A collective bargaining provision that the claimant would return to work in the fall unless notified otherwise is insufficient to meet the employer's burden to show that it affirmatively provided reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A.

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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 13, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 8, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on January 14, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had reasonable assurance of re-employment, and, thus, was disqualified under G.L. c. 151A, § 28A. 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 claimant had reasonable assurance of re-employment because the employer did not notify the claimant that she would not be returning to work for the 2020–2021 academic year, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant began working full-time for the employer on 8/29/06 as an instructional assistant. The claimant returned to work in the same capacity at the start of each subsequent school year. The claimant is hired to work the scheduled 180-day school year. The claimant's last day of work prior to filing her initial unemployment claim was 6/13/20.

2. The claimant applies each year to work in the employer's summer program. The claimant has been hired to work in the summer program during each summer

prior to 2020. The claimant earned approximately $3,250 from her work performed during the 2019 summer session. The claimant did not work for any other employer while working for the instant employer.

3. The claimant is aware that the employer is required by its collective bargaining agreement with the teachers' union to provide notice if the claimant will not be reinstated for the next school year. The employer did not inform the claimant that she would not return to work in the 2020-2021 school year.

4. The claimant filed an initial claim for unemployment insurance benefits, effective 7/5/20.

5. On 4/8/21, the DUA issued the claimant a Notice of Disqualification, finding her ineligible for benefits under Section 28A of the law for the period of 7/5/20 through 8/29/20. The claimant appealed the Notice.

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. 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 2020–2021 academic year.

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 . . . .

Before a claimant may be disqualified from receiving benefits pursuant to G.L. c. 151A, § 28A, there must be substantial evidence to show that the employer provided reasonable assurance of re-employment. The burden to produce that evidence lies with the employer.[1] If it is determined that a claimant had reasonable assurance, 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 the present case, the review examiner concluded that the claimant had reasonable assurance of re-employment because she believed that she would be returning to the same position in the subsequent academic year unless the employer notified her otherwise. We disagree.

Under the federal guidelines, a claimant will not have reasonable assurance of re-employment unless he or she receives a *bona fide* offer of re-employment in the subsequent academic year in the same capacity and under the same or similar economic terms as the previous academic year. Such an offer may be written, oral, or implied and must be made by an individual with actual hiring authority. *See* U.S. Department of Labor Unemployment Insurance Program Letter No. (UIPL) 5-17, (Dec. 22, 2016), 4(a).

In this case, there was no evidence that a written, verbal, or implied offer sufficient to meet the requirements articulated in UIPL 5-17 was ever made to the claimant. While we recognize that the UIPL permits reasonable assurance to be conveyed in writing, orally, or in an implied manner, we do not believe that the collective bargaining provision's passive assurance that the claimant would return, unless the employer informs her otherwise, meets this standard. This is particularly so in view of the drastic changes forced on schools during 2020 because of the COVID-19 pandemic and the absence of any other evidence indicating that the claimant would be returning to work. *See* Board of Review Decision 0047 0949 58 (Jan. 26, 2021).

The claimant was unable to work during the summer of 2020 due to the employer's response to the COVID-19 pandemic, and there is no indication from the record that the employer addressed uncertainties about the status of the coming academic year in light of the ongoing public health emergency.[2] Absent any evidence suggesting the claimant had any specific assurances from the employer that she would be returning to work in same capacity and under the same economic terms as the previous academic year, and we see none, we conclude the employer has failed to meet its burden.

We, therefore, conclude as a matter of law that the employer did not provide the claimant with reasonable assurance of re-employment to the claimant for the 2020–2021 academic year pursuant to G.L. c. 151A, § 28A.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning July 5, 2020, through August 29, 2020, if otherwise eligible.

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[1] *See* Board of Review Decision 0016 2670 84 (Jan. 29, 2016).

[2] The claimant's uncontested testimony in this regard, 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).

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 11, 2022

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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.

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