BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

GARY A. SCARBOROUGH
(Claimant)

EMPLOYMENT DEVELOPMENT DEPARTMENT

PRECEDENT
BENEFIT DECISION
No. P-B-451
Case No. 86-02029

Office of Appeals No. S-03580

The Department appealed from that portion of the decision of an administrative law judge which held that the claimant was not ineligible for benefits under section 1252 of the Unemployment Insurance Code for two weeks ending July 13, 1985. No appeal was taken from that portion of the decision which found good cause for the claimant's having filed an untimely appeal.

STATEMENT OF FACTS

The claimant, a member of the Association of West Coast Pulp and Paper Workers Local 863, was employed by Simpson Paper Company until locked out from work on or about June 1, 1985. After filing a claim for unemployment insurance benefits effective June 2, the claimant was paid benefits at a rate of $166 a week.

When claiming benefits for weeks ending July 6 and July 13, 1985, the claimant reported that he had been paid vacation pay for such weeks. Although the exact amount is uncertain, it was estimated at $500. This payment represented vacation earned by the claimant in 1984 and, in accordance with the collective bargaining agreement, payable any time after June 1, 1985. The claimant had, prior to the lockout, scheduled his vacation for the first two weeks in July. Upon learning these facts, the Department denied benefits for the two weeks ending July 13, 1985, relying upon Unemployment Insurance Code section 1252.

REASONS FOR DECISION

Section 1251 of the Unemployment Insurance Code provides that benefits are payable to individuals who meet the eligibility requirements of the code. Since the claimant was paid benefits following the filing of his claim, it follows that he was both unemployed and eligible for benefits in accordance with the code provisions. The only matter for our consideration at this time is whether the claimant's receipt of vacation pay for the two weeks ending July 13, 1985 changed his status.

Section 1252 of the code provides that an individual is unemployed in (1) any week during which he or she performs no services and with respect to which no wages are payable to him or her, or (2) any week of less than full-time work, if the wages payable to him or her with respect to the week, when reduced by $25 or 25 percent of the wages payable, whichever is greater, do not equal or exceed his or her weekly benefit amount.

Section 1252 states that two factors determine whether an individual is "unemployed." First, he or she must either perform no services or be engaged in less than full-time work. Secondly, he or she must either have no wages payable to him or her or, in the case of part-time employment, the wages must be less than $25 or when reduced 25 percent does not exceed the claimant's weekly benefit amount.

If the performance of services were the only criteria, it would follow that the claimant was unemployed and eligible for benefits since he not only performed no services during the two weeks in question, but the employer refused to permit him to offer his services. Since this is not the only factor to be considered we must examine the question of whether the claimant received wages.

Section 926 of the Unemployment Insurance Code provides that the term "wages" means all remunerations payable to an employee for personal services, whether by private agreement or consent or by force of statute. Sections 926.5 through 940 deal with special situations where an individual's receipt of compensation may be treated as wages or as exclusions there from. In this same vein, section 1265.5 deals with vacation pay.

Code section 1265.5 provides:

> "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." (emphasis added)

In Appeals Board Decision No. P-D-160, it was held that a claimant who was absent from work due to a disability had not been terminated and consequently vacation pay received by him while absent from work was wages. Similarly, in Appeals Board Decision No. P-B-161, the Board held that there was no termination of employment where a claimant performed no services due to a uniform vacation shutdown. Vacation pay received by him was held to be wages.

Similar to the claimants in Appeals Board Decisions Nos. P-D-160 and P-B-161, the claimant herein was involuntarily unemployed and potentially eligible for benefits. As in the earlier cases, there is also the question whether there was a termination of employment.

The claimant herein performed no services after June 1, 1985 due to a lockout. A lockout is defined as an employer's withholding of work from his employees in order to gain a concession from them (Restatement of the Law of Torts, Volume 4, Section 787(a)). Does this action by the employer terminate the employment relationship? We think not.

In Mark Hopkins, Inc. v. California Employment Commission (1944), 24 Cal.2d 744, 151 Pac.2d 229, the court held that a strike does not terminate an employment relationship, it simply suspends it.

As in Mark Hopkins, the situation before us involves unemployment resulting from a trade dispute. Although the claimant ceased performing services on or about June 1, 1985, that event was brought about by neither a voluntary leaving of work, a discharge, a lack of work, or anything other than a dispute regarding the terms and conditions of employment. Neither party had taken any affirmative action to sever the employment relationship. In fact, that relationship continued beyond the claimant's last day of work as evidenced by his receiving a wage payment in accordance with his scheduled vacation. Since there was no termination, such payment constitutes wages and must reduce the claimant's benefit entitlement in accordance with Unemployment Insurance Code section 1252.

In Jones v. C.E.S.C., 120 Cal.App.2d 770, decided before the enactment of Unemployment Insurance Code section 1265.5, the court said that it would be illogical to allocate vacation pay to the time it was being earned, in the absence of a specific agreement regarding allocation. It went on to say that a worker can realize a vacation benefit only upon the happening of a specific condition, viz: the termination of his services. In such event, a worker's vacation starts immediately upon the termination of his services and continues until his vacation pay had been used up at its current hourly wage. The present case differs from Jones in that the claimant was not paid vacation pay immediately upon the cessation of services, but upon his request to be granted vacation during the first two weeks in July 1985. Since there is no agreement under the contract allocating the payments otherwise, they are allocated to the period in which they became "realizable," i.e., the period after receipt. Having thus received wages in excess of his weekly benefit amount, the claimant is ineligible for benefits under code section 1252.

DECISION

The appealed portion of the decision of the administrative law judge is reversed. The claimant was not unemployed during the two-week period ending July 13, 1985. Benefits are denied as provided in the Department's determination.

Sacramento, California, March 31, 1987.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT L. HARVEY, Chairman

GEORGE E. MEESE

J. RICHARD GLADE

JAMES S. STOCKDALE

DISSENTING - Written Opinion Attached

LORETTA A. WALKER

DEBRA A. BERG

DISSENTING OPINION

We dissent.

The majority's reliance upon the Mark Hopkins case is misplaced. Nothing in that decision is authority for the proposition that an employment relationship continues although the employer will not permit its employees to work.

Mark Hopkins holds only that the employment relationship is suspended during a strike. There is a great deal of difference between a strike and a lockout and the court relied strongly upon those differences in reaching its decision. The basic question was whether unemployment following a period of stopgap employment relieved an individual from the trade dispute disqualification. In concluding that it did not, the court looked to the real reason for the individual's current unemployment. It applied the two-pronged test of volition and causation promulgated in Ruberoid Company v. California Unemployment Insurance Appeals Board (1963), 59 Cal.2d 73, 27 Cal.Rptr. 878, and Bodinson Manufacturing Company v. C.E.C., 17 Cal.2d 321. Simply stated, the principle is that an individual is subject to disqualification under the trade dispute provisions of the code only if he or she acts voluntarily and the consequent unemployment stems from the trade dispute and not from some other cause. In holding that neither the strike nor the stopgap employment terminated the employment relationship, the Mark Hopkins court observed that a striker does not intend to divorce himself from his employer. In fact, the very purpose of the strike is to retain one's job but under conditions which are more favorable to the worker. Buttressing this conclusion is the court's recognizing that the acceptance of stopgap employment does not mean that a claimant has forfeited his employment with the struck employer and the performance of picket duty is cogent proof that a striking employee wants to go back to work when the strike is settled.

A lockout, on the other hand, is an entirely different thing. In instituting a lockout, the employer neither overtly nor tacitly indicates that it has a desire to continue the employment relationship. On the contrary, the employer is telling the workers that they are no longer wanted. Except in situations involving an unfair labor practice, the employer acts within its prerogative and has no obligation to put its employees back to work.

The situation here is not unlike that in the Ruberoid case where the court held that the claimants were not subject to disqualification under trade dispute provisions of the Unemployment Insurance Code, since the employer's act of replacing them left the claimants with no jobs to go to. The court said:

> "Here the employer's discharge and replacement of the striking employee precluded the exercise of his volition. . . .
>
> "The importance of the severance of the employer-employee relationship becomes obvious upon an analysis of the economic elements involved. By replacement and loss of his job the employee loses not only the job itself but its concomitants, such as seniority, bonuses, the measure of compensation payable for the particular job, vacation and sick leave rights, and pension rights. Even if the striking employee were later to be reemployed as a new employee, he might very well be assigned to a job of less desirability; the skilled worker, for instance, could be given a less skilled job. He might be placed upon a different shift which offered less favorable hours or working conditions. In an industrial society the disruption of the relationship between the erstwhile employer and employee signifies to the worker a deep and vital loss."

The claimant herein finds himself in a similar predicament. He may be called back to work but has no assurance that he will return to his same employment. A severance of the employment relationship does not portend that the severance be eternal. Appeals Board Decision No. P-B-430 held that a layoff of indefinite duration severs the employment relationship even though it is inevitable that an employee will be called back to work sometime in the future. Claimants who have been locked out from work are laboring under much more uncertainty than, say, a seasonal worker who has been laid off for an indefinite period of time. The seasonal worker can expect to be called back when a new season begins, whereas the locked out employee is justified in assuming that the animosity which occasioned the lockout might well discourage his former employer from ever offering him reemployment.

The claimant became unemployed though no fault of his own. He had no idea when, if ever, he would get his old job back or be offered employment of any sort. His situation must be looked upon prospectively and not retrospectively.

Section 1265.5 of the Unemployment Insurance Code was passed after the decisions of the Appellate Court upon which the majority relies. The apparent purpose of the new code section was to remedy the hardship caused by a worker's long-term unemployment. The present claimant's situation is one for which the legislation was intended.

This code section provides that "vacation payments" made to those who are terminated is not wages interfering with the receipt of unemployment compensation. For the reasons explained above, the claimant was in the same position as one who had been laid off for an indefinite period of time. The legislative intention to disregard vacation payments where the claimant's unemployment is protracted is frustrated by the majority.

LORETTA .A. WALKER

DEBRA A. BERG