

Given that the employer had cancelled this adjunct instructor's course due to low enrollment a year before, that the employer could also reduce her salary if the offered course was under-enrolled, and evidence showing a downward trend in overall college enrollment, the claimant did not have reasonable assurance of teaching her ESL course under substantially similar economic conditions in the next semester. However, once the college revealed that ESL program enrollment was actually up, the claimant could reasonably infer a high likelihood that she would teach her offered course at full pay.

**Board of Review
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Issue ID: 0028 7665 21

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 and filed a claim for benefits, effective December 23, 2018. The DUA denied benefits for the period December 23, 2018, through January 26, 2019, in a determination issued on January 19, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on March 2, 2019. 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. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, 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 claimant had reasonable assurance of re-employment under G.L. c. 151A, § 28A, in each week that she certified during the weeks between the fall and spring semesters, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant began working as an adjunct professor at the employer's community college in 1999. The claimant is a contracted employee in the Liberal Arts Department. The claimant typically taught courses that are part of the employer's English as a Second Language (ESL) program. The claimant's position is represented by a labor union and her pay is dictated by the collective bargaining agreement between the union and employer.
2. During the term of her employment, the claimant has received availability forms from the employer. The claimant completes the forms, in order to inform the employer of her availability for work during the next academic semester. The claimant completed such a form for the fall 2019 semester, indicating that she was available to teach on Monday through Friday, from 4:00 p.m. until 10:00 p.m., and from 10:45 a.m. until 1:35 p.m. on Saturday. The claimant indicated that she was not available to teach from 8:00 a.m. until 4:00 p.m. on Monday through Friday, and from 8:00 a.m. until 10:45 a.m. on Saturday. The claimant has the education required to teach full-time; however, she prefers to work in a part-time capacity.
3. During the fall 2017 semester, the claimant was offered the opportunity to teach two courses, which totaled nine credits. The claimant taught Introductory ESL Grammar II, which is a 6-credit course, and was paid \$7734 for her work. The claimant also taught Introduction to ELS Writing II, which was a 3-credit course, and was paid \$3867 for her work. The claimant also taught two courses, totaling nine credits, during the spring 2017 semester.
4. During the spring 2018 semester, the claimant taught one course. The claimant taught Introductory ESL Writing and was paid \$3867 for her work. The claimant was initially offered the opportunity to teach two courses; however, one course was subsequently cancelled due to lack of enrollment or funding. This was the only semester when the claimant had a course cancelled by the employer due to low enrollment or lack of funding.
5. During the fall 2018 semester, which ran from 9/17/18 until 12/14/18, the claimant taught one 6-credit course. The claimant taught ESL Writing & Grammar and was paid approximately \$7600 for her work.
6. The employer ran a winter intersession from 1/2/18 to 1/30/18. The claimant was not offered the opportunity to teach any courses during the intersession.
7. On 12/10/18, the employer issued the claimant a Letter of Agreement (Letter) for the spring 2019 semester, which was scheduled to run from 1/15/19 through approximately 5/10/19. The claimant was offered the opportunity to teach one course: ESL Writing & Grammar. The claimant began teaching this course on 1/28/19 and was paid \$8004 for her work. The course maintained sufficient enrollment for the claimant to receive her full pay for the semester, despite three students dropping after the semester began. The claimant is

aware that the class enrollment must be greater than 11 students during the first week in order for the claimant to receive the full amount of the pay disclosed in the Letter. The number of students in the claimant's class dropped from 16 to 13. The claimant teaches this course two nights per week from 6:00 p.m. until 9:20 p.m.

8. The Letter issued to the claimant for the Spring 2019 semester informed the claimant that the employer would determine whether or not a course would run, based upon the students' and college's needs. The Letter reads in relevant part: "The College makes individual determinations as to whether the College will in fact run a course that is under enrolled after considering student and College needs. If the College determines that it will run an under enrolled class, then the Dean will consult with the faculty member to determine if they are willing to teach for reduced compensation." The claimant was aware that the CBA did not contain any provisions that prohibited the employer from cancelling a course offered to her in the Letter of Agreement. The claimant was aware that the employer has cancelled courses after offering adjunct faculty the opportunity to teach them. The claimant was aware of the employer reassigning courses from professors with less seniority to professors with greater seniority when it determined that a planned course would not run. The claimant was aware that the employer has cancelled courses due to low student enrollment or lack of funding. The claimant was aware that when the employer decides to run a course with low enrollment, the professor's pay will be determined based upon their seniority, the number of students in the class, and the number of credits assigned to the course. The claimant accepted an offer to teach an under-enrolled course in approximately 2003 when only five students enrolled in the course. The claimant has not had this situation occur since that time.
9. On 12/27/18, the claimant filed an initial claim for unemployment insurance benefits, effective 12/23/18.
10. On 1/13/19, the employer's Vice President of Academic Affairs issued an email message to the claimant and other faculty. In her message, the Vice President wrote: "First, you may notice that enrollment has been softer than initially anticipated. This has required a number of you to move a few of your full time and adjunct courses into alternative parts-of-term, either 13 week or second 7 week times in hopes of garnering more enrollment. I want to personally thank you for your flexibility and willingness to be adaptive in these changing times." The Vice President also wrote: "Being only a semester into our newly redesigned ESL program, I am proud to say we have increased enrollment in ESL by 18% this fall in comparison to last fall; 132 students in fall 2018 versus 108 students in fall 2017. Overall success in these new courses mirrors institutional course success rates of 77-78%..."
11. On 1/19/19, the DUA issued the claimant a Notice of Disqualification, finding her ineligible for benefits under Section 28A of the law for the period of

12/23/18 through 1/26/19 because she had reasonable assurance of returning to work with the employer during the next academic term.

12. On 1/20/19, the claimant appealed the Notice of Disqualification.

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 do not agree with the review examiner's legal conclusion that the claimant had reasonable assurance of re-employment, as that term is defined under law, in each week during the period at issue.

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.

The question here is whether the employer had provided reasonable assurance of re-employment to the claimant for the spring, 2019 semester. Specifically, we must decide whether or not the claimant had such reasonable assurance in the weeks that she seeks unemployment benefits from December 23, 2018 until January 26, 2019, when the spring semester began.

On December 10, 2018, the employer's Vice President of Academic Affairs sent the claimant a letter offering her the opportunity to teach the same ESL Writing and Grammar course for the spring, 2019 semester in the same capacity as she had taught in the fall, 2018 semester. Nothing in the record suggests that this Vice President lacked the authority to make the offer. It was, however, an offer that was contingent upon sufficient enrollment. Pursuant to the DOL guidance, student enrollment is deemed to be a factor that is beyond the employer's control, and 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 spring semester.¹

In her decision, the review examiner improperly relied upon the fact that the claimant ended up teaching the offered course at full pay to conclude that she had been given reasonable assurance. *See Finding of Fact # 7.* This is hindsight. The question is whether, *at the time* the claimant was unemployed, the totality of circumstances showed a high probability that the offered job would be available under similar economic terms as the most recent semester.

We consider that when the claimant opened her claim in mid-December, she knew that she would make at least the same salary for the ESL Writing and Grammar course based upon the pay scale under her collective bargaining agreement, but this was *only if* at least 11 students were enrolled at the end of the first week of classes. If fewer than 11 students enrolled, the employer had the option to cancel the course or pay her less money to teach it. *See Finding of Fact # 8.* She was also aware that student enrollment at the employer's community college had been declining,² and she had had one of her courses cancelled due to insufficient enrollment a year before. *See Finding of Fact # 4.* In this environment, we cannot say that the employer's offer came with a high probability of re-employment under economic terms that were substantially similar to the prior term.

However, the record also shows that course enrollment in the claimant's particular area of instruction was actually running counter to this trend. In an email from the Vice President of Academic Affairs, dated January 13, 2019, the claimant learned that enrollment in the newly designed ESL program rose 18% from the fall of 2017 to the fall of 2018. *See Finding of Fact # 10.* From this communication, we think the claimant could reasonably infer that, notwithstanding the overall school enrollment decline, there was a highly likelihood that she would teach her ESL course at full pay.

We, therefore, conclude as a matter of law that given the totality of circumstances, the claimant had reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A, only

¹ *See* UIPL 5-17, p. 6.

² *See* Finding of Fact # 10; *see also* Exhibit 13, statistics from the Massachusetts Department of Higher Education showing a steady decline in student enrollment at the employer's community college between fiscal years 2011 and 2017.

when the employer communicated an increase in student enrollment in the specific program that the claimant was teaching and not before.

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits pursuant to G.L. c. 151A, § 28A, from December 23, 2018, through January 12, 2019, if otherwise eligible. The claimant is denied benefits pursuant to G.L. c. 151A, § 28A, from January 13 through 26, 2019.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 18, 2019



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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

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