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Edwena M. Arends v. Department of Employment Security, and Board Of Review of the Industrial Commission of Utah : Brief of Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

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EDWENA M. ARENDS,

Appellant,

-vs-

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

Respondents.

Case No. 11830

- -

BRIEF OF APPELLANT

- -

An Appeal to Review the Determination by the Industrial Commission of Utah

- -

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NATURE OF THE CASE

Petitioner brought this action pursuant to Section 35-4-10, U.C.A. 1953, to review respondents' decision of August 27, 1969 denying petitioner's claim to unemployment compensation.

DISPOSITION OF CASE BY ADMINISTRATIVE AGENCY

This is an appeal to review the determination by the Industrial Commission of Utah that the petitioner failed without good cause to accept a referral to suitable, available work and that petitioner be disqualified for two weeks benefits for that refusal.

RELIEF SOUGHT ON APPEAL

Petitioner seeks an order reversing the Board of Review's decisions and an award of benefits for June 1, through June 14, 1969 in accordance with the provisions of Chapter 4 of Title 35, U.C.A. 1953.

STATEMENT OF FACTS

Petitioner lived at 121 First Avenue and was employed full time as a secretary and receptionist for Pacific Flight Support at 940 West 1st South, Salt Lake City, Utah, beginning June 24, 1968 (R. 14, 16). There was public bus transportation to this location and she was also able to walk. Because of a reduction in force by her employer her position was terminated on February 4, 1969 and she filed a claim with the Department of Employment Security (DES) on February 19, 1969 (R. 14). On March 28, 1969, petitioner was hired by the Denver and Rio Grande Railroad at the Roper Yards, 21st South and 6th West in Salt Lake City (R. 14-15). Since there were no buses or other public transportation to that location, petitioner had to drive her own car to this employment (R. 15). She occasionally experienced problems with the car when returning home from work (R. 15). It was not a

dependable car (R. 12, 15). Plaintiff married while working for this employer (R. 15). This employment was terminated May 9, 1969, because the employer felt the petitioner was "not suitable for the assignment" (R. 15). Petitioner again contacted the Department of Employment Security (DES) for benefits and employmer references. On June 4, 1969, the DES gave petitioner a referral for the following day to the Hi-Land Dairy at 700 Vine Street in Murray, Utah for a permanent position as a secretary at the prevailing wage (R. 15, 29). Petitioner called the Hi-Land Dairy on June 5, 1969, before going for the scheduled personal interview (R. 26). On the phone, petitioner discussed the job and other circumstances for employment with Hi-Land including the actual location of the employment (R. 26, 24, 16). After determining the location of Hi-Land to be in Murray, Utah, at 49th South and 7th East, petitioner declined the employment (R. 16, 26) Petitioner then called DES to inform them of her decision to seek employment within the city limits of Salt Lake City so that she might resort to walking or the use of public transportation whenever her car gave her problems as it had at Roper Yards (R. 16, 26, 12).

The next day Employment Security Office referred petitioner to Terracor at 529 East South Temple in Salt Lake City -- less than one mile from petitioner's residence at 121 First Avenue (R. 12, 16). Petitioner was hired by this employer and has driven and walked to this employment (R. 12, 16, 17).

On the basis of petitioner's refusal to accept employment with Hi-Land Dairy at 700 Vine in Murray, Utah, the Department of Employment Security on June 23 denied petitioner six weeks benefits from June 1, 1969 through July 12, 1969 (R. 28). Upon review, the Adjudication Section felt the facts justified a reduction in the denial benefits from six to two weeks from June 1, 1969 through June 14, 1969 (R. 25, 21).

Upon further appeal by petitioner the appeal referee noted that the facts of this case including the non-dependability of petitioner's car and the distance she would have been required to drive if she had accepted the Hi-Land Dairy employment were taken into consideration when the original six week denial of benefits was reduced to only two weeks of disqualification (R. 20, 21). The Appeals Referee,

did find as his conclusion of law:

> That the claimant failed without good cause to accept a referral to suitable, available work offered her by the Employment Office. 35-4-5(c) U.C.A. 1953 (R. 21).

The Board of Review of the Department of Employment Security affirmed the decision of the referee on 27 August 1969 (R. 4).

ARGUMENT

POINT I

DEPARTMENT OF EMPLOYMENT SECURITY AND THE BOARD OF REVIEW IMPROPERLY APPLIED THE PROVISIONS OF THE EMPLOYMENT SECURITY ACT TITLE 35 CHAPTER 4 U.C.A. 1953 TO THE FACTS OF THIS CASE.

Respondent bases the denial of benefits to petitioner solely upon a portion of Section 35-4-5(c) U.C.A. 1953 which states:

> An individual shall be ineligible for benefits . . . If the Commission finds that . . . he [petitioner] has failed without good cause. . . to accept a referral to suitable work when offered him by the employment office. (R. 21).
>
> Such ineligibility shall continue for the week in which such failure occurred 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.

The determination by respondent must be upheld if, when the evidence is looked at in the light most favorable to the findings, there is evidence of any substance whatever which can reasonably be regarded as supporting the determination. Conversely, a reversal of that determination can be justified if there is no substantial evidence to sustain the determination and there is proof of facts giving rise to the right of compensation so clear and persuasive that the refusal to accept it and make an award was clearly capricious, arbitrary, and unreasonable. Gocke v. Wiesley, 18 Utah 2d 245, 420 P.2d 44, (1966); Kennecott Copper Corp. Employ. v. DES, 13 Utah 2d 262, 372 P.2d 987 (1962); Martinez v. Board of Review, DES, ___Utah 2d ___ (1970)

The record discloses the following:

1. Petitioner was given a job referral by the Placement Office on June 4 with Hi-Land Dairy (Hi-Land) at 700 Vine Street (4900 South) (R. 15, 20, 29).

2. Petitioner telephoned Hi-Land Dairy on June 5, 1969 (the day scheduled for interview by the Placement Office) and discussed the job and location of Hi-Land with that employer (R. 16, 24, 26).

3. Petitioner, after discussing the job with Hi-Land on the telephone, informed that employer that she would not take that job because it was too far from her home (R. 16, 26).

4. Petitioner telephoned the Placement Office on June 5, 1969 after contacting Hi-Land Dairy to inform them she would not be taking Hi-Land Dairy position because it was in Murray, Utah and too far from her home (R. 16, 20, 26, 29).

Respondents maintained petitioner should be denied benefits because she failed without good cause to accept a referral to suitable, available work. Petitioner disagrees with that legal conclusion, based on the record as a whole, which adequately shows the petitioner did accept the referral to Hi-Land, by telephoning to discuss the work and other circumstances of employment with Hi-Land. During that conversation with Hi-Land petitioner learned the actual location of Hi-Land Dairy. Petitioner did not fail to accept the referral as alleged by respondent but instead based upon her discussion with Hi-Land, she was able to make a rational judgment that the employment would not be suitable in view of the circumstances.

POINT II

THE RECORD AND FINDINGS OF FACT DO NOT SUSTAIN THE DETERMINATION OF THE INDUSTRIAL COMMISSION THAT PETITIONER FAILED TO COMPLY WITH 35-4-5(c) U.C.A. 1953.

The purpose of Unemployment Security Act in Utah is to establish financial reserves for the benefit of persons unemployed through no fault of their own. The provision of the statute (35-4-5) disqualifying employees from employment compensation is to prevent workers from obtaining benefits where there is work available and suitable which they decline to accept. Lexes et al v. Industrial Commission et al., 121 Utah 551, 243 P.2d 964 (1951); Olof Nelson Construction Company v. Industrial Commission et al, 121 Utah 525, 243 P.2d 951 (1951).

However, 35-4-5(c) does not require an individual to accept every available, suitable employment opportunity offered him by the Employment Security Office to be eligible for benefits provided by the Act. He is disqualified from receiving benefits only if he "failed without good cause" to apply for or accept available, suitable work. "Good Cause" as a justification for refusal was discussed by the Court in Lexes p. 561 where it was concluded that "good cause"

as used in the act means such "cause" as would justify a reasonable person in leaving his work.

This court states that the Employment Security Act should be liberally construed to best effectuate its purposes of meeting the needs of unemployed workers. First, it is to enable them to find suitable work; second, it is to provide cash benefits during periods of unemployment. To be eligible for these benefits a claimant must act in good faith and make an active and reasonable effort to secure employment and findings by the DES should relate to the reasonableness of these efforts. Gocke v. Weisley, 18 Utah 2d 240, 420 P.2d 44 (1966).

Other jurisdictions require "good cause" in a context of unemployment statutes to be based on real, not imaginary, substantial not trifling, and reasonable, not whimsical circumstances; there must be some compulsion produced by extraneous and necessitous circumstances. The standard is one of reasonableness as applied to the average person. Burroughs v. Employment Security Agency, 86 Idaho 412, 387 P.2d 473 (1963), 81 C.J.S. Social Security and Public Welfare § 167 pp. 253, 254. Personal factors are to be included in determining "good cause" for refusing offered

employment within meaning of statute. Swanson v. Minneapolis-Honeywell Regulation Co., 240 Minn. 449, 61 N.W. 2d 526, 532(1953).

A study of the cases yields the conclusion that the standard of "good cause" in each case is to be based upon the subjective determination by a reasonable man in the same circumstances with the vitalizing element of "good cause" being good faith.

The record shows petitioner refused to accept possible employment by Hi-Land Dairy in Murray, Utah when she informed that potential employer he was too far from her residence to insure she could find reliable, adequate transportation. Although she considered moving closer to that employer she felt it would be more suitable to obtain employment in Salt Lake City, where she was registered with the DES, since she lived close to the center of the business district and would be able to walk or bus to work whenever her car failed her. Her assessment of the circumstances of having an undependable car and living in the business center of Salt Lake City with her husband led her to decline the offer of employment in Murray. She was then free to accept a position at least close enough that she could insure promptness

and reliability in reporting daily for work. That is what she did the next day when, upon referral, she accepted a position with Terracor in Salt Lake City.

Petitioner's sole reason for refusal of the Hi-Land Dairy position was the location of that employer and that she had no reliable suitable transportation to that location.

Other jurisdictions have ruled on the effect of lack of transportation on eligibility for unemployment benefits when an individual refuses to accept a position he feels is too far from his residence. These cases have generally denied benefits when a claimant refuses work which would require him to furnish transportation, even if he has none available. Copeland v. Oklahoma Employment Sec. Comm., 197 Okla 429, 172 P.2d 420 (1946); Rabinowitz v. Unemployment Compensation Board of Review, 177 Pa. Super. 236, 110 A. 2d 792 (1955); Zupanic Unemployment Comp. Case, 186 Pa. Super. 252, 142 A 2d 395 (1958); Huiet v. Wallace, 108 Ga. App. 208, 132 S.E. 2d 523 (1963), Moya v. Employment Security Commission, 80 N.M. 39, 450 P.2d 925(1969).

However, these cases can all be distinguished from the one at bar on their facts and the issues presented. Most of these cases base the denial of benefits upon the fact that claimant did not reside in a community where any suitable available work existed and he therefore needed to be able to transport himself a distance which would bring him into the sphere of the general labor market so that he could become part of the general work force "available for work". Once he was able to transport himself to an area where he became "available for work" he was eligible for compensation. Salt Lake City is not such a community lacking secretarial and receptionist employment opportunity. Contrariwise, the majority of positions for which petitioner is qualified are in the central business district within a mile of petitioner's residence. She was not detached from the general labor market when living at 121 First Avenue and there was no need for her to go into another community to seek suitable, available work. She lived in the area of greatest concentration of secretarial jobs in the State of Utah.

The other cases deny benefits when the lack of transportation claim by an employee evidences lack of sincerity or good faith in the refusal of suitable available employment. Petitioner has not demonstrated any bad faith or malingering. She was not looking for a compensated vacation. Instead she was acting as a reasonable person to insure she would always be present for work and on time for any job she accepted. She was willing to accept any position in which she could serve her employer reliably. Her decision to refuse employment with Hi-Land was based on a reasonable assessment of the circumstances and the alternatives. The reasonableness of her decision is evident from the fact she was employed the next day on a referral from the DES to a position in Salt Lake City.

The DES recognizes distance to work and transportation are factors to be considered by an employee when appraising a job opportunity. Although the Adjudication Section review stated only that the facts of the case justified a reduction in the denial of benefits from six weeks to two weeks, the Appeals Referee commented that this reduction was due to a consideration of the distance petitioner would have

had to travel. "Good cause" must always ultimately be based upon the subjective factors and circumstances surrounding a claimant and, admittedly, it is not always easy for respondent to determine. But the respondent must have compelling and reasonable evidence to deny benefits to any claimant who has demonstrated a reasonable, subjective and good faith "good cause" for refusing employment. There is no substantial evidence in the record to support a determination that petitioner "failed without good cause" to accept offered employment. Conversely, the record abundantly expresses elements sufficient and necessary to establish "good cause" as delineated by Utah law.

CONCLUSION

The law requires petitioner to show "good cause" for refusal of available suitable work. The record shows she had "good cause" for refusal of the Hi-Land Dairy position on June 4, 1969 and, therefore, should be granted the unemployment compensation benefits applied for by her.

Respectfully submitted,

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