SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0225-16T1

ELIZABETH CHANDO,

Appellant,

v.

BOARD OF REVIEW, DEPARTMENT OF LABOR, SPRING OAK ASSISTED LIVING AT VOORHEES, LLC and GENESIS HEALTHCARE, LLC t/a MEADOWVIEW NURSING & RESPIRATORY CARE CENTER,

Respondents.

Argued December 11, 2017 - Decided January 12, 2018

Before Judges Messano, Accurso and O'Connor.

On appeal from the Board of Review, Department of Labor, Docket No. 077,879.

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

Peter H. Jenkins, Deputy Attorney General, argued the cause for respondent Board of Review (Christopher S. Porrino, Attorney General, attorney; Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Peter H. Jenkins, on the brief).

PER CURIAM

Elizabeth Chando appeals from an August 1, 2016 final decision of the Department of Labor's Board of Review disqualifying her from receipt of unemployment benefits pursuant to N.J.S.A. 43:21-5(a), on the ground she left her employment without good cause attributable to the work. Because we conclude Chando may qualify for benefits under the 2015 amendment to the statute, we vacate and remand for a new hearing before the Appeal Tribunal.

As neither of Chando's former employers, defendants Spring Oak Assisted Living at Voorhees, LLC and Genesis Healthcare, LLC t/a Meadow View Respiratory and Acute Care Center, have participated at any level in this proceeding, the Board based its findings on the facts as presented by Chando at the hearing before the Appeal Tribunal. Chando testified she began work as director of nursing at Spring Oak on September 1, 2015. On October 20, she resigned to take the same position at another facility offering higher pay and better benefits. She gave thirty days' notice, arranging to leave Spring Oak on Friday, November 20, and start her new job the following Monday, November 23.

On her last day at Spring Oak, her new employer, Rivera, advised her its Meadow View facility was being acquired by Genesis and moved her start date to Tuesday, December 1, to

coincide with the takeover. Chando reported to work on December 1 and participated in an orientation. The following day, December 2, a representative of Genesis advised her there had been a misunderstanding. Genesis had its own director of nursing and did not need another, and so "let [her] go."

Based on those facts, a majority of the three-member Board of Review found Chando disqualified for benefits as of November 15, 2015, because she left her employment at Spring Oak without good cause attributable to the work. The majority adopted the reasoning of the Appeal Tribunal that because Chando's new employment with Genesis commenced eleven days after her voluntary resignation from Spring Oak, the 2015 amendment to N.J.S.A. 43:21-5(a), permitting a claimant to avoid disqualification if she commences her new job within seven days of resigning the old, did not apply.

One member of the Board dissented. Reasoning that Chando's new employment was to commence three days after she left Spring Oak, "well within the seven day requirement of the statute," and was only postponed at the "new employer's choice," the dissenting member concluded disqualifying Chando under those circumstances subverted the legislative intent of the 2015 amendment. She wrote:

> To consider the altered commencement date of her new employment, over which the claimant had no control, as a reason to disqualify the claimant, seems to subvert the intent of the amended unemployment law. She had no intent to become unemployed, and had good cause for failing to meet the requirements of the seven day commencement. A disqualification for this reason is contrary to the intent of . . . N.J.S.A. 43:21-5(a).

Chando appeals. Acknowledging the recent split between two panels of this court in interpreting the 2015 amendment to N.J.S.A. 43:21-5(a), she urges us to follow McClain v. Board of Review, 451 N.J. Super. 461 (App. Div. 2017), and reject Blake v. Board of Review, Dep't of Labor, 452 N.J. Super. 7 (App. Div. 2017). At oral argument, she further urged we find that leaving one job for another offering higher pay and better benefits does not constitute having "left work voluntarily without good cause attributable to such work" under N.J.S.A. 43:21-5.

Taking Chando's points in inverse order, we have no hesitation in concluding she left Spring Oak voluntarily without good cause attributable to her work there when she resigned to take a better job at Meadow View. The law is well settled that one who leaves a job "for personal reasons, however compelling, . . . is disqualified under the statute." Utley v. Bd. of Review, 194 N.J. 534, 544 (2008); see also Rider Coll. v. Bd. of Review, 167 N.J. Super. 42, 48 (App. Div. 1979) (rejecting the

Board of Review's opinion that a worker leaving a job "to accept a 'substantially more favorable position'" as "not comport[ing] with the statutory test").

The only issue in this case is whether Chando avoids disqualification by operation of the 2015 amendment, which exempts

> an individual who voluntarily leaves work with one employer to accept from another employer employment which commences not more than seven days after the individual leaves employment with the first employer, if the employment with the second employer has weekly hours or pay not less than the hours or pay of the employment of the first employer, except that if the individual gives notice to the first employer that the individual will leave employment on a specified date and the first employer terminates the individual before that date, the seven-day period will commence from the specified date.
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> [N.J.S.A. 43:21-5(a), as amended by L. 2015, c. 41, § 1.]

One panel of this court has interpreted that language to mean a claimant need not "actually commence work within the seven-day period" to avoid disqualification, but only leave employment with the first employer to accept a job having comparable hours and better pay "which was to commence seven days later." McClain, 451 N.J. Super. at 469, 474. Another panel has expressly rejected that view and held "the Amendment's exception

does not apply unless the employee accepts employment with another employer 'which commences not more than seven days after the individual leaves employment with the first employer.'" Blake, 452 N.J. Super. at 11 (quoting N.J.S.A. 43:21-5(a)).

Neither opinion is binding on us, see Brundage v. Estate of Carambio, 195 N.J. 575, 593-94 (2008), and it is not for us to resolve the conflict between them. We are, however, required to decide this case, which necessarily entails following one or the other. The wording of the amendment and its legislative history incline us to the Blake court's view that a worker voluntarily quitting one job to take another having comparable hours and pay, avoids disqualification only if the worker commences the second job within seven days of leaving the first.

Were it otherwise, that is, if the worker need never commence the second job she was scheduled to start within seven days of quitting the first in order to qualify for benefits under the amendment, the Legislature's intent that the amendment not redound to the detriment of the first employer would be thwarted. See Blake, 452 N.J. Super. at 13-14.

> Another portion of the current law, [N.J.S.A.] 43:21-7(c)(1), provides that an employer's [unemployment insurance] account is not charged for [unemployment insurance] benefits paid to a claimant if the employee's employment . . . ended in any way which would have disqualified the claimant

> from [unemployment insurance] benefits if the employee had applied for benefits at the time when the employment ended, including if the employee voluntarily left work with that employer without good cause attributable to that work. Therefore, under those provisions of the current law, that employer's [unemployment insurance] account would not be charged when the claimant leaves work with that employer to accept employment from another employer, and the claimant is, pursuant to the provisions of this bill, paid [unemployment insurance] benefits after being laid off by the subsequent employer, even if the first employer paid wages to the claimant during the claimant's base year.
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> [Ibid. (quoting Senate Labor Comm., Statement to S. 2082 (June 5, 2014); Assembly Labor Comm., Statement to S. 2082 (September 11, 2014); Assembly Appropriations Comm., Statement to S. 2082 (February 5, 2015).]

As the legislative committees noted, N.J.S.A. 43:21-7(c)(1) provides with regard to an employer's "[f]uture rates based on benefit experience" that:

> with respect to benefit years commencing after January 4, 1998, an employer's account shall not be charged for benefits paid to a claimant if the claimant's employment by that employer was ended in any way which, pursuant to subsection (a), (b), (c), (f), (g) or (h) of [N.J.S.A.] 43:21-5, would have disqualified the claimant for benefits if the claimant had applied for benefits at the time when that employment ended. Benefits paid under a given benefit determination shall be charged against the account of the employer to whom such determination relates.

[N.J.S.A. 43:21-7(c)(1) (emphasis added).]

Reading the two statutes together makes clear the Legislature's intent was to relieve a claimant who leaves one job to immediately take another, from which she is shortly laid off, from the disqualification[1] she would otherwise suffer, without charging the unemployment insurance account of the first employer for the benefits. The only way that would appear possible is if the claimant's benefits are charged against the new employer. If the claimant never commences employment with a new employer, there is no employer chargeable with the claimant's benefits under the statutory scheme.

That point is at the root of our disagreement with the McClain court. Although we are in accord with the Blake court's reading of the plain language of the amendment, we accept the McClain court's interpretation of those words is also plausible. Reading the amendment in context with the related provision of N.J.S.A. 43:21-7, as we must to understand the legislation as a whole, see Chasin v. Montclair State Univ., 159 N.J. 418, 426-27

[1] An individual who leaves a job voluntarily without good cause attributable to the work is disqualified from benefits "[f]or the week in which the individual has left work . . . and for each week thereafter until the individual becomes reemployed and works eight weeks in employment . . . and has earned in employment at least ten times the individual's weekly benefit rate, as determined in each case." N.J.S.A. 43:21-5(a).

(1999), and reviewing the legislative history, as permitted by the susceptibility of the language to more than one interpretation, see DiProspero v. Penn, 183 N.J. 477, 492-93 (2005), convinces us the McClain court's interpretation of the amendment is inconsistent with the statutory scheme. Its interpretation plainly frustrates the legislative goal of relieving a narrow band of claimants from disqualification without penalizing their former employers.[2]

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[2] The McClain court resolves that problem by converting the claimant's reason for departing into one "for good cause attributable to the work," thus making the benefits fairly chargeable to the first employer. McClain, 451 N.J. Super. at 474. But that characterization is contrary to the plain language of the amendment and at odds with almost sixty years of case law interpreting the phrase "good cause attributable to the work." See Blake, 452 N.J. Super. at 9-10.

The amendment does not declare that leaving a job for a comparable position no longer constitutes having "left work voluntarily without good cause attributable to such work." It relieves a claimant leaving one job for another equally good from the disqualification her voluntary quit requires, so long as she commences her new job within seven days of leaving the old. N.J.S.A. 43:21-5(a). That interpretation is also consistent with N.J.S.A. 43:21-7(c), which states "an employer's account shall not be charged for benefits paid to a claimant if the claimant's employment by that employer was ended in any way which, pursuant to subsection (a), (b), (c), (f), (g) or (h) of [N.J.S.A.] 43:21-5, would have disqualified the claimant for benefits if the claimant had applied for benefits at the time when that employment ended." (emphasis added). A worker's having left a job for comparable employment elsewhere is judged a voluntary quit at the point when the first employment ends. The first employer is thus not chargeable with her unemployment benefits. The 2015 amendment does not change that analysis, even in cases in which the amendment is applicable.

Having agreed with the Blake court that "the [a]mendment's exception does not apply unless the employee accepts employment with another employer 'which commences not more than seven days after the individual leaves employment with the first employer,'" Blake, 452 N.J. Super. at 11 (quoting N.J.S.A. 43:21-5(a)), one might expect we would readily agree with the Board that Chando is disqualified from benefits because she did not begin her new job at Meadow View until eleven days after she left Spring Oak. Our analysis of the statutes and our recent cases interpreting them, however, convinces us the critical point here is that Chando, unlike the claimants in McClain and Blake, actually commenced her new employment — and would have done so within seven days of leaving her old job but for her new employer having changed her start date.

Specifically, Chando testified she left Spring Oak on a Friday for a comparable job at Meadow View, which she was scheduled to start the following Monday morning, and which she actually commenced eight days later, after her start date was pushed back at the last minute at the request of her new employer. If the Board, having afforded Meadow View the opportunity to refute Chando's version of events, finds those were indeed the circumstances, we might agree with its dissenting member that "[t]o consider the altered commencement

date of [Chando's] new employment, over which [she] had no control, as a reason to disqualify [her], seems to subvert the intent of the amended unemployment law." If the Board finds the facts to be as Chando has alleged, she is certainly entitled to consideration of whether she is among the class of claimants for whom the amendment was intended, consistent with a liberal construction to further the unemployment compensation law's "remedial and beneficial purposes." Utley, 194 N.J. at 543 (quoting Yardville Supply Co. v. Bd. of Review, 114 N.J. 371, 374 (1989)).

We cannot make such a determination on this record because it does not appear Chando's new employer, Meadow View, was afforded the opportunity to participate in the hearing before the Appeal Tribunal. Chando's former employer, Spring Oak, although noticed, did not call into the hearing. As the Blake court noted, "as a practical matter, the first employer, . . . who did nothing to cause [the claimant] to quit, is ill-equipped to rebut any claim for benefits," because it is likely ignorant of whether the claimant actually received an offer of employment or its terms. Blake, 452 N.J. Super. at 16. Because Meadow View, the only employer liable for unemployment benefits in the event Chando is determined to qualify for benefits under the amendment, was not afforded an opportunity to participate in the

hearing, we vacate the Board's final decision and remand for a new hearing before the Appeal Tribunal. We leave to the Appeal Tribunal and the Board the question of Chando's actual circumstances and whether they qualify her for benefits under the 2015 amendment.

Chando has also appealed from a November 4, 2016 final decision of the Board disqualifying her "for disability during employment benefits as of November 15, 2015" based on its August 1, 2016 final decision disqualifying her from receipt of unemployment benefits pursuant to N.J.S.A. 43:21-5(a), on the ground she left her employment without good cause attributable to the work. We likewise vacate the November 4, 2016 decision and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

Vacated and remanded.