Court of Appeals, State of Michigan

ORDER

Jane E. Markey
Presiding Judge

Donald S. Owens

Karen M. Fort Hood
Judges

Joel A. Newman v River Rouge Schools
Roberta L Virgis v River Rouge Schools
Patricia M Plaza v River Rouge Schools
Jennifer M Dermody v River Rouge Schools
Laurie L Haener v River Rouge Schools
Michelle A Michaels v River Rouge Schools
Rosalyn R Glavin v River Rouge Schools
Susan M Bowling v River Rouge Schools

Docket Nos. 314033, 316930, 316931, 316933, 316934, 316935, 316936, and 316937

LC Nos. 12-005774-AE, 12-013927-AE, 12-013930-AE, 12-013933-AE, 12-013937-AE, 12-013938-AE, 12-013940-AE, 12-013942-AE

The Court orders that the July 24, 2014 opinion is hereby AMENDED. The opinion contained the following clerical error: The lower court number 12-013927-AE is added to the opinion case caption.

In all other respects, the July 24, 2014 opinion remains unchanged.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

AUG 13 2014
Date

Jerome W. Zimmer Jr.
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

JOEL A. NEWMAN,

Claimant-Appellant,

v

RIVER ROUGE SCHOOLS,

Respondent-Appellee,

and

DEPARTMENT OF ENERGY LABOR & ECONOMIC GROWTH/UNEMPLOYMENT INSURANCE AGENCY,

Appellee.

UNPUBLISHED
July 24, 2014

No. 314033
Wayne Circuit Court
LC No. 12-005774-AE

ROBERTA L. VIRGIS, PATRICIA M. PLAZA, JENNIFER M. DERMODY, LAURIE L. HAENER, MICHELLE A. MICHAELS, ROSALYN R. GLAVIN, and SUSAN M. BOWLING,

Claimants-Appellants,

v

RIVER ROUGE SCHOOLS,

Respondent-Appellee,

Nos. 316930, 316931, 316933, 316934, 316935, 316936, and 316937
Wayne Circuit Court
LC No. 12-013927-AE
12-013930-AE
12-013933-AE
12-013938-AE
12-013940-AE
12-013942-AE

and

DEPARTMENT OF LICENSING &
REGULATORY AFFAIRS/UNEMPLOYMENT
INSURANCE AGENCY,

Appellee.

Before: MARKEY, P.J., and OWENS and FORT HOOD, JJ.

PER CURIAM.

In these consolidated appeals, claimant Joel A. Newman (Docket No. 314033) appeals by leave granted a circuit court order affirming a Michigan Compensation Appellate Commission (MCAC) order that affirmed a referee order and decision from the Michigan Administrative Hearing System (MAHS), Employment Services Divisions, which found that Newman was ineligible for unemployment benefits from August 16, 2009 to September 19, 2009. Claimants Robert L. Virgis (Docket No. 316930), Patricia M. Plaza (Docket No. 316931), Jennifer M. Dermody (Docket No. 316933), Laurie L. Haener (Docket No. 316934), Michelle A. Michaels (Docket No. 316935), Rosalyn R. Glavin (Docket No. 316936), and Susan M. Bowling (Docket No. 316937) (collectively, the Bowling claimants) appeal by leave granted a circuit court order affirming an MCAC order that affirmed a MAHS referee order and decision, which found that the Bowling claimants were also ineligible for unemployment benefits from August 16, 2009 to September 26, 2009. For the reasons explained below, we affirm the circuit court orders in all appeals.

I. FACTS

All of the claimants (Newman and the Bowling claimants) were employed as teachers with respondent's school district. At the end of the 2008/2009 school year, the claimants received reasonable assurance of reemployment for the 2009/2010 school year. On July 24, 2009, however, respondent sent letters to the claimants notifying them that they would be laid off effective August 6, 2009. The claimants were in fact laid off on August 6, 2009, and they each filed a claim for unemployment benefits. The last pay date for the 2008/2009 school year was, August 14, 2009. August 15, 2009 marked the beginning of the first pay period for the 2009/2010 school year, and the claimants received unemployment insurance benefits for the weeks ending August 22 and August 30, 2009, and for the first few weeks in September. The claimants did not receive the biweekly paycheck they would have received on August 28, 2009 had they not been laid off. The first day that employed teachers were required to report for work for the 2009/2010 school year was September 1, 2009, the first day of school.

During the layoff, the claimants' union filed an unfair labor practice charge against respondent with the Michigan Employment Relations Commission. A court-ordered facilitation took place on September 20, 2009. On September 23, 2009, respondent's school board voted to accept "the global settlement offer" proposed by the claimants' union, but an agreement was not

reduced to writing. Effective September 24, 2009, respondent called the claimants back to work. Respondent also agreed to provide the claimants with back pay.

On September 25, 2009, respondent's counsel sent a letter to the claimants' counsel seeking to discuss arrangements for the back pay, as well as confirm that the claimants agreed to dismiss the pending grievance arising from the layoffs. The claimants' counsel responded that the claimants would withdraw the litigation as soon as there was an agreement on certain issues, which included the following:

> The [claimants] will have to reimburse either [respondent] or the Unemployment Agency for any unemployment benefits that they have received after what would have been the *first day that the [claimants] were scheduled to report for work*. The reason for this is that the reports to the MPSERS by [respondent] should include the back pay; therefore, we cannot give a credit for the unemployment benefits, but must instead repay those monies.

On September 29, 2009, respondent's counsel responded to the previous letter, stating in pertinent part:

> In response to your inquiries regarding back pay, please note the following:
>
> 1. UNEMPLOYMENT BENEFITS
>
> The RRSD receives statements from the Unemployment Agency bi-weekly which details the unemployment benefits paid to each member. Upon receipt of the unemployment statements, the District will identify the teachers that have been paid unemployment benefits from *August 15, 2009 (the beginning of their contract term)*, to their recall date and note the amount of the payments. . . . The Unemployment Agency will then send a letter to each individual member advising that they have been "overpaid" and requesting restitution for the unemployment benefits they received. . . .
>
> * * *
>
> 4. BACK PAY DISBURSEMENT
>
> The back pay monies will be direct deposited into each affected member account on October 5, 2009. This is the date of the District's normal pay day and each member will receive two separate deposits (their regular paycheck and the back pay check). *The back pay will be calculated based upon the contract year beginning on August 15, 2009*, through the date that the individual member was recalled. . . . [Emphasis added.]

The claimants' counsel responded with the following:

> The reimbursement of unemployment benefits that will have to be repaid will be only for those benefits received for the weeks beginning *August 17, 2009 (August 15, 2009 was a Saturday)*. Therefore, benefits for that period, as opposed to when

> the benefits were received (there is a big lag between the eligibility week and the actual time that payment is received), are the amounts that [respondent] is entitled to recover. [Emphasis added.]

Thereafter, respondent's counsel responded, "the District does not expect the members to refund any benefits received outside of the period that their actual contract would have begun."

On December 15, 2009, respondent sent a letter to the Unemployment Insurance Agency, which stated the following:

> The River Rouge School District was involved in a lawsuit with the RREA teachers union, regarding the layoff of some of the district's teachers. Teachers were given reasonable assurance for the 2009/2010 school year, but were then laid off because of economic reasons on July 23, 2009. We reached an agreement with them to pay all monies owed to each teacher to make them whole, back to the start of their contract for the current 2009/2010 school year. This agreement also had a stipulation that all persons that collected unemployment benefits, and was given their back wages in full, would pay those benefits back to our UIA account. The teachers were paid the full retro amount of their contracts on September 25, 2009.

The claimants subsequently received notices of determination from the Unemployment Insurance Agency (UIA) stating that they were not entitled to unemployment benefits under sections 27(c) and 48 of the Michigan Employment Security Act (MESA), MCL 421.1 *et seq.*, for various weeks during the layoff, including the last two weeks of August 2009 and several weeks in September 2009, due to their receipt of back pay. The claimants protested the UIA's determinations, but the agency issued redeterminations that again ruled them ineligible for benefits.

Newman timely appealed his redetermination before a referee, and Newman was the only witness at the hearing. The parties agreed that Newman's back pay provided him reimbursement dating back to the beginning of the 2009/2010 school year, but they disagreed as to when the school year began. Newman argued that his back pay made him whole going back to September 1, 2009 (the first day teachers were required to report for work), but respondent argued that the 2009/2010 school year began two weeks prior on August 15, 2009 (the beginning of the first pay period).

Following a second hearing, the referee found that Newman was ineligible for benefits from August 16 to September 19, 2009. The referee based his decision on the exchange of letters between respondent's counsel and the claimants' counsel, particularly the claimants' counsel's letter stating that they would have to reimburse unemployment benefits as of the pay period beginning on Monday, August 17, 2009. The referee concluded that because Newman's back pay constituted remuneration dating back to August 16, 2009, he was not unemployed for the last two weeks of August 2009 and was therefore not entitled to unemployment benefits for that period.

Newman appealed to the MCAC (then the Michigan Employment Security Board of Review), which affirmed on the basis that the referee's findings of fact accurately reflected the evidence and that he properly applied the law to those facts.

Newman then appealed the MCAC's decision to the circuit court, which concluded that the referee's finding that the agreement between respondent and the claimants' union provided for back pay retroactive to the week ending August 22, 2009 was supported by material and substantial evidence based on the exchange of letters between respondent's counsel and the claimants' counsel. The circuit court also concluded that the referee correctly applied the law to the facts in determining that Newman was ineligible for unemployment benefits under MCL 421.48(1). Accordingly, the court affirmed the MCAC's decision.

The Bowling claimants also appealed their redeterminations, and a different referee heard their claims jointly. The referee concluded that the Bowling claimants were ineligible for unemployment benefits from August 16 to September 26, 2009 under MCL 421.48, but not because of an agreement between respondent and the claimants' union regarding back pay. Rather, the referee concluded that, based on respondent's counsel's September 29, 2009 letter, respondent designated the start date for back pay as August 15, 2009 in accordance with MCL 421.48(2), such that the Bowling claimants were ineligible for benefits from August 16 to September 26, 2009. The Bowling claimants appealed the referee's decision to the MCAC, which affirmed.

The Bowling claimants then appealed to the circuit court. The cases were assigned to the same judge that heard Newman's appeal, and the court consolidated the matters for purposes of oral argument. The circuit court concluded that the referees' decisions were supported by substantial evidence and did not contain any errors of law, noting the claimants had been paid as of the week ending August 22, 2009 pursuant to respondent's designation and were therefore ineligible for benefits under MCL 421.48. The claimants now appeal to this Court, arguing that the circuit court erred by affirming the MCAC's decisions.

II. LEGAL STANDARD

Motycka v Gen Motors Corp, 257 Mich App 578, 580-581; 669 NW2d 292 (2003) provides a clear exposition of the appropriate standard of review:

> Pursuant to Const 1963, art 6, § 28, a court that conducts a direct review of an administrative decision must determine whether the action was authorized by law and if the decision was supported by competent, material, and substantial record evidence. Substantial evidence is evidence that reasonable persons would accept as sufficient proof to support a decision. However, "when reviewing a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." Matters involving the interpretation of statutes are reviewed de novo; nevertheless, unless an interpretation is clearly wrong we will generally defer to the construction given a statute by the agency charged with its interpretation. [Citations omitted.]

III. ANALYSIS

The following principles apply to the Court's review of the relevant statutory provisions at play in this appeal:

> The primary goal in statutory construction is to ascertain and give effect to the intent of the Legislature. "If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written." Statutory language should be construed reasonably and in agreement with the statute's purpose. When a term or phrase is not defined in a statute, the court may consult a dictionary to ascertain its commonly accepted meaning.
>
> The MESA is a remedial act that was enacted "to safeguard the general welfare through the dispensation of benefits intended to ameliorate the disastrous effects of involuntary unemployment." Accordingly, the provisions of the MESA are liberally construed; whereas, any disqualification provisions are narrowly construed. [*Motycka*, 257 Mich App at 581-582 (citations omitted).]

In this case, there is no dispute that the claimants had the lawful right to collect unemployment benefits during August and September 2009 while they were laid off. Rather, the issue is whether claimants were required to return the unemployment benefits they received during their layoff due to their receipt of back pay after they returned to work, and if so, the date from which they were no longer eligible for unemployment benefits.

An individual must be considered "unemployed" to be eligible for unemployment benefits under the MESA. *Motycka*, 257 Mich App at 581-582, citing MCL 421.48. Relevant to this issue, "An individual shall be considered unemployed for any week during which he or she performs no services and for which remuneration is not payable to the individual . . . ." MCL 421.48(1). The term "remuneration" is generally defined as "all compensation paid for personal services," MCL 421.44(1), but MCL 421.48(2) adds the following:

> All amounts paid to a claimant by an employing unit or former employing unit for a vacation or a holiday, and amounts paid in the form of retroactive pay, pay in lieu of notice, severance payments, salary continuation, or other remuneration intended by the employing unit as continuing wages or other monetary consideration as the result of the separation, excluding SUB payments as described in section 44, shall be considered remuneration in determining whether an individual is unemployed under this section and also in determining his or her benefit payments under section 27(c), for the period designated by the contract or agreement providing for the payment, or if there is no contractual specification of the period to which payments shall be allocated, then for the period designated by the employing unit or former employing unit. However, payments for a vacation or holiday, or the right to which has irrevocably vested, after 14 days following a vacation or holiday shall not be considered wages or remuneration within the meaning of this section.

Thus, under MCL 421.48(2), remuneration includes "retroactive pay" and "other remuneration intended by the employing unit as continuing wages or other monetary consideration as the result of the separation" for the period designated by a contract, an agreement, or the employer's designation.

First, with respect to the Bowling claimants' appeal, we conclude that there was substantial evidence to support the referee's finding that respondent designated that the Bowling claimants were not unemployed during the last two weeks of August 2009 because respondent *designated*, by means of its September 29, 2009 letter to the claimants' counsel, that the back pay would constitute retroactive pay dating back to August 15, 2009. As evidenced in the record, in its September 29, 2009, letter to the claimants' counsel, respondent stated that the school district would identify the unemployment benefits the claimants received from August 15, 2009 to their recall date—noting that August 15, 2009 was "the beginning of their contract term"—and that "back pay will be calculated based upon the contract year beginning August 15, 2009, through the date that the individual member was recalled." In his response letter, the claimants' counsel acknowledged that the claimants would have to reimburse the UIA for benefits they received prior to September 1, 2009, and objected to the August 15, 2009 date only to the extent that it was a Saturday, instead proposing a start date of Monday, August 17, 2009. Respondent's counsel replied that "the District does not expect the members to refund any benefits received outside of the period that their actual contract would have begun," and the claimants do not deny that even though their first teacher day for the 2009/2010 school year was September 1, 2009, the first pay period began on August 15, 2009 and the first pay date was August 28, 2009. Thus, there is substantial evidence to support the finding that respondent designated that the claimants would receive remuneration as of the week ending August 22, 2009, and that the claimants' attorney approved of this designation.

The next question is whether the designation was lawful, and whether the referee and the circuit court erred in concluding that the Bowling claimants were not unemployed during the final two weeks of August 2009 under MCL 421.48(2). We conclude that respondent's August 15, 2009 designation was lawful under the circumstances of this case, in which the claimants' counsel was notified of the designation before the claimants' receipt of back pay and approved of the designation (at least as of August 17, 2009) in writing. There is nothing in MCL 421.48(2)'s plain language that prohibits this practice, and it did not unfairly deprive the claimants of unemployment benefits considering their union's approval of the designation and their interest in receiving back pay. Notably, the claimants do not argue that their back pay was insufficient to make them whole. Accordingly, we conclude that the referee's interpretation of MCL 421.48(2) was not clearly wrong. See *Motycka*, 257 Mich App at 580-581.

The Bowling claimants' arguments to the contrary are lacking in merit. First, the Bowling claimants argue that this case is similar to *Grand Rapids Pub Schs v Falkenstern*, 168 Mich App 529; 425 NW2d 128 (1988), but *Falkenstern* did not involve back pay, either by agreement or designation. In *Falkenstern*, the Court held that school employees were entitled to unemployment benefits during the summer because the school system's assurance of future employment was not reasonable. *Id.* at 536-539.

Additionally, the Bowling claimants argue that they could not have received remuneration as a matter of law for the final two weeks of August 2009, because they could not

have earned any remuneration during a period when they were not working for respondent. In support of this argument, the Bowling claimants rely on our Supreme Court's decision in *Phillips v Michigan Unemployment Compensation Comm*, 323 Mich 188; 35 NW2d 237 (1948), for the proposition the remuneration means "[r]emuneration earned, not remuneration received." *Id.* at 193. According to the Bowling claimants, even if they received compensation for the final two weeks of August, they did not *earn* any compensation during that time, and therefore remained unemployed under MCL 421.48. But as respondent correctly points out, *Phillips* stated that "[r]emuneration earned, not remuneration received, is the test *under this section*," and at the time "this section" stated that "an individual shall be deemed 'totally unemployed' in any week during which he earns no wages and in which he earns no other remuneration in excess of $3.00." *Id.*, citing MCL 421.28 (emphasis added). MCL 421.48 no longer speaks of wages earned, and instead provides that all amounts "paid" for retroactive pay, severance payments, and vacation or holiday payments during a designated period "shall be considered remuneration in determining whether an individual is unemployed under this section and also in determining his or her benefit payments." MCL 421.81(2). In other words, the current law expressly provides that compensation payable during a layoff may constitute remuneration sufficient to determine that an individual is not entitled to unemployment benefits, even if the amounts paid are not earned during the layoff.

The Bowling claimants also suggest that the August 15, 2009 designation was unclear because August 15, 2009 was a fictional date, but the evidence does not support that assertion. Again, respondent informed the claimants' union that the start of their contract for the 2009/2010 school year was August 15, 2009, and the claimants do not deny that the first pay period for the 2009/2010 school year began on the week ending August 22, 2009. Thus, the designated date was not fictional, and the claimants' union was aware of the date and expressed its approval of the designation in writing.

With respect to Newman's appeal, we first conclude that there was substantial evidence to support the referee's finding that Newman was not unemployed during the last two weeks of August 2009 because respondent and the claimants' union *agreed* that teachers such as Newman would receive back pay dating back to the week ending August 22, 2009, as evidenced by the exchange of letters between respondent's counsel and the claimants' counsel.

Newman, however, argues that any agreement to waive or relinquish his rights to unemployment benefits properly received during the layoff is invalid under MCL 432.31, and we agree. Although it appears that Newman did not raise this issue below, this Court may address issues raised by similarly situated parties in consolidated cases to avoid inconsistent results, *People v Hayden*, 132 Mich App 273, 288 n 8; 348 NW2d 672 (1984), and this Court may review unpreserved issues involving questions of law for which the necessary facts have been presented, *Duffy v Dep't of Natural Resources*, 490 Mich 198, 209 n 3; 805 NW2d 399 (2011), as is the case here.

MCL 421.31 provides as follows:

> No agreement by an individual to wave [sic], release, or commute his rights to benefits or any other rights under this act from an employer shall be valid. No agreements by an individual in the employ of any person or concern to

> pay all or any portion of the contributions of an employer, required under this act from such employer, shall be valid. No employer shall directly or indirectly make or require or accept any deduction from the remuneration of any individual in his employ to finance the contributions of the employer required from him, or require or accept any waiver of any right hereunder by any individual in his employ.

We conclude that any agreement between respondent and the claimants' union was one to waive or release the right to unemployment benefits. Newman lawfully received unemployment benefits during his layoff and, according to respondent and the lower courts in this appeal, Newman entered into an agreement that required him to relinquish his unemployment benefits. Under the plain language of MCL 421.31, this agreement is not valid and should not have been enforced.

However, notwithstanding the invalidity of the agreement, we conclude that the referee reached the right result in determining that Newman was ineligible for unemployment benefits during the last two weeks of August 2009. As in the Bowling claimants' appeals, there is substantial evidence to support the finding that respondent lawfully designated that Newman's back pay would constitute remuneration as of the week ending August 22, 2009, meaning Newman was not unemployed from that point on under MCL 421.48(2). Accordingly, the error in the referee's reasoning was harmless, and we affirm the result reached. See *Gleason v Mich Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003) ("A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason.").

Affirmed. Respondent, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Donald S. Owens
/s/ Karen M. Fort Hood