Although the claimant was guaranteed a minimum of 12 hours of work per week for the subsequent academic year under a collective bargaining agreement, the record contained no evidence of the economic conditions of offered position. The minimum guarantee was actually a 30% reduction from what the claimant earned in the prior academic year. Held the terms of the collective bargaining agreement did not provide the claimant with reasonable assurance of re-employment under G.L. c. 151A, § 28A.

Board of Review
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Issue ID: 0082 7843 92

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, effective May 12, 2024, which was denied in a determination issued on June 6, 2024. 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 July 6, 2024. 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 for the subsequent academic year, and, thus, she was not eligible for benefits 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 as a part-time Professor of Voice for the fall academic term pursuant to G.L. c. 151A, § 28A, because her contract guaranteed her a minimum of 12 hours of pay, 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. In 2011, the claimant began working as a part-time Professor of Voice for this employer's music college.

2. The claimant continues to work for this employer as a contracted part-time Professor of Voice with her current contract in effect from 9/1/23 through 5/31/26.

3. Under the terms of her currant teaching contract, the claimant works 12–17 hours per week during the academic year or term with 12 hours of work or pay guaranteed.

4. On 5/10/24, the claimant stopped working due to the usual period of summer break.

5. In past years, the claimant has frequently worked during the summer months if the claimant wanted to work extra hours and such hours were available.

6. There is no guarantee of hours during the period of summer break.

7. Due to low enrollment for summer classes, the claimant was told that summer work was not available in 2024 for either the 12-week or 5-week programs the claimant had worked in past summers.

8. In all communications with employer management in 2024, the claimant was assured that she would be returning to work during the academic year under the same terms as reflected in her current three-year contract.

9. On 5/13/24, the claimant filed a claim for unemployment benefits effective 5/12/24. The claimant reopened this claim effective 6/2/24.

10. The claimant has no non-school base period employment.

11. On 6/6/24, the claimant was sent a Notice of Disqualification for the period beginning 5/12/24 through 8/31/24 because she had both a contract and reasonable assurance of ongoing work following the usual period of summer break.

12. The claimant requested a hearing.

13. The claimant is expected to return to work when classes resume following the summer break period.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is not entitled to benefits.

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 . . . .

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. *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 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. "Considerably less" means that the claimant must earn at least 90% of the amount she earned in the prior academic period. Id. at part 4(a)(3), p. 5. If the employer's offer meets these criteria, we consider whether the offer includes a contingency. If it does, 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 in the next academic period. *See* Id. at part 4(c), p. 6.

On appeal, the claimant argues that the review examiner misapplied the law because he failed to consider the claimant's eligibility based on her wages from her previous work in the summer program. We agree. However, as discussed below, the review examiner made a superseding error in conducting the reasonable assurance analysis.

The claimant is working for the instant employer under a three-year contract as a part-time Professor of Voice. Finding of Fact # 2. Because this contract includes the 2024–2025 academic year, its terms appear to create an implied offer of reemployment for said academic year. However,

the employer has not shown that the economic terms of this offer are not considerably less than the terms of the claimant's position in the previous academic year.

In assessing the economic conditions of an offer of re-employment, DOL guidance requires that we compare the terms of the offer to the claimant's actual earnings from the previous academic year or term. UIPL 5-17 at part 4(a), pp. 4–5. The claimant in this case was guaranteed a minimum of 12 hours a week during the 2023–2024 academic year. *See* Finding of Fact # 3. However, those were not the economic conditions under which she actually worked.

The claimant's uncontested testimony was that she worked approximately 17 hours a week.[1] As the claimant is paid hourly, her earnings during that period were based upon approximately 17 hours of work per week. *See* Finding of Fact # 3. Therefore, those hours and corresponding earnings are the economic conditions we must use in assessing whether the employer offered the claimant reasonable assurance of re-employment for the 2024–2025 academic year.

As discussed above, the employer has shown it provided the claimant with an implied offer of re-employment for a minimum of 12 hours per week. *See* Finding of Fact # 3. However, such a guarantee represents a reduction of approximately five hours of work per week, or an approximately 30% reduction in wages, when compared to the claimant's actual earnings during the 2023–2024 academic year. Because the employer made no offer beyond the contractually guaranteed minimum for the 2024–2025 academic year, it did not show that it provided the claimant with an offer of re-employment under economic conditions that were at least 90% of the claimant's earnings in the previous academic year.

We, therefore, conclude as a matter of law that the employer did not meet its burden to show it provided the claimant with reasonable assurance of re-employment for the subsequent academic year 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 May 12, 2024, through August 31, 2024, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 27, 2024

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

[1] The claimant's uncontested testimony in this regard, while not explicitly incorporated into the review examiner's findings of fact, is part of the unchallenged evidence introduced at the hearing and placed in to 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).

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