
GLEN TURNER,

Plaintiff

Case #110-058

vs.

INDUSTRIAL COMMISSION OF
WISCONSIN and RED GRANITE
PICKLE COMPANY,

DIRECTIONS FOR JUDGMENT

Defendant.

Before Hon. Richard J. Bardwell, Judge

This is an action to review a decision of the Industrial Commission dated September 15, 1961, affirming a decision of an Appeal Tribunal which held that the plaintiff-employee, Glen Turner, having received wages in the form of back pay, was not therefore unemployed during some 11 calendar weeks of 1957 and 32 calendar weeks of 1958. Accordingly it was held that Mr. Turner had been overpaid unemployment benefits for such weeks in the total amount of \$1,061.50. The plaintiff was directed to repay such amount.

PROCEDURAL BACKGROUND

The employee here worked for the Red Granite Pickle Company in excess of a year and was discharged on August 15, 1957. He thereafter claimed unemployment benefits for some 43 weeks, having properly reported wages earned by him from other employers during this period. The plaintiff was paid unemployment benefits totaling some \$1,312.50.

At this point it should be indicated that counsel for plaintiff and the Industrial Commission have agreed that the computation of plaintiff's back pay liability was in error. Counsel for both parties have further stipulated that the actual back pay liability here at issue totals \$1,061.50. By so agreeing counsel has removed from the case the knotty problem of whether or not plaintiff should have been entitled to unemployment compensation benefits during part of the time he was laid off because of the seasonal nature of the pickle business. In other words plaintiff would have been out of work for some of the period involved even though he had not been given an unfair labor discharge. By eliminating any dispute over the amount at issue we have left only the legal question as to whether or not a back pay award constitutes wages within the meaning of the Unemployment Compensation Act.

Plaintiff appealed his August 15, 1957, discharge to the National Labor Relations Board which on April 17, 1959, pursuant to a prior order, sent a check to the plaintiff in the amount of \$2,025.14. This amount represented back pay for the period August 15, 1957, to October 15, 1958. The Board computed the award by subtracting from the plaintiff's anticipated earnings during the period in question the actual amount of wages earned by him from other employers during such period. It is significant to note that in making the back pay award to the plaintiff the Board subtracted social security and withholding taxes.

On April 13, 1959, a Commission deputy issued an initial determination holding that the plaintiff had been awarded back pay for the period 8-15-57 to 12-1-58 and therefore was ineligible for the unemployment benefits paid to him for the respective weeks he had claimed during the period in question.

Plaintiff appealed from the initial determination and after hearing the Appeal Tribunal affirmed the deputy's initial determination disqualifying the plaintiff for benefits. Plaintiff duly took an appeal to the Industrial Commission.

The full Commission under date of September 15, 1961, rendered its decision affirming the Appeal Tribunal's finding that the employee was ineligible for unemployment compensation benefits during the 43 weeks in question. The Commission's decision further required the plaintiff to repay the benefit overpayment of \$1,312.50 which, as indicated, has now by stipulation been reduced to \$1,061.50. Appeal from the Commission's decision was then taken to the Circuit Court for Dane County.

ISSUE INVOLVED

The sole issue involved on this appeal is whether or not a back pay award of the National Relations Board constitutes wages within the meaning of the Unemployment Compensation Act.

We are advised by counsel that this is a case of first impression in Wisconsin even though the Commission historically has always regarded a back pay award as wages within the meaning of Section 108.02(6) which reads as follows:

"'Wages' means every form of remuneration payable for a given period (or paid within such period, if this basis is permitted or prescribed by the commission) to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses and the reasonable (actual or estimated average) value of board, rent, housing, lodging, payments in kind, and any other similar advantage received from the individual's employing unit or directly with respect to work for it; but there shall not be treated as 'wages' the actual (or reasonably estimated average) amount of any required or necessary expense incurred by an individual on his job. Tips shall be counted as 'wages' solely for benefit purposes."

In support of his argument that a back pay award does not constitute wages within the meaning of the above quoted statutory language, counsel for the plaintiff raises several interesting points.

1. An employee has no personal right to a back pay award and therefore cannot sue at law to compel payment as he could do under Section 103.39 in the case of wages owed.
2. A back pay award is not subject to garnishment under Section 267.02; wages are.
3. A back pay award does not constitute wages but partakes more of the nature of an award of damages such as would arise in a tort action.
4. A back pay award may not be assigned to creditors.
5. A back pay award may be ordered even where no employer-employee relationship exists, which is not true in the case of a wage payment.

Before considering the evidence supporting the Commission's findings, two points should be made in connection with the arguments advanced by counsel for the plaintiff. In the instant case it is conceded that there was an employer-employee relationship between the parties at and during the time of the unlawful discharge. Without such relationship no unemployment compensation payments would ever have been made.

As to whether or not a back pay award partakes more of the nature of a tort award rather than wages, plaintiff in his brief has cited the case of Clayton-Willard Sales, 126 NLRB 1325, 1326, 1327 (1960) where the Board stated:

"The remedy of reinstatement and back pay is not a private right, but a public right granted to vindicate the law against one who has broken it. Its object is to discourage discharges of employees contrary to the statute and thereby vindicate the policies of the National Labor Relations Act. The statute authorizes reparation orders, not in the interest of the employees, but in the interest of the public. They are not private rewards operating by way of penalty or of damages." (Emphasis supplied.)

It would appear from the foregoing that the Board itself does not consider a back pay award to be "damages."

In support of the Commission's findings and decision three principal grounds are advanced:

1. The statute quoted above, 108.02(6), is broad enough to include a back pay award within the definition of wages. The material part of the language provides:

"'Wages' means every form of remuneration payable for a given period to an individual for personal services...."

In the leading case of Social Security Board vs. Nierotko, 327 U.S. 358, which held that a back pay award is to be treated as wages under the Social Security Act, Justice Frankfurter in his concurring opinion stated:

"The decisions of this Court leave no doubt that a man's time may, as a matter of law, be in the service of another though he be inactive...."

It is conceded here that the amount of the award was determined by the amount of salary which the plaintiff lost because of the unlawful discharge. We agree with the Commission that the statute, 108.02 (6), defining wages, is broad enough to include by permissible inference a back pay award.

It is true that Sec. 108.02(6) does not specifically denominate a back pay award as "wages"; neither does it exclude such an award from the broad definition set forth. Certainly a back pay award is "remuneration payable for a given period," and it obviously arose out of the employment relationship between the parties.

In 1961 the legislature enacted Chapter 12 creating Sec. 108.05(6) of the statutes which provides:

"(6) A payment to an individual by an employing unit, which is in the nature of back pay (or in lieu of pay for personal services) for certain past weeks, whether made under a back-pay award or similar decision or otherwise, shall be wages for benefit purposes but only when paid within 104 weeks after the start of the earliest such week."

Bill 301, S., which led to the creation of the above statute contains the following pertinent explanatory comment:

"NOTE: Adopts a long-standing administrative interpretation that back pay is wages. But if back pay is delayed more than 2 years, it will be ignored, under this provision,--so that long-since benefit payments and charges will no longer have to be recaptured and adjusted."

Subsection (6) of 108.05 did not change the existing law. It merely placed a 2 year limitation period of back pay awards in so far as they could be considered wages for unemployment compensation purposes.

2. As already indicated, the Commission historically has interpreted the statute defining wages to include back pay awards. Certainly the Commission's long-standing interpretation of the statute is entitled to be given great weight by the Court. State ex rel. West Allis vs. Dieringer, 275 Wis. 208, 220; State ex rel. Koch vs. Retirement Board, 244 Wis. 580, 586; see also State ex rel. Green vs. Clark, 235 Wis. 628, where the Court stated at page 630:

". . . the practical construction, long continued, given to a statute by those intrusted with its administration is 'of great weight and is oftentimes decisive' in determining its meaning. State v. Johnson, 186 Wis. 59, 69, 202 N.W. 319."

3. Social security and withholding tax deductions were made from the plaintiff's back pay award in question. We deem this fact alone as being decisive in support of the Commission's finding in this case. If a back pay award actually constituted a tort award of damages then obviously plaintiff would have to pay neither social security nor withholding taxes. As previously indicated in the Nierotko case, supra, the United States Supreme Court unequivocally held that a back pay award constituted wages within the meaning of the term "wages" as defined in the Social Security Act. This definition read:

"The term 'wages' means all remuneration for employment including the cash value of all remuneration paid in any medium other than cash; . . ."

The term "employment" is defined in the Social Security Act as follows:

"(b) The term 'employment' means any service, of whatever nature, performed within the United States by an employee for his employer. . . ."

In the Nierotko case the Court wrote:

"While the legislative history of the Social Security Act and its amendments or the language of the enactments themselves do not specifically deal with whether or not 'back pay' under the Labor Act is to be treated as wages under the Social Security Act, we think it plain that an individual who is an employee under the Labor Act and who receives 'back pay' for a period of time during which he was wrongfully separated from his job, is entitled to have that award of back pay treated as wages under the Social Security Act definitions which define wages as 'remuneration for employment' and employment as 'any service . . . performed . . . by an employee for his employer'"

The Court went on to note that back pay is not a fine or a penalty imposed on the employer but rather, coupled with reinstatement, is for the protection of the employee and tends to make him whole. That is precisely what was done in the instant case.

To permit the plaintiff to retain unemployment benefits along with the back pay award, which was based solely on the amount of wages lost due to the unlawful discharge, would be permitting plaintiff to retain a windfall. This clearly was not the intended purpose of the Unemployment Compensation Act.

Plaintiff argues that the Nierotko decision was a very liberal one from the point of view of the employee. The Court held that a worker should not be denied social security tax credits merely because he was wrongfully discharged. Counsel then urges that we should likewise interpret the Unemployment Compensation Act liberally so as to exclude back pay awards from the statutory definition of wages. We do not so interpret the statute. We consider that the Unemployment Compensation Act is a neutrality act which seeks neither to favor management nor labor but rather its purpose was and is to prevent economic dislocation as a result of unemployment. In the instant case there were no lost wages due to unemployment once the back pay award had been made.

Section 108.22(8) specifically provides:

"(a) In case benefits have been overpaid or improperly paid to an individual, an initial determination may be issued setting forth the individual's liability to reimburse the fund for such overpayment."

The above statute is the section under which the Commission has proceeded. It also should be noted that the Commission, not the defendant employer, Red Granite, has raised the issue of reimbursement. (Red Granite is apparently insolvent.) This the Commission has a perfect right to do under the provisions of Section 108.04(13)(a).

Finally, as noted, in addition to social security deductions, withholding tax deductions were also made by the N.L.R.B. from the back pay awarded to the plaintiff. If the payment from the award of social security taxes was not sufficient to denominate a back pay award "wages," certainly the deduction of income taxes from the award removes all doubt. If this award were in the nature of a penalty or damages then obviously no income taxes would have been due or owing. The contrary action has been taken which is consistent with the language of both Justices Reed and Frankfurter in the Nierotko case.

We therefore conclude for the above outlined reasons the findings and decision of the Commission find adequate support in the record, and it would therefore appear that the plaintiff herein has been overpaid the sum of \$1,061.50.

The Commission's decision so finding is confirmed in all respects. Counsel for the Industrial Commission may prepare the necessary form of judgment confirming the findings and decision here under review. Same should be submitted to counsel for the plaintiff before submission to the Court for signature.

Dated, December 14, 1962.

RICHARD W. BARDWELL
Circuit Judge