

**As the economic terms of the employment offer made to the claimant for the following academic semester reflected a 50% cut in earnings, this offer was insufficient to provide the claimant with reasonable assurance of re-employment under G.L. c. 151A, § 28A. The review examiner erred in excluding the wages from this employer on the grounds that the claimant had received reasonable assurance from another educational employer. The claimant is entitled to a weekly benefit amount for all wages paid during her base period for which she did not have reasonable assurance, including those wages paid by the instant employer.**

**Board of Review  
100 Cambridge Street, Suite 400  
Boston, MA 02114  
Phone: 617-626-6400  
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.  
Chairman  
Charlene A. Stawicki, Esq.  
Member  
Michael J. Albano  
Member**

**Issue ID: 0080 3196 46**

### 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 we affirm in part and reverse in part.

The claimant filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 22, 2023. 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 August 16, 2023. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that one of the claimant's educational employers had provided the claimant with reasonable assurance of re-employment in the subsequent academic term and, thus, she 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 was not entitled to benefits based on her wages from the instant employer even though it did not provide her with reasonable assurance of re-employment because the DUA found the claimant's other educational employer had provided her with reasonable assurance, 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. The claimant filed an initial claim for unemployment benefits effective for 5/29/2022.

2. The Base Period of the claimant's claim was from 4/1/2022 through 3/31/2023.
3. During the Base Period of the claimant's claim, she worked for four employers, one of which was the instant employer.
4. Based on the wages paid to the claimant during the base period of this claim, including the school wages, it was determined that the claimant was monetarily eligible to receive weekly benefits in the amount of \$976.00 with an earnings exclusion of \$325.33, totaling \$1,301.33.
5. Two Base Period employers, including the instant employer, were educational institutions. The two additional employers were not educational institutions.
6. Based on the wages paid to the claimant during the base period of this claim, excluding the school wages, it was determined that the claimant was monetarily eligible to receive weekly benefits in the amount of \$149.00 with an earnings exclusion of \$49.67, totaling \$198.67.
7. The claimant has worked as a part-time faculty member, an adjunct professor for the instant employer, a community college, since 2004.
8. The claimant typically teaches speech communications related courses.
9. The claimant is paid \$4,500.00 for each course she teaches.
10. Adjunct faculty members are required to complete an availability form which includes which campuses the member is available to work; the days the member is available to work; the times the member is available to work; and their course preference.
11. The course could be cancelled a week prior to the start of the semester for several reasons including, but not limited to, low enrollment in the course or for budgetary reasons.
12. The claimant's scheduled courses are contingent on having what the employer deems to be sufficient enrollment.
13. The employer requires a minimum of 12 students per course. If enrollments fall below 12 students, the employer pays the claimant an unknown amount per student, not the \$4,500.00 course rate.
14. During the spring 2023, the claimant taught two courses.
15. On 5/15/2023, the assistant to the dean of humanities emailed the claimant with her tentative fall 2022 schedule that included one course. The course was offered to the claimant through the assistant with the authorization of the dean of humanities.

16. The claimant also worked as an adjunct professor during the 2022 – 2023 school year as an adjunct professor and it was determined that she had a reasonable assurance of returning to the same position for the 2023 – 2024 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 findings are supported by substantial and credible evidence; and (2) whether the review examiner’s 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. Further, while we believe that the review examiner’s findings of fact support the conclusion that the instant employer did not provide the claimant with reasonable assurance of re-employment for the subsequent academic year, we believe that the review examiner erred in denying the claimant benefits.

As a professional 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 . . . .

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. *See* Board of Review Decision 0016 2670 84 (Jan. 29, 2016). If it is determined that a claimant had reasonable assurance, her base period earnings from that position are excluded when calculating the claimant’s weekly benefit rate for the period between academic years.

In 2016, the U.S. Department of Labor (DOL) released guidance pertaining to the analysis of reasonable assurance for adjunct professors. In its Unemployment Insurance Program Letter (UIPL) 5-17 (Dec. 22, 2016), DOL set forth 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. Id. at part 4(c), p. 6.

On May 15, 2023, the employer sent the claimant a tentative assignment offering her one course in the fall semester of 2023. Finding of Fact # 15. In the previous semester the claimant had taught two courses, meaning the assignment offered by the employer represented a 50% decrease in the claimant's projected earnings. *See* Findings of Fact ## 9, 14, and 15. As the economic terms of the assignment offered by the employer for the fall semester of 2023 were considerably less than during the prior academic term, we agree with the review examiner's conclusion that the employer did not provide the claimant with reasonable assurance of re-employment.

Despite finding that the employer had not provided the claimant with reasonable assurance of re-employment, the review examiner concluded the claimant was not entitled to benefits under G.L. c. 151A, § 28A, because she had received reasonable assurance of re-employment from her other base period educational employer. Consolidated Finding # 16. This was an error.

As the claimant worked in an instructional capacity for multiple educational employers, UIPL 5-17 requires the DUA determine whether the claimant had received reasonable assurance of re-employment from *each* of the claimant's base period educational employers. *See* UIPL 5-17, part 4(d)(5). In consonance with this requirement, the Board has declined to have the outcome of one determination under G.L. c. 151A, § 28A, based on discrete services for one educational employer negate the outcome of the other determinations under the same section of law. *See, e.g.,* Board of Review Decision 0013 5095 61 (Jun. 11, 2015); *see also* UIPL 5-17, part 4(d)(5)(a). In other words, a determination that one of a claimant's educational employers did provide a claimant with reasonable assurance does not automatically result in a complete exclusion of all base period wages paid by each of the claimant's educational employers.

The claimant's UI Online profile confirms that she worked for four different employers during her base period: the instant employer, a second educational institution, and two other non-educational employers. In a separate issue, the DUA determined that the claimant's second educational employer had provided her with reasonable assurance of re-employment. Finding of Fact # 16. Pursuant to G.L. c. 151A, § 28A, the claimant's base period wages from that other educational institution cannot be used in calculating her weekly benefit rate. However, as discussed above, the DUA's decision to exclude the claimant's base period wages from her other educational employer does not extend to the base period wages paid by the instant employer. As the instant employer did not meet its burden to show that it provided the claimant with reasonable assurance of re-employment, the claimant is entitled to a weekly benefit amount during the period between academic terms based on the inclusion of her base period wages from the instant employer.

A review of the claimant's profile in UI Online, the DUA's electronic recordkeeping system, shows the instant employer paid the claimant gross wages totaling \$46,033.59 during her base period in addition to the \$14,103.32 in base period wages from the claimant's two non-educational employers. Accordingly, the claimant is entitled to a weekly benefit amount based upon gross base period wages of \$60,136.91.

We, therefore, conclude as a matter of law that the claimant did not receive reasonable assurance of re-employment for the subsequent academic period within the meaning of G.L. c. 151A, § 28A(a), in her position as an adjunct professor for the instant employer, and she is entitled to receive benefits during the relevant period based upon her base period wages paid to her for that position. We further conclude that G.L. c. 151A, § 28A(a), does not preclude the award of benefits based upon the claimant's other base period earnings for which she did not receive reasonable assurance.

The review examiner's decision is affirmed in part and reversed in part. For the week beginning May 28, 2023, and through September 2, 2023, the claimant is entitled to a weekly benefit amount based upon \$60,136.91 in base period wages, if she is otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - December 22, 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](http://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