Employment Security - Severance Pay
Unemployment Insurance - Severance Pay
Severance Pay
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To: Emilien A. Levesque, Commissioner
Department of Manpower Affairs

From: Allan A. Toubman, Asst. Atty. General
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Subject: Severance Pay

You have requested an opinion on a number of aspects regarding the relationship between severance pay and the Employment Security Law.

For the purposes of this opinion, severance pay shall mean a sum of money granted to an employee by an employer upon the termination of the employment relationship; such sum is not for future services, and is in addition to normal wages paid to the worker. The amount of severance pay is calculated on the basis of longevity of service. The sum may be paid in a lump sum or in periodic payments.

This opinion may be summarized as follows:

Severance pay is included within the meaning of "terminal pay" in 26 M.R.S.A., § 1193 (5), (A). A claimant who receives severance pay is disqualified for the week in which he receives such pay. Severance payments are not wages for the purposes of § 1192 (5), and may not be applied to determine base period eligibility.

Your first question was whether severance pay is terminal pay within the meaning of 26 M.R.S.A., § 1193 (5), (A). The answer is "yes." Section 1193 (5), (A), provides:

> "An individual is disqualified for benefits;...For any week with respect to which he is receiving, is entitled to receive or has received remuneration in the form of: ... Dismissal wages or wages in lieu of notice or terminal pay or vacation pay;...."

There are four categories of remuneration in § 1193 (5), (A), that are disqualifying. To understand the nature of "terminal pay," it is necessary to review what the courts have said of two other disqualifying categories: "dismissal wages" and "wages in lieu of notice." These two categories were defined in Dubois v. MESC, 150 Me. 404 (1955). Under review in that case was a Commission regulation which had defined "dismissal wages" to mean "any remuneration accrued or otherwise paid or payable to an individual at the time of his separation from work." The Court invalidated this regulation because it exceeded the statutory disqualification. It held that retirement severance payments based on years of service and calculated in number of weeks was not disqualifying. In reaching its decision, the Court relied on cases that held severance pay received by employees terminated for non-retirement reasons was not disqualifying. See Ackerson v. Western Union Tel. Co., 48 NW2d 338 (Minn.1951).

The Court also held severance pay not to be "wages in lieu of notice."

> "'Dismissal notice may be defined as advance notice given by the employer of his intention to dismiss the employee. Sometimes in lieu of such notice the employee's salary is paid for the period which would otherwise be covered by the notice.****.' 147 A.L.R. 154." 150 Me. at 503.

In 1961, the Legislature added two additional disqualification categories: "Terminal Pay" and "Vacation Pay" P.L. 1961, c. 361, § 9. It must be assumed the additional disqualification criteria was more than surplusage. Nothing should be treated as surplusage if a reasonable interpretation supplying meaning and force is possible. Finks v. Maine State Highway Commission, 328 A.2d 791 (Me. 1974).

"Terminal" has a plain meaning in the context of employment. It signifies the ending of the employment relationship. Conger v. Travelers Ins. Co., 146 SE2d 462, 465 (N.C. 1966). "Termination allowance" has been interpreted to include severance pay and, therefore, disqualifying under the employment security law of one state. Globe-Democrat Publishing Co. v. Industrial Comm. of Missouri, 301 SW2d, 846 (Mo. App. 1957). If the meaning of a statute is plain, it should be accorded that interpretatation, unless there is a legislative intent to do otherwise. Union Mutual Life Ins. Co. v. Emerson, 345 A.2d 504 (Me. 1975).

It should be noted that the Court in Dubois rejected an argument that the Legislature did not intend to allow claimants to collect both unemployment benefits and severance pay at the same time. See Thornbrough v. Gage, 350 SW2d 306 (Ark. 1961), Globe-Democrat Publishing Co., supra, 93 ALR2d, 1320. This policy judgment by the Dubois court must give way to an express legislative provision.

While the Employment Security Law is remedial in nature, and should be interpreted to accomplish its ends of relieving unemployment insecurity, courts may not alter the policies established by the Legislature when interpreting the law. Toothaker v. MESC, 217 A.2d 203, 210 (Me. 1966). Also cf. Therrien v. MESC, 370 A.2d 1385, 1389 (Me. 1977).

It is not necessary to speculate on the Legislative policy when the plain words of the statute adequately answer the question. The addition of two new disqualification categories shows the Legislature intended to expand the reasons for disqualification. In the context of § 1193 (5), (A), there is no logical construction of "terminal pay" that would exclude severance pay. Payments are conditioned on termination of employment. They are, therefore, disqualifying.

Your second question was, if it is established that terminal pay includes severance pay, for what weeks is the claimant disqualified? The answer is for any week he actually receives a severance payment.

Section 1193 (5), (A), provides that a claimant is disqualified for any week with respect to which he is receiving, is entitled to receive, or has received remuneration in the form of terminal pay.

In Dubois, the court held that a lump sum severance payment was not wages paid "with respect to" the weeks following separation, even though the sum was calculated based on a certain number of weeks. The severance pay was for past service, not future weeks. 150 Me. at 498-99. "It is recognition and reward for certain intangibles which are of very real worth and value to the employer who desires a stable labor force." 150 Me. at 498.

> We think the Commission has taken too literally the use of the word "weeks" in the contract formula used to compute the lump sum payment. It has assumed that the reference must be to some particular weeks specifically the weeks immediately following retirement. The manifest purport of the formula is otherwise.

> Properly interpreted, the formula produces an arbitrary lump sum reward for the quality of the whole service of the employee, a sum which is fixed in a range of from fifteen to twenty times the weekly pay received in the last week of that service. The payment is not related or made "with respect to" any particular weeks, either past or future. It is doubtful if the problem would have arisen if the contract had established some arbitrary fixed sum such as $1,000 rather than to provide a computation by formula; yet the intention would have been the same. 150 Me. at 499.

Since severance pay cannot be treated as remuneration for future weeks of unemployment, the only weeks for which the disqualification applies to terminal pay are those wherein the claimant has "received" remuneration. If he receives a lump sum, he is disqualified for the week he receives it. If he receives it in weekly allotments, he is disqualified for any week he receives severance pay.

In Globe v. Democrat, supra, this interpretation was rejected as a circumvention of the legislative intent to disqualify claimants who receive severance pay. However, as stated earlier, if there is a plain meaning to the statute, it must be followed irrespective of the court's belief of what policies are most wise. The Legislature could just have as easily believed that the disqualification should only occur when claimants are actually paid a benefit that is a substitute for employment remuneration.

The last question is whether the receipt of severance pay is wages for the purposes of computing the base period under 26 M.R.S.A., § 1192 (5). The answer is "no."

Under 26 M.R.S.A., § 1192 (5), to receive benefits, a claimant must show that "...he has been paid wages of at least $250...in each of 2 different quarters in his base period and has been paid total wages of at least $900 in his base period...." Wages are defined in 26 M.R.S.A., § 1043 (19) as all "remuneration for personal services, including commissions, bonuses, gratuities, and the cash value of all remuneration in any medium other than cash."

If severance pay is not "wages" within the meaning of § 1192 (5), it may not be considered in determining eligibility. On two occasions, the Law Court has refused to include severance pay within the meaning of "wages." In Dubois, supra, it determined that retirement severance pay was not for personal service, since the employees did not work beyond their termination date, and they had already been paid "wages" for their work. The severance pay was "recognition and reward for certain intangibles which are of very real worth and value to the employer who desires a stable work force." 15 Me. at 498.

> We conclude "...that in the weeks following separation these claimants were 'totally unemployed,' and were then neither performing any personal services nor receiving any wages or remuneration 'with respect to' those weeks." 150 Me. at 501. (emphasis added.)

In Malloch v. M.E.S.C., 159 Me. 105 (1963), the court reversed a Commission decision that had reduced the benefits paid to laid-off employees who were receiving benefits from an employer-supported fund designed to supplement unemployment benefits. The Law Court repeated the above quotation from Dubois and held that such supplemental benefits were not wages. It cited In re Schuler, 122 SE2d 393 (N.C. 1961), as follows:

> The word 'wages' as used in provision of Unemployment Compensation Act limiting wages to all forms of remuneration received for personal services, includes only that which comes from personal efforts. 159 Me. at 113.

If severance pay is not wages, it may not be considered in determining the eligibility of claimants. It may be an anomaly to disqualify a claimant from receiving benefits because he is receiving terminal pay, yet fail to apply such pay to his eligibility. However, there does not appear to be any flexibility in the definition of wages.

Because the Legislature decreed that terminal pay disqualifies the claimant from benefits, perhaps under the theory that on the week that payment is received there is less economic insecurity, it does not necessarily follow that such payments should be used for eligibility. Since severance pay may represent a loss of privileges amassed over a period longer than the base period, the Legislature could have decided that it would be improper to lump all of the severance pay into the base period. But, compare Dingleberry v. Bd. of Rev., , N.J. Super. , 7 CCH Unemployment Rep., N.J., ¶ 8526, where the court included a proportional share of the severance pay into the base period.

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