After hiring more delivery drivers for the evening shift, the employer reduced the claimant's regularly scheduled hours from full-time to part-time. When the employer declined to restore his full-time schedule or transfer him to another store, he managed to continue working full-time hours by showing up at the store when not scheduled and picking up shifts when other drivers did not report for work. Held this was a substantial, detrimental change to his employment and an unreasonable way for the claimant to maintain his full-time hours. It constituted good cause attributable to the employer to resign. The claimant is eligible for benefits under G.L. c. 151A, § 25(e)(1).

Board of Review
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Issue ID: 0078 4558 68

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 affirm on different grounds.

The claimant separated from his position with the employer after March 3, 2022. He had previously filed a claim for unemployment benefits with the DUA, effective January 16, 2022, which was denied in a determination issued on November 2, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on March 15, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was discharged and had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, he was not disqualified under G.L. c. 151A, § 25(e)(2). 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 further evidence about the claimant's schedule and efforts to reinstate any reduced hours. 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 discharged due to lack of work because the employer hired more employees, 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. Beginning on October 17, 2017, the claimant worked as a full-time delivery driver for the employer, a pizza company. The claimant earned $6.15 an hour plus tips when making deliveries.

2. The claimant worked a 10:00 a.m. to 6:00 p.m. shift Sundays through Thursdays, five days a week.

3. Prior to January 2022, the claimant consistently worked 40 to 60 hours each week.

4. The employer's vice-president would typically send out a weekly schedule to 17 individual stores. The vice-president and/or the store manager had the ability to (and often did) tweak the employees' weekly schedules. The vice-president had no direct knowledge of when the store manager modified the claimant's shift or hours.

5. The claimant would receive his schedule by text messages or by viewing the schedule posted in the store. The schedule posted at the store would regularly have manual edits.

6. In January of 2022, the employer hired additional employees for its 4:00 p.m. to midnight shift to accommodate the increase in evening business.

7. For the week beginning Sunday, January 16, 2022, the on-site manager changed the claimant's scheduled shift to 3 days a week Tuesday, Wednesday and Thursdays, approximately 15 hours a week.

8. The employer reduced the claimant's scheduled hours to offset the expense it incurred for bringing on additional employees for its evening shift, as the onsite manager had to cap weekly labor costs.

9. During the week beginning Sunday, January 16, 2022, the claimant vehemently complained to his manager and the franchise owner about his reduced hours. The claimant asked for his full-time hours back. The manager responded to the claimant's request by telling him to come in to work on Wednesday, January 26, 2022.

10. On Wednesday, January 26, 2022, the claimant worked 7.16 unscheduled hours.

11. At no time after mid-January 2022 was the claimant scheduled for full-time hours.

12. In order to maintain the same level of income, the claimant would go to the store, hang around, and take on additional hours that were not on his reduced schedule. The number of extra hours he worked ultimately depended on whether other drivers showed up for their shifts.

13. By picking up extra shifts, the claimant ended up working a full-time schedule of hours.

14. The claimant worked a total of 348.36 hours from January 1, 2022, through February 25, 2022, and earned $4,094.98 in wages and $1,214.70 in tips, for a total of $5,309.68.

15. The claimant worked 190.84 hours in January of 2022 and 157.52 hours in February of 2022.

16. The claimant's last day of work was March 3, 2022. He quit because his schedule was reduced to three days a week, and his ability to work more hours was dependent on other employees not coming into work.

17. At no time was the claimant told that he was discharged or terminated from his employment.

Credibility Assessment:

The claimant testified that his hours were reduced around the last week of January 2022 when he observed that the schedule posted in the store did not reflect that he was scheduled to work his usual Thursday through Sunday, 40-hour shift. The claimant testified that he would make up for the reduction in hours by hanging out at the store and working unscheduled hours. However, it was only possible to work additional unscheduled hours if other employees failed to report to work. This aspect of the claimant's testimony was credible. Also credible is the claimant's testimony that the schedules submitted by the employer were not the same schedules he observed posted in the store. The testimony and documents provided by the employer's witness relating to the claimant's schedule are not credible. Although initially stating that these were the final schedules, he subsequently admitted that he would often tweak the schedules and that store managers also had the ability to tweak them, without his personal knowledge. Where the claimant also testified that he saw manual edits on the posted schedules, it is concluded that the schedules submitted by the employer are not an accurate reflection of the schedules received by the claimant or posted at the store.

However, the employer's payroll detail report is credible and accurately shows the number of hours the claimant worked during the months of January and February of 2022. Although it shows the claimant worked fewer hours worked [sic] in February than in January, it does not contradict the claimant's testimony that his schedule was significantly reduced, and that he was forced to hang out at the store and pick up additional hours from the schedules of co-workers who did not report

> to work in order to reach 40 hours a week. The claimant maintained that his hours were reduced because the employer hired more evening drivers at his expense. When asked, the employer's witness testified that he was unable to provide the number of drivers hired during January and February because so many drivers come and go. The witness quickly produced two payroll reports during the hearing. This Examiner finds that his testimony that he was unable to determine the number of drivers on the payroll to be incredible. It is more reasonable to conclude that the employer reduced the claimant's hours because they hired additional drivers.

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. As discussed more fully below, while we agree that the claimant is eligible for benefits, we do so under a different provision of law.

Because the review examiner originally concluded that the employer had effectively discharged the claimant when it stopped offering the claimant any work, she analyzed his eligibility for benefits pursuant to G.L. c. 151A, § 25(e)(2). However, after remand, the consolidated findings show that the claimant quit. Consolidated Finding # 16. Whether a person is eligible for benefits following a resignation is properly analyzed under G.L. c. 151A, § 25(e)(1), which states, in relevant 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 in these provisions places the burden of proof on the claimant.

Prior to January, 2022, the claimant had been regularly scheduled to work full-time hours of between 40–60 hours a week, delivering pizzas from 10:00 a.m. to 6:00 p.m. Sunday through Thursday. Consolidated Findings ## 1–3. After the employer hired additional employees to work from 4:00 p.m. to midnight, the employer scheduled the claimant for only three days a week, approximately 15 hours per week, beginning the week of January 16, 2022. *See* Consolidated Findings ## 6 and 7. Ultimately, he resigned because of this change to his regular hours. *See* Consolidated Finding # 16.

When a claimant contends that the separation was for good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon

v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). A substantial decline in wages may render a job unsuitable and constitute good cause attributable to the employer to resign under G.L. c. 151A, § 25(e)(1). Graves v. Dir. of Division of Employment Security, 384 Mass. 766, 768 (1981) (citation omitted).

Here, the record shows that, after the week of January 16, 2022, the employer ended up paying the claimant the equivalent of full-time hours. *See* Consolidated Findings ## 13–15. Thus, he did not experience a substantial decline in wages. But it was only because he made himself available for unscheduled shifts in case other drivers did not show up for work. *See* Consolidated Findings ## 12 and 13.

We can reasonably infer that the employer had a business reason for hiring more help from 4:00 p.m. to midnight, when, presumably, the demand for pizza deliveries is highest. *See* Consolidated Finding # 6. However, this business decision changed the claimant's schedule from a predictable one of regular full-time hours to one that was highly unpredictable, dependent upon the whim and attendance habits of other employees. In our view, this was a substantial, detrimental change to the terms and conditions of his employment, and it was an unreasonable way for the claimant to maintain his full-time hours. Thus, it created good cause attributable to the employer to resign.

Our analysis does not end here. The Supreme Judicial Court has held that an employee who voluntarily leaves employment due to an employer's action has the burden to show that he made a reasonable attempt to correct the situation or that such attempt would have been futile. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984). The consolidated findings show that the claimant did try to remedy the problem. He promptly complained to his manager, asking for his regular full-time hours back. Consolidated Finding # 9. During the hearing, he testified that he also reached out to the franchise owner asking to be transferred to a different store.[1] When these attempts failed, he made himself available at the store on days and during hours when he was not scheduled on the chance that he could pick up hours. *See* Consolidated Findings ## 10–12. We are satisfied that, after two months of this, he could reasonably conclude that further attempts to restore his regular full-time schedule were futile.

We, therefore, conclude as a matter of law that the claimant resigned from his employment for good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1). However, because the claimant did not resign until the end of the week beginning February 27, 2022, we further conclude that his eligibility pursuant to G.L. c. 151A, § 25(e)(1), does not take effect until the following week.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning March 6, 2022, and for subsequent weeks if otherwise eligible.

[1] 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).

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 26, 2024

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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