

When a minority shareholder of the employer's student transportation corporation was working reduced hours because there was less work to do, she was in partial unemployment. Requiring the claimant or employer to fire other workers so that the claimant could get more hours is not in accord with the general purpose of Chapter 151A.

**Board of Review
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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny 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, and the claim was determined to be effective August 14, 2016. She subsequently filed a claim for benefits in August of 2017, and that claim was determined to be effective August 13, 2017. On September 13, 2017, the DUA sent the claimant a Notice of Disqualification, which informed her that she was not eligible to receive unemployment benefits, beginning August 14, 2016, and that she had been overpaid \$3,603.00.¹ The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on November 21, 2017.

Benefits were denied after the review examiner determined that the claimant, a part owner of the employer, should have laid off other workers so that she could obtain more hours during a period when there was less overall work for the business. Accordingly, the review examiner concluded that the claimant was not in unemployment and was disqualified under G.L. c. 151A, §§ 29(a), 29(b), and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accepted the claimant's application for review. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant is not in unemployment, beginning August 14, 2016, is supported by substantial and credible evidence and is free from error of law, where the review examiner found that the claimant usually worked

¹ The determination denied benefits using the following rationale: "Because the corporation is still active, and you have failed to establish that work is not available to you, you are not in unemployment." Exhibit #5, p. 1. The determination indicated that the claimant was overpaid benefits on both her 2016 and 2017 claims.

full-time for the company, but was not working full-time hours after she filed her claims due to a lack of work during the summer, school break, and early fall periods.

Findings of Fact

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

1. The employer's company was established in 2013. The employer's establishment is still operating.
2. The employer's establishment is a transportation company for students with special needs.
3. The claimant is an owner of the company. The claimant's son also owns the company. They own the employer's establishment equally.
4. The claimant is the Manager and a bus driver for the company.
5. The claimant's son is the Director, Secretary and General Manager.
6. The claimant is paid \$15.00 per hour.
7. The claimant usually works fulltime hours for the employer's establishment in her combined bus driver and manager role. The claimant usually works 40 hours per week.
8. The employer has 4 office workers, including the claimant, 1 mechanic, 14 bus drivers and 4 bus monitors.
9. The employer's establishment operates year round. During school summer recess periods and vacation periods, the employer has less hours available as there are not as many students in need of transportation.
10. On August 22, 2016, the claimant filed an initial claim for benefits (Exhibit 1). The effective date of the claim is the week beginning August 14, 2016.
11. The claimant requested benefits for the weeks ending August 20, 2016 through October 1, 2016 and June 17, 2017 through August 12, 2017 (Exhibit 1).
12. On August 21, 2017, the claimant filed an initial claim for benefits (Exhibit 2). The effective date of this claim is the week beginning August 13, 2017.
13. The claimant requested benefits for the weeks ending August 19, 2017 through September 30, 2017 (Exhibit 2).
14. The claimant requested benefits for the weeks ending August 20, 2016 through October 1, 2017, June 17, 2017 through August 12, 2017, and August 19, 2017

through September 30, 2017, as the claimant was working reduced hours for these weeks. The claimant was working 6 hours per week during these weeks. The claimant was able and available to work fulltime hours these weeks. The claimant was working reduced hours due to school recess periods for students and due to one of the claimant's students having an injury. During these weeks, the claimant could have laid off other school bus drivers working for the company so the claimant could have worked more hours. The claimant decided not to lay off other workers. The claimant could have worked up to 16-20 hours per week during these weeks if other workers were laid off instead of the claimant.

15. During the weeks the claimant requested unemployment, the claimant was looking for work with other employers. The claimant was looking for part-time work. The claimant was looking for work 3 days per week and maintaining a work search activity log. The claimant looked for work at [Company A], the [Company B], [Company C] and [Company D]. The claimant was only looking for part-time work as the claimant was looking for students to come back on her route at the employer's establishment.
16. The employer's Office Manager works on a fulltime basis for the employer. The Office Manager's hours were also reduced during the same times the claimant's hours were reduced. The Office Manager's major tasks involve billing and using computers. The claimant cannot perform the tasks of the Office Manager as the claimant is not very good with billing or computers.
17. The employer's Assistant Manager also works fulltime for the employer. The Assistant Manager's hours are also reduced during periods of times. The Assistant Manager performs the tasks of scheduling the routes for the buses. The claimant does not know how to perform the Assistant Manager's tasks.
18. On September 13, 2017, the Department issued a Notice of Disqualification denying the claimant benefits under Sections 29(a) & 1(r) of the Law commencing the week beginning August 14, 2016 and subsequently thereafter until she met the requirements of the Law (Exhibit 5). As a result of the Notice of Disqualification, the claimant was overpaid \$3,603 in previously received benefits for the weeks ending August 27, 2016 through October 1, 2016 and June 17, 2017 through September 9, 2017 (Exhibit 5).

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact, with the following observation. In Finding of Fact #3, the review examiner found that the claimant and her son are owners of the employer. She found that "[t]hey own the employer's establishment equally." Based on the testimony from the hearing, a more accurate finding would be that the claimant and her son owned equal shares of the business. It appears that the review examiner may have

intended to find this, but did so unclearly in the finding. The testimony was that the claimant owned ten percent and her son owned ten percent.² It is not apparent from the record who or what owns the other eighty percent of the company. We accept Finding of Fact #3 with this understanding of what the review examiner tried to convey with the finding. As discussed more fully below, we reject the review examiner's legal conclusion that the claimant was not in unemployment as of August 14, 2016.

To be eligible for unemployment benefits, the claimant must show that she was in a state of unemployment, whether total or partial. 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....

The review examiner found that the claimant filed her unemployment claims and requested benefits, because she “was working reduced hours.” Finding of Fact # 14. Because the claimant continued to work for the employer, the most applicable provisions here are those relating to partial unemployment, G.L. c. 151A, §§ 29(b) and 1(r)(1).

The review examiner found that the claimant normally works a full-time schedule of hours with the employer, a student transportation company, in a combined role of bus driver and manager. Finding of Fact # 7. However, she worked reduced hours during the summer, school break periods, and the early fall. *See* Findings of Fact ## 9 and 14. Generally, when a claimant has a reduced schedule of work due to no fault of her own, the individual is considered to be in partial unemployment, so long as the partial weekly earnings do not exceed the benefit rate of the claim. *See* DUA's Service Representative Handbook, Section 1405(A), with which we agree. In this case, however, the review examiner did not apply that legal maxim. She reasoned, instead, that the claimant was not in partial unemployment, “because during those weeks the claimant could have laid off other school bus drivers working for the company so that the claimant could have worked more hours.”

² The ownership percentages of the claimant and her son, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing, 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 Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

We recognize that the agency must closely scrutinize cases in which an owner, or part owner, of a company argues that he or she is in unemployment. Because unemployment benefits are to be paid to those who are out of work through no fault of their own, the agency must analyze whether the claimant's unemployment was compelled by circumstances affecting the business or whether the claimant voluntarily put himself or herself in a state of unemployment. See Jahn v. Dir. of Division of Employment Security, 397 Mass. 61 (1986).

We note at the outset that it is far from clear from this record that the claimant had any control over whether she could have laid off other workers. The review examiner concluded, in part, that the claimant could have had more hours, but "the claimant decided not to lay off other workers." As noted above, the claimant had only a ten percent interest in the company. To be sure, the company was family-owned, and we could speculate that the family members involved in the business work closely together and that the claimant could have influenced how many hours she worked. However, the testimony and findings are insufficient to support such a conclusion. Thus, they are also insufficient to conclude that the claimant controlled the employment status of other employees or the amount of hours she worked. Compare, Jahn, 397 Mass. at 63 ("Where an employee who is also a majority shareholder exercises his controlling interest in the company to effectuate a sale, his separation from employment is properly deemed voluntary and subject to disqualification . . .").

In addition, under the facts of this case, we disagree with the review examiner's reasoning as stated in Part III of her decision. The findings make it clear that work was reduced for all employees during the summer break and early fall periods. There was less work to do during the weeks in which the claimant requested benefits on both her 2016 and 2017 unemployment claims. We decline to hold that, as a matter of law, the claimant (a minority shareholder of the company), in conjunction with the other owners, should have laid off other employees so that she could obtain more hours of work. First, this can potentially encourage employers to lay off employees, rather than keep them employed, even in reduced capacities. We decline to endorse a legal theory which encourages employers to put their workers into unemployment. Second, we are hesitant to approve a legal theory or policy which purports to dictate how an employer should divide a limited number of hours of work among its employees. All, or most, of the employees are in unemployment, because there is a reduced amount of work during the periods at issue. It should make little difference to the agency which employees apply for benefits, so long as there is an overall reduction in work.

In short, as suggested above, the most straightforward way to analyze this case is to focus on the amount of work available to the company during the periods the claimant requested benefits. During those periods, there was less work to do. Consequently, the claimant's hours were reduced. She had less income than she normally would have. Thus, she was eligible to request partial unemployment benefits to supplement her reduced income.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits is not based on substantial and credible evidence or free from error of law, because the claimant was working reduced hours when there was a reduced amount of work for the company to do, thus putting her in partial unemployment pursuant to G.L. c. 151A, §§ 29(b) and 1(r)(1).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning August 14, 2016, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 31, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

**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.

SF/jv