

**Although the claimant did not attend the hearing, no evidence was presented from which the review examiner could conclude that the claimant was not in unemployment. The employer did not dispute the claimant's eligibility for benefits, the employer admitted it had not offered any work to the claimant since the start of her claim, and the employer did not offer any suggestion that the claimant was not able and available to work. Therefore, the claimant is not disqualified under G.L. c. 151A, §§ 29 and 1.**

**Board of Review  
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Chairman  
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Member  
Michael J. Albano  
Member**

**Issue ID: 0033 4323 13**

### 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 reverse.

The claimant filed a claim for unemployment benefits with the DUA, which was determined to be effective January 5, 2020. On January 28, 2020, the DUA sent the employer a Notice of Approval, stating that the claimant was eligible to receive benefits. 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 February 26, 2020.

Benefits were denied after the review examiner determined that the claimant had not shown that she was in unemployment and, thus, was disqualified under G.L. c. 151A, §§ 29 and 1. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accepted the claimant's application for review and afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision that the claimant is not in unemployment, as of January 5, 2020, is supported by substantial and credible evidence and free from error of law, where employer testified that it had no work for the claimant in January and February of 2020 and did not dispute that the claimant is eligible for benefits.

### Findings of Fact

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

1. The claimant filed a 2019-01 claim for unemployment insurance benefits. The effective date of the claim is 1/05/20.

2. The base period of the claimant's 2019-01 claim is the first quarter [of] 2019 through the fourth quarter [of] 2019. The DUA used the wages paid to the claimant in this period to establish her weekly benefit amount.
3. The claimant worked for the employer in the base period of her 2019-01 claim. The claimant also worked for two other businesses (Business 1 and Business 2) in her base period.
4. The employer paid the claimant a total of \$7,177.11 in wages in the base period of the claimant's 2019-01 claim.
5. Business 1 paid the claimant a total of \$49,566.79 in wages in the base period of the claimant's 2019-01 claim.
6. Business 2 paid the claimant a total of \$12,155.02 in wages in the base period of the claimant's 2019-01 claim.
7. The employer is a banquet service. The claimant began her employment for the employer on 5/20/19.
8. The employer hired the claimant to work as an on-call server. The claimant still works in this role. The employer pays the claimant \$6.44 per hour plus tips.
9. The employer does not require the claimant to work any set number of hours or shifts in any given timeframe.
10. The employer assigns work to the claimant based on its needs. The claimant reports her work availability to the employer.
11. The employer did not have any work for the claimant in January and February 2020. The claimant last performed work for the employer in December 2019.
12. It is unknown whether the claimant has been able to work full-time since 1/05/20. It is unknown whether the claimant has been available to work full-time since 1/05/20.

### 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 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 findings of fact except Finding of Fact # 12.<sup>1</sup> In adopting the remaining findings, we deem them to be supported by substantial and credible

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<sup>1</sup> For the reasons stated in our decision, we think that it was unreasonable for the review examiner to find that it was "unknown" if the claimant was capable of working or available for full-time work.

evidence. As discussed more fully below, we conclude that the claimant was in unemployment, beginning January 5, 2020, and is, therefore, eligible to receive 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 . . . .

(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.

In this case, the claimant’s unemployment claim is effective January 5, 2020. There was no dispute that the claimant was not offered any work by the employer in January or February of 2020. She last worked for the employer in December of 2019. *See* Finding of Fact # 11. Because she did not work for the employer at all after the filing of her claim, the question is whether the claimant was in total unemployment as of January 5, 2020.

As to this question, the review examiner concluded the following:

The claimant is not entitled to benefits from 1/05/20 onward because the record does not support a conclusion that she has been in total unemployment from 1/05/20 onward. The claimant did not establish that she has been capable of and available for full-time work since 1/05/20.

While it is true that the claimant did not attend the hearing and, thus, did not testify under oath that she was able and available to work, we conclude that there is no reason to believe that the claimant was not in unemployment as of January 5, 2020. Consequently, we have rejected the review examiner’s Finding of Fact # 12.

During the hearing, the employer’s senior banquet manager testified that the claimant was busy and worked during the holiday season in late 2019. However, since January 5, 2020, she has not worked at all. There was no indication that the claimant refused work due to illness or incapacity. There is no evidence that the claimant told the employer that she did not want to work. Nor is there any evidence that the claimant declined a shift for personal reasons, which may have rendered her unavailable for full-time work. The record only supports a conclusion that the claimant was not working, because there was no work for her to do and not for any other reason.

Moreover, during the hearing, the employer’s agent stated that the employer does not dispute that the claimant is eligible to receive unemployment benefits. The employer appealed the initial determination, because it wants to be sure that its account is charged appropriately. If the claimant

had refused work or had been unable to work, we assume that the employer would have been aware of this fact and would have offered such evidence during the hearing.<sup>2</sup>

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits pursuant to G.L. c. 151A, §§ 29 and 1, is not supported by substantial and credible evidence, because, when the record is considered as a whole, it supports the conclusion that the claimant has been in unemployment since January 5, 2020.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning January 5, 2020, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - April 10, 2020**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

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

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<sup>2</sup> Of course, if there was any indication in the hearing testimony or in the documentary evidence that there were issues with the claimant's ability to work or availability for work, our conclusion in this case may very well have been different. In such a case, the claimant's ability and availability would be in question, and affirmative evidence would likely be necessary to resolve the issue in the claimant's favor. Such is not the case here.