Although the claimant signed a release of claims and was given two payments of termination pay, the pay is disqualifying, because the consideration for the release was not termination pay but the forbearance of the claimant's obligation to repay a signing bonus.

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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Matthew Shortelle, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits for the period from August 6, 2017 through September 2, 2017. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm, but for reasons which differ from those stated in the review examiner's decision.

The claimant separated from her position with the employer on August 4, 2017. She filed a claim for unemployment benefits with the DUA, and the effective date of her claim is August 6, 2017. On September 29, 2017, the DUA sent the claimant a Notice of Disqualification which informed her that she was not eligible to receive benefits from August 6, 2017, through September 2, 2017. The claimant appealed the determination to the DUA Hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on December 19, 2017.

Benefits were denied after the review examiner determined that the claimant had received severance payments for the period at issue and, thus, she was not in unemployment and was disqualified under G.L. c. 151A, §§ 29 and 1(r)(3) for the four weeks noted in the September 29, 2017 determination. 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 make subsidiary findings from the record regarding the Separation and Release Agreement the claimant signed on August 22, 2017. Thereafter, the review examiner issued his 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 subject to disqualification from August 6, 2017, through September 2, 2017, due to her receipt of remuneration during that period of time 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 assessments are set forth below in their entirety:

1. The claimant worked as the Senior Director of Program Management for the employer, a biotech start up, from June 12, 2017 until August 4, 2017.

2. When beginning work, the employer paid the claimant a $40,000.00 signing on bonus.

3. The claimant earned approximately $200,000.00 per year.

4. The employer paid the claimant approximately $8,000.00 bi-weekly.

5. On August 4, 2017, the claimant became separated from her employment.

6. The claimant and the employer agreed the claimant would receive her $8,000.00 bi-weekly salary through September 4, 2017.

7. From August 4, 2017 through September 4, 2017, the claimant did not have any work responsibilities and did not have any a

8. On August 22, 2017, the claimant signed a Separation and Release Agreement (the Agreement).

9. The employer did not require the claimant to sign the Agreement in order to receive her paychecks from August 4, 2017 through September 4, 2017.

10. In consideration of signing the Agreement and thereby releasing all claims, the employer agreed the claimant would not have to repay the employer the $40,000.00 signing on bonus she received when she began her employment.

11. On September 8, 2017, the claimant filed a claim for unemployment benefits with an effective date of August 6, 2017.

[CREDIBILITY ASSESSMENT:] The claimant testified at the initial hearing the two $8,000.00 payments she received from the employer between August 4, 2017 and September 4, 2017 were in consideration of her signing the Agreement. Based on the text of the Agreement, it is concluded the claimant made a mistake in her testimony and the Agreement did not affect the claimant's receipt of the two payments. Rather, the text of the Agreement establishes the claimant did not have to repay the $40,000.00 sign on bonus if she signed the Agreement and waived all claims.

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. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except for the second portion of Consolidated Finding of Fact # 7. This finding is not a complete sentence, and it is unclear what the review examiner intended to find. However, this finding is not critical to the outcome of this matter. We accept the finding, insofar as it states that the claimant "did not have any work responsibilities" after August 4, 2017. The portion of the finding stating "and did not have any a" is rejected. In addition, Consolidated Finding of Fact # 5 should be September 4, 2017, rather than August 4, 2017, pursuant to paragraph 1(b) of the Agreement.[1] In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the review examiner, and the DUA, that the claimant is subject to disqualification.

In order to be eligible for unemployment benefits, beginning August 6, 2017, the claimant must have been in a state of unemployment. Because she provided no services to the employer after August 4, 2017, the question is whether the claimant was in total unemployment. 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.

As the claimant performed no "wage-earning services" after August 4, 2017, the issue before the review examiner, and now the Board, is whether the claimant received any remuneration which could be attributable to the period from August 6, 2017, through September 2, 2017. Under G.L. c. 151A, § 1(r)(3), remuneration is defined, in relevant part, as the following:

> . . . any consideration, whether paid directly or indirectly, including salaries, commissions and bonuses . . . received by an individual (1) from his employing unit for services rendered to such employing unit, (2) as net earnings from self-employment, and (3) as termination, severance or dismissal pay, or as payment in lieu of dismissal notice . . . .

In his decision, the review examiner concluded that the claimant had received severance payments following her separation from work, and that the severance payments constituted disqualifying remuneration under the above-cited statute. We do not believe that the money paid to the claimant after August 4, 2017, was severance. The classic attributes of severance pay include that the total amount paid was directly related to years of service, the payments were not subject to limitation if the claimant obtained employment with employers other than the employer, and the claimant was permanently severed from employment. *See* Bolta Prods. Div.

[1] The full contractual terms of the Separation and Release Agreement, while not explicitly incorporated into the review examiner's findings, are part of the unchallenged evidence introduced at the hearing and placed in the record, 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).

v. Dir. of Div. of Employment Security, 356 Mass. 684, 689–690 (1970).[2] The review examiner did not make findings of fact regarding all of these aspects of the payments.

In our view, the two $8,000.00 payments made to the claimant more closely resemble termination pay. Termination pay is defined by the DUA as "[t]he maintenance by an employer of an employee's wages following the employee's separation from the employ of the employer." *See* DUA Service Representative's Handbook Section 1415(R). Here, for all intents and purposes, the employer kept the claimant on the payroll for two more payments cycles and paid her accordingly. Therefore, the monies were remuneration as defined in G.L. c. 151A, § 1(r)(3).

In his decision, the review examiner found and concluded that the claimant signed a Separation and Release Agreement (Agreement) in order to receive the two $8,000.00 payments.[3] If this were true, then the money the claimant received would not be disqualifying, because payments made as consideration for the signing of a release of claims is not considered remuneration by the DUA. *See* White v. Comm'r of Department of Employment and Training, 40 Mass. App. Ct. 249, 252-253, *further app. rev. den'd.* (1996). However, here, the claimant did not have to sign the Agreement to receive the two payments.

The Agreement states that the last day of the claimant's employment would be September 4, 2017. Paragraph 1(b) of the Agreement then states, in relevant part, the following:

> Regardless of whether Employee executes this Separation Agreement, (i) Employee has received, or will receive . . . (A) continued base salary through the last day of her employment . . . ."

Thus, the claimant was going to receive the two $8,000.00 payments even if she did not sign the Agreement. Consolidated Finding of Fact # 9. Paragraph 2 of the Agreement does indicate, however, the following:

> As good consideration for Employee's execution, delivery and non-revocation of this Separation Agreement, Employer agrees to waive the requirement that Employee repay the Sign-on Bonus [of $40,000.00].

Taken together, these provisions make clear that the employer received the claimant's signature on a release of claims, and the claimant was allowed to keep her bonus. The two $8,000.00 payments played no role in the signing of the release of claims. Consequently, the holding of White is inapplicable here.

[2] 430 CMR 4.38 defines "Severance Pay" as "a payment to an employee at the time of separation in recognition and consideration of the past services the employee has performed for the employer. The amount of the payment is usually based on years of service."

[3] The review examiner based his decision to deny benefits on a completely erroneous reading of G.L. c. 151A, § 1(r)(3). After incorrectly finding that the claimant needed to sign the Agreement to receive the two payments, he reasoned that the fact that the payments were split up, rather than in a lump sum, meant that the monies were remuneration. Neither the text of the statute, nor any case law, supports such a reading of the definition of remuneration.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits from August 6, 2017, through September 2, 2017, is supported by substantial and credible evidence and free from error of law, because the claimant did not sign a release of claims in order to receive the monies paid out to her following her separation from employment.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning August 6, 2017, through September 2, 2017. Pursuant to G.L. c. 151A, § 1(c), her benefit year shall be extended by four weeks.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 27, 2017

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/rh