

Claimant, who waited to file for unemployment benefits on the advice of his attorney while he was trying to negotiate for a severance package, was automatically entitled to a pre-date where his employer failed to provide information about how to file for benefits upon separation.

**Board of Review
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Issue ID: 0024 6139 64

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 the claimant's request that his unemployment claim be pre-dated. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

After separating from his employer, the claimant filed a claim for unemployment benefits with the DUA on December 29, 2017. The claim had an effective date of December 24, 2017. The claimant requested that his claim be pre-dated, but this request was denied in a determination issued by the DUA on July 18, 2018. 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 October 12, 2018.

The pre-date was denied after the review examiner determined that the claimant was aware of unemployment benefits, as shown by his attorney's advice to delay filing for benefits while they attempted to negotiate a severance package with his former employer, and, thus, he was not eligible to have an earlier effective date of his 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 took the claimant's appeal for review. 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 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 employer failed to provide him with written information about how and where to file a claim for unemployment benefits when he became separated.

Findings of Fact

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

1. On November 17, 2017, the claimant's employment ended after twenty-four years.
2. The employer, based in Ohio, did not provide information regarding unemployment benefits.
3. The claimant felt that he was being discriminated against based on age and he believed that severance package being offered was too little.
4. The severance package was conditioned upon an agreement (either release or noncompete).
5. The claimant contacted an attorney to explore legal options and negotiate for a larger severance package. The attorney advised the claimant to hold off on filing a claim for unemployment benefits while negotiations took place.
6. Negotiations failed, the claimant did not receive a severance, and the claimant filed a claim for unemployment benefits with an effective date of December 24, 2017.
7. On January 2, 2018, the claimant began new employment.

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. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, since the employer 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.

In analyzing the claimant's eligibility for a pre-date, we look to G.L. c. 151A, § 62A(g), which 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

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 statute is to his benefit and will not leave the claimant aggrieved.

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.

Following the remand hearing, the review examiner found that the claimant testified that employer did not provide the claimant with information about filing for unemployment benefits.

Written notice instructing the claimant on how to file a claim for benefits is required by 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 his claim pre-dated. Where the claimant never received any information from the employer about how to file a new claim, there is no need under this section 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 is automatically entitled to have his 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 his unemployment claim. The effective date of the claim shall be November 19, 2017, which is the week the claimant separated from his most recent job.

BOSTON, MASSACHUSETTS
DATE OF DECISION -December 24, 2018



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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.

JPC/rh