

Although the claimant was removed as President just prior to the sale of a profitable business, the record showed that he had to sign off on the transfer and received sizeable compensation in the weeks prior to the sale. Held he voluntarily caused his own unemployment and was ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0062 9121 65

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 separated from his position with the employer and filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 27, 2021.¹ The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner modified the agency's initial determination and denied benefits under a separate section of law in a decision rendered on June 30, 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 or urgent, compelling, and necessitous reasons, and, thus, he 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 ensure that the claimant had notice that the issue to be decided in this case is whether he is eligible for benefits under G.L. c. 151A, § 25(e), and to ask for additional documents from the claimant. The claimant attended the remand hearing with his attorney, and the new owner of the employer participated as a witness. 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 because it was his decision to sell a profitable corporation that caused his unemployment, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

¹ The DUA determination disqualified the claimant pursuant to G.L. c. 151A, §§ 29 and 1(r).

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

1. In March 1990, the claimant established a corporation for the purpose of operating a swimming pool business. The Articles of Organization designated the claimant as President, Treasurer, and Director of the corporation. The only other member of the corporation was an attorney, who was designated the position of Clerk. The corporation issued 15,000 shares.
2. The corporation was profitable in 2019 and in 2020. In the corporation's annual report, filed on 3/12/20, the claimant is listed as the President and only member of the corporation.
3. On 8/31/20, the business was sold for \$490,000. The claimant's wife signed the sale agreement, identified as an authorized officer. The claimant signed the sale agreement, identified as a key employee.
4. The sale agreement did not provide for the claimant and his wife to be kept on and immediately laid off upon the new owners taking control of the company. The owner did not intend to keep the claimant and his wife as employees. Since the business sold, the claimant worked intermittently as a W2 employee on an as-needed basis. The date when the claimant last worked is unknown. The claimant was last paid during the first week of November 2021. The claimant was not laid off because the sales agreement required him to be.
5. The sale agreement contains a section that reads in part: "The seller and (Claimant) agree to not own a pool services, installation or restoration business for a period of five (5) years and the seller and (Claimant) agree to not compete for a period of five (5) years within an area of fifty (50) miles of [Town A], Massachusetts. Further, the seller and (Claimant) agree to not solicit employees, customers, or referral sources for business of (Business Name) during this five (5) year period. (Claimant) and (wife's name) will sign a five (5) year non-competition agreement at the closing for this matter. After a period of two and one-half years (2 ½), (Claimant) ({Claimant's name} only) may return to the industry as an employee. In no event, during the balance of the five (5) year noncompetition term, will (Claimant) directly compete against (Business Name) as an Owner, Director, General Manager, of a competing company. Should (Claimant) desire to return to the industry as an employee, the buyer will retain the first right of refusal to employee (Claimant) at a predetermined compensation structure. The compensation for a sales position will be ten (10) percent commission of sales contracted. The construction supervisor position will be paid an hourly wage of fifty (\$50.00) dollars per hour with a company vehicle and fuel. The further and specific details of the employment agreement shall be negotiated between the buyer and (Claimant). If the buyer declines to hire (Claimant), (Claimant) will then have the ability to work for a pool services, installation and restoration business under the restrictions outlined above and contained in the noncompetition and non-solicit agreement."

6. In the corporation's annual report, filed on 3/25/21 for the fiscal year ending on 12/31/20, the claimant is listed as an agent of the business and a second individual is identified as the President. The claimant's name was included in error.
7. The claimant did not receive \$238,281 for a building or in any other way in connection with the sale of the business.
8. The claimant filed an initial claim for unemployment insurance benefits, effective 1/24/21.
9. On 2/27/21, the DUA issued the claimant a Notice of Disqualification, finding him ineligible for benefits under Section 29(a) and 1(r) of the law because the corporation is still active. The claimant appealed the Notice of Disqualification. In his appeal, the claimant wrote that the business was sold on 9/25/20; he was laid off and will return to work on 4/1/21.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Consolidated Finding # 4 states that the business was sold on August 31, 2020. We note that this was the date that the Purchase and Sale Agreement was signed. The transfer of stock took place on September 25, 2020.²

Consolidated Finding # 8 states that the claimant filed an initial claim for benefits, effective January 24, 2021. However, the DUA's UI Online record-keeping system shows that he had re-opened an existing unemployment claim (his 2020-01 claim), before opening this new claim, effective January 24, 2021. This is important, because the review examiner's original decision had disqualified the claimant beginning September 20, 2020, and the claimant in this appeal seeks benefits since the week ending October 3, 2020.

We also believe that the portion of Consolidated Finding # 7, which states that the \$238,281 payment to the claimant was not in any way connected with the sale of the business, is overbroad and, therefore, misleading.

In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. Following remand, we believe the review examiner's legal conclusion that the claimant is ineligible for benefits is correct, as outlined below.

² Remand Exhibit 14 is the Bill of Sale, signed on September 25, 2020. The Purchase and Sale Agreement, signed on August 31, 2020, was included with Remand Exhibit 15. 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 first issue we must decide is whether the claimant's separation was voluntary or involuntary. Throughout the hearing, the claimant maintained that this was an involuntary separation, that he had been laid off. If true, his separation would be deemed to be involuntary and we would consider his eligibility for benefits under G.L. c. 151A, § 25(e)(2). In her decision, the review examiner concluded that the claimant's separation was voluntary and analyzed his eligibility pursuant to G.L. c. 151A, § 25(e)(1). We believe the review examiner's original analysis was correct.

G.L. c. 151A, § 25(e), 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 . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

The express language of the above provisions places the burden of proof upon the claimant.

As of March 12, 2020, the claimant was the President and the only corporate member of a profitable swimming pool business, for which he also performed services as an employee. *See Consolidated Finding # 2.* His wife held the corporation's shares of stock. *See Remand Exhibit 14.*³ This business was sold to a new owner on September 25, 2020. *See Consolidated Finding # 3.* Although the claimant insisted during the hearing and on appeal that he had no control over the sale of the business, substantial evidence indicates otherwise.

First, he signed the Purchase and Sale Agreement on August 31, 2020. *See Consolidated Finding # 3.* In our view, it makes no difference that he signed this agreement as a "key employee" rather than in the capacity as a president of the corporation. *See Consolidated Finding # 3.* The fact that the agreement includes a covenant not to compete, which applies to the claimant personally, shows that the new owner required the claimant's consent to this sales transaction. *See Consolidated Finding # 5.*

We are also unpersuaded by the fact that, on paper, the \$490,000 proceeds went to his wife as the sole shareholder, not to the claimant. *See Consolidated Finding # 3 and Remand Exhibit 14.* As the review examiner noted in her original decision, wages reported to the Department of Revenue show that the claimant received \$238,281.40 in the third quarter of 2020, as compared to wages for the previous year's quarters, which did not exceed \$40,000. *See Remand Exhibit 1 (the original hearing decision).* The third quarter of 2020 coincides with the sale of this business. Although the claimant testified that this payment of nearly a quarter of a million dollars had nothing to do with the sale but was compensation for additional scheduling duties that he assumed at the time, we are not convinced. Given the size and timing of the compensation, we believe his explanation

³ During the hearing, the claimant explained that the business was set up as a woman-owned business because she was looking to bid on government contracts. This testimony is also part of the unchallenged evidence in the record.

and the portion of Consolidated Finding # 7, which states it was unrelated to the sale, are unreasonable in relation to the evidence presented.

Second, the consolidated findings do not support the claimant's assertion that he was involuntarily laid off due to a seasonal slowdown in the pool industry. Consolidated Finding # 4 provides that, although the written purchase and sale agreement did not, by its terms, require the claimant to be laid off, there was never any intent for him to continue working after the business was sold, and he only did so intermittently on an as-needed basis. In rendering this finding, the review examiner relied upon the new owner's remand hearing testimony, in which he stated that it was not intended for the claimant to work for him because there was no need for the claimant's services, except off and on to help with a few things.

"The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). Unless a credibility assessment is unreasonable in relation to the evidence presented, it will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). "The test is whether the finding is supported by "substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" *Id.* at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted). We believe Consolidated Finding # 4 is reasonable in relation to the evidence presented.

Thus, the claimant stopped working not because of a seasonal slowdown, but because the pool business was sold. Nothing in the record demonstrates that he or his wife were compelled to sell it, or that the sale was otherwise due to circumstances beyond his control. In short, the claimant caused his own unemployment when he and his wife elected to sell a profitable business. Consequently, he is ineligible for unemployment benefits. *See* Jahn v. Dir. of Division of Employment Security, 397 Mass. 61 (1986) (where sole shareholder of closely held corporation sells business, it's presumed voluntary and disqualifying unless claimant proves compelling circumstances — fact that still earning salary showed business still profitable); Shuman v. Dir. of Division of Unemployment Assistance, No. 11-P-1498, 2012 WL 3154548 (Mass. App. Ct. Aug. 6, 2012), *summary decision pursuant to rule 1:28* (where claimant's corporation remained both profitable and a source of significant personal income, dissolution was not urgent, compelling, and necessitous).

We, therefore, conclude as a matter of law that the claimant is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning September 20, 2020, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 21, 2022



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.

AB/rh