THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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Tel. (617) 626-6400 • Office Hours: 8:45 a.m. to 5:00 p.m.

BOARD OF REVIEW
DECISION

BR-107595-OP (Jan. 8, 2009) -- When the employer fails to furnish information, DUA has a duty under 430 CMR 4.39(4) to make a determination about whether a lump sum payment was due to a plant closing based upon information provided by a claimant. Held claimant's income was not disqualifying.

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), which concluded that the claimant is liable to repay an overpayment of benefits. We review pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The review examiner determined that the claimant was overpaid in the amount of $3,600.00 following her separation of employment due to receiving disqualifying remuneration within the meaning of G.L. c. 151A, § 1(r). Our decision is based upon the recorded testimony and evidence from the hearing, and the decision below.

The claimant was laid off on April 3, 2008. She filed a claim for unemployment benefits with the DUA, which was granted. However, in a redetermination issued by the agency on June 18, 2008, the agency found the claimant to be responsible to repay $3,780.00 in benefits on the grounds that a lump sum payment given to her by his employer was not made in connection with a plant closing. Following a hearing on the merits attended by the claimant, a DUA review examiner rendered a decision on July 23, 2008, modifying the agency's redetermination by reducing the amount of the overpayment.

The issue on appeal is whether the employer's lump sum payment to the claimant in lieu of dismissal notice constituted remuneration, which rendered her ineligible for benefits for a period of time.

Findings of Fact

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

1. The claimant was laid off from a long-term, full-time job on 4/3/08.

2. It appears that the employer laid off a significant portion of its work force during the six months prior to the claimant's lay off. It appears that far more than 50 employees were laid off during that period. It also appears that the employer may have employed a sufficient number of employees at one time so that the reduction in force could amount to a "plant closing" as defined in Chapter 151A.

3. However, the employer provided the Division with insufficient factual information and the Division therefore never made a determination that the reduction in force in fact qualified as a "plant closing".

4. As a result of the lay off, the claimant received the equivalent of eight weeks of her regular pay pursuant to the WARN Act; this was paid to her in a lump sum and was paid to her in lieu of dismissal notice.

5. The claimant filed a new claim for benefits on 4/7/08.

6. Thereafter, the claimant signed for and received benefits of $600 in each of the eight weeks with ending dates 4-19-08 through 6-07-08.

7. On 6/18/08 the Division issued a Corrected Determination and Notice of Redetermination and Overpayment. It disqualified the claimant for eight weeks beginning with week ending 4/12/08 under Sections 29(a) and 1(r)(3) of the Law. It also found her overpaid in the amount of $3780 and liable for the repayment of that sum. It concluded that the overpayment resulted from an error without fraudulent intent.

8. The claimant appealed the redetermiantion [sic].

Ruling of the Board

The Board adopts the DUA review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 29 provides, in relevant part, as follows:

> (a) Any individual in total unemployment and otherwise eligible for benefits . . . shall be paid for each week of unemployment . . . .

The term "unemployment" is defined under G.L. c. 151A, § 1(r), which provides, in pertinent part, as follows:

> (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 . . . .
>
> (3) "[R]emuneration shall not include . . . payment in lieu of dismissal notice, made to the employee in a lump sum in connection with a plant closing, . . .
>
> For the purpose of this clause, "plant closing" shall mean a permanent cessation . . . of business at a facility of at least fifty employees which results . . . in the permanent separation of at least fifty percent of the employees of a facility . . . .

Additionally, 430 CMR 4.39 describes the procedure for determining when a plant closing has occurred. It states, in relevant part, as follows:

> (3) A finding made by the commissioner or his representative that a plant closing has . . . occur[red] shall, along with any supporting documents, become part of the record in any proceeding under M.G.L. c. 151A, §§ 39(b), 41, and 42 and shall be prima facie evidence in such proceeding that [a] plant closing has . . . occur[red].
>
> (4) Whenever an employer is requested to furnish information necessary to determine whether a plant closing has occurred, such information shall be furnished within ten days of the date of request.
>
> (5) Whenever an employer has failed to provide the requested information within the time period prescribed by 430 CMR 4.39(4), the commissioner *shall determine whether a plant closing has occurred on the basis of information furnished by the employee* . . . .
>
> (emphasis added.)

The agency declined to issue a determination about a plant closing for this case, because it did not receive any response from the claimant's former employer. This was an error. When an employer fails to provide such information, 430 CMR 4.39(5) directs the commissioner to make the determination from the employee's information. In this case, the record shows that the claimant provided such information to the agency twice, on April 13, 2008, and again on June 18, 2008. On both occasions, the claimant provided information to show that this employer had employed more than fifty employees and permanently laid off more than fifty percent of those.

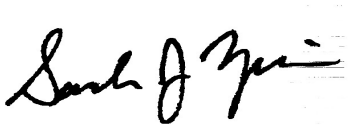
In his decision, the review examiner also declined to rule that the claimant's lump sum payment was received in connection with a plant closing, even though the claimant had presented sufficient facts to warrant such a conclusion. The findings merely provide that "it appear[ed]" that the reduction in force amounted to a plant closing under G.L. c. 151A. The review examiner believed that he did not have authority to make a more definitive determination. G.L. c. 151A, § 39(b) expressly provides that, "[T]he decision of the commissioner or his authorized representative shall be final on all questions of fact *and law*." (Emphasis added.) As the commissioner's representative, the review examiner is empowered to make such rulings of law.

Since sufficient information necessary to establish that the claimant was laid off pursuant to a plant closing was provided at the hearing, we conclude as a matter of law that the lump sum payment given to the claimant in lieu of dismissal notice was not disqualifying remuneration within the meaning of G.L. c. 151A, § 1(r)(3).

The DUA review examiner's decision is reversed. The claimant was not overpaid benefits and is not liable for repayment.

BOSTON, MASSACHUSETTS
DATE OF MAILING - January 8, 2009

John A. King, Esq.
Chairman



Sandor J. Zapolin
Member

Member Donna A. Freni did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT – February 9, 2009

ab/ jv