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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1780, A07-2120

William H. Root,
Relator (A07-1780),

Kevin J. Leino,
Relator (A07-2120),

vs.

Key Lakes Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed December 23, 2008
Affirmed
Collins, Judge[*]
Minnesota Department of Employment and Economic Development
File Nos. 6669 07; 7256 07; 7255 07; 7254 07

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Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Collins, Judge.

U N P U B L I S H E D O P I N I O N

COLLINS, Judge

In these consolidated certiorari appeals, relators challenge the decision of the unemployment law judge (ULJ) that relators received vacation pay and, therefore, are disqualified from receiving unemployment benefits. Because the record supports the ULJ's findings of fact and because the conclusions of law are not erroneous, we affirm.

FACTS

Relators William Root and Kevin Leino are employed by respondent Key Lakes, Inc. (Key Lakes), a shipping company, and are members of the Seafarers International Union (SIU). As members of the SIU, relators work under a collective-bargaining agreement that requires employees to work a "rotary" schedule, meaning that they work aboard ship for a designated tour of duty[1] and on return are required to take vacation for approximately half as long as their completed tour of duty. Key Lakes and its employees assume that employees will return to work following the mandatory vacation. Relators worked under such a schedule during the relevant periods in 2006 and 2007.

The collective-bargaining agreement also established the Seafarer's Vacation Fund (the fund). Pursuant to the agreement, for each hour an employee works, money is transferred from Key Lakes to the SIU and placed into the fund. The money is

[1] A "tour of duty" is defined as the set period of time when employees are aboard ship to complete a specified project. Generally, the duration of a tour of duty is from 75 to 120 days.

transferred to the SIU monthly. In addition, employees are entitled to "safety bonuses" if they complete their tour of duty without illness or injury. Money to pay the safety bonuses is likewise transferred by Key Lakes to the SIU.

Employees request distributions from the SIU by completing a "vacation application." A distribution request can be made at any time: employees need not be on leave to request a distribution; employees on vacation are not required to take a distribution; and distributions can be deferred for up to 15 months. When a distribution is requested, payment is made subject to tax withholdings. Like the "rotary" schedule, this distribution plan is familiar to all Key Lakes employees.

On January 3, 2007, one day after ending his tour of duty, Root requested a distribution from the fund. He received a gross distribution of $8,385.06. Root described the distribution as "vacation pay" that he earned by working from August 24, 2006, until January 2, 2007. When he applied for unemployment benefits, Root also indicated to the Department of Employment and Economic Development (department) that he had or would receive vacation pay.[2]

Leino requested a distribution on or about January 29, 2007, one week after he completed a tour of duty. He received a gross distribution of $4,462.26.[3] Leino

[2] Root later clarified this, stating that the vacation pay was earned before the layoff and was only paid thereafter.

[3] The ULJ found that Leino received a gross distribution of $4,662.26, of which $219.97 was a safety bonus. However, the findings also indicate that $4,242.29 was vacation pay. It appears that the correct amount of this gross distribution is $4,462.26 (4,242.29+219.97). This is consistent with Leino's testimony.

requested another distribution after his tour of duty ending on May 31, 2007. He received a gross distribution of $3,557.58, of which $107.80 was a safety bonus.

Relators subsequently applied for unemployment benefits. After paying unemployment benefits to Root sporadically for nearly two years, the department determined that Root (1) was not permanently separated from employment, (2) had received vacation pay, and (3) was ineligible for unemployment benefits from December 31, 2006, through March 10, 2007. On April 19, 2007, the department issued determinations of overpayment, requesting repayment of overpaid benefits for the period of January 7, 2007, through March 10, 2007. In total, the department sought to recover $3,902 in overpaid unemployment benefits.

Root appealed the department's determinations, and a hearing was held before the ULJ on June 1, 2007. In ruling that Root was ineligible for unemployment benefits, the ULJ stated:

> The parties failed to provide documents indicating the intent of the fund itself. Based on the name of the fund and the preponderance of the evidence as to past practice and usage, the intent in establishing and maintaining the fund, regardless of whether it permits workers to withdraw or be paid funds while working, was apparently to provide payment of vacation monies from the fund to an employee for periods when not performing services for shipping firms.

Root requested reconsideration, the ULJ affirmed, and Root's certiorari appeal followed.

Likewise, Leino applied for unemployment benefits for periods following his tours of duty. The department initially determined that each of the distributions Leino had

received from the fund was "a bonus earned at the time of payment of wages and [is] not vacation pay." Key Lakes challenged the determination, stating:

> The company has scheduled them to take vacation of which they are compensated for. Mr. Leino may not have chosen to take this pay during his period of time off the vessel, this is his choice, but the company is supporting that they are to take this money they have built up in the vacation fund during this time off the vessel. This money is not a bonus but rather vacation pay.

Following a hearing on August 16, 2007, the ULJ contradicted the department's determination, finding that the evidence does not support the distinction between a bonus earned at the time of payment of wages and vacation pay. The ULJ concluded that because the distributions from the fund to Leino were vacation pay, he is ineligible for unemployment benefits. Leino requested reconsideration, the ULJ affirmed,[4] and Leino's certiorari appeal followed.

Pursuant to an order of this court, these certiorari appeals are consolidated.

D E C I S I O N

Relators challenge the ULJ's determination that the distributions they received from the SIU are "vacation pay," which disqualifies them from unemployment benefits for the periods at issue. Specifically, relators argue that (1) the lump-sum payments are part of a comprehensive benefit plan administered by the SIU; (2) Key Lakes employees lack sufficient knowledge to provide insight regarding the operation of the fund, therefore the testimony of Key Lakes' witnesses lacks foundation and should be disregarded;

[4] The ULJ amended the findings of fact only to correct an error regarding Leino's pay rate.

(3) even if the distributions are considered vacation pay, they are paid in anticipation of a permanent separation and do not offset unemployment benefits; and (4) the distributions are severance or bonus payments that are not considered wages for purposes of unemployment compensation.

When reviewing the decision of a ULJ, we may affirm the decision, remand it for further proceedings, or reverse or modify it if the substantial rights of the applicant have been prejudiced because the findings, inferences, conclusion, or decision are "(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious." Minn. Stat. § 268.105, subd. 7(d) (2006).

"When reviewing questions of law, this court is not bound by the [ULJ's] conclusions of law, but is free to exercise its independent judgment." *Markel v. City of Circle Pines*, 479 N.W.2d 382, 384 (Minn. 1992). A person's eligibility for unemployment benefits is a question of law. *Id*. The applicant bears the burden of proving eligibility for unemployment benefits. *Mueller v. Comm'r of Econ. Sec.*, 633 N.W.2d 91, 92 (Minn. App. 2001). Statutory construction is a question of law, which we review de novo. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998).

When reviewing the ULJ's factual findings, we apply a deferential standard of review and view those findings in the light most favorable to the decision. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Those findings will not be

disturbed "when the evidence substantially sustains them." *Id*. "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Id*. at 345.

I.

Relators first argue that the ULJ erred by determining that the distributions were vacation pay and not part of a comprehensive benefit plan. Relators contend that (1) the distributions were made as a lump-sum payment; (2) the fund also included "safety bonus" payments; and (3) distributions were made at any time on an employee's request, and the time off was mandatory.

An applicant is ineligible for unemployment benefits "for any week with respect to which the applicant is receiving, has received, or has filed for payment, equal to or in excess of the applicant's weekly unemployment benefit amount, in the form of: (1) vacation pay paid upon temporary, indefinite, or seasonal separation." Minn. Stat. § 268.085, subd. 3(a) (2006). Any payment made by an employer that renders an applicant permanently or temporarily ineligible to receive unemployment benefits can be made either in periodic payments or as a lump-sum payment. Minn. Stat. § 268.085, subd. 3(b) (2006).

Relators contend that because they received a lump-sum payment the payment was part of a comprehensive benefits plan and not vacation pay. But this contention is unavailing. As shown above, the legislature explicitly included a provision regarding lump-sum payments, stating that "if the payment is made in a lump sum, that sum shall be divided by the applicant's last level of regular weekly pay from the employer." Minn.

Stat. § 268.085, subd. 3(b)(2). Employers are free to disburse payments as either periodic or lump-sum payments.

Relators next argue that because "safety bonuses" also are distributed from the fund, the fund should be deemed to be a comprehensive benefits fund. Relators are correct in pointing out that Key Lakes transfers the safety-bonus money to the SIU similar to vacation pay. But employees requesting distributions from the fund receive two checks—one for their safety bonus, and the other for their vacation time. Moreover, relators provide no legal authority for the proposition that if an employer adds a bonus into the same fund as vacation pay, comingling the two somehow transforms the vacation pay into a bonus.

Finally, relators argue that because employees can request distribution from the fund at any time, and because the time off was mandatory, the distributions cannot be properly considered as vacation pay.

In support of this argument, relators urge us to reverse the ULJ's determinations based on this court's unpublished decision in *Auren v. Belair Builders, Inc.*, 2006 WL 771394 (Minn. App. 2006). There, Auren earned money that was held for him by his union and was disbursed to him by the union upon Auren's request. *Id.* at *2. Auren received a distribution from the union 12 days prior to being laid off; however, Auren did not know he was to be laid off when he requested the distribution. *Id.* at *3. On those facts, the ULJ determined that Auren was ineligible for unemployment benefits because he received vacation pay. *Id.* at *1.

As the controlling statute provided at the time, an applicant was disqualified for unemployment benefits if the applicant received "severance pay, bonus pay, vacation pay, sick pay, and any other money payments . . . *paid by an employer* because of, upon, or after separation from employment . . . ." Minn. Stat. § 268.085, subd. 3(a)(1) (2004) (emphasis added). Reversing the ULJ's determination, this court stated that there was no evidence to support a finding that the union was acting on behalf of the employer and therefore, the money was not paid by the employer. *Auren*, 2006 WL at *3. Also, when Auren requested the distribution, he was not on notice of the layoff. Thus, this court held that there was no evidence to support a finding that the distribution was received "because of, upon, or after" the layoff. *Id.*

The ULJ distinguished the present case from *Auren*, stating:

> The parties failed to provide documents indicating any contrary intent of the fund. Based on the name of the fund and the preponderance of the evidence as to taxability of the payments, past practice . . . and usage, the fund, regardless of whether it permits workers to withdraw or be paid funds while working, was apparently to provide payment of vacation monies from the fund to an employee for periods when not performing services for shipping firms whether on a temporary or permanent basis.

We agree with the ULJ because relators' reliance on *Auren* ignores three important distinctions. First, *Auren* is unpublished and is not precedential. Minn. Stat. § 480A.08, subd. 3(b) (2006). Second, Auren sought and received his distribution prior to, and without notice of, his layoff; whereas here, relators know when their tour of duty will end and approximately how long they will be on vacation. Third, the controlling law has changed since *Auren* was decided and no longer refers to vacation payments made by the

employer. Minn. Stat. § 268.085, subd. 3(a)(1) (2006). In light of these significant distinctions, *Auren* is not persuasive authority for relators' position.

But while there is little caselaw interpreting and applying the vacation pay disqualification provision, and even less under the current statutory language, we do find guidance from *Minneapolis Park & Recreation Bd. v. LeCuyer*, 457 N.W.2d 760 (Minn. App. 1990), *review denied* (Minn. Sept. 20, 1990). LeCuyer was a full-time permanent intermittent worker for the park board. *Id.* at 761. LeCuyer was subject to a collective-bargaining agreement that provided for a percentage of his overtime earnings to be placed into an account from which funds were disbursed to supplement his paycheck for weeks in which he worked less than 40 hours. *Id.* Although he received disbursements from this carry-over overtime-earnings account, LeCuyer applied for unemployment benefits for weeks in which he did not work. *Id.* at 761-62. In reversing a decision by the department of jobs and training, this court wrote:

> Here, the parties entered into a collective bargaining agreement, the intent of which was to make overtime payable with respect to those weeks in which an employee would not receive a full 40 hours in regular wages. LeCuyer and his bargaining agent clearly intended that payment from the accumulated hours of service account would provide a bridge during periods in which no work was available. We agree with the Park Board's argument that payment from this overtime account is analogous to payment of a teacher's salary in monthly increments during the summer when the teacher is not actually on the job site.

Id. at 763.

Likewise, relators worked intermittently under a collective-bargaining agreement. Here, as in *LeCuyer*, the employer created a mechanism by which employees on leave or

working fewer than full-time hours could receive some form of compensation. While the plan in *LeCuyer* did not allow employees to control the timing of the distributions, and the source of the funds is different, the purpose of the fund—to "provide a bridge during periods in which no work was available"—is accomplished similarly by the plan implemented by Key Lakes and the SIU. Moreover, relators used the fund exactly for that purpose—taking a distribution while not on a tour of duty as an income "bridge" until they began their next tour of duty. Accordingly, the ULJ did not err by determining that the distributions are vacation pay.

II.

Relators next argue that the Key Lakes' employee-witnesses demonstrated such a lack of understanding about the fund, how it operates, and the benefits that it provides, that their testimony should be disregarded. Essentially, relators are urging us to make credibility determinations. But that is a function within the exclusive province of the ULJ which we will not disturb on appeal. *Skarhus*, 721 N.W.2d at 345.

This testimony was properly before the ULJ, who, after considering all of the evidence presented, concluded that the distributions are properly considered vacation pay. The ULJ is in the best position to weigh the credibility of all parties and witnesses, and we will not second-guess the ULJ's credibility determinations.

III.

Alternatively, relators argue that even if the distributions are deemed to be vacation pay, they were made in anticipation of a permanent separation. Under Minnesota law, vacation pay paid upon a "permanent separation from employment" does

not disqualify an employee from receiving unemployment benefits. Minn. Stat. § 268.085, subd. 3(1) (2006).

Key Lakes' personnel manager testified that layoffs of employees occur each winter because the Sioux Locks freeze and are closed from approximately January 15 to March 25, but they are seasonal layoffs and not a permanent separation. The SIU representative testified that the seasonal separations are not permanent and, although Key Lakes does not guarantee that employees will return in the spring, employees "normally" do so. Root, himself, testified that although seasonally laid-off employees are not assured of resuming employment, it is anticipated, and after the mandatory time off employees "come back to work."[5] Moreover, it is undisputed that both Root and Leino have worked many tours of duty followed by mandatory vacations, both have been laid off over winters, and both returned to Key Lakes after each separation.

Based on the record, the ULJ correctly determined that neither Root nor Leino was permanently separated from his employment by virtue of seasonal layoff or mandatory vacation and, thus, section 268.085, subd. 3(1), does not apply.

IV.

Finally, relators argue that the distributions should be construed as severance or bonus payments because employees can request a distribution at any time, not only while on vacation. Severance or bonus payments made by an employer because of a separation from employment do not render the recipient ineligible for unemployment benefits if, at

[5] Root later testified that his layoff in January when the locks closed "could have been permanent or not permanent. I don't know."

the time of the payment, the payment is not considered to be wages. Minn. Stat. § 268.085, subd. 3(2) (2006). Although "severance payment" is not defined by the statute, this court has defined the phrase to mean "a sum of money usually based on length of employment for which an employee is eligible upon termination." *Carlson v. Augsburg Coll.*, 604 N.W.2d 392, 394-95 (Minn. App. 2000).

The distributions here were not severance payments because there was no separation from employment. As discussed above, although relators were required to take time off following each tour of duty and were laid off each winter, they were expected to return to work and did so. Therefore, substantial evidence in the record supports the ULJ's finding that there was no separation from employment, and thus the distributions were not severance pay.

Second, while there is little caselaw addressing the issue of what constitutes a bonus for purposes of unemployment eligibility, the plain meaning of "bonus" does not include the vacation-pay distributions made to relators. Bonuses, in the employment context, are payments made "for services or on consideration in addition to or in excess of the compensation that would ordinarily be given." *Black's Law Dictionary* 194 (8th ed. 2004). Here, the collective-bargaining agreement dictates the "rotary" schedule, the amount of money Key Lakes must transfer to the SIU for deposit into the fund, and when the transfers and deposits are made. Therefore, relators know exactly how much Key Lakes transfers to the SIU for their accounts and when funds are available for them to request distribution.

The distinction between bonus and vacation pay is clear upon comparing the safety bonus with the vacation pay. The safety bonus, which the ULJ properly qualified as a "bonus," is a reward paid only to employees who avoid injury and illness during their tour of duty; it is not a guaranteed payment. Conversely, employees earn vacation pay simply by fulfilling their ordinary tasks—nothing new, additional, or different is required of them.

Because substantial evidence in the record supports the ULJ's factual findings and because the ULJ correctly applied the law, the ULJ correctly determined that relators received vacation pay and, therefore, are disqualified from receiving unemployment benefits for the periods at issue.

Affirmed.