SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0949-16T3

LUCINDA BRACEY-COUNCIL,

Appellant,

v.

BOARD OF REVIEW, DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, PNC BANK, and EQUIFAX,

Respondents.

Argued December 4, 2017 – Decided December 21, 2017

Before Judges Sabatino and Whipple.

On appeal from the Board of Review, Department of Labor and Workforce Development, Docket No. 088,085.

Adam L. Schorr argued the cause for appellant (Alan H. Schorr & Associates, PC, attorneys; Adam L. Schorr, on the briefs).

Robert M. Strang, Deputy Attorney General, argued the cause for respondent Board of Review (Christopher S. Porrino, Attorney General, attorney; Jason W. Rockwell, Assistant Attorney General, of counsel; Robert M. Strang, on the briefs).

Respondents PNC Bank and Equifax have not filed briefs.

PER CURIAM

Claimant Lucinda Bracey-Council appeals the Board of Review's September 30, 2016 final agency decision denying her claim for unemployment benefits. Because of material uncertainties and other deficiencies of the administrative record that bear upon claimant's eligibility, we remand for a further hearing at which those matters can be explored and the merits reconsidered.

Claimant was employed by PNC Bank for approximately nine and a half years as a relationship manager. She worked out of a PNC branch office in New Jersey. For a number of years claimant has suffered from chronic stomach-related medical issues. Prior to the events that led to the present case, claimant had to miss work for several days because of illness. On one previous occasion, she missed nine days of work and on another occasion she missed thirteen days. According to claimant, on both of these prior occasions she called out sick during her absence, and then contacted the company's HR Service Center upon her return to work.

PNC's written company policy concerning unexpected family or medical leaves of absence instructs employees to "[f]ollow normal call-off procedures and contact the HR Service Center as soon as practical to discuss the absence." The written policy specifies no maximum number of days that can elapse before a sick employee must contact the HR Service Center, nor any more concrete

definition of the meaning of the term "as soon as practical." Nor does the written policy make clear that adverse consequences, such as termination of employment, will result if an employee takes longer than a minimally "practical" amount of time to contact the HR Service Center, except to say that if a PNC employee does not follow "established advance-approval and call-off procedures" for what is termed "intermittent" or "reduced schedule leave[,]" the worker's "time off may not qualify as job protected leave." The written policy does state that "[f]or additional information or for special circumstances, contact the HR Service Center."

In February 2016, claimant developed a stomach condition that made her too ill to come to work. Starting on February 13, claimant called her branch office on a daily basis, advising her direct supervisor or the bank's branch manager that she would not be able to come to work that day.

Claimant's stomach illness persisted. By February 22, she came under the care of a physician, Robert A. Adair, M.D. According to a signed typed letter, written on Dr. Adair's letterhead, which was admitted into evidence at the Appeal Tribunal, claimant was under his care from February 22 through March 26. Dr. Adair further noted that claimant had been hospitalized during this period with "multiple medical conditions," and was "totally disabled and unable to work."

Claimant's hospital stay, which spanned six days from her admission on March 19 through her discharge on March 25, is corroborated with a certification from Holy Name Medical Center. The hospital's certification was similarly admitted into evidence at the Appeal Tribunal hearing.

According to the telephonic testimony of a PNC Employee Relations Area Manager at the hearing, the Area Manager became concerned that claimant was going to continue calling in sick on a daily basis. The Area Manager felt that claimant needed to contact the company's Leave and Disability ("L&D") unit,[1] because her absence possibly could be governed by the New Jersey Family Medical Leave Act, N.J.S.A. 34:113-1 to -16.

According to the Area Manager, on February 24, 2016, she spoke with claimant and told her to contact the L&D unit. The Area Manager recalled that she spoke that same day with claimant's direct supervisor and relayed the same instructions. The Area Manager was not asked by the hearing examiner whether claimant had described her then-existing medical condition at the time of the call. Nor was the Area Manager ever asked to describe how time-consuming and onerous it would be for a sick individual to interact with the L&D unit while she was ill, or exactly what the process

[1] According to the Area Manager's testimony, the L&D unit is the same thing as, or is part of, the HR Service Center.

entailed. According to claimant's unrefuted testimony on that subject, it was a "lengthy process" to contact the L&D unit. Claimant anticipated the unit would ask the employee to place a call to an insurance company.

Claimant remained ill and called out sick daily, but did not contact the L&D unit. According to the Area Manager's testimony, the persisting situation prompted her to call claimant a second time, which occurred on Friday, March 4. As the Area Manager recalled this undocumented conversation, she and claimant agreed on March 4 that claimant could have "over the weekend" to determine what she was going to do. If claimant sufficiently recovered to come back to work on Monday, March 7, then she should contact the L&D unit on Monday to "get the leave [of absence] in place for the time she had been out, and move forward." On the other hand, if claimant did not return to work on March 7, the Area Manager and claimant allegedly agreed that claimant would need to "open" a "leave claim to cover her future absences that she may have needed."

Notably, the record is bereft of any e-mail, text message, letter, memo or other contemporaneous documentation substantiating what the Area Manager told claimant in their March 4 conversation. Nor was claimant, who was self-represented, asked at the hearing any questions about the March 4 conversation described by the Area

Manager. The record does contain a pre-hearing written submission by claimant in which she stated that she had been contacted by an Area Manager "out of Myrtle Beach, SC,"[2] who "suggested that I contact the [L&D] department during my absence." Claimant added that, "Since I was still not feeling well [I] thought I would have the ability [to contact] the . . . department when I returned [to work] as I previously had done." According to claimant's written submission, the Area Manager "also said that I should plan on returning to work by March 7th, however I was still feeling unwell and could not return upon that date."

Regardless of what exactly was said in the March 4 conversation, it is undisputed that claimant did not return to work on March 7. Consequently, on Thursday March 10, 2016, the Area Manager sent a certified letter to claimant. The letter essentially conveyed an ultimatum to claimant: either "return to work no later than Monday, March 14, 2016 or I will assume that you have chosen to resign from PNC, and your employment will be terminated." The letter did not state that claimant had any option to contact the L&D unit at that point to preserve her position.

[2] The Area Manager who testified apparently is based at PNC's offices in Pittsburgh, Pennsylvania and not in South Carolina, but this may be the same person.

Nor did it mention what claimant should or could do, if anything, if she was still feeling too ill to return to work.

According to claimant's testimony, she regarded the certified letter as "somewhat threatening." Moreover, she at that time "was feeling vulnerable from [her] lengthy illness." Claimant "assumed basically" that she had been terminated, and therefore "didn't contact" her employer further at that point.

As we previously noted, on Friday, March 19, four days after the Area Manager's March 14 deadline for her to return to work, claimant was admitted to the hospital, where she remained for six days until her discharge on March 25.

Claimant subsequently filed a claim for unemployment benefits with the Department of Labor and Workforce Development. The Department's Deputy denied her claim on various grounds. In particular, the Deputy concluded claimant had "left work voluntarily" on February 16, 2016, had been "terminated for job abandonment" because she "failed to properly apply for a leave of absence and never returned back to work on the date agreed with [her] employer," and claimant's "reason for leaving [work] does not constitute good cause attributable to the work." The Deputy's decision said nothing about claimant's medical condition.

Claimant disputed the Deputy's denial of benefits. A telephonic hearing before an Appeals Examiner was conducted on June 16, 2016, at which claimant, and the Area Manager testified.

Following the telephonic session, the Appeals Examiner issued a written decision that same day, upholding the denial of benefits. The Appeals Examiner found that claimant was disqualified because she "left work voluntarily without good cause attributable to the work" pursuant to N.J.S.A. 43:21-5(a). More specifically, the Appeals Examiner rejected as irrelevant claimant's assertion that she had been allowed to call in sick over several days on two previous occasions without contacting the L&D unit until she returned to work. The Appeals Examiner found "claimant's analogy does not work in the present situation because of the length of time she needed to be off." The Appeals Examiner also rejected claimant's assertion that she felt vulnerable and threatened by the Area Manager's certified letter. The Appeals Examiner found that "claimant had ample opportunity to digest the employer[']s verbal remarks and act upon them."

The Appeals Examiner said nothing in her decision about Dr. Adair's letter, or his statement that claimant was totally disabled and unable to work from February 22 through March 26, 2016. Nor did the Appeals Examiner's decision make any reference to

claimant's documented six-day hospitalization that began on March 19.

On September 30, 2016, the Board of Review upheld the Appeals Examiner's determination. The Board stated that it "agree[d] with the decision reached[.]" Oddly, the Board "deleted" three sentences from the Appeals Examiner's findings of fact because it felt that they conflicted with the Examiner's rejection of claimant's assertion that "she had submitted leave slips in the past that were approved 'after the fact.'"

Now represented by counsel on this appeal, claimant argues the Department's decisions in her case were arbitrary and capricious, and inconsistent with the applicable statutes, regulations, and case law. She maintains that she did not abandon her job, that she had legitimate reasons for not contacting the L&D unit while she was ill, and that she was not terminated for just cause. She further argues that it was improper for the Board of Review to "delete" factual findings of the Appeals Examiner that were arguably supportive of her reliance on the employer's past practices.

In considering claimant's appeal, we are mindful that we ordinarily afford considerable deference to the administrative decisions of the Board of Review. Generally, we will not set aside the Board's decisions on unemployment benefits matters

unless they are shown to violate legislative policies, or are arbitrary, capricious or unreasonable. Silver v. Bd. of Review, 430 N.J. Super. 44, 58 (App. Div. 2013). Even so, our scope of review is not one of complete deference. Rather, "it calls for careful and principled consideration of the agency record and findings[.]" Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 93 (1973).

As a preliminary legal question, we conclude that, applying the applicable statute, N.J.S.A. 43:21-5, and regulation, N.J.A.C. 12:17-9.11, claimant did not quit or abandon her employment at PNC. N.J.A.C. 12:17-9.11(a) provides, in pertinent part, that an employee "who is absent from work for five or more consecutive work days and who without good cause fails to notify the employer of the reasons for his or her absence shall be considered to have abandoned his or her employment."

Here, although claimant missed work for more than five days, she manifestly did notify her employer of the reasons for her absence, i.e., her ongoing illness that ultimately resulted in her hospitalization. Indeed, the Area Manager essentially admitted the lack of abandonment in her testimony, acknowledging that claimant "did call in[,]" and "as far as the job desertion I won't dispute that either[.]" See also DeLorenzo v. Bd. of Review, 54 N.J. 361, 363-64 (1969) (construing N.J.S.A. 43:21-5(a) to signify

that an employee has not voluntarily left work if the "employee becomes ill and does those things reasonably calculated to protect the employment").

Putting aside the unproven abandonment issue, the more difficult legal question posed here is whether claimant was rightly terminated for cause because she did not follow her employer's instructions to contact the L&D unit during her illness. On this issue, the existing record is murky and incomplete.

As we have noted, the March 4 telephone conversation between the Area Manager and claimant, which the Appeals Examiner treated as pivotal, is not contemporaneously documented. Claimant's written submission asserts that the Area Manager only "suggested" that she contact the L&D unit. Claimant does not admit that she had agreed to contact the L&D unit during her illness. Unfortunately, after the Area Manager testified at the hearing about her recollection of the March 4 conversation, claimant was not herself asked to testify about her own version of that particular call.

Moreover, the record is bereft of any evidence about the severity of claimant's illness and symptoms while she was out of work sick. The record is equally void of evidence addressing whether it would have been realistic and fair to expect her to spend what she characterized as a "lengthy process" on the

telephone with the L&D unit, and perhaps an insurance company, while she contends she was in the throes of a persisting stomach illness and under the care of a physician. Dr. Adair's letter provides no insight on the actual severity of claimant's condition between February 22 and March 26, other than noting that it resulted in hospitalization. The extensive six-day period of claimant's hospitalization — which began on March 19, not long after the Area Manager's certified letter of ultimatum — arguably supports a circumstantial inference that claimant was too sick to participate in a "lengthy process" to validate her sick leave.

The record is also murky as to what steps claimant would have had to undertake if she had followed up with the L&D unit, and how time-consuming and burdensome those steps would have been. The particulars are not spelled out in the portion of the employer's written leave policy contained in the record.

It is also unclear from the present record as to whether the Area Manager had clearly communicated to claimant, before the March 14 certified letter, that if she failed to follow through with the L&D unit she would be terminated, or whether instead some lesser consequences would ensue, such as loss of pay. Nor does the record enlighten us whether, if an employee is legitimately too ill to process a leave application though the L&D unit, a third party could be designated to do so on an employee's behalf,

or whether a medically-based waiver or relaxation of that policy is ever allowed. It is also puzzling as to why a veteran mid-level employee of the company, such as claimant, would cavalierly jeopardize her employment and future bonus opportunities, unless she truly was too ill to carry out the Area Manager's alleged instructions, or was operating under some reasonable misunderstanding.

In sum, the present record has many open ambiguities, omissions, and uncertainties that materially bear upon the critical facts relating to the bona fides of claimant's discharge. Given the circumstances, we therefore remand the matter for a new hearing before a different Appeals Examiner, who can develop the record in the subject areas we have identified, ask appropriate follow-up questions, seek additional documentation, and make necessary credibility findings. If feasible, the remand hearing shall be in person rather than by telephone. To assure an independent examination of the proofs and legal issues on remand, we direct that the new hearing be conducted before a different Appeals Examiner.

The Board of Review's final agency decision is therefore vacated without prejudice, and the matter is remanded for a new hearing and a fuller development of the record. We do not retain jurisdiction.