-DECISION-

Claimant:
CHARLYCE M JOHNSON

Employer:
ANNE ARUNDEL CO ECONOMIC OPPORT COMM INC (BEVERLY BROWN)

Decision No.: 575-BH-00

Date: March 24, 2000

Appeal No.: 9818880

S.S. No.:

L.O. No.: 02

Appellant: CLAIMANT - REMAND FROM COURT

Issue: Whether the claimant failed to file proper claims for benefits within the meaning of Maryland Code, Labor and Employment Article, Title 8, Section 901.

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the *Maryland Rules of Procedure, Title 7, Chapter 200.*

The period for filing an appeal expires: April 23, 2000

- APPEARANCES -

FOR THE CLAIMANT:
Charlyce M. Johnson
Micheal Ragland, Esquire
Brenda Claiborne, Witness
Shari Johnson, Witness

FOR THE EMPLOYER:
Beverly Brown

PRELIMINARY STATEMENT

The Board held a consolidated hearing on three appeals, all involving the same claimant, employer and, except for the year in question, the same issue. Appeal number 981880 was remanded to the Board by the Circuit Court. Appeal numbers 9902402 and 9902403 were on appeal to the Board from decisions of the Hearing Examiners.

The issue in all three cases is whether or not the claimant failed to file proper and timely claims for benefits, within the meaning of LE, Section 8-901 for the years 1994 through 1996.

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.

FINDINGS OF FACT

The claimant has been employed by the Head Start program of the Anne Arundel County Economic Opportunity Committee, Inc., since September, 1993. The claimant has been a 10- month employee and has regularly been off for the summer months, returning to work each September. The claimant signed a contract prepared by the employer which included a provision stating that:

> …Maryland Unemployment Insurance Law applies to non-profit organizations with professional and non-professional employees, including teachers and teachers aides, which states that these employees are **ineligible to collect unemployment benefits** due to the fact that there is a reasonable assurance that the individual will perform services in the same capacity for the organization when [the] academic school year begins. (Emphasis added.)

The last paragraph of the contract, just above the claimant's signature line states: "I have read and do understand the above stated employment agreement and agree to comply with its' content." In addition to this contract, the claimant was also discouraged from applying for benefits when she was informed by supervisors at staff meetings that she was not eligible for unemployment insurance benefits during the summer months.

As a result, the claimant did not file for unemployment insurance benefits during the summer months of 1994, 1995 and 1996. The claimant did not make her own inquiry with the Unemployment Insurance Agency (the "Agency") during any of those summers with regard to her eligibility for benefits.

It is uncontested that the claimant did have reasonable assurance of returning to work for those years and that is not in issue in this case. It is also uncontested that the employer is not an educational institution, within the meaning of the statute.

At the time that the employer wrote this contract and gave it to the claimant to sign, the employer was unaware that the provision regarding unemployment insurance was incorrect. However, it did not take steps to insure that the contract was legally correct, which, in fact, it was not. While the Board finds that the employer did not intentionally *mislead* the claimant, the Board finds that the employer did intentionally *discourage* the claimant from applying for benefits.

Neither the claimant nor the employer became aware of the inaccuracy of this contract provision until the summer of 1998. On June 29, 1998, the Executive Director of the Agency sent a letter to the employer, informing them that 10-month employees of Head Start who are not employed by a school system are not subject to the reasonable assurance provision of the Maryland Unemployment Insurance statute. That letter pointed out that precedent decisions (of this Board) dating back to 1984 held Head Start employees are disqualified under the reasonable assurance provisions of the law only if they were employees of an educational institution. The Executive Director also counseled the employer that:

> You should be advised that Section 09.32.02.04D(7) of the Code of Maryland Regulations (COMAR) provides that initial claims may be backdated when the claimant did not file a claim in reasonable reliance on an invalid agreement to waive, release or commute his/her rights to unemployment insurance benefits as defined within Section 8-1301 of the Maryland Unemployment Insurance Law. More simply put, if a Head Start employee of AACEOC should report to file a claim now and indicate that he/she did not file earlier this summer because he/she interpreted the employment agreement to order him/her not to file, the initial claim for benefits would be backdated, and back weeks of benefits would be paid that would be charged to AACEOC's employer account.

The employer did not directly relate the contents of this letter to its employees. The employer informed them that they could only apply for the summer of 1998. This was allegedly based on information received by the employer from Mr. R.A.Breschi, Hearing Examiner.[1]

In any event, on or about September 21, 1998, in addition to filing for 1998, the claimant filed for benefits for the periods from June 9, 1996 to August 24, 1996; June 4, 1995 to August 19, 1995 and from June 5, 1994 to August 13, 1994.

CONCLUSIONS OF LAW

[1] There is no written communication from Mr. Breschi. Further, to the extent that he provided any information to the employer, it was an expression of his own opinion and not binding on the Agency or the Board.

Section 8-901 of the Labor and Employment Article states:

An individual who files a claim in accordance with regulations adopted under this title is eligible to receive benefits with respect to any week if the Secretary finds that the individual meets the requirements of this subtitle.

The regulations referred to above are found in COMAR, 09.32.02.03 and state, in pertinent part, that:

C. (1) [The] Effective date of an initial or reopened claim is the first day of the week in which an individual reports, registers, and files the initial or reopened claim as instructed by the Secretary;

D. (6) A claim may be backdated when the claimant did not file a claim in reasonable reliance on an invalid agreement to waive, release, or commute the claimant's rights to benefits as prohibited by the Unemployment Insurance Law.

Section 8-1303 of the Labor and Employment Article states in pertinent part: "An employing unit, directly or indirectly, may not:...(2) accept or require from an employee a waiver of a right to which the employee is entitled under this title."

The issue here is whether the claimant may be permitted to backdate claims for benefits in 1998 for the years 1994 through 1996 because the employer; actions (however unintentional) resulted in her believing that she was not eligible. The claimant argues that the contract that she was required to sign by the employer, which included a requirement that she comply with the contract provisions, was, in essence, a waiver of her right to file for benefits.

The Board does not agree. The claimant did not waive her right to seek benefits. The contract merely informs the claimant (although in very strong terms) that she is not eligible; it does not forbid her from applying for benefits. While the employer clearly discouraged the claimant from filing for unemployment, it did not prohibit her from doing so, nor did it make employment conditional on her not seeking benefits. Therefore, the contract does not technically violate LE, Section 8-1303 nor does it act as a waiver.

The employer did (unknowingly) use wrong information to discourage the claimant from applying for unemployment benefits. The question remains then, does this justify the backdating of the claimant's claims?

The Board has held that misleading information by the Unemployment Insurance Agency may act as a waiver of the usual filing requirements. **See, e.g., Saeed**, 835-BR-86; **Gordon**, 222-BH-88. The Agency who is administering the statute clearly has an obligation to provide correct information upon which parties have a right to rely. Does the employer have a similar obligation and does the claimant have a right to rely on it?

In the decision, **Dept. of Economic v. Lilley**, 106 Md.App. 744, 666A.2d 921(1995), the Court of Special Appeals held that the Agency may backdate claims for benefits where it finds that the employer *knowingly* made a false statement in order to prevent the claimant from *filing* for unemployment insurance

In Lilley, the evidence was that not only did the employer knowingly give wrong information, the employer also told the claimant that he could not even *file* for unemployment insurance. The Court clearly made a distinction between *collecting* and *filing*:

> We agree with the circuit court that the record does not support the agency's finding that Westinghouse merely told Lilley that he was ineligible to *collect* benefits. As we have noted, the agency heard uncontradicted testimony from Lilley that Westinghouse had told him that he could not even *file* for unemployment compensation.

The Court did not specifically address whether the employer's informing the claimant that he could not collect benefits, for the purpose of discouraging filing, based on information that the employer did not know was wrong, would be sufficient justification to allow backdating of claims.

The Board concludes, based on all the evidence, and using the above cited cases as guidelines, that the employer had an obligation to make sure that the information it was including in the contract that it prepared, as well as the information it was providing to employees in the staff meetings, was accurate, especially where, as here, the employer had an interest in keeping its employees from collecting benefits. The claimant relied on the information given to her by the employer and that reliance was not totally unreasonable, given all the circumstances here. Therefore, some backdating of claims by the claimant is justified and appropriate under the law.

However, the Board concludes that the claimant also had an obligation, at some reasonable point in time, to contact the Agency or other legal authority to determine what her rights were, with regard to filing for unemployment insurance benefits. She failed to do that from 1993 until 1998. In addition, at some point, the legal doctrine of laches[2] also attaches. Therefore, the Board concludes that the claimant should not be permitted to backdate her claims for benefits for the years 1994 and 1995. The Agency should, however, allow her to file backdated claims for the summer of 1996.[3]

DECISION

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[2] **Black's Law Dictionary** (Revised Fourth Edition) defines Laches, Estoppel By as: A failure to do something which should be done or to claim or enforce a right at a proper time. HutchinsonV. Kenney, C.C.A.N.C., 27 F.2d 254,256. A neglect to do something which one should do, or to seek to enforce a right at a proper time. Jett v. Jett, 171 Ky. 548,188 S.W. 669, 672.

[3] Claims for the summers of 1997 and 1998 are not before the Board, but the Board would apply the same reasoning for such claims and allow backdating for those years as well, if those cases were to come before us.

The claimant failed to file proper claims, within the meaning of LE, Section 8-901 for the weeks beginning June 5, 1994 to the week ending August 13, 1994 and for the weeks beginning June 4, 1995 to the week ending August 19, 1995. The decisions of the Hearing Examiners for those weeks are affirmed.

The claimant did file proper claims, within the meaning of LE, Section 8-901 for the weeks beginning June 9, 1996 to August 24, 1996. The decision of the Hearing Examiner is reversed.

Hazel A. Warnick, Chairperson

Donna Watts-Lamont, Associate Member

Clayton A. Mitchell, Sr., Associate Member

Notice of Right to Request Waiver of Overpayment

The Department of Labor, Licensing and Regulation may seek recovery of any overpayment received by the Claimant. Pursuant to Section 8-809 of the Labor and Employment Article of the Annotated Code of Maryland, and Code of Maryland Regulations 09.32.07.01 through 09.32.07.09, the Claimant has a right to request a waiver of recovery of this overpayment. This request may be made by contacting Overpayment Recoveries Unit at 410-949-0022 or 1-800-827-4839. If this request is made, the Claimant is entitled to a hearing on this issue.

A request for waiver of recovery of overpayment does not act as an appeal of this decision.

KJK
Date of hearing: October 20, 1999
Copies mailed to:
CHARLYCE M. JOHNSON
ANNE ARUNDEL CO ECONOMIC
LOCAL OFFICE #02
MICHAEL J. RAGLAND, SR.

UNEMPLOYMENT INSURANCE APPEALS DECISION

CHARLYCE M. JOHNSON

SSN #

Claimant

vs.

ANNE ARUNDEL CO ECONOMIC OPPORT COMM INC

Employer/Agency

Before the:

Maryland Department of Labor, Licensing and Regulation
Appeals Division
1100 North Eutaw Street
Room 511
Baltimore, MD 21201
(410) 767-2421

Appeal Number: 9818880
Appellant: Claimant
Local Office: 06 / Southwest

December 2, 1998

For the Claimant:PRESENT

For the Employer:BEVERLY BROWN

For the Agency:

ISSUE(S)

Whether the claimant has filed proper claims for Unemployment Insurance benefits within the meaning of MD Code Annotated, Labor and Employment Article, Title 8, Section 901.

FINDINGS OF FACT

Claimant began working for Employer on September 7, 1993. She regularly worked during the fall, winter, and spring months, but was laid off each year during the summer months. In 1994 and 1995, Claimant and Employer executed a form document (*See,* attachments to Claimant's Exhibit 1), entitled "EMPLOYMENT AGREEMENT FOR 10-MONTH FULL-TIME, HEAD START EMPLOYEES," for the 1994-95 and 1995-96 academic years, respectively. Those two documents are essentially the same, with the exception of the dates. No agreement was executed by the parties for the 1996-97 academic year, although Claimant did return to work with Employer, in a different capacity, after the summer 1996 layoff.

The two aforementioned employment agreements provide, *inter alia:*

III.10-MONTH EMPLOYMENT AGREEMENT

A.Employment: As a 10-month, full time employee of Head Start, it is understood that my calendar year extends through the academic school year. Subsequently, active employment with the program is curtailed for a period of approximately six weeks inclusive of July through mid August.

My reinstatement will become effective at the beginning of *[sic]* orientation session August [22nd, for 1994 / 21st for 1995] at [9:00 A.M., for 1994 / 8:00 A.M., for 1995] or as designated by the Head Start Director. Since my employment to *[sic]* the program in the capacity of Cook is incorporated into the total program planning, I, Charlyce Johnson agree to remain employed with the Head Start Program for the [1994-1995, 1995-1996] school year. Should I decide not to return to the program, I will advise the Head Start Program Director no later than [July 25, 1994 / August 11, 1995].

B.Unemployment Eligibility Requirements: Section 4(f) 3 and 4(f) 4 *[sic]* of the Maryland Unemployment Insurance Law *[sic]* applies to non-profit organizations with professional and non-professional employees, including teachers and teachers *[sic]* aides, states that these employees are ineligible to collect unemployment benefits due to the fact that there is a reasonable assurance that the individual will perform services in the same capacity for the organization when *[sic]* academic school year begins.

. . . .

Employer's position regarding ineligibility for benefits because of the reasonable assurance issue (now addressed in § 8-909 of the Maryland Unemployment Insurance Law) was reiterated during staff meetings, which were attended by Claimant and other employees. In addition, a memorandum, dated October 6, 1998, (*See,* attachment to Claimant's Exhibit 1) regarding "10-month employees applying for unemployment for 1997" was distributed to Claimant and other employees. The text of that memorandum is as follows:

I have received correspondence from the Department of Labor, Licensing, and Regulation in reference to 10-month employees applying for unemployment for 1997.

As has been communicated to you previously, according to Mr. R. A. Breschi Esquire/Hearing Examiner, the Maryland Law states that you may only apply for the current year - 1998.

You may call Human Resources if you need further clarification of this issue.

Thank You.

Claimant has also entered into evidence a letter (*See,* attachment to Claimant's Exhibit 1), dated August 27, 1997, from Employer's Human Resources Manager to an employee who applied for unemployment insurance benefits in 1997. The manager reiterates Employer's position regarding ineligibility for benefits because of the reasonable assurance issue and states, *inter alia,* "Based on this information, it was not appropriate for you to apply for unemployment benefits."

Claimant did not file for unemployment insurance benefits during the summer layoffs of 1994, 1995, and 1996. She subsequently learned that other individuals, who were situated similarly to herself, were being paid benefits and thereafter filed a claim for benefits, effective September 20, 1998. Claimant has

requested that her claim be backdated to include the period June 9, 1996 through August 24, 1996, inclusive.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, § 8-901 (Supp. 1996) provides that an individual who files a claim in accordance with regulations adopted under this title is eligible to receive benefits with respect to any week if the individual meets the requirements of this subtitle.

COMAR 09.32.02.03C provides that the effective date of an initial or reopened claim is the first day of the week in which an individual reports, registers, and files the initial or reopened claim at a local office. A claim cannot be backdated unless it falls within one of the exceptions listed in COMAR 09.32.02.03D.

COMAR 09.32.02.03D states that the effective date of an initial or reopened claim may be other than as provided in section C of this regulation in the following situations:

(1) A claim shall be effective with the beginning of the week which includes the last day of work if the:

(a) claimant's reporting day is within 24 hours following the last day of work, and

(b) the initial or reopened claim was filed on the appropriate reporting day in the immediately succeeding week;

(2) A claim may be backdated when a claimant reports partial earnings for a week before the initial claim, to the Sunday of that week provided the claim is filed not later than:

(a) 30 days immediately following the close of that week, or
(b) 2 weeks after the date the partial wages are paid;

(3) A transitional claim shall be effective the day following the end of the preceding benefit year;

(4) Severe weather conditions exist, as declared by the Secretary;

(5) Clerical error attributable to the Department occurs;

(6) A local office is closed for a reason other than that the day is not a working day;

(7) A claim may be backdated when the claimant did not file a claim in reasonable reliance on an invalid agreement to waive, release, or commute the claimant's rights to benefits as prohibited by the Unemployment Insurance Law.

Claimant's position is that she should be allowed to file backdated claims for 1994, 1995, and 1996 and that the reasonable-assurance provision of § 8-909 should not be a bar to benefits. The period of time at issue in the instant case includes only June 9, 1996 through August 24, 1996, inclusive.

In support of the backdating issue, Claimant argues that she did not file timely claims for benefits because of misinformation provided to her by Employer and that Employer knew, or should have known, the "true state of the law it was representing to the employees." (Claimant's Exhibit 1). She further argues that the alleged misstatement of the law violates §§ 8-1302 and 8-1303 of the law and that the decision of the Court of Special Appeals in *Dept. of Economic & Emp. Dev. v. Robert K. Lilley* (hereinafter, *Lilley*), 106 Md. App. 744, 666 A.2d 921 (1995) supports her request to backdate her claim.

Section 8-1302 provides, in pertinent part:

An employer, its officer or agent, or another person may not:
(1)knowingly make a false statement or false representation or knowingly fail to disclose a material fact to:
(i)prevent or reduce the payment of a benefit to an individual who is entitled to the benefit;

Section 8-1303 provides, in pertinent part:

An employing unit, directly or indirectly, may not:

. . . .

(2)accept or require from an employee a waiver of a right to which the employee is entitled under this title.

In *Lilley,* the Court upheld the decision of the Circuit Court, which allowed the claimant to backdate his claim because the employer in that case had not only told the claimant that he was ineligible to collect benefits, but also told the claimant that he could not even file for benefits. In addition, the Circuit Court held that the employer had violated § 8-1302.

In the instant case, it is concluded that Claimant has failed to prove either of the underpinnings upon which the Circuit Court based its decision in *Lilley* or that she was required to waive her right to benefits.

Although Claimant has introduced the employment agreements for 1994-95 and 1995-96, it is concluded that the language in those documents regarding the precursor statute to § 8-909 does not constitute a waiver of any right on the part of Claimant. The language is only a statement of Employer's understanding of the law and does not require Claimant to agree to do, or not do, anything. Consequently, it is concluded that Employer has not violated the waiver provision of § 8-1303 of the law (or any other section of the law and regulations).

Unlike the situation in *Lilley*, Employer did not tell Claimant that she could not even file for benefits. This is the case with the language of the employment agreements, as well as the other documentary evidence presented by Claimant.

Although the October 1998 memorandum, which addressed employees' application for benefits for 1997, states that employees may only apply for the current year, 1998, (and therefore implies that employees may not apply for benefits for 1997), that document has no application to the period at issue in this case--summer 1996.

Likewise, the August 1997 letter to an unnamed employee cannot demonstrate that Claimant was told not to even apply for benefits during the period at issue herein, since it deals with application for benefits in 1997 was not even directed to Claimant, but rather another individual. Claimant has made no assertion that she ever received such a letter from Employer.

Finally, it is concluded that Claimant has failed to prove that Employer knowingly made a false statement or false representation or knowingly failed to disclose a material fact, in violation of § 8-1302. Indeed, Claimant's own evidence demonstrates that Employer took the prudent step of seeking guidance from a

knowledgeable individual in the Appeals Division of this Agency, who informed Employer that then-current state of the law was that the reasonable-assurance provision of § 8-909 precluded 10-month employees from receiving benefits.

For the foregoing reasons, it is concluded that Claimant has failed to demonstrate good cause for backdating her claim for benefits and that she is ineligible for benefits for the period of time at issue herein, pursuant to the provisions of § 8-901 of the law and regulations promulgated thereunder.

Although Claimant argues that § 8-909 should not be a bar to benefits in her particular case, the only issue on appeal in the case at bar is the § 8-901 issue, regarding backdating claims, and the § 8-909 issue is therefore not addressed herein.

DECISION

IT IS HELD THAT the claimant filed untimely claims for the week beginning June 9, 1996, and through August 24, 1996, within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-901 (Supp. 1996) and COMAR 09.32.02.04B(4). Benefits are denied for that period.

K. C. Sippel, Esq.
Hearing Examiner

Notice of Right to Petition for Review

Any party may request a review **either in person or by mail** which may be filed in any local office of the Department of Labor, Licensing and Regulation, or with the Board of Appeals, Room 515, 1100 North Eutaw Street, Baltimore, MD 21201. Your appeal must be filed by **December 17, 1998**.

Note: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing: November 13, 1998
AP/Specialist ID: ERGB1
Seq. No.: 001
Copies mailed on December 2, 1998 to:

CHARLYCE M. JOHNSON
ANNE ARUNDEL CO ECONOMIC
LOCAL OFFICE #02