

Claimant adjunct professor did not have reasonable assurance of re-employment pursuant to G.L. c. 151A, § 28A, where the employer had cancelled one of his courses in each of the four preceding terms, and university enrollment continued a downward trend.

**Board of Review
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Issue ID: 0049 0594 90

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 his position with the employer and filed a claim for unemployment benefits with the DUA, effective July 5, 2020, which was denied in a determination issued on October 21, 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 December 23, 2020. We accept 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, he was ineligible for benefits 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 took the case for further review to allow the claimant—whose timely request for a copy of the recording of the hearing was not fulfilled within the appeal period—additional time to perfect his appeal. The claimant submitted his supplemental appeal within the time afforded to him. 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 the employer provided the claimant with reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A, is supported by substantial and credible evidence and is free from error of law, where the employer had cancelled courses offered to the claimant in the prior four semesters and enrollment at the college continued to decline.

Findings of Fact

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

1. The claimant has worked as a professor for the employer, a university, since 2014.

2. The claimant has had no other employment during the benefit year.
3. The employer offers the claimant courses contingent upon sufficient course enrollment. Sometimes classes are cancelled due to low enrollment.
4. Since the Fall 2016 semester, the claimant has taught 1 course per semester.
5. In the Spring 2018 semester, the claimant taught Organic Chemistry. He was paid \$13,816.00.
6. In the Fall 2018 semester, the claimant taught Chemistry 131. He was paid \$17,270.00.
7. In the Spring 2019 semester, the claimant taught Chemistry 131. He was paid \$17,217.00.
8. In the Fall 2019 semester, the claimant taught Chemistry 131. He was paid \$12,838.09.
9. In the Spring 2020 semester, the claimant taught Organic Chemistry. He was paid \$15,630.64. Part of the semester was taught remotely due to the COVID-19 pandemic.
10. The claimant has a pattern of returning to the same and/or similar position each semester.
11. On 07/24/20 [sic], the claimant was offered a full-time contract for the Fall 2020 semester and Spring 2021 semester. The claimant will be paid \$68,000.00 for his work in the two semesters.
12. The claimant's salary is determined by the Collective Bargaining Agreement.
13. On 10/21/20, the DUA sent the claimant a Notice of Disqualification stating the claimant had performed services for an educational institution during the most recent academic year or term and there is a contract or a reasonable assurance that s/he will perform services for an educational institution during the next school year or term and therefore s/he may not receive benefits based on wages earned working for an educational institution for weeks commencing during the period between these academic years or terms and s/he was not eligible to receive benefits for the period beginning 07/12/20 and through 08/29/20.

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 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 findings of fact, except for the portion of Finding of Fact # 11 which indicated that the claimant was offered a contract for the fall 2020 semester on July 24, 2020. We note that the actual letter offering the claimant contract employment for the fall 2020 term was dated August 12, 2020. *See* Exhibit # 8. 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 is ineligible for benefits.

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) No. 5-17 (Dec. 22, 2016), the 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 in the next academic period. *Id.* at part 4(c), p. 6.

The review examiner's decision affirmed the DUA's determination, which disqualified the claimant from receiving benefits from July 12 through August 29, 2020. Thus, the question before us is whether, during this period of time, the employer had provided the claimant with reasonable assurance of re-employment in the upcoming fall, 2020 semester.

The claimant has been a professor with this university employer since 2014. *See* Finding of Fact # 1. Where the employer offers the claimant courses to teach contingent on sufficient course enrollment, and classes can be cancelled due to low enrollment, the claimant performs services for the employer in the capacity of adjunct faculty. *See* Finding of Fact # 3.

The review examiner found the claimant has taught one course per semester since the fall 2016 term. *See* Finding of Fact # 4. The claimant’s compensation has varied for each such course taught. For example, he was paid \$13,816.00 for teaching one course in the spring 2018 term (*see* Finding of Fact # 5); \$17,270.00 for teaching one course in the fall 2018 term (*see* Finding of Fact # 6); \$17,217.00 for teaching one course in the spring 2019 term (*see* Finding of Fact # 7); \$12,838.09 for teaching one course in the fall 2019 term (*see* Finding of Fact # 8); and \$15,630.64 for teaching one course in the spring 2020 term (*see* Finding of Fact # 9).

On August 12, 2020, the employer offered to re-employ the claimant to teach in the fall 2020 and spring 2021 semesters. *See* Finding of Fact #11 and Exhibit # 8. The offer was for the same professional teaching work that the claimant had been performing. It was also contingent upon sufficient tuition-paying student enrollment. The offer specifically noted the employer retained “sole discretion” to determine “sufficient enrollment,” and it was also contingent on “lifting operational restrictions due to the ongoing pandemic and public health emergency.” *See* Exhibit # 8. Student enrollment is a factor that is deemed to be beyond the employer’s control. *See* UIPL 5-17 at part 4(c), p. 6. Thus, we must decide whether or not the totality of circumstances 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.

For some reason, the review examiner failed to render any findings about the university’s enrollment figures, or whether the employer had previously cancelled courses offered to the claimant. Because these criteria are necessary components to our reasonable assurance analysis, we would ordinarily have to remand the case to obtain this evidence. In this case, that is not necessary, because these criteria are present in the undisputed testimony and evidence before us in the record.

Although the findings show the claimant has taught one course per semester since the fall 2016 term, the claimant produced emails that establish the employer had cancelled one offered course in each term due to insufficient enrollment from fall 2018, to the spring 2019 term, the fall 2019 term, and the spring 2020 term. *See* Exhibit # 9. Further, the record supports a conclusion that the college’s overall student enrollment has declined.¹ *See* Finding of Fact # 2 and Exhibit 12. This declining enrollment trend, combined with the claimant’s recent course cancellations and the uncertainty regarding schools reopening during the COVID-19 pandemic, do not reflect a high probability that the claimant would end up teaching the offered courses in the fall. *See* Board of Review Decision 0031 5700 75 (Dec. 19, 2019) (claimant adjunct faculty did not have reasonable assurance where the employer had cancelled courses due to low enrollment in the previous two semesters, and overall college enrollment continued its downward trend).

We, therefore, conclude as a matter of law that the employer has not shown that during the summer of 2020, the claimant had reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A, for the fall, 2020 academic term.

¹ During the hearing, the claimant testified that enrollment at the employer university was declining; the employer did not dispute this claim during the hearing. Both the emails and the employer’s declining enrollment, while not explicitly incorporated into the review examiner’s findings, are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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 reversed. The claimant is entitled to receive benefits for the period July 12 through August 29, 2020, if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 28, 2021



Charlene A. Stawicki, Esq.
Member

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

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may apply at: <https://ui-cares-act.mass.gov/PUA/>. The claimant may also call customer assistance at 877-626-6800 (select the number for your preferred language, then press # 2 for PUA).

**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.

JPCA/rh