

1980

James H. Johnson v. Board of Review of the, Industrial Commission of Utah, Unemployment Compensation Appeals : Defendeant'S Brief

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Johnson v. Utah Indus. Comm'n*, No. 16939 (Utah Supreme Court, 1980).
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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES H. JOHNSON,

Plaintiff-Appellant,

vs.

Case No. 16939

**BOARD OF REVIEW OF THE,
INDUSTRIAL COMMISSION
OF UTAH, UNEMPLOYMENT
COMPENSATION APPEALS,**

Defendant-Respondent.

DEFENDANT'S BRIEF

**Appeal from a decision of the Department of Employment Security,
State of Utah, as upheld by the Appeals Referee
and the Board of Review of the Industrial Commission,
State of Utah**

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**FILED
JUN 3 1960**

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BOARD OF REVIEW OF THE,
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COMPENSATION APPEALS,

Defendant-Respondent.

DEFENDANT'S BRIEF

STATEMENT OF NATURE OF THE CASE

This is an action before the Supreme Court of the State of Utah pursuant to Section 35-4-10(i), Utah Code Annotated 1953, as amended, for the purpose of judicial review of a decision of the Board of Review of the Industrial Commission of Utah, affirming the decision of the Appeal Referee, which held that the claimant had knowingly withheld material information of work earnings for the purpose of obtaining unemployment benefits to which he knew he was not entitled, but which modified the disqualification imposed by the Appeal Referee to a period of fifty-two (52) weeks beginning February 25, 1979, and assessing an overpayment to the Plaintiff in the amount of \$640. The questions are whether the Board of Review unreasonably refused to consider Plaintiff's claim that he was improperly denied benefits at the onset of his

unemployment, during July and August, 1978, and that the amount so denied is a setoff to any amounts Plaintiff may owe the Department by reason of his subsequent withholding of material information.

DISPOSITION BELOW

A Department Representative, after hearing, disqualified the Plaintiff for the weeks ended March 3 through 31, 1979, and for thirty-seven (37) additional weeks beginning September 16, 1979, and established an overpayment in the amount of \$1,280.00 on the grounds Plaintiff knowingly withheld material information of work and earnings in order to obtain benefits to which he knew he was not entitled, pursuant to Section 35-4-5(e), Utah Code Annotated, 1953, as amended effective July 1, 1979. Upon appeal, an Appeal Referee affirmed the decision of the Department Representative. The Board of Review of the Industrial Commission of Utah, by decision dated February 5, 1980, in Case No. 79-A-2302, 79-BR-174, affirmed the decision of the Appeal Referee, but modified the disqualification to a period of 52 weeks beginning February 25, 1979, and reducing the overpayment to \$640.00. The modification was made on the grounds the failure to report material information occurred prior to the effective date of the 1979 amendments to the Utah Employment Security Act.

RELIEF SOUGHT ON APPEAL

Plaintiff requests the Court to remand this case to the Board of Review with an order to consider Plaintiff's claim of wrongful denial of unemployment benefits for a period prior to the withholding by Plaintiff of material information. Defendant seeks affirmance of the decision of the Board of Review.

STATEMENT OF FACTS

Defendant is in substantial agreement with the Statement of Facts set forth in Plaintiff's Brief, except in the following particulars, to wit:

Plaintiff's August 1978 application for unemployment benefits, with backdating, was denied by the Department because he failed to appear for an adjudication interview on August 25 to discuss his separation from work and his request for backdating. (R.00040, 00064) Such decisions are issued on a general form, with details added for each case. The form contains pre-printed information on its reverse side regarding the claimant's right to appeal. (R.00065)

Plaintiff did not appeal the decision and he did not request reopening of his claim until October, 1978. (R.00025) Because the Plaintiff had been given the statutory six (6) week disqualification for voluntarily quitting without good cause, the Department allowed benefits when the claimant reapplied in October, 1978. (R.00025, 00026) Plaintiff intended to file claims for benefits during March, 1979, a period of time when he knew that he was employed by and performing services for Howe Building Products. (R.00027, 00028, 00030, 00034, 00039)

ARGUMENT

THE BOARD OF REVIEW AND THE APPEAL REFEREE DID NOT ERR IN REFUSING TO CONSIDER THE DENIAL OF UNEMPLOYMENT BENEFITS TO PLAINTIFF BY REASON OF HIS VOLUNTARY QUIT.

Plaintiff does not dispute the finding by the Appeal Referee, as affirmed by the Board of Review of the Industrial Commission of Utah, that he was overpaid \$640.00 in unemployment benefits to which he was not entitled during the month of March, 1979. (See Plaintiff's Brief, page 3) It is Plaintiff's sole contention on appeal that he was wrongfully denied a hearing or right of appeal at the time he was disqualified for voluntarily quitting work, and that the Commission should be required to offset such wrongfully denied benefits against the subsequent fraud overpayment of \$640.

Plaintiff's contention is based on the factual issues of: 1) Did the Department of Employment Security fail to consider his August 1978 claim for benefits; and 2) Was the Plaintiff informed of his appeal rights with respect to the decision of August, 1978? The standard of review in unemployment insurance cases is well established. Section 35-4-10(i), Utah Code Annotated 1953, provides in part:

"In any judicial proceedings under this section, the findings of the Commission and the Board of Review as to the facts, if supported by evidence, shall be conclusive and the jurisdiction of said Court shall be confined to questions of law."

See also *Martinez v. Board of Review*, 25 U. 2d 131, 477 P. 2d 587 (1970); *Kennecott Copper Corporation Employees v. Department of Employment Security*, 13 U. 2d 262, 372 P. 2d 987 (1962); *Gocke v. Wiesley*, 18 U. 2d 245, 420 P. 2d 44, 45 (1966); *Decker v. Industrial Commission of Utah, Department of Employment Security* (Utah, 1975) 533 P. 2d 898; *Whitcome v. Department of Employment Security, Industrial Commission of Utah*, (Utah, 1977) 564 P. 2d 1116.

The record in the instant case provides ample support for the refusal of the Commission and the Board of Review to consider Plaintiff's contention of wrongful denial of benefits in August, 1978. The original decision of the Commission was offered into evidence by the Appeal Referee, and Plaintiff's counsel objected to its admission:

Referee: Now then, I would enter as Exhibit 10 in this hearing a document from that period that you previously indicated. It's dated August 30, 1979, and is a decision by the Department denying benefits to the claimant, James H. Johnson, address to P.O. Box 2436, stating, 'You did not keep your appointment in this office on August 25 to discuss your separation from work and backdating of your claim.' So, as a consequence, they denied benefits effective July 9, 1979, and I would gather you did not contact them between that date and the date you came in and filed your initial claim that is presently under question.

Mr. Proctor: Well, I'm going to object to that question as leading. I'm going to object to this document as being hearsay, on the grounds it doesn't, it's not signed or the signature on it is illegible, totally illegible. Secondly, it's, there's some confusion with, in, with regard to the document as to whether it's concerning his backdating request--

Referee: Well, it states both. (R.00040)

Section 35-4-6(c), Utah Code Annotated 1953, provides:

The claimant or any other party entitled to notice of a determination as herein provided may file an appeal from such determination with an appeal referee within ten days after the date of mailing of the notice to his last known address or, if such notice is not mailed, within ten days after the date of delivery of such notice.

The Salt Lake Local Office of the Department of Employment Security issues such decisions on a standard, pre-printed form which contains a statement of the claimant's right of appeal. (R.00065) Plaintiff acknowledged receiving a notification of denial of backdating his claim to July. (R.00025) Claimant did not allege that he appealed the decision, nor did he object or otherwise protest the Appeal Referee's statement in the hearing that the Plaintiff did not appeal:

Referee: But that was on a benefit year that was existing at that time. I don't have a copy of the documentations for that benefit year, but was, in other words, you had established an entitlement then and the disqualification was assessed which evidently you did not appeal, because if you had appealed it, they would have held a hearing on it for you, and you did nothing with it until you got down to, down to--

Mr. Johnson: Down to Fort Lauderdale. (R.00025)

Section 35-4-10(h), Utah Code Annotated 1953, specifically provides:

Any decision in the absence of an appeal therefrom as herein provided shall become final ten days after the date of notification or mailing thereof and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted his remedies before the commission and board of review as provided by this act.

In the absence of an appeal from the decision of the Department Representative, that decision became final ten days after it was issued. Consistent with the above-quoted section of law, neither the Commission and Board of Review, nor this Court have jurisdiction to review such decision. See *First Security Bank of Utah v. Utah Turkey Growers, Inc.*, (Utah, 1980) _____ P. 2d _____ (Case No. 16354, filed March 21, 1980), footnote 13.

CONCLUSION

Plaintiff's appeal to this court is founded on a decision of the commission which became final on September 4, 1978, ten days after it was issued. Plaintiff did not appeal such decision and is, therefore, barred from now asserting any claim for benefits for the period to which that decision applied. The commission and the board of review properly refused to consider such claim as a setoff against a subsequent overpayment for fraud. Therefore, the decision of the Board of Review should be affirmed.

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BY: _____
K. Allan Zabel

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that I mailed two copies of the foregoing Defendant's Brief to Paul H. Proctor, DART & STEGALL, Plaintiff, 430 Ten Broadway Building, Salt Lake City, Utah, this _____ day of June, 1980.

BY: _____
K. Allan Zabel