United States District Court
Southern District of New York

Roberto Torres and Walter Dinger,

        Plaintiffs,

       v.

New York State Department of Labor and
Louis L. Levine, Industrial Commissioner,

        Defendants,   :

       v.

United States of America,   :

        Intervenor-Defendant   :

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(Argued October 14, 1971   Decided   October 26, 1971)

Before: Hays, Circuit Judge, McLean and Lasker, District
        Judges.

               Dennis R. Yeager, New York, New York
               (Robert P. Roberts, New York, New York,
               Emilio P. Gautier, New York, New York, Paul
               G. Chevigny, New York, New York, on the
               brief), for Plaintiffs,

               Brenda Soloff, Assistant Attorney General
               of the State of New York (Louis J. Lef-
               kowitz, Attorney General, Samuel A.
               Hirshowitz, First Assistant Attorney
               General, on the brief), for Defendants
               New York State Department of Labor and
               Louis L. Levine,

               Joseph D. Danas, Assistant United States
               Attorney (Whitney North Seymour, Jr.,
               United States Attorney for the Southern
               District of New York, L. Patrick Gray III,
               Harland F. Leathers, David J. Anderson,
               United States Department of Justice,
               Alfred G. Albert, Louise F. Freeman,
               H.A. Kelly, United States Department of
               Labor, on the brief), for Intervenor-
               Defendant United States of America.

Per Curiam:

This class action was commenced by New York
recipients of unemployment benefits seeking a declaratory
judgment that New York Labor Law § 597, 598, and 620
(McKinney 1965) violated the due process clause of the
fourteenth amendment and § 303(a)(1) of the Social Security Act
42 U.S.C. §503(a)(1) (1970), "insofar as /those sections/
authorize the suspension or termination of unemployment com-
pensation benefits without a prior hearing." In addition
plaintiffs sought a permanent injunction preventing enforcement
of these provisions unless a hearing prior to the termination
of benefits was granted to claimants. This court dismissed
the complaint on the ground that the sections of the New York
Labor Law to which the complaint is addressed, do not violate
either the fourteenth amendment or the Social Security Act.
Torres v New York State Dep't of Labor, 321 F. Supp. 432 (S. D.
N.Y. 1971) (three-judge court). The Supreme Court vacated the
judgment and remanded the case for reconsideration in light
of its opinion in California Dep't of Human Resources Develop-
ment v Java, 402 U.S. 121 (1971). 402 U.S. 968 (1971).

We hold that nothing in the opinion of the Supreme
Court in California Dep't of Human Resources Development v Java
402 U. S. 121 (1971), calls for a result different from that
announced in our previous decision. As to the claim of con-
stitutional invalidity, which was not passed on in Java, Judge
Hays and Judge McLean adhere to the position expressed in
their former opinion, and Judge Lasker adheres to his dissent
from that opinion.

The facts of the present case and the New York
statutory provisions are set forth in detail in our previous

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_opinion. 321 F. Supp. at 433-36.

In California Dep't of Human Resources Development v
Java, 402 U.S. 121 (1971) the Supreme Court held that the
California procedure providing automatic termination of
unemployment benefits, when an employer files an appeal,
violates §303(a)(1) of the Social Security Act, 42 U.S.C.
§ 503(a)(1) (1970) since it is not "reasonably calculated to
insure full payment of unemployment compensation when due,"
as the statute requires. The Supreme Court based its decision
solely on the statutory ground advanced by plaintiffs, stating
it is "unnecessary to reach the consitutional issue . . . . "
402 U.S. at 124. As we adhere to our previous decision that
the New York administrative procedures comport with the
requirements of the due process clause of the fourteenth
amendment, it is only necessary to analyze the New York
procedures in light of the Supreme Court's interpretation of
42 U.S.C. § 503 (a)(1) (1970) in Java.

The California procedure challenged in Java
involved "/t/he automatic suspension of benefits upon the
employer's appeal, after an initial determination of
eligibility . . . ." 402 U.S. at 128. To summarize briefly the
California procedure: a person claiming unemployment benefits
first filed forms indicating the basis of his claim; pertinent

information was requested from his former employer; then an

Eligibility Benefits Rights Interview was held which both

the employer and the claimant could attend and at which they

could present relevant information. If the administrative

interviewer found the claimant to be eligible, benefit payments

began immediately. If the employer then appealed that

initial determination of eligibility within 10 days, all

payments were "stopped pending determination on appeal before

an Appeals Board Referee." 402 U. S. at 128. This automatic

suspension, after the eligibility determination, was the

fatal flaw in the California procedure.

> "We conclude that the word "due" in § 303(a)(1), when
> construed in light of the purposes of the Act, means the
> time when payments are first administratively allowed as
> a result of a hearing of which both parties have notice
> and are permitted to present their respective positions;
> any other construction would fail to meet the objective of
> early substitute compensation during unemployment.
> Paying compensation to an unemployed worker promptly
> after an initial determination of eligibility accomplishes
> the congressional purposes of avoiding resort to welfare
> and stabilizing consumer demands; delaying compensa-
> tion until months have elapsed defeats these purposes.
> It seems clear therefore that the California procedure,
> which suspends payments for a median period of seven
> to 10 weeks pending appeal, after an initial determination
> of eligibility has been made, is not "reasonably calculated
> to insure full payment of unemployment compensation
> when due."

id. at 133 (footnote omitted).

The Java decision does not control the instant case.

Plaintiff Torres was initially determined to be eligible to receive

benefits on the basis of his written statement that he had

been laid off work. Due to a mailing error, the local

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insurance office   learned of the employer's stated reason

for the discharge (repeated lateness for work)-/after benefit

only

payments had commenced. Thereafter the local insurance office

conducted an interview with Torres during which he admitted

that he had been late for work "a few times." On the basis

of this interview the local insurance office, pursuant to

New York Labor Law §597 (3), reevaluated the facts and re-

determined that plaintiff was ineligible for benefits because

he had provoked his discharge. The suspension of benefits was

therefore, not an automatic consequence of Torres' employer's

action, nor was it made without a hearing. Unlike the situa-

tion in _Java_, in Torres' case there was administrative re-

determination on the basis of the original facts that

benefits were not "due." This decision was made after a

hearing procedure identical to that initially used to determine

eligibility. The hearing procedure prior to the suspension

of benefits involved an interview, at which claimant had an

opportunity to present information favorable to his version

of the facts or unfavorable to that of his employer, and to

answer charges. As the issue and the procedure were the same

at both the determination and redetermination stages, we

believe that the procedure is "reasonably calculated" to insure

that benefits are paid "when due."

Plaintiff Dinger, laid off by his employer due to

slack business, was originally found eligible for benefits.

Under New York administrative regulations, a claimant must

report to an insurance office once a week and certify that

he is ready and willing to work. Department of Labor Field

Operations Manual 385030-5042. After receiving ten benefit

payments, Dinger was interviewed at an insurance office about

his availability for work. On the basis of information Dinger

supplied in response to questions, and on the basis of

newspaper listings of available jobs, the interviewer deter-

mined that Dinger was ineligible to continue to receive

benefits because he had not demonstrated "an active, realistic

and diligent search for work." The benefits were suspended

on the basis of new factual circumstances which could not

have been considered at the original eligiblity interview.

The _Java_ decision is therfore irrelevant to plaintiff

Dinger: not only was the eligibility redetermination based

on new facts, but the plaintiff supplied the insurance office

with those very facts at an administrative interview. This

administrative procedure for redetermining that benefits

were not "due" fully comports with the requirement of 42

U.S.C. §503(a)(1) (1970).

Under the order of this court the class

represented by these plaintiffs comprises all those

recipients of unemployment compensation benefits in New

York who might have the benefits terminated without a

hearing. As to recipients similarly situated to the named

plaintiffs, the administrative procedure for the redetermination

of eligiblity includes a hearing fully compatible with the

requiremnts of 42 U.S.C. §503(a)(1) (1970). As to those re-

cipients who might, at one time, have had payments suspended

after an employer's appeal from an initial determination of eli-

gibility, the claim is now moot in view of the administrative

regulation adopted after _Java_ requiring "benefits (to be

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2   continued) unless and until a referee or Appeal Board decision

3   thereafter holds that benefits are not payable." The conflict

4   between the previous procedures for the suspension of benefits

5   pending an employer's appeal and the requirements of the Social

6   Security Act has been cured by the change in the administrative

7   procedures eliminating the automatic suspension feature condemned

8   in Java.

9   For the foregoing reasons we adhere to our previous

10   decision dismissing the complaint.

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Torres and Dinger v. New York State Department of Labor, et al

(Argued October 14, 1971   Decided October 26, 1971)

—— PAUL R. HAYS
United States Circuit Judge

EDWARD C. McLEAN
United States District Judge

MORRIS E. LASKER
United States District Judge