

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

AUDLEY L. SMITH
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-52
Case No. 69-1863

The claimant appealed to a referee from a determination of the department which held the claimant could not establish a valid claim under section 1277 of the California Unemployment Insurance Code. Prior to the issuance of Referee's Decision No. S-25945, we assumed jurisdiction of the matter under section 1336 of the code. Written argument was filed by the claimant. The department elected to submit the matter on the record before the referee.

STATEMENT OF FACTS

The claimant filed a claim for benefits effective January 28, 1968. Commencing with the week of March 4, 1968 he received 26 weeks of benefits.

Effective January 26, 1969 the claimant filed a new claim. This is the claim which the department has found invalid.

The claimant worked for approximately 21 years for Aerojet-General Corporation at a terminal wage of \$4.82 per hour. Effective January 12, 1968 the claimant elected to take early retirement in lieu of a layoff. On that date he was paid the following amounts for a gross total of \$3,705.62:

Regular pay	40.0 hours	\$ 192.80
Severance pay	480.0 hours	2,313.60
Accrued vacation pay	98.4 hours	474.29
Vacation balance	120.0 hours	578.40
Sick leave pay	30.4 hours	146.53

The claimant has neither worked nor received any wage payments since January 12, 1968.

Under the collective bargaining agreement existing at the time of the claimant's separation, accumulated vacation pay was allocated to the period following termination. Severance pay was not considered wages, and sick leave pay was allocated to the period prior to termination. Although the claimant as a salaried worker was not a union member, the same terms applied to him.

Using the above formula, the Department of Employment allocated only the vacation pay to the period following termination. Forty hours of the vacation pay was allotted to the week beginning January 14, 1968, and forty hours to the week beginning January 21, 1968. This left a balance of 138.4 hours as of the time the claimant filed his first claim on January 28, 1968. The department held that he was not unemployed until the accumulated leave was exhausted. When he filed his new claim effective January 26, 1969, this balance of 138.4 hours was multiplied by the claimant's hourly wage of \$4.82, and the sum of \$667.09 was credited towards meeting the so-called test period wages required for a valid second claim. Since the claimant had no other wages during this period, the department found he had insufficient wages to file a valid second claim.

The claimant's contention is that he should have been told by Aerojet of the consequences of the delay in filing his claim. He asked someone in the personnel department at the time of his termination as to when he should file for unemployment benefits and was told to do so whenever he pleased. Had the claimant been made aware of the consequences of the delay, he would have filed his claim immediately after the termination of employment. The claimant made no inquiries to the department prior to filing his claim.

REASONS FOR DECISION

Section 1277 of the California Unemployment Insurance Code provides as follows:

"1277. Wages paid prior to the filing of a valid claim and not used in the computation of the award may be used for the purpose of computing the amount of any other award only if within the 12-month period following the date of the filing of the valid claim the individual was paid sufficient wages to meet the eligibility requirement under Section 1281. For the purpose of

this section only the term 'wages' includes any and all compensation for personal services performed as an employee for the purpose of meeting the eligibility requirement under Section 1281. This section is not applicable to the computation of an award for disability benefits but the establishment of a valid claim for disability benefits shall not constitute a valid claim for unemployment compensation benefits unless the claimant has sufficient wages to entitle the claimant to an award under this section."

Section 1281(a) of the code provides as follows:

"1281. (a) An individual cannot establish a valid claim or a benefit year during which any benefits are payable unless he has during his base period been paid wages for employment by employers of not less than seven hundred twenty dollars (\$720)."

It should be observed that section 1277 speaks in terms of wages "paid" during the test period. In the instant case, no wages were actually "paid" to the claimant after he filed his first claim for benefits; and if section 1277 were literally construed, the claimant would have no wages to use toward meeting the requirements of that section of the code. The answer, however, is not that simple.

In Benefit Decision No, 6080 we had before us a case where the claimant at the time of termination from his last employment, October 1, 1950, was paid severance pay equal to 120 weeks of salary. At the time that decision was written, severance pay was considered wages and the department had allocated the pay to a 120-week period following the termination of employment. The claimant had filed a claim for benefits on March 6, 1951 but was denied benefits on the grounds he was not unemployed and would not be for a period of 120 weeks following termination because of the receipt of the severance pay.

After this period had expired, the claimant filed another claim for benefits effective March 11, 1953. The department found this claim invalid because the claimant had not been actually "paid" any wages during the base period. Section 53(a) of the Unemployment Insurance Code (now section 1281(a)) then provided that to establish a valid claim the claimant must have been "paid" wages of not less than \$300 during the base period.

We pointed out that the position of the department created an anomalous situation. On the one hand the claimant had been denied benefits based on the allocation of the severance payment; on the other hand the allocation could not be used for the same period to establish a subsequent valid claim.

The anomaly was resolved by construing Title 22, California Administrative Code, section 60 (now section 1282-1) and section 73(c)(2) (now section 926-1), which deal with wages paid at irregular and infrequent intervals, as providing for a constructive payment of wages extending over the allocation period.

Benefit Decision No. 6080 stands for the proposition that those wages which are properly allocated over a period subsequent to employment will be considered to have been paid by operation of law on a weekly basis equal to the claimant's normal weekly wage until the funds are exhausted.

Subsequent to Benefit Decision No. 6080, the Supreme Court of California in Powell, et al. v. California Department of Employment (1965), 63 Cal. 2d 103, 45 Cal. Rptr, 136, 403 P. 2d 392, held that lump sum severance payments when made under circumstances as are present in the instant case are not wages for purposes of determining entitlement to unemployment insurance but are a supplement to benefits within the meaning of section 1265 of the Unemployment Insurance Code (compare Appeals Board Decision No. P-B-4). The principle set forth in Benefit Decision No, 6080 remains unaffected and properly applicable to vacation and sick leave payments.

The question remains as to the proper allocation of the vacation pay and sick pay received by the claimant in the present case.

It is noted that under the union agreement between Aerojet-General Corporation and the union, the provisions of which have been applied to the claimant, the sick pay would be allocated to the period prior to termination and the vacation pay to the period subsequent to the period of employment. In a recent case, however, (Appeals Board Decision No. P-B-40) we held that the parties cannot by a collective bargaining agreement determine how payments shall be allocated for the purpose of unemployment insurance after the employment relationship has ended. We pointed out that under the law this is the right and responsibility of the Department of Employment and the board, and allocated vacation pay to the period immediately subsequent to the termination of employment.

Similarly in Appeals Board Decision No. P-B-36, we held that where the employee cannot collect either accumulated sick pay or vacation pay until he is terminated, he has no vested interest until that occurs and that both types of pay must be allocated to the period following employment.

In the instant case the same would seem to be true, and accordingly, the collective bargaining agreement notwithstanding, both the sick pay and vacation pay should have been allocated to the period following the claimant's retirement on January 12, 1968. This means that as of the time the claimant filed his first claim on January 28, 1968, 30.4 hours of sick pay (representing \$146.53 of wages) remained to be allocated in addition to the 138.4 hours of vacation pay (representing \$667.09 in wages). Since the total amount to be allocated to the period following the claimant's first claim is \$813.62, it follows that he has been constructively paid sufficient wages during the test period to satisfy the requirements of section 1277 of the code.

In view of this disposition it is unnecessary to pass on the claimant's contention that his claim should be valid because of the failure of Aerojet-General Corporation to inform him of all the ramifications of the unemployment insurance program.

DECISION

The determination of the department is reversed. The claimant's claim effective January 26, 1969 is not invalid under section 1277 of the code.

Sacramento, California, September 18, 1969.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

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CLAUDE MINARD

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