

Claimant was automatically entitled to have her claim pre-dated under G.L. c. 151A, § 62A(g), because none of her employers provided the mandatory notice of how to file a claim. She is not required to show good cause for failing to file earlier.

**Board of Review
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Issue ID: 0022 4583 16

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Michele Lerner, a review examiner of the Department of Unemployment Assistance (DUA), to deny the claimant's request that her unemployment claim be pre-dated. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

After separating from her full-time employer on June 28, 2017, the claimant filed a claim for unemployment benefits with the DUA on July, 20, 2017. The claim had an effective date of July 16, 2017. The claimant requested that claim be pre-dated, but this request was denied in a determination issued by the DUA on September 2, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant, the review examiner affirmed the agency's initial determination and denied the pre-date request in a decision rendered on November 9, 2017. We accepted the claimant's application for review.

The pre-date was denied after the review examiner determined that the claimant did not have good cause for failing to file her claim earlier, and, thus, she was not eligible to have an earlier effective date of her claim under G.L. c. 151A, §§ 23(b) and 24(c). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to obtain subsidiary findings regarding whether the claimant was given written information by her employer about filing a claim for benefits. 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 conclusion that the claimant is not entitled to a pre-date is supported by substantial and credible evidence and is free from error of law, where the claimant's most recent employers failed to provide her with written information about how and where to file a claim for unemployment benefits after she stopped working.

Findings of Fact:

1. The claimant had at least eight unemployment claims before she filed her 2017-01 claim on July 20, 2017.
2. The claimant's last day of full-time work, as a schoolteacher, was Wednesday June 28, 2017.
3. The claimant's school employer did not provide the claimant with written information regarding how to file a claim for unemployment benefits.
4. On Thursday July 20, 2017, the claimant worked as a Dining Room and Cafeteria Attendant for her subsidiary on-call employer, an entertainment business. She continued to be an on call employee for them after this date.
5. The entertainment business also did not provide the claimant with written information regarding how to file for unemployment benefits.
6. On Thursday July 20, [2017], the claimant filed her 2017-01 claim for unemployment benefits. The Department of Unemployment (DUA) later established the effective date of the claim as July 16, 2017.
7. When the claimant filed her claim on July 20, 2017, she had expected it to be effective July 9, 2017, the Sunday of the last week she did not work.
8. The claimant did not perform any paid services during the week ending July 15, 2017.
9. The claimant returned to work the week ending July 22, 2017.
10. The claimant was disqualified from receiving benefits for the week ending July 22, 2017 because her earnings exceeded her benefit rate. The week ending July 29, 2017 was therefore determined to be the claimant's "wait week".
11. On July 24, 2017, the claimant attempted to request benefits for the week ending July 15, 2017 but the system would not allow her to do so. At that time, the only week she was able to request benefits for was the week ending July 22, 2017.
12. On or about July 25, 2017, the claimant requested that her claim be pre-dated to July 9, 2017.
13. On September 2, 2017, DUA issued Notice of Disqualification for Issue 0022 4583 16-01, stating that a wait period could not be served nor benefits paid on this claim for any week prior to July 16, 2017.

CREDIBILITY ASSESSMENT:

The claimant's testimony that she did not receive written information, regarding how to file for unemployment benefits, from either of her employer's is accepted as credible. There is no evidence or testimony in the record to rebut the testimony and it is consistent with the answers both she and the subsidiary employer provided on the fact-finding questionnaires. There is no questionnaire in the record from the full time employer.

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 ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, since the employers did not comply with the requirements of G.L. c. 151A, § 62A(g), we reject the review examiner's conclusion that the claimant is not entitled to a pre-date.

G.L. c. 151A, § 62A(g), provides, in pertinent part, as follows:¹

Each employer shall issue to every separated employee, as soon as practicable, but not to exceed 30 days from the last day said employee performed compensable work, written information furnished or approved by said division which shall contain . . . instructions on how to file a claim for unemployment compensation Delivery is made when an employer provides such information to an employee in person or by mail to the employee's last known address. The waiting period under section 23 for an employee who did not receive the information required by this paragraph and who failed to file timely for benefits, shall be the Sunday of the initial week such employee would have been eligible to receive unemployment compensation. Each employer shall have the burden of demonstrating compliance with the provisions required herein.

The review examiner found that the claimant thought she was not supposed to file her claim until after she had completed one full week without full-time work. *See* Exhibit # 4. The claimant filed her claim on July 20, 2017, expecting it be effective July 9, 2017, the Sunday of the last week she did not work. *See* Exhibit # 7. During the hearing, the claimant testified that she was given no written information by her employers about filing for unemployment benefits. She also told this to the DUA, when she was filling out her fact-finding questionnaire. *See* Exhibit # 6, p. 4. The review examiner found the claimant's testimony credible on this issue and further noted the lack of evidence or testimony in the record to rebut the claimant's testimony. Such assessments are within the scope of the review examiner's role as fact finder, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996).

¹ We recognize that G.L. c. 151A, § 62A(g), was not specifically noticed to the parties as a section of law which was to be considered at the hearing. However, the claimant is the only interested party to this case and application of this statutory provision is to her benefit.

Written notice instructing the claimant how to file a claim for benefits is a statutory requirement under G.L. c. 151A, § 62A(g). In light of these facts and the applicable law, we conclude that the claimant is automatically entitled to have her claim pre-dated. Where the claimant never received any information from her employers about how to file a new claim, there is no need to also show any form of good cause for not filing the claim earlier. This is because the statute uses mandatory language (“[t]he waiting period . . . for an employee who did not receive the information required . . . shall be the Sunday of the initial week such employee would have been eligible . . .”). The good-cause analysis used by the review examiner was not necessary and is legally erroneous, given the applicability of G.L. c. 151A, § 62A(g).

We, therefore, conclude as a matter of law that the review examiner’s decision to deny the pre-date was based on an error of law, because, under G.L. c. 151A, § 62A(g), the claimant did not receive information from her employer about how and where to file for unemployment benefits, and the claimant is automatically entitled to have her claim be effective earlier without a showing of good cause.

The review examiner’s decision is reversed. The claimant is entitled to a pre-date on her most recent unemployment claim. The effective date of the claim shall be July 9, 2017, which is the week the claimant separated from full time employment.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 16, 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.

CAS/rh