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Whose Due Process?

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WHOSE DUE PROCESS?

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CAN the legislature validly provide that a claim for unemployment compensation which has been allowed by the benefit agency and affirmed by an administrative appeal tribunal shall be paid at once notwithstanding the employer's application for judicial review? [1]

On the assumption that such provisions are valid, the legislatures of some thirty states during the past twenty years have enacted clauses to this effect in their unemployment compensation statutes (usually called "employment security laws").

In 1956 the appellate courts of two states were asked to consider this question and arrived at opposite conclusions.[2] The Supreme Court of Pennsylvania held the provision [3] invalid on the ground that it permits the employer's property to be taken without due process of law.[4] The Supreme Court of Oklahoma decided that such provisions neither offend due process nor improperly curtail judicial powers.[5]

The recent cases are of special interest in several particulars. The Pennsylvania Supreme Court adopted extensive excerpts from the opinion of the

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[1] Appeals lie from the benefit agency to a referee, from the referee to the Board of Review, and from the Board to the Superior Court. Sections 501 to 512 of the Pennsylvania Unemployment Compensation Law, Act of December 5, 1936, P.L. (1957) 2897, as amended; tit. 43, PURDON'S PA. STAT. ANN. §§ 821 to 832. Where an appeal is filed it takes at least a month (after the claim) for the referee to hold this hearing and make a decision. An appeal to the Board adds another month or more until the Board makes its decision. This is followed by a 40 day period within which an appeal may be filed in the Superior Court. If an appeal is filed in the Court, a year or more may elapse before judicial determination.

[2] Thereby preserving the balance of authority on the question of validity of the so-called "double affirmation" (more accurately, the "double allowance") clauses of state employment security laws. That such clauses are *valid:* Abelleira et al. v. District Court of Appeal, 17 Cal.2d 295, 109 P.2d 942 (1941); State ex rel. Aikens v. Davis, 131 W. Va. 40, 45 S.E.2d 486 (1948); Todd Shipyards Corp. v. Texas Employment Commission, 245 S.W.2d 371 (Texas 1951). That they are *invalid:* Dallas Fuel Co. v. Horne, 230 Iowa 1149, 300 N.W. 303 (1941); Chrysler Corp. v. Appeal Board of Michigan, 301 Mich. 351, 3 N.W.2d 302 (1942); State ex rel. Campbell v. State et al., 223 Ind. 59, 57 N.E.2d 433 (1944).

Employers have no right of review with respect to cases within the coverage of the Railroad Insurance Act. Benefits are payable upon final decision of the Railroad Retirement Board. 45 U.S.C. 355. See Railway Express Agency v. Kennedy, 95 F. Supp. 788, *aff'd* 189 F.2d 801, *cert. den.* 342 U.S. 830.

[3] Sections 501(e) and 511 of the Pennsylvania Unemployment Compensation Law, tit. 43, PURDON'S PA. STAT. ANN. §§ 821(e) and 831.

[4] Pennsylvania State Chamber of Commerce v. Torquato, 386 Pa. 306, 125 A.2d 755 (1956).

[5] Abraham v. Van Meter, Sup. Ct. Okla., Nov. 7 & 19, 6 CCH UNEMP. INS. REP., Okla., par. 8088. The employer in this case has instituted an action before a federal court in Oklahoma to have the double allowance provision of the Oklahoma Act declared unconstitutional. Aero Design and Engineering Co. v. Okla. Employment Security Commission, Case No. 7297, U.S.D.C.W.D. Okla.

Common Pleas Court of Dauphin County, which it affirmed. In two of these excerpts, describing the interest of the claimants' employer, Westinghouse Electric Corporation, and the procedures for "charging" benefits, it is stated:

> *"Its* (Westinghouse's) *own reserve account will be charged with the payment of any unemployment benefits that are made and its present contribution rate thereby jeopardized."* [6] (Emphasis added.)
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> *"It is, of course, apparent that where the Board orders the payment of unemployment benefits . . . to the extent of the payments pending the determination of the legal questions in the Superior Court . . . the credit balance in an employer's reserve account"* (must be depleted).[7] (Emphasis added.)

If these were the facts, it would be possible to follow the Court's reasoning that

> "These payments having been made, the question as to whether or not the claimants-employees . . . are eligible to these benefits actually would be *moot* as to the payments already made when the case reaches the Superior Court." [8] (Emphasis added.)
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> "All of these claims or a substantial number of them, could be paid under Section 501 (e) of the Act and would likely be paid before a decision on the merits has been made or could be made by the Superior Court. *There may be no justiciable issue before that Court if compensation has been paid prior to that Court's hearing and decision on the merits. . . .*" [9] (Emphasis added.)

The fact is that no employer's "reserve account" has been charged with benefit payments where the claimant was finally ruled to have been ineligible. The employer's appeal in the Superior Court proceeded notwithstanding payment of the claims below. The very object of the appeal was to determine whether the payments should be charged for contribution (tax) rating purposes. If the employer won in the Superior Court (or, as sometimes happened, on his appeal from the Superior to the Supreme Court) no charges were made against the "reserve account" of the claimant's employer or against the "reserve account" of any other employer under the experience rating provisions of the Law.[10]

In all except procedural form, the situation was the same as where an employer applies for and obtains relief from charges for benefits paid to an

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[6] 386 Pa. at 315.
[7] 386 Pa. at 320.
[8] 386 Pa. at 320-321.
[9] 386 Pa. at 327.
[10] Nor were charges made against an employer's reserve account where the last decision was by the Board of Review reversing decisions which the benefit agency and the referee had made in favor of the claimant.

employe whose separation was necessitated by circumstances neither atttributable to the employer nor to the employe's fault.[11]

It did not follow, therefore, as the Court concluded it did, that appeals to the Superior Court after claims were paid were *moot,* presented *no justiciable issue* and did not afford the appealing employer due process of law for the protection of his "reserve account".

The Pennsylvania Supreme Court opinion was handed down on October 1 while the parallel case was pending in Oklahoma and by supplemental brief it was brought to the attention of that state's Supreme Court. The Oklahoma Court declined to follow the Pennsylvania decision. *Quoting and relying upon the above excerpt from page 315 of the Pennsylvania opinion, it distinguished the Pennsylvania case, in part, on the ground that Pennsylvania, unlike Oklahoma, charges employers' "reserve accounts" for tax rating purposes regardless of the outcome of judicial review—when the fact is that neither state makes charges if the last decision rules the claimant ineligible.*

But if benefit payments later reversed are not "charged" against the employer's "reserve account", what are they "charged" against? They are not charged against any account. They have been paid, *as all benefits are paid,* out of the Unemployment Compensation Fund, the pooled public fund maintained by taxes on all covered payrolls. They are not paid out of any individual employer's "reserves" because there are no individual employer reserves in the Unemployment Compensation Fund. The "reserve accounts" to which reference is made in the Law and in the Court's opinion are merely bookkeeping accounts for gauging the relative experience of employers with compensable unemployment and benefit costs. Each employer is assigned a tax rate on a table of graduated rates in accordance with his relative experience. Throughout the states various methods are used for measuring such experience.[12] Some compare charged benefits with payrolls; others compare wages against which charged benefits have been drawn with the employer's total payroll; others consider payroll declines or use a combination of methods. Pennsylvania and certain other states use the "reserve account" or "reserve ratio" method of gauging unemployment risk. The "reserve ratio" for each employer is the ratio of his total contributions (less his total *charged* benefits) to his average payroll as of a "computation date" each year. The employer's "reserve account" does not represent any individual fund nor does it reflect anything like a definable share in the pooled, public benefit fund.

[11] Section 302(f) of the Law, tit. 43, PURDON'S PA. STAT. ANN. § 782. How the Dauphin County Court and the Supreme Court arrived at their factual conclusions concerning the charging of "reserve accounts" is a mystery. On judicial notice after trial, see Morgan, *Judicial Notice,* 57 HARV. L. REV. 269.

[12] See Teple and Nowacek, *Experience Rating: Its Objectives, Problems and Economic Implications,* 8 VAND. L. REV. 376 (1955).

The total of all "balances" on individual "reserve accounts" in 1956 was $550 million. This was a wholly theoretical and fictitious figure. The amount in *the Fund* was $350 million.

As the years go by, the gap between the real Fund balance and the total of individual "reserve accounts" will widen because many benefits paid for what the Legislature has deemed socially desirable reasons are not charged against any employer because the Legislature believes they are not fair measures of an employer's experience for tax rating purposes. Payments for unemployment resulting from personal "good cause," payments to veterans for involuntary unemployment following their return from military service, payments to workers in "sick" areas and industries, *and payments after two decisions of eligibility later reversed* are examples of this.[13]

Although non-chargeable benefit payments cannot affect an employer's relative experience and position on the graduated tax table, they can become a factor in the selection of the tax table applicable to all covered payrolls. The Law contains several tables, and during any given year rates may be higher or lower than for the preceding year depending on whether the year-end Fund balance had shifted as much as $50 million or $100 million.[14] It is conceivable, therefore, that *any weekly benefit payment* might round out the sum which would invoke a higher rate table or that it might defeat realization of a lower schedule. This can be said with respect to *every payment made from the Fund and of every tax dollar payable but not actually paid into the Fund!* The Pennsylvania Court did not pause to differentiate between this *possible effect* of *every* benefit payment and the *direct effect* of *charged payments* on an employer's experience rate. It did not have to do so. The case before it was a taxpayers' suit by many employers for an injunction and, following its traditional policy, the Court held that any taxpayer has standing to invoke equitable relief to prevent allegedly improper payments from the tax fund. It affirmed the grant of such relief on the theory that *any payment* without an opportunity for prior judicial review is improper. It approved such relief not only to the claimants' employer but to a host of other employers who joined in the suit, and the injunction was issued before the referee had commenced hearings on the employer's appeal.

Is it indicated that the *possible effect* of a benefit payment on the selection of rate tables gives each employer in the Commonwealth standing to *appeal* from the allowance of benefits to every other employer's employees?[15]

[13] In certain areas and industries benefit costs exceed many times the amount contributed by the employers even though they are taxed at the maximum rate, 2.7%, because of their poor "experience." These employers could be said to have "deficit reserve accounts."

[14] Section 301, tit. 43, PURDON'S PA. STAT. ANN. § 781.

[15] If so, does it not follow that each employer is entitled to appeal from every other employer's tax determinations? If employer A applies for an "adjustment" of his tax rate and a refund from

Where does due process for the unemployed claimant appear in this procedural panorama?

The legislature adopted these provisions for the prompt payment of benefits upon the double allowance of claims by two administrative agencies in order that resort to judicial review for protection of the employer's experience rating would not prevent timely receipt of income by workers during their period of unemployment. Evidencing the need for dispatch, eligibility for unemployment compensation is determined on a weekly basis (Sections 401 and 404 of the Law). In Pennsylvania, 85 per cent of all benefit checks have been made available within 14 days after an eligible claim is filed. As a result of the elimination of Sections 501 (e) and 511, an employer who chooses to take two administrative appeals will automatically postpone the payment of compensation almost four months, because benefits cannot be paid before expiration of the 40 day period for appealing to the Superior Court from the decision of the Board of Review. This delay runs far beyond the average five-week spell of unemployment. An employer who files a further appeal in the Superior Court will thereby postpone the payment of insurance far beyond the maximum duration of compensable unemployment even in duress cases under recessional conditions.

A recent study of Pennsylvania unemployed workers revealed that of claimants whose unemployment lasted eight consecutive weeks or more, unemployment compensation benefits represented 100 per cent of income for all single claimants. For about half of the four-person families studied, benefits represented 90 per cent of the total income.[16] Timeliness in the payment of unemployment insurance is a practical necessity for the effective operation of the program.

In its opinion, the Pennsylvania Supreme Court said:

> "Although it is indisputable that the law's delays almost always cause successful litigants severe economic hardship, the answer is not to short-circuit or violate the constitution, but to expedite (by speed-up or elimination or otherwise) administrative procedures and time for appeals."

Administrative procedures can usually be speeded up, but if overdone this inevitably produces ill-considered decisions, more mistakes and more frequent resort to judicial review. As to elimination of appeal steps between

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the Fund, can employer B insist on judicial review before the refund is granted? This would seem to follow. This could prove interesting because unions are contributing employers and in the past have taken a lively interest in some of the refunds employers have received from the Fund. If their intellectual interest has legal or equitable status, they may decide to participate in certain refund proceedings which could affect their own future tax rates.

[16] See *Survey of Unemployment Compensation Beneficiaries in Pittsburgh, Pa.*, by Duquesne University and the U.S. Department of Labor, March, 1955.

the initial decision and judicial review, statistics show that during the period 1949-1955, more than 82,000 appeals were filed and heard by Pennsylvania referees, of which more than 14,000 were further appealed to the Board of Review. Obviously the referees should not be eliminated from the echelon of appeal bodies. Functioning throughout the state, they hold their hearings in the localities where the parties reside. Even if one had no compunctions against making the unemployed travel long distances to support their claims before a massive central board, Federal "fair hearing" requirements (which must be met to receive Federal monies for administration) would prohibit this.[17]

Elimination of the Board of Review would move all secondary appeals immediately into judicial review by the Superior Court. This would reduce the period for appellate consideration of cases which would have gone to the Court in any event, but it would increase the time for disposing of all other secondary appeals; with minor exceptions, courts take much longer than boards and commissions to decide cases. And what would be the reaction of the Superior Court or the Dauphin County Court to the proposal that they hear 40 to 50 compensation appeals *each week?* If, in place of each referee, a judge "learned in the law" was elected, his affirmance of the agency's allowances presumably would permit benefits to be paid at once, as the Legislature intended, because he would supply the "judicial review" the Pennsylvania Court holds essential to "due process" in these cases.[18]

For the Oklahoma Court there were none of these problems. The way was clear. Quoting a California opinion, the Court stated:

> "The foregoing cases demonstrate the weakness of the argument that because a commission man makes an occasional error in ordering some payment out of a public or semi-public fund, the courts must have the power to stay any and all payments during the lengthy period of judicial review. The legislature has concluded that it is wiser to have a system of unemployment compensation operating with a small percentage of error, than to have a system not operating at all. The legislative power to make such provision is unquestioned; the statutory language cannot be misunderstood; and for the courts that is the end of the matter."

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[17] 42 U.S.C. 503(a).

[18] The "non-judicial" Board (one lawyer and two laymen, all appointed by the Governor) has had about 80% of its appealed decisions affirmed by the Superior Court. This record compares favorably with that of the Superior Court where the Supreme Court has allowed further appeals in compensation cases.