Due to the COVID-19 pandemic, the U.S. Department of Labor has required state agencies to re-assess an initial determination of reasonable assurance when the circumstances warrant it. Here, the employer delayed the start of the 2020-21 school year due to the pandemic, and it failed to participate in the remand hearing to answer questions about when and how it's plans for the school year had changed. Board held the employer did not meet its burden to prove that, after issuing its usual re-employment letter in June, the claimant had reasonable assurance of re-employment in the next academic term under substantially similar economic terms.

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Issue ID: 0049 0631 94

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 on March 20, 2020. He filed a claim for unemployment benefits with the DUA, which was approved. However, in a determination issued on August 1, 2020, the claimant was denied benefits from June 21 through September 5, 2020. The claimant 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 from June 21 through September 1, 2020, in a decision rendered on September 26, 2020. 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, 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 remanded the case to the review examiner to obtain additional evidence about any changes over the summer in the employer's plans for the 2020–21 school year. Only the claimant attended the remand hearing. 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 substitute teacher had reasonable assurance of re-employment pursuant to G.L. c. 151A, § 28A, during the summer of 2020, 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 and credibility assessment are set forth below in their entirety:

1. The claimant began working as an on-call substitute teacher for the employer's public schools on 10/24/17. The claimant last performed services for the employer sometime in March 2020, prior to the closing of its schools due to the COVID-19 pandemic. The claimant was last paid on 3/20/20. The employer did not provide the claimant any pay after the schools closed.

2. During the 2019–2020 academic year, the claimant worked as an on-call substitute teacher. The claimant was paid a daily rate of approximately $75.

3. The claimant filed an initial claim for unemployment insurance benefits, effective 3/29/20.

4. On 6/15/20, the employer issued the claimant written notice of its intention to retain him as a substitute teacher for the 2020–2021 school year, which at the time was scheduled to begin on 9/1/20. The claimant signed the notice, confirming that he would return to work with the employer. The employer [sic] received the signed notice on 6/22/20.

5. On 7/3/20, the employer completed a DUA Lack of Work Notification Form, indicating that the claimant had reasonable assurance of reemployment.

6. On or about 7/17/20, the claimant completed a DUA factfinding questionnaire, indicating that he worked for the employer as a school employee and did not have any non-school employment during the previous year. The claimant did not respond to questions related to reasonable assurance.

7. On or about 7/17/20, the employer completed a DUA factfinding questionnaire, indicating that the claimant worked as a substitute teacher during the 2019–2020 school year and would return to work in the same capacity during the 2020–2021 school year.

8. On 8/1/20, the DUA issued the claimant a Notice of Disqualification, finding him ineligible for benefits under Section 28A of the law for the period of 6/21/20 to 9/5/20.

9. On 8/4/20, the claimant appealed the Notice of Disqualification.

10. It is unknown whether the employer revised its plan for running its 2020–2021 school program after providing the claimant with the 6/15/20 letter. The employer did not communicate any revised plan directly to the claimant.

11. The claimant learned from listening to statements made by the Governor of Massachusetts that the start of the 2020–2021 school year would be delayed.

During the period of 6/15/20 and approximately 9/30/20, the claimant did not receive any communication from the employer.

12. On or about 9/30/20, the claimant was contacted by a Vice-Principal, asking if he was willing to come in to work. The claimant accepted the offer of work. After receiving his paycheck in October, for the work performed on or about 9/30/20 and subsequent days, the claimant found that the employer paid him the rate of $75 per day. The claimant was aware that approximately one year ago, the School Board approved an increase in the daily rate for substitutes and the increase would take effect in the 2020–2021 school year. The rate of pay for the 2020–2021 school year was increased to $125 per day.

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 first sentence of Consolidated Finding # 10, which provides that it is unknown if the employer changed its plans for the 2020-21 school year after issuing its June 15, 2020, letter, is misleading, as the undisputed evidence in the record indicates that it did. The second sentence of Consolidated Finding # 11 is also misleading. While there is no evidence that the employer issued a *written* communication to the claimant, the record includes evidence that there had been a verbal communication, as set forth below. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We further conclude that the record after remand no longer supports 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 . . . .

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).

In the present case, there is no dispute that on June 15, 2020, the employer provided the claimant with the usual written notice that he would be re-employed in the same substitute teacher position in the 2020–21 academic year that was to begin on September 1, 2020. Consolidated Finding # 4. The record also indicates that the economic terms were the same. *See* Consolidated Finding # 12. However, we also know that the school year did not begin on September 1, 2020. It was delayed. *See* Consolidated Finding # 11. The only logical inference is that at some point during the summer, the employer had to revise its original plan for the 2020–21 school year. Thus, inasmuch as Consolidated Finding # 10 states that it was unknown whether the employer changed its plans, this is misleading.

Due to the COVID-19 pandemic, the employer closed its schools in March, 2020. Consolidated Finding # 1. Although not specified in Consolidated Finding # 11, it is common knowledge that the Governor delayed public school openings in the fall of 2020 due to continuing public health concerns related to the COVID-19 virus. During the initial hearing, the employer's witness was unsure about the 2020–21 school year start date and whether the employer was actually employing substitute teachers. For this reason, we remanded this case to find out what had changed since issuing the June 15, 2020, letter and when that happened.

This information is necessary because, in light of COVID-19, the DOL has directed states to re-assess entitlement to unemployment benefits under certain circumstances. Specifically, it is warranted if, after initially providing its reasonable assurance of re-employment, an educational employer decided not to re-open school as scheduled, or a specific individual no longer had reasonable assurance to return, as provided in UIPL 5-17.[1]

The employer chose not to participate in the remand hearing. Consequently, we must rely on the claimant's testimony. The claimant reported that during the summer, he asked the employer about the fall a few times, including visiting the school department once, when he was told, "we can't tell anybody anything right now because we don't know anything."[2] Lacking anything more specific from the employer, we can reasonably infer from this and the uncertainty brought about by the COVID-19 pandemic that, at some point after issuing its June 15, 2020, letter to the

[1] *See* UIPL 10-20, Change 1 (May 15, 2020), 4(d).

[2] This portion of the claimant's testimony, while not explicitly incorporated into the review examiner's findings, 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).

claimant, circumstances changed. The COVID-19 pandemic is a circumstance well beyond the employer's control. Given the delayed start date and the uncertainty presented in the record about the employer plans for the 2020-21 academic year, we are not persuaded that, after issuing its June letter, the claimant had a high probability of working under substantially similar economic conditions as he had worked in the 2019-20 school year. This means that he no longer had reasonable assurance of re-employment within the meaning of the statute.

Had the employer participated in the remand hearing, we may have been able to pin down a date when its plans for the 2020–21 school year became uncertain such that it impacted the claimant's reasonable assurance of re-employment. The employer has the burden of proof, and it did not present evidence to address the period of time after June 15, 2020. The record reflects the fact that the COVID-19 pandemic remained a concern throughout the summer of 2020. Because we are required to apply the unemployment law liberally in aid of its purpose to lighten the burden on the unemployed worker, we conclude that the claimant did not have reasonable assurance beyond that point. *See* G.L. c. 151A, § 74.

We, therefore, conclude as a matter of law that the employer has failed to sustain its burden to prove that the claimant had reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A, starting with the week after June 15, 2020.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning June 21, 2020, through September 1, 2020, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS Paul T. Fitzgerald, Esq.
DATE OF DECISION - January 8, 2021 Chairman

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 contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

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.

AB/rh