

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

JUNIUS T. FINKE
(Claimant)

EMPLOYMENT DEVELOPMENT DEPARTMENT

Office of Appeals No. OAK-24823

PRECEDENT
BENEFIT DECISION
No. P-B-444
Case No. 85-7874
85-8036

The Department appealed from that portion of the decision of the administrative law judge which held that the claimant's weekly benefit was not subject to reduction under the provisions of section 1255.3 of the code prior to April 28, 1985.

The claimant appealed from that portion of the decision of the administrative law judge which held that the claimant's weekly benefit amount was subject to reduction under section 1255.3 of the code for the period beginning April 28, 1985.

The above two appeals have been assigned Appeals Board Cases Nos. 85-7874 and 85-8036, respectively, and consolidated for a decision pursuant to section 5107, Title 22, California Administrative Code, as the facts and circumstances are the same or similar and no substantial right of any party will be prejudiced.

STATEMENT OF FACTS

The claimant established a benefit year beginning February 17, 1985. The weekly benefit amount computed for that claim was \$162.

The claimant had previously worked as a business agent for a union, and did so during the base period of his claim. That employer contributed 100 per cent to a private pension to which the claimant would be entitled upon retirement. The employer contributions during the base period of the claimant's claim increased the amount of the claimant's pension entitlement.

The private pension became effective on March 1, 1985, payable in the amount of \$464 per month. The claimant received his first pension check about May 3, 1985, which included the amount due to him from March 1, 1985, the effective date of the pension.

REASONS FOR DECISION

Section 1255.3 of the Unemployment Insurance Code provides in pertinent part as follows:

"(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 that 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 the individual shall be reduced, but not below zero, by an amount equal to the amount of the pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to that week.

"(b) 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 those provisions as a condition of certification of state unemployment insurance laws by the Secretary of Labor.

"(c)(1) 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:

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

"(B) In the case of such a payment not made under the federal Social Security Act or the federal Railroad Retirement Act of 1974 (or the corresponding provisions of prior law), services performed for the 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."

The claimant's weekly benefit amount is subject to reduction under the provision of section 1255.3 of the Unemployment Insurance Code due to the receipt of his pension payments if 1) the claimant's base period employer contributed to the pension plan, and 2) the services performed by the claimant for the employer, or the employer contributions after the beginning of the base period, affected his eligibility for such pension or increased the amount of the pension.

Here, the claimant's employer contributed 100 per cent to the pension plan during the base period of the claimant's claim, and such contributions increased the amount of the pension to which he would be entitled. Accordingly, the claimant's weekly benefit amount is subject to reduction under the provisions of section 1255.3 of the code. The question remains as to when that offset should commence.

In Evans v. Unemployment Insurance Appeals Board (1985), 39 Cal.3d 398, 216 Cal.Rptr. 782, the Supreme Court of California considered the allocation of a "special payment" payable only to those qualified to receive an immediate pension on termination under the terms of a pension agreement. Evans retired effective August 9, 1980. His regular pension payments were scheduled to begin in November 1980. However, he received a lump sum "special payment" in October 1980 pursuant to the pension agreement which provided the special payment was allocable to the three-month period following the effective date of Evans' retirement.

The court concluded that that portion of the special payment which was not equivalent to accrued vacation pay was properly considered a pension payment for purposes of reducing unemployment benefits under section 1255.3 of the code, and allocable in weekly increments consistent with the method of calculation. That portion of the special payment that was not equivalent to accrued vacation was the first installment of a pension whose regular monthly installments begin three months after retirement. Further, the fact that the first interim payment was paid on a quarterly basis and calculated differently did not render it a "pension paid on a lump sum basis" independent of a periodic pension which commenced in the second quarter after retirement. Therefore, each week's payment (of the pension portion of the special payment) should be attributed to a week of potential eligibility for unemployment compensation. The court therefore reasoned that eight weeks of "adjusted vacation pay" (the pension portion) would result in eight weeks of offset.

The claimant in the case before us received the first payments of a periodic pension in a lump sum on May 3, 1984. The payment was paid with respect to the months beginning with the effective date of the claimant's retirement, irrespective of the fact the payment was received two months after the effective date of retirement. Accordingly, under the rationale of the Evans case this pension payment is allocable to the period beginning with the effective date of the claimant's retirement, and results in the offset of unemployment benefits on a weekly basis for the period for which the payment was made under the provisions of section 1255.3 of the code.

DECISION

The decision of the administrative law judge is reversed in part and modified. The claimant's weekly benefit amount is subject to reduction under section 1255.3 of the code beginning March 1, 1985, as provided in the Department determination.

Sacramento, California, March 11, 1986.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT L. HARVEY, Chairman

JAMES J. HAGARTY

J. RICHARD GLADE

GEORGE E. MEESE

CONCURRING and DISSENTING -
Written Opinion Attached:

LORETTA A. WALKER

CHET WRAY

DEBRA A. BERG

CONCURRING AND DISSENTING OPINION

Although we concur that the claimant's weekly benefit amount is subject to reduction, we dissent from that portion of the majority decision with respect to when that reduction begins.

The majority of the Board holds that when a benefit claimant receives the first payments of a periodic pension in a lump sum after retirement, such payment results in the offset of any unemployment benefits that would otherwise be payable beginning with the effective date of the retirement rather than when first received. This holding is based on the majority's interpretation of the decision of the Supreme Court of California in Evans v. Unemployment Insurance Appeals Board (1985), 39 Cal.3d 398, 216 Cal.Rptr, 782. We cannot concur in this interpretation.

As we interpret the decision of the court in Evans the court did not consider the language in section 1255.3 of the code providing that the reduction of unemployment benefits may be made only when the claimant is receiving a pension. The court did not specifically state when the offset began but only that the pension payment should be allocable in weekly increments consistent with the method of calculation, and that the collective bargaining agreement itself provided an equitable formula for the allocation of the special payment.

The court in Evans considered the allocation of a "special payment" which, exclusive of accrued vacation pay, the court also considered as falling within the definition of other "periodic payments" based on previous work and thus deductible under the provisions of section 1255.3 of the code. This special payment was specifically allocated by the terms of the collective bargaining agreement to the period prior to the commencement of the regular pension payments. The court was concerned with the allocation of that part of the special payment, adjusted vacation pay, that did not consist of the payment of accrued but unused vacation pay, a portion which cannot be offset under the provisions of section 1265.5 of the code. The court, however, concluded that an offset of unemployment benefits was not appropriate for any weeks the claimants in that case either received accrued vacation pay or received nothing.

Therefore, if a claimant in the Evans case received a lump sum special payment prior to the start of the regular periodic pension payments which consisted of five weeks of accrued vacation and eight weeks of "adjusted vacation pay" (pension portion) only eight weeks of unemployment benefits may be offset in the 13-week period prior to the commencement of the regular period payments. Thus, the court did not allocate the pension portion to the beginning date of the claimant's retirement, but to the eight-week period for which the claimant was paid the "adjusted vacation pay" and specifically allocated by the terms of the collective bargaining agreement to the period prior to the commencement of the regular periodic pension payments.

In the instant case there is no issue of allocating certain portions of any lump sum special payment paid to this claimant in accordance with the terms of a collective bargaining agreement. The lump sum payment herein consisted entirely of the payment for the first three months of retirement which began March 1, 1985. The claimant received this payment approximately May 3, 1985, or two months after the effective date of his retirement. Prior to the first week in May, 1985 the claimant had not received any pension payments.

Section 1255.3 of the code provides in pertinent part:

". . . 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 that 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 the individual shall be reduced . . ." (Emphasis added)

The clear wording of the statute provides that only unemployment benefits in any week beginning in a period in which an individual is receiving a pension or other similar periodic payment shall be reduced. It follows that unemployment benefits received in any week in which a claimant is not receiving a pension or other similar periodic payment shall not be reduced. The statute does not provide that benefits shall be reduced by such pension payments which accrued prior to the individual actually receiving such payments. In other words, there is nothing to indicate the legislature intended to apply the offset provision retroactively. In such case the legislature could have simply provided that benefits are to be offset for any week in which an individual is entitled to receive rather than is receiving.

In our view, the Evans case should be limited to the fact situation involved therein and not applied generally to all claimants who become entitled to pension or other similar periodic payments which may subject any benefits payable to them to reduction. Therefore, we would affirm the decision of the administrative law judge holding that the reduction or offset of the claimant's unemployment benefits may not commence until the week in which the claimant begins actually receiving his pension benefits.

LORETTA A. WALKER

CHET WRAY

DEBRA A. BERG