

Where the claimant was not given information about filing an unemployment claim by his most recent employer, he is automatically entitled to have his claim pre-dated pursuant to G.L. c. 151A, § 62A(g).

**Board of Review
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Issue ID: 0025 1553 94

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 March 23, 2018. The claim had an effective date of March 18, 2018. The claimant requested that his claim be pre-dated, but this request was denied in a determination issued by the DUA on May 11, 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 June 13, 2018.

The pre-date was denied after the review examiner determined that the claimant had experience filing for benefits in the past, but he did not make a consistent effort to complete the process in this claim, 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 remanded the case to the review examiner to take additional evidence. The claimant attended the remand hearing. 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 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 consolidated findings of fact are set forth below in their entirety:

1. The claimant filed a claim on 3/23/18 and that claim is effective 3/18/18 with a benefit year end date of 3/16/19.
2. On 2/26/18 the claimant became separated from [Employer A]. (1b and 1c)
3. The claimant is requesting that his claim be predated to the week he became separated. [sic] The week effective 2/25/18. (1d)
4. The claimant filed previous unemployment claims in the year 2010 through the year 2016. When he filed these claims he went to the local Workforce office with his information and [sic] representative of that office put the claim in the computer for him. (3)
5. When the claimant became separated, the employer did not furnish him with information about how to file for unemployment benefits. (2a)
6. The claimant was aware of his ability to file for unemployment benefits based on his past experience. (1e)
7. The claimant was able to determine how to file a claim on-line by looking up information on-line. He elected to file on line believing that this would be the most efficient way to file for himself and for the DUA. (1e) (4)
8. During the week that he became separated, the claimant went on-line with the intent to file a claim, but he could not figure out the process.
9. In the weeks following his separation, the claimant went into the [Town A] workforce office to get help to file his claim, but the representative designated to help the public in filing was not in the office.
10. In the weeks following his separation, the claimant tried to use the telephone to file his claim but was kept on hold for hours. The claimant did not get a message asking him to leave his number and a representative would contact him.
11. In the weeks following his separation, the claimant went to the [Town A] Workforce office a number of times and was told there were a number of people ahead of him and the representative would be leaving in 45 minutes.
12. In the weeks following his separation, the claimant was told by the employees at the [Town A] Workforce office to go to a specific website to file his claim. He did this but could not complete his claim because there was a problem with his password.
13. On 3/23/18, he was finally able to sit with a representative at the [Town A] Workforce office, and he was able to create a new password and file a claim.

14. From the date the claimant became separated, he believed that he had a good chance on a job, but that fell through. By mid-February, 2018, after e-mailing the perspective employer three or four times, he came to the conclusion he was not going to be hired.

15. The claimant attempted to secure help from the DUA or his local career center between the date he was separated and 3/23/18 every Monday, Wednesday and Friday of each week. (5c)

[REVIEW EXAMINER'S NOTE:] The claimant did not have any telephone records of his calls to the DUA or career center. 5(b)

The claimant had no further information from the employer other than Remand Ex. 4 referring to his separation. (2)

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 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 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.

After remand, the review examiner found that the claimant became separated on February 26, 2018. Although he had filed previous unemployment claims between 2010 and 2016, the claimant was unable to actually open the instant claim until March 23, 2018.

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 his benefit and will not leave the claimant aggrieved.

During the remand hearing, the claimant testified that he was given no written information by the employer about filing for unemployment benefits. He also told this to the DUA, when he was filling out his fact-finding questionnaire. *See* Hearings Exhibit # 2, p. 2. Moreover, the employer's discharge letter, dated February 26, 2018, made no reference to how the claimant could pursue his right to unemployment benefits. *See* Remand Exhibit # 4.²

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.

² We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

The review examiner's decision is reversed. The claimant is entitled to a pre-date on his most recent unemployment claim. The effective date of the claim shall be February 25, 2018, which is the week the claimant separated from his most recent job.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 28, 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