

The claimant is not in unemployment during the period that she reduced her availability to part-time, as she failed to present substantial evidence to show it was for reasons under DUA's temporary policies in response to the COVID-19 public health emergency or for any of the reasons listed under 430 CMR 4.45.

**Board of Review
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Issue ID: 0068 0958 96

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed a claim for unemployment benefits with the DUA effective on April 18, 2021. On May 22, 2021, the DUA issued a determination awarding benefits to the claimant. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on October 8, 2021. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was in partial unemployment and, thus, was not disqualified under G.L. c. 151A, §§ 29(a), 29(b) and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to obtain additional evidence pertaining to reasons why the claimant reduced her schedule to part-time. Only the employer participated in the remand hearing. Thereafter, the review examiner issued his 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 in partial unemployment, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the claimant's reason for reducing her schedule to part-time is unknown.

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 debt collector for the employer, a collections agency. She began work for the employer in July, 2019. She was hired as a full-time

employee and worked Monday through Friday, from 8 a.m. to 4:30 p.m. She earned \$16.00 per hour.

2. In March, 2020, the employer closed its offices because of the COVID-19 pandemic. The employer then allowed its employees to work remotely.
3. In April, 2020, the employer reopened its offices for employees who could work full-time.
4. The claimant reported to the employer that she could not work full-time because she was caring for a relative.
5. The claimant applied for unemployment benefits and was determined to have a benefit year beginning April 19, 2020.
6. The employer allowed the claimant to continue to work remotely. The employer told the claimant she could work any hours she wanted within the hours of Monday through Friday, from 8:00 a.m. to 9:00 p.m., and Saturday from 8:00 a.m. to 2:00 p.m.
7. The claimant did not accept all available work. The claimant continued to work part-time, remotely.
8. It is not known why the claimant restricted her hours to part-time only.
9. It is not known who the claimant cared for.
10. It is not known what the claimant's relative's medical condition was.
11. The claimant has not worked since November 1, 2021.

Credibility Assessment:

At the initial hearing on September 20, 2021, the claimant testified that she cared for her stepmother, who was ailing due to a COVID-19 infection. However, her testimony regarding the identity of this person was inconsistent. Because her testimony was inconsistent, this examiner asked the claimant to provide medical documentation supporting her testimony. The claimant did not provide this documentation. Nevertheless, the claimant's overall testimony was compelling other than her inconsistent testimony regarding the relative's identity. Accordingly, this examiner found the claimant eligible for benefits under Section 29(b) and 1(r) of the Law.

However, the claimant did not attend the remand hearing on December 9, 2021. She presented none of the evidence requested by the Board of Review to prove the identity or medical condition of a family member. For that reason, most of the questions asked by the Board of Review memorandum remain unanswered. A

review of her inconsistent testimony from the September 20, 2021, hearing, combined with her failure to attend the remand hearing to support her previous testimony, results in a conclusion from this examiner that the claimant is not credible. It is concluded [that] the claimant reduced her hours to part-time for unknown reasons. It is not concluded her reasons for working part-time were for a COVID-19 related reason or any other compelling reason.

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 reject the review examiner's original legal conclusion that the claimant was in partial unemployment and qualified for benefits.

To be eligible for unemployment benefits, the 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. . . .

Ordinarily, under federal and Massachusetts law, claimants are only eligible for benefits if they are physically capable of, available for, and actively seeking full-time work, and they may not turn down suitable work. Under limited circumstances, they may meet these requirements even if they are only available to work part-time hours. *See* 430 CMR 4.45. In this case, because the claimant seeks benefits beginning on April 18, 2021, the effective date of her claim, 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.

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

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.² In response, the DUA adopted several temporary policies, including a flexible definition of suitable work and it expanded the circumstances under which claimants could limit their availability to part-time work.³ Under this policy, claimants were permitted to limit their availability to part-time employment for COVID-19 related reasons. The above policies were effective retroactively to the beginning of the pandemic emergency on March 8, 2020, and were in effect until September 4, 2021.⁴

In the instant case, the employer reduced the claimant's hours to part-time at the claimant's request. *See Consolidated Findings ## 6–7.* The claimant alleged that she requested the reduction to part-time hours in order to care for a sick relative, who had contracted COVID-19. *See Consolidated Finding # 4 and the Credibility Assessment.* The claimant informed the employer about her alleged sick relative in April, 2021.⁵ Despite the claimant's inconsistent testimony and failure to provide requested medical documentation to substantiate her assertions during the original hearing, the review examiner awarded benefits, concluding that the claimant reduced her hours to part-time for a qualifying COVID-19 related reason. We remanded the case to obtain documentary evidence pertaining to the identity of the individual the claimant was allegedly caring for, the nature of the individual's medical condition, and the claimant's specific role in their care.

The claimant subsequently failed to participate in the remand hearing and, therefore, did not provide the necessary documentary evidence to substantiate her prior testimony. Consequently, the review examiner found that the claimant's original testimony was not credible, and her reason for reducing her schedule to part-time is unknown. *See Consolidated Finding # 8.* Such an assessment as to the claimant's credibility is within the scope of the review examiner's role as the fact-finder, and, because it is reasonable in relation to the evidence presented, we will not disturb it on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996).

Based on the above findings, the claimant has not established that her reason for reducing her availability to part-time hours during the period at issue, April 18, 2021, through September 4, 2021, was for a COVID-19 related reason in the DUA's temporary policies or for the reasons listed under 430 CMR 4.45. Accordingly, the claimant has not presented a qualifying reason to reduce her availability for work from full-time to part-time.

We, therefore, conclude as a matter of law that, pursuant to G.L. c. 151A, § 29(a), 29(b) and 1(r), the claimant was not in unemployment during the relevant period.

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

³ DUA UI Policy and Performance Memo (UIPP) 2020.14, p. 2–3.

⁴ *See* UIPP 2021.02, p. 2; and UIPP 2021.08.

⁵ 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 review examiner's decision is reversed. The claimant is denied benefits for the weeks ending April 18, 2021, through September 4, 2021.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 29, 2022



Paul T. Fitzgerald, Esq.
Chairman



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.

SVL/rh