

2002

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

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

UTAH
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DOCKET NO. 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 RESPONDENTS

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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STATUTE SUBJECT TO INTERPRETATION

Utah Code Annotated, § 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 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 active member shall have the same rights to receive retirement benefits, if eligible therefor, as any active employee member.

(iii)

SUMMARY OF ARGUMENTS

It is the position of the Retirement respondents that 49-10-24, U.C.A. 1953, as amended clearly applies by its terms to the individual plaintiffs and that it prohibits the granting of the relief sought by these individuals. The referenced statute provides in no uncertain terms that whenever a member of the Retirement System ceases "for any cause" other than those provided for in the Retirement Act itself, i.e.; retirement, disability or death, to perform "Covered Services" that person's options are as provided in subsection (a) and (b) of the statute.

The individual plaintiffs seek to apply the rules and interpretations of private defined contribution plans to a public defined benefit plan in contravention of the law establishing it.

Section 2 of Title 49, Chapter 10, U.C.A. 1953, as amended, is clear on its face. Prior interpretations of retirement law by this Court, and particularly, Donald Bryson and Russell Nebeker, et al., v. Utah State Retirement Office, a Utah State Agency, 573 P² 1280, are controlling on this issue. The legislature must have acknowledged power to determine the type of retirement plan which it will approve for public employees and the concomitant authority to determine the law and procedure under which it will operate.

Equity as well as law favors the decision of the Court below. Although attempts are made to assert a principle of unjust enrichment, it is clear from the facts on their face that the remaining employees under

the system will be called upon to subsidize the approximately 49 employees of plaintiffs employers who have or will retire from the system. (R - 128- 130 and unnumbered affidavit of Robert Drisko)

Under the law of the jurisdictions which allow employer unit withdrawal for any reason other than loss of public funding, Payson City Hospital would have been required to reimburse the Retirement Board when it went private.

To accede to the individual plaintiffs demands in this case would reverse the whole history of public defined benefit retirement plans and open a Pandora's Box of consequences. Private defined contribution plan law is simply not relevant to this issue.

STATEMENT OF THE FACTS

The Utah State Retirement Defendant-Respondents take no serious issue with the STATEMENT OF THE CASE and the STATEMENT OF FACTS presented by Plaintiffs-Appellants in their brief except in some instances the emphasis and interpretation drawn therefrom. Their assumptions both of law and fact are deemed erroneous and will be dealt with hereafter in detail.

A R G U M E N T

I. THE LAW PLAINLY AND SPECIFICALLY DENIES THE RELIEF SOUGHT BY THE PLAINTIFFS AND COMMANDS THE JUDGMENT OF THE COURT BELOW.

The sole issue of this case is the liability of the Retirement defendants to pay as "refund" the employer contribution to individuals who have ceased to perform "Covered Services" for an employer under the Utah State Retirement Act. Erroneous and statutorily unauthorized assumptions must be made in order for that question even to be raised.

First it must be recognized that we are here concerned with the implementation of a public retirement system, created and governed by legislative authority and not by "negotiation" and "contract" as in private systems. Thus, it is pointless to spend time examining the laws, rules, or procedures governing private systems. These two are clearly noncomparable at this point, and legal and equitable rules cannot be used interchangeably. Thus, we will not attempt to distinguish or otherwise attack the legal sanctity of the private cases upon which the plaintiffs-appellants rely.

In public retirement systems in the several jurisdictions of the United States, there are two distinct types of plans. Each has its own advantage and disadvantages to both employers and employees, but once adopted by the authorized legislative body the rules of one cannot be applied to the other to vary its application. This is exactly what plaintiffs seek to do.

Briefly, a DEFINED CONTRIBUTION plan may be considered to require specified contributions from the employer and/or the employee which vests in the employee either immediately or at a specified subsequent date. The contributions and interest, wherever and however invested, are deemed to be the property of the employee after vesting and may be withdrawn in full upon termination of employment with the participating employer. In fact, the employee assumes all investment risk and may theoretically have nothing either at retirement or termination of covered employment. This system is, in essence, a savings and investment plan and not a retirement plan as such.

Conversely, a DEFINED BENEFIT plan places all the investment risk upon the employer. When the employee attains the age and years of service specified in law he is entitled to a specified monthly retirement benefit for life. based on those years and age and a set percentage formula without reference to the actual funds paid in or the success, or otherwise, of the investments made by trustees. While the employees rights vis-a-vis retirement "vest" at a statutorily

established point (4 years, 10 years, etc.), this vesting relates only to retirement and has no reference to receipt of employer or, indeed, employee contributions upon termination, except as provided in the enabling legislation. Without exception, public defined benefit plans prohibit the payment to individual employees of the employer contribution except under the purposes specified in the enabling legislative enactment - the law.

Utah adopted in 1961 (Laws of Utah, 1961, Chapter 100) and is now operating a DEFINED BENEFIT plan. It is, therefore, not surprising that the law governing this action, 49-10-24, U.C.A. 1953, as amended, specifies the payment to an employee of only his contributions if he so elects upon his ceasing to "be employed in covered services for an employer."

It is difficult to imagine specific language more to the point than is the section in controversy when it says:

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: (emphasis added)

There follows the option of receiving a refund of his contributions (which has been interpreted to include interest at the assumed rate) or leaving the money in and later receiving a retirement benefit earned, if and when qualified.

Retirement, permanent or temporary disability and death are the statutory "benefits" provided by the law. Since the defined benefit plan is not a savings account for an individual employee (as

a defined contribution plan may be considered to be), early termination refund is not considered to be a "benefit" under the law.

On the facts and the law it is difficult to understand why the plaintiffs persist in arguing that section 24 does not apply to them and that the legislature did not consider their case. While it is true that the legislature, in enacting section 24, did not itemize "other causes," it did specifically state "for any cause" other than the specified benefits of the plan. Can it really be argued that unless legislation specifies a particular set of circumstances it may not deal with such in a broad, general, exclusive way? This would indeed be a novel approach to statutory construction.

It is scarcely arguable that the plaintiffs-appellants have ceased "to be employed in covered services" And certainly, it is for some cause (any cause) except retirement, permanent or temporary disability or death. Thus, it is squarely within the terms of the law and the options are clear.

While the law is deemed remarkably clear as heretofore suggested, it is significant that in 1983 under legislation termed "clarifying legislative intent" the legislature, in enacting Senate Bill 327, specified that section 24 would be applicable in the event a unit were to withdraw with retirement board approval for loss of public funding. Since that language is intended to be clarifying but, even more clearly because it does not alter the law in any real degree as it existed in section 24, this cannot be reasonably argued to be prohibitive retroactive legislation.

It is significant that if this Court were to reverse the lower court and grant the relief urged by the plaintiffs-appellants, it would be a direct reversal of the law in this jurisdiction and in every other jurisdiction in these United States (where it was followed) as it relates to public defined benefit plans.

The actuarial rate is determined and the employer-employee contributions fixed in a defined benefit plan upon the assumption that the employer contribution is in all cases, other than to receive the benefits of the plan, nonrefundable. (R - 128 - 130 and unnumbered affidavit of Robert Drisko P. 3 - no objection) Thus, the mischief inevitably resulting from judicial reinterpretations of this well established and, indeed, fundamental rule must be incalculable. The whole funding base would have to be reconsidered and recalculated.

Plaintiffs-appellants would have us believe that theirs is a unique situation and we can accede to their demands without opening Pandora's Box. This is demonstrably untrue. Payson City Hospital was not the first, nor the last, to go private, and it is difficult to understand why they would argue that a reinterpretation of this basic rule of public defined benefit plans should apply only to them.

This Court has heretofore followed a long line of decisions on the subject of refunds to terminating employees. This is not a case of first impression. Until recently the public safety and firemen's systems provided for the refund to terminating employees of only 80% of their contributions. It is suggested that the sustaining of such a law must put to rest the question of refunding employer

contributions. The Retirement defendants asked the court to sustain that law and in doing so to reverse the lower court in Weber County, which it did in Donald Bryson and Russell Nebeker, et al, v. Utah State Retirement Office, a Utah State Agency, 573 P² 1280. With reference to refund the Court said, in a unanimous decision:

The obligation to return contributions to employees who terminate is an important cost factor in operating a retirement system. It is to be realized that the retention of a percentage helps to pay the cost of its maintenance and operation. This tends to keep the system solvent and better able to pay pensions to those who serve until retirement, all of which contributes to making it a better system.

It is respectfully argued that this decision is controlling in this case, dealing as it does with a percentage of employee contributions not refundable. Under a public defined benefit plan the employer contribution has never in any jurisdiction in the United States been deemed to have ever become the "property" of the employee. A rule sustaining refundability of less than the whole of an employee's own contributions must certainly apply with much greater force, therefore, to funds which were never deemed his nor payable to him under any circumstances, except as provided in the plan.

We have been unable to locate a single case in which a court of this or any sister jurisdiction has ordered the payment to a terminating employee (or one who ceases to perform "covered service" for an employer) of more than the amount specified in the law. Contrarily, the following courts have sustained the law of the several jurisdictions, even disallowing a refund of any sums at all where the law so provided:

Kodish v. Public Employees Retirement Board, 341 NE² 320 (Ohio, 1975) - only the principal of his own contributions; Billings v. City of Orlando 287 S² 316 (Florida, 1973) - only 50% of sums deducted from their salaries; and Williams v. Schrunk, 527 P²1 (1974); Holmes v. City of Los Angeles, 172 Cal Rptr. 585 (1981); Robbins v. Police Pension Fund, 32 F. Supp. 93 (1970); Duff v. City of Gardena, 167 Cal Rptr. 4 (1980); Stevens v. Board of Trustees of the Police Pension Fund of the City of Shreveport, 370 S² 528 (1979); and Muzquiz v. City of San Antonio, 520 F² 993 (1975) all of which later cases allowed the plaintiffs to recover nothing of even their own contributions in face of a statute to the contrary.

It is respectfully suggested that plaintiffs here as elsewhere may recover only the amounts or proportions of their own contributions specified in the law and none of the employer contribution except as provided by law. It is further suggested that both statutory and controlling case law in this jurisdiction clearly and emphatically denies the relief sought by plaintiffs-appellants and requires the sustaining of the judgment of the lower court.

II. NO UTAH STATUTE OR CASE CAN REASONABLY BE INTERPRETED TO AUTHORIZE THE RELIEF SOUGHT BY PLAINTIFFS.

Because plaintiffs have sought to sustain their theory by appeal to several Utah Cases dealing with public retirement, it is deemed appropriate to canvass their cases. Let it be stated at the outset that the Retirement defendants do not take issue with the specific holding of any of their cases and asserts that they are simply not apropos to the issue here, which is controlled by Bryson and Nebeker, supra.

In ruling as the Court did in Hansen v. Public Employees Retirement System Board of Administrators, 246 P² 591, it upheld the power and authority of the legislature. This case involved the termination of the public plan then mandated by federal law in order to secure Social Security coverage. It is significant that this case deals with a terminating plan, not a continuing plan. The legislature broadened the eligibility of certain classes to obtain "vesting" specifically because of the termination. But while permitting a broadened class (not all employees) to obtain some otherwise prohibited benefit from the employer contributions, the legislature did not authorize, in any case, the payment of such contributions to individual employees. Some did not have service credit to obtain even this broadened participation. The legislature drew the lines and the court sustained them. Those who were within certain well defined lines could elect to either take a refund of their own contributions, or obtain a paid up annuity using both the employer and employee contributions. Since this was a terminating plan, the logic of this case is compelling both legislatively and judicially but, attempting to apply it to the facts of this case is like building a bridge across the Pacific Ocean from California to Japan. It is totally impractical.

Similarly, we have no argument with the holding of either Driggs v. Utah State Teachers Retirement Board 142 P² 657. or Newcombe v. Ogden City Public School Teachers Retirement Commission, 243 P² 941.

In the former case, we insist that members do have "inchoate contractual rights, which upon completion of conditions precedent to retirement and actual retirement, ripen into vested rights." The trouble here is that as a result of no fault on the part of these retirement defendants, the plaintiffs did not, in fact, complete the conditions precedent.

Nor do we take issue with Newcombe, that "the right to a pension becomes so much a part of the agreed compensation for the service of the employee as the monthly stipend, but it is deferred in payment until after his retirement." But the employee must qualify under the terms of the contract, which these plaintiffs have demonstrably failed to do. Thus, the legislature has both a right and a duty to otherwise provide, which it has in section 24.

If these plaintiffs have a justifiable complaint it is against the City of Payson and/or the Payson City Hospital . . . not these defendants. The issue of whether or not these entities are indispensable parties has no bearing on that factual situation.

Plaintiffs have presented all the classic arguments favoring in the beginning the adoption of a defined contribution plan for public employees. But, since our legislature opted to establish a defined benefit plan instead, those arguments are both too late and too little.

The legislature placed responsibility upon each member "to acquaint himself with his rights and obligations as a member of the

system." 49-10-49, U.C.A. 1953, as amended. Since the system does not contemplate the payment to a terminating member "for any cause" of the employer contributions, but contrarily, has built into the actuarial base a percentage of employer contributions not paid out and thus available to retirees, this should in all conscience settle the issue.

Plaintiffs' reference to 49-10-7, U.C.A. 1953, as amended, in aid of their cause is sadly miscited since that statute militates strongly against them. When the legislature stated "It is hereby declared to be the policy of the legislature that this act be liberally construed so that the benefits and protections as herein provided shall be extended as broadly as reasonably possible(.)," (emphasis added) It cannot reasonably be interpreted to intend benefits exactly opposite to those "herein provided" as plaintiffs seek here. The benefits are as already established by the legislature to be retirement, normal or disability, and death benefits and nothing else. Certainly not a savings account via payment of employer contributions.

III. EQUITABLE PRINCIPLES MAY NOT BE APPLIED TO DEFEAT CLEAR STATUTORY TERMS, NOR DOES EQUITY AID PLAINTIFFS.

Plaintiffs continue to urge some principle of unjust enrichment as an aid to their cause, thus appealing to principles of equity. It is axiomatic that he who seeks equity must do equity. Nowhere in the pleadings or arguments of plaintiffs do they recognize the liability which the Retirement defendants have been required to assume for

the employees of plaintiffs' employer, Payson City Hospital, who had previously retired or who elected, as noted in Appellant's brief at page 9, to take an early retirement or to leave their contributions in for a later retirement upon qualification. The records of the Retirement Office disclose that some 33 persons had retired from Payson City Hospital prior to the events here involved, together with the 10 who chose to leave their contributions in for later retirement, and the 6 who chose early retirement (R - 128 - 130). There is then a total of approximately 49 persons from Payson City Hospital whose retirement must be funded. Under a defined contribution program it would be immaterial, but under the defined benefit plan of this State it is highly significant. Is it equitable to shift the financial responsibility for all these retirees to the other members while these plaintiffs claim benefits beyond and above the law? This is a perfect example of the continuing effort of these plaintiffs to apply the rules of a defined contribution plan to a defined benefit plan in clear contravention of existing law, both statutory and judicial.

There are defined benefit plans in the public sector which are more liberal in permitting employer unit withdrawal. The California and Montana plans are cases in point. However, there is not a single public defined benefit plan which permits the payment of any portion of the employer contributions to employees in the event of such unit withdrawal. No statute and no judicial action has ever countenanced

the relief sought by these plaintiffs. How then does equity come to their aid in clear contravention of law? Equity may be invoked where the law is silent, not in direct contravention of statutory mandate.

Further, plaintiffs have ignored the fact that each of them has received some benefit from their participation in the State Retirement System. In the event any of them had incurred a covered disability or had died during retirement coverage, a benefit under the plan would have been payable. The costs of this coverage are not acknowledged anywhere by plaintiffs, although this cost is attributable to them. See Kodish v. Public Employees Retirement Board, op cit, 341 NE 2 320 (Ohio 1975).

Plaintiffs do not come before this Court with clean hands and may not invoke equity thusly.

Is it assumed that the funds of Payson City Hospital and its employees were managed and invested over a period in excess of fifteen years without cost and expense? While unacknowledged by plaintiffs, it needs no proof that costs were incurred.

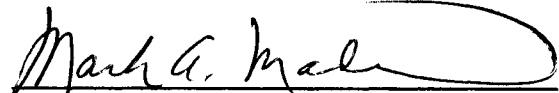
The foregoing all goes to establish the rational difference between defined contribution and defined benefit public plans and why the legislature was not insensitive or irrational in denying payment of employer contributions to employees no longer in "Covered Services."

Neither law nor equity is of aid to these plaintiffs as they seek to recover sums universally denied public employees under defined benefit plans in the jurisdictions of the United States.

S U M M A R Y

It is respectfully urged that legislative statement of law and policy and the prior decisions of this Court sustain the judgment of the lower court and the action of the Utah State Retirement Board in refusing to pay over to plaintiffs all or any part of the employer contributions of Payson City Hospital. The judgment of the lower court should be sustained.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Mark A. Madsen", written over a horizontal line.

Mark A. Madsen
Attorney for Defendant-Respondent
Utah State Retirement Office

MAILING CERTIFICATE

I hereby certify that I mailed four (4) true and correct copies of the foregoing Brief of Respondents to Stanford B. Owen, FABIAN & CLENDENIN, a Professional Corporation, Attorneys for Plaintiffs-Appellants, Twelfth Floor, 215 South State Street, Salt Lake City, Utah 84111. on this 12th day of July, 1985.

Mark A. Madison