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Wear-ever Aluminum, Inc. v. Board of Review of the Industrial Commission of Utah, Department of Employment Security : Brief of Defendant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

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WEAR-EVER ALUMINUM, INC.,

Plaintiff,

vs.

BOARD OF REVIEW OF THE IN-
DUSTRIAL COMMISSION OF
UTAH, DEPARTMENT OF EM-
PLOYMENT SECURITY,

Defendant

no Court, Utah,

No.
9321

BRIEF OF DEFENDANT

Original Proceeding to Review a Decision of the
Board of Review of the Industrial Commission

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IN THE SUPREME COURT of the STATE OF UTAH

WEAR-EVER ALUMINUM, INC.,
Plaintiff,

vs.

BOARD OF REVIEW OF THE IN-
DUSTRIAL COMMISSION OF
UTAH, DEPARTMENT OF EM-
PLOYMENT SECURITY,
Defendant

No.
9321

BRIEF OF DEFENDANT

Original Proceeding to Review a Decision of the
Board of Review of the Industrial Commission

STATEMENT OF CASE

This is a matter on original proceeding to review a decision of the Board of Review of the Industrial Commission of Utah, which affirmed a decision of the Appeals Referee of the Commisison that the plaintiff, Wear-Ever Aluminum, Inc., is liable for contributions to the Utah Unemployment Compensation Fund on monies paid to certain distributors. The question posed for determination is whether or not the said distributors are in "employment" in their relationship with

the Wear-Ever Aluminum, Inc., as defined by the Utah Employment Security Act, Section 35-4-22 (j) (1), Utah Code Annotated 1953. The issue as to whether or not such services might be excluded under the provisions of Section 35-4-22 (j) (5) if the decision of the Board of Review is affirmed in this action is not raised.

STATEMENT OF FACTS

As a result of several individuals having filed claims for unemployment compensation benefits and having reported earnings from the Wear-Ever Aluminum, Inc., during their base period, the Department investigated the circumstances surrounding the performance of services by "distributors" of Wear-Ever Aluminum, Inc. The Department determined that the distributors were performing services for the Wear-Ever Aluminum, Inc., and upon the basis of earnings and information submitted by the Company, the Department made an assessment of unemployment compensation contributions. This matter arises out of that assessment.

The Wear-Ever Aluminum, Inc., a wholly owned subsidiary of the Aluminum Company of America, has, since 1950, been qualified to do business in the State of Utah and at the time of the hearing and for some time prior thereto, the Company maintained an office in Salt Lake City. Operations are carried on in the Utah area, and apparently elsewhere, by the Company under the trade name of "Cutco," which appears to be the name of the sales division. At its Salt Lake Office, a salaried employee who was designated as Division Sales Manager, has been regularly reported to the Department of Employment

Security for the purposes of unemployment compensation coverage and contributions have been paid on his earnings. The Division Sales Manager was directly responsible to, and reported to a Specialty Manager in charge of distributor relations, whose office is located in New Kensington, Pennsylvania, the Company headquarters (Tr. 039).

The primary function of the Division Sales Manager is that of obtaining distributors. The Division Sales Manager obtains these primarily by personal contacts, through recommendations from other distributors, recommendations from customers, and newspaper advertising (Tr. 063). After having obtained the general facts pertaining to a prospective distributor, the information is forwarded to the home office for the attention of the Specialty Manager in charge of distributor relations, who approves or disapproves the granting of a distributor's agreement, Company's Exhibit No. 1, (Tr. 095) which is signed by the distributor and the Division Sales Manager. Under the terms of the agreement, which in each case runs until December 31 of the current year subject to renewal, the distributor agrees to *solicit orders for the sale of the Company's cutlery products*.

The distributor agrees that he will solicit said orders in a specified territory. The Company agrees to provide the distributor the necessary catalogues, price lists, order forms, and other materials. These remain the property of the Company except for those orders, etc., which have been used and the balance must be returned upon the termination of the distributor's termination with the Company.

As security for any amounts which might be due from the

distributor to the Company upon termination of his relationship the distributor must at the time he signs the agreement, sign an acceptable bond and pay the premium thereon. The Company agrees to ship to the customer with reasonable promptness all products included in orders sent in by the distributor *that have been accepted by the Company*. The Company allows discounts from its current retail price lists. These discounts range from 30 per cent in the case of a cash sale, to 20 per cent on conditional sales wherein the title remains in the Company until it is completely paid for. If and when it is completely paid for on a conditional sale, the distributor receives an additional five per cent, based on the retail price. The Company agrees to pay the distributor once a month in a net amount which is due him. In other words, when the down payment which is collected by the distributor is not equal to or in excess of the percentage discount which he is allowed on the retail price, then the Company in the case of a deficit, collects the amount from the customer and remits once each month.

Although counsel for plaintiff states that the distributor is not required to remit any monies collected to the Wear-Ever Aluminum, Inc., we presume he would agree that if the distributor collects more than the amount to which he is entitled as a discount, he would be required to remit the balance to the Company as part of the amount due on the sale. In all cases where the distributor sells the merchandise and does not obtain total payment in cash, the record shows that the distributor is required to submit a completed form, Company's Exhibit No. 2, (Tr. 096) "Conditional Sales Contract," which contract form shows the amount collected by the distributor

as a down payment, the total price, including state and local sales taxes, and the unpaid balance, together with a statement as to the payments which are to be made in the future on the unpaid balance. The "Conditional Sales Contract" provides that the title to the merchandise is in the New Method Finance, which is a division of Wear-Ever Aluminum, Inc., with the New Method Finance being designated as "seller." If the Conditional Sales Customer fails to pay the balance of the contract in full, any loss by reason of his failure to pay is absorbed by the Company and is not charged to the distributor. Any repossessions which are made are made by the Division Sales Manager and in no case are distributors required to make collections or repossessions (Tr. 069).

A Division Sales Manager (Tr. 066-067) conducts sales meetings for the distributors, attendance at which is not compulsory. He provides Company literature which may help them increase their sales. He frequently in the early part of the salesman's relationship with the Company, goes out on sales contacts with him and at that time, if the distributor is making the demonstration and is successful in making the sale, the distributor gets his discount, which is set up under the contract; but if the Division Sales Manager is making the demonstration when they are both on such call and a sale is made, the Division Sales Manager is credited with the sale.

At the time of the hearing in this matter, none of the distributors maintained offices or formal places of business (Tr. 068) and none of them at that time maintained any telephone sales listings as distributors. The only such current listing being the telephone listing of the Company in Salt Lake City, which was the office of the Division Sales Manager.

There is no dispute as to the fact that the distributors were free to come and go as they pleased; free to work in various other areas in addition to the one designated in their agreement; free to give premiums at their own (the distributor's) cost; free to work or not work as they saw fit; and generally free from direction and control over the details of their performance.

About 50 per cent of the orders which are solicited by the distributors are turned into the Salt Lake Office of the Company from whence they are forwarded to the Pennsylvania headquarters for shipment of the merchandise. The other 50 per cent of the orders go direct from the distributor to the Pennsylvania office. Monies which accompany the orders are sent by check to the headquarters' office in Pennsylvania (Tr. 072). When the individual distributor has aggregate sales of \$1500 he is notified by the Company that he will receive an additional remuneration or commission (Tr. 074). When a distributor's sales appear to drop, the Division Sales Manager occasionally calls on him and if the distributor wishes it, the Sales Manager will give him help in an attempt to increase the sales (Tr. 074, Tr. 086).

All sales taxes are computed on the suggested retail price and the payment of the taxes to the state or local governments is handled entirely by the Company (Tr. 076).

The Division Sales Manager, when testifying as a witness, stated that he knew of no instance in which a distributor carried his own Conditional Sales Paper (Tr. 077).

POINT ON WHICH THE DEFENDANT RELIES

1. The Wear-Ever distributors performed services for the Company for wages within the meaning of the Utah Employment Security Act.

ARGUMENT

THE WEAR-EVER DISTRIBUTORS PERFORMED SERVICES FOR THE COMPANY FOR WAGES WITHIN THE MEANING OF THE UTAH EMPLOYMENT SECURITY ACT.

The sole issue which has been raised by the plaintiff in its appeal is that of whether or not the distributors under contract to the Wear-Ever Aluminum, Inc., are in "employment" within the meaning of the Employment Security Act, Section 35-4-22 (j) (1) Utah Code Annotated 1953, by reason of having performed personal services for wages within the meaning of that Act. Section 35-4-22 (j) (1) provides:

" 'Employment' means any service performed prior to January 1, 1941, which was employment as defined in the Utah Unemployment Compensation Law prior to the effective date of this act, and subject to the other provisions of this subsection, service performed after December 31, 1940, including service in interstate commerce, and service as an officer of a corporation performed for wages or under any contract of hire written or oral, express or implied." (Italics ours).

No issue has been raised as to whether if it is determined that services are performed for Wear-Ever Aluminum, Inc., such services might be excluded by the A, B, C, exclusion tests of Section (j) (5).

In the case of the *Fuller Brush Company v. Industrial Commission of Utah and Lamont Holst*, 99 U. 97, 104 P. 2d 201, the court in the majority opinion after discussing the matter of the relationship between Holst and the Company stated:

“In other words, was the relationship between plaintiff and claimant that of employer and employee, or that of vendor and vendee?”

In order to establish a proper perspective of the Fuller Brush case as compared to the instant case, it is necessary to briefly restate the facts in the Fuller case. The Fuller Brush Company was engaged in the manufacture of brushes at Hartford, Connecticut. It sold its brushes on a direct from the factory to the customer system through local dealers. It maintained some 12 or 13 distributor warehouses throughout the United States from which goods ordered by its dealer salesmen were shipped. In carrying on this merchandise method, the Company maintained District Managers at strategic points whose duties it was to make contracts with the dealers. The dealers were required to sign “Dealer’s Agreements.” Under the terms of the Dealer’s Agreement, the claimant Holst, and others in similar positions, were permitted to purchase the Company’s merchandise at its current wholesale price and were permitted, within 30 days after termination of the contract, to return the merchandise on hand and receive pay for it or credit at the wholesale price at which he purchased it. The dealer agreed to pay the Company for the merchandise he purchased with cash, or to make a cash deposit of \$200.00, or give the Company bond, etc.

The dealer, using a regular order book, ordered each week

a supply of brushes, etc., for resale. Generally he would pay for his purchases at the end of the week and receive a second week's supply. He would then deliver the purchases to the customers to whom he had sold them. As remuneration for his selling activities he retained the difference between the retail and wholesale price.

In the *Fuller Brush* case, after examining the circumstances surrounding the entire transaction, this court held that the relationship which existed between the Fuller Company and Holst was that of wholesaler-retailer, or vendor-vendee, and that Holst was not performing a service for Fuller Brush Company.

In the case of *Creameries of America, Inc., v. Industrial Commission*, 98 U. 571, 102 P. 2d 300, the court looked at the terms of the agreement between the Company and Robert L. Foss and their operating relationships and concluded that while Foss was supposedly buying dairy products from the Company, the purchasers of the products as a matter of actual fact were the consumer customers of the Company. The court, therefore, found in the *Creameries* case that there was a service being performed for the Company for wages. The court proceeded to apply the A, B, C, tests of Section 22 (j) (5).

In the instant case, the written agreement which forms the basis for the relationship between the Company and the distributor cannot in any sense be construed as to establish a vendor-vendee relationship. The agreement by its clear and well defined terms describes the relationship of the distributor to the Company as that of an "agent." It authorizes him to

hold himself out as duly authorized to effect the sale of the Company's (not the distributor's) cutlery products. The Company fixes the retail price of its merchandise and the agreement provides that sales made on a title retaining contract basis shall be on forms approved and furnished by the Company and the title to the merchandise remaining in the Company. The agreement also provides that all conditional sales are in the name of, and subject to approval of, the Company and that merchandise will be shipped, not to the dealer as was the case in the Fuller situation, but directly to the customer. The amount of discount or commission which will be received by the distributor on any of his sales depends to an extent on the method of payment by the customer under the terms of the agreement. The distributor receives 30 per cent of the retail price as his remuneration of the sale of the cutlery product if the product is paid for in cash at the time of the sale. If the product is paid for only in part at the time of the sale and the balance is to be collected by the Company under its title retaining note, the distributor is entitled to a discount or commission of only 20 per cent of the Company's retail price, with an added five per cent to be received when the total amount due on the contract has been paid.

The plaintiff in its Brief on page 16, in comparing the Wear-Ever situation with that existing in the case of the *Northern Oil Company v. Industrial Commission*, 104 Utah 353, 140 P.2d 329, stated:

"The written agreement between the Company and its distributors is in evidence (R. 95). There is no agreement except in accordance with the printed form (R. 24)."

We agree. We again would like to emphasize there is nothing in said agreement which empowers the distributor to do anything other than the primary activities of *soliciting orders for the sale of the Company's products*. We recognize in certain instances, according to the testimony of the Company's witnesses, that some distributors apparently buy some merchandise from the Company in advance of sales. There is nothing in the record to show that the so-called stocks of merchandise maintained by any of the distributors amounted to any more than a fraction of their total volume of business. The additional discount or commission on cash sales probably influenced the distributors to pay cash at the time the order went to the Company.

The Division Sales Manager testified (Tr. 072) that 50 per cent of the orders solicited by the distributors were transmitted to the Pennsylvania headquarters' office through his Salt Lake office and the balance of the orders were sent direct to the Pennsylvania office, and that monies collected by the distributors accompanied the orders in the form of either his or the distributor's checks. The contract, of course, provides that the Company will, once each month, pay the distributor the net amount which is due him.

The distributor's agreement in this case is in many respects similar to that involved in the case of *Singer Sewing Machine Company v. Industrial Commission*, 104 Utah 175, 134 P. 2d 479. In its opening statement in that case the court stated:

"In form the contract was an agency agreement. It authorized the salesman to hold himself out to the public as duly authorized to effect the sale of Company sewing

machines and vacuum cleaners and make collections on accounts entrusted to him. The salesman is not obligated either to make sales or to accept accounts for collection, but his contract was terminable at the will of either party. The Company fixes the net cash price of its new merchandise which must be paid to the Company; sales may be made on a title retaining contract basis on forms approved and furnished by the Company; the title being retained by the Company, the sales contract being forwarded to it . . . If he did not choose to make the installment collections, such were handled from the Company office . . . The salesman himself determined the amount of time he devoted to the business of the Company and where he maintained his place of business. He could handle other lines of merchandise for other firms and could sell his 'trade-in' machines in competition with the Company's new line."

In the *Singer* case the salesman would, if he so desired, make collections on Conditional Sales Contracts. In the instant case, the distributor was not asked to make collections on such contracts. This collection function was primarily carried out by direct mail between the Company headquarters and the customer, with an occasional request going to the Division Sales Manager to make the collection (Tr. 070). In the *Singer* case the Company fixed the net cash price of its merchandise which must be paid to the Company. In the instant case the Company in effect did the same thing. It fixed and published the current retail price of its cutlery products and the distributor's commission or discount was based on that fixed retail price. Because the type of sale, cash or conditional, affected

the discount rate, the amount received by the Company could vary according to whether or not the sale was made for cash or on terms.

Losses occasioned by the failure of the Company to collect the total amount due on conditional sales agreements are borne entirely by the Company. The distributor on a completed sale at the current retail price can suffer no loss. On a Conditional Sales Contract the distributor may fail to receive the five per cent additional discount if the customer fails to complete the contract as to payment. The distributor could of his own free will quote a lower sale price to the customer and thus receive a smaller discount. This, of course, is not a loss in the true sense of the word.

It is interesting to note that although the Division Sales Manager maintained a stock of merchandise at the Company store or office, the distributor was not encouraged to obtain the merchandise from the Division Sales Manager (Tr. 071). The Sales Manager testified that normally the distributor would write directly to the Company and receive his merchandise from the Company. The Division Sales Manager testified (Tr. 072) that when the total sales in his division reached a certain volume he received an increased remuneration and that in most cases when a distributor had sold \$1500 worth of merchandise he received an additional discount for any sales made by him after that point.

It would appear (Tr. 086) from the testimony of one of the distributors that from time to time the distributors request assistance from the Division Sales Manager in the sale of the Company's products and that upon such request being made,

the Division Sales Manager does help out the distributors. In addition the Division Sales Manager from time to time submits premium suggestions to the distributors.

Section 35-4-10 (i) Utah Code Annotated 1953 (Employment Security Act) provides in part:

“ . . . In any judicial proceeding 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. . . . ”

The decision of the Commission and the Board of Review is supported by a preponderance of the evidence. From the terms of the contract and the other facts submitted as part of the record, the Commission and the Board of Review could not have reached a different conclusion. The contract established a service relationship between the Company and the distributor whereby the distributor's primary function was that of *selling the Company's products*. In other words, as stated in the contract, it was that of "*soliciting orders*."

While counsel for the plaintiff admit that the distributor agreement is controlling their entire Brief substantially ignores the existence of the contract itself. We submit that the agreement between the Company and the distributors was one under which the Company obtained the services of the distributors to solicit orders for the Company's products and that nowhere in the said agreement or in the actual record is there any evidence of any intention to establish the relationship of wholesaler-retailer or vendor-vendee.

Inasmuch as the term "wages" includes all remuneration for services we feel that it is not necessary to argue at any length the proposition that the discounts or commissions received by the distributors are wages. This is a service relationship and the amounts received by the distributors are wages.

CONCLUSION

In conclusion we respectfully submit that the preponderance of evidence supports the Commission's findings that a service relationship exists between the distributors and the Company and such service constituted "employment" as defined in the Utah Employment Security Act and the decision of the Commission, therefore, as upheld by the Board of Review assessing unemployment compensation contributions against the Wear-Ever Aluminum, Inc., based on such services should be affirmed.

Respectfully submitted,

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