

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

UNEMPLOYMENT LAW PROJECT,
MCKEEZI TAYLOR BARRAZA, and
MARIANNE WHITE

Petitioners,

v.

SUZAN LEVINE, COMMISSIONER
FOR THE WASHINGTON STATE
EMPLOYMENT SECURITY
DEPARTMENT,

Respondent.

No. 9 8 6 3 3 - 9

RULING

Petitioners Unemployment Law Project and unemployed workers McKeezi Barraza and Marianne White, ask this court to issue a writ of mandamus directing respondent Suzan LeVine, Commissioner for the Washington State Employment Security Department, to take numerous actions, including immediate payment of unemployment benefits. For reasons explained below, this original action is retained in this court for a decision on the merits.

This matter arises from the rapid and staggering increase in unemployment caused by the COVID-19 pandemic. According to the department, more than 2.2 million initial applications for unemployment benefits were filed since March 8, 2020. The sudden tidal wave of unemployment claims triggered by this public health crisis,

accompanied by a massive and initially successful scheme by foreign actors to fraudulently obtain benefits, overwhelmed Washington's unemployment benefits system, resulting in delays in processing claims and issuing payment of benefits to a significant number of unemployed workers. The numerous declarations of unemployed individuals submitted in this matter relate heartbreaking stories of frustration, despair, and stress arising from these delays.

This matter was formally initiated on June 5, 2020, when the clerk of this court accepted the instant petition for filing. Petitioner Unemployment Law Project is a not-for-profit provider of legal services to low income persons seeking unemployment benefits. It alleges that it has been overwhelmed by the sudden influx of unemployed workers seeking its help in dealing with the department. Mr. Barraza and Ms. White are unemployed workers who encountered difficulty working with the department in their quest for unemployment benefits.

Petitioners seek by way of mandamus the following: (1) an order directing respondent to report to this court all steps she has taken to "ensure due process is protected and prompt payment of unemployment benefits is made;" (2) an order directing respondent to "take all actions necessary to process and ensure prompt payment of unemployment benefits pursuant to 42 U.S.C. § 503 and ESD's fiduciary duty to claimants;" (3) an order directing respondent to "provide claimants the required due process and refrain from cutting off benefits to claimants without providing notice and opportunity for hearing pre-termination of benefits;" (4) an order directing respondent to "ensure timeliness of payments, adjudications, and appeals, and specifically provide a definitive maximum adjudication time;" (5) an order directing respondent "to provide regular public reports to the State Auditor's Office pursuant to RCW 43.09.185;" (6) an order directing respondent "to consider the dignity of claimants, for example, by avoiding inequitable methods of verifying identity;" (7) an

order directing the department “to adopt policies that prioritize promptly paying benefits to those who are eligible without subjecting them to dangerous privacy risks;” (8) an order directing respondent to exercise her emergency rulemaking authority under RCW 50.12.040 and ask her legal counsel to “reevaluate existing regulations, including emergency rules, for statutory authorization;” (9) an order directing respondent to “implement a system for claimants to securely submit personal information;” (10) the provision of “legal assistance to claimants to the extent feasible to assist claimants answering overbroad and underinclusive e-services questions;” (11) retention of this court’s jurisdiction “until ESD has adjudicated all claims for unemployed workers impacted by COVID-19;” (12) an award of all costs and attorney fees incurred in this matter; and (13) any other relief this court deems just and proper. Petition at 18-20.

The matter was set on my July 30, 2020, motion calendar.

On June 23, 2020, petitioners filed a “MOTION FOR ACCELERATED REVIEW AND IMMEDIATE RELIEF,” demanding immediate action on their mandamus petition. The motion was supported by declarations from the following individuals: (1) petitioner Marianne White, (2) Shanyece Wake, (3) John Tirpak (an attorney working for petitioner Unemployment Law Project), (4) Amy Swanner, (5) David Svoboda, (6) Nadya Robinson, (7) Marisa Riegert, (8) Miroslava Radovich, (9) Nicholas Petrish, (10) Randall Peters, (11) Fabian Pascuelles, (12) Christine Mair, (13) Jordan Jolma, (14) Thomas Harrington, (15) Chynna Glenn, (16) Flavia Feliciano, (17) Kelli C. Ebert, (18) Michael DeMaddalena, (19) William F. Burris, Sr., (20) Jeremy Bradford, (21) petitioner McKeezi Taylor Barraza, (22) Chelsea Altona, and (23) Billie Abbit. On June 26, 2020, petitioners filed the declaration of Thomas Harrington. Apart from Mr. Tirpak, the above-listed declarants (only two of whom are parties to this action) described the difficulties they encountered in seeking unemployment benefits. The delay in many of these cases was tied to problems verifying claimants’ identity.

On June 29, 2020, respondent filed an answer opposing petitioners' motion to accelerate review and for immediate relief. Respondent reported great progress in cutting through the huge backlog of outstanding claims. Respondent further asserted that Mr. Barraza's and Ms. White's issues were resolved or soon to be resolved.

Also on June 29, petitioners filed a declaration by Jefferson Coulter, an attorney representing several individuals seeking unemployment benefits. Among other things, Mr. Coulter disclosed that on June 24, 2020, several of his clients filed a complaint for declaratory judgment and injunctive relief against the Employment Security Department in the Thurston County Superior Court. *Arrington, et al. v. State Employment Security Dep't*, Thurston County Superior Court No. 20-2-01640-34. The plaintiffs in that action seek relief that may fall within the array of relief requested in this original action. A trial setting hearing on the case is set before Judge Lanese on October 23, 2020.

On July 2, 2020, respondent filed a motion to strike Mr. Coulter's declaration. Petitioners filed an answer to that motion later that same day. Respondent filed her reply on July 7.

Also on July 2, 2020, petitioners filed their reply concerning the motion for accelerated review and immediate relief, supported by another declaration by John Tirpak, who, among other things, related how Unemployment Law Project has been overwhelmed by the tsunami of claimants seeking help in obtaining benefits.

On July 9, 2020, I denied the motion for accelerated review and immediate relief and the motion to strike Mr. Coulter's declaration. On July 10, petitioners filed an emergency motion seeking immediate modification of my ruling denying accelerated review and emergency relief. The emergency motion will be considered at this court's special departmental conference on August 4.

On July 14, 2020, respondent filed the declaration of Senior Assistant Attorney General Eric D. Peterson, providing information on the status of the above-referenced *Arrington* matter in the Thurston County Superior Court.

On July 16, 2020, petitioners filed another declaration by Thomas Harrington, describing a public records request he made concerning a request for assistance from the Washington National Guard in processing unemployment claims.

Meanwhile, on July 13, 2020, respondent filed her answer to the petition for writ of mandamus. The answer alleges, among other things, that the backlog of benefits claims held up by identity verification issues may be cleared by the end of July and that Mr. Barraza's and Ms. White's claims for unemployment benefits have been resolved. Respondent urges me to dismiss the matter outright pursuant to RAP 16.2(d).

On July 23, 2020, petitioners filed their reply to respondent's answer. They do not dispute respondent's assertion that Mr. Barraza and Ms. White have received the requested unemployment benefits but argue that these two individual petitioners "reasonably fear further arbitrary inaction." Reply at 9. In support of their reply, petitioners submitted declarations made by the following individuals: (1) John Tirpak, (2) James Alexander, (3) Joshua Allen, (4) Edward Bittick, (5) Christopher Brothers, (6) Lucas Claussen, (7) Leslie Daniels, (8) Steven Degon, (9) Kelly Domen, (10) Timothy Duffy, (11) Shannon Henderson, (12) Emma Holt-Toman, (13) Lindsey Horn, (14) Jerry Jarvis, (15) Rebecca Joyce, (16) Leah Kapernick, (17) Donald Kulawik, (18) Timmy Joe Marteny, (19) Kasie Matkins, (20) Chelsey McIvor, (21) Milton Turner, (22) Leslie Minor, (23) Marcie Ritchie, (24) Jamie Scholer, (25) Gerard Smith, (26) Josh Thomas, (27) Jenifer Tighe, (28) Robin Walker, (29) Bryan Weed, (30) Barry Wegner, and (31) Elissa Whitver. Mr. Tirpak represents that 570 of Unemployment Law Project's clients asked to submit declarations in this matter. The 30 other

declarations filed in support of the answer are an apparent sampling of those clients, describing various struggles in seeking unemployment benefits during this crisis.

On July 28, 2020, petitioners filed a statement of additional authorities, advising this court of a federal district court decision issued on that date, partly granting a preliminary injunction sought by unemployed app-based for-hire drivers (Uber, Lyft, and the like) seeking unemployment benefits from the state of New York. *MD Islam, et al. v. Cuomo, et al.*, No. 20-CV-2328 (LDH) (E.D.N.Y., Jul. 28, 2020).

Meanwhile, Washington State Psychological Association filed an amicus curiae brief in support of petitioners, discussing how unemployment and the delay in providing benefits affects homelessness, substance abuse, and mental health. Petitioners subsequently filed a response agreeing with amicus's position on these issues.

Now before me for determination is whether to retain the original action in this court for further consideration, transfer it to the appropriate superior court for a decision on the merits, or dismiss it outright. RAP 16.2(d). None of the parties have asked to have the case transferred to the superior court.

As explained in my earlier ruling, this court has original jurisdiction, concurrently with the superior court, to issue writs of mandamus against state officers. CONST., art. IV §§ 4, 6; RCW 7.16.160; RAP 16.2(a). A writ of mandamus is an extraordinary remedy that allows this court to direct a coordinate, equal branch of Washington's government to take specific actions, notwithstanding constitutional doctrine of the separation of powers. *Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.2d 920 (1994). The availability of mandamus is strictly limited because under separation of powers principles this court ordinarily "will not usurp the authority of the coordinate branches of government." *Id.* at 410. Therefore, mandamus is available only when the law plainly requires a government official to take a particular action. *Freeman v. Gregoire*, 171 Wn.2d 316, 323, 256 P.3d 264 (2011).

Besides showing that a state official has a clear duty to act, petitioners seeking a writ of mandamus must show they have no “plain, speedy, and adequate remedy in the ordinary course of law” and that they are “beneficially interested,” RCW 7.16.170. Petitioners must prove all three of these elements to justify mandamus.” *Eugster v. City of Spokane*, 118 Wn. App. 383, 403, 76 P.3d 741 (2003).

There is no question that this court has jurisdiction over this original action asserted against a state officer. CONST., art. IV § 4. Beyond that, debatable procedural and substantive questions exist in this case affected by constantly evolving events. For example, there is no clearly controlling precedent in this court on whether an entity such as Unemployment Law Project has standing as a beneficially interested person for purposes of mandamus. Additionally, there are mootness questions to be resolved concerning Mr. Barraza and Ms. White and specific claims for relief. Furthermore, the court will need to explore whether an adequate remedy at law exists, as potentially reflected by the availability of administrative adjudicative procedures, the pending *Arrington* action in Thurston County Superior Court, and the partially successful federal action for injunctive relief filed in *MD Islam*.¹ And from a public interest standpoint, amicus Washington State Psychological Association highlights the seriousness of this problem beyond the legal issues.

Of ultimate concern is whether there exists a plain duty actionable in mandamus on the part of respondent to provide unemployment benefits more expeditiously in light of the economic and societal fallout caused by the ongoing pandemic. *See* RCW 50.20.010; 42 U.S.C. § 503; *see also MD Islam*, No. 20-CV-2328, slip op. at 17 (for purposes of preliminary injunction state had duty to unemployed workers to insure state unemployment compensation system tenders benefits to claimants “when due” under

¹ *MD Islam* was filed in federal district court pursuant to 42 U.S.C. § 1983. The order issued on July 28, 2020, partially granted the plaintiffs’ motion for a preliminary injunction. As indicated, the action here is solely one for a writ of mandamus.

42 U.S.C. § 303(a)(1)). It is uncertain whether such a duty exists for purposes of this original action, but having reviewed the extensive briefing and numerous declarations submitted in this matter, and mindful of the statewide importance of timely provision of unemployment benefits to the great number of workers affected by this crisis, it would be appropriate to have these questions decided on the merits. Moreover, after considering seriously whether to transfer this original action to the superior court, I have concluded that the better use of judicial resources is to retain the matter for a decision in this court. RAP 16.2(d).

Accordingly, this original action will be retained in this court for a decision on whether petitioners have made a sufficient showing that a writ of mandamus should issue against respondent. The matter will be decided in due course in accordance with a schedule for providing a record and submitting briefing as set by the clerk of this court. Oral argument before the court will be set on a date to be determined.


COMMISSIONER

July 30, 2020