

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY  
BRANCH IV

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GEORGE J. MASINO,

Case #144-236

Complainant,

-vs-

DEPARTMENT OF INDUSTRY, LABOR AND  
HUMAN RELATIONS, STATE OF WISCONSIN,

DECISION

Respondent.

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This action was commenced by the plaintiff, Mr. George Masino, pursuant to Wis. Stats. (1971) Section 108.09 and Wis. Stats. (1971) Section 102.23, to review the decision of the respondent, Department of Industry, Labor and Human Relations, dated September 4, 1974. That decision affirmed the decision of the Appeal Tribunal for the Department's employment security division, Unemployment Compensation, which ordered Mr. Masino to repay the sum of \$2,340 representing unemployment compensation benefits he received for which he is ineligible.

Mr. Masino was discharged from Arlan's Department Store on August 15, 1972 for an alleged theft. He was charged criminally, tried before a jury, and acquitted. After Mr. Masino was found not guilty of theft, unemployment benefits were made available to him. He then challenged his discharge pursuant to his union's collective bargaining agreement with Arlan's. The grievance was ultimately submitted to a member of the staff of the Wisconsin Employment Relations Commission for final and binding arbitration. The arbitrator found that there was not "just cause" for his discharge. The following remedy was ordered:

"That (I) be reinstated to his former or an equivalent position without loss of seniority or any benefits flowing therefrom. (II) shall receive back pay for all time lost since the date of discharge. The amount of back pay shall be reduced by an amount equal to that he has earned in any employment that he would not have earned except for the discharge.

Such amount shall be further diminished by the amount of Unemployment Compensation he has received for the period forward from the date of discharge until he is reinstated. The Employer is directed to reimburse the Unemployment Compensation Division of the Wisconsin Department of Industry, Labor and Human Relations in such amount as (P) has received in the form of unemployment compensation benefits." (Emphasis added).

Arlan's made an appropriate payment to Mr. Masino under this award, but neglected to "reimburse" the Department for the unemployment compensation benefits previously received by Mr. Masino (\$2,340).

Apparently sometime between March 16, 1973 (date of the arbitration award) and May 14, 1973 (date of the restraining order of the bankruptcy court - p. 38 of the record), a trustee in bankruptcy was appointed for Arlan's Department Stores, Inc.

Mr. Masino and the Retail Clerks Union Local 1401, AFL-CIO, obtained a confirmation of the arbitration award by judgment taken in the Circuit Court for Dane County -- apparently before they were notified of the bankruptcy (February 2, 1974). The Department was entitled to payments from Arlan's in the arbitration award, but they did not join in seeking this judgment.

Mr. Masino later filed a claim in the bankruptcy proceeding for \$2,340 (representing the "offset" unemployment compensation benefits). His claim was considered a "general unsecured payment" and was not paid. The Department did not pursue any claim in the bankruptcy court, even though Wis. Stats. Section 108.23 would give their claim a preferred status which likely would have been paid in some amount.

The Department evidently did not or was not able to recoup their payments through the ordinary employer contribution rates required by Wis. Stats. Section 108.19(1) and (4). Nor did the Department issue a warrant to collect "delinquent payments" under Wis. Stats. Section 108.22(2) from the employer.

The Department did, however, commence administrative proceedings against Mr. Masino to recover unemployment compensation benefits he received prior to the back pay award. Since Mr. Masino won his arbitration and received "back pay" he was not "unemployed" for benefit purposes and he was ordered to repay \$2,340. The findings of the DILMR deputy for Unemployment Compensation were affirmed by the Appeal Tribunal, and the Appeal Tribunal

was affirmed by the Commission. This appeal is taken from the Commission's decision.

Wisconsin Stats. Section 108.09(9)(c) provides:

"(c) If any determination or decision awarding benefits is finally amended, modified or reversed, any benefits paid to the claimant which would not have been paid under such final determination or decision shall be deemed an erroneous payment. Sections 108.16(2m) and (3) and 108.22(8) shall apply to the charging and recovery of such erroneous payment."

Wis. Stats. (1971) Section 108.22(8)(a), as applicable to this action, provided:

"(8)(a) In case benefits have been overpaid or improperly paid to an individual, an initial determination may be issued setting forth the individual's liability to reimburse the fund for such overpayment ....

"(b) To recover any overpayment for which liability has been thus established, the Department may file a warrant against the liable individual in the same manner as is provided in this section for collecting delinquent payments from employers."

From these sections the Appeals Tribunal concluded that:

"The employee's eligibility for unemployment benefits and his obligation for reimbursement of overpayment of such benefits are set forth in the Unemployment Compensation Law, and neither the employee nor the employer or anyone representing their interests can alter these responsibilities and obligations for compliance with the Unemployment Compensation Law. The arbitrator cannot transfer the employee's obligation for reimbursement of an overpayment to another."

We disagree with the tribunal's interpretation. The tribunal is correct insofar as its reasoning is related to the deductibility of "collateral payments" from back pay awards. It is clear that collateral benefits such as back pay are treated as "wages" and may retroactively affect the eligibility of an unemployment compensation recipient. However, it is not clear that when "setoff" is made in the discretion of the arbitrator that "unemployment compensation" was ever received for purposes of Section 108.22(8)(a).

The Wisconsin Supreme Court has approved the "offset" procedure (used by the arbitrator in this case) yet certainly did not require that it be used in every case. Lehnart v. Waukesha Brewing Co.,

(1963) 21 Wis. 2d 583, 597, 124 N.W. 2d 664. That procedure is within the discretion of the arbitrator, and objection by the employee to such an "offset" would not be proper.

This procedure is much to the advantage of the Department and consistent with equitable principles. The "contribution" system is already set up between employers and the fund, an employer is more likely to be available and solvent, and it avoids a forfeiture on the employee's part.

The Department's claim in this action arose solely from the arbitration award. Before that time Mr. Masino was eligible for unemployment benefits. At the same time the arbitrator awarded back pay he made the "offset". Therefore, his direction, (including requiring the employer to pay unemployment compensation benefits already received by Mr. Masino) was properly made within his discretion.

The effect of the offset is the crux. The "offset" substituted money in the hands of the employee (unemployment compensation) for money in the hands of the employer (back pay). It is only logical that this procedure, supported in law, also substitutes the name associated with that money. Thus, the employee received only "back pay" and as such he is not subject to a cause of action for "erroneously paid" unemployment compensation benefits.

This result is consistent with the purpose of the Unemployment Compensation Act. The idea is to compensate the employee, not unduly enrich the employer. "A sound system of unemployment reserves, contribution and benefits should induce and reward steady operations by each employer, since he is in a better position than any other agency to share in and to reduce the social costs of his own irregular employment." Wis. Stats. Section 108.01(2).

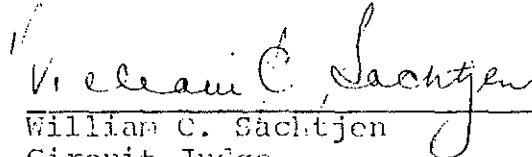
The statutory cause of action provided in Wis. Stats. Section 108.22(a) does not lie against this employee. Since

there has been no unjust enrichment of the employee, no common law restitutionary actions are available.

Judgment may be entered for the plaintiff, reversing the Commission.

Dated this 6th day of December, 1977.

BY THE COURT:

  
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William C. Sachtjen  
Circuit Judge

cc: Davey, Jarchow