In order to participate in its DUA WorkShare plan, the employer required the claimant to contribute his earned sick or vacation time to make up hours in those weeks when it did not have enough work for the claimant to perform. If he didn't contribute, he would get paid only for the reduced hours offered. Either way, this was a reduction in compensation. Held it constituted good cause attributable to the employer to resign within the meaning of G.L. c. 151A, § 25(e)(1), and the claimant was eligible for benefits.

Board of Review
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Issue ID: 0051 2847 29

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 resigned from his position with the employer on July 21, 2020. He had filed a claim for unemployment benefits with the DUA when previously laid off, which had been approved. Upon returning to work, he was allowed further benefits pursuant to the DUA's WorkShare program.[1] Following his separation, in a determination issued on March 23, 2021, the DUA awarded benefits because the agency had failed to determine his eligibility within 21 days. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits,[2] the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on September 14, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without having good cause attributable to the employer, nor did he show that he left for new permanent full-time employment and became separated from such employment for good cause attributable to the new employing unit. Thus, the review examiner concluded that the claimant was disqualified under G.L. c. 151A, § 25(e)(1).

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 information about how the claimant was paid prior to his resignation. Only the claimant attended

1 The WorkShare program is an option for companies covered by the unemployment insurance system to manage employee hours in partnership with the unemployment insurance benefit system. WorkShare allows employers to bring back furloughed employees and hire new employees on a reduced basis to incentivize a return to work. New hires or furloughed workers receive unemployment benefits to supplement their part-time wages. Participation further allows those employees to retain health insurance and other employee benefits.

2 The hearing was held in two sessions, because the employer did not join the first session until near the end of the allotted time. At the continued hearing, the employer failed to participate.

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 did not have good cause attributable to the employer to resign, is supported by substantial and credible evidence and is free from error of law, where he left because the employer required him to supplement his reduced hours by using his earned sick time.

Findings of Fact

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

1. The claimant worked as a full-time Order Picker for the employer, a Wholesale Food Distribution business from January 27, 2020, until becoming separated from employment on July 21, 2020.

2. The claimant was hired to work full-time. The claimant's hours of work were 8:00 p.m. to finish, Monday through Friday. The claimant would normally finish work between 5:00 a.m. and 6:00 a.m. The claimant worked 35 to 38 hours per week.

3. The claimant was paid $15.50 per hour in his position. The claimant received benefits, including accrued sick time and paid time off.

4. The claimant was laid off from work on March 24, 2020, due to COVID-19.

5. Prior to being laid off from work, the claimant was working his regular full-time schedule of hours, Monday through Friday from 8:00 p.m. until close, between 5:00 a.m. and 6:00 a.m.

6. The claimant filed his claim for unemployment benefits on April 5, 2020. The effective date of the claim is April 5, 2020.

7. In June 2020, the claimant was notified of his recall to work under the "Workshare program". The claimant was notified that the Workshare program would be explained to him upon his return.

8. The claimant returned to work for the employer on June 22, 2020. However, at no time was the Workshare program explained to the claimant. The claimant did not receive any email explaining the Workshare program and did not see any posting of that information on the work premises.

9. Neither before nor after his recall to work in June 2020 did the claimant receive written documentation from the employer regarding the Workshare plan.

10. The claimant never saw an approved Workshare plan and had no knowledge of the beginning and end date of any Workshare plan.

11. Upon his return, the claimant was assigned to work on the overnight shift from 8:00 p.m. to finish for a total of 32 hours per week. However, because the employer business had slowed, the claimant was not working until 6:00 a.m. The claimant was finishing work between 3:00 a.m. to 5:00 a.m.

12. Approximately one to two weeks later, the Night Manager informed the claimant that he should no longer report at 8:00 p.m., he should report to work at 10:00 p.m. Thereafter, the claimant was working 10:00 p.m. to finish.

13. Under the "Workshare program" when an employee fell short of the required hours (32 per week), the employer was paying the employee using their vacation or sick time.

14. The week of June 22, 2020, the claimant was paid for 32 hours, with 4 hours of sick time being used.

15. The claimant spoke with the Night Manager regarding his concern about the number of hours of work available and the employer utilizing his sick time to pay him for 32 hours per week. The Night Manager did not offer any resolution.

16. On July 6, 2020, the claimant e-mailed the Chief Financial Officer about the use of his sick time.

17. On July 7, 2020, the Chief Financial Officer sent the claimant an email explaining that in order to be eligible for the "Workshare Program" and to be eligible to receive unemployment benefits, all employees had to work or be posted for 32 hours per week. The claimant had an option of not being part of the program.

18. After receiving the Chief Financial Officer's email response, the claimant did not request any change to be made.

19. The week of July 13, 2020, the claimant was paid by the employer for 32 hours, with 12 hours of sick time being used.

20. During the period of June 22, 2020, to July 21, 2020, the claimant reported to work on time as scheduled. (The claimant would normally arrive 15 minutes before his schedule shift.)

21. During the period of June 22, 2020, to July 21, 2020, the employer was using the claimant's sick time to meet the 32 hours per week. The amount of sick time used varied because of the varying finish times. The claimant never asked the employer to use his time, sick or vacation, to make up for the hours not worked, to total 32 hours per week.

22. The claimant did not call out of work or request to take vacation days/time from June 22, 2020, to July 21, 2020. The claimant was paid for the full 32 hours per week during the period of June 22, 2020, to July 21, 2020, with the use of his sick and vacation time.

23. The claimant decided to resign his position because the hours were not consistent. The claimant did not address any further concerns about his hours of work or the use of his sick time prior to resigning his position.

24. The claimant began looking for other work. The claimant interviewed to work as a full-time cleaner. The claimant was informed that he would be working 40 hours per week, being paid $16.02 per hour. The claimant was informed that he would have to pass a drug test and a CORI check to start in the position. (The claimant was not provided with a start date.)

25. On July 21, 2020, the claimant provided his resignation to the Night Manager via text message, indicating that he was not receiving the 32 hours per week, and he had found a full-time position elsewhere that could guarantee him forty hours per week, and he was resigning his position. The claimant indicated that he would work out the notice period.

26. The claimant did not work for the employer thereafter. The claimant's last day at work for the instant employer was July 21, 2020.

27. At or around the end of July 2020 the claimant began the position with the other employer, whereupon he only worked for a brief period because he did not pass the CORI check.

28. On August 10, 2020, the claimant sent an email to the Chief Financial Officer indicating "Good Morning [Chief Financial Officer] can you kindly remove me from the work share program unfortunately my 32 hours a week was not being met because the lack of hours and using all my sick time was hurting me. I had to move in to another job that guaranteed me 40 hours thanks for understanding I tried doing both just impossible thanks [Co-Worker] let me know when you can remove that thanks I need to resolve some things with unemployment till than I can't enjoy your day any ? you may reach be at (telephone number)."

29. On March 23, 2021, a Notice of Approval was issued under section 25(e)(1) of the Law, indicating "There is an issue associated with your claim that is being approved because the issue has not been determined after 21 days and the issue is one which is more likely than not to be approved. Therefore, payments are due to you under 42 U.S.C. sec. 503(a)(1)." The employer filed an appeal to that determination.

Credibility Assessment:

The employer attended the initial remand hearing, submitting only the email communication dated August 11, 2020, at 9:45 a.m. from the claimant to the CFO indicating that he wanted to be removed from the workshare program, as he had obtained other full-time work. (Both the employer and the claimant agreed that although the email was sent on August 11th, the claimants last day at work for the employer was July 21, 2020.) The employer did not have an opportunity to clarify and/or offer any testimony as to that email communication as they failed to attend the continued Remand Hearing. The Review Examiner requested that the employer provide the various documents requested in the Board Remand Order at the continued hearing. The employer did not attend that hearing and provided no further documentation.

The claimant provided direct and consistent testimony that he did not call out of work, he was not late for work, and he did not request the use of his sick or vacation time during the period of June 22, 2020, through July 21, 2020, during which time the employer utilized his sick time to total 32 hours of work per week.

The claimant does not have a copy of the Workshare plan, nor does he have any written communication issued by the employer regarding that plan. Further the claimant does not have any paystubs, payroll records or any documents to show his hours of work from June 22, 2020, to July 21, 2020. The claimant testified that all of that documentation would be accessed through the employer website, which he can no longer access. Additionally, the claimant did not produce any written communication about the Workshare plan, his concern about the use of time, his schedule or time being changed or the work schedule, as he testified that his communicators were verbal. (The email communication of July 6th and July 7th testified to at the initial hearing, was not produced at the Remand Hearing.)

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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

Because the claimant resigned from his position with the employer, this case is properly analyzed pursuant to G.L. c. 151A, § 25(e)(1), which provides, in pertinent part, as follows:

> [No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . .

> No disqualification shall be imposed if such individual establishes to the satisfaction of the commissioner that he left his employment in good faith to accept new employment on a permanent full-time basis, and that he became separated from such new employment for good cause attributable to the new employing unit.

These statutory provisions expressly assign the burden of proof to the claimant.

Consolidated Finding # 25 provides that the claimant gave the employer two reasons for resigning. One was because he had found another full-time job. We agree with the review examiner's conclusion that the claimant has not shown that he qualifies for benefits under the provision above which allows benefits where a claimant leaves one job in good faith to accept new employment on a permanent full-time basis, then becomes separated from the new position for good cause attributable to the new employing unit. Here, the claimant knew the new job was conditional upon his passing a CORI check, and we can reasonably infer that he knew what was in his own CORI record and that it could jeopardize this new employment. *See* Board of Review Decision 0026 4397 01 (Feb. 27, 2019) (no good faith belief that he would be hired by new employer, where the job was contingent upon passing a CORI check and the claimant knew he had a criminal record).

Alternatively, the claimant may be eligible for benefits if his leaving was for good cause attributable to the employer. When a claimant contends that the separation was for good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980).

His second reason for leaving was that he was not consistently receiving 32 hours of work. *See* Consolidated Finding # 25. Specifically, he objected to the fact that, when the employer could not provide the minimum 32 hours of work per week necessary to participate in the WorkShare program, the employer used the claimant's earned sick time or vacation time to make up the hours. *See* Consolidated Finding # 13. In fact, the employer used the claimant's earned sick time several times in the month between the claimant's recall from layoff and his resignation, whenever the employer had failed to offer him the 32 hours of work, which we assume was set forth in the employer's WorkShare Plan. *See* Consolidated Findings ## 14, 17, 19, 21, and 22.[3]

Although payment for sick time comes from the employer, it is an earned fringe benefit for work performed. In that sense, because the employee has already worked for it, it is his to use, as needed, when unable to work for medical reasons. Here, the employer was utilizing it to make up for the fact that it had fewer work hours to offer than the full 32 hours per week under its WorkShare Plan. It is true that the employer offered the claimant the choice of not participating in the plan, and thereby not having to supplement his weekly pay with his earned sick time. *See* Consolidated Finding # 17. However, this is a false choice. If he declined to participate in the WorkShare program, the claimant would not receive the minimum 32 hours each week. If he assented to continue allowing the employer to use his earned time to meet the 32-hour threshold, he had to relinquish an earned fringe benefit. Either way, the claimant's compensation was reduced.

[3] The employer did not produce a copy of its WorkShare plan, which the Board requested in its remand order.

Moreover, the degree to which the employer reduced his compensation each week was unpredictable and on-going. *See* Consolidated Finding # 21. In our view, the arrangement constituted good cause attributable to the employer to resign.

The outcome would be different if it were the claimant's own actions which reduced his hours, such as reporting for work late or calling out sick. Here, Consolidated Findings ## 20 and 22 make clear that, during this period, the claimant did not arrive to work late, call out sick, or ask for vacation time.

Our analysis does not end here. The Supreme Judicial Court has held that an employee who voluntarily leaves employment due to an employer's action has the burden to show that he made a reasonable attempt to correct the situation or that such attempt would have been futile. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984). In the present case, the claimant attempted to address the problem with the employer. He spoke with the Night Manager and emailed the Chief Financial Officer. *See* Consolidated Findings ## 15–17. Since the employer's only response was the choice described above, we think the claimant could have reasonably concluded that further attempts to remedy the problem were futile.

We, therefore, conclude as a matter of law that the claimant separated for good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning July 12, 2020, and for subsequent weeks if otherwise eligible.

Paul T. Fitzgerald

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 19, 2022

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki

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

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/rh