1969

Juan S. Castro v. Department of Employment Security and Board of Review of The Industrial Commission of Utah : Brief of Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

JUAN S. CASTRO,

Appellant,

vs.

DEPARTMENT OF EMPLOYMENT SECURITY AND BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH,

Respondents.

Case No. 11355

BRIEF OF RESPONDENTS

VERNON B. ROMNEY
Attorney General
FRED F. DREMANN
Special Assistant
Attorney General
Attorneys for Respondents

HERBERT B. MAW
Attorney for Appellant

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CASES CITED

STATUTES

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STATEMENT OF CASE

Petition for review challenging the Department of Employment Security as affirmed by the Appeals Referee and the Board of Review of the Industrial Commission of Utah holding appellant, Juan S. Castro, to be disqualified from receiving unemployment compensation benefits under Section 35-4-5(d) UCA, 1953,

by reason of the fact that he was unemployed due to a stoppage of work which existed because of a strike in which he was involved.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the decision of the Board of Review and an order granting Appellant unemployment compensation benefits.

STATEMENT OF FACTS

The Appellant was employed by the Kennecott Copper Corporation in 1946 (TR-0019) and was still employed there on July 14, 1967 at the time of a stoppage of work which was caused by strike of Appellant's union, which strike was supported by picket lines (TR-0020). The Appellant, a member of striking union No. 485, United Steelworkers of America (TR-0020) served on the picket line on several occasions during the strike and returned to work at Kennecott at the end of the strike (TR-0024). At all times during the strike he maintained his seniority, his union membership and other company connected benefits (TR-0022). While working for Kennecott, the Appellant, for approximately ten years, had seasonal part-time employment with the Salt Lake Turkey Processing Company (TR-0022) and in 1967 he worked for that company from July to December (TR-0022), (TR-0024). Appellant

filed a claim for unemployment compensation benefits effective December 17, 1967 (TR-0045) when he was laid off by the processing company due to "Reduction of Force" (TR-0045). He was denied unemployment compensation benefits on the grounds that his unemployment at the time he filed was due to a stoppage of work which existed because of a strike against the employer by whom he was employed at the time he filed his claim (TR-0042).

STATEMENT OF POINTS

1. THE DECISION IS CONSISTENT WITH THE PURPOSE AND POLICY OF THE EMPLOYMENT SECURITY ACT.

2. APPELLANT WAS AN EMPLOYEE OF KENNECOTT COPPER CORPORATION DURING THE ENTIRE PERIOD OF THE STRIKE.

3. HE WAS UNEMPLOYED DUE TO THE STOPPAGE OF WORK WHICH EXISTED BECAUSE OF THE STRIKE IN WHICH HE WAS INVOLVED.

ARGUMENT

POINT I

THE DECISION IS CONSISTENT WITH

THE PURPOSE AND POLICY OF THE EMPLOYMENT SECURITY ACT.

The Utah Employment Security Act was adopted in recognition that:

> "35-4-2. . . . Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This objective can be furthered by operating free public employment offices in affiliation with a nationwide system of employment services, by devising appropriate methods for reducing the volume of unemployment and by the systematic accumulation of funds during periods of employment from which benefits may be paid for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of unemployment. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police power of the state, for the establishment and maintenance of free public employment offices and for the compulsory setting aside of unemployment reserves to be used for the benefit of unemployed persons."

The Legislature recognized that certain unemployments arise by reason of voluntary acts of individuals and that, therefore, disqualifications should be assessed. Section 35-4-5 was enacted to establish conditions of ineligibility in cases of voluntarily leaving work, discharge for misconduct, failure to apply for or accept suitable work, and for individuals who became unemployed due to stoppages of work which existed because of strikes. Section 35-4-5(d) provides:

> "An individual shall be ineligible for benefits or for purposes of establishing a waiting period:
> . . .
>
> "(d) For any week in which it is found by the commission that his unemployment is due to a stoppage of work which exists because of a strike involving his grade, class, or group of workers at the factory or establishment at which he *is* or *was* last employed." (Emphasis added.)

This Court in the case of Gus P. Lexes, et al vs. The Industrial Commission of the State of Utah, Department of Employment Security, and American Smelting and Refining Company, 121 Ut. 551, 243 P. 2d 964, said:

> "The 'Utah Unemployment Reserve Law' as it was first known was enacted in 1953, Chapter 38, Laws of Utah 1935. Section 1 declared that the policy of the act was to lessen the burden of in-

voluntary employment 'which now so often falls with crushing force upon the unemployed worker and his family.' The act was designed to establish 'financial reserves for the benefit of persons unemployed through no fault of their own.' At that time this nation was in the throes of a great economic depression. The purpose of providing unemployment benefits was twofold: first, to alleviate the need of the worker and his family who found no market for their services and were deprived of wages by the general business collapse; second, it was a 'pump-priming' measure to provide increased buying power and thereby stimulate our economic system. In present times of prosperity, neither of these objectives would be served by granting benefits to the present claimants. Future times may present occasions when the cushioning effect of unemployment compensation may arrest the course of a narrowing downward economic spiral so as to make pump-priming in its raw form unnecessary. Labor's right to seek higher wages by concerted lawful economic pressure is recognized but the labor force which chooses to strike in order to enforce its demands cannot be classified as involuntarily unemployed. It is specifically disqualified from receiving compensation by statute. Those who are in sympathy with the striking body and stay away from their available jobs in order to uphold the reciprocal pact amongst laboring forces to honor each other's picket lines cannot logically be placed in any other category. We believe that consideration of the background and general purpose of unemployment legislation is what has prompted the courts to hold that the decision of an employee not to cross a picket line which surrounds his place of work cannot be deemed an involuntary act."

It appears clear that it is the policy of the Act to deny benefits to an individual who remains attached to an employer where there is a stoppage of work due to a strike in which the individual is directly involved.

POINT II

APPELLANT WAS AN EMPLOYEE OF KENNECOTT COPPER CORPORATION DURING THE ENTIRE PERIOD OF THE STRIKE.

Section 35-4-5(d), supra, denies benefits to the individual with respect to any week during which he *is* still employed by a struck employer where he is involved in the strike.

The first question that arises is whether or not one who is on strike is no longer to be considered an employee of the struck employer. The authorities appear to be quite unanimous that the relation of employee and employer is not terminated by reason of the strike.

In Benny Cruz vs. Department of Employment Security, 453 P. 2d 894, April 29, 1969 (involving a benefit claimant under a practically identical fact situation as is applicable to this Appellant), this court said:

> "On April 20, 1967, less than three months before the strike, he went with the sand company

on an eight-hour basis, in addition to his work with Kennecott. He continued on with the sand company after the strike until December 20, 1967, when he was laid off because of inclement weather. He did not quit his job with Kennecott, and he returned to work there after about three months' unemployment after leaving the sand company. From the inception of the strike until final settlement (eight months) he retained his seniority rights and other benefits incident to his employment with Kennecott, he himself paying premiums on his group insurance policy, etc. He had no such rights or obligations, and no such fringe benefits with the sand company. He conceded he would return to Kennecott when and if the strike were settled, which he did. Under the facts of this case there seems to be no question as to an uninterrupted employee-employer relationship during the strike, although there was a work stoppage . . ."

In Jeffery-DeWitt Insulator Co. vs. National Labor Relations Bd., 91 F. 2d 134 (4 Cir., 1937), 112 A.L.R. 948, the court stated:

"It has long been recognized by the law, as well as in common understanding, that the relationship existing between employer and employee is not necessarily terminated by a strike. As was well said by Judge Baker, speaking for the Circuit Court of Appeals of the Seventh Circuit, in Michaelson vs. United States, 291 F. 940, 942: 'In the case of a controversy over wages and conditions of work in a private and local industry we agree with counsel for plaintiffs in error that a "strike" does not of itself terminate the relation

of employer and employee. A controversy arises, and the employees, then at work, say to their employer: "We shall stop work until you are in what we may consider a more reasonable state of mind. We shall deprive you of our labor as a legitimate means of exerting economic pressure to induce you to yield. If we go out, we shall remain at hand, ready to negotiate with you concerning fair wages and working rules, and ready to return to work the moment we can agree." If, by reason of a failure to agree, the employees stop their work, a "strike" is on. They are no longer working and receiving wages; but, in the absence of any action other than above indicated looking to a termination of the relationship, they are entitled to rank as "employees," with the adjective "striking" defining their immediate status.'
* * *

"In State vs. Personett, 114 Kan. 680, 220 P. 520, 524, in sustaining a conviction under the Kansas Industrial Court Act, the Supreme Court of that state said: 'It may be noted that a strike is not a quitting of employment. The man who goes out on a strike does not profess to quit his employment. He still lays claim to his position and asserts a right to go back and take it at more advantageous terms'."

See also Iron Moulder's Union vs. Allis-Chalmers Co. (C.C.A. 7th) 166 F. 45, 52, 20 L.R.A. (N.S.) 315; Tri-City Central Trades Council vs. American Steel Foundries (C.C.A. 7th) 238 F. 728, 733; Dail-Overland Co. vs. Willys-Overland, Inc. (D.C.) 263 F. 171, 188.

In Burger vs. Unemployment Compensation Board of Rev., 168 Pa. Super 89, 77 A. 2d 737, the Court said:

> "Where there is a labor dispute, whether it takes the form of a strike or a lock-out, the relation of employer and employee is not severed, but continues until the dispute is settled or until the employee secures other employment."

POINT III

HE WAS UNEMPLOYED DUE TO THE STOPPAGE OF WORK WHICH EXISTED BECAUSE OF THE STRIKE IN WHICH HE WAS INVOLVED.

Since the strike does not terminate the relation of employer-employee, we go to the next question, does the continuance or the taking of other employment after the beginning of the stoppage of work which exists because of the strike dissolve the employer-employee relationship?

This Court, in Benny Cruz vs. Department of Employment Security, supra, passed on the specific question of the effect of supplemental or intervening employment on the matter of the claimant's eligibility for unemployment compensation benefits.

> "The question arises as to whether an employee out on strike against his employer and who takes

a job *after* the strike with another employer, is qualified for benefits if the latter employer lets him go for some reason with which the employee had nothing to do. Generally, paraphrasing the statement in Calvin B. Scott v. U. C C. in showing qualification for benefits the applicant must 1) show he is not disqualified, 2) that the fact of employment after the strike alone does not sustain such burden, 3) the new employment must be intended to be permanent, with an intention *not* to return to his former employment, 4) must be in good faith and of a type the employee performed theretofore, 5) accomplished and undertaken by complete severance from his former employment.

"Applying the guidelines above, we can come to no other conclusion except had Cruz gone with the sand company *after* the strike, such employment would not have made him eligible after being let out by the sand company, under the facts of this case, the guidelines mentioned and the authorities cited. The circumstance of double employment at the time of the strike under the facts and concessions here, should not serve to transmute disqualification into qualification. It takes little imagination to conclude that were we to decide otherwise, dozens or more employees, anticipating a strike, by the simple device of obtaining a second job a week or so before the strike, with a subsequent reduction in force by the second employer, could become eligible for benefits. We do not believe such a conclusion would be compatible with the letter and spirit of the statute."

In Hopkins vs. California Employment Com., 24

Cal. 2d 744, 151 P. 2d 299, 154 A.L.R. 1081 Annot. decided in 1944, the court stated:

> "Section 56(a) of the California Unemployment Insurance Act, under which claimants were originally disqualified, provides that 'an individual is not eligible for benefits for unemployment, and no such benefit shall be payable to him * * * (a) If he left his work because of a trade dispute and for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed. Stats. 1939, ch 7, Sec. 4, Deering's Gen. Laws, 1939 Supp. Act 8780d, Sec. 56(a). A claimant is thus ineligible for benefits if the trade dispute is the direct cause of his continuing out of work. If a claimant who leaves his work becausee of a trade dispute subsequently obtains a permanent full-time job, however, he is no longer out of work and the continuity of his unemployment is broken. If he loses his new job for reasons unrelated to the dispute, he is unemployed by reason, not of the trade dispute, but of the loss of the new employment. . . .
>
> "The termination of a claimant's disqualification by subsequent employment thus depends on whether it breaks the continuity of the claimant's unemployment and the causal connection between his unemployment and the trade dispute. Such employment must be bona fide and not a device to circumvent the statute. [Citing cases.]
>
> "It must sever completely the relation between the striking employee and his former employer. The strike itself simply suspends the employer-employee relationship but does not terminate it. [Citing cases.] Mere temporary or casual work

does not sever this relationship for it does not effectively replace the former employment. The worker expects its terminatoin and does not look forward to that continuity of work and income that characterizes permanent employment. [Citing cases.] Similarly, part-time employment of a claimant does not break the casual relation between the trade dispute and his unemployment. [Citing cases.] Only permanent full-time employment can terminate the disqualification. If bona fide, it completely replaces the claimant's former employment, terminating whatever relation existed between the claimant and his former employer. It must be judged prospectively rather than retrospectively, with regard to the character of the employment, how it was obtained, and whether it was in the regular course of the employer's business and the customary occupation of the claimant. [Citing cases.] In the absence of special circumstances, employment of a short duration admits of an inference that it was not entered into in good faith with the intent that it be permanent.

* * *

"In the remaining cases the commission could not reasonably conclude that the claimants had obtained permanent full-time employment and had completely severed their relations with their former employers. The undisputed evidence shows that the work secured by the claimants during the hotel strike was stop-gap employment and that the claimants had not forfeited their employment in the struck establishments."

In 1960 the matter was before the Pennsylvania court in Oluschak vs. Unemployment Compensation Bd.

of Review, 192 Pa. Super. 255, 159 A. 2d 750, and we quote from their opinion:

> " . . . The record indicates that the claimant, while on strike at Westinghouse, sought and obtained employment at H. W. Butterworth & Sons, Philmont Road, Bethayers, Pa. The employment began on October 23, 1955, and ended by lay-off on March 9, 1956. He did not at any time sever his employment or resign from the job at Westinghouse nor did he give to his employer or anyone else any indication of an intention so to do. He testified that the new job paid $1.75 per hour plus bonus, on piece work, and his job at Westinghouse paid, prior to the strike, $2.10½ cents per hour; that it was similar work; that 'I said I would stay if the job was dependable because with the bonus, it would be the same as I was getting and I said if I made out, I would stay there'; and that he joined the union but continued his membership in the Westinghouse union. He remained on the Westinghouse payroll as one of the striking employees, with all the benefits of fifteen years seniority, insurance and other incidents of that employment. After said strike, he was recalled, and with other employees of Westinghouse received the additional benefits won by the strike.
> * * *
>
> "The burden was upon the claimant to prove he was entitled to unemployment compensation benefits. Smith Unemployment Compensation Case, 1950, 167 Pa. Super, 242, 74 A. 2d 523. An unemployed person because of a labor dispute, can only recover unemployment compensation

when he can prove that he is not directly interested, and that he is not a member of the striking union and that he is not in the same grade or class of workers as the strikers. Curcio Unemployment Compensation Case, supra; Stahlman Unemployment Compensation Case, 1958, 187 Pa. Super, 246, 144 A. 2d 670. In this case the claimant must establish, that although at the time of the strike he was disqualified under Section 402(d), he now comes within subsections (1), (2) and (3), by showing he obtained a new job and severed his employment with Westinghouse. The evidence of an intervening job, standing alone, is not sufficient. Such a job could be stop-gap, part-time or temporary employment accepted during the strike for economic reasons. The claimant could continue to be 'participating in, or directly interested in, the labor dispute which caused the stoppage of work' and could still be 'a member of an organization which is participating in, or directly interested in, the labor dispute which caused the stoppage of work' and could be in the same grade or class of workers as the strikers. His recall at the end of the strike by Westinghouse is evidence of his continued membership in the union and of the maintenance of his employee status on the Westinghouse payroll, from which it can be inferred that he continued to be 'directly interested' in the outcome of the labor dispute."

The Idaho Supreme Court held in Ankrum vs. Employment Security Agency (Idaho 1961), 361 P. 2d 795, that the burden is upon a claimant to establish his eligibility for benefits whenever his claim therefor is questioned.

When Appellant was laid off by the Salt Lake Turkey Processing Company due to a reduction of force, he continued to be unemployed by reason of the strike in which he was involved and through which he hoped to receive future higher pay and other benefits. He stood ready to work for Kennecott when the strike ended. He recognized that he was an employee of Kennecott at all times and that as such he retained his seniority and other rights (TR-0022), (TR-0026). In the cases discussed herein, the courts were looking to see what effects intervening, supplemental or stop-gap employment had on the intentions of the appellants with reference to their claims for unemployment compensation benefits. In other words, did they intend to substitute the new or supplemental employment for the struck employment on a permanent basis.

In Calvin B. Scott vs. UCC, and Anaconda Co., 141 Mont. 230, 376 P. 2d 733, decided under identical statutory provisions, the court examined the leading cases in the several states including a number of those cited by Respondent and concluded:

> "1. The burden is upon claimant to show he is not disqualified.
>
> "2. The taking of other employment by a claimant while on strike, standing alone, is not sufficient to establish that burden.
>
> "3. The new employment must not be of the stop-gap, part-time or temporary type, but rather

of the permanent full-time type without intention of returning to the struck employer at the termination of the strike.

"4. The new employment must have been undertaken in good faith and be of the type formerly engaged in by the employee or for which he would be skilled and competent.

"5. There must exist a complete and bona fide severance of his employment with the struck employer."

In the Scott case, supra, all of the claimants were members of the union that called the strike with the employer and caused their unemployment; each found some form of new employment during the course of the strike and then, upon losing or quitting same before the end of the strike, filed for benefits. All responded to notices of recall at the conclusion of the dispute. The decision of the court was that:

"A strike does not sever the employer-employee relationship. The burden of showing that this relationship is severed by new employment is upon the claimant. At best, claimants evidenced reluctance to quit or renounce their seniority rights with the struck employer and most admitted that they viewed their new work as stop-gap employment and that they did return at the end of the strike. Therefore, under the substantial-evidence rule, the lower courts were without authority to reverse the benefit denials imposed by the Commission."

In the instant case, the Appellant testified that he

considered himself to be an employee of Kennecott Copper Corporation all during the period of the strike and that he retained his several rights as an employee of Kennecott. It is clear from the record that his employment with Salt Lake Turkey Processing Company was secured in order to supplement and not be a substitute for his employment with Kennecott. There is only one reason why the Appellant was unemployed and continued to be unemployed after he was laid off by the Salt Lake Turkey Processing Company and that reason was that the Appellant, his union and other unions, were involved in a strike at Kennecott Copper Corporation which brought about a stoppage of work. In the Scott case, supra, the court said:

> "Having reviewed the records before us of the various claimants, it appears that in no case did the claimant sustain his burden of proving he was not disqualified, and in no case did a claimant show a complete and bona fide severance of his employment with the struck employer.
>
> "Further, no claimant proved that he had no intention of returning for work for the struck employer at the termination of the strike."

The Appellant, in his brief, (page 2) admits that he is not entitled to unemployment compensation from his employment at Kennecott but contends that he is entitled to such compensation from his work with Salt Lake Turkey Processing Company.

The Employment Security Act, Chapter 35-4,

U.C.A., contains no provisions which would allow a benefit computation which would accomplish such result. His unemployment was directly due to the strike at Kennecott.

From the record and the testimony, it is clear that the Appellant considered his employment with Salt Lake Turkey Processing as secondary and supplementary and he considered himself to be a regular permanent employee of Kennecott Copper Corporation.

Therefore it is clear that the Department, as affirmed by the Board of Review, had no choice in view of the obvious intentions of Appellant but to deny benefits on the grounds that the Appellant was, at the time he filed his claims for unemployment compensation benefits, an employee of Kennecott Copper Corporation and that the only reason he was unemployed was because there was a stoppage of work due to a strike in which he was involved.

CONCLUSION

The decision of the Board of Review of the Industrial Commission denying unemployment compensation to the Appellant was founded upon substantial evidence and its decision should be affirmed.

Respectfully submitted,

ATTORNEYS FOR RESPONDENTS:

Vernon B. Romney
Attorney General

Fred F. Dremann, Special
Assistant Attorney General