The employer provided the claimant bus monitor with an offer letter of re-appointment for the 2020-21 academic year. However, the start of the academic year was delayed and the claimant's hours were reduced from the previous year as a result of the pandemic. Because she did not return to the same position under the same economic terms, she is entitled to retroactive benefits pursuant to G.L. c. 151A, § 28A.

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: 0048 7008 18

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 her position with the employer on June 12, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 18, 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 in part, and reversed in part the agency's initial determination and denied benefits for the period between June 28, 2020, and September 12, 2020, in a decision rendered on July 23, 2021. 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 in the next academic year, 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 subsidiary findings of fact relevant to the claimant's work in the 2020–21 academic year. Thereafter, the review examiner issued her consolidated findings of fact. 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 was not entitled to benefits under G.L. c. 151A, § 28A, during the summer of 2020 because she had received and signed a letter offering her reasonable assurance of re-employment for the subsequent academic year, 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 has worked as a Bus Monitor for the employer, a school, from 6/6/05 through the present. She has not separated from this employment.

2. The claimant was hired to work an average of 20 hours a week, earning $14.05 an hour.

3. The claimant filed a new claim for unemployment benefits on 6/30/20 after the 2020–2021 school year ended on 6/12/20. Buses stopped running in March 2020 due to the pandemic. The claimant did not work after the buses stopped, but she did get full pay until the end of the school year.

4. The claimant received a reasonable assurance letter on 6/1/20 for the 2020–2021 school year. The claimant accepted the work and signed the letter on 6/3/20.

5. Summer work is above and beyond the 10-month contracted work during the school year. The claimant never received any guarantees from the employer for summer work.

6. The employer had limited summer work available over the summer of 2020. The claimant did not work during the summer of 2020.

7. The claimant did return to work in the same position for the 2020–2021 school year. Normally the claimant would start work as a bus monitor in the end of August. The start of the 2020-2021 school year was delayed until 9/17/20. The claimant got an increase in pay to $14.33 an hour for the 2020- 2021 school year.

8. During the 2019-2020 school year the claimant averaged approximately 30 to 31 hours a week as a bus monitor. During the first week of school for the 2020–2021 school year, the claimant worked 10 hours; during the second week, she worked 20 hours; during the third week, she worked 19 hours and during the fourth week, she worked 17 hours.

9. Upon the claimant's return to work on 9/17/20 for the 2020-2021 school year, she did not work Wednesdays as she had during the last school year. She was subsequently informed through a work agreement between the Union and the employer regarding Wednesdays that she would continue to be paid for Wednesdays although she had no work on these days. The agreement was dated 12/18/20. It was signed by a Local Union Representative on 12/2/20. The agreement did not compensate the claimant for all of the hours she lost as a result of not working on Wednesdays.

10. The claimant had no other employment during her base period.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. The portion of Consolidated Finding # 4 which indicates that the letter provided by the employer constituted reasonable assurance of re-employment is not a factual finding. This is a legal conclusion reserved to the Board. *See* Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979) ("Application of law to fact has long been a matter entrusted to the informed judgment of the board of review."). In adopting the remaining findings, we deem 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 was not eligible for benefits during the summer of 2020.

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;
>
> (c) with respect to services described in subsections (a) and (b), benefits shall not be paid to any individual on the basis of such services for any week commencing during an established and customary vacation period or holiday recess if such individual performs such services in the period immediately before such vacation period or holiday recess, and there is a reasonable assurance that such individual will perform such services in the period immediately following such vacation period or holiday recess . . . .

If it is determined that a claimant has 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.

The review examiners original decision disqualified the claimant from receiving benefits on the ground that she had reasonable assurance of re-employment for the subsequent academic year. However, given the additional findings articulated following remand, we do not believe the claimant is disqualified from receiving benefits under G.L. c. 151A, § 28A.

While the claimant would normally return to work at the end of August, the start of the 2020–21 academic year was delayed until September 17, 2020. Consolidated Finding # 7. Further, when she did return to work, she was working fewer hours per week when compared to the 2019–20 academic year. *See* Consolidated Findings ## 8 and 9. In light of these facts, we must decide whether these circumstances entitle the claimant to the payment of retroactive benefits, even though the claimant may have been provided with a letter of re-employment at the end of the previous academic year. *See* Consolidated Finding # 4.

The U.S. Department of Labor has stated that, in order to constitute reasonable assurance, the employer's offer of re-employment must offer economic conditions that are not considerably less than the prior academic period.[1] The DUA has also promulgated regulations for non-professional school employees which are applicable to this case. Specifically, an employer must provide the employee with an "opportunity to perform" "suitable services." 430 CMR 4.96(1). These terms are defined under 430 CMR 4.93, as follows:

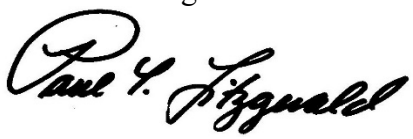
> Opportunity to Perform Services means a chance to actually perform services in the next ensuring academic year or term.
>
> Suitable Services as used in 430 CMR 4.96(1) means service in the same or substantially similar position *at the same or higher pay*, except as otherwise provided by a collective bargaining agreement. (Emphasis added.)

The record before us shows that the claimant started the academic year late, is working fewer hours than in the prior academic year and has not received sufficient compensation to match her earnings from the previous year. *See* Consolidated Findings ## 8 and 9. With a shorter academic year and fewer hours, we can reasonably infer that she is not earning as much money as she did in the 2019–20 school year. Therefore, the claimant cannot have been offered the opportunity to perform suitable services in the 2020–21 academic year. *See* Board of Review Decision 0047 7352 64 (Jan. 8, 2021). Under 430 CMR 4.98(1), she is entitled to retroactive benefits for any period originally excluded due to having initially been given reasonable assurance of re-employment.

We, therefore, conclude as a matter of law that, pursuant to G.L. c. 151A, § 28A(b), and 430 CMR 4.96(1), the claimant may not be disqualified from receiving unemployment benefits for any weeks of unemployment in the period between the 2019–20 and 2020–21 academic years. We further conclude that pursuant to 430 CMR 4.98(1), she is entitled to retroactive benefits.

[1] U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 5-17 (Dec. 22, 2016), 4(a).

The review examiner's decision is reversed. The claimant is entitled to receive benefits based upon the wages earned from the employer during her base period from the week beginning June 21 through September 12, 2020, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - November 22, 2021

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
(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.

LSW/rh