

BEFORE THE  
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

JUAN RODRIGUEZ  
(Claimant)

KAY MANUFACTURING CORPORATION  
(Employer)

PRECEDENT  
BENEFIT DECISION  
No. P-B-410  
Case No. 79-2461

Office of Appeals No. LA-27924

Pursuant to section 412 of the Unemployment Insurance Code, the Appeals Board assumed jurisdiction over this case prior to the issuance of the decision of the administrative law judge.

STATEMENT OF FACTS

The employer appealed to an administrative law judge from a determination of the Department which held the claimant eligible for benefits for the week ending December 30, 1978, under section 1252 of the Unemployment Insurance Code, on the ground that the claimant performed no services and had no wages payable to him with respect to that week.

The claimant has worked for the above employer for about 13 years. There is a collective bargaining agreement in effect between the employer and its workers. This agreement provides that after having been employed for 30 days each worker shall be entitled to nine paid holidays per year through calendar year 1979, including Christmas Eve and Christmas Day.

For the last three or four years the employer has been closing its plant the last Friday before Christmas Day and reopening the day after New Year's. This closing is in addition to the regular closing of the plant for vacations which begin in late June or early July of each year.

During the period of shutdown around Christmas the employees receive no pay other than that for any holidays to which they may be entitled.

The collective bargaining agreement provides that to be eligible for holiday pay an employee shall be available for work on the last regularly scheduled workday immediately preceding such holiday and on the first regularly scheduled workday immediately following such holiday. If a worker is not working because of a layoff for lack of work or has an excused absence on such required workdays, he is deemed to be available for work within the meaning of the contract terms and eligible for holiday pay.

The pay periods of the employer begin on Sunday and end at midnight the following Saturday. Payment for each week is then made on the Friday after the close of the pay period.

The claimant, because he was not working, filed a claim for benefits for the period between December 24 and December 30, 1978. He returned to his work after New Year's on January 2, 1979. On Friday, January 5, 1979, the claimant was paid a check for gross earnings in the amount of \$109.22 which represented holiday pay for December 25 and 26, 1978. Because Christmas Eve was on a Sunday, the employer allocated the holiday pay for that day to December 26, 1978, which would have been a regularly scheduled workday if the plant had not been closed.

The employer contends that because the claimant was entitled to holiday pay for two days during the week ending December 30, 1978, and the pay was in excess of his weekly benefit amount, the claimant was not unemployed within the meaning of section 1252 of the California Unemployment Insurance Code.

### REASONS FOR DECISION

Under section 1252 of the California Unemployment Insurance Code, "an individual is 'unemployed' in any week . . . during which he performs no services and with respect to which no wages are payable to him" or in "any week of less than full-time work if the wages payable to him with respect to that week are less than his weekly benefit amount."

Section 1279 of the code provides that an eligible, unemployed, individual shall be paid benefits with respect to any week an amount equal to his weekly benefit amount less the amount of wages in excess of \$21 payable to him for services rendered during that week. If the resulting benefit payment is not a multiple of \$1, it shall be computed to the next higher multiple of \$1.

Section 1265.5 of the code provides as follows:

"Notwithstanding any other provision of this division, payments to an individual for vacation pay or holiday pay which was earned but not paid for services performed prior to termination of employment, or commencement of unemployment caused by disability, as the case may be, shall not be construed to be wages or compensation for personal services under this division and benefits payable under this division shall not be denied or reduced because of the receipt of such payments."

The facts in the present case show that the claimant received holiday pay for December 25 and 26, 1978 and that if such holiday pay is included as wages for the week ending December 30, 1978 the claimant would not have been unemployed for that week, and therefore would not be entitled to a waiting period credit, or benefits for that week.

In Appeals Board Decision No. P-B-161 this Board held that a temporary layoff was not a "termination of employment" as provided in section 1265.5 of the code, and therefore vacation payments which the employer could require the claimant to take during the temporary shutdown were "wages" and the claimant therefore was not "unemployed" under section 1252 of the code.

Although this case deals with holiday rather than vacation pay, it is apparent that the rationale in Appeals Board Decision No. P-B-161 is applicable to the present circumstance. Accordingly, we find that the claimant was temporarily laid off with a definite date of recall and was not terminated from his employment. Therefore, holiday pay for December 25 and 26, 1978 was wages.

The only remaining question is when were the wages earned? In deciding this question it is immaterial when the wages were paid. If the wages were earned when the claimant reported for work on January 2, 1979, then they must be reported for the week ended January 6, 1979. However, if the holiday pay was earned on December 25 and 26, 1978, then it must be reported for the week ended December 30, 1978. The outcome of this decision depends on whether the contract provision requiring an employee to work on his regularly scheduled workday following the holiday period is construed as a condition precedent or condition subsequent.

Black's Law Dictionary defines these terms as follows:

"A 'condition precedent' is one that is to be performed before the agreement becomes effective, and which calls for the happening of some event or the performance of some act after the terms of the contract have been agreed on, before the contract shall be binding on the parties. Rogers v. Maloney, 85 Or. 61, 165 P. 357, 358; Mercer-Lincoln Pine Knob Oil Co. v. Pruitt, 191 Ky. 207, 229 S.W. 374. A condition subsequent is one annexed to an estate already vested, by the performance of which such estate is kept and continued, and by the failure or non-performance of which it is defeated; or it is a condition referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition. Co. Litt. 201; Carroll v. Carroll's Ex'r, 248 Ky. 386, 58 S.W. 2d 670, 672."

It is found that the condition in the collective bargaining agreement was a condition referring to a future event and if the claimant did not work his regularly scheduled workday following the holiday the obligation by the employer to pay the holiday pay was no longer binding upon the employer, if the employer chooses to avail himself of the condition. It is found that the condition to report to work on the regularly scheduled day after the holiday was a condition subsequent and the claimant's entitlement to holiday pay was vested unless he did not report to work after the holiday. Therefore the holiday pay of December 25 and 26, 1978 was earned on those days and such pay was allocated to the week ending December 30, 1978. For the week ending December 30, 1978 the claimant was not unemployed under section 1252 of the code since wages payable to him with respect to that week were more than the weekly benefit amount. Therefore, the claimant was ineligible for benefits for the week ending December 30, 1978.

Although the appellate courts of this State have not published any decisions on the subject, in jurisdictions where cases involving similar facts and statutes have been considered, the appellate courts almost uniformly have reached a conclusion consonant with our decision herein: General Motors Corp. v. Michigan Unemployment Compensation Commission (1951), 331 Mich. 303, 49 N.W. (2d) 305, Erickson v. General Motors Corp. (1954), 177 Kans. 90, 276 Pac. (2d) 376; In Re Employees of Weyerhaeuser Timber Co. (1958), 332 Pac. (2d) 947. See also Hill v. Review Board (1953), 124 Ind. App. 83, 112 N.E. (2d) 218.

### DECISION

The determination of the Department is reversed. The claimant is ineligible for benefits for the week ending December 30, 1978 under section 1252 of the code.

Sacramento, California, December 13, 1979.

#### CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

HARRY K. GRAFE

HERBERT RHODES

LORETTA A. WALKER

Dissenting - Written Opinion Attached

MARILYN H. GRACE

DISSENTING OPINION

While I agree with the majority that the claimant performed no service during the week ended December 30, 1978, and that the holiday pay in question is wages, I cannot agree with their allocation of the holiday pay

Section 1252 of the code refers to wages which "are payable" and not wages which might become payable upon the happening of a future event. In this case it is undisputed that the claimant performed no services during the weeks in which the holidays occurred. Under section 1279 of the code, deductions from a claimant's weekly benefit amount are to be made only in the amount of wages "payable to him for services rendered during that week."

The collective bargaining agreement herein is quite clear; the claimant was entitled to holiday pay only upon the conditions that he be available to work the scheduled hours the work day prior to and after the holiday. In other words, his entitlement to holiday pay was a mere expectancy contingent upon the happening of a future event, his availability to return to work on the date in question. This return to work did not and could not occur during the week ending December 30, 1978; consequently, there could be no wages payable to him with respect to that week. Rather, the holiday pay was payable with respect to the week in which all the conditions for entitlement were met, which was the week ended January 6, 1979. Therefore, since the claimant performed no services and no wages were payable to him with respect to the week ended December 30, 1978, he was entitled to his full weekly benefit amount for that week.

Although the majority speaks of the uniformity of appellate court's decisions there are decisions to the contrary. For example see: Rumery v. Administrator, 15 Conn. Sup. 501, 150 A 2d 206; In re Schultz, 272 App. Div. 1094, 74 N.Y.S. 2d 755; In re Marshall, 282 App. Div. 531, 125 N.Y.S. 2d 854; and Parker v. Gerace (1978), 354 So. 2d 1022.

Further, the majority, by its decision, would deny benefits to a claimant during the week of the holiday even though the holiday pay might never be received because of some circumstances beyond the control of the claimant. This would be violative of the Federal mandate in 42 U.S.C. 503 (a)(1) that state law must conform to the federal requirement that "it be reasonably calculated to insure full payment of unemployment compensation when due" (Calif. Dept. of HRD v. Java, 402 U.S. 121, 91 S.Ct. 1347).

MARILYN H. GRACE