

2002

Mark L. Johnson and Carol Ann Nielson v. Utah State Retirement Office : Brief of Appellant

Utah Supreme Court

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BRIEF

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20534 IN THE SUPREME COURT OF UTAH

STATE OF UTAH

MARK L. JOHNSON and CAROL ANN)
NIELSON, on behalf of themselves)
and as representatives of all)
others similarly situated,)

Plaintiffs-Appellants,)

v.)

UTAH STATE RETIREMENT OFFICE, a)
Utah State Agency,)

Defendant-Respondent.)

Case No. 20534

BRIEF OF APPELLANTS

APPEAL FROM THE SUMMARY JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE JAMES S. SAWAYA, JUDGE

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STATEMENT OF ISSUES

1. Whether plaintiffs, former public employees who were disqualified from participation in the Utah State Retirement System when their public employer was sold to a private corporation, may recover the pension fund contributions previously paid on their behalf by their public employer.

2. Whether the termination and forfeiture provisions of the Utah State Retirement Act, particularly Utah Code Ann. § 49-10-24, strictly limit plaintiffs' rights against the Utah State Retirement System and preclude an equitable action for restitution of their employer contributions.

STATUTE SUBJECT TO INTERPRETATION

Utah Code Ann. §49-10-24:

Options of terminating employee -- Withdrawal of accumulated contributions -- Inactive membership. If a member shall for any cause, except retirement, permanent or temporary disability or death, cease to be employed in covered services for an employer he may:

(a) By written request directed to the retirement office receive a refund of all his accumulated contributions, less a withdrawal fee the amount of which the retirement board shall establish by regulation for the purpose of reimbursing its administrative fund for the cost entailed by said withdrawal. In the event of such election, a terminating employee upon later re-employment by an employer under the provisions of this act, unless he redeposits his refund as herein permitted, shall be treated as a new employee and his service history and benefit rights shall then be based upon current services from the date of said re-employment in covered services.

(b) Leave his account in the fund intact. In the event of such election, a terminating employee shall retain status as a member of the system, excepting for the lack of contributions paid into the fund by him or on his behalf. In the event of his re-employment by an employer for services covered by this act, his service history and benefit rights shall be based upon the prior service credit and current service credit accredited to him at the time of his most recent termination of employment, as well as upon the current service credit that he acquires as the result of his re-employment.

Upon the attainment of retirement age, an inactive member shall have the same rights to receive retirement benefits, if eligible therefor, as any active employee member.

STATEMENT OF THE CASE

This appeal is from an order of Judge James S. Sawaya of the Third Judicial District Court denying plaintiffs' motion for parital summary judgment and granting defendant's oral cross motion for summary judgment, no cause of action. Plaintiffs-Appellants' motion sought a declaration that Utah Code Ann. §49-10-24 is inapplicable to plaintiffs as a matter of law, and an order that the defendant Utah State Retirement Office return to plaintiffs the employer contributions paid on their behalf by their former employer.

Plaintiffs' public employer, Payson City Hospital, was sold to a private corporation, rendering the Hospital and plaintiffs ineligible to continue participating in the Retirement System. Plaintiffs' demand for restitution of their employer contributions was denied by the Retirement Office because defendant classified plaintiffs as "terminating employees" under Utah Code Ann. §49-10-24. Plaintiffs contend that statute was

never intended to, and should not, govern the rights of public employees disqualified from participation by public divestiture.

This case was originally initiated by plaintiffs' Complaint (record at 2) and Notice of Claim (record at 20), both filed on September 29, 1978. Plaintiffs also filed an Amended Complaint on July 30, 1979 (record at 47), after which the case was dismissed without prejudice to refile on September 21, 1979 (record at 99).

The Utah Supreme Court reversed the dismissal on November 25, 1980, holding that plaintiffs had complied with the Utah Governmental Immunity Act and that Payson City Hospital and Payson City were not indispensable parties (record at 108). However, the Court remanded the case for referral to the Utah State Retirement Board ("Board") (record at 107). On March 30, 1982, Judge Dee ordered that the case be referred to the Board and that the district court take no further action until it had been advised of the Board's determination (record at 112).

A hearing on plaintiffs' Claim was held before the Board on June 7, 1983. The Board voted to deny plaintiffs' Claim. On February 21, 1984, the Utah State Retirement Office filed its Answer to the Amended Complaint (record at 149).

Plaintiffs' Motion for Partial Summary Judgment (record at 179) was heard by the district court on January 28, 1985, at which time the court received defendant's oral motion for summary judgment. No court reporter was present at the January 28, 1985 hearing. Pursuant to Utah R. App. P. 11(g), plaintiffs filed a

Statement of Proceedings For Which No Transcript Was Made.

(Record at __; reproduced in Addendum.) On February 8, 1985, the district court granted defendant's motion and denied plaintiffs' motion (record at 357). Plaintiffs' timely Notice of Appeal was filed on March 8, 1985 (record at 365).

STATEMENT OF FACTS

I. PRELIMINARY FACTUAL STATEMENT

A. The Statutory Framework of the Utah State Retirement System.

The Utah State Retirement Act ("Act"), Utah Code Ann. § 49-10-1 et seq., was passed in 1967 to establish the most recent version of a succession of public employee retirement systems. See e.g., Utah Code Ann. § 49-10-3. The Act is administered by the Utah State Retirement Board through the respondent Utah State Retirement Office. Utah Code Ann. § 49-10-1.

The express purpose of the 1967 Act was to terminate and consolidate the old school employees' and public employees' retirement systems; to provide a uniform system of membership, retirement requirements, and contributions and benefits for public employees and their employers; and to enable employees to provide for themselves and their dependents in the case of old age, disability and death. Utah Code Ann. §§ 49-10-2, 49-10-3.

All employing units participating in the terminated systems, including Payson City Hospital, were automatically

incorporated under the Act into the 1967 system. Utah Code Ann. § 49-10-3(h).

During the period relevant herein, the Utah State Retirement Fund ("Fund") was financed by equal matching mandatory contributions from employers and employees based on a percentage of each employee's "compensation." Utah Code Ann. § 49-10-20. The contribution rate is statutorily defined and has been increased periodically. "Compensation" is defined in Utah Code Ann. § 49-10-6(20).

The percentage rate for contributions is determined actuarially by consideration of various elements, including employee turnover, mortality rates, prior service history, assets of the Fund, historical and expected wages and salaries, rates of interest earned by the Fund, and costs of Fund administration. "Employee turnover" is the rate at which employees have and are expected to die, retire, or quit employment. Defendant has computed this information solely on an individual employee basis, without reference to employer units or distinct employee groups who enter or leave the system. Deposition of Burt D. Hunsaker, Executive Director of the Utah State Retirement Board, taken November 28, 1978, at 29:1-30 [hereinafter cited as Deposition of Burt Hunsaker].

The Fund also receives significant income from interest on investments. Deposition of Burt Hunsaker at 15:19-21 and 30:1-6.

Although the Retirement Office provided assistance to the Utah Legislature before passage of the 1967 Act, no mention was made that an employer unit might withdraw from the Retirement System. Deposition of Burt Hunsaker at 33:19 to 34:23.

Prior to passage of the current Act in 1967, no employing unit had ever withdrawn from the retirement system. Deposition of Burt Hunsaker at 33:10-13.

The only withdrawals that occurred between 1967 and 1983 involved (1) a few small cities with a couple of employees who changed to ineligible part-time or elected positions, and (2) two or three small cities' hospitals, such as Payson City Hospital, that were sold around 1977. Deposition of Burt Hunsaker at 32:8 to 33:9.

Prior to 1983, the Act made no provision for employer unit withdrawals. Deposition of Burt Hunsaker at 66:13-18; Utah Code Ann. § 49-10-11 (amended 1983, 1984). See also City of West Jordan v. Utah State Retirement Office, Civ. No. C82-6157, Memorandum Decision at 5 (3d Jud. Dist. Ct. Utah Jan. 17, 1983) (record at 211).^{1/}

^{1/} City of West Jordan involved the city's attempt to withdraw while it was still a political subdivision. The court held that the city could not withdraw because the Act made no provision for withdrawal. In the present case, however, defendant admits that Payson City Hospital did in fact withdraw as a result of its divestiture to a private entity. Deposition of Burt Hunsaker at 32:20-22. See also footnote 4, infra.

The declared policy of the Utah Legislature is for the Act to be "liberally construed so that the benefits and protections . . . provided shall be extended as broadly as reasonably possible." Utah Code Ann. § 49-10-7.

B. Plaintiffs' and Payson City Hospital's Participation in the Retirement System

Payson City Hospital became a participating employer unit in 1961 under the old public employees retirement system. Deposition of Burt Hunsaker at 50. Payson City Hospital filed a resolution of its desire to join the retirement system with the Retirement Office. The Retirement Board then approved the resolution and sent a notification to the Hospital. Upon this action by the Board, the Hospital became a participating employer unit. No written contract was ever signed by the Retirement Office, the Hospital or the Hospital's employees. The Retirement Office's standard practice did not call for such a written contract. Deposition of Burt Hunsaker at 17:10 to 19:6 and 20:8 to 21:3.

When the 1961 system was repealed by the 1967 Act, the Hospital automatically became a participating employer unit under the new Act. Utah Code Ann. § 49-10-3(h). Every employee of the Hospital working the minimum hours required under the Act was statutorily required to become, and automatically became, a member of the Retirement System. Id. § 49-10-12.

All plaintiffs in this case were members of the Retirement System. Plaintiffs made all their required employee

contributions and the Hospital paid its required matching contributions.

On or about October 1, 1977, Payson City sold the Hospital to a private entity. The decision to sell was made by Payson City and not by the plaintiffs. The sale was made with the approval of the Utah Department of State Planning.

Upon the sale, plaintiffs were not fired, nor did they quit, change jobs, or otherwise cease to be employed by the Hospital.

Because of the sale of the Hospital, the Retirement Office, through its Executive Director, Mr. Burt Hunsaker, was obliged to interpret the Act to determine the status of the appellants. Deposition of Burt Hunsaker at 54:24 to 55:4.

Mr. Hunsaker looked to the Act, particularly § 49-10-24, which sets forth the options of a "terminating" employee. Deposition of Bert Hunsaker at 54:5-15 and 56:17 to 57:4. That statute provides that a member who, except for retirement, disability or death ceases to be employed in "covered services" may: (1) withdraw his accumulated employee contributions, or (2) leave his account in the Fund intact and receive deferred retirement benefits based on service to date when he reaches retirement age. Utah Code Ann. § 49-10-24.

Mr. Hunsaker determined that the Act did not distinguish between individual terminations of employees and the departure of an entire employer unit. Deposition of Burt Hunsaker at 55:5-10. That interpretation was based on Mr. Hunsaker's underlying

interpretation that there was no provision in the Act for an employing unit's withdrawal. Id. at 66:13-18. Thus, Mr. Hunsaker determined that plaintiffs were limited to the options in § 49-10-24, even though they continued to perform their same jobs for the same hospital.

After the Retirement Office determined that Utah Code Ann. § 49-10-24 governed plaintiffs' rights, approximately 106 hospital employees with less than four years of service were required to forfeit all retirement fund benefits arising from employer contributions paid by the Hospital on their behalf. Another group of approximately 59 employees -- those with over four years of service -- had to choose one of the two options in § 49-10-24. Of the 59, about 43 chose the first option (a refund of employee contributions), resulting in their forfeiture of rights and benefits deriving from the Hospital's contributions on their behalf; approximately 10 chose the second option and left their employee contributions in the System; 6 chose early retirement.

By the time the Hospital was sold, it had paid substantial employer contributions on behalf of plaintiffs. Determination of the amount of employer contributions was reserved for trial in plaintiffs' motion.

II. STATEMENT OF MATERIAL FACTS SUPPORTING SUMMARY JUDGMENT

The material facts relied upon by plaintiffs in their motion for partial summary judgment are set forth below. Those

facts were not disputed by the defendant in its memorandum in opposition or at the hearing. (Statement of Proceedings In Which No Transcript Was Made, record at ____). The court below found no genuine issue of material fact (record at 357).

1. Payson City Hospital joined the public employees retirement system in 1961 and automatically became a participating employer in the current Utah State Retirement System when enacted in 1967.

2. As employees of a participating employer, plaintiffs were required to become, and did become, members of the Utah State Retirement System.

3. Plaintiffs paid their required employee contributions under the Retirement System to the defendant.

4. The Hospital paid its mandatory matching employer contributions on plaintiffs' behalf to the defendant.

5. In 1977, the Hospital was sold by Payson City to a private entity, the Hospital Corporation of America.

6. Upon the sale, plaintiffs continued in their former jobs and did not quit, retire, change jobs, or otherwise cease working for the Hospital.

7. Plaintiffs took no part in Payson City's decision to sell the Hospital.

8. Plaintiffs sought a refund of their employer contributions from the Retirement Office, arguing that the termination and forfeiture provisions of the Act did not apply to them as a class of involuntarily and suddenly disqualified employees.

9. The Retirement Office determined that plaintiffs were "terminating employees" under Utah Code Ann. § 49-10-24. The Retirement Office interpreted § 49-10-24 to govern regardless of whether plaintiffs were terminated as individuals or disqualified as a class.

10. Because plaintiffs were treated as "terminating employees," approximately 106 employees with less than four years of credited service received a refund of their employee contributions, but were required to forfeit all benefits under the Utah State Retirement System, including employer contributions paid on their behalf.

11. Another group of approximately 59 employees had over four years of service and had to choose one of the options under § 49-10-24: about 43 chose the first option, withdrawing their employee contributions and forfeiting all rights and benefits derived from employer contributions paid on their behalf; about 10 chose the second option, leaving their employee contributions in the Retirement Fund; and about 6 chose early retirement.

12. Plaintiffs appealed the Utah State Retirement Board's determination that § 49-10-24 governs plaintiffs' rights to the Third District Court.

SUMMARY OF ARGUMENT

Plaintiffs' Motion for Partial Summary Judgment sought a declaration that the termination provisions of the Act, including § 49-10-24, do not apply to plaintiffs and sought restitution of the employer contributions paid on their behalf by Payson City Hospital to the Utah State Retirement Fund. The motion reserved determination of the amount of recovery for trial. On all legal issues, the analysis in support of plaintiffs' motion is the same as the analysis in opposition to defendant's motion.

This Court's decisions, acts of the Utah Legislature, and basic labor economics establish that plaintiffs' employer contributions are part of their employment compensation in the form of "deferred wages." Plaintiffs have a legally protectable interest in their employer contributions (deferred wages), even before attaining vested benefits.

Plaintiffs' rights to enjoy their deferred wages would normally be predicated on satisfying the statutory vesting schedule. However, cases such as this one have shown that events outside the contemplation of the retirement plan may frustrate or render impossible satisfying those vesting requirements. The best reasoned decisions from courts faced with this problem hold that employee groups suffering unanticipated mass discharge have an immediate equitable claim for restitution of their deferred wages. This restitution is necessary to prevent an unjustified windfall to the retirement system caused by employee forfeitures

that were beyond the plan's actuarial assumptions and outside the scope of the participants' assumed risks.

Before this case arose, the Utah State Retirement System never contemplated the divestiture of a participating employer unit and the consequent mass disqualification of an entire workforce. There was no historical experience in Utah to prompt legislature consideration of this problem and, in fact, no legislative discussion of this phenomenon is known to have occurred.

The Retirement Office's application of the Act's termination provisions to plaintiffs, disqualified from participation in the Retirement System for reasons beyond their control, worked a gross and inequitable forfeiture to the unjust enrichment of the Retirement System. As a matter of law, therefore, plaintiffs are entitled to restitution of the employer contributions paid on their behalf.

ARGUMENT

I. PLAINTIFFS' EMPLOYER CONTRIBUTIONS WERE COMPENSATION FOR PLAINTIFFS' SERVICES IN THE FORM OF "DEFERRED WAGES."

Pension plans were originally perceived as gratuitous, bestowing no enforceable rights on participating employees or retirees. See generally, Bernstein, Employee Pension Rights When Plants Shut Down, 76 Harv. L. Rev. 952, 959 (1963) (record at 222). Utah, however, long ago joined the modern view that "the right to a pension becomes as much a part of the agreed

compensation for the services of the employee as the monthly stipend, but it is deferred in payment until after his retirement." Newcombe v. Ogden City Public School Teachers Retirement Commission, 121 Utah 503, 243 P.2d 941, 943 (1952).

The theory for viewing employer pension contributions as "deferred wages" is well-founded:

Unions demand increases of X cents per hour in money wages and Y cents per hour in fringe benefits, including pension plan contributions. Employers respond with counteroffers [and] . . . [f]actfinding boards report bargaining proposals of both in the same fashion. The bargaining of large unions and large employers is most explicit on this point because both sides have the technical assistance to translate fringe costs, including pension plan contributions, into costs per hour

Not infrequently ununionized employers are "following" the pattern set by the unionized sector as a means of competing for employees [A]s a general proposition, unbargained plans seem no less a part of employee compensation than bargained plans

The demand to bargain did not turn the contributions and pension plan into "wages"; rather, it was the nature of the inducement by the company to the employees and the value of the contributions and the benefits to the employees which made them "wages".

Bernstein, 76 Harv. L. Rev. at 960, 961 (emphasis added).

Under Utah's Retirement System the proportion of contributions paid by employees and employers is the subject of negotiation at the legislative level. For example, participating public employers contribute more than employees in the Public Safety Retirement System, the Firemen Retirement System, and the Judges Retirement System; but employer and employee contributions are equal in the public employees' Utah State Retirement System. Deposition of Burt Hunsaker at 43, 44. The basis for the

discrepancy between the retirement funds is "[n]egotiation by the individual groups when establishing a program. The law being an effort at the legislature, a compromise between employer and employees." Id. The fact that the various funds' proportions of employer to employee contribution rates is subject to negotiation confirms the fact that all contributions are truly part of an employee's total compensation.

The fact that pension contributions are deferred wages is further manifested by the State Department of Personnel's biennial comparisons of state and private compensation for similar jobs. Utah Code Ann. § 67-19-12. Included in the studies are three categories: take-home pay, fringe benefits including pension values, and a composite of money and fringe benefits. Although take-home wages for some positions differ between the public and private sectors, it is the composite figure which the Legislature attempts to equalize. Section 67-19-12(3) defines "total compensation" for purposes of the salary survey to "include but not be limited to salaries and wages, bonuses . . . retirement and all other fringe benefits that are or may be offered to state employees as inducements to work for the state."

(Emphasis added). See also Utah Code Ann.
§ 67-19-12(2)(f).

The deferred compensation characteristic of employer contributions is conclusively demonstrated by the history of Utah's retirement system. In 1951, the Utah Legislature voted to repeal the State retirement system in order to join the Social

Security System. Provision was made for employees with less than ten years service to receive back the present value of both their employee and employer contributions in the form of a paid-up annuity. Hansen v. Public Employees Retirement System Board of Administration, 122 Utah 44, 53, 57, 246 P.2d 591, 595, 597 (1952) (record at 252).

The Utah Legislature has historically viewed employer and employee retirement contributions as equally compensatory in nature and intent. See also Driggs v. Utah State Teachers Retirement Board, 105 Utah 417, 142 P.2d 657 (1943) (refusing to distinguish between pension benefits funded solely by the employee, and benefits funded by the state, or both the state and employee). It is clear, therefore, that plaintiffs' employer contributions were compensation in the form of deferred wages. Plaintiffs have legally enforceable interests in their deferred wages, even if plaintiffs' pension rights are not "vested."

II. PLAINTIFFS HAVE A PROTECTABLE INTEREST IN THEIR EMPLOYER CONTRIBUTIONS.

Members of the Retirement System have "inchoate contractual rights, which upon completion of conditions precedent to retirement and actual retirement, ripen into vested rights." Driggs v. Utah State Teachers Retirement Board, 105 Utah 417, 434, 142 P.2d 657, 664 (1943). Because the sale of Payson City Hospital to a private corporation disqualified plaintiffs from continued public service, they could not complete those conditions precedent to formal "vesting."

Nevertheless, the rights of public employees to protection of their inchoate interests in employer contributions, even those which are not "vested," have long been recognized. For example, constitutional law forbids altering the requirements for attaining vested benefits after an employee has begun participation in the pension plan. See, e.g., Public Employees Retirement Board v. Washoe County, 615 P.2d 972, 974 (Nev. 1980); discussion in Singer v. City of Topeka, 227 Kan. 356, 607 P.2d 467, 473-75 (1980).

Professor Corbin recognizes that

It is clear that the fact that rights are future and conditional does not prevent their recognition and protection; they are within the protection of the constitutional provision against impairment of obligations by a State.

3A Corbin on Contracts § 626, at 10 (1960) (emphasis added) (record at 267). See also State v. Allen, 625 P.2d 844 (Alaska 1981).

The principle that "nonvested" employees have protectable rights was demonstrated in Hansen v. Public Employees Retirement System Board of Administrators, 122 Utah 44, 53, 57, 246 P.2d 591, 595, 597 (1952). In Hansen, a public employee without vested pension benefits sought to invalidate the Legislature's repeal of the retirement system for the purpose of joining the Federal Social Security System. The court denied his claim, but primarily because he was provided with a "substantial substitute" for his right to continued participation in the

repealed system. The "substantial substitute" took the form of a paid-up annuity equal to his employee and employer contributions.

Hansen is very analogous to the instant case. First, the facts in Hansen involved the repeal of the entire retirement system. Similarly, the facts at bar present the dismantling of an entire subset (an employer unit) of the current Retirement System. Second, the "substantial substitute" in Hansen is exactly the relief sought by the plaintiffs in the instant case: return of employer as well as employee contributions.

Therefore, plaintiffs have a protectable interest in their deferred wages. The next issue is what form that protection should take when an unanticipated mass disqualification of an entire workforce makes attaining vested benefits impossible.

III. FAILURE OF THE UTAH STATE RETIREMENT ACT TO CONTEMPLATE THE MASS DISQUALIFICATION OF PLAINTIFFS GIVES PLAINTIFFS A RIGHT TO RESTITUTION OF THEIR EMPLOYER CONTRIBUTIONS.

Courts have long held that the intended scope of a pension plan's forfeiture provisions determines whether terminated employees have a claim for restitution. Most critically, those courts have often recognized that express forfeiture provisions, which initially appear to limit employees' rights, were not actually drafted in contemplation of operations foreclosures and mass terminations. Consequently, those courts have upheld the rights of terminated employee classes to restitution.

The first award of restitution to a class of discharged employees came in Longhine v. Bilson, 159 Misc. 111, 287

N.Y.S. 281 (1936) (record at 269). Employees of a closed down mill sued the association which represented the employees of three companies and which provided sick benefits to its members. The association defended itself on the grounds of a by-law which declared forfeited any money paid to the association by a terminated employee. The court held that the section was

intended simply to cover the case of individual members who left the employ of the companies either voluntarily or involuntarily while such company continued in production and in the employment of help. In the case at bar a substantial number of members of the defendant association have lost employment en masse for reasons beyond their control through the discontinuance of operations of the [employer] . . . [W]hen the defendant association came into being it was not within the contemplation of the members . . . that the mass discharge of all employees through the closing down and taking out of production of the mill . . . was such leaving of employment as described in Section 5.

Id. at 285 (emphasis added). Thus, the Longhine court awarded the plaintiffs their prorated share of the association's assets.

In Lucas v. Seagrave Corporation, 277 F. Supp. 338 (D. Minn. 1967) (record at 275), the new owner of the employing corporation discharged 30 of the 65 participating employees and deemed the terminated employees' rights forfeited. Consequently, the employees claimed that they had been discharged as a group to Seagrave's unjust enrichment.

The court denied the defendant employer's motion for summary judgment and found that it had been unjustly enriched by plaintiffs' forfeitures. Seagrave had retained prior tax advantages from plaintiffs' participation and had been able to refrain from paying plaintiffs their full compensation in cash.

"It seems unrealistic to say in this context, as some courts have, that the employer received nothing." Id. at 345. Rigid adherence to the pension plan's language was deemed inequitable because it did not consider whether the plan intended to place the risk of circumstances not contemplated in the actuarial assumptions on the employees. In reaching its conclusion, the Lucas court placed great reliance on Bernstein, Employee Pension Rights When Plants Shut Down, 76 Harv. L. Rev. 952 (1963).

This Court should adopt the position taken by the Illinois Court of Appeals in Kenneke v. First National Bank of Chicago, 105 Ill. App.3d 630, 434 N.E.2d 495 (1982) (record at 283); see also prior appeal, 65 Ill. App.3d 10, 382 N.E.2d 309 (1978) (record at 294). In Kenneke, the plaintiffs were delivery drivers for one publisher and were covered by a multiple-employer pension plan. The plaintiffs' employer ceased publishing, dismissed all its drivers, and told them that they had not yet acquired any vested benefits.

The trial court had awarded summary judgment to the plan's defendant trustee based on provisions of the collective bargaining agreement and pension plan.^{2/} The appellate

^{2/} Section 11.2 of the plan provided:
"Vested Interests. Neither the association, any Employer, Participant, nor the Union, nor any member of the Union, . . . shall have any right, title or interest in or to the Pension Trust Fund, or any part thereof, excepting the right of a Participant to benefits as provided hereunder."

court reversed, stating that the plan provisions themselves did not "operate to place the full risk of lost pension benefits from mass termination on the employees." 434 N.E.2d at 499. Rather the intention of the parties had to be ascertained. The thrust of the opinion is that, absent a showing by the employer that the risk of mass termination had been clearly allocated to the employees, a suit for unjust enrichment would succeed. Both of the Kenneke opinions relied on the Bernstein article, and the Lucas opinion. 434 N.E.2d at 498; 382 N.E.2d at 311.

The need to protect the inchoate rights of employees to their deferred wages (employer contributions) has also been recognized by Congress, and efforts to provide such protection were recently codified in the Employee Retirement Income Security Act ("ERISA"). In order to attain the tax benefits under ERISA, a pension plan must contain a "partial termination" clause, whereby all contributions made on behalf of a group of employees terminated en masse become nonforfeitable. See 26 U.S.C. § 411(d)(3) (record at 297). The policy of § 411(d)(3), described in United Steelworkers of America v. Harris & Sons Steel Co., 706 F.2d 1289, 1298-99 (3d Cir. 1983) (record at 299), is to ensure that "employees will not be deprived of their anticipated benefits." Citing Lucas, supra, the Third Circuit stated that pension plans which do not actuarially anticipate the sudden discharge of a large group of employees may incur a windfall. 706 F.2d 1298 n. 23. Obviously, the State plan in the present case is not governed by ERISA. Nevertheless, the policy behind § 411

clearly supports the equitable nature of plaintiffs' claim for restitution.

Finally, the most basic principles of contract law support plaintiffs' claim for equitable relief. Both the Lucas opinion, supra, and the Bernstein thesis rely in part on Sections 357(1) and 468(1) of the Restatement [First] of Contracts (1932) (record at 317). Section 357 states that when a plaintiff has not willfully failed to completely perform a condition of his contract,^{3/} "the plaintiff can get judgment for the amount of such benefit in excess of the harm he has caused to the defendant."

Section 468(1) provides that "[e]xcept where a contract clearly provides otherwise, a party thereto who has rendered part performance for which there is no defined return fixed by contract, and who is discharged from further performance by impossibility of rendering it, can get judgment for the value of past performance rendered."

^{3/} The relationship of the parties under the Utah State Retirement Act is contractual as well as statutory. Driggs v. Utah State Teachers Retirement Board, 105 Utah 417, 422, 434, 142 P.2d 657, 659, 664 (1943); City of West Jordan v. Utah State Retirement Office, Civ. No. C82-6157, Memorandum Decision, at 6 (3d Jud. Dist. Ct. Utah July 29, 1983) (record at 319). The defendant argued below that private pension cases such as Lucas, Longhinee and Kenneke are irrelevant in an action against a public pension fund. This Court, however, specifically rejected that argument in Driggs. 105 Utah at 427-28, 142 P.2d at 661-62.

In the present case, plaintiffs are unable to complete the performance required to secure pension benefits due to the sale of the Hospital; plaintiffs played no role in the decision to sell the Hospital and their consequent disqualification. Thus, plaintiffs fall squarely within sections 357(1) and 468(1).

The above case law, Congressional policy, and learned treatises all support restitution of employer contributions for employees disqualified en masse. Consequently, upon plaintiffs' conclusive showing in the next section that employer withdrawal was not contemplated by the Utah State Retirement Act, equitable recovery must be granted.

IV. THE UTAH STATE RETIREMENT ACT DID NOT CONTEMPLATE THE MASS DISQUALIFICATION OF PLAINTIFFS.

All of the circumstances surrounding the Act support only one conclusion: the 1967 Legislature did not contemplate the possibility of withdrawal by an entire employer unit, or the divestiture of a public employer unit to a private corporation. At the hearing on the parties' motions for summary judgment, defendant admitted that the 1967 Legislature had never expressly considered these possibilities. (Statement of Proceedings In Which No Transcript Was Made, record at __).

The language of Utah Code Ann. § 49-10-24, which sets forth the options of terminating employees, speaks only in terms of individual employees. Nothing in the language suggests that the Legislature considered the consequences of an entire work

force barred from continued participation by the divestiture of their employing unit.

The historical employee turnover rates prior to the 1967 Act came from a period of governmental growth, not contraction. Unlike the private sector, the possibility of the closure or divestment of an employer unit was simply not a serious contingency requiring contemplation in 1967. The history of the Retirement System supports this view -- prior to 1967, no employing unit is known to have withdrawn from the Retirement System. Deposition of Burt Hunsaker at 33:10-13. Employer withdrawal only became an issue around 1977, when Payson City Hospital and a couple of other public hospitals were divested. The only other relevant history is the very few instances in which small units have discontinued employment of the couple of persons eligible for coverage. Defendant has characterized those very few instances in deposition as follows:

Q: In your history with the various systems, have there ever been occasions when . . . a unit itself has withdrawn from the fund and thereby ceased to have coverage under it?

A: Only through having no employees. In other words, they have no employees. They've had one or two employees; they ceased to have any employees, so there's no membership. . . . I'm referring to a small city that might have an employee on full-time and they've gone to part-time or elected positions where they haven't been covered.

Deposition of Burt Hunsaker at 32:8-19. Thus, prior to the Payson City Hospital's divestiture, there was never any reason to contemplate and provide for mass termination.

Even more compelling is Mr. Hunsaker's testimony regarding the Legislative process at the time of enactment:

Q: . . . was it ever brought up [by the Retirement Office] that an entire unit might withdraw from the system?

A: In dealing with the legislature?

Q: Yes.

A: No.

Deposition of Burt Hunsaker at 34:18-23. Even defendant's own counsel's questions establish the absence of legislative consideration:

Q. . . . is there any provision in the law for withdrawing of an employer unit?

A. No, that's what created the problem.

Deposition of Burt Hunsaker at 66:16-18.^{4/}

Thus, the only known circumstances concerning the legislative intent show that (1) there was no historical experience to prompt legislative contemplation of mass

^{4/} The new § 49-10-11(3)-(4) forbids employer withdrawal except as permitted by the Retirement Board and subject to § 49-10-24. That section, however, became effective March 3, 1983. 1983 Utah Laws Ch. 224, §§ 6, 12. Even the new provision, however, does not appear to address undeniable de facto withdrawal when a public entity is divested and its employees become ineligible for continued participation. Furthermore, the amendments to § 49-10-11 do not retroactively affect appellants' action. Utah Code Ann. § 68-3-3.

Finally, the incorporation of § 49-10-24 by § 49-10-11(4) is limited to employing units that began participation pursuant to § 49-10-11(3). Payson City Hospital, however, was admitted pursuant to § 49-10-3(h) and not § 49-10-11(3). Thus, the legislature has still not provided for withdrawal under the circumstances of this case.

termination, (2) no known legislative discussion of the possibility of mass termination was held, and (3) the statutory language itself does not suggest any contemplation of mass termination or employer withdrawal. As cases such as Kenneke, Lucas, and Longhine exemplify, failure to consider mass termination is common, even in the private sector where such a risk is much more pervasive. Accord Bernstein, Employee Pension Rights When Plants Shut Down, 76 Harv. L. Rev. 952 (1963)^{5/}.

CONCLUSION: PLAINTIFFS ARE ENTITLED TO RESTITUTION AS A
MATTER OF LAW

The employer contributions made by Payson City Hospital were compensation for plaintiffs' services in the form of deferred

^{5/} Three justices of the United States Supreme Court adopted the Bernstein article and found that "Pension plans normally do not make provision to protect the interests of employees . . . who are terminated because an employer closes one of his plants. . . . For unlike discharges for inadequate job performance, which may reasonably be foreseen, the closure of a plant is a contingency outside the range of normal expectations of both employer and employee." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 253 (1978) (Brennan, White, Marshall, J.J., dissenting) (majority holding retroactive state minimum funding law violated contract clause of U.S. Constitution) (record at 337). Although these justices were speaking in dissent, the issue and holding in Spannaus were quite distinct from the case at bar.

See also Note, A Reappraisal of the Private Pension System, 57 Cornell L. Rev. 278 (1972); Levin, Proposals to Eliminate Inequitable Loss of Pension Benefits, 15 Vill. L. Rev. 527 (1970); Note, Pension Plans and the Rights of the Retired Worker, 70 Colum. L. Rev. 909 (1970); Note, Employees' Rights To Employer Contributed Pension Benefits After A Plant Shutdown, 1984 Utah L. Rev. 807.

wages; moreover, plaintiffs have protectable rights in those employer contributions whether or not they attained "vested benefits." As a matter of law, where mass termination was not contemplated at the time the forfeiture terms of a pension plan were established, terminated employees are excused from the vesting schedule and have a right to restitution for employer contributions.

Accordingly, plaintiffs are entitled to a reversal of the district court's Order granting summary judgment to defendant, and denying plaintiffs' motion for partial summary judgment. The district court should be directed to enter an order (1) that the forfeiture provisions of the Act, including § 42-10-24, are not applicable to the plaintiffs, (2) that the Utah State Retirement Fund, administered by the defendant, has been unjustly enriched, and (3) that plaintiffs are entitled to restitution. The actual amount of recovery is subject to subsequent determination at trial.

RESPECTFULLY SUBMITTED this 17th day of June, 1985.

FABIAN & CLENDENIN,
a Professional Corporation
Attorneys for Plaintiffs

By Stanford B. Owen
Stanford B. Owen

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be hand delivered four
(4) true and correct copies of the foregoing Brief of Appellants
on this 17th day of June, 1985, to:

Mark A. Madsen
Assistant Attorney General
Attorney for Defendant-Respondent
540 East 200 South
Salt Lake City, Utah 84102


Stanford B. Owen
Attorney for Plaintiffs-Appellants

ADDENDUM

49-10-24. Options of terminating employee — Withdrawal of accumulated contributions — Inactive membership. If a member shall for any cause, except retirement, permanent or temporary disability or death, cease to be employed in covered services for an employer he may:

(a) By written request directed to the retirement office receive a refund of all his accumulated contributions, less a withdrawal fee the amount of which the retirement board shall establish by regulation for the purpose of reimbursing its administrative fund for the cost entailed by said withdrawal. In the event of such election, a terminating employee upon later re-employment by an employer under the provisions of this act, unless he redeposits his refund as herein permitted, shall be treated as a new employee and his service history and benefit rights shall then be based upon current services from the date of said re-employment in covered services.

(b) Leave his account in the fund intact. In the event of such election, a terminating employee shall retain status as a member of the system, excepting for the lack of contributions paid into the fund by him or on his behalf. In the event of his re-employment by an employer for services covered by this act, his service history and benefit rights shall be based upon the prior service credit and current service credit accredited to him at the time of his most recent termination of employment, as well as upon the current service credit that he acquires as the result of his re-employment.

Upon the attainment of retirement age, an inactive member shall have the same rights to receive retirement benefits, if eligible therefor, as any active employee member.

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
 STATE OF UTAH

MARK L. JOHNSON and CAROL ANN)	
NIELSON, on behalf of themselves)	STATEMENT OF PROCEEDINGS FOR
and as representatives of all)	WHICH NO TRANSCRIPT WAS MADE
others similarly situated,)	
)	
Plaintiffs,)	Civil No. C78-6162
)	(Hon. James S. Sawaya)
v.)	
)	
UTAH STATE RETIREMENT OFFICE, a)	Appeal No. _____
Utah State Agency,)	
)	
Defendant.)	

Pursuant to Utah R. App. p. 11(g), Mark L. Johnson and Carol Ann Nielson, et al., plaintiffs-appellants in the above-captioned matter submit the following statement of the January 28, 1985 hearing, held without a court reporter, on the parties' cross-motions for summary judgment.

This statement is based upon the recollection of Stanford B. Owen, counsel of record for the plaintiffs, and Robert Palmer Rees, law clerk appointed by court order to represent the

plaintiffs. This statement is limited to matters raised at the hearing which are not otherwise sufficiently covered in the parties' memoranda of points and authorities submitted before the hearing.

1. The January 28, 1985 hearing was scheduled by plaintiffs to consider plaintiffs' motion for partial summary judgment. Plaintiffs were orally advised by defendant that a cross-motion for summary judgment might be made orally at the scheduled hearing.

2. Before plaintiffs presented their oral argument, counsel for the defendant made an oral cross-motion for summary judgment. Defendant's counsel stated that the cross-motion was appropriate because no material facts were in dispute. The Court received defendant's motion.

3. Plaintiffs began their oral argument by observing that defendant had indicated no material facts were in dispute when making its oral motion; plaintiffs further noted that defendant's memorandum of points and authorities did not properly raise any material factual issue. Plaintiffs stated that they would therefore not address any factual issues unless raised by the defendant in oral argument.

4. After summarizing the Preliminary Factual Statement from plaintiffs' memorandum in support, plaintiffs made their legal argument based on the four-part analysis presented in their memorandum.

5. During their initial argument, plaintiffs withdrew their citation to Cal. Gov. Code §§ 20563, 20564 (West) (appended to plaintiffs' memorandum as Appendix L) because that section does not, as erroneously first read, refer to employer contributions.

6. In defendant's oral argument, defendant admitted that the 1967 Utah Legislature had not expressly considered the prospect of an employer unit withdrawing from the Utah State Retirement System, or the possibility of divestiture of a public employer unit to a private corporation. Defendant then proceeded with the legal arguments presented in its memorandum in opposition.

7. In rebuttal, plaintiffs clarified that they were not raising the constitutional arguments from their complaint in their motion for partial summary judgment.

DATED this 15 day of March, 1985.

FABIAN & CLENDENIN,
a Professional Corporation

By Stanford B. Owen
Stanford B. Owen
Attorneys for Plaintiffs

APPROVED AS TO FORM:

Mark A. Madsen
Attorney for Defendant