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Recommended Citation

Wilbert H. Sirota, *Unemployment Compensation - Recovery Of Benefits Paid - Waters v. State*, 20 Md. L. Rev. 363 (1960)

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**Unemployment Compensation — Recovery Of
Benefits Paid**

*Waters v. State*¹

Appellant, who was employed by a radiator company, was discharged on October 18, 1956, and promptly filed claim under the Unemployment Insurance Act.² Subsequent to his receiving payments, an arbitrator, pursuant to a collective bargaining agreement between the employer and the union, directed that he be reinstated and "be made whole for the time lost by reason of his discharge."³ Pursuant to the order, appellant was reinstated and received \$1,809.91 in back pay, no deduction being made for

¹ 220 Md. 337, 152 A. 2d 811 (1959).

² MD. CODE (1951) Art. 95A, now codified in 8 MD. CODE (1957) Art. 95A.

³ *Supra*, n. 1, 340.

unemployment benefits. Subsequently, the Unemployment Insurance Fund (hereinafter referred to as the Fund), having made a redetermination of the claim and having determined that the benefits paid appellant were an overpayment which should be recovered under Section 16(d) of the Act⁴ brought suit to recover these benefits. From a judgment adverse to the appellant in the Superior Court of Baltimore City, an appeal was taken.

The Court of Appeals, in holding that the Fund could not recover the benefits paid to the appellant under either Section 17(d) or a common law count for unjust enrichment, reasoned that: Appellant had been unemployed within the meaning of the Act during the period for which benefits were paid; the payments were not made as a result of any non-disclosure or misrepresentation of a material fact by the Appellant; the Appellant had, as a result, received benefits which were not actually due him, but Section 16(d) did not provide the necessary means by which the Fund could recoup itself and, since the statute set up a specific and exclusive remedy, there could be no other means of recoupment than as provided in the statute.

The Fund contended that, since the employee was wrongfully discharged, wages were "payable" to him throughout the period and that he was, therefore, not "unemployed" within the meaning of the Act. The Court felt, however, that Section 19(1)⁵ of the Act, defining wages, meant "wages currently payable" rather than "wages legally due and payable under a contingency."⁶ It is quite evident that the General Assembly in drafting the Act meant it to mean such on looking at Sections 5(b)⁷ and

⁴ MD. CODE (1951) Art. 95A, § 16(d), now codified in 8 MD. CODE (1957) Art. 95A, § 17(d), states:

"Any person who, by reason of the non-disclosure or misrepresentation by him or by another, of a material fact (irrespective of whether such non-disclosure or misrepresentation was known or fraudulent) has received any sum as benefits under this article while any conditions for receipt of benefits imposed by this article were not fulfilled in his case, or while he was disqualified from receiving benefits, shall, in the discretion of the Board either be liable to have such sum deducted from any future benefits payable to him under this article or shall be liable to repay to the Executive Director for the Unemployment Insurance Fund, a sum equal to the amount received by him, and such sum shall be collectible in the manner provided in sec. 15(f) of this article for the collection of past due contributions."

⁵ MD. CODE (1951) Art. 95A, § 19(1), now codified in 8 MD. CODE (1957) Art. 95A, § 20(n).

⁶ *Supra*, n. 1, 348.

⁷ MD. CODE (1951) Art. 95A, § 5(b), now codified in 8 MD. CODE (1957) Art. 95A, § 6(b).

5(c),⁸ which respectively disqualify an employee for benefits when he is discharged for wilful misconduct or as a disciplinary measure.⁹ No mention is made in the Act as to persons who are wrongfully discharged. It is true that subsequent to appellant's release an arbitration proceeding established that such discharge was wrongful, but it must be taken into account that throughout that period the employer was insisting that he was discharged for good cause. Waters was unemployed through no fault of his own, and the mere fact that the dismissal was wrongful does not alleviate his financial condition during the jobless period. Such circumstances, it seems, would come within the intent of the Act as expressed in two earlier cases, which point out the purpose of the Act as being to prevent economic insecurity and involuntary unemployment.¹⁰

The next question to confront the Court was whether such payment by the Fund was induced by any non-disclosure or misrepresentation on the part of the appellant. As the facts disclosed, the Fund was as aware of the pending arbitration proceedings as the employee. Section 16(d) provides for recovery where there has been a non-disclosure or misrepresentation of a material fact, although innocent.¹¹ In construing this section the Court felt the "material fact", referred to in the section, meant an existing fact and not merely a contingent event "which may or may not occur in the future."¹² Such a construction follows the rule underlying recovery against fraud, that the misrepresentation must be of an existing fact and not of some future event or expression of opinion.¹³

Similar results are to be found in other States. The Court called attention to *Hill v. Review Board of Indiana*

⁸ Md. CODE (1951) Art. 95A, § 5(c), now 8 Md. CODE (1957) Art. 95A, § 6(c).

⁹ See Note, *Unemployment Insurance Benefits — Refusal to Answer "Security" Questions as Wilful Misconduct*, 19 Md. L. Rev. 332 (1959).

¹⁰ *Saunders v. Maryland Unemployment Compensation Board*, 188 Md. 677, 53 A. 2d 579 (1947); *Maryland Unemployment Board v. Albrecht*, 183 Md. 87, 36 A. 2d 666 (1944).

¹¹ *Supra*, n. 4.

¹² *Supra*, n. 1, 349.

¹³ *Schnader v. Brooks*, 150 Md. 52, 132 A. 381 (1926); *Boulden v. Stillwell*, 100 Md. 543, 552, 60 A. 609 (1905).

Judge Prescott, in writing the dissent, felt that such a construction would preclude recoupment under all circumstances except as specified within the section prescribing penalties for "Unlawful Acts." He pointed out that if payments were made through some mistake of fact, as excessive benefits being paid to a jobless employee, no recovery would be forthcoming. This, in his opinion, would be very unfortunate.

Employment Security Division,¹⁴ where it was held, under a statute analgous to that of Maryland, that the fund could only recover benefits it had paid when there was a non-disclosure or misrepresentation on the part of the claimant. The dissent in the present case attempted to distinguish this case contending that the Indiana statute¹⁵ conferred jurisdiction on the Review Board to recoup and not on a court of general jurisdiction, and, therefore, was not relevant to the problem in point, *i.e.*, whether recoupment can only be granted by a court of general jurisdiction when there is non-disclosure or misrepresentation. This distinction seems merely to be grasping at insignificant points which do not clearly differentiate the cases. Moreover, a holding similar to that reached in the Maryland and Indiana cases has been reached under a statute of like import in Idaho.¹⁶ Even though such results are viewed by the dissent as unfortunate, they are nevertheless the only possibility under our present law.

Admitting the recovery could not be had under Article 95A, the Fund finally maintained that it could be had, in the alternative, under a common law count for money had and received. The Court, in repudiating this contention, pointed out that the Unemployment Compensation Act is a remedial statute and has as its objective protecting those unemployed through no fault of their own.¹⁷ The Act plainly sets out the limits upon recovery or recoupment. The Court followed the phrase of *expressio unius est exclusio alterius* in determining that since the legislature specifically set forth one remedy under Section 17(d) it, by implication, excluded any other.

The dissent was unable to accept such a theory and instead cited *State v. Rucker*¹⁸ where recovery was allowed against the employer under a count for money had and received. The fact situation in that case was similar to the instant case in that the employee was discharged wrongfully, received unemployment compensation, and was subsequently reinstated with an award for back pay less income earned elsewhere (including Unemployment Compensation benefits). Then the employer withheld an amount equal to the Unemployment Compensation benefits

¹⁴ 124 Ind. App. 83, 112 N.E. 2d 218 (1953).

¹⁵ BURNS' INDIANA STATUTES (Supp. 1951) § 52-1537.

¹⁶ Claim of Sapp, 75 Idaho 65, 266 P. 2d 1027 (1954), which found that under the Idaho Statute recovery could be had only if there was a non-disclosure or misrepresentation (even if innocent).

¹⁷ *Supra*, n. 10.

¹⁸ 211 Md. 153, 126 A. 2d 846 (1956).

but did not turn it over to the Fund. The Court allowed a judgment against the employer for the amount withheld on the theory of unjust enrichment. In its decision the Court pointed out:

“It is not necessary that we decide whether appellant can recover from Bethlehem (employer) under the provisions of that statute (Art. 95A, Sec. 17(d)). Even if we should assume without deciding, that recovery against the employee would not lie under the statute, we find nothing in the statute that would deny recovery against the employer or third party under common law principles.”¹⁹

The *Rucker* case is distinguishable on the grounds that the employer was the person who received the payment unjustly, whereas in the instant case it was the employee to whom the benefit accrued. Under the situation in the *Rucker* case a common count recovery will lie since the statute in no way expresses any intent to benefit employers or to set up exclusive remedies for recovery against them.

In reviewing the opinion of the Court one can discern two distinct theories as to the intent of the Unemployment Compensation Act, Section 16(d). The majority constantly strived for strict construction of the provision, whereas the dissent stressed the necessity for conjunctive application of common law principles. In that the Section is in derogation of the common law and provides for a separate and distinct remedy in the circumstance in which it may be used, the possibility of alternative common law recovery can not be realized. The result of the case appears to be unfortunate. Undoubtedly the dissent resorted to its various theories to make up for the deficiencies of the statute. The Act makes no provision for recovery from employees where benefits are, through subsequent events, found to amount to unjust enrichment. But the job of the Court is not to legislate; it can only interpret and apply existing law. Although a court may interpret a statute in different ways in various situations, it cannot change the obvious meaning and effect of a statute as the dissent desired to do in the instant case. The answer to the problem lies with the legislature, which alone possesses the power to amend existing law.

Steps were taken by the Indiana legislature after the result of the *Hill* case. The Indiana statute now allows for

¹⁹ *Ibid.*, 157.

recovery from an employee of payment to which, through subsequent events, he is no longer entitled.²⁰ To alleviate the situation in Maryland it is suggested that the present Section 17 of Article 95A be amended. The following provision is, therefore, submitted to broaden Section 17(d):

Any person who, because of the subsequent receipt of income deductible from benefits which is allocable to the time for which benefits were paid, becomes not entitled to such benefits under this act, shall be liable to repay such amount to the Executive Director for the Unemployment Insurance Fund.

WILBERT H. SIROTA

²⁰ BURNS' INDIANA STATUTES (Supp. 1959) § 53-1537(b).