

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

FRED W. TRAUGOTT
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-438
Case No. 84-7684

EMPLOYMENT DEVELOPMENT DEPARTMENT

Office of Appeals No. SD-17443

The Department appealed from that portion of the decision of the administrative law judge which waived repayment of a \$3,108 overpayment.

STATEMENT OF FACTS

The claimant established a benefit year effective June 26, 1983. At the time that he applied for benefits he advised the Department that he was receiving social security payments and was informed that drawing social security benefits would not affect his unemployment insurance compensation. On May 8, 1984, the Department notified the claimant that as a result of being paid full benefits when also in receipt of a deductible pension, he was being assessed an overpayment for the period July 6, 1983 through March 31, 1984. The claimant was offered the opportunity to request a waiver of repayment.

On May 15, 1984, the Department issued a determination holding the claimant ineligible for full unemployment insurance benefits under code section 1255.3 beginning June 26, 1983, because one half of his social security benefits was deductible from his weekly benefit amount. This was accompanied by a notice of overpayment in the amount of \$3,108. The claimant filed a timely appeal from the determination and notice of overpayment and a hearing was held before an administrative law judge on June 22, 1984. The claimant's principal contention in argument to the administrative law judge was that he had been misled to his detriment by the Department. The administrative law judge found the claimant ineligible for full benefits under code section 1255.3 but waived the overpayment. The Department filed a timely appeal from the waiver of the overpayment.

The record reflects that the Department did not notify the claimant that there was any uncertainty regarding his entitlement to full benefits or that he might be required to repay them. The claimant used the unemployment insurance benefits to make mortgage payments on the home of his unemployed son with whom he was living. Prior to retiring, the claimant had been working in a shared work program. He did not apply for retirement benefits when that employment ended as he had been assured that his unemployment compensation would not be reduced as a result of his receiving social security.

We take official notice that the Department issued Field Office Directive No. 83-64 on April 21, 1983, with respect to providing claimants with notice of the pending litigation regarding section 1255.3 of the Unemployment Insurance Code. No such notice was given this claimant.

REASONS FOR DECISION

Section 1375 of the California Unemployment Insurance Code provides that a claimant who is overpaid benefits is liable for this amount unless the overpayment was not due to fraud, misrepresentation or wilful nondisclosure on his part, was received without fault on his part, and its recovery would be against equity and good conscience.

Code section 1255.3 provides:

"(a) Except as provided by subdivision (c), the amount of unemployment compensation benefits, extended duration benefits, and federal-state extended benefits payable to an individual for any week which begins after March 31, 1980, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced, but not below zero, by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment which is reasonably attributable to such week.

"(b) The provisions of subdivision (a) shall be operative only during such time as Section 3304 of the Federal Unemployment Tax Act requires that state unemployment insurance laws contain such provisions as a condition of certification of state unemployment insurance laws by the Secretary of Labor.

"(c) The provisions of subdivision (a) shall apply to any pension, retirement or retired pay, annuity, or other similar periodic payment only if both of the following are met:

"(1) Such pension, retirement or retired pay, annuity, or similar payment is under a plan maintained (or contributed to) by a base period or chargeable employer.

"(2) In the case of such a payment not made under the Social Security Act or the Railroad Retirement Act of 1974 (or the corresponding provisions of prior law), services performed for such employer by the individual after the beginning of the base period (or remuneration for such services) affect eligibility for, or increase the amount of, such pension, retirement or retired pay, annuity, or similar periodic payment.

"(d) The provisions of subdivision (a) shall not apply to that portion of any pension, retirement or retired pay, annuity or other similar periodic payment which is attributable to contributions made by the individual for the pension, retirement or retired pay, annuity, or other similar periodic payment."

The issue under code section 1255.3 was decided adversely to the claimant by the administrative law judge and is not on appeal to us. However, it is essential that we review that section in order to understand the context in which the overpayment arose, and whether it should be waived.

All state unemployment insurance laws must include certain provisions before they will be approved or certified by the U.S. Secretary of Labor. Lack of approval or certification of a state law by the Secretary can result in denial of the federal tax credit for employers in that state and the withholding or suspension of administrative grants. In short, state unemployment laws must conform with certain minimum standards as established by federal legislation. Section 1255.3 of the California Unemployment Insurance Code was enacted to conform with the language contained in section 3304 of Title 26 of the United States Code.

Conflicting interpretations with respect to the application of code section 1255.3 led to litigation. As a result, on May 2, 1982, the federal district court in the case of Rivera v. Patino (524 F.Supp. 136) held that social security benefits attributable to nonbase period employers are not to be offset against unemployment insurance benefits arising from employment with a base period employer. The United States Ninth Circuit Court of Appeals reversed the district court's decision in Rivera v. Becerra & Donovan (714 F.2d 887) on August 29, 1983. However, that decision was stayed on September 28, 1983, pending disposition by the United States Supreme Court of a Petition for Writ of Certiorari. The Supreme Court denied certiorari and the self-imposed stay was lifted by the Ninth Circuit Court on March 19, 1984. Of significance in the instant case is the holding of the Ninth Circuit that pursuant to section 1255.3 of the code, unemployment insurance benefits are to be reduced if the claimant was receiving social security payments and if claimant's base period employer made social security contributions. Only the portion of social security benefits reflecting the employer's contribution is offset. The result here is that the claimant's unemployment insurance compensation is subject to offset by one half of his social security benefits.

It is apparent that overpayment in this case is not due to misrepresentation, wilful nondisclosure, or fraud on the part of the claimant. Hence, the issue is whether recovery of the overpayment would be against equity and good conscience.

Field Office Directive No. 83-64 UI provides, in pertinent part:

"Purpose

In FOD 83-33, dated March 18, 1983, we informed field offices that an appeal had been filed by the Department of Labor from the Rivera decision and that it would be necessary to inform claimants who were held to be eligible for benefits under the provisions of the Rivera criteria that an appeal from that decision had been filed and that they may have to repay any benefits received under the Rivera ruling should a higher court reverse that decision."

In conjunction with the F.O.D., the Department developed Form DE 4240 to advise claimants that they may be required to repay an overpayment in the event of an adverse decision by the courts in the Rivera case.

In considering whether the claimant's overpayment should be waived, it is significant to note that the Department was well aware of the pending litigation and recognized an obligation to warn claimants that litigation was pending and could result in an overpayment. Nonetheless, in this particular instance the Department failed to follow its directive which required the forewarning of claimants of prospective overpayments.

In Gilles v. Dept. of Human Resources (1974) 11 Cal 3d 313 (113 Cal.Rptr. 374), the court indicated that equity and good conscience, the language used in code section 1375, was not rigid and specific, but looked to the basic precepts of justice and morality. The court states that:

"Notice is indeed one relevant factor, since a claimant who receives timely warning that he may be called upon to repay benefits cannot blindly assume no such obligation will be imposed."

In that case, the claimant had received notice. The court held that once notice has been given to the claimant advising that he may be required to repay, equity and good conscience required consideration of other factors before repayment could be required. These factors include

- (a) cause for overpayment;
- (b) whether claimant received only normal unemployment benefits or some extra duplicative benefit;
- (c) whether the claimant changed his position in reliance upon receipt of the benefits; and
- (d) whether recovery of the overpayment by imposing extraordinary hardship on the claimant would tend to defeat the objectives of the Unemployment Insurance Code.

The antithesis of Gilles is the situation in the instant case where the Department knows litigation is pending and knows that the claimant may be required to repay benefits but fails to warn the claimant. The claimant thus loses the option of declining to accept benefits or accepting benefits and placing himself in a position to repay.

In our view, the notice required by the Department's Field Office Directive is basic to equity and good conscience. Indeed, Title 22 CAC section 1375-1(d)(1) of the Department's rules and regulations provides:

"(1) Notice to Claimant. If an overpayment is created as a result of a decision by an administrative law judge or the Appeals Board which reverses a prior decision granting benefits, the claimant shall not be required to repay the overpayment unless the department has given notice to the claimant that his or her entitlement to benefits has been appealed and that he or she may be required to repay the benefits in the event of a reversal by an administrative law judge or the Appeals Board. If the notice is given, recovery of the overpayment is appropriate unless there has been a change of position by the claimant or recovery will cause extraordinary hardship."

The Department's practice is that a claimant is not liable for repayment of an overpayment in circumstances where an appeal is pending unless the claimant has had notice of a prospective requirement of repaying the overpaid benefits. We view the situation relating to cases arising as the result of the Rivera case as analogous to the Department's position in cases relating to Title 22 CAC section 1375-1(d)(1). Moreover, basic precepts of justice require that the Department adhere to its own directives so that claimants are not misled to their detriment.

We conclude that overpayment must be waived in the instant case.

DECISION

The appealed portion of the decision of the administrative law judge is affirmed. The overpayment is waived,

Sacramento, California, December 18, 1984.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT L. HARVEY, Chairman

JAMES J. HAGARTY

HERBERT RHODES

LORETTA A. WALKER

CHET WRAY

J. RICHARD GLADE

DEBRA A. BERG