

**Under DUA’s temporary flexible policies adopted in response to the COVID-19 pandemic, the claimant, a per diem/on call employee working for her sole base period employer, is deemed to be in partial unemployment pursuant to G.L. c. 151A, §§ 29(b) and 1(r), because she had to restrict her availability to weekends due to a lack of childcare while her child is attending school remotely from home.**

**Board of Review  
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**Issue ID: 0057 2844 31**

### 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 on November 2, 2020, after restricting her availability for work as a per diem employee of this base period employer to weekends, effective November 1, 2020. The DUA issued a Notice of Approval on April 26, 2021, awarding benefits. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner issued a decision on August 12, 2021, overturning the agency’s determination and denying benefits from November 1, 2020, through April 3, 2021. We accepted the claimant’s application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment within the meaning of the law while restricting her availability for work, 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner’s decision, and the claimant’s appeal.

The issue before the Board is whether the review examiner’s decision, which concluded that the claimant is not eligible for benefits while restricting her availability to weekends is supported by substantial and credible evidence and is free from error of law, where she continued to work weekends for the employer, but could not work weekdays because she does not have childcare due to the COVID-19 pandemic.

### Findings of Fact

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

1. The claimant started working as a licensed practical nurse for the employer, a home care company, on 9/30/19.
2. Employees are either part-time, full-time, or per diem.
3. Part-time and full-time employees must work every other weekend and holidays. They are eligible for benefits such as health insurance. They are guaranteed work every week.
4. Per diem employees must work 8 hours in a 12-week period to remain employed. Per diem employees do not receive benefits. They may choose to accept or decline work based on their availability.
5. The claimant chose to work per diem for the employer when she was hired and did not request to change her status to part-time or full-time during her employment.
6. The employer posts available shifts on the employer's website. Employees may also view which shifts are available when they log into the website.
7. The employer posts the location of the shift, the age of the patient, and which shifts are available, day, evening, or night.
8. The claimant provided care for one client the entire time she worked for the employer.
9. The claimant worked Monday, Thursday, Friday, and every other Saturday, 7 a.m. to 4 p.m., from 9/30/19 to 10/31/20.
10. The claimant filed an unemployment insurance claim and obtained an effective date of her claim of 10/25/20. Her weekly benefit rate is \$485. Her weekly earnings exclusion is \$161.67. Her benefit rate plus earnings exclusion is \$646.67.
11. The claimant informed the employer she was only available weekends effective 11/1/20, as her child needed assistance with remote learning and the claimant's childcare provider relocated to a destination out of the country.
12. The claimant is a single parent. The other parent does not have parenting time with the above child.
13. The claimant worked between 9 and 12 hours per week, on weekends, from 11/1/20 to 2/27/21.
14. Full-time hours were available to the claimant each week she worked for the employer.

15. The claimant's child was on a wait list for a childcare program that allows students to learn remotely at the program after the child's care provider relocated out of the country.
16. The child was accepted into the above program on or about 2/28/21.
17. The claimant worked 28 hours between 2/28/21 and 3/6/21 and earned approximately \$750.
18. The claimant did not request unemployment insurance benefits for the weeks beginning 3/7/21 to 4/2/21.
19. The claimant was on a medical leave of absence from approximately 4/1/21 to 5/9/21.
20. The claimant stopped requesting benefits effective 5/1/21. She returned to the schedule she worked prior to 11/1/20, on 5/10/21.

### Ruling of the Board

In accordance with our statutory obligation, we review 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 original 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, we reject the review examiner's legal conclusion that the claimant is ineligible for unemployment benefits while she was unable to work weekdays due to childcare issues, as discussed more fully below.

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.

The review examiner properly concluded the claimant was not in total unemployment from November 1, 2020, through April 3, 2021, because she performed work for or received remuneration from the employer each week during this period.

The review examiner also concluded that because the claimant was a per diem employee and this employer was her only base period employer, she was not in partial unemployment because of her status as an on call/per diem employee. *See Town of Mattapoisett v. Dir. of Division of Employment Security*, 392 Mass. 546 (1984). Generally, the review examiner's conclusion would be correct. However, because the claimant here seeks benefits from November 1, 2020, through April 3, 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.<sup>1</sup> The U.S. Department of Labor 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.<sup>2</sup>

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 requires the claimant's full-time care, and no alternative care was available due to COVID-19.<sup>3</sup> The claimant's circumstances here fall squarely within this policy.

In this case, the claimant has a child with a learning disability and special needs.<sup>4</sup> She is a single parent, and the child's other parent has no parenting time with the child. *See Finding of Fact # 12.* The claimant had to restrict her availability to weekends because her childcare provider relocated to a destination out of the country, and the claimant had to remain home because her child needed more assistance with remote learning. *See Finding of Fact # 11.*

From November 1, 2020, through February 27, 2021, the claimant worked between 9 and 12 hours per week during weekends for the employer. *See Finding of Fact # 13.* Although full-time hours were available for the claimant during each of these weeks, she was unable to work weekdays because of her childcare responsibilities. *See Finding of Fact # 14.*

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<sup>1</sup> *See* EUISAA, Pub. Law 116-127 (Mar. 18, 2020), § 4102(b).

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

<sup>3</sup> *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).

<sup>4</sup> 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).

The claimant signed up for a childcare program that allows students to learn remotely. Eventually, the child was accepted into the program on or about February 28, 2021. *See Findings of Fact ## 15–16.* The claimant resumed working more hours as of February 28, 2021. *See Finding of Fact # 17.* After a medical leave of absence from April 1 through May 9, 2021<sup>5</sup>, the claimant returned to the schedule she had worked prior to November 1, 2020. *See Findings of Fact ## 19–20.*

Where the claimant’s child was only able to participate in school on a virtual basis due to COVID-19, and the claimant had to be home with him to assist with remote learning after losing her childcare, she could not perform her regular job. The review examiner’s analysis specifically noted the “claimant worked all of the hours she as available to work,” and found she worked each weekend until she was able to secure appropriate childcare. Thereafter, she resumed working her previous schedule.

We believe the DUA’s temporary flexible policies permitting claimants to reduce their availability because of lack of childcare due to the COVID-19 public health emergency extend to on call employees like this claimant, who had to be home to assist her special needs child with remote learning, but continued to make herself available for work around her childcare responsibilities and returned to work once she secured appropriate childcare.

We, therefore, conclude as a matter of law that the claimant was in partial unemployment from November 1, 2020, through April 3, 2021, pursuant to G.L. c. 151A, §§ 29(b) and 1(r). She continued to work all of the hours she was available to work, in view of her need to restrict her availability due to lack of suitable childcare for her child, who was attending school remotely because of the COVID-19 public health emergency.

The review examiner’s decision is reversed. The claimant is entitled to receive benefits from November 1, 2020, through April 3, 2021, if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - November 22, 2021**



Paul T. Fitzgerald, Esq.  
Chairman



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)**

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<sup>5</sup> The claimant’s eligibility for benefits while on this medical leave of absence from April 1, 2021, through May 9, 2021, is being adjudicated separately. *See Issue ID# 0072 0723 93.*

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](http://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.

JPCA/rh