

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0738

Reversed & Remanded

PROCEDURAL HISTORY: On July 9, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from February 21, 2021 through July 3, 2021 (weeks 08-21 through 26-21) and therefore was not eligible to receive unemployment insurance benefits for those weeks and until the reason for the denial had ended (decision # 133450). Claimant filed a timely request for hearing. On August 24, 2021, ALJ Frank conducted a hearing, and on August 26, 2021 issued Order No. 21-UI-173410, affirming decision # 133450. On September 13, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

The parties may offer new information such as that contained in claimant's written argument into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

FINDINGS OF FACT: (1) The Buffalo Gap Saloon and Eatery (BGSE) employed claimant as a server from approximately March 2019 through July 3, 2021. Prior to the onset of the COVID-19 pandemic, BGSE generally scheduled claimant to work four to five shifts per week. BGSE was closed on Mondays and Tuesdays.

(2) On March 18, 2020, claimant filed an initial claim for unemployment insurance benefits. The Department determined that in claimant's labor market, work as a restaurant server was performed all days, day and swing shifts.

(3) BGSE closed due to COVID-19 from November 2020 to late February 2021. After BGSE closed due to COVID-19, claimant applied to attend school at Portland State University beginning in March 2021. Claimant's application was accepted, and claimant planned to attend school on Mondays, Tuesdays and Wednesdays when she began school. Claimant also began part-time work as a server for another employer, the Clubhouse Bar & Grill, LLC (CBG), where she worked on Fridays and Saturdays.

(4) On February 26, 2021, BGSE prepared to reopen for business, and contacted claimant about returning to work. Claimant had not yet begun school, but notified BGSE that she planned to attend school, had begun a part-time job with a different employer, needed to reduce her schedule, and would be available to work only on Thursdays and Sundays for BGSE. Exhibit 1. Claimant intended to schedule her employment with BGSE and CBG around her school schedule.

(5) After February 26, 2021, claimant learned that her financial aid was not approved and decided that she could not attend school for financial reasons.

(6) Claimant claimed and was paid benefits for each of the weeks from February 21, 2021 through July 3, 2021 (weeks 08-21 through 26-21), the weeks at issue.

CONCLUSIONS AND REASONS: Order No. 21-UI-173410 is set aside and this matter is remanded for further development of the record.

To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). For an individual to be considered "available for work" for purposes of ORS 657.155(1)(c), they must be:

(a) Willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work being sought, unless such part time or temporary opportunities would substantially interfere with return to the individual's regular employment; and

* * *

(c) Not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time[.]

* * *

OAR 471-030-0036(3) (December 8, 2019). Where, as here, the Department has paid benefits, the Department has the burden to prove benefits should not have been paid for any of the weeks at issue. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (where the Department has paid benefits it has the burden to prove benefits should not have been paid; by logical extension of that principle, where benefits have not been paid claimant has the burden to prove that the Department should have paid benefits).

The order under review concluded that claimant was not available for work during the weeks at issue and was ineligible for benefits for those weeks because she intended to attend classes rather than work on three days of each week, and because she did not seek work on those days with her employers after she decided not to attend school. Order No. 21-UI-173410 at 4. However, the record as developed does not support the order's conclusion that claimant was not available for work during all of the weeks at issue.

The record shows that claimant may have been unwilling to work on Mondays, Tuesdays and Wednesdays for any employer from February 26, 2021 until she learned that she would not be attending school, or that in notifying BGSE that she was unwilling to work Wednesdays, she imposed a condition that substantially reduced her opportunities to work for BGSE. Claimant's failure to notify BGSE that she could work on Wednesdays after she knew she would not be attending school suggests that claimant may have remained unwilling to work for any employer on Wednesdays, or may have imposed another condition that substantially reduced her opportunities to work for BGSE.

However, further development of the record is needed for a determination of whether claimant was available for work during at least some of the weeks at issue, including when claimant decided that she would not be attending school and whether, after that date, and for which of the weeks at issue after that date, claimant remained unwilling to work all days, day and swing shift. The record fails to show whether CBG ever asked claimant to work on days other than Friday and Saturday, or whether, after claimant learned that she would not be attending school, she offered to work for CBG on other days of the week. Although the record shows that BGSE was closed on Mondays and Tuesdays, it does not show whether claimant was willing to work for BGSE on Wednesdays during any of the weeks at issue and whether she ever contacted BGSE in that regard. The record also fails to clarify what days of the week claimant actually worked for CBG during the weeks at issue.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant was willing to work full time, part time, and accept temporary work opportunities during all of the usual hours and days of the week customary for work as a server during each of the weeks at issue, Order No. 21-UI-173410 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-173410 is set aside, and this matter remanded for further proceedings consistent with this order.

D. Hettle and A. Steger-Bentz;
S. Alba, not participating.

DATE of Service: October 21, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-173410 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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