STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

SANDS MOTEL, INC.,

Plaintiff, Case No. 147-325

vs.

EILEEN J. BACHMANN and
DEPARTMENT OF INDUSTRY,
LABOR AND HUMAN RELATIONS,

MEMORANDUM DECISION

Defendants.

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is an action to review a decision of the defendant department dated June 30, 1975, entered in an unemployment compensation proceeding which determined that the appeal tribunal's findings of fact were supported by the applicable records and evidence, and affirmed the decision of the appeal tribunal. The appeal tribunal's decision determined that the defendant employee Bachmann was eligible for unemployment benefits.

The appeal tribunal's findings of fact read as follows:

> "The employe worked about ten months as an office clerk and bookkeeper for the employer, a company engaged in the hotel and restaurant business. Her last day of work was December 13, 1974 (week 50).
>
> "The employer contended that the employe quit her employment. On Tuesday, December 10, 1974 (week 50), the employer's president informed the employe that her work schedule was being reduced to three days weekly (24 hours), effective January 1, 1975. The employe made no objection when the president explained that a reduction in office force was necessary and that she was given the reduced hours because of her attendance record. However, on Friday, December 13, 1974 (week 50), he notified her that her hours would be reduced effective December 16, 1974 instead of January 1, 1975, and during their discussion regarding her work performance and attendance which he considered unsatisfactory, tempers flared, and the president told her to get out as she was fired. Although a few minutes later he asked her to return to work, she did not do so but left the employer's office and did not work for the employer thereafter.
>
> "Although the language used by the president during his conversation with the employe on December 13, 1974, would have

"justified the employe in quitting, the employer-employe relationship was terminated by the employer's president when he told her she was discharged. It was not established that such discharge was for misconduct connected with her employment.

"The appeal tribunal therefore finds that in week 50 of 1974, the employe did not terminate her employment with the employer, within the meaning of section 108.04(7)(a) of the statutes, and that she was discharged by the employer, but not for misconduct connected with her employment, within the meaning of section 108.04(5) of the statutes."

THE ISSUES

After reviewing the plaintiff employer's brief and hearing the argument of counsel the Court concludes there are but two issues presented which require decision by the Court. These are:

(1) Is there credible evidence to sustain the appeal tribunal's findings of fact that were adopted by the department?

(2) Did the examiner sitting as the appeal tribunal employ procedures which denied the plaintiff employer due process?

Plaintiff's brief frames the evidence issue in terms of the findings of fact being "unsupported by substantial evidence". The substantial evidence test is that imposed by sec. 227.20(1)(d), Stats., and is applicable to review of administrative agency decisions under ch. 227, Stats. Unemployment compensation proceeding decision reviews are not governed by ch. 227 procedure but by ch. 102 procedures. Sec. 108.09(7), Stats., so provides. The applicable section is sec. 102.23(1), Stats., and in particular paragraph (d) 1 thereof. The department acts in excess of its powers when it makes a finding not supported by the evidence. Borgnis v. Falk Co. (1911), 147 Wis. 327, 359-360; Thomas v. Industrial Comm. (1958), 4 Wis. 2d 477, 481. The test is whether there is any credible evidence to support the finding made. R. T. Madden, Inc. v. ILHR Department (1969), 43 Wis. 2d 528.

Under sec. 102.23(1)(d) 1 not all errors in procedure occurring in workmen's compensation and unemployment compensation proceedings are reviewable, but only those which constitute a denial of due process. See Borgnis v. Falk Co., supra, at page 361.

THE COURT'S DECISION

A. Credible Evidence Issue

The Court has carefully read all of the evidence in the transcript together with the exhibits and concludes that the parts of claimant Bachmann's testimony, which was believed by the appeal tribunal examiner in making his findings of fact, which findings have been adopted by the department, constitutes credible evidence which supports the findings. There was a sharp conflict between what Krantz, the president of plaintiff, testified to and what he set down in Exhibit 6, and the testimony given by claimant. Determining the credibility of witnesses is the function of the department and not of this Court. Kohler Co. v. Industrial Comm. (1956), 272 Wis. 310, 322. The examiner submitted to the department a "Credibility Memorandum" dated June 5, 1975, in which he explained why he believed the testimony of claimant and not that of Krantz.

The Court has concluded that it would serve no useful purpose to summarize the testimony given by the witnesses.

Claimant's testimony was unequivocal that she was discharged and did not quit her employment. Her testimony as to what was said between her and Krantz on December 13, 1974, shows that Krantz did not discharge her for misconduct but his discharge of her was done in anger when he became provoked because she questioned why he was reducing her work week from five days per week to three. Furthermore, claimant specifically denied she had ever been warned about coming to work too early, missing her lunch period, being tardy, or being absent from work. With respect to the absence to go deer hunting she testified that Krantz consented to it. She further testified that her tardiness in

arriving at work averaged about twice a month and it was her practice to report such tardiness to Krantz on the day it occurred. Her testimony also established that when she punched in early she started to work then, and that when she missed lunch periods it was in order to continue her work, so that in all probability any time lost as a result of being tardy was more than made up by the extra time worked by her beyond the required eight hours per day.

B. Alleged Improper Procedures by Examiner.

The claimant was not represented at the hearing by counsel thus imposing upon the examiner the duty of questioning her to bring out her version of the events leading up to the termination of her employment with the plaintiff.

It was the plaintiff's position, as set forth in its UC-23 Eligibility Report (Exhibit 1) that claimant quit. This form had squares to be checked to indicate the nature of the claimant employee's termination of employment. One was labeled "Quit" and another was labeled "Misconduct". Krantz, who signed this Eligibility Report, had placed an X in the square labeled "Quit" and left unchecked the square labeled "Misconduct". The employer adhered to this position when at the beginning of the hearing the examiner asked, "It is still the employer's contention the employe quit?" and counsel for the employer replied, "Yes." The claimant, on the other hand, contended she was "fired".

In view of the quitting issue and the fact that claimant was not represented by counsel, the Court can find nothing improper in making this statement to claimant after she had given the major portion of her testimony prior to cross examination (Tr. 68-69):

> "Well, I am wondering whether you might like to tell me the other comments that were made in that room in language in the event that I should have to decide whether or not you have good cause for quitting. If I should find that the testimony is

"supported in finding a quit I should also look into whether or not you had good cause for quitting."

Claimant's response was that she did not quit but was fired (Tr. 69).

Plaintiff's brief criticizes the examiner for thereafter asking claimant (Tr. 70):

"Now is there anything that you would like to tell me that you feel I may not have asked you about?"

The Court considers that an examiner would be remiss if he did not put such a question to a claimant unrepresented by counsel. This question did not have the effect of placing any restriction upon plaintiff's counsel interposing legitimate objection to claimant's testimony given in response to such question.

Plaintiff's brief states that at page 74 of the transcript his objection to testimony by claimant was sustained and yet she was allowed to continue after the objection. The Court finds no merit to this criticism. The record with respect to this is as follows (Tr. 74):

"MR. TERRIS: I'll object to that, that's got nothing to do--

"THE EXAMINER: The objection is sustained I don't feel it's material to the issue in this case.

"THE WITNESS: Okay.

"THE EXAMINER: We're concerned with whether or not you quit, you see not some other investigation that's going on.

"THE WITNESS: But this has to do with this because it's justified how many things he tried to get away with down there.

"MR. TERRIS: Still object, we have checked it and we have stopped it.

"THE EXAMINER: I beg your pardon. She has a right if she can establish that it is material in any way I will listen to it, but first we'll let you, what is it, how do you feel it's related?

"A Because like this deer hunting and everything I think this man could testify to how many things he has tried to get away with with the federal government and how many records --

"Q I'm going to have to, I'm going to have to sustain his objection.

"A Okay, all right, I was just--

"Q It's not material to your issue and so we're not going into it."

Plaintiff's brief also asserts that the examiner "continuously fed" information to the claimant while she was being cross examined by plaintiff's counsel to impeach her credibility, and cites pages 79 and 80 of the transcript. However, the only participation of the examiner at page 79 was as follows (Tr. 79):

"THE EXAMINER: Just a moment please. You're not asking him questions he's asking you questions.

THE WITNESS: He's repeating himself.

THE EXAMINER: Just a moment, if it gets too repititious I'll stop it but this is cross examination as I indicated to you when you were questioning as I told him I'm rather lenient. I would appreciate you're avoiding repetition but you keep in mind too that he has a right to ask the questions and you're not asking him questions at this time, as I've explained to you if there is something you want to explain again later I'll let you do it, but you've got to answer his questions."

At page 80 the examiner did stop plaintiff's counsel from pursuing a question further on the ground he was being repetitious. Such a ruling is a discretionary one and the Court perceives no abuse of discretion. The remaining participation of the examiner at page 80 was as follows (Tr. 80):

"MR. TERRIS: All right, now, may I see this statement here. This statement was signed by you on January 22--

THE EXAMINER: You're referring to exhibit number--

MR. TERRIS: The employe's statement, correct.

THE EXAMINER: It's exhibit 7, is it?

MR. TERRIS: Yes.

THE EXAMINER: Your answer to that was?

THE WITNESS: Yes.

THE EXAMINER: You signed it?

"THE WITNESS: January 22.

THE EXAMINER: Okay."

The Court does not consider that this constituted improper supplying of information to claimant.

Another criticism leveled by plaintiff's brief is that the examiner continuously interrupted plaintiff's counsel to lead claimant to the correct responses, citing page 82 of the transcript. That page shows the examiner's participation to have been (Tr. 82):

> "THE EXAMINER: . . . Now, just so you understand his questions you follow along with this exhibit [apparently Exhibit 6] so there's no chance of your misunderstanding the question, you follow me?
>
> THE WITNESS: Thank you, okay.
>
> THE EXAMINER: When he refers to a certain date you flip this page here until you find that date and you see whether you recall it or not. I want you to be as accurate as possible.
>
> THE WITNESS: Okay.
>
> THE EXAMINER: Now, he asked you whether you denied there was a meeting on December 12, you want to look through that exhibit --
>
> MR. TERRIS: November 12.
>
> THE EXAMINER: Was it November 12?
>
> MR. TERRIS: November 12, yes.
>
> THE EXAMINER: November 12, he's asking you about.
>
> THE WITNESS: Yes, I do deny that.
>
> THE EXAMINER: Okay."

Apparently the examiner thought claimant was being confused without having Exhibit 6 before her. However, this was cross examination and counsel was endeavoring to ascertain whether her testimony then would be consistent with her testimony on direct examination. She had not refreshed her memory from Exhibit 6 (which was the employer's exhibit) while testifying on direct examination, and there was no reason why she

should be provided with that to assist her on cross examination. In the Court's opinion the examiner should not have come to her assistance on cross examination in the absence of any improper questions by plaintiff's counsel. If she did become confused, it would have been proper for the examiner on redirect examination at the close of the cross examination to have questioned her further to ascertain this and give her an opportunity to correct her answers. However, the Court does not consider there was any prejudicial error in this incident that could even approach a denial of due process.

Another incident complained of occurred on the next page of the transcript. Claimant had been asked about a meeting with Krantz on December 3, 1974, and had answered that there was no meeting in his office but a casual conversation took place about deer hunting. Then this occurred (Tr. 83):

> "THE EXAMINER: Was that on December 3 the meeting about the deer hunting?
>
> THE WITNESS: I don't know I told you before I don't know the exact dates we talked.
>
> THE EXAMINER: That's why I'm asking you to be careful because he's asking you whether you deny there was a meeting on December 3 and you denied it but you said you did have a casual conversation?
>
> THE WITNESS: It was just conversation.
>
> THE EXAMINER: About deer hunting, was that on December 3?
>
> THE WITNESS: The conversation.
>
> THE EXAMINER: About the deer hunting?
>
> THE WITNESS: It was approximately a week before I went. I don't exactly remember what day we left for deer hunting.
>
> THE EXAMINER: Well then you said possibly on December 3?
>
> THE WITNESS: Okay, it's possible we had a meeting on December 3 about deer hunting none of this."

In order to put the examiner's above questions in context, claimant on direct examination had not placed a definite date on the casual conversation between her and Krantz about her taking time off to go deer hunting. The Court interprets the purpose of the examiner in asking the above quoted questions was to ascertain if she now definitely was fixing December 3rd as the date of the conversation about deer hunting. The Court perceives nothing improper in such questioning.

At page 84 of the transcript the examiner rebuked the claimant twice for flippant remarks which had the purpose of aiding rather than hindering the cross examination.

Plaintiff's brief further complains of this further incident connected with the cross examination (Tr. 86):

> "Q Okay, so far we've had meeting on December 3, 10, and December 13?
>
> A No, I didn't say we had a meeting on December 3, I said possibly a casual--
>
> THE EXAMINER: That's true counselor and please let's not misstate the testimony of this witness it implies--
>
> THE WITNESS: I won't get mixed up because I don't lie.
>
> THE EXAMINER: And she has come back with the same answer and I'm going to ask you now to be more careful in the way you're phrasing your questions."

Claimant had made it very clear in her testimony up to this point that she had had no meeting with Krantz on December 3rd unless the casual conversation with respect to deer hunting had occurred on that date. The Court deems the words of caution voiced by the examiner were in order.

Complaint is also made to this instruction given by the examiner to claimant (Tr. 88):

> "THE EXAMINER: Now don't go giving answers, just be responsive to his questions don't volunteer anything."

It is contended that this aided claimant and broke down the full effect of the cross examination. The answer which prompted this instruction was

wholly irresponsive, and the instruction was entirely proper.

Lastly, complaint is made about an incident that occurred as a result of counsel for plaintiff getting claimant to reluctantly state the exact foul words she claimed Krantz had applied to her in their heated exchange of December 13, 1974, except she identified one four letter word only by its initial (Tr. 89-90). This answer was (Tr. 90):

> "Q He just said fuck to you?
>
> A Like for instance, get the hell out of here you f and [ing?] witch or b itch or whatever."

Plaintiff's counsel persisted with more questions and finally this occurred (Tr. 91):

> "Q I think so that we can get the tempo of the conversation that occurred in that room I would almost have to insist that she bring out those words in their proper context. Just shooting out words f, don't mean anything to me.
>
> THE EXAMINER: All right did he say get the hell out of here you fucking witch, is that correct?
>
> THE WITNESS: Yes.
>
> THE EXAMINER: All right, that's what I understood you to mean, okay, you might just as well say it. We've heard these things before.
>
> THE WITNESS: Bitch, bitch the word was.
>
> THE EXAMINER: Bitch it was?
>
> Q Did he raise his voice when he said that?
>
> A Yes, he did.
>
> Q Okay, now --
>
> THE EXAMINER: You see this has a bearing on the degree of anger that might have involved him also and that's why you shouldn't hesitate to tell us."

The first question put by the examiner pretty much paraphrased what the witness had stated in her above quoted answer at page 90 of the transcript. While leading, the Court does not consider plaintiff was prejudiced thereby. At page 89 claimant had already testified Krantz had called her a tramp and a whore. The Court does not deem that the examiner is subject to censure for making his last quoted remark of explanation to the witness.

The Court will state in conclusion that an overall review of the transcript does not leave the Court with any impression that the plaintiff was not accorded an impartial and fair hearing.

Let judgment be entered confirming the department's decision here under review.

Dated this 27th day of October, 1975.

By the Court:

Reserve Circuit Judge