

The employer did not offer any work and did not pay the claimant after his last on-call shift on January 10, 2020. When his other, full-time job laid him off on March 10, 2020, the claimant has been in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), and is eligible for benefits.

**Board of Review
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Issue ID: 0033 3658 91

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 unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

The claimant last performed work for the employer on January 10, 2020. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 30, 2020. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on July 8, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant did not fulfill the requirement to be capable of and available for full-time work and, thus, he was disqualified under G.L. c. 151A, §§ 29 and 1(r). 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 further evidence about any benefit year work or wages paid to the claimant. Both parties participated in the remand hearing. 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 decision, which concluded that the claimant was disqualified from receiving benefits under G.L. c. 151A, §§ 29 and 1(r), because he was not capable and availability for work, 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 are set forth below in their entirety:

1. The employer is a casino and hotel.

2. The claimant works as food server for the employer. The claimant began work for the employer on 6/03/2019.
3. The employer hired the claimant to work on an on-call basis. This arrangement has not changed.
4. The employer pays the claimant \$6.44 per hour plus tips. The employer has not reduced the claimant's pay rate since 1/05/2020.
5. The employer offers work to the claimant based on business demand and seniority. The employer has three worker lists based on seniority: List A, List B, and List C. The claimant is on List C. The employer offers work to the workers on List A before it offers work to the workers on List B. The employer offers work to the workers on List B before it offers work to the workers on List C.
6. The claimant performed work for the employer on 1/10/2020. The employer paid the claimant \$283.26 for this work. The claimant has not performed any work for the employer on any other date since 1/05/2020.
7. The employer furloughed the claimant on 7/01/2020. The employer has begun to reopen. The employer has called some workers back to work based on seniority. The employer has not offered any work to the claimant since 1/10/2020.
8. The employer did not pay any money to the claimant for the period 3/17/2020 to 6/01/2020.
9. The claimant did not receive any paychecks from the employer for \$0.00.
10. Since 1/05/2020, the claimant has not had any illness, physical condition, or psychological condition that has rendered him unable to work full-time.
11. Since 1/05/2020, the claimant has not faced any circumstances that have rendered him unavailable for full-time work.
12. The claimant began work for a certain business ("Business X") on 3/01/2011. The claimant worked as a full-time banquet server for Business X. The claimant worked for Business X until 3/10/2020. Business X laid off the claimant.

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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject the portion of Consolidated Finding # 6 that states the claimant has not performed any work for the employer since January 5, 2020, because it is inconsistent with the testimony and Consolidated Finding # 7, which provides that the claimant last performed work for

the employer on January 10, 2020. In adopting the remaining consolidated findings of fact, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

G.L. c. 151A, § 29 authorizes benefits be paid only to those in "total unemployment" or "partial unemployment." These terms are in turn defined by G.L. c. 151A, § 1(r), which provides, in relevant part, as follows:

(1) "Partial unemployment", an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week; provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded. . . .

(2) "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.

Read together, the statutory provisions cited above under G.L. c. 151A, §§ 1(r) and 29, reflect the Legislature's expectation that an unemployed worker will only be eligible for benefits if he is unable to obtain full-time work. Those unable to obtain any hours of work during a given week may be in total unemployment and entitled to their full weekly benefit. Those who are only able to work part-time may be in partial unemployment and eligible for partial unemployment benefits.

During the original hearing, only the employer provided evidence. Based upon this evidence, the review examiner originally concluded that the claimant had not established that he was capable of and available for full-time work since January 5, 2020. Because the claimant's appeal included pay stubs and bank records that appeared to conflict with some of the review examiner's original findings of fact, we remanded to obtain more information about the claimant's availability for work, how much he worked, and how much he was paid by the employer after January 5, 2020.

The claimant's employment with the employer was part-time and on-call. *See Consolidated Findings ## 3 and 5.* After remand, the consolidated findings now explain that while working for the employer, he was also working full-time for another employer (Business X) from before the effective date of his claim, December 29, 2019, through March 10, 2020. *See Consolidated Finding # 12.* Because he was working full-time, we agree that he was not in either partial or total unemployment from December 29, 2019, through the week ending March 7, 2020.

The consolidated findings now also state that the claimant has been able and available for full-time work since January 5, 2020. Consolidated Findings ## 10 and 11. Despite this, the employer has not offered any work to the claimant since January 10, 2020. *See Consolidated Finding # 7.* The claimant has also not received any pay from the employer since the paycheck covering his work on January 10, 2020. *See Consolidated Findings ## 6 – 9.* Aside from the employer and Business

X, the claimant has not had any other work since filing his claim.¹ Thus, the record shows that after he separated from Business X on March 10, 2020, the claimant has performed no wage-earning services and received no remuneration.

The DUA's records in the UI Online system show that the claimant began certifying for benefits with the week beginning March 8, 2020, and during that week, he reported working 16 hours and being paid \$406.00 in wages. This coincides with the claimant's layoff in the middle of this week from Business X. *See Consolidated Finding # 12.* Because the claimant had less than a full-time schedule of work and earned less than his weekly benefit amount plus earnings disregard, we conclude as a matter of law that he was in partial unemployment within the meaning of G.L. c. 151A, § 1(r)(1), during the week beginning March 8, 2020.

Because the claimant has not worked or been paid since then, yet he remained able and available for full-time work, we conclude as a matter of law that he has been in total unemployment within the meaning of G.L. c. 151A, § 1(r)(2), since the week beginning March 15, 2020.

The portion of the review examiner's decision that disqualified the claimant from receiving benefits from January 5 – March 7, 2020, is affirmed. The portion of the review examiner's decision that disqualified the claimant from receiving benefits after March 7, 2020, is reversed. The claimant is entitled to receive benefits for the week beginning March 8, 2020, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 22, 2020



Paul T. Fitzgerald, Esq.
Chairman



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.

¹ In response to a review examiner's question, the claimant testified that he has had no other employment during this period. Although not explicitly incorporated into the review examiner's findings, this testimony is part of 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).

**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.

AB/jv