

**The employing unit, which failed to appear for the hearings, did not show that the claimant's services as a graphic designer met prong (a) of the ABC test. Claimant reported to the employer's worksite daily, reported to an on-site supervisor, reported any absences to the on-site supervisor, and used the employer's office equipment and supplies to perform her work.**

**Board of Review  
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**Issue ID: 0033 0693 47**

### Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), which concluded that the claimant was not monetarily eligible for benefits under G.L. c. 151A, §§ 24(a) and 1(s). We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

On December 14, 2019, the DUA sent the claimant a Monetary Determination stating that she was not eligible for an unemployment claim, as she had no wages upon which to base a claim.<sup>1</sup> 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 in a decision rendered on April 22, 2020.

In her decision, the review examiner concluded that the claimant had insufficient wages to establish an unemployment claim because she was found to be an independent contractor, lacking the requisite employment relationship with the employing unit pursuant to G.L. c. 151A, § 2. 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 regarding the claimant's employment status as laid out in G.L. c. 151A, § 2. Only 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 monetarily eligible for an unemployment claim, is supported by substantial and credible evidence and is free from error of law.

### Findings of Fact

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<sup>1</sup> In concluding that no wages existed for a claim, the DUA was implicitly finding that no employment relationship existed between the claimant and the employing unit.

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

1. The claimant filed a claim for unemployment benefits, with an effective date of March 31, 2019.
2. The Department of Unemployment Assistance (the Department) determined the primary base period of the claim to be from January, 2018 through December, 2018.
3. The base period wages per each full quarter for the claimant were as follows:

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|--|--------------|
| January 1, 2018, to March 31, 2018:    | \$10,393.80; |
| April 1, 2018, to June 30, 2018:       | \$12,477.60; |
| July 1, 2018, to September 30, 2018:   | \$13,080.00; |
| October 1, 2018, to December 31, 2018: | \$11,445.00  |
4. The claimant worked for one employer in the primary base period of this instant claim.
5. The claimant began working under contract for the employer from August, 2016. At the time, the contract was for six months.
6. On February, 2017, the claimant contract with the employer was completed.
7. From February, 2017, the employer continued to employ the claimant without a contract. The claimant continued to work at the same rate of pay from her contract until January, 2019.
8. In January, 2019, the employer issued a raise in wages to the claimant.
9. The employer paid wages to the claimant without benefits. The employer did not withhold any taxes from the claimant's wages.
10. The employer laid off the claimant in April, 2019.
11. On December 13, 2019, DUA determined that the claimant was an independent contractor and did not have an employer-employee relationship as covered under Section 2 of the Law.
12. The claimant resides in Massachusetts.
13. The claimant worked for the employer as a graphic designer in their marketing team.
14. The employer is a beverage and food services company.
15. The employer has one location in [Town A], Massachusetts.

16. The claimant reported to work at the employer's location in [Town A], Massachusetts.
17. Dung [sic] the period of employment, the claimant was not registered and operating as an independently established business of a similar nature offering similar services to the public.
18. The employer exercised control over the claimant's work activities.
19. The employer required the claimant to follow a set work schedule. The work schedule set for the claimant by the employer was 8:30 a.m. to 5 p.m., 4 days a week.
20. The employer assigned the claimant to a Supervisor, the employer's Art Director/Print Manager.
21. The claimant was required to report to the Supervisor if she was going to be absent for any reason.
22. The claimant did not have special access to the employer's facility.
23. The employer provided a computer, a phone, a desk, office supplies to the claimant.
24. The employer required the claimant to attend meetings.
25. The employer issued to the claimant a key fob to enter the building.
26. The employer did not issue a uniform, identification badge or any other credentials that could be used to represent the employer.
27. The claimant was required to submit reports to the employer.
28. The claimant was not required to sign a service agreement with the employer.
29. There is no familial relationship between the claimant and the owners of the business.
30. The claimant was required to report to the Art Director/Print Manager, [redacted].

### Ruling of the Board

In accordance with our statutory obligation, we review the record and 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 conclusion is free from error of law.

After such review, the Board adopts the review examiner's consolidated findings of fact except for Consolidated # 18, which is a legal conclusion. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we conclude that the claimant's services were employment and the monies she was paid by the employing unit constitute wages for purposes of Chapter 151A.

Employment is defined in G.L. c. 151A, § 2, which states, in relevant part, as follows:

Service performed by an individual . . . shall be deemed to be employment subject to this chapter . . . unless and until it is shown to the satisfaction of the commissioner that—

(a) such individual has been and will continue to be free from control and direction in connection with the performance of such services, both under his contract for the performance of service and in fact; and

(b) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and

(c) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

By its terms, this statute presumes that an employment relationship exists, unless the employing unit carries its burden to show “that the services at issue are performed (a) free from the control or direction of the employing enterprise; (b) outside of the usual course of business, or outside of all the places of business, of the enterprise; and (c) as part of an independently established trade, occupation, profession, or business of the worker.” Athol Daily News v. Board of Review of Division of Employment and Training, 439 Mass. 171, 175 (2003). The test is conjunctive, and it is the employing unit's burden to meet all three prongs of this “ABC” test. Should the employer fail to meet any one of the prongs, the relationship will be deemed to be employment. Coverall North America, Inc. v. Comm'r of Division of Unemployment Assistance, 447 Mass. 852, 857 (2006).

The review examiner concluded that the services that the claimant performed for the employing unit did not constitute employment. She implicitly concluded that the employing unit, although it did not attend the initial hearing, carried its burden as to all three prongs of the ABC test. Because we conclude that the employer did not carry its burden with respect to prong (a), we disagree with the review examiner's legal conclusion that the claimant was an independent contractor.

Under G.L. c. 151A, § 2(a), we analyze whether the worker is free from supervision “not only as to the result to be accomplished but also as to the means and methods that are to be utilized in the performance of the work.” Athol Daily News, 439 Mass. at 177, *quoting* Maniscalco v. Dir. of Division of Employment Security, 327 Mass. 211, 212 (1951). “The essence of the distinction under common law has always been the right to control the details of the performance,” but “the

test is not so narrow as to require that a worker be entirely free from direction and control from outside forces.” Athol Daily News, 439 Mass. at 177–178.

In this case, although the claimant was initially hired on a six-month contract, she continued to work for the employing unit for over two years after the contract expired in February of 2017. Thereafter, the claimant worked a regular schedule set by the employer. Consolidated Finding # 19. She reported to the employer’s worksite in [Town A], Massachusetts. Consolidated Finding # 15. She used office equipment provided by the employer. Consolidated Finding # 23. She reported to an on-site supervisor, to whom she was required to submit reports and to report any absences. Consolidated Findings ## 20–21 and 27. And, she was required to attend meetings. Consolidated Finding # 24.

All of these aspects of the relationship between the claimant and the employing unit show that the claimant was directed in what services she was to perform for the employer. She reported directly to a supervisor, who appeared to keep track of her work assignments, and the employer provided her with the space and tools to perform her job. This amount of direction and control is sufficient to conclude that the employing unit has not met its burden with respect to prong (a) of the ABC test. *See Driscoll v. Worcester Telegram & Gazette*, 72 Mass. App. Ct. 709, 713–716 (2008).

The employing unit’s failure to show that the claimant performed her services free from its direction and control as required by prong (a), means that the claimant’s services are deemed to be employment. We also note that the findings establish that the services performed by the claimant were within the employer’s regular course of business, and that said services were performed at employer’s regular place of business. Consequently, we believe the employer has also failed to carry its burden under prong (b) of the ABC test. Given the foregoing, it is not necessary for the Board to consider whether the employing unit carried its burden under prong (c).

We, therefore, conclude as a matter of law that the review examiner’s initial decision, which concluded that the services the claimant performed were not employment pursuant to G.L. c. 151A, § 2, is not supported by substantial and credible evidence or free from error of law, because the employing unit failed to show that it met prong (a) of the ABC test.

The review examiner's decision is reversed. The services the claimant performed as a graphic designer constituted employment. Her earnings constituted wages under G.L. c. 151A, § 1(s)(A), and those wages shall be used to establish an unemployment claim.



**BOSTON, MASSACHUSETTS**

Paul T. Fitzgerald, Esq.  
Chairman

**DATE OF DECISION - September 28, 2020**



Charlene A. Stawicki, Esq.  
Member

Member Michael J. Albano did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS  
STATE DISTRICT 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](http://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.

JPCA/rh