STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: April 10, 2018]

LVD STAFFING, INC., d/b/a EXPRESS EMPLOYMENT PROFESSIONALS	:	
v.	:	
STATE OF RHODE ISLAND, DEPARTMENT OF LABOR AND TRAINING, DIVISION OF LABOR STANDARDS, by and through its Director, CHARLES J. FOGARTY, and CAROLYN B. CHARNLEY	:	**C.A. No. PC-2011-6536**

DECISION

K. RODGERS, J. This matter is before the Court on Plaintiff LVD Staffing, Inc., d/b/a/ Express Employment Professionals' (Express) appeal from a decision by a Department of Labor and Training hearing officer (the DLT Decision) to award Appellee Carolyn B. Charnley (Charnley) holiday and vacation compensation in the amount of $792.00.

Jurisdiction is pursuant to G.L. 1956 § 42-35-15. For the reasons that follow, the DLT Decision is affirmed in part and modified in part.

I

Facts and Travel

On or about March 5, 2011, Charnley and Bruce Day (Day) each filed a complaint with the Department of Labor and Training's Division of Labor Standards (the Division) alleging non-payment of wages for holiday and vacation pay due at the time of their respective

separations from Express.[1] On September 23, 2011, hearing officer Valentino D. Lombardi, Esquire (the Hearing Officer), as the authorized representative of the Director of the Department of Labor and Training, conducted a hearing in accordance with G.L. 1956 § 28-14-19.

The following facts were deduced at the hearing. LVD Staffing, Inc. is a local franchise of Express, a national chain providing staffing services. In December 2008, Charnley interviewed with "Elaine"[2] on behalf of Express, at which time Elaine gave Charnley an employee handbook which included an insert entitled "Holiday and Vacation Pay." On the insert, "Holiday Pay" is followed by a single asterisk which reads, "When your normal work schedule is less than 8 hours per day, holiday and vacation pay will be adjusted accordingly." "Vacation Pay" is followed by double asterisks which reads, "Benefits may vary at different locations." According to Charnley's testimony, Elaine informed Charnley that these pay provisions applied to her. Hr'g Tr. 9-10, Sept. 23, 2011 (Hr'g Tr.).

Thereafter, Charnley worked with Express from September 22, 2009[3] through March 3, 2011 and was placed at Wild Tree Herbs. Hr'g Tr. 33. Charnley was assigned to one job during that time and was ultimately hired by Wild Tree Herbs, resulting in her separation from Express in March 2011. Charnley did not receive any holiday or vacation pay during the time she worked with Express. Charnley testified that she inquired about holiday and vacation pay on a

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[1] Charnley's original complaint filed with the Division also sought payment of wages at the rate of time-and-a-half when she did work on any company-recognized holiday, which payment was resolved between the parties to Charnley's benefit. It is the payment of wages for company-recognized holidays when the employee did not work which remains an issue in the instant case, as well as paid vacation.

[2] Charnley was unable to identify Elaine's surname. *See* Hr'g Tr. 9.

[3] Charnley was first assigned to Wild Tree Herbs in May 2009 which, for reasons unrelated to the issues before this Court, did not continue. Charnley was eventually reassigned to Wild Tree Herbs on September 22, 2009, with no other intervening assignments from Express. The parties agree that, for purposes of this appeal, Charnley's only relevant employment period with Express is from September 22, 2009 through March 3, 2011.

couple of occasions to Maria Lopes, the Light Industrial Recruiter at Express. Hr'g Tr. 13. Additionally, Charnley requested that Julie Belanger, the manager and operator of Wild Tree Herbs, call Express to address the holiday and vacation pay on Charnley's behalf. Through those inquiries, Charnley was first informed that holiday pay is only paid after one thousand hours had been worked, and was later informed that holiday pay was only available after 2,500 hours worked. Hr'g Tr. 55. When Charnley ultimately separated from Express, she spoke with Lilliana Dolan, the owner of the local Express office, who informed Charnley that Express had not paid holiday or vacation pay in two years due to the state of the economy.

Charnley and Day both testified at the hearing, as did Maria Lopes and Susan Esposito on behalf of Express. Unlike Charnley who testified that she received and discussed the Holiday and Vacation Pay insert during her December 2008 interview with Express, Day testified that the Employee Handbook he received during his interview with Express in 2010 did not include the same insert, that he only saw the Holiday and Vacation Pay insert when Charnley provided him a copy, and that he was required to and did execute an acknowledgment that Express would only pay him for shifts he actually worked. The Hearing Officer found that Charnley was entitled to compensation for her holiday and vacation time, but concluded that Day was not entitled to similar pay.[4] The Hearing Officer reasoned that based upon the Holiday and Vacation Pay insert included in the handbook which Charnley obtained in her December 2008 interview, she was entitled to holiday and vacation pay consistent with the terms set forth therein. The Hearing Officer explained that Express "presented no credible or substantial testimonial or other evidence to dispute the testimony of [Charnley]" that she had received a document detailing holiday and vacation pay and discussed the same with a representative of Express. *See* DLT Decision 5. As

[4] Only Charnley's appeal is now before this Court.

such, the Hearing Officer declared that "[i]t must be concluded that the terms of the Holiday and Vacation Benefits flyer pertained to [Charnley's] employment." *Id.* In considering her work schedule, the Hearing Officer thereafter determined that Charnley was "entitled to holiday pay for seven holidays, New Year's Day 2010, Memorial Day 2010, Independence Day 2010, Labor Day 2010, Christmas Day 2010 and New Year's Day 2011."[5]

Express appealed the DLT Decision on grounds that the Hearing Officer erred in weighing the reliable, probative and substantial evidence. Compl. ¶ 6. Express contends that the Hearing Officer awarded Charnley holiday and vacation pay "based solely on a [sic] Charnley's testimony she was promised holiday and vacation pay precisely as stated in a Franchisor produced handbook and flyer dated (01/08) and notwithstanding language in close proximity that stated 'benefits may vary by location.'" Appellant's Mem. 1. Furthermore, Express argues that the DLT Decision granting the award was "made notwithstanding the employer provided tow [sic] credible witnesses who gave testimony that LVD Staffing Inc. maintained a policy of no holiday pay and no vacation pay." *Id.* In rendering the award, Express contends the hearing officer improperly rejected the testimony of Esposito and Lopes and instead relied solely on Charnley's testimony. *Id.* at 11. Consequently, Express now asks this Court to conclude that Express's witnesses at the hearing were more credible than Charnley and to reverse the DLT Decision.

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[5]In listing just six holidays for which Charnley would receive holiday pay, it is evident that the Hearing Officer inadvertently omitted Thanksgiving 2010, which is provided for on the Holiday and Vacation Pay insert. Additionally, although not raised on appeal by Express, this Court notes that Charnley is not entitled to holiday pay for Labor Day 2010 because Charnley's original complaint filed with the Division sought time-and-a-half holiday pay when she did work a holiday, including Labor Day 2010, for which Express ultimately agreed to pay. *See* n.1, *supra*. This Court concludes that it was error to include Labor Day 2010 as one of the seven holidays for which Charnley was awarded $462, and that such award should be reduced accordingly to $396. The twenty-five percent penalty assessed against Express should be reduced accordingly as well.

II

Standard of Review

Section 42-35-15 of the Administrative Procedures Act governs this Court's review of the DLT Decision. *See Grasso v. Raimondo*, 177 A.3d 482, 486 (R.I. 2018). Section 42-35-15 provides in pertinent part:

> "(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 or 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." Sec. 42-35-15(g).

Our Supreme Court has determined that '"[t]his Court does not substitute its judgment for that of the agency concerning the credibility of witnesses or the weight of the evidence concerning questions of fact."' *Beagan v. R.I. Dep't of Labor & Training*, 162 A.3d 619, 626 (R.I. 2017) (quoting *Tierney v. Dep't of Human Servs.*, 793 A.2d 210, 213 (R.I. 2002)). When this Court reviews questions of fact, it "may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous."' *Guarino v. Dep't of Soc. Welfare*, 122 R.I. 583, 410 A.2d 425 (1980); *see also Envtl. Sci. Corp. v. Durfee*, 621 A.2d 200, 206 (R.I. 1993); *Liberty Mut. Ins. Co. v. Janes*, 586 A.2d 536, 537 (R.I. 1991) (reviewing court is "not privileged to assess the credibility of witnesses and may not substitute its judgment" concerning the weight of the evidence on questions of fact).

Where there is legally competent evidence in the record to support the agency's decision, this Court must uphold that decision. *Barrington Sch. Comm. v. R.I. State Labor Relations Bd.*, 608 A.2d 1126, 1138 (R.I. 1992); *Blue Cross & Blue Shield of R.I. v. Caldarone*, 520 A.2d 969, 972 (R.I. 1987). Our Supreme Court has determined that "'relevant evidence that a reasonable mind might accept as adequate to support a conclusion means an amount more than a scintilla but less than a preponderance.'" *Town of Burrillville v. R.I. State Labor Relations Bd.*, 921 A.2d 113, 118 (R.I. 2007) (quoting *Ctr. for Behavioral Health, Rhode Island, Inc. v. Barros*, 710 A.2d 680, 684 (R.I. 1998)). Thus, this Court may reverse factual conclusions of administrative agencies '"only when they are totally devoid of competent evidentiary support in the record."' *Baker v. Dep't of Emp't and Training Bd. of Review*, 637 A.2d 360, 363 (R.I. 1994) (quoting *Milardo v. Coastal Res. Mgmt. Council of R.I.*, 434 A.2d 266, 272 (R.I. 1981)).

III

Analysis

This Court must now determine whether the Administrative Decision of the Rhode Island Department of Labor and Training was founded on legally competent evidence or whether the agency's findings were clearly erroneous. Express essentially asks this Court to substitute its judgment on the weight of the evidence presented and conclude that its two witnesses and the practice of the company warrant reversal of the DLT Decision. *See* Appellant's Mem. 12 (arguing that "[t]he employer's testimony was not only more credible, but it agreed with the actual practice"). This is an impermissible result in light of the competent, relevant evidence in the record which supports the agency's decision. The Hearing Officer in the instant case relied upon the testimony of Charnley, the Holiday and Vacation Pay insert she was provided at her December 2008 interview, and the company's inability to present credible evidence to refute the

information that Charnley claims she was provided in advance of her hiring by Express. DLT Decision 5. This is surely more than a scintilla of relevant evidence which reasonable minds would accept as adequate to support a finding in Charnley's favor. *See Town of Burrillville*, 921 A.2d at 118; *Ctr. for Behavioral Health*, 710 A.2d at 684. Accordingly, this Court is without authority to substitute its judgment concerning the weight of the evidence offered by Express. *See Baker*, 673 A.2d at 363; *Envtl. Sci. Corp.*, 621 A.2d at 208; *Liberty Mut. Ins. Co.*, 586 A.2d at 537.

Additionally, this Court is not persuaded by Express's argument that the Hearing Officer's failure to consider the evidence in light of *Oken v. Nat'l Chain Co.*, 424 A.2d 234 (R.I. 1981) constitutes error. *See* Appellant's Mem. 12-14. Express contends that Charnley was put on notice of a different holiday and vacation pay policy than she had been given in writing in December 2008 with every passing holiday where her paycheck did not include holiday pay. Relying on *Oken*, Express asserts that Charnley accepted Express's interpretation of the terms and conditions of employment by not quitting and continuing in her employment even after not receiving holiday pay in her paycheck. *Id.* at 12. This Court does not read *Oken* as broadly as Appellant suggests. In *Oken*, a commissioned employee sought payment of sales he alleged he was due. 424 A.2d at 235. The Court held that the employee was due commission for sales made before he left his employment and further held that the employer's modification of the commission rate agreement applied to the employee's earned commission following that modification. *See id.* at 236-37. In that case, the employer drafted and delivered a written notice of the change in commission percentages to the employee, and a subsequent conversation took place during which the employee was specifically advised when the employer interpreted the new rates to take effect; in the course of that conversation, the employee was told that if he

didn't like the rate modification, he could quit. *Id.* The Court concluded that the employee's election to stay in his employment was an agreement to be bound by the employer's modification. *Id.* at 237.

Here, Charnley's receipt of paychecks without holiday pay included does not rise to the level of a written notice of modification, a subsequent discussion and an ultimatum as was the case in *Oken*. The evidence before the Hearing Officer did not demonstrate that, during the course of her employment with Express, she had been expressly told that the holiday and vacation pay policy was anything other than what she was given in writing in December 2008.[6] There is no evidence that Express provided Charnley with an updated handbook concerning holiday and vacation pay. Instead, the Hearing Officer found that Charnley received the employer handbook with the Holiday and Vacation Pay insert at the time of her hire, that she discussed it with a representative of Express in December 2008, and it was that same flyer that she relied on in asserting her entitlement to holiday and vacation pay. The facts here are distinguishable from those in *Oken,* and the Hearing Officer did not commit error by failing to reach the same result as in *Oken*.

Finally, this Court disagrees with Express's contention that the Holiday and Vacation Pay insert did not apply to Charnley because there was a disclaimer that "[b]enefits varied by

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[6] Express suggests that Charnley's credibility should be challenged in this area. *See* Appellant's Mem. 13 ("She was determined to avoid any attempt to pin her down to any awareness of any contrary interpretation of the terms and conditions of employment. . . . Charnley was careful to avoid admitting she was told of the policy, no holiday pay, no vacation pay."). Express even suggests that the case be remanded for further credibility determinations. *Id.* at 14 ("[A]t best, the claimant might be entitled to a remand to determine if her subjective belief was truly weighty enough to warrant an award of pay for Christmas day, 2009 or New Years day 2010."). Issues of credibility, however, are not properly before this Court on an administrative appeal absent a showing that the Hearing Officer was clearly wrong. *See Envtl. Sci. Corp.*, 621 A.2d at 206; *Liberty Mut. Ins. Co.*, 586 A.2d at 537. Nor is there any basis for remanding this case back to the Hearing Officer to address a credibility issue that is otherwise not reviewable by this Court.

location." *See* Appellant's Mem. 14. Express fails to recognize that the disclaimer on the insert, as denoted by double asterisks, applies only to vacation time and not to holiday pay. In any event, the Hearing Officer considered all the evidence and determined that, consistent with what Charnley had been told in December 2008 and absent any competent, substantial evidence to the contrary, both the holiday pay and the vacation pay provisions applied to Charnley.

IV

Conclusion

After a review of the record, this Court finds that the DLT Decision was supported by legally competent evidence contained in the record and, except as noted herein, is not clearly erroneous in view of the reliable, probative, and substantial evidence. The DLT Decision is modified only to the extent that holiday pay for Labor Day 2010 shall be excluded from the calculation of pay owed to Carolyn B. Charnley, reducing the holiday pay to $396; vacation pay in the amount of $330 remains the same, for a total award of $726 from which standard deductions should be made. The twenty-five percent penalty assessed against Express shall likewise be reduced to $181.50. In all other respects, the DLT Decision is affirmed.

Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	LVD Staffing, Inc., d/b/a Express Employment Professionals v. State of Rhode Island, Department of Labor and Training, et al.
CASE NO:	C.A. No. PC-2011-6536
COURT:	Providence County Superior Court
DATE DECISION FILED:	April 10, 2018
JUSTICE/MAGISTRATE:	K. Rodgers, J.
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