

The claimant took a leave of absence from the employer initially because she lost her childcare due to COVID-19 and then because she became ill with the virus. Because she had removed herself from the labor market, she was not eligible for benefits under G.L. c. 151A, §§ 29 and 1(r).

**Board of Review
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Issue ID: 0040 1118 03

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 affirm.

The claimant had stopped working for the employer for a period of time from March 31 through June 30, 2020. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on May 28, 2020. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties¹, the review examiner overturned the agency's initial determination and denied benefits from March 29 through July 4, 2020, in a decision rendered on September 25, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had declined available work from the employer, and, thus, she 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 information about wages paid to the claimant during the weeks that she claimed benefits. Both parties 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 original decision, which concluded that the claimant was ineligible for benefits when she was unable to work because she did not have childcare due to the COVID-19 pandemic, 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 initial hearing was held over two dates. The claimant participated only in the second hearing session.

1. On February 17, 2020, the claimant started working fulltime for the employer as a production worker. The claimant is paid \$14.25 per hour. The claimant is scheduled to work Monday through Friday from 5:30 a.m. until 2:30 p.m.
2. The claimant's supervisor is the Production Manager.
3. Prior to filing an initial claim for unemployment benefits, the claimant's last date of work for the employer was on March 30, 2020.
4. The claimant has two children aged 10 years old and 2 years old. The claimant's 10-year-old child's school closed down because of the COVID-19 pandemic in March 2020. The child has been learning remotely from home since March 2020. The claimant had an individual watching her children initially. This individual no longer could watch the claimant's children due to the COVID-19 pandemic. The claimant had no childcare available once this individual could not care for her children any longer.
5. On March 31, 2020, the claimant informed the employer that she was going to be absent from work due to childcare issues. The employer initially expected the claimant to return to work on April 13, 2020.
6. The employer provided the claimant with leave information. The claimant chose not to use the leave information.
7. On April 1, 2020, the claimant filed an initial unemployment claim effective the week beginning March 29, 2020. The claimant's weekly benefit rate is \$223.00. The claimant's weekly earnings exclusion amount is \$74.33.
8. On April 21, 2020, the claimant and the employer communicated about the claimant's job status. The employer was expecting the claimant to return to work on April 27, 2020.
9. The claimant subsequently informed the employer that the claimant was advised by a medical professional to self-quarantine for 14 days in connection with COVID-19 symptoms. The claimant provided the employer with a doctor's note. The employer was expecting the claimant to return to work on or about May 4, 2020.
10. The claimant was initially self-quarantining as the claimant's partner had tested positive for the COVID-19 virus. The claimant subsequently was self-quarantining because the claimant and her child tested positive for the COVID-19 virus.
11. The claimant returned [sic] fulltime work for the employer on July 1, 2020. The claimant was able to return to work on this date as she has a family member watching her children while she works. The claimant has been able and available for work with the employer since she returned to work.

12. The claimant was not able and available for work for the employer from March 31, 2020 until her return to fulltime work for the employer on July 1, 2020 due to lack of childcare in connection with the COVID-19 pandemic, and the claimant was self-quarantining as the claimant's partner tested positive for the COVID-19 virus and the claimant testified positive for the COVID-19 virus. The claimant did not work for the employer during this period of time.
13. The employer was holding the claimant's job while the claimant was out of work. The claimant was on a leave status with the employer.
14. The employer had fulltime work for the claimant while the claimant was absent from work and continues to have work for the claimant.
15. The claimant did not quit her job.
16. The claimant was not fired from her job.
17. The claimant was not laid off from her job.
18. The claimant has continued to be an employee of the employer's establishment since the week beginning March 29, 2020.
19. The claimant was paid wages by the employer while she was out of work for certain periods of time. The claimant was issued a sick day payment for March 31, 2020 by the employer. The claimant was issued a floating holiday payment by the employer for April 6, 2020. The claimant was issued a vacation day payment by the employer for April 13, 2020. The claimant was issued sick day payments by the employer from April 27, 2020 to April 30, 2020. The claimant was issued COVID-19 payments [sic] total gross wages of \$570.00 for the period of time running from May 1, 2020 to May 7, 2020.
20. The last date the claimant requested for unemployment benefits (as of the date of the hearing) was the week ending July 4, 2020. The claimant declined benefits for the week ending July 11, 2020.
21. The employer pays the claimant on biweekly basis.
22. On the claimant's Earnings Statement with a Pay Date of April 17, 2020, the following information is listed regarding the claimant's gross wages from Period Start March 29, 2020 through April 11, 2020:

<u>Earnings</u>	<u>Rate</u>	<u>Hours/Units</u>	<u>Current Period</u>
[City A] Floating Holiday	14.25	8	114.00
[City A] Sick Full Time	14.25	8	114.00

Regular Hourly	14.25	8.52	121.41
Total Gross:			\$349.41

23. On the Earnings Statement for Period Start March 29, 2020 through Period End April 11, 2020, the 8.52 hours of Regular Hourly Earnings with gross pay of \$121.41 was from the claimant working on March 30, 2020. On this earnings statement, the 8.00 hours of [City A] Sick Full Time Earnings with gross pay of 114.00 was representing payment for March 31, 2020.
24. On the Earnings Statement for Period Start March 29, 2020 through Period End April 11, 2020, the 8 hours of [City A] Floating Holiday Earnings with gross pay of \$114.00 was representing payment for April 6, 2020.
25. The claimant's gross wages for the week beginning Sunday, March 29, 2020 through the week ending Saturday, April 4, 2020 were \$235.41. This represents \$121.41 (Regular Earnings) plus \$114.00 ([City A] Sick Fulltime Earnings).
26. The claimant's gross wages for the week beginning Sunday, April 5, 2020 through Saturday, April 11, 2020 were \$114.00.
27. On the claimant's Earnings Statement with a Pay Date of May 1, 2020, the following information is listed regarding the claimant's gross wages from Period Start April 12, 2020 through April 25, 2020:

<u>Earnings</u>	<u>Rate</u>	<u>Hours/Units</u>	<u>Current Period</u>
Vacation [City A]	14.25	8.00	114.00
Total Gross:			\$114.00

28. On the Earnings Statement for Period Start April 12, 2020 through Period End April 25, 2020, the 8 hours of Vacation [City A] with gross pay of \$114.00 was representing payment for April 13, 2020.
29. The claimant's gross wages for the week running from Sunday, April 12, 2020 through Saturday, April 18, 2020 were \$114.00.
30. The claimant's gross wages for the week running from Sunday, April 19, 2020 through April 25, 2002 were \$0.00.
31. On the claimant's Earnings Statement with a Pay Date of May 15, 2020, the following information is listed regarding the claimant's gross wages from Period Start April 26, 2020 through May 9, 2020:

<u>Earnings</u>	<u>Rate</u>	<u>Hours/Units</u>	<u>Current Period</u>
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[City A] Sick Full Time	14.25	32	456.00
COVID Self	14.25	40	570.00
Total Gross:			\$1,026

32. On the Earnings Statement for Period Start April 26, 2020 through Period End May 9, 2020, 32 hours of [City A] Sick Full Time Earnings was representing payment for the four days running from April 27, 2020 through April 30, 2020 for 8 hours each day.
33. On the Earnings Statement for Period Start April 26, 2020 through Period End May 9, 2020, the 40 hours of COVID Self Earnings was [sic] representing payment for May 1, 2020 and the four days running from May 4, 2020 through May 7, 2020 for 8 hours each day.
34. The claimant's gross wages for the week running from Sunday, April 26, 2020 through Saturday, May 2, 2020 were \$570.00. This represents the 4 days of [City A] Sick Pay Earnings (\$456) at 8 hours a day running from April 27, 2020 through April 30, 2020 and the 8 hours of COVID Self Earnings (\$114) for May 1, 2020 8 hours [sic].
35. The claimant's gross wages for the week beginning May 3, 2020 through May 9, 2020 were \$456.00. This represents 32 hours of COVID Self Earnings for May 4, 2020 through May 7, 2020 for 8 hours per day.
36. The next Earnings Statement that the claimant was issued after Pay Date May 15, 2020 was the earnings statement for Pay Date July 10, 2020 for Pay Start June 21, 2020 through July 4, 2020.
37. On the claimant's Earnings Statement with a Pay Date of July 10, 2020, the following information is listed regarding the claimant's gross wages from Period Start June 21, 2020 through July 4, 2020:

<u>Earnings</u>	<u>Rate</u>	<u>Hours/Units</u>	<u>Current Period</u>
Holiday	14.25	8	114.00
Regular Hourly	14.25	8.38	119.42
Total Gross:			\$233.42

38. On the Earnings Statement for Period Start June 21, 2020 through July 4, 2020, the 8.38 Hours of Regular Earnings represent July 1, 2020, when the claimant returned to work for the employer.

39. On the Earnings Statement for Period Start June 21, 2020 through July 4, 2020, the 8 Hours of Holiday Earnings represent July 4, 2020.
40. During the week running from Sunday, June 21, 2020 through June 27, 2020, the claimant had \$0.00 gross earnings.
41. During the week running from Sunday, June 28, 2020 through Saturday, July 4, 2020, the claimant's gross wages were \$233.42.

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. 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, we also agree with the review examiner's legal conclusion that the claimant was not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), during her leave of absence.

The review examiner rendered her decision under G.L. c. 151A, § 29, which 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.

As provided under these sections of law, a claimant is considered to be in total unemployment and could qualify for her full weekly benefit amount in any week in which she does not receive any remuneration.

"Remuneration" is defined at G.L. c. 151A, § 1(r)(3), which states as follows:

For the purpose of this subsection, "Remuneration", any consideration, whether paid directly or indirectly, including salaries, commissions and bonuses, and reasonable cash value of board, rent, housing, lodging, payment in kind and all payments in any medium other than cash, received by an individual (1) from his employing unit for services rendered to such employing unit, (2) as net earnings

from self-employment, and (3) as termination, severance or dismissal pay, or as payment in lieu of dismissal notice, whether or not notice is required, or as payment for vacation allowance during a period of regular employment; provided, however, that for the purposes of this chapter, “remuneration” shall not include any payments made pursuant to subsections (b) and (c) of section one hundred and eighty-three, and subsection (b) of section one hundred and eighty-four of chapter one hundred and forty-nine, nor shall it include payment for unused vacation or sick leave, or the payment of such termination, severance or dismissal pay, or payment in lieu of dismissal notice, made to the employee in a lump sum in connection with a plant closing, nor shall this clause affect the application of subsection (d) of section twenty-nine. . . .

During the weeks ending April 25, 2020, and June 27, 2020, the claimant had no work and did not receive any remuneration. *See Consolidated Findings ## 30 and 40.* There is also nothing in the record to indicate that the employer paid her anything for the weeks ending May 16 through June 20, 2020. She would be in total unemployment during these weeks, if she were capable and available for work, but was unable to find suitable work.

The consolidated findings provide that during the other weeks that she certified for benefits, the claimant was given some holiday, vacation, or sick pay. To determine whether she was in partial unemployment during these weeks, we must first consider whether the gross wages paid to the claimant for holiday, vacation, or sick pay were less than her weekly benefit rate plus earnings disregard. *See G.L. c. 151A, §§ 29(b) and 1(r)(1).*

The claimant’s weekly benefit rate is \$223.00, and her earnings disregard is \$74.33. Consolidated Finding # 7. In any week that she earned more than \$297.33 (\$223.00 plus \$74.33), she is not considered to be in partial unemployment and would not qualify for benefits. Consolidated Findings ## 34 and 35 provide that during the weeks ending May 2 and May 9, 2020, the employer paid the claimant \$570.00 and \$456.00, respectively, as a form of sick pay. In these two weeks, she earned too much to qualify for any partial unemployment benefits.

However, during the weeks ending April 4, April 11, April 18, and July 4, 2020, the claimant was paid less than \$297.33. *See Consolidated Findings ## 25, 26, 29, and 41.* She would be in partial unemployment during these four weeks, if she were capable and available for work, but unable to find suitable work.

Ordinarily, under federal law and the above provision of G.L. c. 151A, claimants are only eligible for benefits if they are physically capable of, available for, and actively seeking full-time work, and they may not turn down suitable work. However, because the weeks at issue in this appeal are March 29 through July 4, 2020, we must also consider temporary modifications to the unemployment law brought about by the COVID-19 pandemic.

In March, 2020, Congress enacted the Emergency Unemployment Insurance Stabilization and Access Act (EUISAA) which, among other things, permitted states to modify their unemployment compensation law and policies with respect to work search and good cause on an emergency

temporary basis as needed to respond to the spread of the COVID-19 pandemic.² The U.S. Department of Labor has also advised states that they have significant flexibility in implementing the able, available, and work search requirements, as well as flexibility in determining the type of work that is suitable given an individual's circumstances.³

In response, the DUA has adopted a more flexible policy for claimants who cannot perform their usual work because child-care was closed or unavailable due to the COVID-19 health emergency.⁴ However, even under this flexible policy, claimants must be available for some type of work. Their availability may not be so limited as to constitute a withdrawal from the labor market.⁵

In the present case, the claimant seeks benefits during the period of time that she took an informal leave of absence from the employer from March 31 through June 30, 2020. Initially the leave was necessary because she had no child-care, and then on or about April 23, 2020, it was because she had the COVID-19 virus. *See* Consolidated Findings ## 4, 5, 9, 10, 12 and 13.⁶ During this time, the review examiner found that the claimant was not available for work for the employer. *See* Consolidated Finding # 12. There is nothing in the record to indicate that the claimant made herself available for some other type of work, even something that she could perform from home. This means that the claimant had removed herself from the labor market while out on leave, and she does not qualify for benefits under the DUA's temporary flexible child-care policy.

We, therefore, conclude as a matter of law that, during her leave of absence, the claimant was neither in total nor partial unemployment within the meaning of G.L. c. 151A, § 29 and 1(r), because she was not available for any type of suitable work.

The review examiner's decision is affirmed. The claimant is denied benefits for the period of March 29 through July 4, 2020.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 30, 2021



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

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

² *See* EUISAA, Pub. Law 116-127 (Mar. 18, 2020), § 4102(b).

³ *See* U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 10-20 (Mar. 12, 2020), 4(b).

⁴ *See* DUA UI Policy and Performance Memo (UIPP) 2020.12 (Oct. 8, 2020).

⁵ *See* UIPL 10-20, 4(b), p.3.

⁶ Though not in the consolidated findings, both parties testified that the claimant reported to the employer on April 23, 2020, that she had both tested positive and was experiencing symptoms of COVID-19. This testimony is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

**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

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.

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