

**APPEAL TRIBUNAL DECISION**

**Docket number:** 21 0345 **Hearing date:** July 8, 2021

**CLAIMANT: EMPLOYER:**

MICHELLE DYKMAN MAT-SU RESORT LLC

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

Michelle Dykman None

#### CASE HISTORY AND FINDINGS OF FACT - TIMELINESS

The claimant filed an appeal against a December 18, 2020 determination that denied benefits under AS 23.20.379 on the grounds that the claimant voluntarily quit suitable work without good cause. The Division mailed the determination to the claimant’s address of record on December 21, 2020. The claimant’s appeal was filed on February 8, 2021, giving rise to the issue of the timeliness of the claimant’s appeal.

The claimant did not receive the determination in this matter until after she had filed her appeal. She has on other occasions had mail delivered late. In February, the claimant received a notice from the Division that she was overpaid and she was in contact with the Division on February 8, 2021 about the overpayment, which she believed was an error. The claimant was made aware of the determination in this matter and she filed her appeal that day.

#### PROVISIONS OF LAW - TIMELINESS

**AS 23.20.340 provides in part;**

(e) The claimant may file an appeal from an initial determination or a redetermination under (b) of this section not later than 30 days after the claimant is notified in person of the determination or redetermination or not later than 30 days after the date the determination or redetermination is mailed to the claimant's last address of record. The period for filing an appeal may be extended for a reasonable period if the claimant shows that the application was delayed as a result of circumstances beyond the claimant's control.

(f) If a determination of disqualification under AS 23.20.360, 23.20.362, 23.20.375, 23.20.378 ‑ 23.20.387, or 23.20.505 is made, the claimant shall be promptly notified of the determination and the reasons for it. The claimant and other interested parties as defined by regulations of the department may appeal the determination in the same manner prescribed in this chapter for appeals of initial determinations and redeterminations. Benefits may not be paid while a determination is being appealed for any week for which the determination of disqualification was made. However, if a decision on the appeal allows benefits to the claimant, those benefits must be paid promptly.

**8 AAC 85.151 provides in part;**

1. An appeal may be filed with a referee, at any employment center, or at the central office of the division and, if filed in person, must be made on forms provided by the division. An appeal must be filed within 30 days after the determination or redetermination is personally delivered to the claimant or not later than 30 days after the date the determination or redetermination is mailed to the claimant’s last address of record. The 30-day time period will be computed under Rule 6 of the Rules of Civil Procedure. However, the 30-day period may be extended for a reasonable time if the claimant shows that the failure to file within this period was the result of circumstances beyond his or her control.

#### CONCLUSION - TIMELINESS

An appellant has the burden to establish some circumstance beyond the appellant’s control prevented the timely filing of the appeal.

*It is clear from Estes v. Department of Labor, 625 P.2d 293 (Alaska 1981) that a late claimant must show some quantum of cause; implicit is the requirement that the claimant's delay be caused by some incapacity, be it youth, illness, limited education, delay by the post office, or excusable misunderstanding, at the very least, and that the state suffer no prejudice. If the delay is short, the claimant need show only some cause; for longer delays, more cause must be shown. Borton v. Emp. Sec. Div., Super. Ct., 1KE-84-620 CI, (Alaska, October 10, 1985).*

*Once a notice has been properly mailed to an individual's last known address, the Department has discharged its "notice" obligation. The appellant's asserted failure to receive the notice does not establish cause for an extension of the appeal period. Andrews, Com. Dec. 76H-167, Oct. 8, 1976; aff'd Andrews v. State Dept. of Labor, No. 76-942 Civ. (Alaska Super. Ct. 1st J.D., April 13, 1977). There is a rebuttable presumption that a notice placed in the mail will be timely delivered. Rosser, Com. Dec. 83H-UI-145, June 15, 1983.*

The determination was delivered to the claimant late by the Post Office. She filed her appeal as soon as she became aware of the determination. The Tribunal finds the delay was due to circumstances beyond the claimant’s control.

#### DECISION - TIMELINESS

The claimant’s appeal from the notice of determination issued on December 18, 2020 is **DISMISSED**.

#### CASE HISTORY - SEPARATION

The determination issued December 18, 2020 denied the claimant’s benefits under Alaska Statute 23.20.379. The issue before the Appeal Tribunal is whether the claimant voluntarily quit suitable work without good cause.

#### FINDINGS OF FACT - SEPARATION

The claimant began work for the employer on June 29, 2019. She last worked on July 20, 2019. At that time, she worked part time as a bartender. She was paid $10.00 per hour plus tips.

The claimant noted after her first few shifts that other employees who were serving drinks would come behind the bar while the claimant was busy and sign into the claimant’s cash drawer and leave their ID signed in. The claimant was not aware of the ID change and she would continue to ring up sales on the server’s ID, which meant the server would get credit for the claimant’s sales and the claimant ended up with a small amount of tips compared with the servers. The claimant brought the practice to the attention of three managers. The managers told the claimant they would stop the servers from coming behind the bar, but the claimant noted the practice continued.

The employer posted available shifts on a website and employees claimed shifts they would work. One night, the claimant showed up to work a shift she had claimed, and another employee said he had claimed the shift. The manager gave the shift to the other bartender because he was more experienced. The claimant drove 45 minutes each way from her home for no wages.

The claimant worked as a bar-support person during a large event on July 18, 2020. The claimant was later told that all employees had received very large portions of the shared tips that night, but the claimant did not receive a share. The claimant asked the bar manager, who said there should be an envelope with the claimant’s name on it. The claimant was never given tips for that night. The claimant was told she would receive tips on her paycheck, but she never noted that she was paid any tips on her paystub. The claimant explained to the bar manager that she was considering leaving the job because she was not receiving tips and the long drive was not worth the claimant’s time without proper compensation.

On the claimant’s last night, her cash drawer was $10 off at the end of the night. The floor manager told the claimant she was required to place $10 from her tips in the drawer to balance it. The claimant was left with $11 tips for the night. The claimant advised her supervisor before the next shift she was scheduled for that she would not return.

The claimant decided she was not making any money considering the long drive to and from work and the fact that her tips were regularly shorted and the management did not take any action.

The Tribunal take official notice of the Department of Labor’s public Research and Analysis website, https://live.laborstats.alaska.gov//wage/, which displays wage date for the state. The website holds that the mean hourly wage for a bartender in the Mat-Su/Anchorage area is $12.31.

#### PROVISIONS OF LAW - SEPARATION

**AS 23.20.379 provides in part:**

(a) An insured worker is disqualified for waiting-week credit or benefits for the first week in which the insured worker is unemployed and for the next five weeks of unemployment following that week if the insured worker...

1. left the insured worker's last suitable work voluntarily without good cause....

**8 AAC 85.095 provides in part:**

(c) To determine the existence of good cause under AS 23.20.379(a)(1) for voluntarily leaving work determined to be suitable under

AS 23.20.385, the department will consider only the following factors:

(1) leaving work due to a disability or illness of the claimant that makes it impossible for the claimant to perform the duties required by the work, if the claimant has no other reasonable alternative but to leave work;

(2) leaving work to care for an immediate family member who has a disability or illness;

(3) leaving work due to safety or other working conditions or an employment agreement related directly to the work, if the claimant has no other reasonable alternative but to leave work;

(4) leaving work to accompany or join a spouse at a change of location, if commuting from the new location to the claimant’s work is impractical; for purposes of this paragraph, the change of location must be as a result of the spouse’s

(A) discharge from military service; or

(B) employment;

(5) leaving unskilled work to attend a vocational training or retraining course approved by the director under AS 23.20.382, only if the claimant enters the course immediately upon separating from work;

(6) leaving work in order to protect the claimant or the claimant’s immediate family members from harassment or violence;

(7) leaving work to accept a bonafide offer of work that offers better wages, benefits, hours, or other working conditions; if the new work does not materialize, the reasons for the work not materializing must not be due to the fault of the worker;

(8) other factors listed in AS 23.20.385(b).

**AS 23.20.385(b) provides, in part:**

(b) In determining whether work is suitable for a claimant and in determining the existence of good cause for leaving or refusing work, the department shall, in addition to determining the existence of any of the conditions specified in (a) of this section, consider the degree of risk to the claimant's health, safety, and morals, the claimant's physical fitness for the work, the claimant's prior training, experience, and earnings, the length of the claimant's unemployment, the prospects for obtaining work at the claimant's highest skill, the distance of the available work from the claimant's residence, the prospects for obtaining local work, and

other factors that influence a reasonably prudent person in the claimant's circumstances.

**8 AAC 85.410. Suitable work.**

(a) The director shall determine that work is suitable for a claimant if the work is in the claimant's customary occupation, or is work for which the claimant has training and experience.

(b) To determine if the wages, hours, or other conditions of work offered to a claimant are substantially less favorable to him than those prevailing for similar work in the locality, the following standards apply:

(1) similar work is work which is similar in the operations performed, the skill, ability and knowledge required, and the responsibilities involved. A judgment of similar work will not be based on job title, hours of work, wages, permanency of the work, unionization, employee benefits, or other conditions of work;

(2) the locality of the work offered to a claimant is the area surrounding the offered work and is comprised of those establishments which normally use the same labor supply for work similar to the offered work;

(3) the prevailing wages, hours, or other conditions of work are those under which the greatest number of workers are employed in similar work in the locality; however, if the greatest number of workers employed at the same rate is not at least one-third of the total employed, then the prevailing rate will be expressed as the weighted average of the total number of rates;

(4) a condition of work offered to a claimant is not substantially less favorable than that prevailing for similar work in the locality if the difference between the condition of the offered work and the prevailing condition is minor or technical, or would have no adverse effect on the claimant. Wages for work offered to a claimant are substantially less favorable than those prevailing if the offered rate is less than 90 percent of the prevailing rate.

#### CONCLUSION - SEPARATION

The claimant left the work because the wages she was receiving did not justify the long commute and the employer did not take action to see the claimant received her share of tips. The claimant’s wage was 81 percent of the average wage for a bartender in the area, not considering tips, which the claimant received little of.

When considering whether the wage makes work unsuitable, regulation 8 AAC 85.410(b)(4) holds that a wage that is less than 90 per cent of the prevailing wage can make the work unsuitable.

Under AS 23.20.379, a claimant must show good cause for leaving suitable work. The claimant in this case left work that paid 81 per cent of the average wage for similar work in her area. The claimant did not accept the wage by working for a length of time before leaving. Because the wage was less than 90 percent of the average wage, the work was not suitable for the claimant and the penalties of the statute are not appropriate in this case.

#### DECISION - SEPARATION

The determination issued on December 18, 2020 is **REVERSED.** Benefits are **ALLOWED** for the weeks ending July 7, 2020 through August 31, 2020, if otherwise eligible. The three weeks are restored to the claimant’s maximum benefits. The determination will not interfere with the claimant’s eligibility for extended benefits under AS 23.20.406-409.

#### APPEAL RIGHTS

This decision is final unless an appeal is filed in writing to the Commissioner of Labor and Workforce Development **within 30 days** after the decision is mailed to each party. The appeal period may be extended only if the appeal is delayed for circumstances beyond the party’s control. A statement of rights and procedures is enclosed.

Dated and mailed on July 13, 2021.

Rhonda Buness, Appeals Officer