IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GEORGE O. TAMBLYN, IV,	)	
	)	No. 67703-9-I
Appellant,	)	
	)	DIVISION ONE
v.	)	
	)	
STATE OF WASHINGTON,	)	
DEPARTMENT OF EMPLOYMENT SECURITY,	)	UNPUBLISHED OPINION
	)	
	)	FILED: January 22, 2013
Respondent.	)	

Becker, J. — The 30-day time limit for appealing an unemployment benefits determination may be extended for "good cause shown." RCW 50.32.075. In weighing whether a benefits claimant showed good cause for an untimely appeal, we consider whether the agency's communications to the claimant were misleading. We conclude the Employment Security Department's notice to George Tamblyn IV informing him that he owed an overpayment was unclear. His failure to immediately comprehend the meaning of the notice was therefore excusable, and the department has shown no compelling prejudice by the delay. We reverse and remand for Tamblyn to have his benefits appeal heard on the merits.

According to testimony and documents in the administrative record,

Tamblyn was the president, founder, and sole owner of a yacht repair center on Lake Union in Seattle. After an ill-timed expansion, the company went out of business in late 2009. The company's final payroll was completed on November 30, 2009. Tamblyn filed for personal and corporate bankruptcy.

Tamblyn submitted an application for unemployment benefits to the Employment Security Department. Although corporate officers and business owners are not automatically covered by state unemployment insurance, Tamblyn had voluntarily deducted unemployment insurance premiums from his paycheck for a number of years to provide himself coverage. His unemployment benefits application was approved, and he began receiving benefits in January 2010.

Later in January, the department's district tax office wished to obtain a fourth quarter 2009 tax report from Tamblyn's company. The tax office attempted to contact Tamblyn. After multiple failed attempts, the tax office gave a "tip" to the department's Office of Special Investigations' "Fraud Management" unit. The department's "Data-Mining Unit" then began an investigation into whether Tamblyn had made a fraudulent claim for benefits. On April 1, 2010, it mailed Tamblyn a "Corporate Officer Advice of Rights" form, informing him that there was "a question on your eligibility for benefits." The Advice of Rights asked Tamblyn to state his percentage of ownership of the company, whether he was currently employed as an officer, and demanded documentation proving that the corporation had been formally

dissolved. These were items of information that would factor into Tamblyn's eligibility for benefits. Tamblyn did not return the form.

Personnel in the Data-Mining Unit then reviewed the company's Department of Revenue records, which listed the account as "open." They reviewed the Secretary of State's records, which listed the corporation as "active." If the corporation was still active, Tamblyn, as a corporate officer and 100 percent owner, was ineligible for benefits.

On April 28, 2010, the department issued Tamblyn an eight-page "Determination Notice." The first two pages of the notice described an issue related to his status as a corporate officer who owned 10 percent or more of the company. At the bottom of page two, the notice stated, "RESULT: Benefits are denied beginning 11/29/2009 and ending 99/99/9999." Page three described an issue related to a knowing false statement or withholding of information. At the bottom of page three, the notice stated, "RESULT: Benefits are denied beginning 04/25/2010 and ending 10/23/2010." Page six of the letter informed Tamblyn that he had received an overpayment of $4,158 that he would have to pay back. The letter informed him he had 30 days to appeal the determination.

Tamblyn was hired by a new employer in April 2010. When he reviewed the April 28 determination notice, he saw the "result" listed on page three, stating that his benefits were "denied beginning 04/25/2010." Based on the timing coincidence, he believed he was being denied prospective benefits because he had started a new job. He did

not read the notice thoroughly or understand that he was being asked to repay the few months of benefits he had already received. He did not file an appeal.

Several months later, in early September, Tamblyn received a certified letter from the department informing him that it would soon begin garnishing his wages to recoup the overpayment. He telephoned the department on the same day and learned of his mistake. On September 10, 2010, he filed a single paragraph appeal:

> Appeal the decision of denial of benefits because Lake Union Yacht Center Inc. closed its doors permanently on Nov. 30, 2010 [sic]. Due to this closure, I was forced into personal bankruptcy as well.

He also completed and sent the Corporate Officer Advice of Rights form, on which he reiterated that the company had closed in November 2009 and that he was no longer employed there. He stated that the corporation had been dissolved in January 2010, though he did not have access to records that would prove the dissolution date. His appeal was filed more than 3 months after the 30-day deadline.

In October 2010, the Department's Office of Administrative Hearings convened a hearing before an administrative law judge to determine whether Tamblyn's untimely appeal should be permitted to proceed. Tamblyn appeared by telephone, unrepresented by counsel. A representative of the department did not appear, although a stack of records had been provided to the administrative law judge as proposed exhibits. Tamblyn explained to the judge that he had found the determination notice confusing

and had believed it was only a denial of prospective benefits after April 25, 2010, based on his new employment. He also explained that at the time he received the letter, he was receiving large quantities of mail due to his company's failure and his personal and corporate bankruptcies, he had recently started a new job, and he had been seeking medical treatment for depression. He admitted not reading the letter thoroughly. He stated that he did not realize he needed to file an appeal until he received the certified letter informing him that his wages would be garnished.

The administrative law judge concluded that Tamblyn had not shown a sufficiently compelling reason to excuse his untimely appeal because the law presumes a person understands a notice he is capable of reading:

> Unfortunately, the law is very clear that if someone receives a notice and (inaudible) able to read it, they are assumed to have understood it and expected to have understood it. So I'm going to say there is not good cause for late appeal in this case.
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> . . . .
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> . . . as an individual, I'm certainly empathetic, but the law is pretty clear about when someone receives a notice.

The judge closed the hearing without taking testimony from Tamblyn on the merits of his appeal. The next day, Tamblyn submitted a letter from his therapist, confirming that she had been treating him for depression during the period in question. The judge issued written findings and conclusions, dismissing Tamblyn's appeal as untimely.

Tamblyn appealed the ruling to the Commissioner's Review Office. In his appeal letter, Tamblyn again explained

that he did not initially understand the meaning of the letter or that he was being asked to repay benefits he had already received. The commissioner adopted the findings and conclusions of the administrative law judge and affirmed, concluding, "The delay of over three months in the filing of the Petition for Review had not been established to be for a reason so compelling as to excuse the substantial delay."

Tamblyn petitioned for review of the commissioner's ruling by the superior court. The court denied review, affirming the commissioner.

This appeal followed.

GOOD CAUSE FOR FILING UNTIMELY APPEAL

Tamblyn contends the court erred by denying him the opportunity to have his appeal heard on the merits.

Judicial review of a final administrative decision of the commissioner of the Employment Security Department is governed by the Washington Administrative Procedure Act (APA), chapter 34.05 RCW. Daniels v. Emp't Sec. Dep't, 168 Wn. App. 721, 727, 281 P.3d 310, review denied, ___ P.3d ___ (Wash. Dec. 5, 2012). An appellate court sits in the same position as the superior court and applies the APA standards directly to the administrative record. Daniels, 168 Wn. App. at 727. The APA allows a reviewing court to reverse if, among other things, the commissioner based his decision on an error of law, if substantial evidence does not support the decision, or if the decision was arbitrary or capricious. RCW

34.05.570(3)(d), (e), (i); Tapper v. Emp't Sec. Dep't, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

Under the Employment Security Act, Title 50 RCW, a claimant for unemployment benefits has the right to appeal the department's unfavorable determination of his claim within 30 days of the notification or mailing date, whichever is earlier. RCW 50.32.020. The appeal tribunal may, however, in its discretion, waive the 30-day time limitation "for good cause shown." RCW 50.32.075. We apply a three-prong test in determining whether the claimant has established "good cause" for filing a late appeal. Wells v. Emp't Sec. Dep't, 61 Wn. App. 306, 311, 809 P.2d 1386 (1991). The criteria considered are: (a) the length of the delay, (b) the excusability of the delay, and (c) whether acceptance of the late filed appeal will result in prejudice to other interested parties, including the department. WAC 192-04-090(1)(a)-(c); see also Wells, 61 Wn. App. at 311. We employ a "sliding scale" analysis whereby a short delay requires a less compelling reason than does a longer delay. Hanratty v. Emp't Sec. Dep't, 85 Wn. App. 503, 507, 933 P.2d 428, 945 P.2d 726 (1997). We consider each case on its own facts. Wells, 61 Wn. App. at 314. In determining excusability, the department is required to take into account "any physical, mental, educational or linguistic limitations" of the claimant. WAC 192-04-090(2).

Whether a claimant has shown good cause for an untimely appeal is a mixed question of law and fact. Wells, 61

Wn. App. at 310. Washington courts apply a substantial evidence standard to the agency's findings of fact but review de novo its conclusions of law. Terry v. Emp't Sec. Dep't, 82 Wn. App. 745, 748-49, 919 P.2d 111 (1996). On review of mixed questions of law and fact, we determine the law independently and then apply the law to the facts as found by the agency. Galvis v. Dep't of Transp., 140 Wn. App. 693, 708, 167 P.3d 584 (2007), review denied, 163 Wn.2d 1041 (2008); see also Wells, 61 Wn. App. at 310-11 ("the reviewing court is entitled to exercise its inherent and statutory authority to make a de novo review of the record independent of the agency's actions.") (internal quotation marks omitted), quoting Rasmussen v. Emp't Sec. Dep't, 98 Wn.2d 846, 849, 658 P.2d 1240 (1983).

Tamblyn does not dispute that he filed his appeal over three months late. His appeal was due on or before May 28, 2010. He did not file it until September 10 of that year. He contends, however, that this delay was excusable because the determination notice was "confusing to the layperson," and as such, it did not provide him effective notice that the department had determined he owed an overpayment.

We agree. The department's eight-page, single-spaced notice fell below any reasonable standard of clarity. To begin with, the notice is inconsistently formatted; some topics in the notice begin with headings in a bold, capitalized typeface, while other topics contain no headings whatsoever. The notice is written in a commingled translation of

English and Spanish, with many paragraphs containing lines in both languages, and many of the Spanish words containing improper punctuation marks mid-word, such as asterisks, percentile marks, and brackets.[1] Sections of the notice written in English proceed without transition from paragraphs written in Spanish. The sequence is so difficult to follow that, if not for the numbered pages, a reader could reasonably believe there to be pages missing.

Although the notice contains two separate denial periods for different reasons lasting different durations, both are emphatically designated in a capitalized, bold typeface as the singular "RESULT" of the notice. The first denial period is described as beginning in November 2009—five months before the date of the letter, and several months after the department began sending Tamblyn benefits—and ending on the futuristic date of "99/99/9999." The second denial period would begin on April 25, 2010, and end on October 23, 2010. Meanwhile, the table on the last page of the letter appears to apply the determination only to benefits received through "04/03/10"—about three weeks before the second denial period was scheduled to *commence*.

The overpayment determination is not even mentioned until page six. After two pages of English/Spanish boilerplate on pages four and five describing

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[1] We also observe that less than half of the letter is translated into Spanish. To the extent the department sought to communicate the full contents of the determination notice to a claimant who reads only Spanish, the notice was a clear failure. If the department tailored its partial translations to its knowledge that Tamblyn spoke English, this begs the question as to why the letter contained *any* Spanish translations.

Tamblyn's appeal rights, the notice proceeds without transition on page six to describe an "overpayment of $4,158.00 as shown on the Schedule of Claim report." The schedule, meanwhile, does not contain the $4,158.00 figure, but lists several series of numbers, mostly zeros, marked by undefined abbreviations such as "Opay Amt," "Pyd/Entit," and "WP." Although a column in the schedule marked "Fraud" states "Yes" for each week of benefits, the column marked "Fraud Penalty" states "No" for each week.

The notice, in summary, was such a confusing and poorly edited amalgam of bureaucratese as to be virtually unreadable. It did not clearly convey that Tamblyn had received an overpayment that he would be required to repay.

In Scully v. Emp't Sec. Dep't, 42 Wn. App. 596, 712 P.2d 870 (1986), cited by the department in this appeal, we held that a claimant's receipt of "misleading" and "contradictory messages" from the department which prevented the claimant from understanding his need to file an appeal "was sufficient to constitute excusable error" under the good cause standard. Scully, 42 Wn. App. at 599, 604. The department mailed Scully a determination notice denying him benefits, but also sent him a benefits check of $150. Scully received both on the same day. Some days later, Scully received a redetermination notice, informing him that he was entitled to a total of $2,400 in benefits, minus the $150 he had already received. About a week later, he received a Request for Waiver Notice, informing him of a potential overpayment. It was not until he received this final notice that he understood the original

benefits check may have been paid in error and that he needed to file an appeal. Scully filed his appeal the next business day, 17 days after the appeal period had closed.

The court concluded that Scully's delay, although lengthy, "should be considered in light of the excusability of the error." Scully, 42 Wn. App. at 603. Because the department's own misleading communications were the cause of the delay, the court concluded the length of the delay "should be measured from the date the claimant has become aware of the need to appeal." Scully, 42 Wn. App. at 604. The court considered only the one "working day" delay between the date Scully discovered his mistake and the date he filed his appeal. Scully, 42 Wn. App. at 604.

We conclude here the department's communication to Tamblyn was unclear and misleading. Under Scully, therefore, we need only consider Tamblyn's delay between discovering his mistake and filing his appeal.

The administrative law judge found that Tamblyn did not become aware of his need to file an appeal until he received a wage garnishment notice from the department "around early September." Tamblyn filed his appeal on September 10. Even if he received the wage garnishment notice as early as September 1, 2010—and for all the record shows, he may have received it several days later—he filed his appeal at most nine days later. Such a delay was not unduly long.

Although in one of the consolidated

appeals decided in Rasmussen, the court declined to excuse a delay as brief as 8 days, that case arose in the context of the old statutory scheme that permitted claimants only a 10-day appeal period. See RCW 50.32.020 (1951); Laws of 1987, ch. 61 § 1 (extending appeal period from 10 to 30 days). Naturally, we may view an 8- or 9-day delay differently under the current, more permissive scheme. More to the point, had the department's notice to Tamblyn conveyed the overpayment in a reasonably clear fashion, the 9 days or fewer that he took to respond would have fallen within the 30 days he was permitted by statute.

The department contends that Tamblyn's delay cannot be excused because "the ultimate reason" for the delay was Tamblyn's failure to read the determination notice in its entirety. The administrative law judge also rested on this factor in concluding that Tamblyn had not shown good cause. "Unfortunately, the law is very clear that if someone receives a notice and [inaudible] able to read it, they are assumed to have understood it and expected to have understood it."

Like the administrative law judge, the department appears to be relying on a boilerplate rule of contract law:

> A fundamental principle of Washington contract law is "that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents." Where a party has an opportunity to examine the contract prior to his agreement, and where such agreement is not induced through fraud or coercion, he may not claim ignorance of the contract's terms.

Wash. Fed. Sav. & Loan Ass'n v. Alsager,

165 Wn. App. 10, 14, 266 P.3d 905 (2011) (footnote omitted), review denied, 173 Wn.2d 1025 (2012). But the determination notice was not a contract; Tamblyn did not sign it, nor was he expected to. The department cites no authority for applying contract law in this context. As Scully illustrates, administrative agencies must communicate clearly if they expect their deadlines to be enforced. Following Scully, we conclude Tamblyn's delay was excusable even though he admitted that he did not read the notice thoroughly.

The final prong of the good cause analysis is whether acceptance of Tamblyn's untimely appeal would cause prejudice to the department. The department contends that it "is prejudiced by an appeal filed over three months late because it has an interest in finality." It provides no further explanation. The department does not argue, for example, that in a hearing on the merits, it will be forced to rely on evidence that may have grown stale or that it took some action in reliance on the finality of the commissioner's ruling that it will be a hardship to undo.

In a previous case, we rejected the department's conclusory argument that it had an "interest in preserving finality." Scully, 42 Wn. App. at 602. Delay, on its own, is not necessarily prejudicial. Were a mere interest in finality enough to establish prejudice, the department would suffer prejudice, per se, in every case of untimely appeal. That is not the intent of the good cause test, in which prejudice is only one of three considerations. The department fails to make a

compelling showing of prejudice.

By contrast, the prejudice to Tamblyn is great if he is denied an opportunity to have his appeal heard on the merits. The preamble to the Employment Security Act states that “this title shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum.” RCW 50.01.010. The legislature takes for granted that those who are entitled to unemployment benefits are suffering. Scully, 42 Wn. App. at 602. The department, moreover, makes no attempt to dispute Tamblyn’s contention that for a number of years, the department accepted his voluntary payroll deductions. If Tamblyn is entitled to unemployment compensation after paying into the system for years, denial of these benefits during his time of need is undoubtedly prejudicial to him. In these circumstances, the department should not apply the 30-day period inflexibly. Liberal application of the Employment Security Act for purposes of reducing the suffering of the unemployed is the “paramount concern.” Wells, 61 Wn. App. at 315.

We do not suggest that the rule of Scully permits any person to establish good cause simply by claiming to have misunderstood a notice sent by the department. If a claimant is feigning confusion or mental distress to excuse an untimely appeal, the department is free to rule—indeed should rule—against hearing an appeal on the merits. But here, the department did not find that Tamblyn lacked credibility. The record provides no reason to doubt that he was genuinely misled by the notice. Not only

was the notice itself difficult to decipher, its timing coincided with his acceptance of a new job. The "result" listed on page three denied him benefits beginning soon after his new job began. A variety of facts in the record support his contention that by the time he filed for unemployment benefits, his company had closed its doors for business. Not only did both Tamblyn and his father repeatedly inform the department that Tamblyn's company had closed for business in November or December 2009, the company's payroll processor sent the department a notice on December 16, 2009, informing it that the company's limited power of attorney had been rescinded.[2]

We reverse the superior court's order denying review. We remand the matter to the Employment Security Department for an administrative hearing on the merits.

Becker, J.

WE CONCUR:

Appelwick, J.

Cox, J.

[2] Certified Appeal Board Record at 42.