

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
Providence, Sc. DISTRICT COURT
SIXTH DIVISION

David M. Otto :
 :
v. : **A.A. No. 14 - 140**
 :
Department of Labor and Training, :
Board of Review :

ORDER

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto. It is, therefore,

ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is AFFIRMED except the order of repayment is AFFIRMED in part and REVERSED in Part.

Entered as an order of this Court at Providence on this 8th day of January, 2015.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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FINDINGS & RECOMMENDATIONS

Ippolito, M. In this case Mr. David M. Otto seeks to set aside a decision rendered by the respondent Board of Review of the Department of Labor and Training which was adverse to his efforts to receive employment security benefits. Jurisdiction for appeals from the decisions of the Department of Employment and Training Board of Review is vested in the District Court by Gen. Laws 1956 § 28-44-52. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1.

I
FACTS AND TRAVEL OF THE CASE

During 2013 and 2014, Mr. Otto was receiving unemployment benefits due to the loss of a prior full-time position when he began to work part-time for Sears as an automotive mechanic. But then, on July 3, 2014, the Director determined that he should repay a portion of the benefits he had received during eight weeks in November of 2013, December of 2013, and January of 2014.¹ The Director decided he had been overpaid because he failed to accurately report the wages he earned at Sears, breaching a duty imposed upon him by Gen. Laws 1956 § 28-44-7. See Director's Decision, July 3, 2014. The Director found Mr. Otto at fault for the resulting overpayment and, under the authority of Gen. Laws 1956 § 28-42-68, ordered him to make restitution in the amount of \$1,068.00 plus interest.

Mr. Otto appealed and a hearing was held on August 6, 2014 before Referee Carol Gibson. The next day Referee Gibson issued a decision in which she affirmed the Director's decision. In doing so she made the following Findings of Fact:

¹ Specifically, the weeks ending: 11-02-13, 11-09-13, 11-16-13, 11-23-13, 12-14-13, 12-21-13, 12-28-13 and 01-04-14. Director's Decision, July 3, 2014, at 1.

At this point we may also note that Mr. Otto's claim was filed on July

The claimant was in benefit status at the time this issue arose. The claimant began a part-time job at Sears in November 2013. The claimant worked varied hours as a mechanic and was paid \$9.25 an hour for his services. The payroll record provided by the employer reveals the claimant failed to accurately report his wages to the Department for the weeks ending November 2, 2013 through the week ending January 4, 2014. At the hearing, the claimant presented paystubs for the period at issue which are in agreement with the employer's payroll record. The claimant acknowledges errors occurred when reporting wages through the Tele-Serve system but, he does not agree with the overpayment amount determined by the Director. The claimant testified that, in error, he reported wages during the wrong weeks and that he sometime reported his net and not gross wages through the Tele-Serve system. The record also reveals the claimant received partial benefits during two weeks that he worked over forty hours for the employer. As a result of the misreporting of wages, the claimant was declared overpaid in the amount of \$1,068.00 plus interest.

Referee's Decision, August 7, 2014, at 1. As a result of these findings, the Referee concluded that Mr. Otto failed to accurately report his wages:

...

Section 28-44-7, states, in part, that an individual partially unemployed and eligible in any week shall be paid benefits for that week, so that his or her week's wages, as defined in 28-42-3(25), and his or her benefits combined will equal in amount the weekly benefit rate to which he or she would be entitled if totally unemployed in that week. It is noted that 28-42-3(25) states that an employee is deemed partially unemployed if in any week of less than full-time work.

The credible testimony and evidence indicates the claimant failed to report his earnings correctly for the wages at issue as required,

16, 2013 and he received \$504.00 weekly. Referee Hearing Transcript, at 6.

resulting in an overpayment of benefits for those weeks. It is, therefore, to be determined that he was not in compliance with the reporting requirements for those weeks as previously determined by the Director.

Referee's Decision, August 7, 2014, at 2. She also found him to be subject to a repayment order pursuant to § 28-42-68:

The credible testimony and evidence in this case indicates the claimant did fail to report his earnings accurately for the weeks at issue resulting in a total overpayment to the claimant for those weeks as previously determined by the Director. Since the claimant did not report those earnings accurately as required, it is further determined he is at fault for the overpayment and that it would not defeat the purposes for which the Employment Security Act was designed to require him to repay those benefits to the Department of Labor and Training as previously determined by the Director.

Referee's Decision, August 7, 2014, at 2. Mr. Otto appealed once more and on September 9, 2014 the Board of Review found the Referee's decision to be a proper adjudication of the facts and the law applicable thereto. Mr. Otto filed an appeal in the Sixth Division District Court on October 10, 2014.

II APPLICABLE LAW

A Partial Benefits

Gen. Laws 1956 § 28-44-7 provides:

28-44-7. Partial unemployment benefits. – For weeks beginning on or after July 1, 1983, an individual partially

unemployed and eligible in any week shall be paid sufficient benefits with respect to that week, so that his or her week's wages, rounded to the next higher multiple of one dollar (\$1.00), as defined in 28-42-3(25), and his or her benefits combined will equal in amount the weekly benefit rate to which he or she would be entitled if totally unemployed in that week..

As one may readily observe, section 7 provides that a person who would be otherwise eligible for benefits may work without being disqualified from receiving benefits; instead, the wages they earn will be offset against the benefits to which they would be otherwise entitled to receive.

B

Repayment

Gen. Laws 1956 § 28-42-68 provides in pertinent part:

(a) Any individual who, by reason of a mistake or misrepresentation made by himself, herself, or another, has received any sum as benefits under chapters 42 - 44 of this title, in any week in which any condition for the receipt of the benefits imposed by those chapters was not fulfilled by him or her, or with respect to any week in which he or she was disqualified from receiving those benefits, shall in the discretion of the director be liable to have that sum deducted from any future benefits payable to him or her under those chapters, or shall be liable to repay to the director for the employment security fund a sum equal to the amount so received, plus, if the benefits were received as a result of misrepresentation or fraud by the recipient, interest on the benefits at the rate set forth in § 28-43-15. * * *

(b) There shall be no recovery of payments from any person who, in the judgment of the director, is without fault on his or her part and where, in the judgment of the director, that

recovery would defeat the purpose of chapters 42 - 44 of this title.

(Emphasis added). Thus, repayment is not mandated in every instance where a claimant has been incorrectly paid. Subsection (b) of § 28-42-68 specifies that repayment cannot be ordered where (1) the recipient is without fault or where (2) recovery would defeat the purposes of the Act.

III STANDARD OF REVIEW

The standard of review by which the court must proceed is established in Gen. Laws § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

42-35-15. Judicial review of contested cases.

...

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court “* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are ‘clearly erroneous.’ ”² The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.³ Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.⁴

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964), that a liberal interpretation shall be utilized in construing and applying the Employment Security Act:

* * * eligibility for benefits is to be determined in the light of the expressed legislative policy that “Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family.” G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it

² Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

³ Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

⁴ Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968). Also D’Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039 (R.I. 1986).

reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

IV ANALYSIS

A Facts

Mr. Otto was the sole witness at the hearing conducted by Referee Gibson on August 6, 2014. Referee Hearing Transcript, at 1. He said he was hired as a part-time auto mechanic by Sears and was paid \$9.25 per hour. Referee Hearing Transcript, at 9. His first paycheck was dated November 1, 2013. Referee Hearing Transcript, at 8-9.

He explained to Referee Gibson how he went about reporting his earnings into the Tele-Serve system —

I used my gross earnings and I reported by earnings on either Saturday or Sunday after I was paid. So I was usually paid on Thursday, I think my direct deposit and then come Saturday or Sunday I would enter my gross wage through tele-serve online.

Referee Hearing Transcript, at 9-10. The Referee then pointed out to Mr. Otto that a claimant is supposed to enter the earnings for the week that is then concluding — i.e., on Saturday one enters the wages he or she earned in the

week just concluded. Referee Hearing Transcript, at 10. On this basis Claimant conceded that all his reported earnings were probably a week off. Id. In order to confirm this they went through his pay stubs week-by-week. Referee Hearing Transcript, at 12-14. Referee Gibson seemed to confirm this was the mechanism for his misreporting. Referee Hearing Transcript, at 15.

Mr. Otto also admitted that for the first couple of weeks he might have reported net earnings not gross, which she also confirmed — though she could not limit this mistake to merely the first two weeks. Referee Hearing Transcript, at 14-15.

B

Overpayment Issue

In this case the Referee and the Board of Review affirmed the Director's determination that Claimant Otto failed to accurately report his part-time earnings as required by Gen. Laws 1956 § 28-44-7. In order to review this conclusion we must simply ask the question — Was the Board's redetermination correct?

In this record there is no suggestion that the computation made by the Department on the question of claimant's part-time earnings is inaccurate. It was made on the basis of wage reports that are contained within the record

forwarded to this Court by the Chairman of the Board of Review. Accordingly, I accept the veracity of the Department’s findings without reservation. I must therefore conclude — as did the Director and the Board of Review — that Claimant was indeed overpaid in the enumerated weeks.

C

Repayment Issue

In this case the Board of Review made a second decision — affirming the Director’s order of repayment.

As I recounted above, Referee Gibson sustained the Director’s order of repayment because she found that the “*** claimant did not properly report his earnings for the weeks in issue as required.” Referee’s Decision, August 7, 2014, at 2. And because she found a causative link between Claimant’s inaccuracies and the overpayment, the Referee determined him, ipso facto, to be “at fault” for the overpayment. Id.

But the repayment statute requires more than a mere invocation of the term “fault.” In my view “fault” implies more than a mere causative relationship, it implies moral responsibility in some degree — if not an evil intent per se, at least indifference or a neglect of one’s duty to do what is

right.⁵ To find the legislature employed the term fault in a broader sense of a simple error would be — in my view — to render its usage meaningless.

As I read the record certified in this case, no proof was presented tending to show that the Claimant acted with deceit. Mr. Otto admitted that he reported his net earnings in some weeks, not his gross earnings, as required by the Employment Security Act. He conceded that the instructions were clear on this point. He simply failed to heed them. As a result, I think we can deem him to have been “at fault” for these errors.

But in my view Mr. Otto’s other error was more understandable. His wage reports to the Department were out-of-synchronicity — i.e., temporally shifted one week backwards. The Department wants all unemployment-benefit recipients who are working part-time to report their earnings at the end of the week they have just concluded. To use a simple example, if the Claimant worked Monday and Thursday he or she is required to report his or her gross income that same Saturday (two days later). And yes, that must be done even

⁵ In the Webster’s Third New International Dictionary (2002) at 839 the first definition of fault applicable to human conduct defines “fault” as “**3**: A failure to do what is right. a: a moral transgression.” This view is longstanding. As Noah Webster stated in the first edition of his American Dictionary of the English Language (1828), “Fault implies wrong, and often some degree of criminality.”

though the Claimant will not receive a paycheck (and a pay-stub full of information) until the Friday of the next week.

I do not see that reporting the information from a pay-stub that one just received would seem patently wrong to all but the most knowing claimant. In fact, I think the Department unintentionally encourages this mistake. I am referring to the “Teleserve” Frequently Asked Question Sheet that is found in the record as the penultimate sheet in the Department’s Exhibit No. 1. It states “... please enter your total gross earnings before tax deductions for the *prior* week” Id.⁶ To me, the phrase “the prior week” could be taken to be the equivalent of “last” week. And so, since the Department has put forward instructions that are quite amenable to misinterpretation, I simply do not believe we can find “fault” on Mr. Otto’s part.⁷

⁶ The document also repeatedly references, in its questions, “last week.” We know that the Department intends this to mean the week that is now just ending; but, I cannot fault anyone for reading it to mean the previous week.

⁷ Mr. Otto also made the point — the validity of which the Referee acknowledged — that reporting his income a week late consistently would all even out in the end (except for the last week). Referee Hearing Transcript, at 20-22. As I see it, this is true, assuming that the Claimant’s benefit figure held steady throughout the period under discussion, as it did here. So, over the course of the benefit period, overpayments should be offset by underpayments, in part if not in whole.

However, it might seem otherwise to the Department because, as the Referee noted, the Department only looks at weeks where an overpayment resulted (not those with an underpayment). Referee Hearing Transcript, at

And so, I recommend that this Court find that the Department may seek restitution from Mr. Otto for that portion of the overpayment attributable to Mr. Otto's reporting of net income instead of gross income. On the other hand, I recommend that Department not be permitted to collect the portion attributable to Mr. Otto's delayed income reporting.⁸

V

CONCLUSION

Pursuant to Gen. Laws 1956 § 42-35-15(g), the decision of the Board must be upheld unless it was, inter alia, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. When applying this standard, the Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.⁹ Stated

12. (The Referee called the weeks identified by the Department “the only relevant weeks.”Id.) This, I think, is not fair — you have to look at the whole period and see the ups and downs, swings and roundabouts. And I would commend the use of this approach to the Department in future cases, so that a claimant is given a true “net” overpayment (or underpayment) figure.

⁸ I have every faith that the Department will be able to calculate these amounts.

⁹ Cahoone, supra at 7, fn. 3.

differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.¹⁰

Upon careful review of the evidence, and applying the standard of review and the principles of law outlined above, I recommend that this Court find that the decision of the Board of Review be AFFIRMED regarding its finding that Mr. Otto failed to accurately report his wages but I recommend that the associated order of repayment be AFFIRMED IN PART (as to those overpayments attributable to his reporting of net wages in lieu of gross) and REVERSED IN PART (as to those overpayments attributable to his repeated submission of “last” week’s figures instead of “this” week’s figures) as being contrary to fact and law, as outlined in Part IV-C of this opinion.

_____/s/_____
Joseph P. Ippolito
Magistrate
JANUARY 8, 2015

¹⁰ Cahoone, *supra* at 7, fn. 3. See also D’Ambra v. Bd. of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws 1956 § 42-35-15(g), *supra* at 6 and Guarino, *supra* at 7, fn. 2.

