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NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3267-76

CAROL DEMECH,

Appellant,

v.

BOARD OF REVIEW, DEPARTMENT
OF LABOR AND INDUSTRY, STATE
OF NEW JERSEY, AND THE GREAT
ATLANTIC AND PACIFIC TEA
COMPANY,

Respondents.

Submitted October 4, 1978 -- Decided **OCT 23 1978**

Before Judges Fritz and Morgan.

On appeal from Board of Review, Department of
Labor and Industry.

Ms. Jane B. Terpstra, Acting Director, Legal Aid
Society of Mercer County, attorney for appellant
(Mr. Gerald B. Schenkman, of counsel; Mr. Richard
Dana Krebs, on the brief).

Mr. John J. Degnan, Attorney General of New Jersey,
attorney for respondent (Mr. Michael S. Bokar, Deputy
Attorney General, of counsel; Mr. Mark I. Siman,
Deputy Attorney General, on the brief).

PER CURIAM

Claimant, Carol Demech, appeals from a final decision of the Board of Review, Department of Labor and Industry, holding that she is disqualified under N.J.S.A. 43:21-5(b) from receiving unemployment benefits from August 1, 1976 through September 11, 1976 because she was discharged on August 4, 1976 for misconduct when she struck a fellow employee, a butcher named Al Hahn, with a 25 pound roast of beef. During the course of her testimony at the hearing, claimant, appearing without counsel, admitted this conduct, contending in mitigation or justification that she was provoked by Hahn's profane language and distasteful sexual overtones directed to her repeatedly while she worked with him.

The employer's attempted rebuttal of claimant's testimony regarding Hahn's extremely provocative conduct consisted of two witnesses who lacked personal knowledge of the incident. Nicholas Martell, the store manager, was never sworn and, not having been a witness to the incident, relied on accounts given by others who may or may not have been witnesses. James Varian, Assistant Personnel Director for A. & P., testified under oath concerning his interviews of other employees conducted days after the incident. Al Hahn, the other protagonist in the incident that led to claimant's discharge, was not produced by either party.

We regard this record as wholly inadequate to support the challenged opinion that claimant's conduct disqualified her for benefits in accordance with N.J.S.A. 43:21-5(b). Acceptance of Martell's unsworn testimony was in direct violation of the rule governing hearings in the Division of Employment Security which requires that "All oral testimony shall be under oath or affirmation and shall be recorded and kept." N.J.A.C. 12:20-3.2(a). Of even greater significance is the fact that the only evidence rebutting claimant's sworn testimony of extreme provocation was testimony by unidentified persons who were not produced as witnesses and whose versions of what occurred were therefore also unsworn and untested by any form of cross-examination. Even had claimant been represented by counsel, it would have been difficult, if not impossible, for her to have met the damaging kind of hearsay presented. Justice requires that an adverse decision not rest upon this kind of a record. Weston v. State, 60 N. J. 36 (1972).

Also claimant was unrepresented by counsel at the hearing. N.J.A.C. 12:20-3.2 provides:

(a) The proceedings [before the Division of Employment Security] shall be fair and impartial and shall be conducted in such a manner as may be best suited to determine the claimant's benefit rights. * * * The parties * * * may examine or cross-examine witnesses * * *. Where a party is not represented by counsel, the tribunal shall give him every assistance that does not interfere with the impartial discharge of its official duties. * * *

In our view, the examiner did not accord the unrepresented claimant "every assistance" when she failed to produce either witnesses having personal knowledge of the incident or Al Hahn, the alleged victim of the assault, whose knowledge could be expected to be on a par with claimant's. Krauss v. A. & M. Karagheusian, 13 N. J. 447, 456-57 (1953); cf. Softtexture Yarns v. Bd. of Review, Div. Empl. Sec., 59 N. J. Super. 57, 62-64 (App. Div. 1960).

Finally, although Hahn's allegedly provocative conduct was the sole factual issue presented for determination (claimant admitted throwing the roast), the examiner made no finding whatsoever concerning it; the issue went entirely without mention. Clearly, a reasoned decision in this matter requires the examiner to arrive at a conclusion as to whether claimant's testimony concerning Hahn's conduct was a complete fabrication, or whether the conduct justified the behavior for which claimant was discharged. The examiner's findings on this issue should be reflected in her final decision on remand.

We, therefore, vacate the challenged decision and remand the matter to the Board of Review with instructions to require another hearing consistent with the mandate of this opinion. All proceedings on remand, including administrative review of the examiner's findings and conclusions, should be completed within 60 days of the date of this opinion. We retain jurisdiction.

A TRUE COPY.

Elizabeth W. Langille
Clerk