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NOTES

IS "SUP" "UC" OR "GAW"?

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Three years ago a large segment of the populace, with special reference to those who were hep that "GAW" stands for "Guaranteed Annual Wage" and including the labor experts of our learned profession, would have said, had you asked them, that this was still a dream, a dream of Walter Reuther, et al. And they also, this time including the personnel of the state unemployment security agencies, would have suggested in large numbers that the concurrent payment of GAW and state unemployement compensation was just a fancy in the smoke of Walter's pipe. But many of these good people never really appreciated the astuteness of Mr. Reuther and his associates, or the forward look of Messrs. Ford, Bugas and Gossett of the Ford Motor Company, or the disposition of big business to cooperate with labor in something new when it becomes practical to do so, or the tremendous stakes involved in this plan. A few, however, who knew their unions along with their employment security onions were not completely overwhelmed when Automobile Workers signed up Ford, General Motors, Deere, and Caterpillar Tractor, and the CIO United Steelworkers, the big can companies, American and Continental, to pay "SUP", i. e., "Supplemental Unemployment Payments" from private unemployment plans, together, they hope, with the receipt of state job insurance benefits. There were legal obstacles which made it doubtful whether unemployment compensation agencies would regard guaranteed wage payments any differently than other "wages" or "remuneration".[1] Consequently, such payments when made by the employer might be taxable (subject to "contributions"), and, when received by the employe, a bar, pro tanto, to the payment of state employment security benefits. Supplemental unemployment plan payments, "SUP", are something else, you see.[2] They are "UC", unemployment compensation, only established by voluntary private plan rather than by compulsory compliance with public law. It would not be right to set off such private fund payments against a worker's state fund compensation, or to tax them as they left the employer's hands; they are not "wages". At least that is the way the motor and can industries and their workers see it.

The purpose of this note, one of a series, is merely to point out the issues and state in a general way some of arguments taking shape for and against "integra-

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1 "The Guaranteed Wage and Unemployment Compensation," Ernest L. Eberling, 8 VAND. L. REV. 458. (1955).

2 See "Guaranteed Annual Wage Plans and Supplementary Uneployment Compensation Plans" by Summer H. Slichter, an address before the American Management Association, Chicago, Ill. (Feb. 15, 1954).

tion" of SUP and UC, that is, the allowance of state unemployment compensation without reduction on account of the receipt of voluntary supplemental payments, and freedom of voluntary plan contributions from subjectivity to state plan contributions.

It is a frail case that rests on technicality and terminology rather than justice and logic. The case for integration is not frail; it stands firmly on the declared policy of employment security law as well as the language of the statutes. Take for example the Pennsylvania Unemployment Compensation Law.[3]

For purposes of determining claimant eligibility, Section 4 (u) of the Pennsylvania Act,[4] which defines the term "unemployed", provides in effect that a claimant is not eligible for compensation to the extent that he receives "remuneration" paid or payable with respect to the claim week in question. The same provision goes on to name several types of payments which "for the purposes of this subsection . . . shall be deemed "remuneration". These are "vacation pay and similar payments whether or not legally required to be paid" and "wages in lieu of notice, seperation allowances, dismissal wages and similar payments which are legally required to be paid."[5]

In a case involving the construction of the second clause[6] the Superior Court of Pennsylvania has stated that the term "remuneration" in this section includes any payment which constitutes "wages" under the contribution provisions of the act, plus those payments which the contribution provisions mention as "remuneration paid by an employer to an individual with respect to his employment" but excepted from returnable "wages". Among these non-covered items at the time the case was before the court were dismissal wages which an employer paid without being required to do so. By this process of reasoning, the court came to the conclusion that the claimant-appellant was temporarily barred from unemployment compensation because of the receipt of dismissal wages voluntarily paid to him by his employer. Subsequent to this round-about decision, the contribution provisions of the state act were amended to include dismissal wages which are paid voluntarily as well as those required. Nearly every state made a similar change about the same time, following the Federal Social Security amendments of 1950 which made all dismissal payments subject to the Federal tax for employment security.[7] Significantly, the Congressional reports[8] show that these payments were subjected to contributions not for any reason of substance or social theory but merely because it was deemed simpler to make all such payments taxable than determine in some

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3 PA. STAT. ANN. tit. 43, § § 751 - 881 (1930).

4 PA. STAT. ANN. tit. 43, § 753 (1930).

5 Required by contract, that is, since there is no obligation to make such payments apart from contract.

6 Fazio Uneployment Compensation Case 164 Pa. Super. 9, 63 A. 2d 489 (1949).

7 64 Stat. 546. The Federal government will collect the full 3% contribution under the Federal Unemployment Tax Act unless the state collects contributions on the same base. 26 USC 1601 (Section 3302 of the Code of 1954).

8 Report of the Committee on Ways and Means of the House of Representatives, 81st Congress on H. R. 2892 and 2893, later to become H. R. 6000, "Social Security Amendments of 1950".

instances whether the payment was or was not "legally required to be made".[9] Although most states automatically followed suit as soon as their legislatures met, not all made these payments "remuneration" for purposes of determining whether an employe was "unemployed" and eligible for compensation when he received them. New York, with greater individualism, enacted that none of these payments were "remuneration", made them subject to state contributions only for the purpose of saving for the state money which otherwise would be taken by the federal government.[10]

This then is the language of the law upon which a person must rely who contends that contributions an employer makes to a voluntarily established unemployment fund are "wages" and that such benefits as a worker may receive therefrom, if he becomes unemployed, are "remuneration" for employment! It leaves him with a case as weak as the case for integration is strong. Even ignoring the fact that the payment the employer makes is not to or for any specific individual and that any payment an employe receives is payable not by the employer but from an employe benefit fund conditionally upon the individual's compliance with the eligibility tests for unemployment compensation (and these facts cannot be dismissed), neither the payments to or from the supplemental benefit fund meet common sense, popular or legal concepts of "wages" and "remuneration". In any view, the latter terms connote payments by an employer to his employe for work, and when the unemployment compensation acts were written this was the sense in which they were used — used in describing the "base year" earnings credits an employe must accumulate to acquire the protection of the insurance program, used to measure the loss of earnings which the program would underwrite, used to describe the base upon which contributions, the premiums to finance the program, would be calculated. No reasonable person would argue that the contributions which an employer pays into a state unemployment fund, based upon the wages he pays to his employes for their work are "wages" paid or payable to the employe, or that the benefits a worker receives as partial insurance against loss of remuner-

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[9] As a source of additional revenue, the report further stated "The increase in the amount of taxable wages which will result from this provision, in the opinion of your committee, will be inconsequential." To which it might be added that this is not as true as would have been the opposite statement, namely, "*The decrease* in the amount of taxable wages which will result from the *elimination of tax on all dismissal wages* will be inconsequential." In any event, the change was for purely procedural reasons. See p. 1098 of the Report.

It would seem more logical to exclude all "dismissal wages" from both "wages" and "remuneration". Like unemployment compensation, they are received by a person who has been seperated from his employment and needs financial help until he finds other work. Unemployment compensation only partially insures the worker's wage loss. If the claimant's last employer pays him something upon his separation it hardly makes sense that the purpose of the payment should be defeated by setting it off against the worker's statutory insurance. Generally, employers who make such payments wish them to supplement the worker's benefits, cannot understand why they should be rendered futile by deduction. By the same tenets, they should be freed from contributions since they serve the same public purpose for which unemployment compensation is paid.

[10] Sections 517.2 and 518, Ch. 705, L. 1944, as amended. - Practically speaking, the state agencies and legislatures are powerless to relieve payments made by an employer from contributions if they are held subject to the Federal Unemployment Tax Act.

ation because of lack of work is "remuneration" for work. No more reasonably can it be said that such payments become "wages" and "remuneration" the moment a private carrier or fund and a voluntary program are utilized to attain, or assist in attaining, the same objectives.[11]

Needless to say, payments made to an employe from a supplemental unemployment compensation fund would not fall within the scope of the specially named and controversial payments which Section 4 (u) states "shall be deemed remuneration" for the purposes of that section, nor were supplemental benefits even considered when these provisions were enacted.

The only other testing provision of the employment security act which might be raised to question integration is the clause requiring a claimant to be "available for suitable work".[12] Although the result could naturally be influenced by the terms and conditions of the supplemental plan, there is no reason why entitlement to supplemental benefits should adversely affect the claimant's availability for work. Health insurance, pension plans, vacation programs and other privately established benefits incident to employment and based upon seniority all have the effect of attaching the individual more closely to the establishment in which these advantages have accrued to him. Nevertheless, they are not deemed to exclude the employe from "availability for work" within the meaning of the law. Moreover, as appeal boards and courts have pointed out, availability for work is composed of two ingredients — first, the individual's ability and attitude toward work, and second, the availability of work. In most instances employes who look principally to one employer for work have a higher degree of availability than employes who have no secure attachment with any particular establishment.[13]

So much for the supposed bars to integration. On the postive side, the case for supplementation is even more convincing. For both private and public reasons, the law favors the protection of employes and their families against wage loss due to involuntary unemployment. Twenty years ago the states, in the exercise of their police powers, established their unemployment compensation systems on the sound theory that "Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people . . . Security against unemployment and the spread of indigency can best be provided by the systematic setting aside of financial reserves to be used as compensation for loss of wages by employes during periods when they become unemployed through no fault

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11 Old Age and Survivors Insurance payments, financed and computed in a manner comparable to unemployment compensation are not "wages" or "remuneration" nor are private pension payments. Kline v. State Employes' Retirement Board, 353 Pa. 79, 44 A. 2d 267 (1945). And the receipt of pension payments financed by employer contributions has been held not to destroy a worker's entitlement to unemployment compensation. Keystone Mining Co. v. Unemployment Compensation Board of Review, 167 Pa. Super. 256, 75 A. 2d 3 (1950).

12 PA. STAT. ANN. tit. 43, § 801 (1930).

13 See Bliley Electric Co. v. Unemployment Compensation Board of Review, 158 Pa. Super. 548, 45 A. 2d 898 (1946).

of their own."[14] Pending accumulation of reserves and sufficient experience to estimate future requirements, the insurance payments were absurdly low; $15.00 a week was the original maximum under the Pennsylvania act, and this was payable for only one to 13 weeks in a year depending upon the amount of the claimant's earnnings. In the years that followed, although reserves, experience with unemployment, and higher-wage-and-cost-of-living scales would have justified stronger insurance without increasing the original cost of the program, improvement came slowly, and with a distressing lack of uniformity among the states. Theoretically, a worker was to be paid benefits at the rate of at least 50 per cent of his weekly wage. Actually, many were denied this because the "ceilings" were kept so low and other limitations were written into the laws to permit reductions of contributions under the so-called "experience rating systems". As late as last year, a majority of the employes in Pennsylvania were unable to qualify for benefits at the 50 per cent rate because maximum weekly payment was held to $30.00.[15]

Against this background, the proposal to supplement state payments with private plan benefits so that worker can receive a total of 60 or 65 per cent of his wage loss when he is thrown out of work appears modest and reasonable indeed.

Article I, Section 1 of the Constitution of the Commonwealth of Pennsylvania guaranteeing the "Natural Rights of Mankind" has been held to protect the right to make contracts, except as they may be inconsistent with the exercise of the police power of the state. Agreements and plans established by employers and their employes for the express purpose of supplementing amounts payable for unemployment from the state fund, for the benefit of employes and their families and the community at large, are in furtherance of the declared objectives on the basis of which the police power was exercised in the enactment of the Unemployment Compensation Law. What stronger case could there be than this for integration?

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[14] From the Declaration of Policy of the Pennsylvania Unemployment Compensation Law. PA. STAT. ANN. tit. 43, § 752 (1930). These provisions (Section 3 of the Law) have been held "not a mere preamble to the statute, but a constituent part of it and to be considered in construing or intrepreting it," Barclay White Co. v. Unemployment Compensation Board of Review, 356 Pa. 43, 50 A. 2d 336 (1947); Bliley Electric Co. v. Unemployment Compensation Board of Review, *supra*.

[15] The maximum weekly rate in Pennsylvania was increased by Act No. 5 of the 1955 Session. Even so, many workers are prevented from receiving 50 per cent of their weekly wage by this limitation.