Reneging on a promise for a second week of paid vacation was not good cause attributable to the employer to resign because it did not amount to a substantial decline in wages. Claimant's efforts after he quit to speak with the owner to try to work through the vacation issue were after the fact efforts to be rehired. Efforts to preserve employment must be made before the employment relationship is severed.

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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

Following the claimant's separation from employment, he filed a claim for unemployment benefits, which was approved in a determination issued by the agency on July 27, 2017. The employer appealed to the Department of Unemployment Assistance (DUA) Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on October 26, 2017, concluding that the claimant had good cause attributable to the employer to resign pursuant to G.L. c. 151A, § 25(e)(1). The employer sought review by the Board, which reversed, denying benefits, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On July 13, 2018, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence concerning the claimant's terms of employment and his efforts to preserve his job. The claimant, his counsel, and the employer's representative attended the remand hearing. Upon reviewing the consolidated findings of fact following this hearing, we remanded a second time to obtain further subsidiary findings of fact from the record seeking more details about the claimant's efforts to preserve. Thereafter, the review examiner issued her revised consolidated findings of fact.

The issue before the Board is whether, pursuant to G.L. c. 151A, § 25(e)(1), the claimant had good cause attributable to the employer to resign when his manager reneged on an employer promise to give him a second week of paid vacation, and, if so, whether the claimant made sufficient efforts to preserve his employment before resigning.

After reviewing the entire record, including the recorded testimony and evidence from the original and remand hearings, the review examiner's decision, the employer's appeal, the District Court's Order, and the consolidated findings of fact, we affirm our prior decision.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant worked as a Mechanic for the employer, a Truck Dealership, from August 13, 2012 until December 15, 2016, when he was separated.

2. The claimant was hired to work full-time. The claimant was originally paid $17 per hour.

3. [A] Sr. was the owner of the company.

4. [A] Jr. was the claimant's manager and direct supervisor.

5. The owner hired the claimant in 2012.

6. The employer has a written policy about benefits that informs employees that they will not be paid for sick days or holidays until they have worked there for at least three months.

7. As a benefit to employees, the employer gives employees one week of paid vacation during their first year of employment and two weeks of paid vacation during their second year of employment.

8. The employer does not usually pay employees for paternity leave.

9. The employer generally does not allow employees to take time off from work in December because it is such a busy month for the employer.

10. The claimant was informed of these policies after hire.

11. On July 10, 2015, the claimant informed the employer that he was resigning due to being dissatisfied with his current rate of pay.

12. On or about September 21, 2015, the owner spoke with the claimant and asked him if he would reconsider coming back to work for him. The employer told the claimant that if he came back to work for him then he would raise his hourly rate of pay from $17 per hour to $20 per hour. The owner also told the claimant that if he agreed to come back to work for him that all of his benefits would remain the same.

13. Had the employer not agreed to allow the claimant to have his benefits remain the same, he would *not* have accepted the job offer.

14. Although it was December, the employer allowed the claimant to take two weeks off from work, beginning December 15, 2015 through December 28, 2015. The employer informed the claimant one week of the time off would be

paid paternity leave and it would not count against his vacation time. The claimant took the second week as paid vacation time.

15. The employer offered the claimant the paid week of paternity leave.

16. The claimant had not asked the employer for the paid paternity leave.

17. The claimant took a week of his vacation time during the summer of 2016.

18. In November 2016, the claimant requested to take his second week of vacation in December in order to celebrate his son's first birthday.

19. When the claimant's manager found out about the claimant's vacation request, he reminded the claimant that December was a very busy month, but he told the claimant that he would look into the request and try to give him that week off from work.

20. The manager did not say anything to the claimant about not being entitled to a second week of vacation when he received the claimant's vacation request in November 2016.

21. The manager never got back to the claimant about his request for vacation in December 2016.

22. On December 15, 2016, the claimant reported to the manager that he was not paid properly for his work for the prior week. The claimant and the manager got into an argument over whether the claimant was owed any money and if so, how much.

23. During the argument, the manager said to the claimant in a mean tone, "[b]y the way, you know that vacation time you requested? You aren't going to get paid for that time. You are the *new guy*. You won't get paid cause when we hired you, we hired you as the *new guy*." The claimant responded, "[o]h really? This is news to me. I have been working 4 years and I'm still the *new guy*?" The manager then responded, "[y]es…..whatever." And then the manager walked away.

24. On December 15, 2016, the manager never told the claimant that he could not take the time off in December 2016 that he had requested, but instead, specifically told him that he was not entitled to be *paid* for the time because he only could get one week of paid vacation as a new employee.

25. The claimant became very angry at hearing this and reminded the manager that when he was hired back by the employer that he was told that all of his benefits would remain the same and this was unfair.

26. Had the manager told the claimant that his December 2016 paid vacation week request was not granted, but that he could take his second paid week of vacation at another time, the claimant would have continued to work for the employer.

27. The claimant's main issue with what the manager said to him on December 15, 2016, was that he was "the new guy" and not entitled to a second week of paid vacation, not that he could not take his paid vacation in December 2016.

28. The manager never told the claimant that he was not able to take his second week of vacation *unpaid* in December 2016.

29. Because the claimant felt that the employer had broken his promise of allowing him to return to work in September 2015 with the same benefits as he previously had before he left in July 2015, the claimant decided to quit.

30. The claimant would have spoken to the owner if he was at the business, but he was not there.

31. At the time the claimant resigned on Thursday, December 15, 201[6], the claimant believed it would be futile to wait until the next day to discuss his vacation time again with the manager because he had already reminded him of what he had been promised.

32. The claimant thought it was a waste of time to try to talk to the manager again on December 16, 2016 because he did not think the manager would give him another chance because the manager was so upset at him.

33. The claimant did not call the owner after December 15, 2016, because he never called the owner's private number and he did not have the owner's private number.

34. The claimant hoped that the owner would find out what happened, call the claimant at some point during the next week, and realize that a mistake had been made on the part of the employer.

35. The claimant testified that he did not go back to the company between December 16, 2016 and December 23, 2016 because he wanted to speak to the owner and the owner is rarely there, not because it was his vacation week.

36. After speaking with the manager on December 15, 2016, the claimant believed that his week of paid vacation had not been approved.

37. The claimant would have called the company directly to speak with the owner, but the claimant knew that the call would go through the manager and not directly to the owner.

38. After the claimant left the employer's premises on December 15, 2016, the claimant's manager never tried to contact the claimant after he may have "calmed down". The manager never apologized to the claimant for the way he treated him.

39. After the claimant left the employer's premises on December 15, 2016, the owner never attempted to contact the claimant in order to attempt to rectify any possible misunderstanding between the claimant and the manager.

40. Because the claimant was unable to contact the owner via telephone, on December 23, 2016, the claimant went to the employer's Christmas party, with the hope of having a "last talk" with the owner about continuing his employment.

41. The claimant went to the employer's place of business on December 23, 2016 because he knew the owner would be there at that time.

42. The claimant did not testify that he did not come back to the company to talk with the owner until December 23, 2016, because this was his vacation week.

43. The claimant testified that the December 2016 week of vacation had not been approved as paid time off.

44. The claimant believed that the owner might have called him after December 15, 2016, if the owner spoke with the manager and thought there had been some confusion and/or a mistake and that the owner may have then believed that the claimant deserved that week of vacation.

45. The claimant wanted to speak directly to the owner because the owner was a different kind of guy than the supervisor. The claimant felt that the owner was a more reasonable person than the manager was. Because the owner was a more reasonable person than the manager was, the claimant believed that he and the owner might be able to resolve the vacation time issue if they had a chance to speak face-to-face.

46. When the claimant arrived at the party on December 23, 2016, the manager approached the claimant and gave him his last check and walked away.

47. After getting his last check, the claimant spoke to one of his old co-workers for a few minutes.

48. Before the claimant had the chance to find the owner to speak to him, the manager approached the claimant again. The manager ordered the claimant to leave the employer's premises. The manager barked at the claimant, "[g]et out! You can't stay here! You can't talk to any other employees. You must leave *now*!" but the employer told the claimant to leave the party [sic].

49. The manager forced the claimant to leave the employer's premises before the claimant had the chance to speak to the owner.

50. Because the claimant had never been disciplined at all during his entire tenure with the employer, the claimant was very upset at the treatment he received from the manager at the Christmas party.

51. Had the employer fulfilled its promise to the claimant about his benefits, the claimant would have continued to work for the employer.

52. The claimant filed for unemployment benefits and received an effective date of January 1, 2017.

Credibility Assessment [and further consolidated findings of fact]:

At the remand hearing, the employer did not testify at all and only the employer agent offered hearsay testimony regarding its allegation that the manager never promised the claimant that his benefits would remain the same when he returned to working for the employer in September 2015 and therefore was only entitled to one paid week of vacation. The employer agent had no firsthand knowledge of the situation. The hearsay evidence of the employer was rebutted by the direct testimony of the claimant that the manager promised the claimant that if he came back to work for him that he would get both a raise in pay and retain all of his previous benefits. The claimant's testimony is given credit since there was no other testimony presented at the remand hearing that was inconsistent with what the claimant testified to. Given the record as a whole, the claimant's testimony is found to be more credible than the employer's testimony.

The claimant provided credible and unrefuted testimony at the Court remand hearing. It is concluded that the claimant's belief that any attempt on his part to contact the manager directly after December 15, 2016 to try to work something out with the manager would have been futile based on the manager's unprofessional, aggressive, and hostile behavior towards the claimant on both December 15, 2016 and December 23, 2016. It is also concluded that the claimant's belief that the only way the situation would be fairly resolved would be if he was able to speak face-to-face with the owner, without interference with the manager. It is concluded that the claimant reasonably believed that December 23, 2016 was the first definite opportunity the claimant would have of being able to speak to the owner face-to-face because he knew it was the company Christmas party and that the owner would attend.

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

and credibility assessment except as follows. We note that the second paragraph of the review examiner's credibility assessment includes three factual findings about the claimant's belief. The last sentence concludes that the claimant "reasonably" believed that December 23, 2016, would be the first opportunity for the claimant to speak face to face with the owner. Whether his belief is reasonable or not is a mixed question of law and fact, which, on appeal, is for the Board to decide. Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979) ("Application of law to fact has long been a matter entrusted to the informed judgment of the board of review."). In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we do not believe that the consolidated findings support the review examiner's original legal conclusion that the claimant is entitled to benefits.

Inasmuch as the claimant quit his job, we must decide whether he is eligible for benefits under G.L. c. 151A, § 25(e)(1), which provides, in relevant part, as follows:

> [No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . .

The express language of this provision places the burden of proof upon the claimant.

Good cause attributable to the employer

When a claimant contends that the separation was for good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). Our inquiry begins with why the claimant resigned.

As background, we note that this was the second time the claimant had resigned from his job. He did so in July, 2015, over dissatisfaction with his rate of pay. Consolidated Finding # 11. Two months later, the employer hired him back with an increase from $17 to $20 per hour and a promise that all of his benefits would remain the same. Consolidated Finding # 12. Since the claimant was entitled to two weeks of paid vacation at the time he separated in July, 2015, he could reasonably believe that this promise included the benefit of two weeks of paid vacation. He quit this second time because he felt the employer broke its promise to grant him the second week of paid vacation. Consolidated Finding # 29.

In our prior decision, we concluded that this change in the terms of the claimant's employment did not constitute good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1). Looking at the change from a financial perspective, the claimant lost one week of paid time off, which, at $20 per hour and assuming 40 hours per week, is $800.00. The Supreme Judicial Court (SJC) has held that a substantial decline in wages may render a worker's job unsuitable and, therefore, may be viewed as good cause attributable to the employer to leave a job. Graves v. Dir. of Division of Employment Security, 384 Mass. 766, 768 n. 3 (1981). In determining what is considered substantial, the Massachusetts Appeals Court, in a summary

decision, expressed the view that a 16% reduction in salary was a substantial change to the terms of employment. North Shore AIDS v. Rushton, No. 04-P-503, 2005 WL 3303901 (Mass. App. Ct. Dec. 6, 2005), *summary decision pursuant to rule 1:28*. In Board of Review Decision 0010 6444 71 (July 31, 2014), we held that a 6.25% reduction in hours did not constitute good cause to quit.[1] Here, the loss of an $800 benefit at the claimant's salary would be a 1.9% cut in pay.[2]

During the remand hearing, the claimant's counsel argued that losing one of two weeks of paid vacation is substantial, as it is a 50% reduction in paid time off. We decline to look at this single benefit in isolation from the claimant's entire compensation package. Although this benefit may have been very important to the claimant and the review examiner found that the employer reneged on its promise, losing it did not amount to a substantial decline in wages. *See* Board of Review Decision 0022 5079 11 (Apr. 24, 2018) (though assistant's transfer may have precluded the claimant from taking a deeply meaningful planned family vacation, it did not constitute good cause attributable to the employer to resign). Again, we do not challenge the claimant's decision to leave over this broken promise. We simply conclude that it does not rise to the level of good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1).

Efforts to preserve his employment

As instructed by the District Court, we consider again whether the claimant made reasonable efforts to preserve his employment in light of the consolidated findings after remand. The SJC has held that an employee who voluntarily leaves employment due to an employer's action also has the burden to show that he made a reasonable attempt to correct the situation or that such attempt would have been futile. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93-94 (1984).

Significantly, the review examiner found that the claimant resigned on December 15, 2016. Consolidated Finding # 31. This means that, on December 15, 2016, the claimant severed his employment relationship.[3] Therefore, any effort to preserve the employment relationship would have had to be made before the claimant ended said relationship. There are a number of findings devoted to the claimant's state of mind over the following week. Specifically, the claimant believed the owner to be a more reasonable person than his manager, he hoped the owner would find out what happened, the owner would realize the manager's mistake about the week of vacation, and he believed the owner would resolve the vacation time issue. *See* Consolidated Findings ## 34, 44, and 45. These findings indicate that the claimant knew there might be a way to correct the situation and that tells us that he did not believe such efforts to be futile. The problem is that the claimant had already quit. Any effort to reach the owner by telephone or at the Christmas party would have been after the fact in an attempt to be rehired, much like he was rehired by the owner after he quit in 2015.

Reasonable efforts to preserve employment can only be made *before* the employment relationship is severed. We recognize that, before he left on December 15, 2016, the claimant

[1] Board of Review Decision 0010 6444 71 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

[2] Assuming 40 hours per week at $20 per hour, the claimant's base annual salary would be $41,600.

[3] Any inference to be made from Consolidated Finding # 28 that the claimant took the following week as an authorized *unpaid* vacation is meaningless, because the claimant no longer worked for the employer.

could not speak with the owner because the owner was not there. Consolidated Finding # 30. Under these circumstances, if the claimant had wanted to keep his existing job, a reasonable course of action would have been not to quit immediately after the heated argument with his manager, but to report for work the next day (Friday) and in the following week until he could speak face to face with the owner at work or at the December 23, 2016, Christmas party (the following Friday). Nothing in the record suggests that he was forced to resign on December 15, 2016, or that he could not come back to work the next day. The claimant, however, chose not to pursue this viable and reasonable means of potentially preserving his employment.

We, therefore, conclude as a matter of law that the claimant resigned from his job without good cause attributable to the employer and without making reasonable efforts to preserve his job before resigning. He is disqualified under G.L. c. 151A, § 25(e)(1).

We affirm our prior decision. The claimant is denied benefits for the week beginning December 11, 2016, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 27, 2019

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT OR TO THE BOSTON MUNICIPAL 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.

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.

AB/rh