



Appeal Tribunal
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SS #: 152-44-1492
Docket #: DKT00306513
Date of Claim: 06/19/2022
Date of Appeal: 07/22/2022
PC : 10
Appellant: Claimant
Mailing Date: 11/01/2023

Decision of the Appeal Tribunal

IN THE MATTER OF: KATHLEEN SANDKUHL, ET AL.

EMPLOYER: PRIME HEALTHCARE SERVICES - ST. MICHAEL'S MEDICAL CENTER, LLC.

The Jersey Nurses Economic Security Organization (JNESO or Union) District Council 1, IUOE/AFL-CIO appealed on July 22, 2022, from a determination of the Deputy mailed July 17, 2022, holding the JNESO claimants disqualified for benefits from May 22, 2022 through June 25, 2022, on the ground temporary workers did not permanently replace the claimants' positions and the labor dispute was resolved within 30 days.

JNESCO appealed on July 22, 2002, from determinations of the Director holding some claimants liable for a non-fraud refund for benefits paid during varied weeks ending from May 28, 2022 through June 25, 2022, in varied amounts.

The employer and JNESO, both with counsel and witnesses, and the Deputy participated in telephone hearings on February 22, 2023, February 23, 2023, April 25, 2023, April 27, 2023, and September 18, 2023. This decision is based upon the testimony and evidence adduced at all hearings.

Closing statements were submitted in written briefs.

FINDINGS OF FACT:

The above-named employer is a hospital employing registered nurses (RN), respiratory technicians, and X-Ray technologists who are members of JNESO and are covered under a collective bargaining agreement (CBA).

The previous CBA expired as of May 22, 2022, at 6:59a.m. and the employer was continuing to honor the terms of the prior CBA during the contract renegotiations. The employer and JNESO engaged in CBA renegotiations beginning in March of 2022 but had not reached an agreement by May 11, 2022. At that time, JNESO provided the employer with a ten-day notice of their intent to commence a strike on May 23, 2022, if no agreement was reached by such date. On May 23, 2022, no agreement had been reached and the strike commenced at 7:00am. An agreement was later reached, ending the strike on June 25, 2022.

The employer employed "traveling" temporary personnel (RNs, technicians, and technologists) prior to, during, and after the strike to supplement staff; the use of that group increased during the strike. During the strike, the employer hired the services of a strike agency which provided the employer with staff to temporarily replace the striking employees. The Union was notified by the employer prior to the strike they had arranged for staff for the duration of the strike. The employer began use of both immediately at the onset of the strike.

The parties stipulated to the following:

- One employer is involved
- One union (JNESO) is involved
- All claimants are members of JNESO (union), and all are represented by JNESO & Kroll Heineman Ptasiwicz & Parsons Firm
- The employer was formerly represented by Industrial UI Services and Paul Mazer, Esq. The employer is now represented by Littler, Mendelson, P.C.
- All claimants are covered by the same collective bargaining contract
- The contract term was 5/5/19 to 5/4/22
- Claimants worked without contract, under terms of prior contract, from 5/5/22 to 5/23/22 until 6:59am
- A "labor dispute" occurred within the meaning of NJAC 12:17-12.2(a)(1)
- On 5/11/22, the union served the employer with an "8(g)" notice; the ten-day notice of intent to strike on 5/23/22 if an agreement was not reached
- On 5/20/22, the employer sent internal notice to the claimants that read in part: "[P]lease be advised that if the union and its workers proceed with a strike on May 23, 2022, JNESO membership (Nurses, Respiratory Therapists, Radiology Techs, Polysomnographic Techs and CV Techs) will not be permitted to work at St. Michael's Medical Center or allowed on the Hospital's campus until further notice. For the duration of the strike, Saint Michael's has arranged for qualified staff to ensure that the hospital can continue providing quality care for our patients."
- There was picketing
- Replacement workers were hired
- A new contract was reached and ratified by union member vote on 6/22/22
- The claimants were allowed to return to work and the replacement workers were released.

During the strike period, the employer remained open and provided services to the public, although some services were curtailed due to the lack of staff as a result of the strike.

Employees who resumed working after the strike ended on 06/22/2022 had varied return dates based upon multiple factors, including when they were contacted about their work schedule, scheduled leave time, scheduled obligations at new employment, etc.

In relation to this matter, a portion of the claimants were paid benefits and held liable for a non-fraud refund. Not all refunds were related to the disposition of this case.

OPINION:

N.J.S.A. 43:21-5 as amended, reads in part:

(d) If it is found that this unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which the individual is or was last employed, except as otherwise provided by this subsection (d).

(1) No disqualification under this subsection (d) shall apply if it is shown that:

(i) The individual is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

(ii) The individual does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute; provided that if in any case in which subparagraphs (i) or (ii) of this paragraph (1) applies, separate branches of work which are commonly conducted as separate businesses in separate premises are conducted in separate departments of the same premises, each department shall, for the purpose of this subsection, be deemed to be a separate factory, establishment, or other premises.

(2) For any claim for a period of unemployment commencing on or after December 1, 2004 due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which the individual is or was last employed, no disqualification under this subsection (d) shall apply if it is shown that the individual has been prevented from working by the employer, even though the individual's recognized or certified majority representative has directed the employees in the individual's collective bargaining unit to work under the preexisting terms and conditions of employment, and, if the period of unemployment commenced before January 1, 2022, the employees had not engaged in a strike immediately before being prevented from working, or if the a period of unemployment commenced on or after January 1, 2022, whether or not the employees had engaged in a strike immediately before being prevented from working.

(3) For any claim for a period of unemployment commencing on or after July 1, 2018 due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which the individual is or was last employed, no disqualification under this subsection (d) shall apply if an issue in the labor dispute is a failure or refusal of the employer to comply with an agreement or contract between the employer and the claimant, including a collective bargaining agreement with a union representing the claimant, or a failure or refusal to comply with a State or federal law pertaining to hours, wages, or other conditions of work.

(4) For any claim for a period of unemployment commencing on or after July 1, 2018 and before January 1, 2022, if the unemployment is caused by a labor dispute, including a strike or other concerted activities of employees at the claimant's workplace, whether or not authorized or sanctioned by a union representing the claimant, but not including a dispute subject to the provisions of paragraph (2) or (3) of this subsection (d), the claimant shall not be provided benefits for a period of the first 30 days following the commencement of the unemployment caused by the labor dispute, except that the period without benefits shall not apply if the employer hires a permanent replacement worker for the claimant's position. A replacement worker shall be presumed to be permanent unless the employer certifies in writing that the claimant will be permitted to return to his or her prior position upon conclusion of the dispute. If the employer does not permit the return, the claimant shall be entitled to recover any benefits lost as a result of the 30-day waiting period before receiving benefits, and the department may impose a penalty upon the employer of up to \$750 per employee per week of benefits lost. The penalty collected shall be paid into the unemployment compensation auxiliary fund established pursuant to subsection (g) of R.S.43:21-14. For any claim for a period of unemployment commencing on or after January 1, 2022 due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which the individual is or was last employed, including a strike or other concerted activities of employees at the claimant's workplace, whether or not authorized or sanctioned by a union representing the claimant, but not including a dispute subject to the provisions of paragraph (2) or (3) of this subsection (d), the claimant shall not be provided benefits for a period

of the first 14 days following the commencement of the unemployment caused by the labor dispute, except that the claimant shall be provided benefits during any part of that the 14-day period in which the employer engages the services of a replacement worker for the claimant's position, whether that replacement worker is engaged on a permanent or temporary basis, or is an existing worker reassigned permanently or temporarily from other duties to perform the duties of the claimant's position. For any claim for a period of unemployment commencing on or after January 1, 2022 which exists because of a labor dispute at the factory, establishment or other premises at which the individual is or was last employed, if the labor dispute has not resulted in a stoppage of work, no disqualification under this subsection (d) shall apply, and the 14-day waiting period in this paragraph (4) shall not apply.

N.J.A.C. 12:17-12.2 Labor disputes

(a) The following words and terms, as used in this section, shall have the following meanings:

1. "Labor dispute" means any controversy concerning wages, hours, working conditions or terms of employment between an employer and a bargaining unit or a group of employees.

2. "Stoppage of work" means a substantial curtailment of work which is due to a labor dispute. Justification for the labor dispute may not be considered. An employer is considered to have a substantial curtailment of work if not more than 80 percent of the normal production of goods or services is met.

Counsel for the employer made several arguments regarding the retroactivity of the statute. First, they argued there was a "manifest injustice" to the employer, since it reasonably relied on the pre-amended statute, and to the Division of Unemployment which was determined the matter under the standards of law in effect at the time. And, that in applying the amendment retroactively, it would cause a deleterious and irrevocable result. Further, the retroactive application of the amendment during the middle of the judicial hearing before the Appeal Tribunal smacks of manifest injustice.

Additionally, they argued that they believed the Appeal Tribunal erred by denying the introduction of evidence showing that union representatives lobbied the Legislature specially to mold the amendments in order to obtain benefits for its members employed by the employer involved in this appeal. The applicable statute was amended and signed by Governor Murphy on April 24, 2023. By its terms, the amendment to the statute took effect immediately and applied retroactively to all claims for unemployment compensation filed on or after January 1, 2022.

In this particular case, parts (1), (2), and (3) of the statute do not apply. Distilled to its simplest, part (4) of the recently amended statute provides that, for claims dated on or after January 1, 2022, there are two paths to full eligibility under the new scheme, dependent upon whether or not there was a "stoppage of work".

If there was a stoppage, then eligibility during the first 14 days of the strike depends on whether or not replacement workers were engaged; if there was no stoppage, then the 14-day potential waiting period does not apply. Either way, benefits would be payable after 14 days. As the record reflects, and it has thus been found as fact, that the employer's engagement of the services of replacement workers commenced on the first day of the strike, the matter of whether or not there was a stoppage of work is, in this case, academic.

Therefore, as the claimants' period of unemployment was due to a labor dispute which commenced after January 1, 2022, and the employer engaged the services of temporary replacement workers to perform the duties of the claimants' position at the onset of the strike, no disqualification arises in accordance with N.J.S.A. 43:21-5(d)(1)(4).

N.J.S.A. 43:21-16(d) provides in part:

When it is determined by a representative or representatives designated by the Director of the Division of Unemployment and Temporary Disability Insurance of the Department of Labor of the State of New Jersey that any person, whether (i) by reason of the nondisclosure or misrepresentation by him or by another of a material fact (whether or not such nondisclosure or misrepresentation was known or fraudulent), or (ii) for any other reason, has received any sum as benefits under this chapter (N.J.S.A.43:21-1 et seq.) while any conditions for the receipt of benefits imposed by this chapter (N.J.S.A. 43:21-1 et seq.) were not fulfilled in his

case, or while he was disqualified from receiving benefits, or while otherwise not entitled to receive such sum as benefits, such person, unless the director (with the concurrence of the controller) directs otherwise by regulation, shall be liable to repay those benefits in full.

The claimants' liability for non-fraud refunds insofar as matters related to N.J.S.A. 43-5(d)(1)(4) is remanded to the Director for recalculation in accordance with established procedures.

DECISION:

No disqualification arises under N.J.S.A. 43:21-5(d)(1)(4).

The determination of the Deputy is reversed.

The claimants' liability for non-fraud refunds insofar as matters related to N.J.S.A. 43-5(d)(1)(4) is remanded to the Director for recalculation in accordance with established procedures.

/s/ Angela Robinson
APPEALS EXAMINER

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APPEAL RIGHTS

IMPORTANT: This decision will become final, unless, within twenty (20) days of the date of mailing or notification, a written appeal is filed with the Board of Review, Department of Labor, Labor Building, PO Box 937, Trenton, New Jersey 08625-0937. If the last day allowed for the appeal occurs on a Saturday, Sunday or legal holiday, the appeal will be accepted if received or postmarked on the next business day. The appeal period will be extended if good cause for late filing is shown. Good cause exists in situations where it can be shown that the delay was due to circumstances beyond the control of the appellant, which could not have been reasonably foreseen or prevented. Please specify the reason for your appeal, and if possible, attach a copy of this decision. Please take notice that in the event that any party files a timely appeal to the Board of Review from this decision of the Appeal Tribunal, the Board hereby exercises its authority pursuant to N.J.S.A. 43:21-6(e) to take jurisdiction over any and all issues arising from the Appeal Tribunal decision regarding the determination(s) of the Deputy/Director. While unemployed and claiming benefits, the claimant must report as instructed by the Division. The parties to an appeal before the Board of Review may be represented by an attorney.

IMPORTANTE: Esta decisión será final, amenos que dentro de veinte días a partir de la fecha en cual esta decisión fue enviada o notificación dada, una apelación en escrito es recibida por la Junta de Repaso, Departamento de Labor, Edificio de Labor, PO Box 937, Trenton, New Jersey, 08625-0937. Si el último día autorizado en su apelación fuera ser un sábado, domingo o día de fiesta, su apelación será aceptada si la estampilla está marcada con el próximo día laboral. El periodo de apelación solo puede ser extendido por buena causa. Buena causa existe en situaciones en donde puede ser comprobado que la demora en apelar su decisión fue causada por circunstancias fuera de su control, en la cual es razonable asumir que no era posible de anticipar o prevenir tal circunstancia. Favor de incluir su razón por la cual está apelando, y si es posible, adjunte una copia de esta decisión. Favor de reconocer que en el evento que cualquier partido someta una apelación a tiempo a la Junta de Repaso de la decisión del Tribunal de Apelaciones, la Junta reserva el derecho según la autoridad dada por las leyes de NJSA 43:21-6(e) en mantener jurisdicción sobre cualquier y todo motivos debidas por la decisión del Tribunal de Apelaciones hechas por el Diputado o Director. Mientras esté desempleado y reclamando beneficios, el reclamante tiene que reportarse según las instrucciones que reciba de la División. Las partes en un recurso ante la Junta de Revisión podrán ser representados por un abogado.