

The totality of circumstances did not show that adjunct professor had reasonable assurance of returning to his job in the fall semester under economic conditions that were substantially similar to his most recent, summer semester appointment. A course during the prior spring semester had been cancelled due to low enrollment and the employer had the right to pro-rate his salary if a course was under-enrolled. Lacking any evidence to show that there was, nonetheless, a high probability of teaching his offered courses at full pay, reasonable assurance was not established.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0022 5813 32

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

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

The claimant separated from his position with the employer and filed a claim for unemployment benefits with the DUA, seeking benefits for the period August 6, 2017 through August 26, 2017. In a determination, dated August 24, 2017, the DUA denied the payment of benefits for those weeks. The claimant appealed the determination to the DUA hearings department. Following an initial hearing, a review examiner affirmed the denial of benefits. The claimant appealed that decision to the Board, which remanded the case for a hearing *de novo* before a new review examiner. Following the hearing *de novo* attended only by the claimant,¹ the new review examiner also affirmed the determination to deny benefits in a decision rendered on March 10, 2018. We accepted the claimant's application to review this March 10, 2018 decision.

Benefits were denied after the review examiner determined that the claimant had been given reasonable assurance of re-employment for the subsequent academic period and, thus, he was disqualified under G.L. c. 151A, § 28A. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing *de novo*, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the employer provided the claimant with reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A, is supported by substantial and credible evidence and is free from error of law, where the employer's right to pro-rate the claimant's salary if a course is under-enrolled

¹ The employer was invited to participate in the hearing as a witness, but did not appear for the hearing.

and the claimant's recent experience having an offered course cancelled raised a question about the likelihood of teaching the offered courses under substantially similar economic terms.

Findings of Fact

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

1. The claimant began working as an adjunct faculty member for the employer, a community college, on 9/4/10.
2. The fall semester begins in September and ends in December; the school has a winter break of 3 weeks; spring semester starts at the end of January and ends in May; and there are four summer sessions between May and August.
3. A couple of months before each semester, the employer sends out a form for the claimant's availability. The claimant completes the form and emails it to the Dean.
4. During the fall 2010 semester, the claimant taught two (4) credit courses; [s]pring of 2011 he taught one (3) credit course; [s]ummer 2011 the claimant did not teach any courses; fall of 2011 he taught three (3) credit courses; spring 2012 one course; summer of 2012 one course; fall of 2012 the claimant taught three (3) credit courses; spring 2013 one course; summer 2013 one course; in fall of 2013 the claimant taught one course; spring 2014 two courses; summer of 2014 two courses; in fall of 2014 one course; spring 2015 one course; summer of 2015 one course; fall 2015 one course; spring 2016 three courses; summer of 2016 three courses; fall 2016 three courses; and spring 2017 two courses.
5. The claimant last worked for the employer during summer semester 2017 when he taught three courses. Approximately a month before fall semester 2017, the claimant received a tentative contract through email for review. He is told by payroll in the email to go online review tentative contract if no issues then no action needs to be taken and he should wait for final contract [sic]. During the first week of the fall 2017 semester, the claimant received a final contract to teach three courses. The claimant acknowledged the final contract on 9/8/17.
6. The claimant had been offered a late start course during the fall of 2017 in addition to the three courses he taught. The late start course was subsequently cancelled and the claimant received notification of the cancellation on 9/22/17. This had been the first year the claimant had been offered to teach a late start course.
7. Courses can be cancelled for insufficient enrollment. To teach a course, there needs to be a minimum enrollment of 12 students. A course can still be held

if under enrolled, however the claimant would be paid based on the number of students enrolled.

8. The claimant filed a claim for unemployment benefits on 8/5/17. The instant employer was the only employer for whom the claimant performed services during his base period.
9. On 8/24/17, the DUA issued the claimant a Notice of Disqualification finding him ineligible for benefits under Section 28A.
10. On 9/6/17, the claimant appealed the Notice.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits under G.L. c. 151A, § 28A.

As an academic employee of an educational institution, the claimant's eligibility for benefits during the relevant period is properly analyzed under G.L. c. 151A, § 28A, which states, in relevant part, as follows:

Benefits based on service in employment as defined in subsections (a) and (d) of section four A shall be payable in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to this chapter, except that:

- (a) with respect to service performed in an instructional . . . capacity for an educational institution, benefits shall not be paid on the basis of such services for any week commencing during the period between two successive academic years or terms . . . to any individual if such individual performs such services in the first of such academic years or terms and if there is a contract or a reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms; . . .

Recently, the U.S. Department of Labor (DOL) released guidance pertaining to the analysis of reasonable assurance for adjunct professors. In UIPL 5-17 (Dec. 22, 2016), DOL sets forth an initial set of criteria for determining whether a claimant is entitled to benefits between academic periods. There must be a written, oral, or implied offer from a person with authority to offer employment, the offer is for a job in the same capacity (i.e., professional or non-professional), and the economic conditions of the offer must not be considerably less than in the prior academic period. *Id.* at part 4(a), pp. 4–5. Where an offer includes a contingency, further criteria require that the contingency must be outside of the employer's control and the totality of circumstances

must show that, notwithstanding the contingent nature of the offer, it is highly probable that the offered job will be available in the next academic period. Id. at part 4(c), p. 6.

The review examiner found that the employer emailed the claimant a tentative contract for his fall 2017 semester. *See* Finding of Fact # 5. Assuming the tentative offer for the fall 2017 semester looked just like the tentative contract offer for the spring 2017 semester, there is no reason to believe that it came from anyone other than the college's administrative office and that it was tendered by a person with authority to make the offer. *See* Exhibit # 11. The record also indicates that the employer offered the claimant work in the same professional capacity of adjunct instruction, as in the prior academic period.

We next consider the contingent nature of the fall 2017 tentative offer. The offer was contingent upon sufficient student enrollment. *See* Finding of Fact # 7. Student enrollment is deemed to be a factor that is beyond the employer's control.² We must decide whether, notwithstanding that contingency, the totality of the circumstances showed that it was highly probable that the claimant would be employed under economic conditions that were not considerably less than the prior academic term.

The review examiner concluded that the claimant had reasonable assurance based on the fact that he ended up teaching the three offered fall 2017 courses. This was an error. As we have stated, the question is whether the claimant had reasonable assurance during the unemployed weeks at issue in August, 2017, not based upon hindsight. *See* Board of Review Decision 0019 3849 62 (Oct. 11, 2017).³

The record before us shows that each of the courses which the employer offered to the claimant were contingent upon sufficient student enrollment and that the employer could cancel a course, if the number of students were insufficient. Alternatively, the employer could pro-rate the claimant's salary, if it chose to proceed with an under-enrolled course. *See* Finding of Fact # 7.

In deciding that the claimant was reasonably assured of returning to his job in the fall semester, the review examiner also relied upon the claimant's six-year history of being re-instated to a teaching position. However, this fails to consider whether the economic terms of the offered employment would be considerably less.

Finding of Fact # 4 provides that the claimant taught only two courses during the spring 2017 semester. During the hearing, the claimant explained that one of the three spring 2017 offered courses was cancelled due to insufficient enrollment.⁴ We think that the claimant's very recent experience of having a course cancelled together with the fact that the employer could prorate the offered salary in the event of insufficient enrollment rendered the likelihood that he would actually teach the three offered fall 2017 courses at full pay uncertain. Lacking any employer input at the hearing, such as statistics showing how frequently or infrequently it cancelled or

² *See* UIPL 5-17, p. 6.

³ Board of Review Decision 0019 3849 62 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

⁴ This testimony, while not explicitly incorporated into the review examiner's findings, 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).

prorated these particular courses, there is nothing in the record to indicate that the claimant's offer came with a high probability that he would teach the three courses under substantially similar economic conditions as the prior summer term. *Compare* Board of Review Decision 0017 7510 63 (Oct. 19, 2016) (employer evidence showed that in the last two years, it had not reduced the claimant's compensation on any of the three occasions when course enrollment fell below 12 students).⁵

We, therefore, conclude as a matter of law that, because the evidence does not show that the claimant had reasonable assurance of performing services under substantially similar economic conditions as the prior term, he is not disqualified by G.L. c. 151A, § 28A.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the period August 6, 2017 through August 26, 2017, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 31, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL 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

⁵ Board of Review Decision 0017 7510 63 is also an unpublished Board decision, available upon request.