Because the employer was unsure whether students would come back for in-person learning at the time it issued the claimant a re-appointment letter, the claimant's hours had already been cut when the employer first transitioned to remote learning due to COVID-19, and the claimant did not have any summer hours available due to the pandemic, the claimant did not have reasonable assurance of re-employment. He may not be disqualified from receiving benefits over the summer under G.L. c. 151A, § 28A.

Board of Review
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Issue ID: 0047 6705 53

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 filed a claim for unemployment benefits with the DUA, effective May 3, 2020, which was denied in a determination issued on August 1, 2020. 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 in a decision rendered on August 26, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant, a Dining Service Attendant for a university, had reasonable assurance of re-employment in the subsequent academic term, and, thus, he 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 in the subsequent academic year because the employer notified him in May, 2020, that he would be returning to work, 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 worked as a full-time Dining Service Attendant for the employer, a university, from September 16, 2019, until May 9, 2020.

2. The claimant worked full-time, 40 hours per week. The claimant was paid $17.95 per hour in his position and received benefits.

3. When the claimant was hired, he was informed that the position was an academic year position for 10-month position (40 weeks). The claimant was informed that he would be notified by the employer if summer work was available. The claimant was informed that summer work would be assigned based upon seniority.

4. The claimant was a member of the union. The claimant received a contract of employment for the period of 2019 through 2023.

5. The claimant's last day at work for the employer was May 9, 2020, when the semester ended. There was no summer work available to the claimant at that time.

6. On May 12, 2020, the employees were issued a letter from the employer thanking them for their work during the year, providing information on summer work and indicating that they would be returned to work in the fall. The letter indicated that the employees should look for updates over the summer when plans for the next academic year would be finalized. The claimant received the May 12, 2020, letter.

7. On May 29, 2020, the employer issued the same letter by email to all employees.

8. In or around that time, the Manager had informed the claimant that he would be returning to work in the fall, but the Manager could not provide a specific date at that time.

9. The claimant had the option of being paid during the summer break period by utilizing any accrued paid time off. The claimant was not paid during the summer break period.

10. On July 15, 2020, the claimant received a call from the Manager and was informed that he would be returned to work on August 10, 2020. The claimant understood that he would be returning to the same position.

11. On August 1, 2020, the claimant was issued a Notice of Disqualification under Section 28A of the Law, indicating "It has been established that you have performed services for an educational institution during the most recent academic year or term and there is a contract or a reasonable assurance that you will perform services for an educational institution during the next school year or term. Therefore, you may not receive a benefit based on wages earned working for an educational institution for weeks commencing during the period between these academic years or terms." "Inasmuch as you have no wages

earned working for other than an educational institution or insufficient such wages to meet the eligibility requirements of M. G. L. chapter 151A, s. 24 (a) you are not eligible to receive benefits for the period beginning 5/3/2020 and through 8/8/2020." The claimant filed an appeal to that determination.

12. On August 3, 2020, the claimant came in to bid on his work for the fall. Thereafter, the claimant returned to work for the employer on August 10th in his same position, same hours, and benefits, with an increase in his hourly rate of pay.

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. 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 reject the review examiner's legal conclusion that the claimant had reasonable assurance of re-employment for the coming academic year or term.

As a non-professional employee of an educational institution, the claimant's eligibility for benefits during the relevant period is properly analyzed under the following provisions of G.L. c. 151A, § 28A, which state, in relevant part:

> 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: . . .
>
> (b) with respect to services performed in any other capacity for an educational institution, benefits shall not be paid on the basis of such services to any individual for any week commencing during a period between two successive academic years or terms if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms; provided that, if such individual was not offered an opportunity to perform such services for the educational institution for the second of such academic years or terms, such individual shall be entitled to a retroactive payment of benefits for each week for which the individual filed a timely claim for benefits and for which benefits were denied solely because of a finding that such individual had reasonable assurance of performing services in the second of such academic years or terms . . . .

If it is determined that a claimant had reasonable assurance of re-employment pursuant to G.L. c. 151A, § 28A, the claimant's base period earnings from that position are excluded when calculating the claimant's weekly benefit rate for the period between academic years.

In 2016, the U.S. Department of Labor (DOL) released updated guidance pertaining to the analysis of reasonable assurance. In its Unemployment Insurance Program Letter (UIPL) 5-17 (Dec. 22, 2016), the DOL set 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. Further, we have held that the employer has the burden to prove that it provided the claimant with reasonable assurance of re-employment. *See* Board of Review Decision 0016 2670 84 (Jan. 29, 2016).

There is no dispute that the employer issued a letter to the claimant suggesting that the employer hoped to have employees return to work in the fall. Finding of Fact # 6. On this basis, the review examiner determined that the claimant had reasonable assurance of re-employment under G.L. c. 151A, § 28A, and was, therefore, ineligible for benefits. We disagree.

The letter sent by the employer, which was admitted into evidence as Exhibit 15, enumerated several contingencies that could impact the economic terms of the claimant's position in the 2020–2021 academic year. Specifically, the employer explained that, while it hoped it could resume in-person learning for the 2020–2021 academic year, it did not know when it would be able to re-open campus or what "it [would] look like when it does." Further, the employer explained that, even if campus did reopen, it was unsure whether dining services would return to pre-pandemic operations. Accordingly, the employer informed its staff that it would continue to provide them with updates about its re-opening plans throughout the summer.[1] As the campus had ceased in-person operations following the onset of the COVID-19 pandemic, we believe that the contingencies articulated in the employer's letter require us to consider whether, at the time the claimant received this letter, the totality of the circumstances indicated that it was not highly probable that the job offered to the claimant would be available in the 2020–2021 academic year.

We initially note that, at the time the letter was issued, the claimant had already been informed that summer work would not be available due to due to the COVID-19 pandemic. Finding of Fact # 5. Additionally, while the claimant's manager did inform the claimant that the employer intended to bring him back for the fall 2020 semester, the manager could not provide the claimant with any specific details about his position in the coming academic year. Finding of Fact # 8. As the campus had shut down during the spring 2020 semester due to COVID-19, no summer work was available to the claimant due to the pandemic, and the employer specifically informed staff that its plans for the 2020–2021 academic year remained uncertain, we conclude that the totality of the circumstances indicated that it was not highly probable that the claimant would be returning to the same position and under the same economic circumstances for the 2020–2021 academic year at the time the employer issued its letter to the claimant.

[1] Exhibit 15 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).

While the claimant's manager did provide the claimant with additional information about his position for the 2020–2021 academic year in a July 15, 2020, phone call, we do not believe that this information is sufficient to show that the employer had provided the claimant with reasonable assurance of re-employment. Finding of Fact # 10. As discussed above, an employer must show that it offered the claimant a position in the same capacity and under the same or substantially similar economic conditions as their position the prior academic period in order to meet its burden. *See* UIPL 5-17 at part 4(a), pp. 4–5. During the July 15th call, the claimant did not discuss his pay, hours, or position for the fall 2020 semester with his manager.[2] In light of the uncertainties previously articulated by the employer, the fact that the claimant assumed that he was going to return to the same position is, by itself, insufficient to show that the employer had made him an offer of work sufficient to constitute reasonable assurance of re-employment within the meaning of the law as of July 15, 2020.

While the claimant did not have reasonable assurance of reemployment for the subsequent academic year or term, he can only be eligible for benefits after his job ended. As the record shows the claimant's last day of work in the 2019–2020 academic year was May 9, 2020, he is only eligible for benefits after that date. Finding of Fact # 5.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that the claimant received reasonable assurance of re-employment for the subsequent academic year within the meaning of G.L. c. 151A, § 28A(b), for his full-time Dining Service Attendant position.

The review examiner's decision is affirmed in part and reversed in part. The claimant is not entitled to benefits for the week beginning May 3, 2020. From the week beginning May 10, 2020, through August 8, 2020, the claimant is entitled to a weekly benefit amount based upon all of his base period earnings, if he is otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 27, 2021

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
(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.

[2] The claimant's testimony in this regard is also part of the unchallenged evidence of record.

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.

LSW/rh