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 did not finalize its plans for the 2020-21 academic year until just before staff returned to work. As such, 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. She may not be disqualified under G.L. c. 151A, § 28A.

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Issue ID: 0060 0062 99

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 March 13, 2020. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on December 23, 2020. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on December 22, 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 additional findings of fact pertaining to the employer's plans for the 2020–21 academic year. Thereafter, the review examiner issued his 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 because the employer had provided her with reasonable assurance of re-employment for the 2020–21 academic year in a letter issued on June 15, 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 are set forth below in their entirety:

1. The employer is a city.

2. The claimant began her employment with the employer on 10/17/2018.

3. The claimant works as an on-call substitute teacher for the employer. The employer calls and sends text messages to the claimant when it needs her to work.

4. The claimant worked as an on-call substitute teacher for the employer in the 2019–2020 school year. The employer paid the claimant $125.00 per day.

5. The employer closed its in-person school programs on 3/13/2020 due to the COVID-19 pandemic. The employer did not offer any work to the claimant for the rest of the 2019–2020 school year. The claimant did not perform any work as a substitute teacher for the employer for the rest of the 2019–2020 academic year.

6. The employer never planned to cancel the 2020–2021 school year. The employer contemplated a hybrid school model for the 2020–2021 school year due to the COVID-19 pandemic. The employer determined that it would need substitute teachers if it implemented a hybrid model.

7. The employer gave a letter to the claimant. The letter was dated 6/15/2020. The letter indicated that the employer wanted the claimant to work in her substitute teacher role for the next school year. The letter indicated that the employer would maintain the claimant on its substitute teacher list.

8. At the time when the claimant received the 6/15/2020 letter from the employer, the employer did not know whether it would start the 2020–2021 school year in a hybrid school model.

9. The claimant desired to know if the employer needed her for the 2020–2021 school year. The claimant spoke to the employer's vice principal in late August 2021. The vice principal told the claimant that she was not on the substitute teacher list for the employer for the 2020–2021 school year. The claimant had been removed from the list in error.

10. The employer decided to open its 2020–2021 school year in a hybrid school model. The employer's 2020–2021 school year began on 9/01/2020 for staff. The employer made the hybrid model decision in late August 2020, just before its staff returned on 9/01/2020.

11. In the period 6/15/2020 through 9/01/2020, the employer did not give any indication to the claimant that it would not recall her for the 2020–2021 school year.

12. The claimant returned to work for the employer as an on-call substitute teacher in the 2020–2021 school year. The claimant worked her first day on 9/20/2020.

> The claimant worked in the hybrid model. The employer's schools were open for in-person instruction on two weekdays per week. The students attended school virtually on the other weekdays. The employer only assigned the claimant to work on the two days when in-person instruction was open. The employer did not decrease the claimant's payrate for the 2020–2021 school year.

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. Upon such review, the Board adopts the review examiner's consolidated 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 as of June 15, 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 . . .
>
> (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;
>
> (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 . . . .

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, the applicable 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).

There was no dispute that the June 15, 2020, letter provided the claimant with written notice that she would be re-employed in the same substitute teaching position for the 2020–21 academic year. *See* Consolidated Finding # 7. However, there was also no dispute that, because of the ongoing COVID-19 public health emergency, the employer did not finalize its plans to re-open in a hybrid learning model for the 2020–21 academic year until the end of August 2020. *See* Consolidated Findings ## 8–10. While many teachers and other professional staff continued to work after the employer transitioned to remote learning in March 2020, the claimant was not offered any work. *See* Consolidated Finding # 5. As such, it is reasonable to infer that the employer would not have needed the claimant's services if the employer decided to re-open in the fall of 2020 with a remote learning model.

This information necessarily alters our analysis 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]

When the claimant called the employer in August to see if they were going to require her services for the start of the 2020–21 academic year, the employer could not have provided a definitive answer, as they had not yet made a final decision about their re-opening plans. *See* Consolidated Findings ## 9 and 10. Because the employer's continuing uncertainty directly implicated the claimant's employment in the 2020–21 academic year, we are not persuaded that the claimant had a high probability of working under substantially similar economic conditions as she had worked in the previous academic year, even though she received the June 15, 2020, letter. Under these circumstances, she did not have reasonable assurance or re-employment.

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.

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

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning June 21, 2020, through August 29, 2020, if otherwise eligible.

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