

The claimant was in partial unemployment during the weeks in which the employer reduced her full-time hours to part-time due to business needs, and she was in total unemployment during the weeks in which the employer did not offer her any work.

**Board of Review
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Issue ID: 0020 0915 15

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

The claimant filed a claim for unemployment benefits effective October 23, 2016. On May 4, 2019, the DUA issued to the claimant a Corrected Notice of Disqualification under G.L. c. 151A, §§ 29(b) and 1(r), which denied benefits to the claimant between November 6, 2016, and October 28, 2017, stating he requested a reduction to his work schedule with the instant employer. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner overturned the portion of the determination denying benefits to the claimant between November 6, 2016, and December 10, 2016, and from January 8, 2017, through February 4, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the employer reduced the claimant's work hours, and, thus, she was not disqualified under G.L. c. 151A, §§ 29(b) and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to afford the employer an opportunity to present evidence. Both parties participated in the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision, which concluded pursuant to G.L. c. 151A, §§ 29(b) and 1(r), that the claimant was in partial unemployment after the employer reduced her hours, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment are set forth below in their entirety:

1. The claimant filed an initial claim for unemployment benefits with an effective date of October 23, 2016. The claimant worked for one employer, which was the instant employer, during the base period of the claim, which extends from October 1, 2015 through September 30, 2016. The Department of Unemployment Assistance (the DUA) determined the claimant was monetarily eligible to receive weekly unemployment benefits in the amount of \$583.00 with an earnings exclusion of \$194.33.
2. The claimant worked full-time as a server for the employer, a bakery and restaurant, from approximately October 2013 or 2014 until September 16, 2018.
3. The business was seasonal due to its location on [Area A].
4. The restaurant was open Wednesday through Sunday.
5. The claimant worked 5 days a week as a server from 3:00 p.m. to 12:00 a.m. when the restaurant was open regular hours.
6. The claimant was paid \$5.00 per hour plus tips. The claimant earned approximately \$1,000.00 a week when she worked full-time and approximately \$400.00 a week when her hours were reduced to part-time due to the season.
7. From August 2015 until the middle of October 2015, the claimant worked full-time hours. The claimant then worked part-time hours until May 2016 when she resumed working full-time.
8. In August 2016, the claimant asked the scheduler to change her schedule to work 4 nights in the restaurant and 1 shift in the bakery during the day.
9. On August 25, 2016, the claimant sent the employer's scheduler an email informing her that she could not work Tuesdays in the bakery. She also asked to start work half an hour later at 3:30 p.m.
10. The scheduler notified the claimant via telephone that she could have Sundays off from work, but she could not start work at 3:30 p.m.
11. Beginning in the middle of October 2016, the Owner reduced the claimant's hours because the restaurant was only open Friday night, Saturday night and Sunday for brunch. The Owner closed the restaurant completely for approximately 3 weeks in January 2017.
12. The claimant certified her weekly benefits for the week beginning October 23, 2016 through the week ending December 10, 2016.
13. The claimant travelled to England to see her mother from December 18, 2016 until January 6, 2017.

14. The claimant did not claim unemployment benefits for the week beginning December 11, 2016 through the week ending January 7, 2017.
15. The claimant reopened her claim for benefits for the week beginning January 8, 2017. The claimant certified her benefits through February 4, 2017. The claimant reopened her claim for the week beginning September 17, 2017, and certified her benefits through the week ending October 21, 2017.
16. The employer pays employees on Friday each week. The time period covered is the previous Wednesday through Sunday.
17. On Friday, October 28, 2016, the employer paid the claimant gross wages in the amount of \$146.70, and she earned \$801.53 in tips for a total of 29.34 hours.
18. On Friday, November 4, 2016, the employer paid the claimant gross wages in the amount of \$116.40, and she earned \$594.88 in tips for a total of 23.28 hours.
19. On Thursday, November 10, 2016, the employer paid the claimant gross wages in the amount of \$117.75, and she earned \$496.42 in tips for a total of 23.55 hours.
20. On Friday, November 18, 2016, the employer paid the claimant gross wages in the amount of \$83.35, and she earned \$113.76 in tips for a total of 23.78 hours.
21. On Friday, November 25, 2016, the employer paid the claimant gross wages in the amount of \$158.40, and she earned \$883.35 in tips for a total of 31.68 hours.
22. On Friday, December 2, 2016, the employer paid the claimant gross wages in the amount of \$168.50, and she earned \$972.89 in tips for a total of 33.70 hours.
23. On Friday, December 9, 2016, the employer paid the claimant gross wages in the amount of \$184.05, and she earned \$495.55 in tips for a total of 25.47 hours.
24. On Friday, December 16, 2016, the employer paid the claimant gross wages in the amount of \$108.80, and she earned \$953.18 in tips for a total of 21.76 hours.
25. On Friday, December 23, 2016, the employer paid the claimant gross wages in the amount of \$158.70, and she earned \$334.14 in tips for a total of 19.96 hours.
26. On Friday, January 27, 2017, the employer paid the claimant gross wages in the amount of \$409.32 for a total of 22.74 hours.
27. On Friday, February 3, 2017, the employer paid the claimant gross wages in the amount of \$493.56 for a total of 27.42 hours.
28. On Friday, February 10, 2017, the employer paid the claimant gross wages in the amount of \$251.09, and she earned \$295.00 in tips for a total of 18.29 hours.

29. The claimant filed a subsequent initial claim for benefits with an effective date of October 29, 2017.

30. On May 4, 2019, the DUA issued the claimant a Corrected Notice of Disqualification under Section 29(b) & 1(r) of the Law beginning November 6, 2016 through October 28, 2017.

Credibility Assessment:

At the initial hearing which the employer did not attend, the claimant testified that she requested of the employer to change her schedule to work four nights a week; and, one day in the bakery, instead of five nights a week in the restaurant; and, that her request was not acknowledged by the employer; and, her schedule remained the same until the middle of October 2016, when the restaurant was only open limited days. However, at the remand hearing, the claimant admitted that she sent an email to the employer's scheduler, which was submitted into the record by the employer, wherein she refused the offer to work in the bakery on Tuesdays. In addition, there is also evidence the claimant was granted a request to work four nights a week, as she was given Sundays off.

The employer's witness, the Owner, testified that he could not recall if he changed the hours the restaurant was open in the middle of October 2016, from Wednesday through Sunday, to Friday and Saturday night and Sunday for brunch. However, based on the payroll records submitted into evidence by the employer, the claimant worked part-time hours from the end of October 2015 until May 2016; and again her hours reduced to part-time beginning in October 2016. Therefore, it's more likely the restaurant was operating on a reduced schedule.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows: we set aside the portion of Consolidated Finding of Fact # 6, which states that, while working full-time, the claimant earned approximately \$1,000.00 per week, and she earned approximately \$400.00 per week while working part-time. This statement is not supported by Consolidated Findings ## 17 to 28, or Remand Exhibit # 8, an employee earnings record for the claimant. We also set aside the portion of Consolidated Finding # 20 detailing the claimant's earnings, as the figures presented by the review examiner are inaccurate; per the claimant's earnings record, she received a check for \$644.20 on November 18, 2016. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented.

G.L. c. 151A, § 29 authorizes benefits be paid only to those in “total unemployment” or “partial unemployment.” These terms are in turn defined by G.L. c. 151A, § 1(r), which provides, in relevant part, as follows:

(1) “Partial unemployment”, an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week

(2) “Total unemployment”, an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work.

After hearing the employer’s testimony and reviewing the documentary evidence submitted by the employer during the remand hearing, including payroll records for the claimant, the review examiner found that the employer reduced the claimant’s hours from full-time to part-time halfway through October, 2016, and closed down its restaurant completely for approximately three weeks in January, 2017. The review examiner further found that the reduction in the claimant’s hours was due to the employer’s business needs, as the employer’s restaurant reduced its days of operation from five to three per week. In making these findings, the review examiner dismissed the employer’s contention that the claimant was refusing work from the employer.

The employer specifically pointed to an email that the claimant sent to the employer on August 25, 2016, in which she refused a Tuesday shift in the employer’s bakery. While it is true that the claimant refused a shift in the employer’s bakery in August, 2016, this refusal has no bearing on the claimant’s employment status during the period at issue here, which begins on November 6, 2016. At the time the claimant refused the shift in the bakery in August, she was already working full-time, five days per week in the employer’s restaurant and was not requesting unemployment benefits.¹ More importantly, there is no indication in the record at the time that the employer reduced the claimant’s hours in its restaurant in October, 2016, and it offered the claimant work in the bakery to supplement her hours.

In light of the foregoing, we conclude that the review examiner’s credibility determination against the employer regarding the reason for the claimant’s reduced work schedule is reasonable in relation to the evidence presented and shall not be disturbed. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996).

Since the employer reduced the claimant’s regular full-time schedule to either part-time, or no hours in certain weeks, beginning in October, 2016, and there is no indication in the record that she was refusing work from the employer during this period of time, pursuant to G.L. c. 151A, §§ 1(r)(1), 29(a), and 29(b), we conclude that the claimant was in partial unemployment during the weeks in which the employer only offered her a part-time schedule of work. We further

¹ We take administrative notice of the claimant’s weekly certifications record in the DUA’s UI Online system.

conclude that, pursuant to G.L. c. 151A, § 1(r)(2), and the claimant was in total unemployment during the weeks in which the employer closed and did not offer her any work.

We affirm the part of the review examiner's decision that awarded unemployment benefits to the claimant between November 6, 2016, and December 10, 2016, and as of January 8, 2017, if otherwise eligible. We also affirm the portion of the review examiner's decision, which denied benefits to the claimant between December 18, 2016, and January 7, 2017, as the claimant was on vacation and not available for work.

However, we reverse the portion of the review examiner's decision that denied benefits to the claimant during the week ending December 17, 2016, because, as noted above, the claimant's vacation did not begin until December 18.



Paul T.

BOSTON, MASSACHUSETTS

Fitzgerald, Esq.

DATE OF DECISION - May 18, 2020

Chairman



Michael J. Albano

Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS
STATE DISTRICT COURT**

(See Section 42, Chapter 151A, General Laws Enclosed)

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until June 1, 2020². If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day following the thirtieth day.

To locate the nearest Massachusetts District Court, see:

www.mass.gov/courts/court-info/courthouses

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.

SVL/rh

² See Supreme Judicial Court's Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 4-27-20.