

With young children attending school remotely two days a week due to the pandemic, the claimant needed to take an intermittent leave of absence to stay home and supervise them. As she continued to work two other days a week, held she was in partial unemployment and eligible for benefits under G.L. c. 151A, §§ 29 and 1(r), during the weeks in which she earned less than her weekly benefit amount plus earnings disregard.

**Board of Review
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Issue ID: 0065 0485 38

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 was on a leave of absence from her position with the employer and filed a claim for unemployment benefits with the DUA, effective January 24, 2021. In a determination issued on April 2, 2021, the DUA approved the payment of benefits beginning February 28, 2021. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner modified the agency's initial determination and denied benefits from February 28, 2023, through April 3, 2021, in a decision rendered on November 5, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that, during these weeks, the claimant was not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), and, thus, 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 remanded the case to the review examiner to afford the claimant an opportunity to testify and to obtain further evidence about the claimant's work and earnings during the relevant period. Both parties attended 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 was not in partial unemployment because she chose to reduce her schedule and earned more than her weekly benefit amount and earnings disregard, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. On 11/11/2013, the claimant began working as a per diem substitute teacher for the employer, a public school.
2. On 12/4/2019, the claimant began working .8 of a full-time schedule, as a paraprofessional for the employer. As an .8 employee, she worked four days a week, Monday through Thursday, 8:25 a.m. to 2:55 p.m., 6.16 hours a day or 24.64 hours a week.
3. When the school opened for the 2020–2021 school year, the employer operated in a hybrid manner due to the COVID-19 pandemic. It conducted classes two days in person (Monday and Tuesday) and two days remotely (Thursday and Friday).
4. The claimant's children, aged five and seven years, attended school in the employer's district. They attended school in a hybrid manner during the 2020–2021 school year.
5. When school opened for the 2020–2021 school year, the claimant requested an intermittent leave of absence under the Family First Coronavirus Response Act (FFCRA) to work in person two days and have paid leave on Thursday and Friday.
6. The claimant requested the FFCRA intermittent leave because her five-year-old could not read and her seven-year-old was a new reader. She needed to assist her children with their remote schooling.
7. The claimant's husband was an essential worker that travelled for his work.
8. The employer approved the claimant's request.
9. The FFCRA intermittent leave expired on 1/1/2021.
10. In 12/2020, the claimant requested an intermittent leave of absence under the Family Medical Leave Act (FMLA) to continue her intermittent leave of absence, unpaid.
11. The employer approved the claimant's unpaid, intermittent leave request under FMLA.
12. Beginning in 1/2021, the claimant worked two days a week in person, and did not work two days a week.
13. In 1/2021, the claimant filed a claim for unemployment benefits with an effective date of 1/24/2021.

14. The Department of Unemployment Assistance (the DUA) established the claimant's weekly benefits allowance as \$150.00, with an earnings disregard of \$50.67, totaling [\$200.67].
15. During the week ending 3/6/2021, the claimant worked 12.32 hours and earned a gross amount of \$101.06.
16. During the week ending 3/13/2021, the claimant worked 7.39 hours and received 4.93 of sick pay due to her child's illness on 3/9/2022. She received a gross amount of \$101.06.
17. During the week ending 3/20/2021, the claimant worked 12.32 hours and earned a gross amount of \$101.06.
18. During the week ending 3/27/2021, the claimant worked 12.32 hours and earned a gross amount of \$101.06.
19. During the week ending 4/3/2021, the claimant worked three hours on 3/29/2021 and used three hours of personal time due to her child's illness. She called out absent from work due to her child's illness on 3/30/2021. The claimant was paid 6.16 hours of holiday pay for the Good Friday holiday.
20. The employer docked the claimant 1.85 hours of sick pay for not having 6.16 hours of sick time during the week ending 4/3/2021.
21. The claimant received a gross amount of \$205.59 for the week ending 4/3/2021.
22. During the weeks ending 3/6/2022 through 4/3/2022, the claimant was able and available to work two days a week, the days of in person school. The claimant was not available to complete any work, including remote work if available, the other days of the week because she assisted her children with remote learning.
23. On 4/5/2021, the claimant returned to work at her previous .8 full-time schedule for the employer.

Credibility Assessment:

Both parties agreed that the claimant reduced her schedule due to childcare issues when the school operated in a hybrid [sic], requiring the claimant to assist her children with school.

Although at the initial hearing, the employer's witness, the business manager, testified the claimant was employed full-time, five days a week, he acknowledged at the remand hearing that the claimant was a .8 full-time, not working five days a week. Further, even though the employer relied on the payroll documentation provided by the employer, the payroll documents offered bi-weekly paystubs, and

he was unable to accurately breakdown the hours the claimant worked in each week, only providing bi-weekly breakdowns.

The claimant testified in detail about how many hours she worked each week. Further, she was able to break down how many hours of sick and personal time she took in a week with detail, as opposed to the bi-weekly breakdown.

Based on the claimant's consistent testimony over both remand hearings, which was also corroborated by the business manager, and included documentation, the totality of the claimant's testimony outweighs the employer's testimony. Therefore, the claimant is deemed more credible.

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 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 reject the review examiner's legal conclusion that the claimant was ineligible for benefits during most of the weeks at issue.

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; provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded. . . .

(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.

In her decision, the review examiner noted that the claimant was working a reduced schedule at her request. Her regular schedule had been Monday to Thursday, 24.64 hours a week. Consolidated Finding # 2. She reduced it when the 2020–21 school year began, because her young children were attending school on a hybrid basis, and she needed to be home to supervise them. *See Consolidated Findings ## 3–6.* Once her Family First Coronavirus Response Act leave of absence ended, she requested, and the employer approved, a continued unpaid, intermittent leave. *See Consolidated Findings ## 5–11.* The question before us is whether the claimant was in partial

unemployment within the meaning of G.L. c. 151A, § 1(r)(1), while on this intermittent leave of absence during the period February 28 through April 3, 2021.

Given the time period at issue, we must also consider the temporary modifications to the unemployment law brought about by the COVID-19 public health emergency. 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 (DOL) 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 was suitable given an individual's circumstances.²

The DOL stated that individuals may be considered available for work if they were available for any work for all or a portion of the week claimed, provided any limitation upon their availability did not constitute a withdrawal from the labor market.³ In response, the DUA announced that an individual was deemed to have good cause to refuse otherwise suitable work, if the claimant was unable to accept this work because of having to care for a family member for whom no alternative care was available due to COVID-19. This included childcare responsibilities. Further, the DUA deemed a claimant to be in unemployment while on any type of unpaid leave of absence and not subject to disqualification under G.L. c. 151A, §§ 29, 1(r), or 24(b), as long as the reason for the claimant's inability to work was related to COVID-19 and the claimant remained available for some type of suitable work.⁴

In this case, there's no question that the claimant asked to reduce her schedule even though the employer had suitable work available, but she did so because of child-care responsibilities caused by the pandemic. Specifically, the employer's school system, where the children were enrolled, chose to operate on a hybrid basis with Thursday and Friday remote learning during the 2020–21 academic year. *See Consolidated Findings ## 3 and 4.* The hybrid school schedule was implemented due to the pandemic. *Consolidated Finding # 3.* The claimant's children were young enough to require adult supervision, and other family members were unavailable to do so. *See Consolidated Findings ## 4, 6, and 7.* Further, her ability to work Monday and Tuesday shows that she had not removed herself from the labor force. *See Consolidated Finding # 12.* Pursuant to the DUA's flexible policies at the time, she may not be disqualified for voluntarily turning down suitable work.

However, the definition of partial unemployment further requires that the individual have earned an amount which is less than the sum of her weekly benefit rate plus the amount of earnings which are disregarded, as specified in G.L. c. 151A, § 29(b). Here, the record shows that the claimant earned wages for two days each week and had also been paid for some holiday and personal time. *See Consolidated Findings ## 15–21.*

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* UIPL 10-20, 4(b).

⁴ DUA UI Policy and Performance Memo (UIPP) 2021.03 (Jan. 29, 2021), pp. 6-7.

The claimant's weekly benefit amount of \$150.00 plus her earnings disregard of \$50.67 equals \$200.67. *See Consolidated Finding # 14.* During the weeks ending March 6, March 13, March 20, and March 27, 2021, she was paid less than this amount. *See Consolidated Findings ## 14–18.* Therefore, she met the definition of being in partial unemployment and is eligible for partial unemployment benefits during these weeks.

During the week ending April 3, 2021, however, she was paid \$205.59 in gross wages. Consolidated Finding # 21. As this amount exceeded her weekly benefit amount plus earnings disregard, she is not entitled to benefits for this week.

We, therefore, conclude as a matter of law that the claimant was in partial unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), in the weeks when her gross wages were less than her weekly benefit amount plus earnings disregard.

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits for the period from February 28, 2021, through March 27, 2021, if otherwise eligible. She is denied benefits for the week beginning March 28, 2021.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 29, 2024



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)**

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.

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