The U.S. Department of Labor has required state agencies to re-assess an initial determination of reasonable assurance when such reasonable assurance may have been impacted by uncertainties related to COVID-19. In this case, the employer was unsure of its reopening plans at the time it issued the claimant a letter offering her reemployment in the next academic year. As the employer's uncertainty was related to the ongoing impact of the COVID-19 pandemic, a circumstance beyond the employer's control, the employer did not meet its burden to prove that the claimant had reasonable assurance of re-employment in the next academic term under substantially similar economic terms at the time of its offer to the claimant in June.

Board of Review
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Issue ID: 0060 2616 68

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 filed a claim for unemployment benefits with the DUA, which was denied for the period between June 21, 2020, and October 17, 2020, in a determination issued on May 4, 2021. 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 April 13, 2023. 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 evidence pertaining to whether the employer had provided the claimant with reasonable assurance of re-employment for the 2020–21 academic year. Both parties attended the remand hearing. 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 during the period between June 21, 2020, and October 17, 2020, because she had reasonable assurance of re-employment in the subsequent academic year for her substitute teaching position, 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. On 9/5/13 the claimant began employment with this employer's public school system as a per diem substitute teacher. The claimant continues to work in this position currently.

2. When called to work, the claimant is paid at a daily rate of pay by this employer.

3. The claimant performed services as a per diem substitute teacher during the 2019-2020 academic year and she had reasonable assurance that she would be working in the same capacity following the summer break for the 2020–2021 school year if she were available to work.

4. On 9/16/19, the claimant was injured at work when she fell downstairs at school. A workers' compensation claim was filed.

5. 3/12/20 was the last day of in-person working for school staff due to the [COVID]-19 pandemic before the start of the summer break period. Before [COVID]-19, the planned end date before the summer break was 6/19/20.

6. The employer paid substitute teachers their average earnings from 3/12/20 through 5/14/20, when the substitute teacher pay ended.

7. On 5/5/20, a furlough letter was sent to staff informing them that as a result of the furlough, workers may be eligible for unemployment benefits. The claimant noted that she would not have filed an unemployment benefit claim but for the receipt of the 5/5/20 furlough letter from the Superintendent of Schools [Name A].

8. The employer had no substitute teacher work available from 3/12/20 until 10/13/20 because working hybrid remote learning due to [COVID]-19 and substitutes were not needed until the return to in-person learning [sic]. The employer did not tell substitutes they would not be needed. They were told to maintain contact with the substitute Coordinator for updates.

9. On 6/26/20, the claimant was notified in writing by the employer's Superintendent of Schools via an email sent to the claimant's email address that the claimant had supplied to the employer for this purpose, that she had reasonable assurance of reemployment in her same position after the summer break. There were no contingencies articulated in the reasonable assurance letter that might impact the claimant's return to work in the 2020–2021 academic year.

10. On 7/17/20 a school reopening process email was sent to staff by the employer's Superintendent of Schools. This email noted that the employer was working

closely with state agencies to safely reopen the schools following the [COVID]-19 shutdown. The preliminary plan was to open schools on 7/31/20 and the final plan used 8/10/20 as the opening date.

11. When the claimant received her 6/26/20 reasonable assurance letter, there was no set plan to return to in-person learning yet. Substitute teachers were told to remain in contact with the Substitute Coordinator [Name B] for reopening updates.

12. Substitute teachers returned to work with this employer in the middle school on 10/13/20 and in the rest of the school district on 10/26/20.

13. The claimant knew both from her long term of employment with the employer and the email communication from the Superintendent of Schools, that she had reasonable assurance of reemployment in the next academic or term following the summer break period, if the claimant were capable of returning to work.

14. On 10/24/20 the claimant began being paid workers' compensation money.

15. The claimant and the employer witness both did not know if the workers' compensation payments were retroactive to the date of the injury or not.

16. On 3/28/21, the claimant's workers' compensation ended. The claimant's physician cleared the claimant to return to work on 3/28/21 and the claimant immediately notified the employer.

17. The claimant returned to work from workers' compensation on 3/29/21.

18. On 5/4/21 the claimant was sent a Notice of Disqualification beginning 6/21/20 through 10/17/20 as she had reasonable assurance of reemployment in the next academic year if she were capable of returning to work.

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 conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Consolidated Findings ## 3, 9, 11, and 13 indicate that the employer had provided the claimant with reasonable assurance of re-employment. This is not a factual finding. This is a legal conclusion that, at this stage of the proceedings, is reserved for the Board. *See* Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979) ("Application of law to fact has long been a matter entrusted to the informed judgment of the board of review."). We also reject the portion of Consolidated Finding # 10 that states that the employer's preliminary plan was to open schools on July 31, 2020, and that its final plan was to open on August 10, 2020, as inconsistent with the evidence of record. 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 was not entitled to benefits between June 12, 2020, and October 17, 2020.

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), 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).

There was no dispute that, on June 26, 2020, the employer provided the claimant with written notice that she would be re-employed in the same substitute teaching position for the 2020-21 academic year. Consolidated Finding # 9. On this basis, the review examiner determined that the claimant had reasonable assurance of re-employment under G.L. c. 151A, § 28A, and was, therefore, ineligible for benefits from the week beginning June 12, 2020, and October 17, 2020. We disagree.

The employer did not have any substitute teaching work available to the claimant after March 12, 2020, when it transitioned to remote learning in response to the impact of the COVID-19 public health emergency. Consolidated Finding # 8. We can, therefore, reasonably infer that the employer would not require the claimant's services as a substitute teacher if it reopened only for remote learning the 2020-21 academic year. Given the ongoing uncertainty about the impact of COVID-19 on the employer's reopening plans, we must consider whether, at the time the employer

issued the letter, the totality of the circumstances indicated that it was highly probable that the job offered to the claimant would be available in the 2020–21 academic year. *See* Consolidated Finding # 11.

The consolidated findings show that, at the time it issued the June 26th offer letter to the claimant, the employer remained unsure of its reopening plans for the 2020-21 academic year. Because the employer had been unable to offer the claimant work at the end of the 2019–20 academic year and remained unsure whether circumstances would change for the 2020–21 academic year, we conclude that the totality of the circumstances indicate that it was not highly probable that the claimant would be returning to the same position and under the same economic circumstances as the previous academic year. *See* Consolidated Findings ## 8 and 11. Accordingly, the employer did not meet its burden to show that it provided the claimant with reasonable assurance of re-employment for the subsequent academic year as of June 26, 2020.

While the employer's July 11th email, which was admitted into evidence as Remand Exhibit 5E, indicated that the employer was required to submit its reopening plan to the Department of Elementary and Secondary Education by August 10, 2020, there was no evidence of what the proposed reopening plan entailed, whether that plan was subject to change, or whether staff were notified of a finalized reopening plan.[1] An October 9, 2020, email from the claimant's supervisor, which was admitted into evidence as Remand Exhibit 5F, indicates that the employer had not informed substitute teachers of a definitive return-to-work date prior to the date of that communication.[2] Further, as that email explains that the employer would only have limited substitute teaching work until October 26, 2020, we do not believe that the employer met its burden to show the claimant had a high probability of working under substantially similar economic conditions at any point prior to that date.

We, therefore, conclude as a matter of law that the employer has failed to sustain its burden to show that the claimant had reasonable assurance of re-employment for her substitute teaching position within the meaning of G.L. c. 151A, § 28A.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week of June 21, 2020, through October 24, 2020, if otherwise eligible.

N.B. The record indicates that the claimant sustained an injury on or around September 16, 2019, that may have impacted her ability to work. For this reason, we are asking the agency to investigate the claimant's eligibility for benefits under the provisions of G.L. c. 151A, § 24(b) as of that date. Additionally, the record indicates that the claimant applied for and received workers' compensation benefits following her injury in September 2019. For this reason, we are asking the agency to the claimant's eligibility for benefits under the provisions of G.L. c. 151A, § 25(d).

[1] Remand Exhibit 5E is part of the unchallenged evidence introduced at the hearing and placed into 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).
[2] Remand Exhibit 5F is also part of the unchallenged evidence introduced in the hearing and placed into the record.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 21, 2023

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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