STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

RICHARD WISKOW,

Plaintiff, DECISION AND ORDER ON REVIEW

vs.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS and MENARD, INC.,

Defendants. Case No. 157-030

BEFORE HON. RICHARD W. BARDWELL, CIRCUIT JUDGE, BRANCH #1

This action was commenced to review a decision of the Department of Industry, Labor and Human Relations (department). The order, dated March 30, 1977, concluded that plaintiff had been discharged for misconduct connected with his employment, within the meaning of sec. 108.04 (5), Stats., and denied him unemployment compensation benefits.

The plaintiff was employed as a salesman by the defendant, Menard, Inc., for a period of about two years. Each salesman was required to enter into a sales agreement with the company, and plaintiff entered into such agreement on February 19, 1975 and again on April 1, 1976. The sales agreement required that employees keep certain records on daily worksheets to be turned in weekly to the management, but this requirement was not strictly enforced. On February 24, 1976, the management sent plaintiff and the other salesmen a memo reminding them of the worksheet requirement, and further stating that failure to keep and submit proper records could result in dismissal.

On April 1, 1976, plaintiff entered into his second sales agreement with Menard. At that time, no mention was made to plaintiff of any deficiencies in his past performance. However, on April 26, 1976, the plaintiff was dismissed. The letter of dismissal stated that the plaintiff had failed to keep and file proper records for the period of April 10 to April 26, that the worksheets filed for the previous two-week period were meaningless, and that the plaintiff had failed to meet the sales quota required by his employment contract for the months of February and March, 1976.

That section has since been revised by Chapter 195, Laws of 1977, and now reads, in part:

> "...Within 30 days from the date of an order or award made by the commission ... any party aggrieved thereby may by service as provided in par. (a) commence, in the circuit court for Dane County, an action against the department for the review of such order or award, in which action the adverse party shall also be made defendant.
>
> "(a) In such action a complaint, which need not be verified, but which shall state the grounds upon which a review is sought, shall be served with the summons. Service upon the secretary, or deputy secretary shall be deemed completed service on all parties...."

It is clear that under the amended statute, an action is commenced by service upon the department. The issue presently before us is whether prior to this amendment an action was deemed commenced when the complaint was filed or when it was served upon defendants.

Although the high court has not addressed this issue directly, several cases assist in analyzing this provision. It has been held that the right to appeal from the decision of an administrative tribunal is statutorily created, and jurisdiction of the reviewing court is conferred only if the claimant strictly complies with the statutory procedures. Holley v. ILHR Dept., 39 Wis. 2d. 260, 264, 158 N.W. 2d. 178 (1968); Jaster v. Hiller, 269 Wis. 223, 231, 69 N.W. 2d. 265 (1955); Rathjen v. Industrial Commission, 233 Wis. 452, 457-58, 289 N.W. 618 (1940). Thus, in Brachtl v. Dept. of Revenue, 48 Wis. 2d. 184, 187, 179 N.W. 2d. 921 (1970), the court held that where the statute specifies that an action is commenced by serving the defendant, no jurisdiction is conferred upon the court in the absence of that service. See also Cudahy v. Dept. of Revenue, 66 Wis. 2d. 253, 263, 224 N.W. 2d. 570 (1974).

Though strict compliance with the provisions of sec. 102.23 (1), Stats., is necessary to confer jurisdiction on the court, the failure to follow certain of the delineated procedures may not bar the action. In Cruz v. ILHR Dept., 81 Wis. 2d. 442, 260 N.W. 2d. 692 (1977), the court held that the intention of the pleading and practice statute was to permit amendment of technical pleading errors to insure that litigation will rest on the merits of the case rather than on "technicalities." Id. at 446. In that case, the court found that

plaintiff had timely followed the proper procedures under the statute, except that he had erroneously captioned the pleadings as "Milwaukee County" circuit court rather than "Dane County." Such an error was deemed a mere technicality which would not destroy the court's jurisdiction, since the defendant was timely notified of the pending action and was not prejudiced by the error. The court noted, however, that the failure to commence the action within the thirty-day limit deprives the court of jurisdiction, since that limitation is "a statement of the policy of the law that all interested parties be apprised of an aggrieved party's intention to seek review within the thirty-day period." Id. at 449.

In Lees v. ILHR Dept., 49 Wis. 2d. 491, 182 N.W. 2d. 245 (1971), the petitioner had erroneously captioned the pleadings as a Chapter 227 review rather than a sec. 102.23 review, and he had failed to serve the defendant altogether, as required under sec. 102.23, Stats. The court first noted that the nature of an action is determined by the allegations in the pleadings, and not by the caption. More importantly, it distinguished between subject matter and personal jurisdiction, holding that while the service of the summons and complaint is not a condition precedent necessary to invoke the subject-matter jurisdiction of the court, the failure to serve the parties deprives the court of personal jurisdiction over the person of the defendant. Id. at 497. The court there found that since defendant had alleged, in its pleadings, only a lack of subject-matter jurisdiction, it had waived the affirmative defense of no personal jurisdiction. Id. at 500.

The Lees case is clearly distinguishable from the present case, in that the department's allegations are not limited to subject-matter jurisdiction, and it has not waived its defense of lack of personal jurisdiction. Though the court in Lees did not directly address the issue herein, it did hold that defendant lost its personal jurisdiction defense because it was waived. The logical inference to be drawn is that, in the absence of said waiver, the failure to serve necessary parties within the statutory period would be a valid defense. This view, that the failure to serve the defendant within the statutory period deprives the court of personal jurisdiction, has been consistently supported by the courts of this circuit. Winter v. ILHR Dept., Dane

County Circuit Court Case No. 152-082 (1976); Joseph Sqro v. ILHR Dept., Dane County Circuit Court Case No. 136-294 (1972); Eva Wells v. Industrial Commission, Dane County Circuit Court Case No. 114-175 (1964). Accordingly, we hold that because the plaintiff failed to serve the summons and complaint within the required thirty-day period, this court lacks jurisdiction to hear the action.

Were we to find that the court has jurisdiction over the person of the defendant, this action must nonetheless be dismissed, for plaintiff's complaint does not state the necessary grounds for relief, as is required by statute.

Section 102.23 (1) (a), Stats. (1975), provided, in part:

> "In such action a complaint, which need not be verified, but which shall state the grounds upon which a review is sought, shall be served with the summons...."

Section 102.23 (1) (d), Stats. (1975), provided:

> "Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds: (emphasis added)
> "1. That the commission acted without or in excess of its powers.
> "2. That the order or award was procured by fraud.
> "3. That the findings of fact by the commission do not support the order or award."

It is apparent that the complaint must state the grounds for review, and that those grounds are limited to the three grounds cited above. In his complaint, the only reference to plaintiff's grounds for review are contained in paragraph 6:

> "6. That your petitioner seeks judicial review of the Commission decision in that such decision totally disregards the fact that the act complained of by the employer as being grounds for dismissal ... was succeeded by a new contract by said employer on April 1, 1976, without limitation, which contract was signed by plaintiff and defendant Menard, Inc. That thereafter no further complaint was made by the employer, Menard, Inc., until the summary discharge of April 27, 1976."

Even if the evidence supported this contention (and it is far from clear that it does), such allegation is not one of the grounds for review provided by the statute. Plaintiff's arguments in his briefs, that the award was procured by fraud and is unsupported by substantial evidence, does not serve to correct the deficiencies in the complaint. Sec. 102.23 (1), Stats., is very specific about what must be pleaded. The error here

is not a mere "technicality," as was the case in Cruz, supra. Rather, it goes to the essence of the cause of action, for the defendant must be apprised of the nature of the alleged error which it is required to defend.

Consequently, we hold that the plaintiff has failed to state a cause of action on which relief can be granted, which failure deprives this court of jurisdiction. Because we so hold, it is unnecessary to consider the merits of the complaint. However, the court has, in fact, reviewed the record herein, and we note in passing that we believe there is ample evidence to support the findings and conclusions of the department.

IT IS THEREFORE ORDERED that plaintiff's complaint, seeking review of defendant's decision denying plaintiff unemployment compensation benefits, is hereby dismissed.

Dated December 7, 1978.

BY THE COURT:

Richard W. Bardwell
Circuit Judge