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Ralph E. Child v. Board of Review of the Industrial Comm. Of Utah : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the
State of Utah

RALPH E. CHILD,
Plaintiff,

vs.

BOARD OF REVIEW OF
THE INDUSTRIAL COM-
MISSION OF THE STATE
OF UTAH DEPARTMENT
OF EMPLOYMENT SE-
CURITY,

Defendant.

CASE
NO. 8873

Brief of Appellant, Ralph E. Child

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Brief of Appellant, Ralph E. Child

STATEMENT OF FACTS

That the appellant, Ralph E. Child, has complied with each and every requirement pertinent to eligibility, as written in Section 35-4-4, Utah Code Annotated.

The appellant is an officer of the Ralph Child Construction Company and has been since the formation of that construction company on or about April 1, 1956, his office and title being that of

President and Director. The corporation has five officers, all of whom served in a policy making capacity and for such service received no pay, at least until the time of this hearing, it being the decision of the Board of Directors that no pay would be paid but that their compensation would be received temporarily on the basis of stock appreciation. The Board of Directors then consisted of three officers of the company, to-wit: Ralph E. Child as President, Earl Child as Vice President, and Lois Child as Secretary. It was the function of these officers to serve and carry out the formal requirements of the corporation, for which they would receive a nominal sum commensurate with their activity. The physical operation of the company was delegated to a Manager and Superintendent and in that respect the Board of Directors and officers retained the services of Ralph E. Child in the capacity of Manager and supervisor, for which he was to receive a weekly wage in the amount of \$165.00. The corporation began to function along the lines set forth in the purpose clause of its Articles, to-wit: as a general contractor, and the duties of managing and directing the affairs of the company, except for the formal requirements, fell upon the manager and supervisor, Ralph E. Child. The company functioned normally until about May of 1957, when work became slack and the corporation was without funds. At this time they still employed Ralph E. Child as manager and supervisor to clean up the work of the corporation that had been incurred and to accumu-

late the company's assets, such as equipment, etc., and to complete such work as was still remaining to be done. However, there was no money received and the corporation was, for practical purposes, insolvent. That being the circumstances, the company paid Mr. Child by check, it being his understanding and instruction that he could not cash the checks until the corporation had moneys in the bank to cover them. This status continued until approximately December of 1957, at which time it was determined by the Board of Directors of the corporation that the company must reduce its overhead and eliminate all help not absolutely necessary, and, therefore, discharge Ralph E. Child as manager and superintendent. The only functions that were left in the company were those small ministerial matters that normally befall a president and executive officers of the corporation. The active function of the corporation for the purpose for which it was designed were terminated. During all the times in which the corporation was organized and functioning and during all of the times that Ralph E. Child was employed as manager and supervisor for the corporation, unemployment compensation was paid by the corporation upon his salary as manager and supervisor. This was required of the corporation by law and the corporation felt duly obligated to pay it inasmuch as its attitude toward Ralph E. Child was one of employer-employee relationship. No objection was ever made by the Industrial Commission to the receipt of these moneys and no protest was made by Ralph E. Child or the corporation

as to his capacity as an employee of that company, as distinguished from an officer or director.

It should be noted that during the year 1956 and 1957 the company did substantial work and paid substantial salaries and wages to its employees and that the work and duties of the manager and supervisor were extensive, but that the obligations of the president and director were relatively constant during the years 1956-1957 and 1958. That the Board of Directors and officers of the corporation have functioned in approximately the same capacity during all of the time the corporation has been organized, but that the work of the employees of the corporation has varied directly with the work available. That on or about December 26, 1957, the appellant, Ralph E. Child, filed his claim with the Industrial Commission for unemployment compensation because of his discharge and termination as manager and supervisor of the Ralph Child Construction Company. That the matter was reviewed by a referee for the Industrial Commission who rejected the claim of the appellant, whereupon the appellant appealed to the Board of Reviews for a review which affirmed the decision of the referee and rejected the appellant's claim. Whereupon the appellant directed this appeal.

STATEMENT OF POINTS

POINT 1

That Ralph E. Child, as manager and supervisor of the Ralph Child Construction Company, was an employee within the meaning of the Unemployment Compensation Act and was entitled to unemployment compensation upon his termination and discharge as manager and supervisor.

ARGUMENT

The findings of the appeals referee and the Board of Review have put great emphasis upon the fact that Ralph E. Child served in a dual capacity, to-wit: President and director, and as manager and supervisor. The Board of Review has consented the fact that the president of the corporation still has functions to perform as it being a factor prohibits Ralph E. Child, he being the same person, from receiving unemployment compensation. Both of these bodies have overlooked and failed to distinguish between the functions and duties of a manager and the functions and duties of a president and director of a corporation. The Court well knows that these responsibilities are not the same. The court is invited to take judicial knowledge of the fact that officers and directors of corporations often assume only nominal responsibilities of policy making and ministerial nature, for which they receive, in many cases only a nominal salary. This is the usual case and the president and director is ordinarily

required in small corporations only to perform those formal duties that are required, such as signing the contracts, and performing the formal legal obligations of the corporation. In other words, it is a common practice for the president of the corporation to function in those capacities that have legal significance in respect to the corporation's relationship to other persons or corporations. This is distinguished from the responsibilities of the manager of the corporation who is charged with the responsibility of the actual active conduct of the corporation for the purposes for which it was organized. The court is invited to consider as an analogy the relationship between the president and board of directors of the usual banking establishment. No one would contend that in a banking organization the manager could also be an officer and director and still be discharged as manager or replaced and be allowed to maintain his president and directorship in the said banking organization. I call this to the Court's attention because I can think of numerous examples in the small banking organizations of the State of Utah, with which I am acquainted. Furthermore, the responsibilities of a manager and a president of a corporation are grossly different. When the reasons for which the manager was hired ceased to exist, it is only natural and proper that he be discharged and it is the responsibility of the officers and directors to see that this is done. They are charged by law with this responsibility, for it is their duty to maintain

the assets of the corporation and protect the rights of the stockholders.

No exception should be taken to the fact that one person served in a dual capacity. The very existence of a corporation anticipates this relationship. The corporation itself is nothing more than an artificial person and can function only through human beings. No one would contend that the president of a corporation cannot be in two capacities, one individually for himself as a human being and one on behalf of the corporation. If that is so, is there any more reason for the court or the referee or the board of review to conclude that he cannot serve in three capacities, one as a human being, two as the president of a corporation, and three as a manager of the corporation, each capacity being separate and distinct.

Let us consider the effect of the board of review's decision. The only way that an employee, who is also an officer, can recover unemployment compensation would be, under the circumstance wherein the corporation was dissolved. If he had any function to perform at all in his capacity as an officer or director of the corporation, he would, within the decision of the referee and the board of review, still be employed and, therefore, not entitled to compensation, but the decision of the board of review and the referee in this case seems to be a one way street. They want to include Ralph E. Child as an employee as distinguished from the president and director when collecting unemployment com-

pensation insurance, but want to consider him as employed as president and director as distinguished from manager when ruling upon his right for unemployment compensation. I could find no cases directly in point on this particular subject matter, although there are numerous cases wherein it has been cited that an officer may also be an employee within the meaning of the act. For example:

“In the case of the State ex rel Murphy vs. Welch, it was held that the President and Vice President for a corporation who worked in the company’s store and received weekly wages were rightfully counted as ‘employees’ in determining whether the company had the number of employees necessary to come under the unemployment compensation act,”

State ex rel Murphy vs. Welch
187 Okla. 470 103 P2d 533

This case is almost exactly in point in respect to the relationship of the officers and directors of the company. In that case the officers also worked as employees for a wage, the same as the officers did in this particular case. It would seem that if an officer is an employee for one purpose he is an employee for another purpose and that purpose being to receive unemployment compensation. To consider this case above cited in the light of the board of review and the referee’s decision would mean that the only time the company’s store clerks could receive unemployment compensation in Oklahoma if they were officers would be when the corporation was dissolved. I cannot believe that that was the

interpretation of the Oklahoma Supreme Court. The functions of the Unemployment act should be reciprocal and it should be a two way street.

Another case that might be analogous, but not directly in point is the case of *In Re: Lishner*. This is a New York case in which the claimant was the owner of 50% of the capital stock of a business corporation which wholly owned a summer resort hotel. He worked for the summer resort hotel as manager. The New York Court denied his right to recover unemployment compensation because the activity he was engaged in was a seasonal activity and seasonal activities are not covered by unemployment compensation. However, no objection was made to his claim for compensation on the basis that he was not an employee within the meaning of the act, or that he was not unemployed within the meaning of the act. It seems in the New York case that the mere fact that he was a stockholder and officer of the corporation did not prevent him from being unemployed as an employee of the corporation and the only reason in that case for which recovery was denied was because he was engaged in a seasonal occupation for which coverage was not allowed. This seems by analogy to be in point. *In Re: Leshner* 268 Appellant Division 582, 52 New York Supplement 2d 587 and an annotation may be found in 24 ALR 2d 1401.

As I mentioned, there are not many cases on this subject matter, although I do not claim to be

an expert in legal research. I do find in 48 AMJ Page 524 at Section 16, some interesting comments that indicate that a person may serve in a dual capacity for the purpose of paying unemployment compensation insurance. There seems to be no case, either in AMJ or ALR or in the annotations under the Utah Code that have had the problem of whether an employee who is also an officer is entitled to compensation when discharged as an employee but retains his position as an officer. The analogy above cited, as well as the one set forth in AMJ, however, should be helpful. For example, in the AMJ citation above cited it stated as follows:

“While the status of an officer of a corporation as an ‘employee’ thereof within the meaning of the Social Security and Unemployment Insurance Acts often presents a difficult problem, it seems clear that under both the Federal and State acts the mere fact that one is an officer or has an interest in the business, corporation, or firm alleged to come within the operation of the acts, does not itself preclude such person from being an employee within the meaning of the acts. In fact, the Federal and some of state acts provided that the term ‘employee’ includes an officer of a corporation.”

CONCLUSION

I regret that I have not more citations to present, however, this type case does not seem to have been decided before. The mere fact that it hasn't

been decided before, would not seem to me to preclude a decision that is necessary and essential to persons such as I who are being taken advantage of by state agencies. If we are employees for one purpose we are employees for another purpose. It seems consistent that if they desire to require the employer to pay unemployment compensation on officers who also serve in a dual capacity as employees, it is only fair and consistent to pay unemployment compensation when that same person is unemployed as an employee, even though he is not unemployed as an officer. To hold otherwise would be to authorize a form of penalty or taxation contrary to what the legislature intended when it enacted the law. It would seem that within the definitions of employment stated in Utah Code Annotated 35-4-22 that Ralph Child Construction Company constitutes an employing unit and Ralph E. Child himself as manager constitutes an employee.

I respectfully urge the court to consider the circumstance and to render a judgment either allowing the unemployment compensation remanded or requiring a refund of the unemployment compensation insurance collected. It seems that one or the other is mandatory.

Respectfully submitted,

RALPH E. CHILD

Appellant