

The reduced wage payments made to the claimant while she was out of work due to a lack of work do not constitute remuneration under G.L. c. 151A, § 1(r)(3), as they were given to the claimant as an inducement to return to work when recalled.

**Board of Review
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Issue ID: 0040 5303 09

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 filed a claim for unemployment benefits with the DUA on May 3, 2020. On May 20, 2020, the DUA issued a Notice of Disqualification to the claimant, stating that the payments she received from the employer constitute remuneration under G.L. c. 151A, § 1(r)(3), and, therefore, disqualified her from the receipt of benefits between March 15, 2020, and July 4, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on September 16, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was neither in total nor partial unemployment, as her average weekly wages exceeded her weekly benefit rate plus earnings disregard, 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 additional evidence pertaining to the monthly payments made by the employer to the claimant. Only the claimant 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 payments made by the employer to the claimant in May, June, and July of 2020 disqualified her from receiving benefits, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that these payments were made to the claimant as an inducement to return to work when recalled.

Findings of Fact

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

1. On 03/19/08, the claimant began part-time and later full-time employment with this employer's airline as a Flight Attendant.
2. The claimant stopped work on 03/15/20 due to [COVID]-19 issues.
3. On 03/17/20, the claimant was scheduled to work a flight for 9 hours and 3 minutes that day, but the claimant had been exposed to [COVID]-19 in an earlier flight, so she was permitted to use PTO sick leave for pay of 9 hours and 3 minutes at an hourly rate of \$56.40 for the one day 03/17/20. The claimant has not used any PTO since that one day in March 2020.
4. The employer continued to pay the claimant her regular pay, full wages through 04/30/20.
5. On 05/03/20, the claimant filed a claim for unemployment benefits effective 05/03/20, due to the reduction in wages being paid as of 05/01/20.
6. The claimant's weekly benefit rate at the time of the initial hearing was \$243.00, and her weekly earnings disregard amount was \$81.00. These amounts were in error, as the employer was reporting net wages and not gross wages to DUA.
7. In a Decision issued 09/16/20, the claimant was found to not be eligible because her reduced weekly wages were allegedly greater than the claimant's then weekly benefit rate plus her earnings disregard amount.
8. The claimant appealed to the Board of Review and the Remand hearing was scheduled.
9. Since the first hearing, the claimant's weekly benefit rate has been adjusted to \$293.00, and her earnings disregard amount has been adjusted to \$97.67.
10. The claimant agrees with the adjustments for the last 3 quarters of 2019, but she believes that the reported wages for the first quarter of 2020 are still in error. The wages reported for the first quarter of 2020 are \$6,516.41, but the claimant believes the correct gross wages for the first quarter of 2020, January through March, should be \$8,641.89.
11. The claimant, during the period of reduced wages: May, June, and July 2020 (05/01/20 through 07/31/20), remained on-call to return to work, and she was told that the employer hoped to have her return to work in August 2020. The claimant returned to full-time work on 08/01/20.
12. The payments to the claimant during the period of reduced wages were not a stipend. The reduced wages were paid as an inducement to return to work when recalled, in return for the claimant's availability, if needed.

13. The claimant's gross weekly pay at [the] time of the work stoppage and wage reduction was \$976.00.
14. The claimant's base hourly pay is \$56.40 per hour.
15. The employer, after 04/30/20, continued to pay the claimant a reduced wage of 26.25 hours of work per month, or gross wages of \$1,480.00 per month, until she returned to full-time work on 08/01/20.
16. The monthly pay for May, June and July 2020 divided by 4.3 (the number of weeks in a month) equals \$334.30 gross pay per week. This amount of remuneration is less than the claimant's adjusted earnings disregard amount of \$97.67 plus her adjusted weekly benefit rate amount of \$293.00 (\$390.67).

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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 set aside the portion of Consolidated Finding # 15, which states that the claimant was paid reduced wages of \$1,480.00 per month, as the claimant clarified during the remand hearing that she was paid \$1,480.50 per month. We also set aside the portion of Consolidated Finding # 16, which states that the claimant's monthly pay divided by 4.3 equals \$334.30, as \$1,480.50 divided by 4.3 equals as \$344.30. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the payments made to the claimant in May, June, and July of 2020 constitute remuneration, as these payments were made to the claimant as an inducement to return to work when recalled.

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.

Also relevant in this appeal is G.L. c. 151A, § 1(r)(3), which defines "Remuneration" 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.

For the purposes of this clause, "plant closing" shall mean a permanent cessation or reduction of business at a facility of at least fifty employees which results or will result as determined by the commissioner in the permanent separation of at least fifty percent of the employees of a facility or facilities. For the purpose of this subsection, the word "remuneration" shall not include tips paid in any medium other than cash but shall include cash tips received by an employee in the course of his employment by an employer. Remuneration shall be deemed to have been received in such week or weeks in which it was earned or for such week or weeks, including any fractions thereof, to which it can reasonably be considered to apply. If the length of the period to which the remuneration applies is not clearly identified, such period shall be determined by dividing such remuneration by the amount of the individual's average weekly wage.

In his original decision, the review examiner concluded that the claimant last worked on March 15, 2020, and she was not eligible for benefits while she was out of work and receiving a payment of reduced wages by the employer. The review examiner arrived at this conclusion after calculating the claimant's average weekly wage and determining that it exceeded her weekly benefit rate plus earnings disregard. After remand, the review examiner found that after he issued his decision on September 16, 2020, the claimant's monetary eligibility was redetermined, and her weekly benefit rate was adjusted from \$243.00 to \$293.00. The review examiner notes in the consolidated findings that the claimant's average weekly wage from the reduced wage payments she received in May, June, and July of 2020, are less than her new weekly benefit rate, plus earnings disregard, thereby indicating that the claimant is now eligible for partial unemployment benefits. We disagree with the review examiner's original decision to treat the reduced wage payments as remuneration, and his continued characterization of these payments as remuneration in the consolidated findings of fact.

The DUA maintains that, during a seasonal or short-term layoff, payments made as an inducement to return to work when recalled do not constitute remuneration. *See* DUA Adjudication Handbook, Chapter 9, Section 3(B)(5). After remand, the review examiner found that the claimant did not

work between March 15, 2020, and August 1, 2020. The employer did not have enough work for all of its employees due to the pandemic's effect on the airline industry.¹ The review examiner also found that the claimant was paid her regular, full-time wages through April 30, 2020, but between May 1, 2020, and July 31, 2020, the employer paid her reduced wages as an inducement for the claimant to return to work when recalled. Based on this finding, we conclude that the payments made to the claimant during the months of May, June, and July of 2020, do not constitute remuneration.

Because the claimant did not receive any remuneration between May 1, 2020, and July 31, 2020, and she was seemingly able to work and available for work during this period, but the employer did not furnish her with any work, she was in unemployment for these three months.² However, the claimant has not established that she was in unemployment prior to May 1, 2020, as she was receiving her regular weekly pay during this time, and these wages constitute remuneration.³

We, therefore, conclude as a matter of law that the reduced wage payments made to the claimant between May 1, 2020, and July 31, 2020, were not disqualifying remuneration within the meaning of G.L. c. 151A, § 1(r)(3). Consequently, the claimant was in total unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), during this period.

¹ 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).

² During this period, the claimant was on "standby status" within the meaning of the DUA COVID-19 Emergency Regulations. See 430 CMR 22.00 *et seq.* (effective Mar. 16, 2020) and DUA UI Policy and Performance Memo (UIPP) 2020.13, p. 3.

³ We note that the claimant's unemployment claim has an effective date of May 3, 2020, and, therefore, a disqualification prior to this date will not affect her claim. However, because the original determination has an issue start date of March 15, 2020, and the review examiner's decision did not modify this date, we are addressing this time period in our decision.

The review examiner's decision is affirmed in part and reversed in part. We affirm the part of the decision that stated the claimant is not entitled to benefits between the weeks ending March 21, 2020, and May 2, 2020. However, we reverse the part of the decision that stated the claimant is not entitled to benefits after May 2, 2020. The claimant is entitled to receive benefits between the weeks ending May 9, 2020, and August 1, 2020, if otherwise eligible.



BOSTON, MASSACHUSETTS

DATE OF DECISION - November 25, 2020

Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

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.

SVL/rh