1964

United Steelworkers of America v. Department of Employment Security of the Industrial Commision of Utah: Respondents' Brief

Utah Supreme Court

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

Case No. 10085

UNITED STEELWORKERS OF AMERICA, LOCAL UNION NO. 5236, for and on behalf of its members employed by Columbia-Geneva Division, United States Steel Corporation, a corporation,

Appellant,

vs.

THE DEPARTMENT OF EMPLOYMENT SECURITY OF THE INDUSTRIAL COMMISSION OF UTAH AND THE BOARD OF REVIEW and COLUMBIA-GENEVA DIVISION OF UNITED STATES STEEL CORPORATION, a corporation,

Respondents.

RESPONDENTS' BRIEF

APPEAL FROM ADMINISTRATIVE DECISION, BOARD OF REVIEW, DEPARTMENT OF EMPLOYMENT SECURITY, INDUSTRIAL COMMISSION OF UTAH

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STATEMENT OF KIND OF CASE

This is a proceeding before the Department of Employment Security of the Industrial Commission of Utah wherein unemployment benefits are sought on behalf of 15 members of appellant Union.

DISPOSITION BY THE INDUSTRIAL COMMISSION OF UTAH

The Appeals Referee denied unemployment benefits to each of the 15 claimants. His decision was affirmed by the Board of Review.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the order denying unemployment benefits to the claimants.

STATEMENT OF FACTS

Appellant does not attack any of the findings of fact duly made and entered by the Senior Appeals Referee. (See R. 41-45.) Consequently, the facts there found and stated are controlling on this appeal. (See Title 35, Chapter 4, Section 10(c), Utah Code Annotated, 1953.) The factual summary contained in appellant's brief is accurate and supported by evidence in the record with the following exception: At page 6 of the brief, appellant states:

> "In the instant case, employees could have accepted the cut back grade and would have continued in employment. *However, an exact number of other employees with less seniority rights would have been laid off.*" (Emphasis added.)

No record citation purporting to support such statement is made as required by Rule 75 (p) (2) (2) of the Utah Rules of Civil Procedure, as amended. Furthermore, the record contains no admissible evidence which would support such a statement of fact. The only "evidence" at

all is the conclusion of witness Williams that if he had worked someone else would be "bumped" and that the state "would have to pay benefits to one man, one way or another".

On the contrary, Mr. Jones testified that at the time of the reduction in force here involved there was an unconfirmed rumor in the mill which all of the employees had heard that a third shift was contemplated. This rumor materialized in fact on October 27, 1963, just nine days after the reduction in force. The expansion of the work force from a two to a three shift operation obviously required an expansion of the work force (R. 69-70).

It also should be noted that this statement of alleged fact by appellant carries with it an inference that such employees hypothetically reduced would have been entitled to workmen's compensation. This inference appears to be the real peg upon which appellant seeks to hang this appeal. Even assuming for purpose of argument that "an exact number" of other employees would have been "laid off", it certainly does not follow that each of them would have been entitled to unemployment compensation. The record contains no evidence which would indicate that such hypothetical reduction would have resulted in the payment of unemployment compensation to anyone.

ARGUMENT

POINT I.

EACH OF THE CLAIMANTS HERE INVOLVED MANIFESTLY LEFT HIS WORK

VOLUNTARILY WITHOUT GOOD CAUSE; EACH THEREFORE WAS INELIGIBLE FOR BENEFITS DURING THE PERIOD HERE INVOLVED.

The case at bar turns upon the provisions of Title 35, Chapter 4, Section 5 (a), Utah Code Annotated, 1953, which provides:

> "An individual shall be ineligible for benefits or for purposes of establishing a waiting period:
> "Voluntarily Leaving Work.
>
> "(a) *For the week in which he has left work voluntarily without good cause, if so found by the commission,* and for not less than one or more than the five next following weeks, as determined by the commission according to the circumstances in each case, provided that when such individual has had no bona fide employment between the week in which he voluntarily left such work without good cause and the week in which he filed for benefits he shall be disqualified for the week in which he filed for benefits and for not less than one or more than the five next following weeks." (Emphasis added.)

Each of the claimants here involved was offered work in a lower pay classification. Each of them "could have continued in employment with the company if they had accepted the demotions as proposed and offered by the company" (R. 42). Claimant Hancock admitted that he elected to be laid off rather than to continue in his employment because (R. 116):

> "Maybe I did two or three times, but between the SUB and unemployment I seemed to do better

than staying on labor out there, when you figure gas and everything."

Claimant Downey stated that he refused to accept a continuation of his employment but instead elected to be unemployed for the reason that (R. 124):

> "Because I have got to figure that I have got to live the best way I can and I have always seen that I can make more money on the SUB and unemployment than I can working out there labor, which has been—they only work four days a week."

From evidence such as this, the Senior Appeals Referee found (R. 44):

> "Judging from the reasons for voluntarily becoming unemployed as given by some of the claimants, it appears that to a considerable extent they were motivated by the fact that they thought they would be better off with unemployment compensation, plus company's supplemental unemployment benefits, rather than continue at the reduced pay rate."

The Legislature, in adopting the Unemployment Compensation Act provided in Title 35, Chapter 4, Section 2:

> "As a guide to the interpretation and application of this act, the public policy of this state is declared to be as follows: 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 re-

> quires protection against this greatest hazard of our economic life. * * *"

Applying this legislative intent to the acts of the claimants here involved, their claim for unemployment compensation is without merit. Their unemployment here resulted from their own calculated volitional act. The legislature judiciously sought to alleviate the "crushing force upon the unemployed worker and his family" only when his unemployed status resulted from factors over which he himself had no control. This court in *Olf Nelson Construction Co.* v. *Industrial Commission,* 121 Utah 525, 243 P. 2d 951 expressly so held stating:

> "As we pointed out in the *Lexes* case, the declared policy of the Unemployment Reserve Law, as it was called in 1935, is to establish
>
> > 'financial reserves for the benefit of persons unemployed through no fault of their own.' "

In *Kennecott Copper Corporation Employees* v. *Department of Employment Security,* 13 U. (2d) 262, 372 P. 2d 987, this court re-stated the original legislative policy of coming to the assistance of the claimant only where his unemployment was "without fault on his part".

Although the precise question here involved has not heretofore been resolved by this court, it has been treated by the courts in a number of other jurisdictions. The rule emerging from the cases is stated as follows at 90 A. L. R. 2d at page 846:

> "A number of cases have involved the question whether an employee who in accordance with the

> seniority provisions of a collective bargaining agreement is transferred or offered a transfer, but refuses such transfer and leaves the service of the employer is 'voluntarily' unemployed. The general rule of these cases would appear to be that the employee offered a lower-paying job when there is no longer work available in his regular classification must take such a job or be considered 'voluntarily' unemployed. It must be noted, of course, that in these cases the Union's part in the transaction is to protect the employee from dismissal for lack of work, and where the employee, rather than take advantage of this protection, chooses to take his chances on doing better elsewhere, he has little ground for complaint."

In *Goebelbecker* v. *State* (1958), 53 N. J. Super. 53, 146 A. 2d 488, a claimant refused to accept a demotion from $2.77 per hour to $2.32 per hour. Because of the difference in the disqualification period under the New Jersey statute between "work refusal" and a "voluntary quit", the claimant there asserted that his refusal constituted a "work refusal", not a "voluntary quit". Whether a work refusal or a voluntary quit under the Utah statute is, of course, immaterial inasmuch as the same disqualification period applies to each. However, the court in the *Goebelbecker* case ruled that the refusal to accept demotion constituted a voluntary leaving of employment stating:

> "This argument is without merit. The relationship of employer and employee was never severed by the employer; appellant remained on the company's payroll and retained both his seniority and the right to continue work at another job in his family group . . . The Act was not intended to of-

> fer benefits to workers as an alternate to accommodating their employers changed operations. Ordinary common sense as well as a consideration of the underlying purposes of unemployment compensation require us to hold that claimant left work voluntarily rather than that he refused to accept suitable new employment.
>
> "* * *
>
> "The burden is on the claimant to establish a justifiable reason or excuse for his failure to accept the Croacher position. Good cause means cause sufficient to justify an employee's voluntarily leaving the ranks of the employed and joining the ranks of the unemployed."

The Wisconsin Supreme Court in *Dentici* v. *Industrial Commission,* 264 Wis. 181, 58 N. W. 2d 717, 720 (1953) entered a similar ruling in a case in which a claimant refused to accept an assignment involving reduced earnings in another department stating:

> "* * * Here it must be held that there was a voluntary termination of his employment by the employee, because the evidence shows that by his acts he intended to leave his employment rather than accept a transfer."

ACCORD:

Claim of Gerdano, 2 App. Div. 2d 88, 153 N. Y. S. 2d 924 (1956) — Where employee refused to accept demotion from job grade 7 to job grade 4 and was held thus to have voluntarily left his employment without good cause.

Arizona, CCH Par. 8211.18 (1956) — Appeal Tribunal ruled that refusal to accept transfer to lower paying job

constituted voluntary quit without good cause.

Indiana, CCH Par. 1975 (.487) (1951) — Review Board ruled that refusal to transfer to a higher paying but less desirable job in accordance with seniority rights constituted voluntary leaving from employment.

Indiana, CCH Par. 8214.05 (1954) — The Board of Review held that an employee who refused to accept transfer to lower paying job voluntarily left work without good cause.

Michigan, CCH Par. 8949 (1960) — The Circuit Court, reversing an Appeals Board award, ruled that a foreman could not receive unemployment compensation who had refused to work on a second shift stating:

> "There is no question of fact at all. It is a question of law. If a man quits his job voluntarily, unless he can blame it on the employer he cannot get benefits."

Washington, CCH Par. 8295 (1958) — The Washington Superior Court ruled that a claimant who refused to accept an assignment to a lower paying classification was disqualified from receiving benefits, stating:

> "* * * the court concludes as a matter of law * * * the claimant left his employment voluntarily without good cause because * * *."

New Jersey, CCH Par. 8322.02 (1958) — A claimant was held to have voluntarily quit by the Board of Review, and hence to be disqualified from receiving benefits, when he refused to exercise seniority to work in a lower paying job instead of accepting lay off.

New Jersey, CCH Par. 8338.10 (1959) — The Board of Review held that an employee who exercised his right under the labor agreement to accept lay-off, rather than demotion, was disqualified for voluntary leaving of work without good cause.

Vermont, CCH Par. 806011 (1952) (new matters) — An employee who refused to accept a transfer to a lower paying job was disqualified because of voluntarily leaving work.

Texas, CCH Par. 8188 (1955) (new matters) — The Employment Commission ruled that refusal to transfer to another job at a lower rate of pay constituted voluntary resignation without cause disqualifying for benefits.

We submit that the expressed policy of the Utah Legislature in adopting the unemployment compensation statute requires an adoption by this court of the rule stated in the authorities set forth above and that the order of the Industrial Commission should be affirmed.

POINT II.

NO AUTHORITY IS CITED IN AID OF ANY OF THE ARGUMENTS MADE IN APPELLANT'S BRIEF; NONE OF THE ARGUMENTS STATED HAS MERIT.

Each of the appellant's arguments will be discussed in sequence:

a) *That* 15 *other employees would have received unemployment compensation; hence,* 15 *em-*

ployees here involved simply were "good samaritans".

This argument appears to be the central core of appellant's argument. However, it is fraught with difficulties.

Aside from the bald and unsupported conclusion contained in the "good samaritan" testimony of witness Williams as follows, the record contains no evidence whatsoever which would indicate that an equal number of employees would have been placed on lay-off status. Mr. Williams gratuitously concluded (R. 118):

> "Some of them had some of their SUB payments still available, but I felt I was in a little better shape financially than some of those may have been, so being a good samaritan, I accepted to take this cut back and let one other man stay on who would normally have been bumped out of the mill and out of all benefits had I stayed on. So the State would have to pay benefits to one man, one way or another."

It is interesting to note that on the same page of the record (R. 118) Williams admitted that at the time he was contacted and offered a job at a lower rate of pay, "I told them definitely not, I was going to get out of there regardless." This latter admission is consistent with the testimony of Mr. Jones who stated (R. 72):

> "Yes. On Mr. Williams, on approaching him he refused anything we had to offer. He turned to me and said, 'I don't want to stay, I don't care what you have got to offer.' "

See also the testimony of witness Jones at record page 133 as follows:

> "Boyd Williams was very indignant when we approached him. He knew of his tentative lay off. We approached him, I showed him the chart with his name within the job class 7 group. It was asterisked, at the bottom it had — those with asterisks are scheduled on vacation next week. Boyd Williams said, 'I do not want anything in the small diameter mill.' He signed the sign off and we left him."

Contrary to the factual assumption necessary for this argument, the Company at the time of the lay off was contemplating changing from a two to a three shift operation which would necessitate additional personnel. The third shift operation commenced on October 27, nine days after the lay off here involved (R. 69-70).

The further conclusion of the "good samaritan" that the State would have been required to pay benefits "one way or another", assumes, as is admitted at page 23 of appellant's brief, that each person hypothetically so reduced in force would have been otherwise eligible for unemployment compensation benefits. There is no justification in the record for such an assumption. Even assuming for purposes of argument that there would have been a lay off of an equal number of men, it does not follow that they would have received unemployment compensation benefits. They may have secured other employment, they may have refused other proper employment or for numerous other reasons they may have been disqualified from receiving unemployment compensation.

Furthermore, this argument cannot be valid for the further reason that the unemployment compensation benefits must be administered on an individual employee basis. Whether or not some other employee may or may not receive unemployment compensation is wholly immaterial in determining under the statute whether a particular employee meets the statutory tests.

b) *That the agreement between the Union and the employer permitting an employee to elect between accepting a demotion or taking lay off binds the Commission and requires the payment of unemployment compensation.*

This argument is patently erroneous on its face. It is absurd to argue that private parties by their contracts can change statutory requirements. The contract provision here involved is highly desirable from the employees' standpoint. He frequently may prefer, as some of these employees obviously did, to attempt to obtain higher paying jobs rather than accept demotions to lower paying jobs. This was not an agreement, however, to permit these employees to draw unemployment benefits. It would not, in any event, change the voluntary nature of employees' acts in leaving available jobs, thereby disqualifying them from unemployment benefits under the Utah Act.

This precise issue was before the Wisconsin Supreme Court in *Roberts* v. *Industrial Commission,* 2 Wis. 2d 399, 86 N. W. 2d 406. There the claimant was entitled under the provisions of the labor agreement to accept lay-off status rather than a demotion. In ruling that the parties

could not by their private agreement alter the application of the statute governing unemployment compensation benefits, the court stated:

> "To hold that by private agreement a party who refuses reasonable employment is entitled to unemployment benefits would make his eligibility dependent on negotiation between the employee or his bargaining agent rather than on the statute, administered by the Industrial Commission. Yet that is the effect which respondent now claims for the contract. If that is the effect of the provision in question the contract must be declared void in that respect. But we do not think the contract attempted any such thing or that it need be so interpreted.
>
> "The contract provision deals with the employee's seniority status. If he is offered a job more than two labor grades below his original one he need not take it. The parties have agreed that quitting under such circumstances will not impair his seniority. But for compensation purposes this is quitting nonetheless for a cause not attributable to the employer as we held in Dentici v. Industrial Commission, supra."

ACCORD:

Chambers v. *Owens-Ames Kimball Company,* 146 Ohio S. 559, 67 N. E. 2d 439.

Bigger v. *Unemployment Compensation Commission,* 43 Del. 553, 53 A. 2d 761.

Department of Labor and Industry v. *Unemployment Compensation Board,* Pa. Superior Court, 32 Law Week 2693 (June 30, 1964).

Barclay White Company v. *Unemployment Compensation Board of Review*, 356 Pa. 43, 50 A. 2d 336.

c) *That since the employer did not "guarantee" indefinite employment at a stated job class, the employees involved are entitled to unemployment compensation.*

Again, no authority is cited for this novel argument and the argument is wholly invalid. It is, of course, impossible for any employer to make such a guarantee. To hold that the failure to make such guarantee justifies a cessation of employment and requires the payment of unemployment compensation is so unrealistic as to be absurd.

The Senior Appeals Referee found (R. 42):

> "That the claimants in this case could have continued in employment with the Company if they had accepted the demotions as proposed and offered by the Company * * *."

The Company made firm offers to these employees. It was required to do no more. If the employees had accepted the firm offers made, they would have still been working at the time of the hearing below in this matter "on a job equal to or greater than the one offered them at that time" (R. 75). However, instead, each of these employees voluntarily left his employment and hence voluntarily disqualified himself from the receipt of benefits.

d) *That the motivation of the claimants is immaterial in determining whether compensation is payable.*

The Senior Appeals Referee found that the claimants here involved "to a considerable extent were motivated by the fact that they thought they would be better off with unemployment compensation, plus company supplemental unemployment benefits, rather than continue at the reduced pay rate" (R. 44). Appellant therefore asserts at page 22 of the brief that "what motivated the claimants to refuse to accept work at a lesser grade in pay is immaterial". This is not true.

Under the applicable statute a claimant has the burden of demonstrating that his unemployment was for good cause. His specific reason for leaving the work force and becoming unemployed certainly is material to that issue. We submit that by admitting to a motive wholly inconsistent with the stated purpose of the statute, the claimants disqualified themselves from any statutory benefits. In treating the burden of a claimant under circumstances similar to those here involved to establish "good cause" the Pennsylvania court in *Fegely* v. *Unemployment Compensation Board of Review* (1960), 192 Pa. Super. 141, 159 A. 2d 574 stated:

> "The burden of proof is upon the claimant to establish that he left his employment for a necessitous and compelling cause * * *."
>
> "We have held that voluntary termination of employment because of refusal to accept different work with the same employer which is suitable and within his capabilities does not constitute a cause of compelling nature * * *."
>
> "* * * The compensation which the claimant would have received while temporarily assigned

> to the labor department was substantial although lower than his previous rate of pay. Claimant had a right to refuse the employment but it does not follow that the change in the nature of the work and the reduction in wages in these circumstances placed claimant in a position whereby he could refuse with good cause and thus create a status of unemployment within the purview of the law * * *."

The claimants' motives here demonstrate conclusively the absence of any "necessitous or compelling cause". Their motives are material to the issues here involved and compel denial of benefits.

e) *That some theory of res judicata should bar the Industrial Commission from denying benefits.*

Again, no authority is cited for this novel and erroneous argument. As is demonstrated from the portion of the record quoted at pages 10-12 of appellant's brief, these claimants have received unemployment compensation on certain occasions in the past when they have elected to accept lay-off status rather than demotion. On such prior occasions, the blue slips contained no notation that the employees involved were voluntarily leaving their employment and benefits were routinely paid. No "official protest" or "appeal" was ever taken from that action to cause a formal determination of the issue by the Industrial Commission (R. 104).

In the instant case, each of the employees was informed prior to his being placed on lay-off status that his refusal to accept a cut back would be placed upon his blue

slip (R. 132). Consequently, the employee election not to work was brought to the attention of the Industrial Commission. The issue then for the first time was thoroughly considered and decision entered.

Since no official decision was entered in the prior situations, no doctrine of res judicata conceivably could apply. The Industrial Commission itself certainly cannot be bound, estopped or precluded from action by res judicata resulting from acts of administrative subordinants, never called to its attention for its approval or rejection.

However, even assuming for purposes of argument that the Industrial Commission itself on some prior occasion had officially ruled that these claimants were entitled to unemployment compensation after having voluntarily elected to be placed on lay-off status, such decision would not constitute res judicata in this case. First there is no showing in the record that the same factual situation prevailed. Second and more importantly, the entire doctrine of res judicata has no application to decisions of the Commission. In *Cantlay and Tanzola, Inc.* v. *Public Service Commission,* 120 Utah 217, 233 P. 2d 344 (1951) this court so ruled. There a proceeding was brought by several common carriers protesting the Commission's action in granting a competitor a permit to haul petroleum products from Salt Lake City to Vernal. The protestants there argued that since the Commission had denied a prior application by the applicant for a permit, the principle of res judicata operated to bar the granting of a subsequent application. This court stated at pages 222-23:

> "The doctrine of res adjudicata applies only to the judicial decisions and a hearing before this Commission does not conclude such rights of the parties that it is deemed to be exercising a judicial function as that term is construed in reference to the courts."

Similarly, in *Mulcahy* v. *Public Service Commission,* 101 Utah 245, 117 P. 2d 298 (1941) this court held that a prior decision of the Public Service Commission denying applicant a certificate of convenience and necessity to operate a common motor carrier was not res judicata as to a subsequent application. The court said at page 254:

> "The doctrine of res adjudicata applies only to judicial decisions * * * and not to legislative, executive or ministerial determinations."

The issue here involved is the proper application of the statute. We submit that the Commission below properly interpreted the statute in this case and that its action should be affirmed.

CONCLUSION

It is respectfully submitted that each of the claimants here involved voluntarily left his employment without good cause and that each of them disqualified himself from receiving unemployment compensation benefits during the period involved. A contrary ruling would fly directly into the face of the stated statutory policy which precipitated the unemployment compensation statute; it would penalize industrious employees who choose to work, would result in windfalls to rocking chair workers and would magnify

the unemployment problem which it was the stated purpose of the act to alleviate. Some of the problems inherent in appellant's position here are described by Justice Crockett in his concurring opinion in *Olof Nelson Construction Co., et al.* v. *Industrial Commission, et al.*, 121 U. 525, 243 P. 2d 951 as follows:

> "To permit an employee to become voluntarily unemployed and draw benefits would have these bad effects: It would tend to encourage work stoppage and thus bring about economic waste; and it would put it within his power to voluntarily drain off the Unemployment Compensation Fund and thus hazard its soundness and the accomplishment of its purposes."

We submit that the order of the Industrial Commission should be affirmed.

Respectfully submitted,

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