STATE OF WISCONSIN CIRCUIT COURT WASHBURN COUNTY

STATE ex rel. DANI R. BERGMAN,

Plaintiff,

vs.

MEMORANDUM DECISION

WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION,

CASE NO. 87 CV 31

Defendant.

This is an action for judicial review under sections 102.23 and 108.09(7) Wis. Stats. brought by the plaintiff. The appeals tribunal found that the employee, Dani Bergman, was overpaid unemployment compensation benefits during years 1982 to 1985 by an amount of $10,783.00 on grounds that he was ineligible to receive such benefits because he owned or controlled, either directly or indirectly, more than 25 percent of the shares in the employer-corporation. By reason of such ineligbility, the Order required the plaintiff to repay the sum of $10,783.00 to the unemployment reserve fund. This Order was affirmed by the commission.

The authority of the court in judicial review of decisions of the Labor and Industry Review Commission is quite restricted and limited by statute, specifically sections 102.23(1), 102.23(6), and 108.09(7) Wis. Stats.

Section 102.23(6) Wis. Stats. states as follows:

> "If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. The court may, however, set aside the commission's order or award and remand the case to the commission if the commission's order or award depends on any material or controverted finding

of fact that is not supported by credible and substantial evidence."

Furthermore, an administrative agency's conclusion of law will be sustained if it is reasonable even if an alternative view is equally reasonable. Bruns Volkswagon, Inc. vs. DILHR, 110 Wis.2d 319, 322, 328 N.W.2d 886 (Ct. App. 1983).

The issues raised in plaintiff's complaint are quite broad and basically allege that the commission acted without or in excess of its powers and that the findings of fact by the commission do not support the order. This court does conclude that the findings of fact by the commission do support the order. The first two issues dealt with in plaintiff's brief primarily involve plaintiff's allegation that the commission acted without or in excess of its powers.

First, plaintiff argues that the department deputy lacked authority under section 108.09(2)(c) Wis. Stats. to make a redetermination.

Section 108.09(2) Wis. Stats. provides that "a department deputy may set aside or amend a determination at any time on the basis of subsequent information or to correct a technical or clerical mistake...".

In the Fall of 1982, plaintiff made application for unemployment compensation and, based upon information provided by the plaintiff, being exhibit 3 of the record, plaintiff was granted compensation benefits. In 1983 and 1984, plaintiff again applied for U.C. benefits and was granted them. Finally, on September 14, 1984, an initial determination of benefits eligibility was issued. The initial determination form U.C.-26 stated that "the claimant worked for the corporation of which he singly owns or controls less than 25 percent of the ownership interests". This initial determination dated September 14, 1984, followed an audit report done by Bill Lippitt and sent to the audit supervisor".

The audit report is dated August 15, 1984, approximately one month prior to the issuance of the initial determination. In the audit report, Mr. Lippitt concluded that the plaintiff owned or controlled 27.4 percent of the employer-corporation, rather than 12 percent as was claimed by the employee. This conclusion was a result of Mr. Lippitt's examination of the sale agreement between the corporation and Mr. Jim Bethel whereby Mr. Bethel was selling to the corporation his majority interest in the corporation of 73 1/2 shares. In essence, the sales agreement provided that pending, payment of the installment sale obligation by the corporation to Bethel, unless and until the corporation defaulted in its payment to Bethel, the voting rights of the 73 1/2 shares belonged to the corporation, and not to Bethel.

There is nothing in the record to indicate whether the initial determination dated September 14, 1984, finding that the plaintiff was eligible, was issued by the Department Deputy, Ervin D. Cross, without knowledge of the audit report dated August 15, 1984, or, in spite of such report. Ultimately, a redetermination of benefit eligibility was issued on August 21, 1985, by Deputy Ervin D. Cross, which set aside the initial determination issued on September 14, 1984. The redetermination covered benefit years 1982, 1983 and 1984. The redetermination forms U.C.-26 for each of such years, states that "the employee worked for a corporation one-fourth or more of the ownership interest, however designated or evidenced, in the corporation is or during such employment was owned or controlled, directly or indirectly, by him".

Once having read section 3.2 of the stock sales agreement, which states, in part, that "all voting rights afforded by the ownership of said stock shall accrue to the company until such time as a default is declared in accordance with the terms

of this agreement", it takes nothing more than elementary arithmatic to determine that since the date of that agreement, being February 5, 1981, until the date of the redetermination, the plaintiff owned and controlled 27.4 percent of the employer-corporation.

The redetermination form U.C.-26 dated August 26, 1985, states that the redetermination was issued "due to a department error". In his "determination rationale" dated August 5, 1985, Department Deputy Ervin D. Cross states that "due to a department error, the claimant's percentage of ownership of the stock was misinterpreted by the adjudicator and benefits were allowed fully. Based on subsequent information, the claimant has been overpaid...". (Emphasis supplied)

Plaintiff claims that because there appears to be no "subsequent information" which would serve as a basis for a redetermination, the department deputy exceeded his authority. Clearly, the department is authorized by statute to make a redetermination to correct a technical or clerical mistake, as well as on the basis of subsequent information. Quite clearly, whether or not there was any "subsequent information", a departmental mistake was made, be it technical or clerical, which served as a proper statutory basis for issuing a redetermination. The court, therefore, concludes that the redeterminations issued for benefit years 1982, 1983 and 1984 were issued in accordance with law.

Next, plaintiff, in his brief, argues that the department's action was arbitrary and capritious and violative of statutes and of the constitutional protection of due process of law. The court finds plaintiff's argument on this issue to be without merit, and without expanding, the court concludes that the department's action was

neither arbitary nor capritious, was within the statutory authority of the department and that the plaintiff has been afforded due process of law by means of administrative review as well as judicial review.

Finally, plaintiff argues that applicability of the doctrine of equitable estoppel should apply to relieve plaintiff from the liability of repaying the over-payments. At the hearing before the appeal tribunal, there was no mention of the doctrine of equitable estoppel. Yet, plaintiff argues that the appeal tribunal erred because it did not apply such doctrine to the case.

After the hearing had formally closed, plaintiff's counsel asked if he could make a comment and proceeded to state to the administrative law judge, in essence, that if the judge found the law to be against his client, it should be taken into account that it would be an "undue hardship" for Mr. Bergman to now repay the over-payments. In response to this comment, the A.L.J. stated:

> "Okay, in essence you are making a collateral estoppel argument?"
>
> To that, counsel stated "that's right, exactly." (Emphasis supplied)

In the written decision of the appeal tribunal, the A.L.J. used the phrase "collateral estoppel" in commenting upon the appeal tribunal's lack of authority to waive repayment of the benefits.

In plaintiff's brief before this court, the doctrine of "equitable estoppel" is first developed by the plaintiff. Also, no where in the pleadings does plaintiff make claim to the application of this doctrine. Be that as it may, this court will consider the applicability, or inapplicability, of equitable estoppel as it relates to this case. The doctrine of equitable estoppel, particularly as it applies to

governmental units, is extensively discussed in City of Madison vs. Lange, 140 Wis.2d 1, 6, 408 N.W.2d 763 (Ct. App. 1987). In that case the court stated as follows:

> "Equitable estoppel has three elements:
> (1) action or nonaction which induces
> (2) reliance by another
> (3) to his (or her) detriment." (Cases cited)

Before estoppel may be applied to a governmental unit, it must also be shown that the government's conduct would work a serious injustice and that the public interest would not be unduly harmed. (Cases cited) Finally, the party asserting the defense of equitable estoppel must prove it by clear and convincing evidence."

An equitable estoppel claim may be asserted only by a party that has acted with due diligence. Monahan vs. Department of Taxation, 22 Wis.2d 164, 168, 125 N.W.2d 331 (1963).

Each element of the estoppel claim must be proven by clear and convincing evidence. Bank of Sun Prairie vs. Opstien, 86 Wis.2d 669, 680, 273 N.W.2d 279 (1979).

Any failure to prove by clear and convincing evidence the reasonableness of the claimed reliance and any failure to prove that the claimed reliance resulted in a detriment to the party dealing with a governmental agency invalidates the entire estoppel claim. In City of Madison vs. Lange, supra, the court in dealing with the issue of "detriment" as it applied to the facts of that case, stated as follows:

> "While we are unaware of any Wisconsin case specifically defining 'detriment' in the context of a claim of equitable estoppel, the requirement has been equated with 'prejudice'. (Cases Cited) And the commonly-understood meaning of both

terms is 'injury or damage'."

Essentially, the Lange case holds that an obligation for repayment does not, in and of itself, prove "detriment".

First of all, this court agrees with the defendant that the appeal tribunal had no authority to rule on or grant relief to the plaintiff by means of the doctrine of equitable estoppel. Yunker vs. L.I.R.C., 115 Wis.2d 525, 531, 341 N.W.2d 703 (Ct. App. 1983).

In this case, it appears, from the record, that plaintiff was well aware that the department was concerned with his eligibility for unemployment compensation by reason of section 108.04(1)(g) Wis. Stats., which provides as follows:

> "(g) If an individual claims benefits based on the individuals employment by:
> (3) a corporation, if one-fourth or more of the ownership interest, however designated or evidenced, in the corporation is or during such employment was owned or controlled, directly or indirectly, by the individual:
> (1) the corporation...employer shall so inform the department on its reports as to such individual for benefit purposes; and
> (2) the individual shall so report, when claiming benefits; and
> (3) the individual's credit weeks based on such employment shall, if more than five, be reduced to five."

It is quite obvious from Mr. Bergman's statements contained in the original record that he was aware of these statutory restrictions right from the time he originally made application for U.C. benefits in the Fall of 1982. In the employee statement dated November 16, 1982, Mr. Bergman stated as follows:

> "I worked for this corporation for the past five years.

> My wife, Lynette Bergman and myself own 12 percent of the corporation. We also own and control 15 1/2 shares of the business. Jean DeRobertis, St. Petersburg, Florida owns 32 percent of the business and owns and controls 41 shares. Jim Bethel, Spooner, Wisconsin owns 57 percent of the business and owns 73 1/2 shares of the business for a total of 130 shares issued by the corporation. There are no others who have any ownership interests in this business." (Emphasis supplied)

In Mr. Bergman's statement dated September 12, 1984, apparently made after he received a copy of Mr. Lippitt's audit report dated August 15, 1984, Mr. Bergman stated that he disagreed with the auditor's report that he owned 27.4 percent of the outstanding stock and went on to elaborate portions of the stock sale agreement between the corporation and Mr. Bethel. In that employee's statement, Mr. Bergman stated that he was attaching to it a copy of the stock sale agreement. On the claim for Wisconsin Unemployment Benefits Form UCB-15 submitted by Mr. Bergman and dated by him on October 16, 1984, in answer to a question as to whether or not he "controlled 25 percent or more of the ownership interest", he answered "no".

In his employee statement dated October 16, 1984, Mr. Bergman wrote as follows:

> "I own and control 12 percent of ownership interest in this corporation. This is seasonal work from April 15 until September 15 of each year. 130 shares in this corp. I own and control 15 1/2 shares. 41 is owned by Jean DeRobertis. 73 1/2 by James Bethel."

In his employee statement dated July 10, 1985, Mr. Bergman stated as follows:

> "I have made statements in previous years and it still is correct. My accountant and myself have review the contract of sale and part 3.2 STATUS OF ESCROWED STOCK, clearly shows that the stock is still yet being paid for by the corporation and that the seller still holds the voting rights of that stock until paid me (sic?) in full. This is in accordance

with the contract of sale." (Emphasis supplied)

This last assertion by Bergman that the "seller still holds the voting rights..." is, of course, absolutely false.

Throughout the course of these statements made by Mr. Bergman, when speaking of his own stock, he consistently uses the words "own and control". He also uses these words when speaking of his step-mother's stock. However, whenever he refers to the stock of Jim Bethel, which is the subject of the stock sale agreement, he uses the word "own", but never uses the word "control".

Although the stock was endorsed in blank by Mr. Bethel when given to the escrow agent, Attorney Kissack, Mr. Bergman was aware that the corporation would not actually obtain "ownership" of that stock until the purchase price was paid in full. However, because the voting rights of the Bethel stock had accrued to the company in accordance with section 3.2 of the sale agreement, Mr. Bergman was aware that Mr. Bethel had no "control" with reference to that stock, and, never again would have any control of the voting rights of that stock so long as the corporation did not default on its monthly payments pursuant to the sales agreement.

It certainly takes no Wall Street financial wizard to determine the percentage of ownership and control which Mr. Bergman had in the employer-corporation subsequent to the execution of the stock sale agreement. Since no person had voting rights with reference to the 73 1/2 shares being sold to the corporation, the two persons who had total control of the corporation were Mr. Bergman and his mother-in-law, Jean DeRobertis. Their combined shares equalled 56 1/2. Mr. Bergman's 15 1/2 shares constituted 27.4 percent of the ownership and control of the corporation.

This conclusion as to percentage of ownership and control is no more subject to differing viewpoints or differing interpretations as is the conclusion of 2+2=4.

The employer-corporation was a subchapter S corporation which provides that the profit or loss each year of the corporation is passed through to the individual stock owners according to their percentage of stock ownership in the corporation. At the hearing before the appeal tribunal, Robert Watkins, a CPA in Spooner, Wisconsin, who accompanied Bergman to his meetings with department deputies each year, testified that for the tax year 1981, being the year of the stock sale agreement, the corporation had a net loss of $2,331.00. Of that loss, $639.00, or 27.4 percent, was passed on to Mr. Bergman for income tax purposes and the balance, $1,692.00, was passed on to Mr. Bergman's mother-in-law, Jean DeRobertis. It was, of course, beneficial to Bergman to take 27.4 percent of the loss, for tax purposes, rather than 12 percent. It appears Bergman wanted his cake and wanted to eat it, too.

In reviewing the elements of equitable estoppel, it is clear that as to "action or nonaction", the department did act by allowing unemployment compensation benefits to Mr. Bergman based upon the information furnished by Mr. Bergman. However, assuming that plaintiff could meet his burden of proof as to the element of "reliance", the court concludes that he has not met his burden of proof with reference to the element "detriment". First, the only real detriment, if it can be called that, that could possibly be claimed by Mr. Bergman, is that he may now have to repay the amount of the overpayment. Throughout the period from 1982 through 1985, Mr. Bergman clearly knew the issue confronting him with reference to his

eligibility. Although Mr. Bergman consistently claimed that he "owned and controlled" only 12 percent of the corporation, he states, in his reply brief, that if the department had notified him earlier that he was ineligible for benefits, "appropriate steps could have been taken to restructure the sales agreement so that it would not have adversely affected his eligibility for benefits". It is interesting in that, on the one hand, Mr. Bergman wishes the department, and the court, to find that he had only a 12 percent interest in the ownership and control of the corporation, for U.C. purposes but, on the other hand, wishes to now convince the court that he had sufficient control of that corporation such that he could have restructured the sales agreement entered into between Bethel and the corporation on February 5, 1981, so as to make him eligible for U.C. benefits. What would he have done? He does not say. Would he have caused the sales agreement to be modified so as to return the voting rights to Bethel pending full payment of the purchase price? Such action would clearly be contrary to the interests of other shareholders. If Mr. Bergman could have truly caused such a "restructuring" of the stock sales agreement, it would certainly be reasonable to infer that Mr. Bergman had, perhaps, control of the entire corporation, directly or indirectly. On the other hand, inasmuch as Mr. Bergman knew the issue confronting him with reference to ownership and control of the corporation from the time he first applied for U.C. benefits in the Fall of 1982, if he had had sufficient control of the corporation so as to "restructure the sales agreement", it seems reasonable to assume that he would have done so and thereby avoid further possibility of being denied U.C. benefits.

As alluded to by counsel for the department, Mr. Bergman's repayment of

U.C. benefits for which he was not eligible is tantamount to the repayment of a loan, without interest. Also, there is, of course, the possibility that the department will exercise its discretion by waiving its collection of overpayment.

Under all the circumstances of this case, the court concludes that repayment by Mr. Bergman would not rise to the level of being a "serious injustice". Mr. Bergman, admittedly, used the U.C. benefits to feed, clothe and shelter his family during the years in question. He does not state what he would have done, alternatively, had he been denied U.C. benefits at the time applied for.

The court concludes that the plaintiff has failed to meet his burden of proof with reference to the elements of equitable estoppel.

The court affirms the commission.

BY THE COURT: 7/17/90

Hon. Dennis C. Bailey
Circuit Judge