STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

HENRY R. NINNEMANN, INC.,

Plaintiff,

Case No. 152-265

vs.

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS and CARL SIX,

MEMORANDUM DECISION

Defendants.

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is an action by the plaintiff employer to review a decision of the defendant department dated May 27, 1976, entered in an unemployment compensation proceeding which adopted the findings of fact of the appeal tribunal, denied the employer's request for a rehearing, and affirmed the appeal tribunal's decision. The appeal tribunal's decision allowed the defendant employee Six unemployment compensation benefits if he was otherwise qualified.

STATEMENT OF FACTS

As of the date of the hearing before the appeal tribunal on December 22, 1975, Six testified he was 65 years old. The facts hereafter stated are those testified to by Six at such hearing.

On about June 20, 1975, Six entered the employment of the plaintiff employer as a truck mechanic on a part-time basis at a wage of $5.50 per hour with no fringe benefits other than being provided with health insurance coverage. The employer's business was that of constructing bodies for trucks and installing them. At the time, the employer had but three full-time employees.

During Six's first day of employment Mr. H. R. Ninnemann asked Six to work full-time at a wage of $7.00 per hour plus health insurance coverage and Six accepted this offer. Full-time work consisted of working 8 hours per day Monday through Friday of each week.

About the middle of August Ninnemann asked Six to take a week's vacation because there was no work. Six asked if it would be all right for him to take his vacation the following week instead, that being the last week in August, and Minnemann agreed. Six then took his vacation during the work week of August 25th through August 29th. Monday, August 31st was Labor Day and he returned to work Tuesday, September 1st, and worked that day which was his last day of work for the employer. During the day there had been talk between Six and Ninnemann as to the future days or hours Six would work, and how much he would be paid.

Minnemann's final offer was that Six would work 24 hours per week and that his wages for such 24 hours would be $55.00. Six was then earning $7.00 per hour working full-time and he was willing to work part-time for 24 hours per week at a wage of $5.50 per hour, but was unwilling to work such 24 hours at a wage of $55 per week which was only at the rate of $2.29 per hour, and he told Ninnemann so. Ninnemann also mentioned that he had found a truck which had come back for repairs because of defective work done on it by Six. Ninnemann asked Six if he was going to do his work over on that truck for nothing and Six said "No". Because Ninnemann's final offer was $55 for 24 hours work per week, Six did not return to work the next day, thus quitting his employment.

Six filed a claim for unemployment compensation and the department's deputy made an initial determination denying benefits, finding that Six had terminated his employment with the employer, and that such termination was not within any of the exceptions to the statutes. Six appealed this determination and a hearing was held before an examiner sitting as an appeal tribunal on December 22, 1975. Although due notice by mail was given to both the employer and Six of this hearing, only Six appeared at the hearing. He was not represented by counsel and his testimony was elicited by questions put to him by the examiner.

On December 22, 1975, the employer wrote this letter:

"Office Manager
Hearing Office, U/C
819 N. 6th Street, Room # 314
Milwaukee, Wis. 53203

Re: Hearing # 75-A-5003MS

Dear Sir:

Please excuse us from not appearing this A.M., but we are a small, family-owned business, in the truck repair business and several large orders for good customers did require my personal attention. As the hearing was set for 8:00 A.M. before I could properly perpare (sic) an alternate with the facts, etc; it was already too late.

On our behalf, we don't understand Mr. Carl Six's claim, as he did clearly quit - in a dispute over wages - as we have previously indicated on your UC-23 Eligibility Reports of September 17 and 19.

To be perfectly honest, we were never really sure what it was that Mr. Six wanted from us.

He started work here on a part-time basis, but when we calculated up the first week's wages and medical insurance costs, etc; he said something to the effect that he couldn't afford to pay extra for the insurance or whatever, and wanted a new deal for full-time employment.

After several weeks on that basis, he again requested that we figure up the maximum (?) that he could earn on a part-time basis. When I advised him what I could afford to pay him - in addition to paying the Blue Cross/Blue Shield - he indicated that he couldn't 'afford' that either, and that he was quitting.

Thank you for this opportunity to present our case.

Sincerely,

Henry R. Ninnemann, Inc.

Henry R. Ninnemann
President"

On December 24, 1975, the appeal tribunal rendered its findings of fact and decision which read:

"FINDINGS OF FACT

"The employe worked for about three months as a truck mechanic for the employer, a manufacturer and assembler of truck bodies. His last day of work was September 2, 1975 (week 36), when he voluntarily terminated his employment.

APPENDIX E

"As the reason for quitting the employe contended that when he began his employment with the employer, he worked part-time at a wage rate of $5.50 per hour. He was then asked to work full-time and was paid at the rate of $7.00 per hour. Because of economic conditions the employer was unable to offer him continuing full-time employment and he returned to part-time work. When he was advised that he would be required to work 24 hours for a gross wage of $55.00, or approximately $2.29 per hour, he quit his employment.

"An employe who voluntarily quits his employment is ineligible for unemployment benefits unless the department determines that the employe terminated his employment with good cause attributable to the employing unit. To constitute good cause for leaving a job, a reduction in wages must be substantial. The reduction of his wages for part-time employment from $5.50 per hour to $2.29 per hour, or approximately 41%, must be regarded as substantial and an unreasonable request on the part of the employer.

"The employer failed to appear at the hearing and no evidence was adduced on its behalf to explain the circumstances surrounding the termination of the employe's employment.

"Under the circumstances, the employe terminated his employment, but with good cause attributable to the employer.

"The appeal tribunal therefore finds that in week 36 of 1975, the employe terminated his employment, but with good cause attributable to the employer, within the meaning of section 108.04 (7)(b) of the statutes.

"DECISION

"The department deputy's initial determination is reversed. Accordingly, benefits are allowed, if the employe is otherwise qualified."

On January 2, 1976, the department received the employer's petition for review having attached thereto a letter to the department dated December 30, 1975, by the employer's counsel, reading as follows:

"Gentlemen:

Pursuant to S. 108.09(3)(c) the employer, Henry R. Ninneman, Inc. requests that the decision entered on December 22, 1975, in the above captioned matter be set aside and the aforesaid employer be afforded an opportunity to be heard on the matter of whether the employee/claimant is eligible to receive unemployment benefits.

The employer shows good cause for failure to appear at the above captioned hearing date in that

1. It was not at that time represented by legal counsel,

2. The officers of the employer did not fully comprehend the significance and necessity of appearing and presenting evidence at the aforesaid hearing.

3. The presures of business made it impossible for the employer to appear.

It is therefore respectfully requested that based on the employer's showing of good cause, the aforesaid order be set aside, and the employer be afforded an opportunity to appear."

THE ISSUES

The brief submitted in behalf of the employer raises these two issues:

1. Did the department act in excess of its power and in abuse of its discretion in denying the employer's request for a further hearing?

2. Do the findings of fact and the law support the department's conclusion that the employer had substantially reduced the employee's wages, thereby justifying his voluntary quit?

STATUTES INVOLVED

Sec. 108.04(7)

"VOLUNTARY TERMINATION OF EMPLOYMENT. (a) If an employe terminates his employment with an employing unit, he shall be ineligible for any benefits for the week of termination and thereafter until he has again been employed within at least 4 weeks in each of which he worked at least 20 hours, except as hereinafter provided.

"(b) Paragraph (a) shall not apply if the department determines that the employe terminated his employment with good cause attributable to the employing unit."

Sec. 108.09(3)

"APPEALS. (a) Unless the request for a hearing is withdrawn, each of the parties shall be afforded reasonable opportunity to be heard, and the claim thus disputed shall be promptly decided by such appeal tribunal as the department designates or establishes for this purpose, or by the commission as provided in sub. (6).

"* * *

"(c) If the party requesting a hearing fails to appear at the hearing, the appeal tribunal or an examiner designated for this purpose may issue its decision dismissing the appeal, provided

that due notice of the hearing was mailed to the party's last-known address.

"(d) If the other party fails to appear at the hearing, the appeal tribunal shall proceed with the hearing, provided that due notice of the hearing was mailed to said party's last-known address, and may issue its decision without further hearing.

"(e) If a party, having failed to appear at a hearing, shows probable good cause for such failure to the appeal tribunal within 10 days after the hearing date or within 5 days after the decision was mailed to his last-known address, whichever last occurs, the appeal tribunal may set aside its decision and afford further opportunity to be heard, either before the same or another appeal tribunal."

Sec. 108.09(6)

"COMMISSION REVIEW. . . . (b) Either party may petition the commission for review of an appeal tribunal decision, pursuant to general department rules, within 14 days after it was mailed to his last-known address. Promptly after the filing of such a petition, the commission shall dismiss it as not timely at any level or may affirm, reverse, change, or set aside such decision, on the basis of the evidence previously submitted in such case or direct the taking of additional testimony."

Sec. 108.09(7)

"JUDICIAL REVIEW. (a) Either party may commence judicial action for the review of a decision of the commission under this chapter if the party after exhausting the remedies provided under this section has commenced such judicial action in accordance with s. 102.23, 1971 Stats., within 30 days after a decision of the commission was mailed to his last-known address.

(b) Any judicial review under this chapter shall be confined to questions of law, and the provisions of ch. 102, 1971 Stats., with respect to judicial review of orders and awards shall likewise apply to any decision of the commission reviewed under this section. . . ."

THE COURT'S DECISION

A. Review of Department's Denial of Employer's Request for Further Hearing

The employer's brief cites sec. 108.09(3)(e) as the controlling statute. The Court is of the opinion that this statute is not applicable. Apparently employer's brief assumes that the letter of employer's counsel dated December 30, 1975, made such a showing of good cause as would

make it an abuse of discretion for the appeal tribunal not to have set aside its decision and grant a further hearing. However, no action or decision of the appeal tribunal is before this Court for review. The only decision which is reviewable is the department's decision of May 26, 1976. Because the department by that decision adopted the findings of fact of the appeal tribunal those findings are reviewable, but not some action or inaction of the appeal tribunal not set forth in its findings and decision.

The applicable statute is sec. 108.09(6), Stats. This statute made it discretionary with the department whether to grant or deny the employer's request accompanying its petition for review that the appeal tribunal's decision be set aside and the taking of further testimony be directed.

The first attack made upon the department's denial of this request is that the department's denial failed to state its reasons for the same. The case of Transport Oil, Inc. v. Cummings, 54 Wis. 2d 256, 263 (1972), is cited as requiring this to have been done. The Supreme Court has not as far as this Court is aware required reasons to be stated for denial of such a highly discretionary procedural request as that made here. It would be a travesty on justice for this Court to have to reverse and remand in the instant case so that the department may state its reason for denial of a request when such reason would not be of any material assistance to the Court in passing on the issue of whether the denial was an abuse of discretion.

After due consideration of all the arguments advanced as to why such denial was an abuse of discretion the Court is of the opinion no abuse of discretion occurred. However, even if it were an abuse of discretion, only a flagrant abuse of discretion is reviewable in worker's compensation cases. Moore v. Industrial Comm., 4 Wis. 2d 208, 218 (1958); Nelson Mill & Agri-Center, Inc. v. ILHR Dept., 67 Wis. 2d 90, (1975). The instant denial certainly does not qualify as a flagrant abuse of discretion.

The employer, through its attorney, gave three reasons for not appearing at the hearing:

> "1. It was not at that time represented by legal counsel.
>
> "2. The officers of the employer did not fully comprehend the significance and necessity of appearing and presenting evidence at the aforesaid hearing.
>
> "3. The pressures of business made it impossible for the employer to appear."

The employer concedes (p. 3 of plaintiff's brief) that it had notice of the hearing.

In Jerome R. Donlin v. DILHR and Hudson Liquors, Inc., Dane County Circuit Court, Case No. 143-094 (June 23, 1975), and in Olaf Venden v. DILHR and Icke Construction Co., Dane County Circuit Court, Case No. 146-242 (January 9, 1976), this Court took judicial notice of the contents of hearing notices and similar documents sent to parties. In bold-face print on the front of the department's hearing notice in unemployment compensation cases appears this: "IMPORTANT: SEE OTHER SIDE OF THIS NOTICE FOR VITAL HEARING INFORMATION."

The employer's first excuse is that it was not represented by legal counsel. The third paragraph of the notice of hearing provided:

> "ATTORNEY: (Or Agent) You may be represented by an attorney or agent or you may present your own case. The state will not provide you with an attorney. If you appear without an attorney or agent, the examiner will try to bring out the necessary facts. In most cases, an attorney or agent representing a claimant cannot charge, by law, a fee of more than ten percent (10%) of the maximum benefits at issue."

This Court in Venden, supra, concluded from this part of the hearing notice:

> "The Court is of the opinion that this notice was sufficient to meet any requirement of due process that the employee be notified of his right to be represented by counsel at the hearing regardless of whatever advance knowledge the department may have of the complicated nature of the evidence the claimant would have the burden of presenting."

Furthermore, the hearing notice was mailed on December 11, 1975, giving each party ample opportunity to secure legal counsel.

As to the employer's second excuse, not comprehending the significance and necessity of appearing at the hearing, the notice of hearing sufficiently apprised the employer as to the importance of attending the hearing:

> "APPEARANCES: If the 'appellant' fails to appear at a hearing without good cause the request for a hearing may be dismissed. If the 'respondent' fails to appear without good cause, a decision may be issued based on the testimony presented at the hearing. It is not necessary for the employer to appear in some cases. A common example is: A case in which the determination was not based on a denial of liability by the employer, but rather by the department's own investigation. However, an employer may attend the hearing and if facts are known which have a direct bearing on the issue, the employer is urged to attend.
>
> "INFORMATION: If you do not understand your rights at this hearing or the above instructions, contact the office manager of the hearing office. However, he cannot advise you on the merits of your particular case or how best to present it." (Emphasis added.)

In the case at bar, the employer had facts which would have had a bearing on the issue, being a quit issue and which the employer raised in its letter of December 22, 1975.

As to the employer's third excuse, "business pressures", the notice of hearing apprised the employer of its expectations:

> "HEARING: The State provides an opportunity for a fair hearing to employers and employes involved in disputes arising from claims for unemployment compensation. The hearing examiner, a salaried state employe, will preside over this hearing. Such hearings usually last about one hour. You are expected to arrange time off from your everyday affairs, including work, to attend. Postponements will not be granted except in event of great emergency." (Emphasis added.)

The employee was present at the hearing. He was ready to proceed. He was also out of work and without means of support. In California

Dept. of Human Resources Development v. Java, 402 U.S. 121, 135-136, 91 S. Ct. 1347 (1971), the United States Supreme Court emphasized the Congressional objective in the federal statutory requirements that state unemployment compensation laws must meet of "getting money into the pocket of the unemployed worker at the earliest point that is administratively feasible."

The general allegation that the pressures of business prevented the employer from attending does not rise to the level of claiming an emergency situation arose which made it impossible for the employer to attend.

B Whether the Findings and the Law Support the Department's Conclusion That the Employee's Quitting Was With Good Cause Attributable to the Employer.

The Wisconsin Supreme Court, in Kessler v. Industrial Comm., 27 Wis 2d 393, 401 (1965), defined and discussed the meaning of sec. 108.04(7)(b):

> "Good cause attributable to the employer as a basis for unemployment compensation under sec. 108.04(7)(b), Stats., has been the subject of prior decisions of this court. In Western Printing & Lithographing Co. v. Industrial Comm., 260 Wis. 124, 50 N.W. 2d 410 (1951), we stated the resignation must be occasioned by 'some act or omission by the employer' constituting a cause which justifies the quitting. Good cause for quitting attributable to the employer as distinguished from discharge must involve some fault on his part and must be real and substantial. 81 C.J.S., Social Security and Public Welfare, pp. 253-256, sec. 167."

In the Dane County Circuit Court case of Alexander P. Stetz v. DILHR and Don Kerr, Inc., Case No. 136-215 (February 13, 1973), this Court in its memorandum decision included the following comment on the foregoing definition from the Kessler case:

> "It seems clear from the above quoted analysis made by the Supreme Court that the proper approach to whether the employee's voluntary quitting of his employment was due to 'good cause attributable' to the employer, is to determine if such quitting was a reasonable reaction to some act on the part of the employer. In other words, the 'good cause' relates to the reaction of the employee, and not whether the

> employer had good cause for the action it did which precipitated the employee quitting. It is true that whether the employer's act involved some fault on its part may be material, but only because of it being a factor to be considered in determining whether the employee's reaction thereto in quitting was reasonable."

The employer's brief cites Frank v. DILHR and Wisconsin Mosaic & Tile Co., Cases Nos. 134-237 and 134-238, Dane County Circuit Court (March 13, 1972), to stand for the proposition that a decrease in fringe benefits and wages of 11% and 12% is not, as a matter of law, good cause for quitting. But that is not the case here. A decrease in wages from $5.50 an hour to the equivalent of $2.29 an hour is a decrease of 59%. (The appeal tribunal's use of 41% is somewhat erroneous; the decrease was to a rate equivalent to 41% of the prior rate but was actually a 59% decrease). This is certainly substantial, being more than three dollars an hour ($3.21) and would amount to well over $60 per week for a mere twenty hour work week. For the twenty four hour week suggested by the employer, the loss of wages would be in excess of $75!

As stated by this Court in the Frank case:

> "There undoubtedly is some point at which a decrease in compensation is so great as to constitute as a matter of law good cause for the employee's quitting. . ."

In Daniel F. Schensky, d/b/a Schensky Builders v. DILHR and Reinsvold, Dane County Circuit Court, Case No. 145-357 (May 16, 1975), the Honorable Norris Maloney presiding, a 12.75% wage reduction equivalent to a monthly loss of $158 was found to be "substantial" (and good cause for quitting). The Court discussed what "substantial" meant:

> "It is safe to say that a pay cut of 3 1/2¢ per hour amounting to 2% of the previous wage is not substantial. Hessler v. American Television and Radio Co., 104 N.W. 2d 876 (Minn., 1960). It is equally safe to say that a pay cut of $42.00 per week amounting to 60% of the former salary is substantial. Snyder v. Unemployment Compensation Board of Review, 169 A. 2d 578 (Pa. Super., 1961)."

The employer's brief alleges that the $5.50 rate excluded medical insurance whereas the $2.29 rate included such coverage. The employer's

brief further alleged that the value or cost of such coverage was $393.84 a year. It also alleges that the $5.50 rate was gross and that the $2.29 rate was net. The problem is that none of these allegations are supported in the record and are thus entitled to no weight by a reviewing court.

Even if the price of insurance coverage is $393.84 a year, at a decrease of $3.21 an hour and working 24 hours a week, this "benefit" would be written off in only five weeks.

The employer's brief also alleges that the $55.00 for 24 hours of work was only an offer made to Six. This is not the case. The employer established the rate of pay and that rate of pay for future work was a substantial decrease. There is no requirement that a worker, being told of a wage cut, must actually work at that decreased wage in order to quit with good cause.

It is true, as the employer alleges, that the employee has the burden of proving that his quitting is with good cause attributable to the employer. It is submitted that Six's testimony of the substantial pay reduction met that burden. If there were some circumstances that might explain the substantial reduction so as to remove the good cause, the burden was upon the employer to establish such circumstances by competent evidence at the hearing. Therefore, it was clearly upon the employer to establish that the $55.00 was net pay. This was not the understanding of Six.

The Court concludes that the findings of the appeal tribunal adopted by the department support the department's conclusion that Six terminated his employment with good cause attributable to the employer within the meaning of sec. 108.04(7)(b), Stats.

Let judgment be entered confirming the department's order which is the subject of this review.

Dated this 31st day of May, 1977.

By the Court:

Reserve Circuit Judge

APPENDIX E