Given the declining enrollment in the claimant's academic department, which caused the department to recently cancel courses, and the employer's practice to pro-rate salaries for under-enrolled courses, the claimant did not have reasonable assurance that she would teach the offered courses in the fall semester under economic terms that were substantially similar to the prior term. She may not be denied benefits under G.L. c. 151A, § 28A.

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Issue ID: 0031 2588 91

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits to the claimant for several weeks during the summer of 2019. 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 in May, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 8, 2019. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner modified the agency's initial determination and denied benefits during the period of July 28 through August 24, 2019. We accept the employer's application for review.[1]

Benefits were denied during these several weeks after the review examiner determined that the claimant had not been given reasonable assurance of re-employment for the subsequent academic period until the week of July 28, 2019, and then no longer had reasonable assurance after August 24, 2019. Thus, he concluded that she was ineligible for benefits under G.L. c. 151A, § 28A, from July 28 through August 24, 2019. Our decision is based upon the recorded testimony and evidence from the hearing, the review examiner's decision, the employer's appeal, and written arguments submitted by the claimant's attorney.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant had reasonable assurance of re-employment for the fall 2019 semester between July 24, 2019 and August 24, 2019, is supported by substantial and credible evidence and is free from error of law.

[1] The Board also received a Memorandum in Support of Application for Review from the claimant's attorney, which was filed after the 30-day appeal period. *See* G.L. c. 151A, § 40. Because the employer's appeal was timely, we have jurisdiction to review the merits of the review examiner's decision.

Findings of Fact

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

1. The claimant worked for the employer, a state university, starting in the Spring of 2012 as Visiting Lecturer in the Communications Department.

2. All offers of employment in the next academic year or term are contingent upon course enrollment, which is also reflected in the collective bargaining agreement (CBA).

3. Since 2010, overall student enrollment has been down with the instant employer, but in the communications department, a steady decline has occurred compared to other majors.

4. In the fall of 2015, the claimant taught three classes for a total of nine credits.

5. In the spring of 2016, the claimant taught three classes for a total of nine credits.

6. In the fall of 2016, the claimant taught three classes for a total of nine credits.

7. In the spring of 2017, the claimant taught three classes for a total of nine credits plus a directed study.

8. In the fall of 2017, the claimant taught four classes for a total of twelve credits.

9. In the spring of 2018, the claimant was slated to teach three classes for a total of nine credits, but due to low enrollment, she taught two classes for a total of six credits, of which she was notified in December of 2017 along with six other course offering cancellations.

10. In the fall of 2018, the claimant taught four classes for a total of twelve credits.

11. In the spring of 2019, the claimant taught four classes for a total of twelve credits.

12. During the spring semester of 2019, a tenured professor and the claimant had a discussion about declining enrollment. The tenured professor indicated that if enrollment was down for one of the classes she taught, she would bump the claimant.

13. The claimant also taught during the summer sessions starting in 2017. In the summer sessions of 2017 and 2018, the claimant taught a three-credit course

in each session, which was paid at the equivalent of eight credits due to the compressed schedule. In 2019, the claimant taught a 1.5-credit course (pay equivalent to four credits) in the first session and a three-credit course in the second. The claimant's first session course was prorated based on low enrollment (five students) versus being cancelled entirely.

14. Between July 25, 2019 and July 30, 2019, the employer sent a temporary employment guidelines and agreement; one for the day program and one for the Division of Graduate and Continuing Education (DGCE). For the day program, the claimant was offered three courses at nine credits and for the DGCE, one class at three credits.

15. On August 10, 2019, the claimant returned signed copies of both forms.

16. On August 20, 2019, the Interim Dean of DGCE emailed the claimant to notify her that her course had low enrollment (five students) and wished to know if she would be willing to teach the course on a prorated basis, which the claimant agreed to.

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 conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact and we deem 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 received reasonable assurance at any point during the summer of 2019.

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 . . . .

The U.S. Department of Labor (DOL) has released guidance pertaining to the analysis of reasonable assurance for adjunct professors. In 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 must be 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.

In his decision, the review examiner decided that the claimant did not receive reasonable assurance of re-employment before the employer gave her a written contract in late July to teach 12 credits in the upcoming fall 2019 semester. *See* Finding of Fact # 14. Because the record lacks *any* type of employment offer before this date, we agree that the claimant did not have reasonable assurance of re-employment and may not be disqualified under G.L. c. 151A, § 28A, from the effective date of her claim through the week beginning July 21, 2019.

As for the subsequent weeks, we do not believe the employer has shown that the claimant had reasonable assurance. To be sure, the agreement mailed to the claimant between July 25 and 30, 2019, meets the DOL requirement as an offer of employment in the same capacity as the prior academic period. The claimant's representative argues that this document had no effect, because the employer had not yet signed it. Whether the document was fully executed under contract law is not relevant to our analysis, inasmuch as the DOL has stated that the offer of re-employment may be written, oral, or implied. UIPL 5-17 at part 4(a)(1), p. 4. Since the record indicates that this document is routinely used to offer employment to the claimant, we also have no reason to question that it was proffered by an individual with actual authority to offer the employment.[2] Further, there is no question that the offer was for employment in the same professional capacity, a visiting instructor, as the prior term. *See* Finding of Fact # 1 and Exhibits 8 and 9.[3]

As the review examiner found, the employer's offer was contingent upon sufficient course enrollment. *See* Finding of Fact # 2. Therefore, we must analyze the totality of circumstances to decide whether, notwithstanding the contingent nature of the offer, it was highly probable that the offered job would be available in the next academic period. Id. at part 4(c), p. 6.

The employer established that it had offered, and the claimant has taught, courses every fall and spring semester since 2015. *See* Findings of Fact # 4-11. This indicates that it was highly probable that the claimant would teach again in the fall 2019 semester. But, to constitute reasonable assurance, the DOL also requires that the economic conditions of the offer not be considerably less than in the prior academic period. *See* UIPL 5-17 at part 4(a)(3). We must decide whether the employer has shown that, in the weeks following this contract offer when the

[2] *Compare* Exhibits 8–9 and 13, which offer employment for the fall 2019 semester and the summer 2019 session, respectively.

[3] Technically, Exhibits 8 and 9 state that the claimant was to be employed as a "Visiting Lecturer." Since she was to perform the same teaching responsibilities as in prior semesters, we are satisfied that she was being hired in the same professional capacity.

claimant had sought benefits, she had reasonable assurance that she would teach under substantially similar economic conditions as she taught in the spring 2019 semester.

The employer's contract offered the claimant $16,506 to teach nine credits in its day school and $4,143 to teach three credits through its continuing education department in the fall 2019 semester. *See* Exhibits 8 and 9.[4] It was undisputed that the claimant's pay rate is set under a collective bargaining agreement, which included increased pay rates for the fall 2019 semester. Since nothing in the record suggests that the claimant taught at anything less than full pay in the spring 2019 semester, on its face, the July contract offered employment under substantially similar economic conditions as in the prior academic semester.

However, the record also shows that the employer may pro-rate the offered salary, if a course is under-enrolled. *See* Findings of Fact ## 13 and 16. Student enrollment has steadily declined since 2010 in the employer's Communications Department, where the claimant is assigned to teach. Finding of Fact # 3. Not long ago, declining enrollment caused that department to cancel seven of its spring 2018 courses, one of which the claimant was supposed to teach. Finding of Fact # 9. Given the declining enrollment, recent course cancellations, and the fact that the employer could reduce the claimant's proposed salary if her courses did not meet sufficient enrollment, we do not believe the claimant could reasonably know what the economic terms would be for her fall employment.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that it provided the claimant with reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A, for the fall 2019 academic term, even after it provided her with a written contract offer.

[4] The contracts sent to the claimant in July, 2019, Exhibits 8 and 9, include salary figures. While not explicitly incorporated into the review examiner's findings, this information 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).

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits for the period beginning May 19, 2019, through August 31, 2019, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 1, 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

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