

STATE OF NEW HAMPSHIRE
SUPREME COURT

1995 TERM
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APPEAL OF CHRISTINA DONALDSON
REGARDING UNEMPLOYMENT COMPENSATION

APPEAL PURSUANT TO RSA 282-A:67
FROM A FINAL DECISION OF
NEW HAMPSHIRE EMPLOYMENT SECURITY

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SUPREME COURT DOCKET NO. _____
NOTICE OF APPEAL
(RULE 10)

APPEAL OF CHRISTINA DONALDSON
REGARDING UNEMPLOYMENT COMPENSATION

Appealing Party: Christina Donaldson
Administrative Agency: New Hampshire Department of
Employment Security
Other Interested Parties: The Woodward Home, Inc.

I. The Agency Decision

This is an appeal of a final decision of New Hampshire Employment Security (NHES). NHES denied unemployment compensation to Christina Donaldson, a 70 year old woman who worked for over 24 years as a nurse's aide. The basis of the denial was "misconduct" that occurred in a phone call made to Mrs. Donaldson by her employer while she was home on vacation. All decisions in this matter are annexed in the Appendix.

II. Questions Presented

1. Did NHES wrongly apply the misconduct standard in Appeal of New Hampshire Sweepstakes Commission, 130 N.H. 659, 664 (1988) by basing its decision on the employer's version of a disputed phone conversation to the worker while she was on vacation and ignoring her 24 year record of good job performance?

2. Do credibility determinations made by the Appeal Tribunal require support by substantial evidence and specific findings as to the relevant evidence considered?

3. Were Mrs. Donaldson's statutory rights under RSA 282-A:158 and her constitutional rights to due process under the state and federal constitution violated when NHES gave her inadequate oral and written notice of the option to be represented by counsel at the Appeal Tribunal?

III. Constitutional, Statutory and Administrative Regulatory Provisions

A. New Hampshire Constitution Part I, Article 15:

No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel. No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; ...

B. United States Constitution 14th Amendment:

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

C. RSA 282-A:32 I(b):

An individual shall be disqualified for benefits:

I. Until he has earned in each of 5 weeks wages in employment as defined in RSA 282-A: g, except RSA 282-A:9 IV(f), or wages earned in a like manner in another state, of at least 20 percent more than his weekly benefit amount in effect when the act occurs, subsequent to the date;

(b) He was discharged for misconduct connected with his work, if so found by the Commissioner.

D. RSA 282-A:158:

... Any individual claiming benefits before the commissioner or his representative may be represented by counsel or other duly authorized agent; but no such counsel or agent shall either charge or receive for such services more than an amount approved by the commissioner. Any person who violates any provision of this section shall be guilty of a misdemeanor.

E. RSA 282-A:56:

A hearing shall be conducted in such a manner as to ensure a fair and impartial hearing to the interested parties. The appeal tribunal shall hear the appeal de novo and shall not be bound by prior findings or determinations of the department of employment security although the records of said department shall be part of the evidence to be considered by the tribunal. An appeal shall be filed and presented and the hearing conducted in accordance with rules adopted by the commissioner. Such rules need not conform to common law or statutory rules of evidence or other technical rules of procedure...

F. RSA 282-A:58:

In every appeal, except those withdrawn, the chairman shall prepare a written decision which shall be sent by registered mail to each interested party at the last address of each according to the records of the department of employment security. The decision, except one on an appeal dismissed for lack of prosecution or defaulted for failure

to attend, among other necessary things as determined by the commissioner, shall: set forth all the material findings and specific provisions of law necessary to support the conclusions...

G. Emp. 201.10 Decision.

The commissioner's decision shall be rendered promptly after the case is submitted, and shall contain a statement of the issues, the findings of fact, the conclusions, and the reasons therefor.

IV. Statement of the Case

New Hampshire Employment Security (NHES) denied Christina Donaldson unemployment compensation on the grounds of misconduct because of a phone call her employer made to Mrs. Donaldson on August 19, 1994. This happened when Mrs. Donaldson was home on vacation from her job. The administrator of Woodward Home, Susan Shaw, claimed and the Appeal Tribunal held, that Mrs. Donaldson refused over the phone to work with her charge nurse. Mrs. Donaldson contests the allegation that she refused to work with the charge nurse or that she ever said on the telephone that she would not work with the charge nurse.

Mrs. Donaldson, a 70 year old woman from Keene, New Hampshire, worked at Woodward Home as a nurse's aide for over 24 years. At the time of her termination, Mrs. Donaldson earned wages of \$6.92 per hour. For over 20 years until early 1994, Mrs. Donaldson worked third shift 11:00 p.m. to 7:00 a.m., 7 days a

week (56 hours regular time). Prior to 1994, Mrs. Donaldson never took a sick day. She also never took a vacation in over 20 years until the early 1990's when the administration required her to take vacations. Appendix at 5.

There is no dispute that Mrs. Donaldson was a very good worker for over 24 years. The Appeal Tribunal stipulated that the employer was "basically satisfied with the claimant's work performance." Appendix at 11. At the Appeal Tribunal, the administrator for Woodward Home declared there was "no problem" with the claimant's work performance and she read from recent work evaluations that described the claimant as "dependable" and "conscientious". Two former co-workers testified that Mrs. Donaldson did an excellent job, was completely dependable and was appreciated by residents due to her generosity. One stated Mrs. Donaldson was a very honest person.

In February 1994, the Woodward Home reduced Mrs. Donaldson to 24 or 32 work hours per week. Appendix at 5. Around the same time, the administrator terminated a very popular charge nurse (who was a registered nurse) and replaced her with a Licensed Practical Nurse (L.P.N.). Mrs. Donaldson found working with the L.P.N. very stressful. Appendix at 5,6. Mrs. Donaldson believed this L.P.N. was criticizing her behind her

back. She also believed the L.P.N. wanted to get rid of her, in part, because of her age. Appendix at 5. Because Mrs. Donaldson needed the income, she resolved to continue working.

In early August, 1994, Mrs. Donaldson became ill. She was unable to work due to illness on August 2, 1994 and August 5, 1994. Mrs. Donaldson suffers from hypertension, chronic obstructive pulmonary disease and diabetes. Appendix at 10. She discussed her illness with the administrator and the administrator told her to stay home on August 6, 1994. Mrs. Donaldson had scheduled a two week vacation from August 7-21, 1994. Mrs. Donaldson took this vacation.

On August 19, 1994, while on vacation, Mrs. Donaldson received a phone call at home from her charge nurse. The charge nurse asked if Mrs. Donaldson would be returning to work on August 21, 1994, and Mrs. Donaldson replied that she did not know if she would be okay that day. Mrs. Donaldson then received another phone call at home from Susan Shaw, the administrator at the Woodward Home.

In this conversation, Mrs. Donaldson told the administrator that she was upset with the charge nurse. Mrs. Donaldson believed the charge nurse was spreading rumors about her competence to perform her job. Mrs. Donaldson disputes any allegation that she refused to

work with the charge nurse.

For reasons which remain unclear, in the course of their phone conversation, the administrator terminated Mrs. Donaldson. The administrator claimed that Mrs. Donaldson was unwilling to work with the charge nurse, was dissatisfied with administration, and that she was having difficulty adjusting to more stringent job requirements. The administrator never gave the claimant any warnings, oral or written. She testified she did not know why she did not call Mrs. Donaldson into the office to discuss the August 19th phone call after it happened.

On August 25, 1994, Mrs. Donaldson filed a claim for unemployment compensation. After an initial denial, Mrs. Donaldson appealed to the Appeal Tribunal stating, "I feel I was discharged for nothing". Appendix at 9. At the Appeal Tribunal, Mrs. Donaldson testified that she never stated she would not work with the charge nurse in the August 19, 1994 phone call from the administrator. The Appeal Tribunal found otherwise.

In concluding that Mrs. Donaldson committed misconduct, the Appeal Tribunal believed the administrator's testimony was credible and the claimant's testimony was "illogical" and not credible. The Appeal

Tribunal cited the claimant's statements about "the events" and her blanket denials of statements adverse to the charge nurse as the basis for its credibility determination. Appendix at 12.

At the time of the Appeal Tribunal hearing, Mrs. Donaldson did not know she could retain her own attorney or that an attorney could help her at the Appeal Tribunal. Appendix at 24. The Appeal Tribunal chairperson never orally advised Mrs. Donaldson that she could be represented under RSA 282-A:158. Written information about the right to counsel was so buried and obscure in NHES documents that the claimant never saw it. Appendix at 60-63. Mrs. Donaldson has a seventh grade education and has limited reading skills. Appendix at 25.

The notice that NHES provides about the option to be represented by counsel is both contradictory and confusing. One handout NHES alleges it gives to claimants, the Claimant's Guide to Unemployment Compensation Appeals, advises claimants that lawyers are not usually necessary to their appeal. Appendix at 62.

NHES advised Mrs. Donaldson that an Employment Security claims representative could assist her at the Appeal Tribunal. The claims representative came to the Appeal Tribunal hearing, ostensibly with the purpose of representation. The claimant's representative played a

largely passive role, conducting minimal cross-examination and asking few questions of any witness.

The DES claims representative did not represent the claimant beyond the Appeal Tribunal. After the Appeal Tribunal denial, Mrs. Donaldson pursued her appeal pro se through the Appellate Board. She contacted counsel after she lost her appeal there. With the assistance of counsel, she requested reconsideration, raising three issues. Mrs. Donaldson disputed the misconduct finding. She contested the legal adequacy of the credibility determinations made by the Appeal Tribunal. She also argued her rights under RSA 282-A:158 and her constitutional right to procedural due process under the state and federal constitution were violated by inadequate notice of the option to be represented by counsel. The Appellate Board denied the Motion for Reconsideration without explanation. Appendix at 76.

V. Jurisdictional Basis for Appeal

RSA 282-A:67 authorizes an appeal to the Supreme Court from a final decision of the New Hampshire Department of Employment Security. In this case, all administrative remedies have been exhausted.

VI. Reasons Why This Appeal Should Be Accepted For Review

This appeal raises three substantial issues of unemployment compensation law. This Court's review is necessary to rectify the State's errors of law, to undo a serious injustice to Mrs. Donaldson, and to protect the fairness of the appeal process.

A. THE STATE WRONGLY APPLIED THE HOLDING IN APPEAL OF NEW HAMPSHIRE SWEEPSTAKES COMMISSION AGAINST MRS. DONALDSON.

The first issue raised in this appeal is the State's misapplication of the misconduct standard under RSA 282-A:32 I(b). The State revised New Hampshire's misconduct test outlined in Appeal of New Hampshire Sweepstakes Commission, 130 N.H. 659, 664 (1988), deleting a key requirement developed by this Court.

Under New Hampshire law, isolated or inadvertent instances of unsatisfactory conduct are not sufficient for a finding of misconduct but recurring careless or negligent acts are enough to constitute misconduct. Appeal of Miller, 122 N.H. 993, 994 (1982). If there are no recurring acts of carelessness or negligence, New Hampshire law implies that a single instance of misconduct may be sufficient for a finding of misconduct if it is a "deliberate violation of a company rule reasonably designed to protect the legitimate business interests of the employer." Appeal of New Hampshire

Sweepstakes Commission, 130 N.H. 659, 664 (1988).

Mrs. Donaldson did not deliberately violate any company rule as required under New Hampshire Sweepstakes when a single instance of misconduct is alleged. She has firmly and consistently disputed that she ever refused to work with her charge nurse. In this case, the alleged misconduct is Mrs. Donaldson's words in her August 19, 1994 phone conversation with the administrator of Woodward Home.

There is no evidence that Mrs. Donaldson knowingly violated any rule. At the Appeal Tribunal, the employer never introduced its rules into the record or made clear what rule was at issue. Mrs. Donaldson never received a warning, oral or written. The employer did not show that the employee had knowledge of a rule and chose deliberately to violate the rule. There is no way to know about Mrs. Donaldson's compliance with rules because personnel policies, warning rules and termination procedures were not introduced.

The Appeal Tribunal decision created an improper misconduct test for Mrs. Donaldson. Under that decision, an intentional disregard of the employer's best interests by refusal to continue working with the charge nurse was enough. Appendix at 12. By this test, any circumstance where there is a single alleged incident of misconduct could be disqualifying if there

was an intentional disregard of the employer's best interests. Such a test would wrongly extend New Hampshire Sweepstakes so that claimants could be disqualified for isolated or inadvertent instances of unsatisfactory conduct, contrary to the holding in Appeal of Miller, 122 N.H. 993, 994 (1982).

What is shocking is that the Appeal Tribunal ignored the fact that the claimant had an undisputed history of good job performance for over 24 years. The Appeal Tribunal did not consider that testimony relevant. In concluding that Mrs. Donaldson committed misconduct, a lengthy objective history is discounted in favor of one disputed phone call.

The danger here is obvious: employers can override years of objectively good conduct by asserting undocumented falsehood that can only be disputed, not disproven. The allegation with no history becomes the critical issue, not the objective work performance. The Appeal Tribunal never explained why it gave so little weight to Mrs. Donaldson's work history when contrasted to a disputed phone call.

The Appeal Tribunal also minimized the fact that the August 19, 1994 phone call occurred away from work and off work time. RSA 282-A:32 I(b) requires that misconduct must be connected to work. Mrs. Donaldson's comments in a phone call while at home on vacation are

not sufficiently "connected to work" to be considered work-related misconduct. The Appeal Tribunal committed error by treating the August 19th phone call as if it were an on-the-job, on-work time incident.

B. CREDIBILITY DETERMINATIONS MUST BE SUPPORTED BY MORE THAN THREADBARE CONCLUSIONS.

The second issue raised in this appeal is the legal adequacy of the credibility determination made by the Appeal Tribunal finding the claimant's testimony not credible and the employer's testimony credible. The Appeal Tribunal drew conclusions about credibility without offering anything but the barest of rationales.

This Court has previously stated that its task is to determine "whether as a matter of law there was any evidence presented to the Appeal Tribunal upon which it could reasonably have decided as it did. Hewitt v. Riley, 94 N.H. 460, 451 (1947); see also RSA 282-A:67, V(d) (Supp. 1994) (this Court shall reverse decisions of tribunal only if it is "clearly erroneous in view of the substantial evidence on the whole record"). Where the testimony of the claimant and the employer is contradictory, we must accept the tribunal's decision as to whom to believe. Appeal of T and M Associates, 134 N.H. 617, 621-622 (1991).

This case presents the extreme situation where a veteran 24 year worker's credibility is decided solely

in reference to one disputed phone call made off work hours. There is no indication that the worker's job performance or former co-worker testimony counted at all as a consideration. The Appeal Tribunal decided based on whom it believed about the August 19th phone call. These facts point to the conclusion that the Appeal Tribunal's credibility determination was "clearly erroneous in view of substantial evidence on the whole record." RSA 282-A:67 V(d).

Because of the importance of credibility, more should be required of the fact-finder than a threadbare conclusion. Did the credibility determination take into account the claimant's work history? Or her seventh grade education? Or the fact that she was, in essence, pro se? What precise factors persuaded the Appeal Tribunal that the employer was credible?

Without standards, nothing prevents the Appeal Tribunal from drawing arbitrary conclusions based on looks, inarticulateness, personality preference or other such insubstantial and possibly irrelevant criteria. The Appeal Tribunal's credibility determinations are inconsistent with the obligation under RSA 282-A:58 to "set forth all the material findings and specific provisions of law necessary to support the conclusions." See also Emp. 201.10 (requiring the reasons for conclusions). The Appeal Tribunal certainly did

not explain why it believed the employer.

An analogous administrative agency (Social Security Administration) offers an example of how to impose standards on credibility determinations in an administrative process. See, DaRosa v. Secretary of Health and Human Services, 803 F.2d 24, 26 (1st Cir. 1985); Gray v. Heckler, 760 F.2d 369, 374 (1st Cir. 1985). DaRosa imposes the requirement that credibility determinations be based on substantial evidence and supported by specific findings as to the relevant evidence considered in choosing to disbelieve a plaintiff.

C. THE STATE FAILED TO PROVIDE LEGALLY
ADEQUATE NOTICE THAT MRS. DONALDSON
COULD BE REPRESENTED BY AN ATTORNEY.

Claimants must know they have the option to retain counsel. See RSA 282-A:158. Without knowledge from notice, uneducated claimants like Mrs. Donaldson will never know of the option and potential benefit of attorney representation. The present notice provided by NHES is so obscure and buried that it is likely to be missed. Mrs. Donaldson did not see it. Appendix at 60-63. This lack of notice undermines the requirement under RSA 282-A:56 that the Appeal Tribunal be "fair and impartial". Without counsel, some uneducated claimants will be unable to present their cases coherently, even if their case has merit.

Mrs. Donaldson is a good example. She did not know that she could retain an attorney at the Appeal Tribunal. At the Appeal Tribunal hearing, there was no mention of the claimant's option to be represented by counsel. The claimant did not knowingly or intelligently understand or decide not to be represented by competent counsel of her choice.

This total lack of oral notice was complimented by inadequate written notice about the claimant's rights under RSA 282-A:158. Neither the Certifying Officer's denial nor the Appeal to Appeal Tribunal form explicitly mention the opportunity to be represented by counsel. Appendix at 7-9. The closest the Appeal to Appeal Tribunal form comes to notice is the statement in small print "Appear at this hearing with witnesses, representatives, records and all evidence necessary to present fully your case." Mention of representatives is ambiguous and does not clearly refer to attorneys.

The Claimant's Guide to Unemployment Compensation Benefit Appeals, a hand-out the State alleges it gives claimants, actually discourages the use of attorneys. In answer to the question "Do you need a lawyer?", the State, in bold print, answers "Not Usually". The answer then goes on to explain that either side may be represented. A further footnote in minuscule print refers to a different page where the claimant is ad-

vised a free or low cost lawyer may be available. Appendix at 62,63 . This notice is so hidden and contradictory that it is not meaningful.

Complicating the lack of notice is the fact that NHES steered Mrs. Donaldson to representation at the Appeal Tribunal by an Employment Security claims representative. After Mrs. Donaldson was denied by the Certifying Officer, Employment Security advised her that she could obtain representation from one of their claims representatives. Mrs. Donaldson followed this advice.

Representation by a layperson untrained in cross-examination who works for your adversary is no substitute for representation by an attorney. As this Court has previously recognized, "although the state is not required to provide counsel, the private retention of counsel can be invaluable when a claimant cannot effectively present a sometime complicated factual case before the DES." Royer v. State Dept. of Employment Security, 118 N.H. 673, 677 (1978).

Mrs. Donaldson was severely prejudiced by the lack of counsel. The NHES claims representative failed to make legal arguments; failed to cross-examine the employer about whether proper company procedures were followed regarding warnings and termination; failed to introduce Woodward Home's rules; failed to cross-exam-

ine the administrator about her evolving inconsistent story; failed to object to hearsay testimony by the administrator; and failed to demand that positive work evaluations, recent awards given to the claimant by the Woodward Home Board of Directors for dedicated service, and supporting sworn statements which the claimant brought to the Appeal Tribunal be made part of the record.

For the statutory right under RSA 282-A:158 to be effective, claimants must know the option to be represented exists. The present state of inadequate notice coupled with the NHES practice of steering claimants to claims representatives for representation insures that the statutory option under RSA 282-A:158 will remain more appearance than reality. Mrs. Donaldson's rights under RSA 282-A:158 were violated because she never knew she could retain counsel at the Appeal Tribunal, the key fact-finding forum in the appeals process. If she had received such notice, she could have then decided if she wanted to proceed with the claims representative or seek counsel.

Due process of law requires that claimants knowingly and intelligently understand or waive their option to be represented by counsel at the Appeal Tribunal. Due process further requires that claimants understand what benefits can be derived by competent

counsel; what legal services organizations can represent them without charge; and that private attorneys can represent them on a contingency fee basis. See, Lewis v. Secretary of Health and Human Services, Civ. No. 92-252-B (D.N.H. August 9, 1993) (administrative law judge did not insure that a pro se claimant's decision to proceed without counsel at Social Security hearing was knowing and intelligent). Appendix at 49-51. See also, Catanese V. Com. Unemployment Comp. Bd., 452 A.2d 929 (Pa Cmwlth 1982); Felders v. Review Bd. of Ind. Employment Sec., Ind. App. 419 NE 2d 190 (1981); Sotak v. Review Bd. of Indiana Employment, etc., Ind. App. 422 NE 2d 445 (1981). Appendix at 67-75.

The State's inadequate notice to Mrs. Donaldson violates Part I, Article 15 of the New Hampshire Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution. Review by this Court is needed to protect the fundamental fairness of the unemployment appeals process. Without improved notice, large numbers of poorly educated or functionally illiterate claimants will remain unaware of their rights.

CONCLUSION

This Court should accept this appeal, reverse Employment Security's decision and remand this matter for calculation of Mrs. Donaldson's benefits.

In addition, Mrs. Donaldson reserves her right, pursuant to 42 U.S.C. § 1988, to request reasonable attorney's fees against NHES on the constitutional claim presented, should she prevail on that claim.

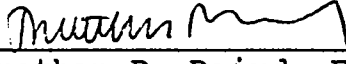
Respectfully Submitted,

Christina Donaldson

Through Her Attorneys,
New Hampshire Legal Assistance


5/18/95
Date

By:


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CERTIFICATE OF COMPLIANCE WITH RULE 10(1)(i)

I hereby certify that each issue specifically raised herein has been presented before the Department of Employment Security and has been properly preserved for review.


Jonathan P. Baird, Esquire

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appeal of Christina Donaldson, was mailed, first-class, postage prepaid to Charles H. Bradley, III, Esq., N.H. Department of Employment Security, 32 S. Main St., Concord, NH 03301, Daniel Mullen, Esq., Assistant Attorney General, 25 Capitol St., Concord, NH 03301, and Susan L. Shaw, Administrator, Woodward Homes, 194-202 Court St., Keene, NH 03431, on this the 19th day of May, 1995.


Jonathan P. Baird, Esquire