1969

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

IN THE SUPREME COURT OF THE STATE OF UTAH

JUAN S. CASTRO, Plaintiff. vs DEPARTMENT OF EMPLOYMENT SECURITY, BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, Defendants.	APPELLANT'S BRIEF Case No. 11355

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Cases and Authority

STATEMENT OF FACTS

During the past ten years appellant has held two full time jobs with different employers. One was with Kennecott Copper Company on which he worked a night shift, and the other with Salt Lake Turkey Processing Company on which he worked during the day time. The Kennecott job is a year around operation while the turkey processing one is seasonal,- functioning during the period from July to December of each year.

On July 10th, 1967 appellant commenced his usual annual employment at the turkey plant in Salt Lake City, Utah where he worked steadily until December 19,1967, at which time the plant closed for the season. Four days after his usual employment at the turkey plant commenced, appellant and the other employees of Kennecott went on strike. The strike continued for nine months.

Appellant admits that because of the strike he is not entitled to unemployment compensation from his employment at Kennecott. On the other hand, he contends that he is entitled to such compensation from his work with Salt Lake Turkey Processing Company.

Shortly after the seasonal termination of his employment at the turkey plant, appellant applied to respondent for unemployment compensation. His application was denied

because he had not terminated his employment with Kennecott after the commencement of the strike. That decision was appealed to the Appeals Referee of respondent and then to the Board of Review. Both in turn sustained the original decision which denied him compensation.

This appeal to the Supreme Court of Utah is from the split decision of the Board of Review. Two of the members of that board, Carlyle F. Gronning and Elliott Y. Gates, in their decision stated as follows:

> "We base our decision largely on the case of Calvin B. Scott vs Unemployment Compensation Commission and Anaconda Company, Montana Supreme Court, 1962, 141 Mont. 230, 376 P.2d.733. In its decision, that court digested the cases in the several states, and on the basis of leading federal and state cases, concluded first that a strike does not terminate the relation of employer-employee, and second that in the absence of an expressed intention or overt act on the part of the claimant to specifically terminate his relationship with the struck company, intervening employment of a temporary or stop-gap nature did not dissolve the employer-employee relationship". (Page 0006 of Record)

The third member of the Board of Review, H.B.Egbert, dissented on the ground that the Montana case which was the basis of the majority opinion, was not in point. He stated:"I dissent; I take the position that in the Montana case the claimants were working in stop-gap employment, and that in the instant case the claimant, Castro, was working for an employer for whom he had worked during the time he was actually working at Kennecott Copper Corporation. Therefore, in the instant

case the employment of the claimant did not correspond to the employment in the Montana case, and the Utah employment was not stop-gap employment within the meaning of that decision." (Page 0007 of Record)

THE ISSUE

The only issue of this case is whether a regular employee of two separate employers who have no connection with each other, is barred under the statutes of this state from receiving unemployment compensation from one of them solely because he is on strike with the other one.

ARGUMENT

The determination of this issue seems to depend on a judicial definition of temporary or stop-gap employment. The case of Calvin B. Scott vs Unemployment Compensation Commission et al (141 Mont 230; 376 P2d.733) upon the Board of Review based its decision in the instant case was one wherein the plaintiff sought and found temporary employment while on strike with Anaconda for the purpose of carrying him over until the strike ended. His intention was to give up his temporary work when the strike was settled and to return to his regular job at Anaconda. The Court held in that case that the provisions of the Montana statute which disqualified a striking employee from receiving unemployment compensation for his

from receiving compensation from a temporary stop-gap job during the strike, which he intended to give up when the strike ended.

It is the contention of the appellant in the inst-ant case that the Montana case is not in point for the reason that Castro's employment at the turkey procession plant was not stop-gap employment. It was a permanent job on which he had worked for a period of more than ten years. If there had been no strike at Kennecott during 1967, he would have performed the same work at the turkey plant as he had done previously. His work at the turkey plant was in no way, directly or indirectly, related to his work at Kennecott or with the strike at Kennecott. Appellant contends that the facts of the case support the conclusions of the minority opinion of the Board of Review.

Section 35-4-5(d), Utah Code Annotated, 1953 is as follows:

5. "An individual shall be ineligible for benefits or for the purpose 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" (P.0032)

This section makes him ineligible for compensation from Kennecott, but not from his last place of employ-

ant, The Salt Lake Turkey Processing Company plant.

In the case of Hopkin vs California Employment Commission, 151 P2nd 229, the court held that if a striking employee obtains work during a strike from another employer with an intention of discontinuing his employment with the struck employer, he becomes elligible for unemployment compensation with the second employer regardless of the strike. In other words, if employment obtained during a strike is not intended to be temporary or stop-gap employment by the employee, but is intended to be a permanent job, the disqualification of the strike does not carry over to the new employment.

Applying that doctrine to the instant case, if Castro intended that his work at the turkey processing plant be a permanent job, he is not disqualified by the strike at Kennecott from receiving compensation through his employment with the turkey processing plant. The test is whether the employment obtained during the strike is intended to be permanent and not merely stop-gap work. Certainly that was the intention of Castro. The stop-gap test should apply to his turkey job as definitely as it would if he had single employment instead of double employment.

The facts in the instant case are somewhat unique because of the small number of people who have two permanent jobs. For that reason, there appears to be no direct judicial determination of the issue in point. Certainly the legislature of Utah did not have double full time employment in mind when it enacted its unemployment compensation legislation. Appellant believes that there is no legislation in this state which was intended to deprive a full time employee of two separate employers from receiving unemployment compensation from either employer because of a strike against the other one.

CONCLUSION

Appellant, therefor, prays that the majority opinion of the Board of Review be reversed and that he be awarded unemployment compensation from his employment with Salt Lake Turkey Processing Company.

Respectfully submitted,

Attorney for Appellant.