An assumption that the claimant would return to work in the fall unless notified is insufficient to meet the employer's burden to show that it 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 through August 22, 2020, and to award benefits thereafter. 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 31, 2020, which was denied in a determination issued on December 23, 2020. 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 May 4, 2021. 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 until the week of August 23, 2020, and, thus, was disqualified under G.L. c. 151A, § 28A, until that date. 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 through August 22, 2020, because she had reason to believe that she would be recalled for the 2020–2021 academic year unless she was told otherwise, 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. On November 1, 2019, the claimant began working, as a part-time special education teacher for the employer, a charter school.

2. The charter school was not generally funded by the school district in which it was located, but the special education funding, which paid the claimant's wages, was funded by the school district.

3. The claimant was led to believe that, unless she was told otherwise, she would be recalled for the 2020-2021 school year. This was the recall system used with all the teachers.

4. The claimant, as a part-time teacher, received all of her wages during the academic year and received no pay checks over the summer break.

5. The claimant was laid off, on May 30, 2020, at the end of the 2019-2020 school year. The 2020-2021 school year was supposed to start September 5, 2020.

6. The claimant sent an e-mail to the Director of the charter school the week of August 29, 2020, to start to ask about access to her classroom in order to get ready for the school year. At that time, the Director informed her that the school district, which normally provided most or all of the funding for her position, was considering having their own teachers provide special education services for the student attending the charter school from their district. She explained that if they did so, the employer would not be able to hire the claimant for as many hours as they had the prior year.

7. The Director later informed the claimant that the school district had decided that they would have their own employees provide the special education services for student from their district. The Director told the claimant that the employer would only be able to pay her for 6-10 hours a week. The claimant told the Director that if the charter school could provide her with 10 hours a week, she would continue working with them. The Director indicated she would let the claimant know.

8. The Director eventually got back to the claimant and told her that it would be best to assume the employer would not have any work for her in the 2019–2020 school year.

9. The claimant was not recalled to work for the present employer.

10. On December 23, 2020, DUA issued Notice of Disqualification 0049 7904 34-01, stating that under MGL c. [151A,] § 28A (a), (b), (c), wages from this employer could not be used to support a claim a claim between May 31, 2020, to September 5, 2020.

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 conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. There appears to be a typographical error in Finding of Fact # 8, which indicates the employer informed the claimant they would not have work for her in the 2019-2020 academic year. As the claimant had

already completed the 2019-2020 academic year at the time she filed for benefits, we believe the review examiner intended to find that the employer informed the claimant they would not have any work for her in the 2020-2021 academic year. 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 had reasonable assurance of re-employment until she was informed that funding for her program was cut.

Since the claimant is a professional employee of an educational institution, we turn to the portions of G.L. c. 151A, § 28A, which state, 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, research, or principal administrative 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, or when an agreement provides instead for a similar period between two regular but not successive terms, or during a period of paid sabbatical leave provided for in the individual's contract, 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; . . .

Before a claimant may be disqualified from receiving benefits, pursuant to G.L. c. 151A, § 28A, there must be sufficient 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 had been led to believe that she would be returning to the same position in the subsequent academic year unless she was told 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).

[1] The Board has previously decided a claimant's eligibility for benefits based on whether the employer established that it provided reasonable assurance of re-employment. *See*, *e.g.,* Board of Review Decisions 0002 1339 07 (May 12, 2014) and 0013 6586 83 (Oct. 21, 2015). These are unpublished decisions, available upon request. For privacy reasons, identifying information is redacted.

In this case, there was no evidence that a written, verbal, or implied offer was ever made to the claimant. The claimant's assumption that she might return to the same position for the 2020–2021 academic year does not, by itself, constitute reasonable assurance of re-employment under G.L. c. 151A. *See* Finding of Fact # 3. Moreover, there is no indication from the record that the employer made any mention of the status of the claimant's position until the claimant reached out to them on August 29, 2020. *See* Findings of Fact ## 6–8. Absent any evidence suggesting the claimant had any 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, 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 affirmed in part and reversed in part. The claimant is entitled to receive benefits for the week beginning May 31, 2020, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 22, 2021

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. 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.

LSW/rh