BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

RAYMOND DOLANDE
(Claimant)

BANK OF AMERICA
(Employer)

OFFICE OF APPEALS NO. SJ-00729

PRECEDENT
BENEFIT DECISION
No. P-B-477
Case No. 93-01335

The employer appealed from the decision of the administrative law judge which held the claimant was not ineligible for benefits under section 1252 of the Unemployment Insurance Code.

STATEMENT OF FACTS

In August of 1992 the claimant was working for the above-named employer as a clerical technician and receiving a salary of $1,347 per month. The claimant had worked for the employer for over 11 years. In August the claimant was given 60 days notice that his employment would terminate on October 12, 1992 and that his termination would be subject to the employer's Merger Transition Program, provided he agreed to accept the terms of the program. The claimant agreed to do so. The claimant was further advised that if he filed for unemployment insurance benefits, he should file on or after his separation date and that if he received severance pay at separation, it should not affect his unemployment benefits.

Under the employer's Merger Transition Program, affected employees are notified of their scheduled date of termination and told that, generally, they need not report to work during the notification period. However, they are informed they may be required to return to work occasionally and that they must keep the employer advised how they may be reached. Affected employees are paid their full wages, continue to be entitled to full employee benefits and are considered to be employees through the end

of the notification period, unless the employee resigns, retires, is discharged, or obtains another position with the employer. During the notification period the employee remains subject to all the normal terms and conditions of employment with the employer and is subject to discharge for cause, including accepting other employment without approval of the employer. In the event the employer is unable to place an individual elsewhere within the company, the termination of the employment relationship occurs at the end of the notification period, provided an individual has not resigned, retired, or been discharged during the notification period. Upon termination, affected employees are also paid severance pay based upon their length of service, less the amount of wages paid during the notification period.

The Merger Transition Program brochure states that it is in compliance with the Worker Adjustment and Retraining Act.

The claimant in this case last performed actual services for the employer on August 10, 1992. He filed a claim for unemployment insurance benefits which was effective August 16, 1992. When the employer advised the Employment Development Department (EDD) of the claimant's situation and the details of its Merger Transition Program, EDD issued a determination on September 2, 1992 holding the claimant ineligible for benefits under section 1252 of the Unemployment Insurance Code for the period beginning August 16, 1992 and ending October 12, 1992, based on a finding that the claimant was receiving in-lieu-of-notice pay of $311.20 per week for the period.

The claimant appealed the determination to an administrative law judge. As of the hearing before the administrative law judge on September 29, 1992, the claimant was continuing to receive his full wages and benefits from the employer and his employment had not been terminated.

If termination of the claimant occurred on October 12, 1992, as scheduled, he was entitled at that time to receive severance pay of $10,263 minus the wages of $2,694 he would have been paid for two months during the 60 day notification period. The employer contends the claimant should be ineligible for benefits while receiving his full wages through October 12, 1992. It does not contend that severance pay paid to the claimant upon termination of his employment should render him ineligible for unemployment insurance benefits after October 12.

REASONS FOR DECISION

Section 1251 of the Unemployment Insurance Code provides that unemployment compensation benefits are payable to unemployed individuals who are eligible.

Section 1252 of the code provides in pertinent part:

"(a) An individual is 'unemployed' in any week in which he or she meets any of the following conditions:

"(1) Any week during which he or she performs no services and with respect to which no wages are payable to him or her.

"(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 twenty-five dollars ($25) or 25 percent of the wages payable, whichever is greater, do not equal or exceed his or her weekly benefit amount."

* * * * *

"(c) For the purpose of this section only 'wages' includes any and all compensation for personal services whether performed as an employee or as an independent contractor or as a juror or as a witness, but does not include any payment received by a member of the National Guard or reserve component of the armed forces for inactive duty training, annual training, or emergency state active duty."

Section 1265 of the code provides that payments to an individual under a plan or system established by an employer which makes provisions for its employees generally, or for a class or group of employees, for the purpose of supplementing unemployment compensation benefits shall not be construed to be wages or compensation for personal services. Benefits payable shall not be denied or reduced because of the receipt of such payments.

The issue in this case is whether the claimant was in receipt of "wages" and therefore not "unemployed" and not entitled to unemployment insurance benefits under section 1252 of the code from August 16, 1992 through October 12, 1992, or whether the sums received during such period were for the purpose of supplementing unemployment compensation benefits and therefore were precluded under section 1265 of the code from being construed as wages or compensation for personal services.

The administrative law judge found the sums paid the claimant did not constitute in-lieu-of-notice pay as determined by EDD because "two months notice was given by the employer at the end of the employment relationship." Then, relying upon the decision of the court in Powell v. California Department of Employment (1965), 63 Cal. 2d 103, he found the payments made by the employer after the claimant ceased performing actual services were in the nature of severance pay and therefore subject to the provisions of code section 1265. We do not agree.

In the Powell case the California Supreme Court considered the situation of the claimants who were either placed on a stand-by status because of a reduction in the work force or permanently terminated. Each of the claimants was covered by either "severance pay" or "dismissal pay" benefits under the terms of collective bargaining agreements. The Court did not describe the exact nature of these benefits, but indicates that each claimant received a lump sum payment which was measured by the claimant's length of service. It was contended by the claimants' employers that such payments constituted wages allocable to a period of time subsequent to the termination of each claimant's employment. There is no indication that the claimants in the Powell case received their regular wages, nor any other employee benefits, for any period subsequent to being placed on stand-by or permanently terminated. The Court rejected the argument that only payments designated as supplemental unemployment payments were subject to section 1265 of the code and held that the Legislature in enacting section 1265 intended to exclude "dismissal" and "severance pay" as "wages". Consequently, the claimants were entitled to their unemployment compensation benefits without the imposition of any limitation due to their receipt of such pay.

We conclude from the Powell case that, as a general rule, sums paid by an employer pursuant to a plan making provisions for its employees generally, or for a class or group of employees, after an employee ceases performing services, are subject to section 1265 of the code and can not be construed to be wages payable with respect to the period after the cessation of services.

We are aware that, relying upon Appeals Board Precedent Decision P-B-4, it is sometimes contended that sums paid after the termination of employment are wage continuation payments and not subject to section 1265 of the code.

In Precedent Decision P-B-4, the Unemployment Insurance Appeals Board held wage payments made after termination of employment, but paid in the same manner and amount as wages paid while working, are wage continuation payments. Such payments constitute wages under sections 1252 and 1279 of the code which are allocable to the period after termination.

However, in Citroen Cars Corporation v. California Unemployment Insurance Appeals Board (1980) 107 Cal. App. 3d 945, 165 Cal. Rptr. 924, the Court limited the applicability of P-B-4 to the situation where, as in the precedent decision, wages were continued on an ad hoc basis for only one individual. Where, as in the Citroen Cars case, wages were continued for a group of employees pursuant to a plan to provide for terminated employees, the Court held P-B-4 was inapplicable and the sums paid to discharged employees after termination were subject to the provisions of section 1265. Therefore, they could not be used to deny or reduce unemployment insurance benefits otherwise payable. Consequently, P-B-4 does not establish an exception to the general rule stated above. An exception to the general rule is in-lieu-of-notice pay.

In Precedent Decision P-B-43, the Unemployment Insurance Appeals Board held in-lieu-of-notice pay paid upon termination of employment constitutes wages under sections 1252 and 1279 of the code which are allocable to the period after termination. Such pay is given to compensate an employee for the employer's failure to give proper notice of termination (See Shand v. California Employment Stabilization Commission (1954) 124 Cal. App. 2d 54).

The Worker Adjustment and Retraining Notification Act (WARN Act), 29 U.S.C. section 2101 et seq., requires certain employers to give 60 days notice to employees of a plant closing or a mass layoff. 29 U.S.C. section 2104 provides that an employer who fails to comply with a 60 day notice provision may be liable to each aggrieved employee for wages and employee benefits for each day that the required notice is not given, up to a maximum liability of 60 days.

The employer herein, in its Merger Transition Program brochure, stated that the program was in compliance with the WARN Act. If the claimant had been terminated after last performing services on August 10, 1992, we would agree with the EDD determination that the sums paid the claimant through October 12, 1992 constituted in-lieu-of-notice payments for failing to provide the claimant 60 days notice of termination as required by the WARN Act and constituted wages payable for the period involved. However, as we find the employment relationship continued at least through the administrative law judge hearing on September 29, 1992, we believe the payments made to the claimant constituted actual wages for the period involved, rather than in-lieu-of-notice pay.

In Armour and Company v. Wantock (1944), 323 U.S. 126, the United States Supreme Court considered whether regularly occurring stand-by or idle time required by the contract of employment should be considered working time for the purposes of computing overtime pay. In concluding that such time constituted service to the employer, the Court stated:

> ". . . an employer, if he chooses, may hire a man to do nothing or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employment in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself . . . ."

In this case the claimant agreed to the terms of the employer's Merger Transition Program for the 60 day notification period terminating October 12, 1992. Although it was agreed he would not generally need to report to work during the notification period, he could have been required to return to work occasionally and had to keep the employer advised how he could be reached.

He agreed that he would be considered an employee until the end of the notification period, unless his employment was sooner terminated, and he continued to be subject to all the normal terms and conditions of employment with the employer. He received his regular wages and full employee benefits just as if he had continued to regularly perform services.

We conclude that it was the employer's intent to comply with the requirements of the WARN Act by continuing the claimant's employment until October 12, 1992 and giving him 60 days advance notice of termination on that date. We further conclude that there was a continuing employment relationship after August 10 until October 12, 1992, unless the employment relationship terminated earlier pursuant to the provisions of the Merger Transition Program. As of the administrative law judge hearing on September 29, 1992 the employment relationship was continuing and the claimant was being paid wages with respect to such period of continuing employment.

As the claimant's weekly wages, when reduced in accordance with section 1252(a)(2) of the code, exceeded the maximum weekly benefit amount of unemployment insurance compensation to which he could have been entitled, we hold that the claimant was not unemployed within the meaning of section 1252 of the code and is therefore ineligible for benefits beginning August 16, 1992 and continuing so long as he received his full weekly wages prior to termination. Thus, he is at least ineligible through the week ending September 26, 1992, the Saturday prior to the administrative law judge's hearing on September 29, 1992. Because the hearing was conducted prior to the intended termination date of the claimant on October 12, 1992, we cannot determine the claimant's eligibility after September 26 and will remand that matter to EDD to do so.

If the employment relationship continued until the end of the notification period and then terminated on October 12, 1992 as contemplated under the Merger Transition Program, it appears that the sum designated severance pay which the claimant received after such termination is exactly that and, as conceded by the employer, does not constitute wages to deny or reduce unemployment insurance benefits.

DECISION

The decision of the administrative law judge is reversed. The claimant is ineligible for benefits under section 1252 of the code beginning August 16, 1992 and continuing through September 26, 1992. That portion of EDD's determination which holds the claimant ineligible for benefits under section 1252 for the period beginning September 27, 1992 through October 12, 1992 is set aside and the issue of the claimant's eligibility for that period is remanded to EDD for determination in accordance with the above.

Sacramento, California, October 19, 1993

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT L. HARVEY

LOUIS WM. BARNETT

DEBRA A. BERG

GEORGE E. MEESE

JAMES S. STOCKDALE

INGRID C. AZVEDO

TOM BANE