Where employer reduced adjunct instructor's economic terms a year earlier, such that she taught her 2 offered courses in the most recent fall and spring semesters, her offer to teach 2 courses again in the fall semester constituted reasonable assurance of re-employment under substantially similar economic terms. However, the claimant is entitled to benefits during the several weeks at the beginning of the summer before the employer mailed its fall semester offer letter.

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Issue ID: 0025 7553 93

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 we affirm in part and reverse in part.

The claimant separated from her position with the employer on May 15, 2018. She re-opened a claim for unemployment benefits with the DUA and payment was denied in a determination issued on June 26, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits for the period May 13 — August 25, 2018, in a decision rendered on October 19, 2018. We accepted the claimant's application for review.

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, she was disqualified under G.L. c. 151A, § 28A. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to obtain further evidence about when the employer made its offer of re-employment for the subsequent term and to clarify the claimant's offer and employment for the most recent semester. 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 had reasonable assurance of re-employment under G.L. c. 151A, § 28A, in each week that she certified for benefits during the summer of 2018, 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 are set forth below in their entirety:

1. The claimant started working for the employer, a university, on 9/1/98. She is a part-time Lecturer in [A] Studies; and does not have tenure.

2. The university's Department of Human Resources has a written Part-Time Faculty Hours policy. The policy states, "Part-time faculty may work no more than 29 hours per week during the semester(s) and the summer(s) for which they are hired. This aggregate limit applies to all teaching and teaching preparation [according to IRS guidance, for each hour of "teaching or classroom time" an adjunct is credited with 2.25 hours of service], as well as required office hours, school/department meetings, advising, supervision, etc.

3. The university also has a policy that states, "Part-time faculty who are compensated per-course ordinarily teach no more than one course per term. Part-time faculty may only teach more than two courses per semester as a rare exception to the norm. The appointment of a part-time faculty member to teach more than two courses per semester requires the endorsement of the Dean and the approval of the Provost. The part-time faculty member will not be hired and paid without the required approval."

4. Whether the claimant teaches a course also depends, in part, on student enrollment, and whether the university re-assigns the course to another professor.

5. The university instituted the above policies after the Affordable Care Act became law. The Affordable Care Act requires that employers with fifty or more full-time employees provide health insurance benefits to employees who work thirty or more hours per week.

6. The above policies are in place to ensure that part-time employees work fewer than thirty hours per week, so the university is not required to offer them health insurance benefits.

7. The university offers health insurance benefits to part-time faculty who teach at least twenty courses in the previous five years.

8. The university may make exceptions to the two-course rule for part-time faculty who teach at least twenty courses in the previous five years.

9. The Chairman of the Department [A], in the School of Arts and Sciences, gave the claimant a letter dated 8/16/10, offering her two courses for the Fall 2010 semester and two courses for the Spring 2011 semester.

10. The Associate Dean of Faculty and Academic Affairs gave the claimant a letter dated 7/22/10, offering her one course in the School of Education for the Fall 2010 semester.

11. The claimant taught one course for the School of Education during the Fall 2010 semester, and the Fall 2011 semester. The last semester she taught this course was Fall 2012.

12. On 2/22/13, the claimant received an e-mail stating that the Provost's office is now not only enforcing the two-courses only rule, but will not permit any part-time faculty member to teach more than two courses per semester across the whole university, effective the Fall 2013 semester.

13. The Chairman of the Department [A] gave the claimant a letter dated 8/14/13, offering her two courses for the Fall 2013 semester and two courses for the Spring 2014 semester.

14. The Chairman of the Department [A] gave the claimant a letter dated 8/23/15, offering her two courses for the Fall 2015 semester and two courses for the Spring 2016 semester.

15. On 8/28/16, the Chairman of the Department [A] sent the claimant an e-mail offering her two courses for the Fall 2016 semester and two courses for the Spring 2017 semester.

16. On 8/15/17, the Chairman of the Department [A] sent the claimant an e-mail offering her two courses for the Fall 2017 semester and two courses for the Spring 2018 semester.

17. On 6/28/18, the Chairman of the Department [A] sent the claimant a letter offering her two courses for the Fall 2018 semester and two courses for the Spring 2019 semester.

18. The third paragraph of each of the above letters from the Chairman of the Department [A] states, "Please note that formal action on this appointment issues from the Office of the University Provost and Dean of Faculties, and that the university reserves the right to cancel classes and negotiate time changes subject to enrollment contingencies."

19. The claimant taught one course for the interdisciplinary [B] program, separate from the courses she taught for the Department [A], each Spring semester, from 2009 to 2017.

20. The claimant received e-mails every winter confirming that the interdisciplinary course would be scheduled for the Spring semester of the following year.

21. On 1/25/17, the claimant received an e-mail which stated that the Director of the interdisciplinary program said the claimant's course would be scheduled for the Spring 2018 semester.

22. On 8/22/17, the Director of the interdisciplinary program told the claimant that the Dean of Arts and Sciences spoke with her and said that because the claimant is a part-time employee, she should not teach the course during the Spring 2018 semester.

23. The Director and the claimant were hopeful that the claimant would ultimately be scheduled to teach the interdisciplinary course during the Spring 2018 semester.

24. The claimant was sure she was not going to teach the interdisciplinary course during the Spring 2018 semester on or about 11/22/17, as that was when course registration for the Spring 2018 semester closed, and the interdisciplinary course was not scheduled.

25. The claimant did not teach the interdisciplinary course for the Spring 2018 semester, because the university enforced the above two-course policy for part-time employees.

26. The history of the claimant's employment with the instant employer during the past five years is as follows:

Semester	Classes Offered	Classes Taught
Spring 2013	3	3
Summer 2013	0	0
Fall 2013	2	2
Spring 2014	3	3
Summer 2014	0	0
Fall 2014	2	2
Spring 2015	3	3
Summer 2015	0	0
Fall 2015	2	2
Spring 2016	3	3
Summer 2016	0	0
Fall 2016	2	2
Spring 2017	3	3
Summer 2017	0	0
Fall 2017	2	2
Spring 2018	3	2
Summer 2018	0	0
Fall 2018	2	2

27. The claimant filed a claim for unemployment insurance benefits on 2/27/18, and obtained an effective date of her claim of 2/25/18. The instant employer is the claimant's sole base period employer.

28. The 2017–2018 academic year ended on 5/15/18.

29. The 2018–2019 academic year started on 8/27/18.

30. The claimant requested benefits from 6/3/18 to 8/11/18, after the end of the Spring 2018 semester, and before the start of the Fall 2018 semester.

Ruling of the Board

In accordance with our statutory obligation, we review 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. As discussed more fully below, we agree that the employer provided reasonable assurance of re-employment to the claimant for the fall, 2018 semester, but we disagree that it had been provided from the beginning of her summer certification period.

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; . . .

In 2016, the U.S. Department of Labor (DOL) released guidance pertaining to the analysis of reasonable assurance for adjunct professors. In its Unemployment Insurance Program Letter (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 under substantially similar economic terms in the next academic period. *See* Id. at part 4(c), p. 6.

At issue is whether the employer had provided reasonable assurance of re-employment for the fall, 2018 semester, which began on August 27, 2018. The spring, 2018 semester ended on May 15, 2018. *See* Consolidated Finding 28. Upon re-opening her unemployment claim, the claimant requested benefits for the period June 3 – August 11, 2018. Consolidated Finding # 30. The employer sent its letter offering her two courses for the fall, 2018 semester on June 28, 2018. Consolidated Finding # 17. Thus, whether or not the content of this offer satisfied the statutory reasonable assurance requirements, the date of the letter establishes that in the first few weeks during this summer break, there was no offer. On this basis alone, we conclude that the employer had not provided reasonable assurance during the period in which the claimant requested benefits for the weeks beginning June 3 – June 24, 2018.

We must also decide whether, beginning with the week of July 1, 2018, the claimant had been given reasonable assurance of re-employment for the subsequent academic term. Because the June 28, 2018 letter was from the same person in the claimant's department who had provided her with a written offer during the prior two years, we assume this person had the authority to make the employment offer. *See* Consolidated Findings ## 15 – 17. The offer was for a position to teach courses in the same capacity as in prior semesters, a part-time lecturer. *See also* Exhibit 7.[1] It was, however, an offer that was contingent upon sufficient enrollment. Student enrollment is deemed to be a factor that is beyond the employer's control.[2] Pursuant to the DOL guidance, we must determine whether, notwithstanding the contingent nature of the offer, it was, at the time, highly probable that the claimant would resume her employment under substantially similar economic terms during the fall semester.

The record shows that for many years, until 2018, the claimant regularly taught two courses in the fall and three courses in the spring semester, until the most recent spring, 2018 semester, when she was initially offered her usual three courses, but she only taught two courses. *See* Consolidated Finding # 26. This last semester is important because in order to examine eligibility for benefits "during the period between two successive academic years or terms," we are to compare the economic terms and conditions of the first academic year or term with those offered for "the second of such academic years or terms." G.L. c. 151A, § 28A; UIPL No. 4-87 (Dec. 24, 1986), paragraph 4(c). In Board of Review Decision 0017 6916 85 (Oct. 19, 2016), we concluded that for adjunct professors who are hired one semester at a time, the prior academic period means comparing the prior semester.

We remanded to find out more about what happened to the claimant's spring, 2018 semester. If, as recently as the prior semester, an offered course had been cancelled at the last minute due to insufficient enrollment, it could indicate less than a high probability that she would actually teach the fall semester courses offered with the same enrollment contingency (*see* Consolidated Findings ## 4 and 18). However, after remand, the consolidated findings show that the cancellation was not last minute and it had nothing to do with the enrollment contingency. The employer simply enforced its policy to cap part-time faculty teaching loads at two courses per semester, and the claimant was made aware of this decision in August, 2017. *See* Consolidated

[1] Exhibit 7 is the June 28, 2018, offer letter. 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).
[2] *See* UIPL 5-17, p. 6.

Findings ## 3, 6, 12, and 22. In short, the employer had reduced the economic terms of the claimant's employment far in advance of the spring, 2018 semester, and she has taught under these economic terms in each of the last two semesters. Because the claimant was offered two courses again for the fall, 2018 semester, and nothing in the record suggests less than a high probability of teaching those courses under substantially similar economic conditions,[3] she had reasonable assurance within the meaning of the statute.

We, therefore, conclude as a matter of law that the employer's June 28, 2018, offer letter constituted reasonable assurance of re-employment for the subsequent academic period within the meaning of G.L. c. 151A, § 28A.

The portion of the review examiner's decision that denied benefits from May 13, 2018, until June 30, 2018, is reversed. The portion of the review examiner's decision that denied benefits from July 1, 2018, until August 25, 2018, is affirmed. The claimant is entitled to receive benefits for the week beginning May 13, 2018, through June 30, 2018, if otherwise eligible. She is denied benefits for the week beginning July 1, 2018, through August 25, 2018.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 27, 2019

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

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

[3] The economic terms for teaching each course are not in the findings, but salary figures in several exhibits indicate that the claimant would be compensated at least as well in the upcoming term. Compare the $2,808 monthly salary stated in the claimant's spring, 2018 semester paychecks (Exhibit 13) with the $7,380 per course offered for the fall, 2018 semester (Exhibit 7). These exhibits are also part of the unchallenged evidence in the record.

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