DEPARTMENT OF EMPLOYMENT AND TRAINING

BOARD OF APPEALS
1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201

(301) 383-5032

STATE OF MARYLAND
HARRY HUGHES
Governor

— DECISION —

Decision No.: 368-BH-85

Date: June 6, 1985

Claimant: Helen Bibbens , et. al.

Appeal No.: Ben. Det. 430

S. S. No.:

et. al.

Employee: Sinai Hospital of Baltimore

L.O. No.: 1, 45, & 9

Appellant: EMPLOYER

Issue: Whether the claimant's unemployment was due to a labor dispute, other than a lockout, within the meaning of § 6(e) of the Maryland Unemployment Insurance Law; whether the claimant's unemployment was due to leaving work voluntarily, without good cause , within the meaning of § 6(a) of the law; and whether the claimants failed, without good cause, to apply for available suitable work within the meaning of § 6(d) of the law.

— NOTICE OF RIGHT OF APPEAL TO COURT —

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAY BE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT ON July 6, 1985

— APPEARANCES —

FOR THE CLAIMANT:

Keith Zimmerman - Attorney
Ron Hollie - Local 1199-E
Claimants (See List A Attached)

FOR THE EMPLOYER:

Frances Kanterman-Attorney
Leonard Marcus - Vice President
Leonard Cohen - Witness

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence established before the Special Examiner, including the stipulations entered into by the parties. In addition, the Board has considered those facts which were litigated at the additional hearing held before the Board on May 14, 1985.

The Special Examiner made an inference from the stipulated facts that the employer knew, when it replaced some of the claimants in this case with permanent employees on December 11, 1984, that those employees had scheduled a ratification meeting that very night in order to consider whether or not the tentative agreement reached between the union and the employer would be put into effect. Although that inference was reasonable, it turns out to have been incorrect upon consideration of the additional testimony presented at the Board level.

FINDINGS OF FACT

The Board of Appeals adopts the findings of fact of the Special Examiner with the exception of the last paragraph. In lieu of the findings set out in the Special Examiner's last paragraph, the Board finds as a fact that the employer was not aware of any agreement between itself and the union or any pending union ratification vote at the time that it was hiring permanent employees to replace the claimants during the morning of December 11, 1984.

CONCLUSIONS OF LAW

Both parties agree that § 6(e) does not provide a disqualification from benefits in this case. Both parties stipulated that there was no "stoppage of work" within the meaning of § 6(e) of the law and that, therefore, § 6(e) does not operate to disqualify the claimants from benefits in this case. See, Employment Security Administration v. Browning Ferris, Inc. 438 A.2d 1356 (Md. 1982).

The first serious question raised by this case is whether or not the disqualification in § 6(e) of the law (for being unemployed due to a stoppage of work at the employer's premises due to a labor dispute) and § 6(a) of the law (for/voluntarily quitting employment), are mutually exclusive. In Browning Ferris, supra, the Court of Appeals held that where there is no disqualification under § 6(e) on account of there being no stoppage of work, there is not an independent disqualification found under the purpose clause of the statute, § 2, even though there was some voluntary action on the part of the strikers in that case which had ultimately resulted in their being unemployed. In Browning Ferris, the Court stated further that the "consensus of states" which have interpreted the "Voluntarily leaving work" and "labor dispute disqualification" provisions have held that they are mutually exclusive. Browning Ferris, at 438 A.2d 1363. Further, in Browning Ferris, the Court cites with apparent approval a statement that a number of courts have concluded that the term "leaving work," as used in unemployment compensation laws refers only to a severance of the employment relationship and does not include a temporary interruption in the performance of services. This language from Browning Ferris is a strong indication that the court
§ 6 (e) and 6 (a) to be mutually exclusive in the case of strikers.

The employer argues in this case that, even if § 6(a) and 6(e) are mutually exclusive in the case of persons who are on strike but not replaced, the situation changes where the strikers refuse to accept an offer to return to their previous work knowing that they will be permanently replaced and lose their jobs if they do so refuse. This issue raises a closer question, since the interruption in services is no longer temporary.

Browning Ferris, however, quotes with apparent approval other language from a law journal article to the following effect:

> Absence from the job is not a leaving of work where the worker intends a temporary interruption in the employment and not a severance of the employment relation.
> Browning Ferris, supra, at 438 A.2d 1363.

Even here, the court cited the language "where the worker intends a temporary interruption in the employment." Thus, the rationale for saying that §§ 6(e) and 6(a) are mutually exclusive could still apply to a case where a striking employee refused an offer to return to his old job, even knowing that the employer had threatened to permanently replace him, since the worker ' s intention to return to his job at the conclusion of the labor dispute remained unchange. The decision in Browning Ferris is far from a clear and definitive ruling on this issue, but the Board is satisfied that the language of Browning Ferris leads more in the direction of mutual exclusivity between §§ 6(a) and 6(e) than it does in any other direction. For that reason, the Board will rule that § 6(a) does not apply in this case to these claimants at all.

Another issued raised is whether or not the claimants should be disqualified for refusal of suitable work within the meaning of § 6(d) of the law. In Cambridge Wire Cloth (264-BH-82) the Board ruled that §§ 6(e) and 6(d) are not mutually exclusive in all cases. The reasoning for this ruling was as follows. There is no question that the legislature did not want claimants penalized under § 6(d) for failing to accept a job that was open on account of a labor dispute. Section 6(d)(2)(a) specifically provides an exemption for this situation. Section 6(d) (2), however, specifically limits this exemption to "new" work. In Cambridge Wire Cloth, the Board ruled that the only possible explanation for the use of the word "new" in this context would be that there was a legislative intention to allow disqualifications under § 6(d) of the law for refusing to accept a job offer to "old" work, i.e., one's old job. In the absence of any court ruling to the contrary, the Board will continue to apply this doctrine.

The first question under § 6(d) of the law is whether or not the work was suitable within the meaning of that section. In Cambridge Wire Cloth, the Board ruled that there is a presumption that one's previous employment was suitable within the meaning of § 6(d). The claimants in this case have presented no evidence which would tend to overcome that presumption.

Another factor effecting suitability of the work is the good faith of the employing unit offering the work. In this respect, the inference made by Special Examiner Ferris comes into play. Special Examiner Ferris's decision was based in part upon a finding that the employer hastily hired replacements, knowing that the claimants in this case were due to vote on an extension of their contract that very night and that there was a high probability that the contract would be renewed that night. As it turns out, the facts are somewhat different and the employer hired replacements on the 11th only during that time in which negotiations had totally broken off from the union. As soon as negotiations were scheduled to resume again, the employer immediately ceased hiring replacements. The Board thus concludes that the Special Examiner's conclusion that the job was somewhat less suitable because of the timing of the employer's offer was incorrect (because based on an incorrect fact) and that there was nothing unsuitable about the method in which the job was offered to the claimants.

The Board agrees, however, with the Special Examiner that a disqualification under § 6(d) of the law is not appropriate in this case because the offer of work was neither an offer made by the Department of Employment and Training nor was it an offer made while the claimants were filing for unemployment insurance benefits. The Board has consistently ruled that a person must be in "claim status" before a disqualification can be imposed for refusal of work from a private employer under § 6(d) of the law. See the Board decisions in Sipe v. Parsons (93-BH-81), DeRoo v. Anne Arundel County Board of Education (470-BR-81), Blake v. Sun Life of America (1162-BH-81), Kramp v. Baltimore Gas and Electric Company (1051-BR-82), Hirons (152-BR-83) , Lokar v. Frederick County Board of Education (158-BR-83), Flowers v. TS Info Systems, Incorporated (224-BR-83), and Calhoun v. Patuxent inn (961-BR-83). The Department of Employment and Training's policy also prohibits the disqualification of claimants under § 6(d) of the law for job refusals which took place during a period when the claimants were not filing for benefits. See, U.I. Administration Instruction 31-83, dated October 25, 1983.

The term "claim status" is mentioned in the departmental regulations only in a totally different context, that part of the regulations dealing with "sick claims". See , COMAR 07.04.02.03.H(1). `No court of record has had the occasion to define what the term "claim status" means, but it would be absurd, as the employer in this case points out, to refuse to apply a disqualification under § 6(d) of the law in a situation where a claimant was continually filing for benefits, refused a job in a certain week and didn't file a claim that week, then continued filing claims in the following weeks. Whether that person would be in "claim status" within the meaning of the sick claim provisions of the regulations is another matter, but for the purposes of § 6(d) of the law, the rationale for not penalizing claimants for refusing jobs when they are not filing claims certainly would not apply to a person who failed to file a claim just to take advantage of that exemption.

In this case, as in most of the other cases cited above, the Board and the agency have refused to apply a 6(d) penalty for a refusal of a private offer of suitable work that took place prior to the claimant ever filing a claim for unemployment insurance benefits. The employer argues that this is an unnecessary gloss on the statute. The Board does not believe this to be so. Section 6(d) of the law is one of the sections (along with § 4(c)) which primarily deal with whether the claimant is actually trying to get a job and end his period of unemployment. A person's entire history is not on trial in an unemployment claim. No one would conceive of disqualifying a claimant from unemployment benefits during a certain week because he failed to actually look for work during another week, long prior to his ever filing a claim for benefits. Section 6(d) is another manifestation of the legislature's desire that people claiming unemployment benefits actively look for work in good faith, but it does not mean that a refusal of a job which was offered in the past, during a time when unemployment benefits were not even claimed, should be held against claimants.

The ultimate holding of this case is that strikers who are given an ultimatum to return to their jobs by the employer, but who do not return and who are replaced, are eligible for unemployment insurance benefits if they later file for them. This question is obviously not free from doubt, but it appears that legislative proposals to change or clarify the statute since Browning Ferris have not met with legislative approval, and this is the best interpretation of the current statute.

DECISION

The unemployment of the claimants was not due to a stoppage of work within the meaning of § 6(e) of the Maryland Unemployment Insurance Law.

The unemployment of the claimants was not due to voluntarily leaving their employment within the meaning of § 6(a) of the law.

The claimants did not refuse available, suitable work within the meaning of § 6(d) of the law.

No disqualification is imposed upon the claimants under §§ 6(e) 6(a) or 6(d) of the law based upon the reason for their separation from employment from Sinai Hospital, Inc.

The decision of the Special Examiner is affirmed.

Thomas W. Keech
Chairman

Hazel A. Walmsley
Associate Member

Maurice E. Dill
Associate Member

K:W:D
dp

DATE OF HEARING: May 14, 1985

COPIES MAILED TO:

CLAIMANTS (See List A, attached hereto and made part hereof)

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Sinai Hospital of Baltimore

Ron Hollie
Local 1199-E

LIST A

Patricia Griffin	Stanley A. Silver
Timothy White	Donald R. Knotts
Leroy Thigpen	Carolyn Davis
Clara Love	Helen Bibbens
Paul T. Zimmerman	Fannie Zimmerman
Vessa Cato	James Wallace
Astley Duncan	Geraldine Womack
Sterling Finch	Lovetta Moore
Roscoe Wimbish	Anthony Trayham

Beatrice Branche

Leroy C. House

Rick Harris

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Lillian Streeter

Alicia Watkins

Alice Mason

Lee P. Bland

Terence A. Wheeler

Towanda Peterson

Althea Taylor

Edward Smith

Andrianne Koenigsberg

Wanda Stith

Minnie Sterling

Shirley Taylor

Laundretta Mitchell

Valerie Lemon

Peter P. Wilson

CORRECTED LIST A - January 28, 1985

LABOR DISPUTE **DATE: January 23, 1985**

IN THE MATTER OF:

Helen Bibbens, et. al.

v.

Sinai Hospital of Baltimore
Belvedere at Greenspring

BENEFIT DETERMINATION NO. 430

APPEAL RIGHTS
CLAIMANT OR EMPLOYER:

Any interested party to this decision may request an appeal and such Petition for Appeal may be filed in any Employment Security Office or with the Board of Appeals, Room 515, 1100 North Eutaw Street, Baltimore, Maryland 21201, either in person or by mail. If the Claimant appeals this determination and remains unemployed, he/she MUST CONTINUE TO FILE CLAIMS EACH WEEK. NO BACK-DATED CLAIMS WILL BE ACCEPTED.

The period for filing a Petition for Appeal expires on February 7, 1985.

BENEFIT DETERMINATION NUMBER 430

IN THE MATTER OF:

Helen Bibbens, et. al.

v.

Sinai Hospital

ISSUES: Whether the claimant's unemployment was due to a labor dispute, other than a lockout, within the meaning of §6(e) of the Maryland Unemployment Insurance Law; whether the claimant's unemployment was due to leaving work voluntarily, without good cause, within the meaning of §6(a) of the Law; and whether the claimant failed, without good cause, to apply for available, suitable work within the meaning of §6(d) of the Law.

APPEARANCES

FOR THE CLAIMANTS:

Keith Zimmerman, Esq.

CLAIMANTS:

Patricia Griffin
Timothy White
Leroy Thigpen
Clara Love
Paul T. Zimmerman
Vessa Cato
Astley Duncan
Sterling Finch
Barbara Stockett
Beatrice Branche
Leroy C. House
Michael Whyte
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Barbara Faust
Wanda Tolover
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Jesse Bibbens, Jr.
Carrie Medley
Adrianne Koenigsberg
Minnie Sterling
Laundretta Mitchell
Peter P. Wilson
Rick Harris
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Carolyn Davis
Christine Francis
Fannie Zimmerman
Arnold Hughes
Geraldine P. Womack
Lovetta Moore
Anthony Trayham
Pearlene Warren
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Nancy Sutherland
Ethel Logan
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Valerie Lemon

FOR THE EMPLOYER :

Frances E. Kanterman, Esq.
Leonard Marcus, Vice President, Sinai Hospital
Ian Berger, Manager, Employee & Union Relations, Sinai Hospital

EVIDENCE CONSIDERED

The Special Examiner, appointed by the Board of Appeals for the purpose of conducting a hearing and making a determination of the claimants' eligibility for unemployment insurance benefits in this labor dispute case, has considered all the testimony exhibits and legal arguments presented at a hearing which was held in Baltimore, Maryland on January 14, 1985 at 9:00 a.m.

FINDINGS OF FACT

The claimants on List A, attached hereto and made part hereof, are members of Local 1199-E of the Hospital and House Care Employees Union. They had previously been employed by Sinai Hospital of Baltimore, Md.

The collective bargaining agreement controlling the conditions of employment and wages and hours of the claimants had expired by its terms. When a new mutually satisfactory bargaining agreement was not achieved, a strike was called by the union. The strike began on December 4, 1984 at 7:00 a.m. and continued until ratification of a new contract occurred on December 11, 1984. The first day on which the claimants could return to work after ratification of the new collective bargaining agreement was December 12, 1984.

There was picketing throughout the strike. The strike did not, however, result in a stoppage of work at the premises of the employer.

The employer was able to continue operating by reason of new hires, replacements, union members who did not strike, and administrative personnel performing some of the tasks previously performed by the claimants.

On November 23, 1984 the claimants' union informed the employer that it would be on strike on Tuesday, December 4, 1984 at 7:00 a.m. When this information was given to the employer, the employer began a series of written communications and announcements aimed at Its employees who were members of the union. The early writings and announcements told the employess that if they struck they could conceivably be replaced and might not have a job available to them when the strike was over. On December 5, 1984 the employer sent a mailgram to the claimants at the addresses the claimants had given the employer in which the

employer told the claimants that their current job at Sinai Hospital was available and that they could return Immediately. On December 7, 1984, the employer informed the claimants who were on strike that on Tuesday, December 11, 1984 the Hospital would begin to hire permanent replacements for strikers who had not returned to work by that date, The employer further Informed the claimants that a permanent replacement hired to do the job of a claimant would not be fired to permit a claimant to return to work. Claimants were told that their seniority would not be available to them to bump a replacement. Their rights were explained to them as being if a vacant job was available that the claimants and other strikers would be considered for it if qualified, and if none was available they might not be able to return to work after the strike was settled.

None of the claimants on List A, attached hereto, returned to work prior to ratification of the contract. As of noon on December 11th the claimants had been replaced because of their failure to return to work by that time. The claimants' union did ratify a contract on the evening of the 11th and were available to return to work as of December 12, 1984 and thereafter.

When the claimants were replaced on the 11th of December, the employer was aware that a union meeting was scheduled for that evening to consider ratification of a new contract.

CONCLUSIONS OF LAW

The employer urges that although the claimants are not disqualified under §6(e) of the law because there was no work stoppage at the premises of the employer, they are disqualified under §6(a) of the law and §6(d) of the law. Section 6(a) provides that a claimant is not eligible for unemployment insurance benefits if the claimant's unemployment is due to voluntarily leaving work without good cause, connected with the work. Section 6[d] of the law provides that a claimant is not entitled to unemployment insurance benefits if the claimant has failed, without good cause, either to apply for available, suitable work when directed by the Executive Director, or to accept suitable work when offered to him or to return to his customary self-employment when so directed by the Executive Director.

With respect to the employer's contention that the claimants are disqualified under $6(a) of the law, it is instructive to consider the decision of the Maryland Court of Appeals in Employment Security Administration v. Browning-Ferris, 'Inc., 292 Md. 515,432 A.2d 1356 (1982). In dealing with the contention of the employers in that case, that §2 required that a claimant be disqualified if his unemployment was voluntary, the Court noted that such an argument would render §6(a) superfluous. The Court further noted that §6(e) and §6(8) have been interpreted by a consensus of the states as mutually exclusive. The Court went on

further to discuss with apparent approval the holdings in a number of cases, including Interisland Resorts v. Akahane, 46 Hawaii 140,156 377 P.2d 715,724 (1962). The Court noted with apparent approval that that case held that an individual whose unemployment is due to a stoppage of work which exists because of a labor dispute cannot be said to have left his work voluntarily within the meaning of the voluntary separation provision. The Court also noted that a number of other courts have concluded that the terms "leaving work" or "left his work" as used in unemployment compensation law refers only to severance of the employment relation and do not include a temporary interruption in the performance of services. It is clear that at the time the claimants in this case separated from their employment they did not do so with any intention other than to create a temporary interruption in support of their efforts to obtain a satisfactory collective bargaining agreement.

The employer also contends that the claimants are disqualified under §6(d) of the law by reason of their failure to return to work on or before December 11, 1984. The employer had on December 7th sent the strikers a written communication informing them that "The Hospital will begin to hire permanent replacements for strikers who have not returned to work by that date." At the time that the employer's communication was sent to the claimants there was no tentative contract agreed upon. One was subsequently agreed upon between the negotiators for the union and the employer and was scheduled for a meeting for possible ratification on the evening of December 11, 1984. The evidence further discloses that none of the claimants had filed a claim for unemployment insurance benefits at the time that the request was sent to the claimants asking them to return before December 11th or be replaced, and also that-they were not in claim status on December 11th, the deadline. The Board of Appeals has consistently held that a claimant must be in claim status before the Section applies. Additionally the action of the claimants in approving of the tentative agreement on the evening of December 11th was also a sufficiently timely acceptance of the employer's offer of work.

In this regard, see, Waugh v. Unland Body & Fender Shop, Inc., 556-BR-83. In that case the employer informed the Department of Employment and Training that the claimant's former position was open. The claimant contacted the employer four days later but the position had been filled the day after the employer informed the agency that the position was open. The Board held that the claimant had contacted the employer within a reasonable time and that §6(d) did not apply. This element of reasonableness would also require that in the instant situation §6(d) would not apply. It was not reasonable for the employer when there was a tentative contract approved among the negotiators and awaiting the ratification of the rank and file to have not waited until the evening of the 11th before replacing the claimants.

Since §6(e) does not disqualify the claimants because of the lack of a stoppage of work and §6(a) and §6(d) are not applicable under the facts of the case, the claimants are not disqualified from receiving unemployment insurance benefits by reason of their separation from employment after December 11, 1984.

DECISION

The unemployment of the claimants was not due to a work stoppage other than a lockout resulting from a labor dispute within the meaning of §6(e) of the Maryland Unemployment Insurance Law.

The unemployment of the claimants was not due to voluntarily leaving their employment without good cause within the meaning of §6(a) of the law.

The claimants did not refuse available, suitable work when offered to them within the meaning of §6(d) of the law.

The claimants are not disqualified from receiving unemployment insurance benefits for the Claims filed by the claimants on List A after December 11, 1984.

MARTIN A. FERRIS
SPECIAL EXAMINER

MAF: kbm
Date of Hearing: January 14, 1985

COPIES MAILED TO:

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Mr. Ron Hollie
Local 1199-E

UNEMPLOYMENT INSURANCE - BALTIMORE

UNEMPLOYMENT INSURANCE - PIMLICO

UNEMPLOYMENT INSURANCE - TOWSON

CORRECTED LIST A

Patricia Griffin	Stanley A. Silver
Timothy White	Donald R. Knotts
Leroy Thigpen	Carolyn Davis
Clara Love	Helen Bibbens
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