

Claimant home health aide needed to limit her availability for work because her five-year-old had no school and she could not find babysitting due to the COVID-19 public health emergency. Pursuant to the DUA's temporary flexible policies adopted during the pandemic, the claimant may not be disqualified due to declining suitable work under G.L. c. 151A, §§ 29 and 1(r). However, because she did not show that she was actively searching for full-time work, the claimant was not eligible for benefits once the DUA's work search waiver policy expired on June 15, 2021.

**Board of Review
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Issue ID: 0053 2744 49

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, effective August 16, 2020, which was approved in a determination issued on February 24, 2021. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner reversed the agency's initial determination and denied benefits in a decision rendered on October 21, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in total or partial unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), and, thus, she was disqualified from receiving benefits. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant did not meet the statutory definition of total or partial unemployment as she turned down suitable work due to lack of child-care, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. From July 28, 2020, to July 8, 2021, the claimant worked as a part-time home health aide for the employer, a home care agency.

2. The claimant worked varying shifts depending on her availability. The claimant's availability for work was limited because she did not have reliable childcare for her child and had to stay home with her child.
3. The employer listed all the available work shifts, and the claimant would pick up the shifts that she would be available to work.
4. The employer always had shifts of work available. At no point did the employer not have available work.
5. The claimant resigned from this employer on July 8, 2021, because she had to stay home with her child and did not have alternative childcare services.
6. The claimant was re-hired by the employer on July 27, 2022.
7. When the claimant worked for the employer between July 28, 2020 and July 8, 2021, she did not work for any other employer.

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. Upon such review, the Board adopts the review examiner's findings of fact and deems 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 for the entire period on appeal.

To be eligible for unemployment benefits, a claimant must show that she is in a state of unemployment within the meaning of the statute. G.L. c. 151A, § 29, authorizes benefits to be paid to those in total or partial unemployment. Those terms are 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.

Read together with G.L. c. 151A, § 29, these provisions reflect the Legislature's expectation that an unemployed worker will only be eligible for benefits if she is available for, and unable to obtain, full-time work, and she may not turn down suitable work. However, because the claimant seeks

benefits from August 16, 2020, through July 10, 2021, 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.¹ The U.S. Department of Labor also advised states that they had 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.²

Pursuant to this federal guidance, the DUA stated that, as a matter of policy, a claimant was not disqualified for refusing otherwise suitable work if, due to age, medical condition or infirmity, another individual required the claimant's full-time care, and no alternative care was available due to COVID-19.³ It further stated that the claimant would not be disqualified for this reason pursuant to G.L. c. 151A, §§ 29 and 1(r), provided the limitation placed on his or her availability did not constitute a withdrawal from the labor market.⁴ The claimant's circumstances here fall squarely within these policies.

The parties agreed that the reason that the claimant could not accept the employer's available shifts of work was that she did not have reliable childcare and had to stay home with her child. Finding of Fact # 2. During the hearing, the claimant explained that her five-year-old daughter was out of school for a year due to the COVID-19 pandemic, and she could not find anyone to babysit her.⁵ We can reasonably infer that a five-year-old requires full-time supervision.

Moreover, the record indicates that, during this period, the claimant did perform work for the employer when she could. Finding of Fact # 3. This shows that the claimant had not removed herself from the labor force.

Thus, lack of childcare due to the COVID-19 public health emergency appears to have been the only reason the claimant turned down suitable work for the employer. Since the DUA's flexible policies at the time allowed claimants to decline suitable work for this reason, she may not be disqualified pursuant to G.L. c. 151A, §§ 29 and 1(r) for this reason.

Finally, we note that implicit in the above provisions is a requirement that claimants also demonstrate that they were actively searching for full-time work. However, because of the COVID-19 public health emergency, the DUA had waived the work search requirement from

¹ See EUISAA, Pub. Law 116-127 (Mar. 18, 2020), § 4102(b).

² See U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 10-20 (Mar. 12, 2020), 4(b).

³ See DUA Unemployment Insurance Policy and Performance Memorandum (UIPP) 2020.12 (Oct. 8, 2020), p. 2-3; and UIPP 2020.14 (Nov. 25, 2020), p. 3. This policy was in effect from March 8, 2020, until September 4, 2021. See UIPP 2021.07 (Sept. 9, 2021).

⁴ UIPP 2021.06 (Sept. 9, 2021), p. 2, *citing* UIPL 10-20 (Mar. 12, 2020).

⁵ While not explicitly incorporated into the review examiner's findings, this portion of the claimant's 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).

March 8, 2020, until June 15, 2021.⁶ To be eligible for benefits after June 15, 2021, the claimant had to show that she had been actively searching for full-time work. Finding of Fact # 7 states that the claimant did not work for anyone else during the period that she remained employed with the employer from July 28, 2020, until July 8, 2021, and nothing in the record indicates that the claimant had searched for other employment during this time. For this reason, she did not meet her burden to show that she was in total or partial unemployment after June 15, 2021.

We, therefore, conclude as a matter of law that the claimant was in total or partial unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), from August 16, 2020, until June 12, 2021, during the weeks that she could not perform any work or in the weeks when she did pick up shifts, respectively. We further conclude that the claimant did not meet the requirement of G.L. c. 151A, §§ 29 and 1(r), as of the week beginning June 13, 2021, once the work search requirement was reinstated.

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits for the period August 16, 2020, through June 12, 2021, if otherwise eligible. The claimant is ineligible for benefits from June 13, 2021, through July 10, 2021.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 28, 2023



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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.

⁶ See UIPP 2021.03 (Jan. 29, 2021); and UIPP 2020.15 (May 20, 2021).

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