

**Board of Review
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Issue ID: 0002 1187 65

BOARD OF REVIEW DECISION

0002 1187 65 (Jan. 31, 2014) – Paid sick leave constituted “services” for the employer during the base period and affected the claimant’s eligibility for, or increased the amount of, his pension within the meaning of G.L. c. 151A, § 29(d)(6). Accordingly, the claimant was subject to a reduction in his weekly unemployment benefits.

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) stating that the claimant is subject to a reduction in his weekly unemployment benefits due to receiving a pension. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant filed a claim for unemployment benefits with the DUA, which was approved but subjected the claimant to a reduction in benefits in a determination issued on April 12, 2013. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency’s initial determination, including subjecting the claimant to a reduction in his weekly unemployment benefits, in a decision rendered on July 8, 2013. We accepted the claimant’s application for review.

Benefits were reduced after the review examiner determined that the claimant’s services for the employer during the base period affected his eligibility for or increased the amount of his pension, within the meaning of G.L. c. 151A, § 29(d)(6). After considering the recorded testimony and evidence from the hearing, the review examiner’s decision, and the claimant’s appeal, we accepted the case for review. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner’s decision, and the claimant’s appeal.

The issue on appeal is whether the review examiner’s conclusion that the claimant’s services for the employer during the base period affected his eligibility for or increased the amount of his pension, even though his only compensation during the base period was entirely in the form of sick pay, is supported by substantial and credible evidence and free from any error of law.

Findings of Fact

The review examiner’s findings of fact and credibility assessments are set forth below in their entirety:

1. On September 14, 2012, the claimant filed a new claim for unemployment insurance benefits, effective September 9, 2012.
2. The Division of Unemployment Assistance established the base period of the claim as July 1, 2011 through June 30, 2012.
3. The claimant performed services for the employer, a town, as a treatment plant operator/sewer foreman from June 25, 1990 until he developed a medical condition causing him to go out on sick leave as of April 19, 2011.
4. The claimant's sick leave is based upon services performed for the town.
5. The claimant received sick leave from the town until it ran out and he retired from his job and began to collect a pension from the County of Barnstable as of the week ending February 2, 2013 in the gross amount of \$3,089.61 per month.
6. While receiving sick leave from the town, the claimant continued to pay his share of contributions for medical, dental and life insurance, union dues, and his county retirement account.
7. The employer also contributed an unknown percentage to the claimant's pension.
8. The claimant funded an annuity account which also began distribution to him during the week ending February 2, 2013 along with his pension.

Ruling of the Board

In accordance with our statutory obligation, we review the findings of fact made by the review examiner to determine: (1) whether these findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion that the claimant is entitled to benefits is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact. As discussed more fully below, we believe that the review examiner's findings of fact support the conclusion that the claimant is subject to a reduction in his weekly unemployment benefits due to receiving a pension.

G.L. c. 151A, § 29(d)(6), provides, in pertinent part, as follows:

(d) An individual in unemployment and otherwise eligible for benefits, who is receiving, has received, or will receive payments in the form of retirement benefits, any part of which was financed by a base period employer, shall be paid for each week of unemployment an amount computed as follows:

(6) Notwithstanding any of the foregoing provisions of this subsection, the amount of benefits otherwise payable to an individual for any week which begins

in a period with respect to which such individual is receiving governmental or other pension, retirement or retired pay, annuity or any other similar periodic payment which is based on the previous work of such individual, shall be reduced by an amount equal to the amount of such pension, retirement or retired pay, annuity or other payment, which is reasonably attributable to such week; provided, however, that such reduction shall apply only if then required by section 3304(a)(15) of the Internal Revenue Code of 1954; and provided, further, that any amendment of section 3304(a)(15) of the Internal Revenue Code of 1954 shall become part of this subsection on the effective date of such amendment; and provided, further, that if then allowed by section 3304(a)(15) of the Internal Revenue Code of 1954, such reduction shall apply only if a base period employer contributed to or maintained such pension, retirement or retired pay, annuity, or other payment plan, and. . . services of the individual for such employer during the base period affected eligibility for or increased the amount of such pension, retirement or retired pay, annuity, or other similar plan; and provided further, that if the individual contributed to such plan, the amount of benefits otherwise payable to such individual shall be reduced by fifty per cent of the amount of such pension, retirement or retired pay, annuity, or other payment, notwithstanding the amount contributed by the individual to such plan. Payments received under the Social Security Act shall not be subject to this paragraph.

The claimant contended at the hearing, and does so now on appeal to the Board, that his pension benefit was affected only by sick pay earned during the base period of his claim, and therefore not by “*services* of the individual for such employer during the base period” (emphasis added) within the meaning of the above-quoted provision. The claimant’s view is that “services” means work actually performed during the base period. He, therefore, reasons that the pension-based reduction in unemployment benefits contemplated by G.L. c. 151A, § 29(d)(6), should not apply. We disagree.

We agree with the review examiner’s conclusion that the claimant’s sick pay was itself based upon services performed for the employer, and therefore subjects the claimant to the pension-based benefits reduction. This accords with how the term “services” is used elsewhere in the unemployment compensation statute, most pivotally in the provisions that establish eligibility for unemployment compensation in the first place. In order to be eligible for unemployment compensation, the claimant must have been paid “wages” during the base period. G. L. c. 151A, §24(a). “Wages” are defined as “every form of remuneration of an employee...for employment by an employer.” G.L. c. 151A, § 1(k), defines “employment” as “service...performed for wages...by an employee for his employer.” Accordingly, the claimant would not be eligible unemployment compensation benefits in the first place if his sick pay were not “service performed for wages.”

While there is no Massachusetts case directly on point regarding the interpretation of these sections of law, the U.S. Supreme Court has interpreted employment services in a similar context. See Social Security Board v. Nierotko, 327 U.S. 358, 362-363 (1946) (defining “wages” as all remuneration for employment, and “employment” as “any service, of whatever nature, performed...by an employee for his employer”). In Nierotko, the issue before the Court was whether “back pay” constituted wages, as the petitioner argued that the employee did not

“perform any service” for the employer. The Court concluded that “[the word] ‘service’ as used by Congress...means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer.” *Id.* at 356-366. Similarly, the D.C. Circuit Court of Appeals had to consider whether paid time off could be counted towards the 26 weeks of employment required to obtain “trade readjustment allowances” (“TRA”) benefits. *UAW v. Brock*, 816 F.2d 761 (D.C.Cir.1987). The court concluded that, “[a]lthough as a technical matter, a person on vacation is not receiving wages for work presently being performed, but, rather, is receiving payments and time-off for work already performed, it does not follow that a person who is on vacation is ‘unemployed.’” *Id.* at 766. Here, it was undisputed that the claimant was still employed by the employer during the base period and received compensation for the services that he performed for the employer. That the compensation included sick pay, which the claimant elected to use during the base period, does not change the conclusion that the basis for that compensation was the employment services that the claimant had provided to the employer.

In order for the claimant to be subject to a reduction in his unemployment benefits, however, G.L. c. 151A, § 29(d)(6), also requires that such services during the base period “affected eligibility for or increased the amount of [the claimant’s] pension” or other retirement pay. We note that the review examiner did not make a finding of fact as to whether the claimant’s services for the employer during the base period affected his eligibility for, or increased the amount of, his pension or other retirement pay. However, the review examiner did note in the “Conclusions & Reasoning” section of her decision that the claimant’s pay stubs, included in the record as Exhibits 7 and 8, reflect that the claimant continued to contribute to his retirement account while he was receiving sick pay during the base period. Furthermore, as the Supreme Judicial Court recently noted, a “[public employee] member’s retirement allowance is based, in part, on the number of years and full months of ‘creditable service’ earned by the member at the time of retirement.” *Massachusetts Teachers’ Retirement System v. Contributory Retirement Appeal Bd.*, 466 Mass 292, 294 (2013). “Creditable service ordinarily is based on the duration of a member’s employment...while a member of a public retirement system.” *Id.* The state public retirement law defines “creditable service” to include “any period of [an employee’s] continuous absence with full regular compensation.” G.L. c. 32, § 4(1)(c). The pay stubs included in the record reflect that the claimant’s sick pay was paid to him at the same hourly rate as his base pay.¹ Thus under the state public retirement law governing the claimant’s pension account (as he was a public employee), the claimant continued to accrue weeks of creditable service while he was receiving sick pay during the base period, which affected his pension.

We, therefore, conclude as a matter of law that the claimant’s services for the employer during the base period affected his eligibility for, or increased the amount of, his pension, within the meaning of G.L. c. 151A, § 29(d)(6).

¹ Exhibit 7 (p. 2), one of the claimant’s pay stubs, shows that the claimant was paid for 8 hours of “base pay” during a pay period, for a total amount of \$254.22. This is at an hourly rate of \$31.7775. The same pay stub shows that during the same pay period, the claimant was paid for 32 hours of “sick pay,” for a total amount of \$1,016.88. This is also at an hourly rate of \$31.7775. These figures, while not explicitly incorporated into the review examiner’s findings, are part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. See *Bleich v. Maimonides School*, 447 Mass. 38, 40 (2006); *Allen of Michigan, Inc. v. Deputy Director of Department of Employment and Training*, 64 Mass. App. Ct. 370, 371 (2005).

The review examiner's decision is affirmed. The claimant is subject to a reduction in his weekly unemployment benefits in the amount of \$359.00 per week for the week ending February 2, 2013, and for an indefinite number of weeks thereafter.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 31, 2014



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

A.M./rh