EO: 200
BYE: 202111

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

483
SE 005.00

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0798

Reversed & Remanded

PROCEDURAL HISTORY: On November 13, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was denied unemployment insurance benefits from June 14, 2020 through September 5, 2020, a school recess period, because she was likely to return to work for the employer after the break, and her wages and/or hours with other employers were not sufficient to entitle her to benefits during the break (decision # 140721). Claimant filed a timely request for hearing. On December 15, 2020, ALJ Frank conducted a hearing, and on December 17, 2020 issued Order No. 20-UI-157819, affirming decision # 140721. On December 21, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's written argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

However, the parties may offer new information, such as the new information included with claimant's written argument, into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing of the notice of hearing.

FINDINGS OF FACT: (1) On April 7, 2020, claimant filed an initial claim for unemployment insurance benefits, effective March 22, 2020. The Department established claimant's base year as the fourth quarter of 2018 through the third quarter of 2019.

(2) During claimant's base year, claimant worked for Archdiocese of Portland, which was an educational institution. Claimant did not earn any non-school wages during the base year. The

Department determined that claimant had a monetarily valid claim with a weekly benefit amount of $151.00.

(3) During the 2019 – 2020 academic year, claimant worked for the employer as the hot lunch director, a non-instructional role, working an average of about 14 hours per week at $13.20 per hour. Claimant's gross earnings from this work exceeded her weekly benefit amount during at least one week of the 2019 – 2020 academic year. Prior to the end of the 2019 – 2020 academic year, claimant intended to return to work for the employer at the start of the 2020 – 2021 academic year, but did not know if work would be available to her because of school closures related to the COVID-19 pandemic.

(4) The employer's recess period between the 2019 – 2020 and 2020 – 2021 academic years was from June 14, 2020 through September 5, 2020 (weeks 25-20 through 36-20).

(5) Claimant claimed and was paid benefits for the weeks from June 14, 2020 through August 22, 2020 (weeks 25-20 through 34-20).

(6) On August 11, 2020, the employer sent a signed "letter of intent" form to claimant, indicating that claimant would be returning to work, in the same role and at a higher rate of pay, for the 2020 – 2021 academic year. Exhibit 1 at 5. For the prior academic year, the employer had sent the signed form to claimant about two months earlier, on June 17, 2019. Exhibit 1 at 4.

(7) Claimant began working for the employer again for "a few hours" on August 26, 2020, and then resumed her regular schedule on September 1, 2020. Audio Record at 18:15.

CONCLUSIONS AND REASONS: Order No. 20-UI-157819 is set aside and this matter remanded for further development of the record.

ORS 657.221(1)(a) prohibits benefits based upon services for an educational institution performed by a non-educational employee from being paid "for any week of unemployment that commences during a period between two" terms "if the individual performs such services in the first academic term" and "there is a reasonable assurance that the individual will perform any such services in the second" term. That law applies when the individual claiming benefits "was not unemployed," as defined at ORS 657.100, during the academic term prior to the term break, regardless whether claimant's position observed between-term recess periods. In sum, the conditions that must be met for the between-terms school recess denial to apply to claimant are these: (1) the weeks claimed must commence during a period between two academic terms; (2) claimant must not have been "unemployed" during the term prior to the recess period at issue; and (3) there is reasonable assurance of work during the term following the recess period at issue.

ORS 657.100 provides that an individual is "unemployed" if there are no earnings, or the earnings are less than the individual's weekly benefit amount. OAR 471-030-0074(3) (January 5, 2020) provides:

> (3) ORS 657.167 and 657.221 apply when the individual claiming benefits was not unemployed, as defined by ORS 657.100, during the relevant period in the preceding academic year or term. The relevant period is:

> * * *
>
> (b) The prior academic year or term when the week(s) claimed commenced during a customary recess period between academic terms or years, unless there is a specific agreement providing for services between regular, but not successive terms.
>
> * * *

At issue in this matter is whether claimant's circumstances during the weeks at issue meet the requirements of ORS 657.221(1)(a), as discussed above. If those requirements are met, the Department is prohibited from paying benefits to claimant for the weeks at issue. The evidence in the record shows that claimant was "not unemployed," per ORS 657.100 and OAR 471-030-0074(3), because she earned more than her weekly benefit during at least one week of the prior academic term. The evidence in the record also shows that claimant claimed benefits for weeks during the period between the employer's two successive academic years. This matter therefore turns on whether claimant had reasonable assurance, within the meaning of OAR 471-030-0075, that she would be returning to work following the end of the break between academic years.

OAR 471-030-0075 (April 29, 2018) states:

> (1) The following must be present before determining whether an individual has a contract or reasonable assurance:
>
> (a) There must be an offer of employment, which can be written, oral, or implied. The offer must be made by an individual with authority to offer employment.
>
> (b) The offer of employment during the ensuing academic year or term must be in the same or similar capacity as the service performed during the prior academic year or term. The term 'same or similar capacity' refers to the type of services provided: i.e., a 'professional' capacity as provided by ORS 657.167 or a 'nonprofessional' capacity as provided by ORS 657.221.
>
> (c) The economic conditions of the offer may not be considerably less in the following academic year, term or remainder of a term than the employment in the first year or term. The term 'considerably less' means the employee will not earn at least 90% of the amount, excluding employer paid benefits, than the employee earned in the first academic year or term, or in a corresponding term if the employee does not regularly work successive terms (i.e. the employee works spring term each year).
>
> * * *
>
> (3) An individual has reasonable assurance to perform services during the ensuing academic year, term, or remainder of a term when:

(a) The agreement contains no contingencies within the employer's control. Contingencies within the employer's control include, but are not limited to, the following:

(A) Course Programming;

(B) Decisions on how to allocate available funding;

(C) Final course offerings;

(D) Program changes;

(E) Facility availability; and

(F) Offers that allow an employer to retract at their discretion.

(b) The totality of circumstances shows it is highly probable there is a job available for the individual in the following academic year or term. Factors to determine the totality of the circumstances include, but are not limited to:

(A) Funding, including appropriations;

(B) Enrollment;

(C) The nature of the course (required or options, taught regularly or sporadically);

(D) The employee's seniority;

(E) Budgeting and assignment practices of the school;

(F) The number of offers made in relation to the number of potential teaching assignments; and

(G) The period of student registration.

(c) It is highly probable any contingencies not within the employer's control in the offer of employment will be met.

The order under review concluded that, because OAR 471-030-0075 defines "reasonable assurance" to include offers of employment that are written, oral or implied, "the preponderance of the evidence . . . shows that the expectation of claimant's return met this standard prior to, and during, the period dividing school years." Order No. 20-UI-157819 at 5. However, the record does not support that conclusion.

Broadly, OAR 471-040-0075(3) requires three separate findings in order to conclude that an individual had reasonable assurance of returning to work after the break period: the "agreement" (i.e., offer of work) must not be contingent upon any factors within the employer's control; the totality of the circumstances shows that it is "highly probable" that the individual will have a job following the break; and it is "highly probable" that any contingencies not within the employer's control, and upon which the offer of work was made, will be resolved.

The record shows that the employer offered claimant an opportunity to return to work after the break; that she accepted the offer; and that she ultimately did return to work after the break. Although this evidence is relevant to the determination of whether claimant had reasonable assurance, it is insufficient without further inquiry into all three of the factors required by OAR 471-040-0075(3). For instance, claimant offered into evidence two "letters of interest" to show that, while in prior years the employer had made a written offer to claimant at or before the end of the closing academic year, in 2020 the employer did not make such an offer until nearly the start of the new academic year. Exhibit 1 at 4 to 5. The employer's witness testified that ". . . through the month of July [2020]," the employer had expected to start school "as normal" once the new academic year began; that when the Governor issued an order mandating distance learning, the school was required to reconfigure their program, casting uncertainty on their plans; and that they once again began planning to reopen sometime in August 2020. Audio record at 18:50 to 19:30.

The record should be developed further to explore the contours of the circumstances which, at various points throughout the summer of 2020, made it seem more or less likely that claimant would have a job to return to at the start of the new academic year. Inquiry should therefore be directed towards the significance, if any, of the employer's delay in returning the "letter of interest" to claimant, as well as the effects that pandemic-related government mandates on educational institutions had on the employer's need for claimant to return to work. Inquiry should likewise be directed toward any other circumstances described in Exhibit 1 which would contribute to the totality of the circumstances to be considered under OAR 471-030-0075(3)(b).

The record should also be developed further to ascertain any contingencies upon which claimant's offer of work was made. To the extent that any such contingencies—such as changing legal requirements resulting from the pandemic—were not within the employer's control, the inquiry and analysis must also focus on whether it was highly probable that those contingencies would be met.

Finally, as discussed above, the evidence in the record demonstrates that the employer's certainty in whether they would reopen in the new academic year—and, by extension, whether claimant would return to work—appeared to waver throughout the summer of 2020. Accordingly, even if the record on remand shows that claimant had reasonable assurance, it must also be developed to show *when* claimant gained reasonable assurance. *See Nickerson v. Employment Department*, 250 Or App 352, 280 P3d 1014 (2012) (school recess law "uses the present tense: a claimant is disqualified during recess periods in which 'there *is* a reasonable assurance' of employment in the next year"; there is no provision in the law "allowing the department to deny benefits that, having been earned (in the sense of having been qualified for), are later declared to be unearned due to changed circumstances"). Thus, based on the evidence in the record, it is for instance possible that claimant had reasonable assurance at one point

during the summer, lost it, and then regained it. The record on remand should therefore be sufficiently developed to determine during which specific weeks, if any, claimant had reasonable assurance, and when, if at all, she lost it.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether, and when, claimant had reasonable assurance of returning to work after the break period, Order No. 20-UI-157819 is reversed, and this matter is remanded.

DECISION: Order No. 20-UI-157819 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Alba and D. P. Hettle.

DATE of Service: January 26, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-157819 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.

Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。 如果您不明白本判決， 請立即聯繫就業上訴委員會。 如果您不同意此判決，您可以按照該判決結尾所寫的說明， 向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab