

SUPERIOR COURT
OF THE
STATE OF DELAWARE

JEROME O. HERLIHY
JUDGE

NEW CASTLE COUNTY
COURT HOUSE
WILMINGTON, DE 19801-3733

October 26, 2004

Ellen Herold
2614 Faulkland Road
Wilmington, Delaware 19808

Mary Page Bailey, Esquire
Deputy Attorney General
Department of Justice
820 North French Street
Wilmington, DE 19801

RE: *Ellen S. Herold v. Sears & Roebuck*
C.A. No. 04A-01-006-JOH

Submitted: September 16, 2004

Decided: October 26, 2004

Upon Appeal from the Unemployment
*Insurance Appeal Board by Ellen Herold- **AFFIRMED***

Dear Ms. Herold and Ms. Bailey:

Ellen Herold has appealed to this Court the decision of the Unemployment Insurance Appeal Board denying her claim for benefits. Herold had at one time worked full-time for Sears and Roebuck. Due to medical reasons, she discontinued work. After a period of time, she returned to work, but by agreement with Sears, she was allowed to work part-time. She started at 15 - 20 hours per week.

Over a period of time, however, Sears reduced the number of hours per week she

worked. As a result, she applied for unemployment compensation. Statutory language and Department of Labor regulations taken together do not provide for benefits for persons working part-time whose part-time hours are reduced. The issue presented is whether there is anything in Herold's work record/history to allow for an award of benefits.

The Court concurs with the determination made below that there is no authority to award Herold benefits for a reduction in the number of part-time hours worked. The decision of the Board is AFFIRMED.

Factual Background

Herold was employed by Sears & Roebuck ("Sears") from January 19, 1990 to June 1998. Due to health reasons, Herold left Sears' employ and went on disability. In June 2000, Herold asked her former supervisor whether she could return to Sears working 15 to 20 hours per week. She was hired on that basis, but was not required to complete another employment application. She was required to take the drug test. Herold is still employed part-time by Sears. As an associate of the merchandise customer assist team, she earns \$7.03 an hour. As she is over age 65, her disability payments are now social security payments.

In April 2003, the hours Herold worked were reduced from 15 to 20 hours per week to 13, then 12 and finally to 9 hours per week. Her hours were increased in June 21, 2003 to about 15 hours per week, when Herold filed her last claim. Herold claims that when her hours were cut back, Sears' Human Resources Department ("HR") told her to file for

partial unemployment.¹

Herold applied for unemployment benefits effective April 20, 2003. She received benefits for the time period she submitted claim forms. When she returned to her 15 to 20 hour per week schedule in 2003, Herold ceased to submit claim forms. She states that she received benefits for nine weeks. In effect, the real issue here is whether she has to repay benefits received for those nine weeks.

On May 21, 2003, a Claims Deputy determined that Herold was not eligible for unemployment benefits effective with or for the week ending April 26, 2003. The Notice of Determination stated that she was not considered to be an unemployed person entitled to receive benefits, as there were no changes in the condition of hire. The Notice continued that any overpayment established would be based upon the Notice.

The Claimant and Employer Appeal Rights section stated that the determination would become final on May 31, 2003, unless a written appeal was filed. Upon receipt of the Notice, on May 28, 2003, Herold took the notice to the Department of Labor's Pencader office. There a processor told Herold to ignore the letter and not do anything, as she would receive something else. Herold noted the conversation on the back of an envelope. When she received the overpayment determination, she came to file her appeal.

The last day to file an appeal was May 31, 2003. On October, 23, 2003, a referee determined that Herold had been given faulty information at the Pencader office.

¹ No one from Sears appeared before (1) the Claims Deputy, (2) the Appeals Referee, or (3) the Board. Nor did Sears participate in the briefing in this case.

Therefore, as a result of Department of Labor misinformation, her appeal was determined to be timely and a hearing was scheduled before an Appeals Referee.

At the conclusion of the November 19, 2003 hearing, the Referee determined that Herold was not an unemployed individual and thereby was ineligible for benefits. On November 26, 2003, Herold appealed the Referee's decision to the Board.

After the conclusion of the December 10, 2003 hearing, the Board determined the appeal was without merit, adopting the Referee's findings of fact as supported by substantial evidence and that the Referee's decision was without any errors of law. It adopted the same reasons for ineligibility as the Claims Deputy and Referee had cited. In affirming the Referee's decision, the Board declined to permit further review. The decision became final on January 3, 2004.

On January 12, 2004, Herold, acting *pro se*, filed this appeal. She states the following grounds for appeal:

1. H.R. person from [Sears] directed me to U.I. to file for partial unemployment, due to reduction of scheduled hours (until regular p/t hours returned).
2. Although duly notified [Sears] did not participate in person or via phone at any of 3 hearings.
3. In documents from previous hearings, it was clearly stated that there was evidence of Departmental error I was given faulty information -
4. PG 2 from "Guide to U.I. Benefits - \ 'Partial Benefits' "*
PG 8 [From Guide to U.I. Benefits - / Partial Benefits]
*As directed by U I. Rep A. Latney, on 4/22/03 [Collected partial benefits by completing gross earnings on space indicated, which I

did for 9 wks. This would be deducted from my weekly claim benefit ~] The only thing achieved in life without effort is failure!²

Herold's Claim

Herold claims both Sears and the Department of Labor misinformed her as to whether she could collect unemployment benefits. Because of the misinformation provided, Herold contends that she should not be forced to repay the \$543.00 in unemployment benefits she received.

Standard of Review

On an appeal from the Board, this Court's role is to determine whether the Board's conclusions are supported by substantial evidence and are free from legal error.³ "Substantive evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁴ This Court does not weigh the evidence, determine questions of witness credibility or make its own factual findings and conclusions.⁵ The Court relies on the Appeals Referee's determination for the findings of fact when the Board affirms the Appeals Referee's decision after additional evidence has been taken.⁶

Discussion

Herold states she wants to keep the five hundred and forty-three dollars (\$543.00)

² Herold's Notice of Appeal. Docket #1.

³ *General Motors v. Jarrell*, 493 A.2d 978, 980 (Del.Super. 1985).

⁴ *Histed v. E.I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

⁵ *Air Mod. Corp. v. E.I. Du Pont de Nemours & Co.*, 215 A.2d 434, 438 (Del. 1965).

⁶ *Boughton v. Division of Unemployment Ins., Dep't of Labor*, 300 A.2d 25, 26 (Del. 1972).

paid her in unemployment benefits. She complains that she was given incorrect information and, without that incorrect information, she would never have applied for unemployment benefits.

Sears' representative, she asserts, suggested that Herold should go to the Department of Labor and apply for benefits. There is no indication that Sears HR informed Herold that she would be eligible to receive benefits, just the suggestion as to where she might get possible assistance.

Herold questions why the Department permitted her to apply for unemployment benefits and pay benefits even after it was discovered that Herold was still working part-time at reduced hours. When Herold initially visited the Department's office on April 22, 2003, she informed the representative she was employed part-time but her hours had been reduced. The representative, however, assisted Herold in completing the claim form. Looking at her application for benefits, Herold states that she was still employed part-time. While her working hours were reduced, Herold followed instructions, and each week, returned the claims forms to the Department. She was sent benefit checks even after April 28, 2003, when it was determined that she was not eligible to receive benefits.

According to 19 *Del. C.* § 3302(17), a person is unemployed when such person received either no wages or, where working less than full-time, the wages received are less than the weekly benefit amount plus the greater of \$10 or 50% of the weekly benefit amount. The section continues that the Department of Labor prescribes regulations making distinctions, as the Department deems necessary. Regulation 15, Department of Labor,

Division of Unemployment Insurance regulations, defines a partially unemployed person as “one who during a particular work week, (I) earned less than his weekly benefit amount plus two dollars, (II) was employed by a regular employe[r], (III) worked less than his normal customary full-time hours for such regular employer because of lack of full-time work.”⁷

Herold does not qualify as a partially unemployed person. She earned less than her weekly benefit amount plus two dollars and was employed by a regular employer, here Sears. However, as she was not employed full-time, she did not work less than her customary full-time hours. Since returning to work for Sears, Herold was employed to work no more than 20 hours per week. There was no change in the conditions of her hire.

There is substantial evidence showing that Herold was employed part-time and Herold does not dispute it. The Board’s holding is free from legal error in that Herold is not entitled to unemployment benefits because part-time employees are not included in the definition of partially unemployed persons.

Conclusion

For the reasons stated herein, the decision of the Unemployment Insurance Appeal Board is AFFIRMED.

Sincerely,

⁷ Regulation 15(1)(a)(III).

JOH/krb
cc Prothonotary