

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1006

Modified

Benefits Are Not Payable for Weeks 23-16 through 34-16

PROCEDURAL HISTORY: On June 24, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding benefits were not payable to claimant during the recess period between two academic years (decision # 140957). Claimant filed a timely request for hearing. On July 25, 2016, ALJ Murdock conducted a hearing, and on July 26, 2016 issued Hearing Decision 16-UI-64480, concluding benefits were not payable for the period June 12 through August 3, 2016. On August 10, 2016, ALJ Murdock issued Amended Hearing Decision 16-UI-65372 concluding benefits were not payable for the period June 12 through July 16, 2016. On August 30, 2016, the Department filed an application for review with the Employment Appeals Board (EAB).

EAB considered the Department's written argument and the entire hearing record.

FINDINGS OF FACT: (1) Beginning in August 2015, claimant worked for Multnomah County School District No. 1 (MCSD), an educational institution, in a non-instructional position as an educational assistant.

(2) Claimant earned more than \$133 working for MCSD during at least one week of the 2015-2016 academic year.

(3) The period between the 2015-2016 and 2016-2017 academic years for the employer began June 10, 2016 and ended August 26, 2016 (weeks 23-16 through 34-16).

(4) Claimant filed an initial claim for benefits on June 13, 2016. The Department determined her base year to be from April 1, 2015 through March 31, 2016. The Department determined claimant had a

monetarily valid claim for weekly benefits in the amount of \$133 based on her base year wages from MCSD. Claimant also had \$448.88 in wages from one other employer that was not an educational institution. Those wages were insufficient to establish an independent weekly benefit amount.

(5) On June 14, 2016, the employer sent claimant a letter stating she would be rehired for the 2016-2017 academic year to work in the same capacity as during the 2015-2016 academic year. Claimant was to earn the same rate of pay in 2016-2017 as she earned during the 2015-2016 year.

(6) On or after June 19, 2016, claimant filed a continued claim for benefits for the weeks from June 12, 2016 through July 16, 2016 (weeks 24-16 through 28-16).¹

CONCLUSIONS AND REASONS: We modify the ALJ's decision to include the entire school recess period. Benefits are not payable to claimant for the school recess period of June 10, 2016 through August 26, 2016 (weeks 23-16 through 34-16).

The Department determined that claimant had a valid claim for benefits, and was thus monetarily eligible for benefits based on the total amount of her base year wages, and that claimant's weekly benefit amount was \$133. However, when claims for benefits are based either solely or primarily on base-year wages from an educational institution, both ORS 657.167 and ORS 657.221 require a reduction in those benefits under certain prescribed conditions.² Claimant seeks benefits based on services performed for

¹ Benefits for any week must be claimed after the week has ended. ORS 657.260(1); OAR 471-030-0045(1)(a) (a continued claim follows the first effective week of an initial claim and certifies to the completion of a week of unemployment). The first week claimed in this case ended on June 18, 2016; therefore, claimant's claim for the week of June 12, 2016 through June 18, 2016 must have occurred on June 19, 2016 or later, making her claim subsequent to the June 14, 2016 letter.

² The unemployment insurance program is a joint federal and state program that was established in 1935 to provide a safety net for workers who become involuntarily unemployed. *See* Federal Unemployment Tax Act (FUTA), 26 USC §§ 3301 to 3311 and *Unemployment Compensation, Federal – State Partnership*, US Department of Labor, Office of Workforce Security, Division of Legislation, April 2005. Benefits are payable based not on need, but on a qualified wage record and re-employability. FUTA did not cover employment in educational institutions until the Employment Security Amendments of 1970 extended limited coverage to employment in higher educational institutions. In 1976, limited coverage was extended to elementary and secondary school employment. Pub L 94-566. The limitation was that benefits based on such employment would not be payable during periods between and within academic terms. *Id.* The policy reason for that reduction in benefits was that the cost of coverage, without the limitations, placed too great a financial burden on “educational employers,” whose sole resource, usually, is tax dollars. Most, if not all, educational employers are “reimbursable employers,” i.e., they are not entitled to “relief of charges,” but must reimburse the Employment Department Trust Fund dollar for dollar for any benefits paid their unemployed workers. *See* ORS 657.471(6).

The reduction in benefits mandated by the Unemployment Compensation Amendments of 1976 (PL 94-566) applies to specified employment and is based on established criteria in terms that have a precise meaning. Oregon was not required to conform to the federal law in this area but chose to do so to obtain the substantial financial benefits that would result. The choice to engage in this “cooperative federalism” led Oregon to adopt ORS 657.167 and ORS 657.221, among other state provisions, and requires Oregon to interpret them in a manner consistent with federal legislative intent. *See Salem College & Academy, Inc. v. Employment Division*, 298 Or 471, 695 P2d 25 (1985). If found to be out of conformity, Oregon stands to lose all of administrative funding for the unemployment insurance program (e.g., \$48.6 million in federal fiscal year 2004), and its employers would have to pay their full FUTA tax obligation (e.g., an increase of approximately \$471 million over the \$71 million they paid in 2005). *See* Fiscal Impact Statement on SB 447 by the Employment Department, prepared by Robin Kirkpatrick, March 13, 2005.

MCSD as an educational assistant. MCSD is an educational institution as defined in ORS 657.010(6). Therefore, ORS 657.221, which applies to services performed for educational institutions by individuals who, like claimant, worked in other than an instructional capacity, limits when those benefits may be paid if prescribed conditions are satisfied.

The Employment Department adopted OAR 471-030-0074, effective January 29, 2007, exempting certain individuals from the reduction in benefits required by ORS 657.221.³ That rule provides in relevant part:

(1) ORS . . . 657.221 appl[ies] only when the individual claiming benefits was not unemployed as defined by ORS 657.100 in the period immediately preceding the holiday, vacation or recess period. . . . Where the week(s) claimed commenced during a customary recess period between academic terms or years, the relevant period is the academic year or term immediately prior to the recess period.

(2) The provisions of ORS . . . 657.221 apply irrespective of whether or not the individual performed services only during an academic year or in a year-round position.

Because claimant seeks benefits for the weeks from June 12, 2016 through July 16, 2016 (weeks 24-16 through 28-16), the relevant period under OAR 471-030-0074 is MCSD's 2015-2016 academic year.⁴ ORS 657.100 provides that an individual is unemployed in any week in which the individual earns less than her weekly benefit amount. Because claimant earned more than her weekly benefit amount of \$133 during at least one week of the 2015-2016 academic year, she is not exempted by OAR 471-030-0074 from the provisions of ORS 657.221.

The first condition that must be met before the reduction in benefits required by ORS 657.221 may be applied is that the benefits sought must be for a week that commenced during a customary vacation period, holiday or summer recess observed by the educational institution for which the services were performed during the base year.⁵ MCSD's summer recess period between its 2015-2016 and 2016-2017 academic years began on June 10, 2016 and ended August 26, 2016 (weeks 23-16 through 34-16). Claimant claimed benefits for the weeks from June 12, 2016 through July 16, 2016 (weeks 24-16 through 28-16), all of which commenced during the recess period. Therefore, the first condition is satisfied.

The second condition that must be met is that claimant must have performed services for at least one educational institution during the academic year immediately prior to the recess period. Claimant worked as an education assistant for MCSD during the 2015-2016 academic year. The second condition is satisfied.

³ See also ORS 657.100(1); *Hutchinson v. Employment Division*, 126 Or App 717 (1994) and *Salem-Keizer School District #24J v. Employment Department*, 137 Or App 320 (1995).

⁴ *Friedlander v. Employment Division*, 66 Or App 546, 676 P2d 314 (1984).

⁵ ORS 657.167 and ORS 657.221.

The third condition that must be satisfied is that claimant must have had “reasonable assurance” of continuing work in the 2016-2017 academic year.⁶ In order to establish “reasonable assurance” under ORS 657.221(2)(b), the work offered must be 1) in the same or similar capacity, and 2) on economic terms and conditions not “substantially less” than the economic terms and conditions of the work performed during the previous academic year. “Same or similar capacity” refers to the type of services provided, i.e., either a “professional” capacity as provided by ORS 657.167 or a “nonprofessional” capacity as provided by ORS 657.221.⁷ Economic terms and conditions are “substantially less” when the weekly wages or average number of hours are “substantially less.”⁸ Whether the economic terms and conditions are “substantially less” is determined according to state law, and not subject to federal conformity requirements.⁹

Claimant had reasonable assurance of continued employment during MCSD’s 2016-2017 school year. Claimant worked for MCSD as an educational assistant during the 2015-2016 academic year, and, prior to any week of benefits claimed, received a letter from the employer stating that her employment would continue in the same capacity during the 2016-2017 academic year as it had in the 2015-2016 academic year, and were thus not “substantially less” than her economic terms in 2015-2016. Accordingly, claimant had reasonable assurance of continuing work under ORS 657.167(1).

We agree with the ALJ in Hearing Decision 16-UI-65372 that the prescribed conditions of ORS 657.221 have been shown to have been satisfied with respect to benefits based on claimant’s base-year wages from an educational institution, and that those benefits are thus subject to the reduction contemplated by that statutory section. The ALJ concluded, as does EAB, that benefits are not payable to claimant for the weeks that commenced during the school recess period between MCSD’s academic years. Although the ALJ concluded that benefits are not payable during the school recess period, the decision was limited only to the weeks from June 12, 2016 through July 16, 2016 (weeks 24-16 through 28-16), presumably because those were the only weeks claimant claimed. However, as asserted in the Department’s written argument, school recess decisions are not week-by-week determinations. Rather, a claimant’s eligibility would be determined for the entire recess period. Hearing Decision 16-UI-65372 is thus modified to state that claimant is not eligible for benefits for the entire recess period, from June 10, 2016 through August 26, 2016 (weeks 23-16 through 34-16).

DECISION: Hearing Decision 16-UI-65372 is modified, as outlined above.

J. S. Cromwell and D. P. Hettle;
Susan Rossiter, not participating.

⁶ See OAR 471-030-0075 (January 29, 2007).

⁷ OAR 471-030-0075(3). For further discussion of these terms, see *Unemployment Insurance Program Letter* (UIPL) No. 04-87.

⁸ OAR 471-030-0075(2). For further discussion of these terms, see *Unemployment Insurance Program Letter* (UIPL) No. 04-87.

⁹ See UIPL No. 04-87; *Johnson v. Employment Division*, 59 Or App 626, 651 P2d 1365 (1982) (discussing *Mallon v Employment Division*, 41 Or App 479, 599 P2d 1164 (1979)).

DATE of Service: October 6, 2016

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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