the comments made by the umpire in respect of the jurisdictional problems involved. He was obviously right to argue that the board of referees and the umpire may intervene and set aside even a discretionary decision of the Commission and give the decision that should have been given in the first place. The decision in *Morin* confirmed all these principles. However, I must say, with respect, that I do not agree that the umpire could have found from the facts of the case that the necessary conditions that would enable him to intervene and decide as he did were present. We have seen that what the umpire relied on in finding that he had the power to intervene was the existence of a

Commission policy the effect of which was to prevent the officer in charge of the case from considering all the circumstances. That policy was not in issue before him; there was nothing from which it could be believed that this policy was more restrictive than a number of others designed to guide and not to compel, the purpose of which is to ensure a degree of consistency in the decisions made by the multitude of officials who must deal with individual cases on an everyday basis; these are internal policies that not only are permitted, but are required for the purposes of the sound administration of such a vast public agency. Nor is there anything to support a belief that the policy suggested parameters that are inconsistent with those imposed by the Act or Regulations. Lastly, and most importantly, there is nothing in the record from which a single relevant circumstance could be identified that might have been misapprehended or ignored.

In fact, however, my main reservations about the decision are of a different nature. As may be seen, those reservations are based on the final comments I made earlier in stating the principles. It is the duty of the board of referees, I would suggest, to intervene if it appears to the board, in the course of its hearing *de novo*, that the discretionary decision of the Commission was made without regard for a relevant consideration, regardless of whether the Commission failed to have regard to it out of ignorance, and then to refer the matter back to the Commission or to decide the case itself if it believes it is in a position to do so properly. Clearly, in the instant case, the board of referees shirked this duty by refusing even to hear the respondent's testimony. Of course, the reason why the members of board of referees refused to do so was that they were not aware of all the aspects of their role, and not that they disregarded the rules of natural justice; however, the result is that they failed to completely exercise their jurisdiction. It is on this basis that the decision of the board of referees should have been disapproved by the umpire and the matter referred back to the board so that it might exercise its jurisdiction fully, for which purpose it will obviously have to hear the respondent.

I am therefore of the opinion that the Court should allow the application by the Attorney General and dismiss the parallel application by the respondent.[1] It should set aside the decision *a quo* and refer the matter back to the umpire for him to dispose of the appeal to him from the decision of the board of referees by allowing it in part, on the ground that the board of referees failed to fully exercise its jurisdiction, and by referring the matter back to the board of referees for it to hear the respondent and decide the question of whether the quantum of the penalty was determined by the Commission without regard for a relevant consideration.

"Louis Marceau"
J.A.

"I concur.
Robert Décary J.A."

"I concur.
François Chevalier D.J."

Certified true translation

C. Delon, LL.L.

[1] In fact, the respondent believed that she had to oppose the application by making a formal application (A-857-95), which was incorporated, by order, into the application by the Attorney General. A copy of these reasons should be entered, with the decision to dismiss, in file no. A-857-95.

IN THE FEDERAL COURT OF APPEAL

A-708-95

BETWEEN

ATTORNEY GENERAL OF CANADA,

Applicant,

- and -

CHRISTINE DUNHAM,

Respondent.

REASONS FOR JUDGMENT

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO:	A-708-95
STYLE OF CAUSE:	Attorney General of Canada v. Christine Dunham
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	Thursday, July 19, 1996
REASONS FOR JUDGMENT BY:	Marceau J.A.
CONCURRED IN BY:	Décary J.A. Chevalier D.J.
DATED:	Friday, September 27, 1996

APPEARANCES:

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Paul Faribault	for the respondent

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