

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

MANUEL KITAY
(Claimant-Appellant)

PRECEDENT
BENEFIT DECISION
No. P-B-5
Case No. 67-3186

The claimant appealed from Referee's Decision No. BK-6351 which disqualified him for unemployment benefits under the provisions of section 1256 of the Unemployment Insurance Code on the ground that he voluntarily left his most recent work without good cause and which held him ineligible for benefits under section 1260(a) of the code on the ground that he had not received remuneration for services performed in bona fide employment equal to or in excess of five times his weekly benefit amount. The referee also held that the claimant's registration for work was effective January 1, 1967. On September 15, 1967, the claimant presented oral argument in Los Angeles, California. The transcript of that oral argument has been read by the members of this board.

STATEMENT OF FACTS

The claimant was last employed for a period of approximately three months as a data processing machine operator by an employer in the Los Angeles area at a weekly wage of \$100. In addition to this type of work, the claimant is an experienced accountant and for at least the past two years had been employed by others in the conventional employer-employee relationship each year except during the period from January until the middle of April -- the so-called tax season -- when he operated a tax service as a self-employed individual.

On December 31, 1966 the claimant voluntarily left his work in order to follow his regular pattern of establishing himself in self-employment offering tax services. Continued employment with his last employer was available to the claimant at the time he left his work.

In November 1966 the claimant telephoned a representative of the Department of Employment to inquire whether he would be eligible for unemployment benefits after the tax season ended. He explained to this representative that he intended to leave employment and enter into self-employment, and at the termination of this self-employment intended to file a claim for benefits. According to his testimony, he was informed, by the representative of the department that in order to be eligible for unemployment benefits he would have to earn at least \$290 (which represented five times his weekly benefit amount). He was told, in substance, that after he completed his self-employment he could reopen his claim for benefits and register for work. Also, he was advised that, in general, income from self-employment could be used to terminate a period of ineligibility resulting from a voluntary quit without good cause.

The claimant contended that had he been told to register for work immediately upon leaving his employment in December 1966, he could have done so because his income tax service did not commence until on or about January 18, 1967, and during the period January 1 to January 18, he was totally unemployed. He contended he had income in excess of \$2,000 during the 1967 tax season and had he been told to register for work prior to January 18, this income could be used to terminate any period of ineligibility following his leaving of work.

The questions presented to us for decision in this case are numerous and may be briefly stated as follows:

(1) Is the claimant subject to disqualification under section 1256 of the Unemployment Insurance Code?

(2) Has the claimant established good cause for backdating his registration for work?

(3) May profits realized from self-employment be considered to be remuneration within the meaning of section 1260 of the code?

(4) Is the department estopped from denying benefits to the claimant because of the information given to him in November 1966?

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides in pertinent part as follows:

"1256. An individual is disqualified for unemployment compensation benefits if . . . he left his most recent work voluntarily without good cause"

In determining whether the claimant is subject to disqualification under this section of the code we must ascertain the meaning of the words "most recent work."

Our first observation concerning the issue is that nowhere in the code or regulations do we find a definition of the word "work" as used above. In fact, whereas that term appears in section 1256 of the code, section 1257(b) of the code provides that an individual shall be disqualified for benefits if it is established that "He, without good cause, refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by a public employment office."

In addition, section 1258 of the code states in part that " 'Suitable employment' means work in the individual's usual occupation or for which he is reasonably fitted, regardless of whether or not it is subject to this division. . . . Any work offered under such conditions is suitable if it gives to the individual wages at least equal to his weekly benefit amount for total unemployment." (Emphasis added) Furthermore, section 1259 of the code reads in part that "Notwithstanding any other provisions of this division, no work or employment shall be deemed suitable and benefits shall not be denied to any otherwise eligible and qualified individual for refusing new work under any of the following conditions:." (Emphasis added)

Thus, it would seem that the words "work" and "employment" as they appear in the code are used interchangeably as substitutes for one another and may logically be accepted as synonymous terms. Accordingly, we may accept a definition of one as equally applicable to the other. In this connection, it should be noted that the word "employment," subject to certain specific exemptions, is defined in section 601 of the code to mean "service . . . performed for wages or under any contract of hire, written or oral, express or implied." The term "wages" as used above is further defined in section 926 of the code as follows:

"926. Except as otherwise provided in this article 'wages' means all remuneration payable for personal services, whether by private agreement or consent or by force of statute, including commissions and bonuses, and the reasonable cash value of all remuneration payable in any medium other than cash."

From reading the language in these definitions we are impressed with the repeated reference to wages being paid in exchange for services. In other words, the definition of employment appears to envision work in the service of another for which wages are received, which would, in turn, seem to imply a direct relationship between the type and extent of the services and the remuneration received. Logically, it then follows that we must find a claimant's "most recent work" to be that work in which an employer-employee relationship existed in connection with his services, and not that in which he may have received or was entitled to receive for his services a profit or share thereof in a business venture.

Section 100 of the code is pertinent to this discussion and sets forth the legislative declaration of public policy in establishing a system of unemployment insurance providing benefits for persons "unemployed through no fault of their own" in order to reduce "involuntary unemployment and the suffering caused thereby to a minimum."

While general in nature, the language in this intendment leads us to the inescapable conclusion that the leaving of work referred to in section 1256 of the code is intended to apply only to those individuals who, while working for wages, sever an employer-employee relationship. That this is a proper interpretation is further supported by section 1256 of the code, which provides in part that "An individual is presumed . . . not to have voluntarily left his work without good cause unless his employer has given written notice to the contrary to the director within five days after the termination of service" Obviously, if the code contemplated an examination into the circumstances surrounding the failure of a private business or the unemployment of a businessman, such provision would be largely meaningless.

When the claimant herein filed his initial claim for benefits, he was in the same position as an individual who had previously left employment and for one reason or another retired from the labor market for a period of time. The mere fact that the claimant chose to become an entrepreneur during the period subsequent to severing an employer-employee relationship does not

act to remove that severance as the original event in the sequence of circumstances leading to the unemployment for which he is now claiming benefits. Accordingly, we find that the claimant left his most recent work when he severed the employer-employee relationship which existed on December 31, 1966.

When the claimant voluntarily terminated the employer-employee relationship on December 31, 1966, he, in fact, quit his most recent work. It is necessary to decide, then, if he had good cause for so doing.

The facts show that he left his work to enter into self-employment. We believe that the legislative declaration of public policy contained in section 100 of the code requires that we find good cause for quitting work exists only in those cases where the reasons for quitting are of a compelling nature. While the desire for advancement or greater income is commendable and understandable, this, alone, in our opinion, does not constitute good cause for leaving work. In this connection, we believe that the Supreme Court of Pennsylvania correctly stated this view in Sun Shipbuilding and Dry Dock Company v. Unemployment Compensation Board of Review (1948) 358 P.A. 224, 56A 2d 254, as follows:

"[The claimant] became a business man at his own risk. He could not assume his new status with the legal assurance that if his expectations of more favorable economic results from his new status was realized he would be the sole gainer, while if his venture failed he could fall back on compensation benefits The law does not make Pennsylvania employers the insurers to any extent whatsoever of the private ventures of their employees."

In this case, the claimant left work solely for the purpose of entering into self-employment. This does not constitute good cause within the meaning of section 1256 of the code.

Section 1260(a) of the code, in effect during the period in issue, provided as follows:

"An individual disqualified under Section 1256, under a determination transmitted to him by the department, is ineligible to receive unemployment compensation benefits until he has

performed service in bona fide employment for which he has received remuneration equal to or in excess of an amount, determined by multiplying the number of disqualifications

imposed under section 1256 by five times his weekly benefit amount, subsequent to:

(1) The week in which the cause of his first disqualification occurs, if he registers for work in that week.

(2) The week subsequent to the occurrence of the cause of his first disqualification in which he first registers for work, if he does not register for work in the week in which the cause of his disqualification occurs."

Under the specific wording of this section of the code, in order to terminate a period of ineligibility resulting from a disqualification under section 1256 of the code, the claimant must have received remuneration for services in bona fide employment subsequent to his registration for work.

Here, the claimant did not register for work until after he left his self-employment. There is an issue whether his failure to register for work prior to entry on his self-employment resulted from information he obtained from the department. However, we deem it unnecessary to resolve this issue because of our conclusions hereinafter set forth.

The claimant received income from his self-employment subsequent to leaving his work on December 31, 1966. The amount of net income apparently exceeded five times his weekly benefit amount and would terminate the period of ineligibility under section 1260 of the code if the self-employment he engaged in may be termed "services performed in bona fide employment."

The phrase "bona fide" has been defined as follows:

"In or with good faith; honestly, openly, and sincerely; without deceit or fraud" (Blacks Law Dictionary, Second Edition).

"In or with good faith; without fraud or deceit; genuine; as a bona fide transaction" (Webster's New International Unabridged Dictionary, Second Edition).

In determining whether subsequent employment indicates a return to the labor market, no definite standards or criteria can be established which may be applied uniformly in every case. We do not believe that such employment must necessarily be permanent and full time. However, consideration should be given, among other things, to the character of the employment, how it was obtained, the wage paid, whether it was in the regular course of the employer's business and the customary occupation of the claimant, the wage last received by the claimant in his customary occupation, and whether the claimant is willing to accept future employment of the same kind and under the same conditions. Evaluation of these factors will tend to show the good faith of the claimant in accepting the employment and will assist the trier of the facts in determining whether there has been a genuine return to the labor market.

Self-employment indicates a withdrawal from the labor market rather than a return to the labor market. We consider that it would be highly inconsistent to hold on the one hand that a claimant who left work to enter into self-employment left work without good cause, and on the other hand to conclude that income derived from such self-employment represented remuneration received for services performed in bona fide employment. Therefore, we conclude in this case that the self-employment in which the claimant was engaged during the 1967 income tax season was not bona fide employment within the meaning of section 1260(a) of the code and the income received was not remuneration received for services performed in bona fide employment.

We do not intend to imply that self-employment may never be construed as bona fide employment. Each case must be decided on the particular facts of that case and it is entirely conceivable that in some situations self-employment would, in fact, show a return to the labor market and therefore would be bona fide employment within the meaning of section 1260(a) of the code.

Finally, it is necessary to decide if the department is estopped from denying benefits to the claimant because of information given to him in November of 1966.

Estoppels are not favored in the law and the doctrine is applicable only where it is established by clear and substantial evidence that equity between the parties demands that one of the parties be estopped to deny previous declarations or conduct upon which another party has relied and acted in good faith to the latter's detriment. Misrepresentation upon which another may reasonably rely may occur not only through actual incorrect statements about what the law provides, but may occur also through omission or a failure to speak where there is a duty to speak and an opportunity to speak (People v. Ocean Shore R. R. (1948), 32 Cal. 2d 406, 196 P. 2d 570, 6 A.L.R. 2d 1179). When advice is given, particularly upon request, claimants are entitled to rely upon the representatives as informed persons and to place credence in the information given (10 Ops. Cal. Atty. Gen. 32). Correct information may be misleading because it may be only part of the information which the claimant needs to have in order to act in accordance with his expressed intentions or to his best advantage.

Insofar as the record shows, the only information given to the claimant in regard to whether or not the profits he realized from his self-employment venture would be used to terminate his period of ineligibility is contained in the statement that, generally, income from self-employment might be used to terminate such a period of ineligibility. The record does not show that on the basis of this information the claimant entered into self-employment; but, rather, in our opinion, the record shows that regardless of any information the claimant might have received from the department, he intended to embark on a self-employment venture in keeping with his past practices. That is, we do not believe that the claimant relied on information given him by the department and acted in good faith to his detriment. The principle of estoppel does not apply in this case.

DECISION

The decision of the referee is modified. The claimant is subject to disqualification under section 1256 of the code and is ineligible for benefits under section 1260(a) of the code until such time as he performs services in bona fide employment for which he receives remuneration equal to or in excess of five times his weekly benefit amount.

Sacramento, California, April 5, 1968.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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