

**Claimant personal care aide was not in partial unemployment, where employer credibly established that it had full-time work available for the claimant, but the claimant had requested a reduction in her schedule and was not working all available hours.**

**Board of Review  
19 Staniford St., 4<sup>th</sup> Floor  
Boston, MA 02114  
Phone: 617-626-6400  
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.  
Chairman  
Charlene A. Stawicki, Esq.  
Member  
Michael J. Albano  
Member**

**Issue ID: 0022 0034 90**

## **BOARD OF REVIEW DECISION**

### **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 reverse.

The claimant filed a claim for unemployment benefits with the DUA on June 1, 2017, which was denied in a determination issued on March 20, 2018. 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 agency's determination and awarded benefits in a decision rendered on May 8, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner concluded that the claimant was accepting all suitable work offered by the employer (in view of her inability to work overnight shifts, due to family obligations) and, thus, the claimant was considered to be in partial unemployment pursuant to 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 allow the employer to provide testimony and evidence. Only the employer attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact and credibility assessment. 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 that the claimant was accepting all hours of suitable work available to her, and thus was in partial unemployment, is supported by substantial and credible evidence and is free from error of law, where, following remand, the record indicates the claimant reduced her availability to perform work for the employer.

### **Findings of Fact**

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

1. On 4/11/16, the claimant was hired to work full-time hours, at \$12 per hour, as a non-union Personal Care Aid for this employer's health care agency. The claimant continues to work for this employer.
2. The claimant is a single mother with two young children. Because of childcare issues, the claimant was only available to work Monday through Friday until 5 pm; and was available at times on weekends. The employer was able to provide the claimant a full-time schedule that accommodated these restrictions.
3. The employer assigned the claimant to work 42 hours per week for one client and three hours per week for another client. The claimant worked 45 hours per week for several months.
4. In the spring of 2017, the claimant began reducing the number of hours she was available to work. The claimant's May 26, 2017 paycheck showed she worked 65 hours in a two-week period.
5. The claimant filed for unemployment benefits on 6/1/2017 effective 5/21/2017. She reopened her claim effective 6/11/2017.
6. In October 2017, the claimant's rate of pay was raised to \$13.00 per hour on weekdays and \$14 per hour on weekends.
7. In December 2017, the claimant informed the employer she was no longer available to work afternoons because she wanted to pick up her children from school. She stated she was available to work Monday, Tuesday and Thursday from 9 a.m. to 1:30 p.m.; Wednesday up to 11:30 a.m., Fridays any time; and Saturday 9 a.m. to noon.
8. The claimant's December 22, 2017 paycheck showed she worked 34 hours in a two-week period.
9. Since the time of hire, the employer has had and continues to have full-time work available to the claimant.
10. On March 20, 2018, the Department of Unemployment Assistance (DUA) issued a Notice of Disqualification to the claimant because she requested a reduction in her schedule of working hours although continuing work was available. The determination disqualified the claimant beginning May 21, 2017 and continuing indefinitely. It found the claimant had been overpaid benefits.
11. On or about March 25, 2018, the claimant asked the employer for additional hours. She informed the employer she was available 7 days per week and had some flexibility regarding the hours she could work.

### Credibility Assessment:

Only the claimant attended the initial hearing. She testified she never requested a reduction in hours. Rather, the employer reduced her hours. Only the employer attended the remand hearing. The employer testified a full-time schedule always remained available to the claimant and it was the claimant who requested the reduction in hours.

The employer corroborated its testimony with a contemporaneously written note detailing a January 2018 request by the claimant for a reduction in hours. Although this note does not deal with the May 2017 timeframe when the claimant began reducing her hours, it directly contradicts the claimant's testimony of *never* requesting a reduction in hours. Therefore, the employer's testimony that the claimant's hours were reduced at the claimant's request is accepted as credible.

### 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. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems 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.

The review examiner's decision to award benefits was based on G.L. c. 151A, §§ 29(a), 29(b), and 1(r). G.L. c. 151A, § 29(a), authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

"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. . . .

G.L. c. 151A, § 29(b), authorizes benefits to be paid to those in partial unemployment. Partial unemployment is defined at G.L. c. 151A, § 1(r)(1), which provides, in relevant part, as follows:

"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 . . . .

Based on the claimant's unrefuted testimony at the initial hearing, the review examiner found that the claimant never requested a reduction in her hours. He further found that the claimant was working all available hours of suitable work and only filed for unemployment benefits when

the employer reduced her schedule from full-time to part-time. *See* Initial Findings of Fact ## 2, 3, and 8 (Remand Exhibit # 2). From there, the review examiner concluded that the claimant at all times accepted all suitable work available to her and was in partial unemployment. We remanded the case to take the employer's testimony. After remand, we reverse and deny benefits.

After remand, the review examiner modified his consolidated findings substantially, deleting the three findings referenced above. The review examiner credited the employer's testimony that the reduction in the claimant's hours came at her request, not the employer's, and that the employer could have provided the claimant with a full-time schedule that accommodated her restrictions, had she chosen not to reduce her schedule from full-time to part-time.<sup>1</sup>

While the claimant contended she did not ask for a reduction in hours, the review examiner accepted the employer's testimony on this issue, and provided a credibility assessment setting forth his reasons for doing so. Such credibility assessments are within the scope of the review examiner's fact finding role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996).

Since the review examiner credited the employer's testimony that the change in employment status was initiated by the claimant, and that the employer had full-time hours available that could have worked around the claimant's schedule restrictions, we conclude that the claimant was neither in total nor partial unemployment. This is so because the claimant did not make herself available for full time suitable work offered by the employer. Such availability is one of the elements of the definition of "in unemployment." *See* G.L. c. 151A, §§ 1(r)(1) and (2). We, therefore, conclude as a matter of law that the claimant was not eligible for benefits because she initiated the change in status that reduced her employment from full- to part-time work and did not work all hours available to her.

---

<sup>1</sup> The review examiner also found that after the DUA initially denied the claimant's request for unemployment benefits on March 20, 2018, she asked the employer for additional hours on or about March 25, 2018. The temporal proximity between the agency's denial of benefits and the claimant's request for additional work further undercuts her claim that the reduction in her hours was at the employer's behest rather than hers.

The review examiner's decision is reversed. The claimant is denied benefits for the week ending May 27, 2017, and for subsequent weeks, until such time as she meets all the requirements of G.L. c. 151A, §§ 29(a), 29(b), and 1(r)(1) and (2).

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - July 30, 2018**



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](http://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.

JPC/rh