NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3067-20

KAREN MCKNIGHT,

Appellant,

v.

BOARD OF REVIEW,
DEPARTMENT OF LABOR,
TOYS "R" US - DELAWARE,
INC., and WEGMANS FOOD
MARKETS, INC.,

Respondents.

APPROVED FOR PUBLICATION
July 3, 2023
APPELLATE DIVISION

Argued April 17, 2023 – Decided July 3, 2023

Before Judges Gooden Brown, DeAlmeida, and Mitterhoff. [1]

On appeal from the Board of Review, Department of Labor, Docket No. 192641.

Alan H. Schorr argued the cause for appellant (Schorr & Associates, PC, attorneys; Alan H. Schorr and Christine A. Cross, on the briefs).

Ian Fiedler, Deputy Attorney General, argued the cause for respondent Board of Review (Matthew J. Platkin, Attorney General, attorney; Donna Arons, Assistant Attorney

[1] Judge Gooden Brown did not participate in oral argument but joins in the opinion with the consent of counsel. R. 2:13-2(b).

General, of counsel; Jana R. DiCosmo, Deputy Attorney General, on the brief).

The opinion of the court was delivered by

MITTERHOFF, J.A.D.

Appellant Karen McKnight appeals from the Board of Review's (the "Board") August 26, 2022 final agency decision, which held her liable to return an overpayment of $6,277 for unemployment benefits she was allegedly ineligible to receive for the weeks ending June 30, 2018 through May 4, 2019, pursuant to N.J.S.A. 43:21-16(d). The central issue on appeal is whether a claimant, who is otherwise separated from full-time employment, may include wages received from a part-time position, which they continue to maintain, in the calculation of their average weekly wage for purposes of unemployment benefits. We conclude that the exclusion of the wages contravenes the legislative purpose of the unemployment benefits statute and is arbitrary as legally unsupported. We therefore reverse and remand for a recalculation of benefits.

We discern the following facts from the record. Appellant was employed full time at Toys "R" Us, where she started working on September 27, 1981. She was also employed part time at Wegmans Food Market ("Wegmans"), where she started working in September of 2011.

In June 2018, Toys "R" Us closed and appellant was permanently laid off after twenty-one years of employment. Thereafter, on June 24, 2018, appellant applied for

unemployment benefits to supplement the loss of income from her full-time job while she continued to work part time at Wegmans with no reduction in hours.

On July 5, 2018, appellant received an initial benefit determination from the New Jersey Department of Labor, Division of Unemployment Insurance (the "Division"), which established a weekly benefit rate of $452, a partial weekly benefit rate of $542, and a maximum benefit amount of $11,752. This initial benefit determination included both appellant's full-time and part-time wages.

Each week thereafter, appellant certified for benefits and reported her earnings from her part-time job. Appellant collected partial unemployment benefits from June 30, 2018 to May 5, 2019; she was paid her partial benefit rate of $542 per week less her actual earnings at Wegmans.

On May 23, 2019, appellant received a monetary redetermination, which excluded her income from Wegmans in the calculation of her benefits; this reduced appellant's weekly benefit rate to $304, her partial benefit rate to $364, and her maximum benefit amount to $7,904. Due to the change in her partial benefit rate, appellant also received a request for refund, advising her that the redetermination rendered her liable for a refund in the amount of $6,099 in overpayments received as benefits for the weeks ending June 30, 2018 through May 4, 2019.

On June 5, 2019, appellant appealed the Division's redetermination, and a hearing was held before the Appeal Tribunal (the "Tribunal") on November 13, 2019.

There, appellant admitted to underreporting the earnings she received from Wegmans for the weeks ending July 7, 2018 through July 28, 2018, and for the weeks ending August 18, 2018 through September 29, 2018, leading to an overpayment totaling $342. However, appellant testified that she had paid that money back at the time of the hearing.

In a decision mailed on November 14, 2019, the Tribunal determined that appellant "was not considered unemployed" and was, therefore, "ineligible" to receive benefits for the weeks ending July 7, 2018 through July 28, 2018, and for the weeks August 18, 2018 through September 29, 2018. Thus, the Tribunal held appellant liable for a refund in the sum of $342, received as benefits for the subject weeks.

On March 26, 2020, appellant appealed the Tribunal's decision to the Board, arguing that the Division incorrectly removed appellant's part-time earnings from her benefit calculation. On June 17, 2020, the Board remanded the matter to the Tribunal, stating only that "there [was] need for additional testimony from [appellant] concerning benefits received on a claim dated June 24, 2018, to ascertain her liability for refund[.]"

A second hearing was held before the Tribunal on July 17, 2020, in which appellant argued that the Department of Labor's regulations required them to include all earnings for purposes of calculating base year earnings. In a decision mailed on July 23, 2020, the Tribunal again determined that appellant was "not considered unemployed" and held her liable for a refund in the amount of $342, received as

benefits for the weeks ending July 7, 2018 through July 28, 2018, and from August 18, 2018 through September 29, 2018. In so doing, the Tribunal conceded that it was "not aware of any regulation or law that requires the Division to place [appellant]'s part-time wages on hold." Nevertheless, the Tribunal concluded that the Division's action "in placing [appellant]'s wages on hold from [Wegmans]" was "not unreasonable," "since [appellant] was still employed by [Wegmans] with no reduction in hours of work when the claim dated [June 24, 2018] was filed."

On August 10, 2020, appellant appealed to the Board for a second time, arguing that the decision of the Tribunal must be reversed as it was not supported by regulation or law. In a decision mailed on December 9, 2020, the Board again remanded the matter to the Tribunal, stating only that "there [was] need for additional testimony to ascertain [appellant]'s liability for refund, and for the . . . Tribunal to properly address the arguments presented by [appellant]'s attorney concerning the legality of" the Division's redetermination.

A third hearing was held before the Tribunal on January 29, 2021. In advance of that hearing, appellant's attorney sent the Tribunal certain sections of the New Jersey Unemployment Compensation Law ("UCL" or the "Act"), N.J.S.A. 43:21-1 to -71, and associated regulations in support of appellant's position. Specifically, appellant's attorney sent the Tribunal N.J.S.A. 43:21-19 and N.J.A.C. 12:17-9.2.

In a decision mailed on March 9, 2021, the Tribunal again refused to consider the wages earned from appellant's part-time job at Wegmans, reasoning that the Board "has historically held that the legislature did not intend to base benefits for unemployment on earnings with an employer who is still employing the claimant." The Tribunal went on to state:

> Herein, [appellant] contended she should be able to use the wages for both employers. The intent was not to allow a claimant to continue to work for an employer who is still employing the claimant under the same terms and charging that employer's account for unemployment benefits paid. Therefore, [Wegmans] was properly placed on hold and the wages removed as those wages could not be used to establish the monetary entitlement on the claim dated [June 24, 2018].

Thus, the Tribunal determined that appellant was liable for a refund of the overpayment in the sum of $6,099, received as benefits for the weeks ending June 30, 2018 through April 6, 2019.

On March 16, 2021, appellant appealed the Tribunal's decision to the Board a third time. On June 24, 2021, the Board rejected appellant's arguments, stating:

> The appellant's contention that N.J.S.A. 43:21-19(t)(3) and N.J.A.C. 12:17-9.2 should be applied in this case to allow the [appellant] to establish base weeks from both employers[] is rejected. N.J.S.A. 43:21-19(t)(3) refers to the calendar week option that allows unemployed individuals with a history of multiple concurrent employers to establish base[] weeks from each employment. N.J.A.C. 12:17-9.2 provided for eligibility upon separation from full-time and part-time employment. Conversely, the [appellant] in this

> case cannot be considered unemployed with respect to her job with [Wegmans].

Ultimately, the Board modified the Tribunal's decision by declaring that appellant was never unemployed and was, therefore, not eligible for benefits in the first place. In so doing, the Board held appellant liable for a refund in the amount of $6,277 for benefits received for the weeks ending June 30, 2018 through May 4, 2019, which represented the entirety of appellant's unemployment benefits.

In February 2020, appellant was notified by the U.S. Department of Treasury, Bureau of Fiscal Service that $3,184 of her federal tax refund was being applied to her debt with the Division. In March 2020, appellant was notified that $3,700 of her state tax refund was also being applied to her debt with the Division. In total, the Division received $6,884 from appellant's tax refunds, which is $607 more than what she allegedly owed.

On July 1, 2021, appellant appealed to this court. Subsequently, we granted the Board's motion for remand to allow further development and clarification of the record. In a revised decision mailed on August 26, 2022, the Board reaffirmed its June 24, 2021 decision, this time relying on two unpublished cases for support.[2] The Board's decision also added the following reasoning:

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[2] See Swindell v. Bd. of Rev., No. A-4266-92 (App. Div. March 23, 1994), and Cummings v. Bd. of Rev., No. A-4793-92 (App. Div. May 16, 1994). We find that these cases are inapposite as the decisions were issued prior to the 2001 amendments to

> Without question, any benefit determination including [appellant]'s base period earnings from Wegman[]s in the [appellant]'s weekly benefit rate, would result in charges being assessed against that employer. . . . Since [appellant] had not suffered a lack of work from Wegmans upon her initial filing for benefits, allowing [appellant] to collect unemployment benefits using wages from that employer would require an assessment of benefit charges, inappropriately penalize that employer, and undermine the purpose of the UCL.

This appeal followed. On appeal, appellant raises the following arguments:

> I. THE REMEDIAL PURPOSES OF THE UNEMPLOYMENT COMPENSATION STATUTE SHOULD BE INTERPRETED LIBERALLY IN FAVOR OF DISPENSING BENEFITS.
>
> II. THE UNEMPLOYMENT COMPENSATION LAW WAS INTENDED TO REWARD EMPLOYEES THAT WORK PART-TIME JOBS, NOT TO PUNISH THEM.
>
> III. THE INITIAL DETERMINATION OF [APPELLANT]'S BENEFITS WAS CORRECT.
>
> IV. THE [DIVISION] ERRED IN PLACING THE EARNINGS FROM WEGMANS "ON HOLD" AND REFUSING TO CONSIDER THOSE WAGES IN CALCULATING [APPELLANT]'S AVERAGE BASE YEAR EARNINGS.
>
> V. BASED ON THE ORIGINAL BENEFIT DETERMINATION, [APPELLANT] WAS PAID

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the UCL, which included an amendment of the definition of "base week." N.J.S.A. 43:21-19(t)(3). In addition, as unpublished decisions, they do not constitute precedent and are not binding upon this court. Rule 1:36-3.

PROPER BENEFITS. THE IMPROPER REDE[TE]RMINATION CAUSED [APPELLANT] TO LOSE MOST OF HER BENEFITS.

VI. THE BOARD OF REVIEW FURTHER ERRED BY FINDING [APPELLANT] NEVER TO HAVE BEEN UNEMPLOYED AND THEREFORE ENTITLED TO NO BENEFITS AT ALL.

VII. THE BOARD OF REVIEW HAS AGAIN CONFUSED ELIGIBILITY WITH CHARGEABILITY, RESULTING IN AN ERRONEOUS, ARBITRARY, AND CAPRICIOUS DECISION.

Judicial review of administrative actions is "severely limited." Mazza v. Bd. of Trs., Police & Firemen's Ret. Sys., 143 N.J. 22, 25 (1995). It is not the function of the reviewing court to substitute its own judgment for that of the administrative agency, "even though the court might have reached a different result." In re Stallworth, 208 N.J. 182, 194 (2011) (quoting In re Carter, 191 N.J. 474, 483 (2007)). Thus, "[a]n administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." In re Herrmann, 192 N.J. 19, 27-28 (2007). In making this determination, our role is restricted to three inquiries:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether[,] in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not

> reasonably have been made on a showing of the relevant factors.
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> [Id. at 28 (quoting Mazza, 143 N.J. at 25).]

The party challenging the administrative action bears the burden of making that showing. Lavezzi v. State, 219 N.J. 163, 171 (2014).

In addition, "'we are required to defer to an agency's technical expertise, its superior knowledge of its subject matter area, and its fact-finding role,'" and, therefore, are "obliged to accept all factual findings that are supported by sufficient credible evidence." Futterman v. Bd. of Rev., 421 N.J. Super. 281, 287 (App. Div. 2011) (quoting Messick v. Bd. of Rev., 420 N.J. Super. 321, 325 (App. Div. 2011)). Although we are not bound by an agency's interpretation of law, we also accord a degree of deference when the agency interprets a statute or a regulation that falls "within its implementing and enforcing responsibility," Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001) (quoting In re Appeal by Progressive Cas. Ins. Co., 307 N.J. Super. 93, 102 (App. Div. 1997)), "unless the interpretation is plainly unreasonable," Ardan v. Bd. of Rev., 231 N.J. 589, 604 (2018). "Despite this level of deference, '[t]he judiciary may intervene in those rare circumstances in which an agency action is clearly inconsistent with [the agency's] statutory mission or with other State policy.'" Futterman, 421 N.J. Super. at 287 (alterations in original) (quoting In re Petition for Authorization to Conduct a Referendum on Withdrawal of N. Haledon

Sch. Dist. from the Passaic Cnty. Manchester Reg'l High Sch. Dist., 181 N.J. 161, 176 (2004)).

At issue here is the interpretation of N.J.S.A. 43:21-19(t)(3), which is "a question of law subject to de novo review." Saccone v. Bd. of Trs., Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (citation omitted). Specifically, this case focuses on whether a claimant, who is otherwise separated from full-time employment, may include wages received from a part-time position, which they continue to maintain, in the calculation of their average weekly wage for purposes of unemployment benefits. This dispute centers around the language included in the latter half of N.J.S.A. 43:21-19(t)(3), as amended in 2001, which states:

> "Base week," . . . means any calendar week during which the individual earned in employment from an employer remuneration not less than an amount [twenty] times the minimum wage in effect . . . on October 1 of the calendar year preceding the calendar year in which the benefit year commences, which amount shall be adjusted to the next higher multiple of $1.00 if not already a multiple thereof, except that if in any calendar week an individual subject to this paragraph [] is in employment with more than one employer, the individual may in that calendar week establish a base week with respect to each of the employers from whom the individual earns remuneration equal to not less than the amount defined in this paragraph [] during that week.
>
> [(emphasis added).]

Relying on N.J.S.A. 43:21-7(c), the Division interprets the above provision to mean that it may consider only those wages derived from a "chargeable" employer or

employers in calculating a claimant's average weekly wage. Appellant, however, interprets the above provision—coupled with the language of N.J.S.A. 43:21-19(u)—to mean that all wages from all employers must be included in the calculation of a claimant's average weekly wage, regardless of chargeability.

We are, therefore, tasked with resolving these conflicting interpretations of the statute. In interpreting the meaning of a statute, "our role 'is to discern and effectuate the intent of the Legislature.'" Saccone, 219 N.J. at 380 (quoting Murray v. Plainfield Rescue Squad, 210 N.J. 581, 592 (2012)). "[G]enerally, the best indicator of that intent is the statutory language," S.L.W. v. N.J. Div. of Pensions & Benefits, 238 N.J. 385, 394 (2019) (alteration in original) (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)), the words of which we give "their ordinary meaning and significance," DiProspero, 183 N.J. at 492. Thus, "[i]f the statutory language is clear, our inquiry ends[.]" S.L.W., 238 N.J. at 394 (citation omitted). "However, if a statute's seemingly clear language nonetheless creates ambiguity in its concrete application, extrinsic evidence may help guide the construction of the statute." Saccone, 219 N.J. at 380 (citing In re Kollman, 210 N.J. 557, 568 (2012)). "Extrinsic guides may also be of use 'if a literal reading of the statute would yield an absurd result, particularly one at odds with the overall statutory scheme.'" Id. at 380-81 (quoting Wilson ex rel Manzano v. City of Jersey City, 209 N.J. 558, 572 (2012)).

We begin our analysis by reviewing the plain language and overall statutory scheme of the UCL, which establishes the procedure for calculating a claimant's eligibility for, and amount of, unemployment benefits. See N.J.S.A. 43:21-3, -4. Under the Act, the Division must first determine whether a claimant is, in fact, eligible for any unemployment benefits. N.J.S.A. 43:21-4; see N.J.A.C. 12:17-5.1 (describing the basic eligibility requirements). To be eligible, a claimant must be separated, or unemployed, from work from a base year employer. See N.J.S.A. 43:21-19(c)(1). "Unemployment" is defined as any week in which the claimant "is not engaged in full-time work and with respect to which his remuneration is less than his weekly benefit rate[.]" N.J.S.A. 43:21-19(m)(1)(A). Here, it is undisputed that appellant established sufficient base weeks of employment during the base year with Toys "R" Us to qualify for unemployment benefits.

Once found eligible, the Division calculates the claimant's benefit amount, which is equal to the claimant's "weekly benefit rate less any remuneration." N.J.S.A. 43:21-3(b). A claimant's "weekly benefit rate" is sixty percent of the "average weekly wage" earned by the claimant during his or her base year, which in turn is comprised of base weeks. N.J.S.A. 43:21-3(c)(1); N.J.A.C. 12:17-2.1. N.J.S.A. 43:21-19(u) defines "average weekly wage" as "the amount derived by dividing an individual's total base year wages by the number of base weeks worked by the individual during the base year;

provided that for the purpose of computing the average weekly wage, the maximum number of base weeks used in the divisor shall be [fifty-two]." (emphasis added).

A claimant's "base year" consists of "the first four of the last five completed calendar quarters immediately preceding an individual's benefit year," N.J.S.A. 43L21-19(c)(1), which begins on the day he or she "first files a valid claim for benefits[.]" N.J.S.A. 43:21-19(d). A "base week" is defined as "any calendar week during which the individual earned in employment from an employer renumeration not less than an amount [twenty] times the [New Jersey] minimum wage in effect . . . on October 1 of the calendar year preceding the calendar year in which the benefit year commences[.]" N.J.S.A. 43:21-19(t)(3). N.J.S.A. 43:21-19(t)(3) goes on to provide that, if an individual "is in employment with more than one employer, the individual may in that calendar week establish a base week with respect to each of the employers from whom the individual earns remuneration equal to not less than the amount defined in this paragraph [] during that week."

Moreover, the Division increases a claimant's "weekly benefit rate" by an additional twenty percent for claimants employed in part-time work while unemployed from their full-time jobs, pursuant to N.J.A.C. 12:17-2.1. That regulation defines "[w]eek of partial employment" as:

> a calendar week ending at midnight Saturday in which an individual is employed not more than [eighty] percent of the hours normally worked in that individual's occupation, profession, trade, or industry; due to lack of work; and earns

> remuneration which does not exceed the weekly benefit rate plus [twenty] percent of such rate.
>
> [N.J.A.C. 12:17-2.1.]

Based upon that definition, the Division calculates a claimant's "partial benefit rate," which is one hundred and twenty percent of the weekly benefit rate.

Based upon our reading of N.J.S.A. 43:21-19(t)(3), in conjunction with the associated statutes and regulations, we find that the statutory language is ambiguous as it "'leads to more than one plausible interpretation[.]'" MasTec Renewables Constr. Co. v. Sunlight Gen. Mercer Solar, LLC, 462 N.J. Super. 297, 320 (App. Div. 2020) (quoting State v. Twiggs, 233 N.J. 513, 532 (2018)). Therefore, we "may resort to extrinsic sources" in determining the Legislature's intent. Ibid. (quoting Twiggs, 233 N.J. at 532).

We recognize that the UCL was created to protect against the "economic insecurity due to unemployment [which] is a serious menace to the health, morals, and welfare of the people of" New Jersey. N.J.S.A. 43:21-2. "The purpose of the [Act] is to provide some income for the worker earning nothing, because he is out of work through no fault or act of his own." Utley v. Bd. of Rev., 194 N.J. 534, 543 (2008) (quoting Battaglia v. Bd. of Rev., 14 N.J. Super. 24, 27 (App. Div. 1951)). In order "'[t]o further its remedial and benefits purposes,' we have recognized that 'the [Act] is to be construed liberally in favor of allowance of benefits.'" Ibid. (second alteration in original) (quoting Yardville Supply Co. v. Bd. of Rev., 114 N.J. 371, 374 (1989)).

Guided by the remedial purpose of the UCL, we are constrained to find that the Division's initial benefit determination was proper and that the Board's decision to affirm the Division's redetermination was in violation of the Act's express legislative policies. See Herrmann, 192 N.J. at 28 (quoting Mazza, 143 N.J. at 25). First, the interpretation forwarded by the Division "would yield an absurd result," Saccone, 219 N.J. at 380-81 (quoting Manzano, 209 N.J. at 572), as it essentially punishes claimants who maintain part-time employment after being laid off by a full-time employer. Following the calculation method applied by the Division, appellant's Wegmans earnings were initially deducted from her weekly benefit rate; then those earnings were deducted again from her partial benefit rate, leaving her no benefits at all for any week in which she earned more than the partial benefit rate based only on her Toys "R" Us earnings. Thus, Toys "R" Us is charged nothing despite causing appellant's unemployment.

Second, the Division's interpretation seriously frustrates one of the main objectives of the UCL, which "is to encourage persons to work[.]" Wojcik v. Bd. of Rev., 58 N.J. 341, 346 (1971). Pursuant to N.J.A.C. 12:17-9.2(a)(2), if appellant had quit her job at Wegmans in order to search for a new full-time job, she would have been entitled to her full benefits. However, appellant was instead punished for maintaining her part-time job following the loss of her full-time job of twenty-one years. Thus, we

find that to punish appellant, rather than reward her, for maintaining her part-time job after losing her full-time job runs counter to the policy of this State.

Finally, we find that the Division has conflated eligibility and chargeability in this matter. In asserting that Wegmans would be charged if appellant's part-time wages were included in the calculation—despite her continual employment—the Division relies on N.J.S.A. 43:21-7(c), which states, "[b]enefits paid . . . shall be charged against the account or accounts of the employer or employers in whose employment such individual established base weeks constituting the basis of such benefits[.]" However, that language is qualified by the succeeding sentence, which states, "[b]enefits paid under a given benefit determination shall be charged against the account of the employer to whom such determination relates." N.J.S.A. 43:21-7(c).

Here, we are aware of no provision of the UCL, or any other authority, under which Wegmans could be charged because they did not discharge appellant. Moreover, there is no need to charge Wegmans because appellant's benefits are properly chargeable to Toys "R" US. In fact, under the correct calculation, all parties benefit: Toys "R" Us benefits because less benefits are paid and, therefore, less benefits are charged to its account due to the part-time earnings paid by Wegmans; the Division benefits by paying less than full benefits from the unemployment fund; Wegmans benefits by retaining appellant's employment and by not being charged; and appellant

benefits by not being penalized for working part-time to supplement the loss of her full-time employment.

In sum, we find that appellant earned a total of $24,867.30 during her base year with Toys "R" Us, the full-time employer that laid her off. Following the correct calculation, which is her yearly earnings divided by fifty-two, appellant's average weekly base year earnings for this employer was $478.22. During that same base year, appellant earned an additional $14,367.54 from her part-time employment with Wegmans, who continued to employ her. Following the same calculation, her average weekly base year earnings from Wegmans was $276.30. Thus, appellant's total base year wages were $39,234.84 and her average weekly earnings amounted to $754.52. Because a claimant's weekly benefit rate is sixty percent of their average weekly earnings, we conclude that the Division's initial calculation—which established a weekly benefit rate of $452—was proper. Moreover, appellant's partial benefit rate of $542 ($452 x 120%), less her actual earnings from Wegmans, was also correctly calculated in the Division's initial benefit determination.

Reversed and remanded for a recalculation of benefits in accordance with this opinion.