EO: 200
BYE: 202126

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

688
SE 005.00

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0015

Reversed & Remanded

PROCEDURAL HISTORY: On November 18, 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, during the break between her school employer's academic years, because claimant was likely to return to work for that employer after the break and her wages and hours with other employers were insufficient to entitle her to benefits during the break (decision # 135320). Claimant filed a timely request for hearing. On December 15, 2020, ALJ Scott conducted a hearing, and on December 17, 2020 issued Order No. 20-UI-157805, concluding that claimant was eligible for benefits for the period June 28, 2020 through August 22, 2020. On January 6, 2021, the Department filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: Order No. 20-UI-157805 stated, as an evidentiary ruling: "Exhibit 1, offered by claimant, was admitted into evidence without objection."[1] However, the case record contains only "Record" documents, does not contain any document marked as "Exhibit 1," and the parties stated and the beginning of the hearing that they did not submit any documents for inclusion into evidence. Audio Record at 8:00 to 8:45. For those reasons, it appears that the evidentiary ruling was made in error.

WRITTEN ARGUMENT: EAB considered the parties' written arguments to the extent they were based on the hearing record.

However, the parties may offer new information, such as the new information included in 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

[1] Order No. 20-UI-157805 at 1.

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 for the notice of hearing.

FINDINGS OF FACT: (1) On June 30, 2020, claimant filed an initial claim for unemployment insurance benefits. The Department established claimant's base year as April 1, 2019 through March 31, 2020.

(2) During claimant's base year, claimant had two employers. One of claimant's employers was Portland Jewish Academy (PJA), which was an educational institution. Claimant also earned non-school wages during her base year from a second employer, Yankee Candle Company. The amount of non-school wages claimant earned was insufficient alone to establish a monetarily valid claim. However, the Department determined that based on wages from both employers, claimant had a monetarily valid claim with a weekly benefit amount of $398.

(3) PJA's break period between the 2019-2020 and 2020-2021 academic years was June 12, 2020 through September 4, 2020 (weeks 25-20 through 36-20). Claimant claimed and received benefits for each of the weeks from June 28, 2020 through August 22, 2020 (weeks 27-20 through 34-20).

(4) During the 2019-2020 academic year, PJA employed claimant as a "safe keeper" in PJA's Early Childhood Education Program, a position the employer considered a "teacher/floater" position within that program. Transcript at 28. Claimant was "teacher qualified" and considered herself "a teacher," even though she taught "one-year olds" in a day-care setting. Transcript at 19. Claimant typically worked full-time and year-round for the employer. Transcript at 19, 23. She was paid a wage of approximately $16.00 per hour. Claimant earned more than $398 from PJA during at least one week of the 2019-2020 academic year.

(5) On or about July 1, 2020, claimant was one of a number of teachers that were "furloughed" due to the COVID-19 pandemic. Transcript at 20. PJA did not completely close its Early Childhood Education Program but its enrollment declined considerably due to the pandemic. On or about that same day, PJA told claimant that her work would resume on August 24, 2020.

(6) On August 24, 2020, claimant returned to work for PJA in the "safe keeper" position. She performed the same duties she had prior to being furloughed but was given additional duties related to sanitizing and disinfecting her work environment. She was paid a wage of approximately $16.60 per hour upon her return.

CONCLUSIONS AND REASONS: Order No. 20-UI-157805 is set aside and this matter remanded for further development of the record.

As a preliminary matter, Order No. 20-UI-157805 found and concluded that claimant worked for PJA in a "non-instructional" capacity because she worked in the employer's day-care division caring for one-year-old children. Order No. 20-UI-157805 at 1, 3. However, the record does not support that conclusion. Claimant asserted that she was "teacher qualified," and both claimant and the employer considered claimant a "teacher." The Department's witness asserted that the Department concluded that claimant was an "instructional" employee and evaluated her claims for benefits as such. Transcript at 6.

The preponderance of the evidence in the record shows that claimant performed services for the employer in an instructional capacity. Accordingly, claimant's claims for benefits are analyzed under ORS 657.167.

ORS 657.167(1) and (2) prohibit benefits based upon services for an educational institution performed in an instructional, research or principal administrative capacity from being paid "for any week of unemployment commencing during the period between two successive academic years or" terms, "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 institution in the second of such academic years or terms." 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. The provisions of ORS 657.167 apply regardless of whether or not the individual performed services only during an academic year or in a year-round position. OAR 471-030-0074(4) (January 5, 2020).

Order No. 20-UI-157805 found that claimant worked for an educational employer during claimant's base year, that the weeks claimed commenced during the break between the employer's two academic years, and that claimant was not unemployed during the term prior to the break period at issue. Order No. 20-UI-157805 at 1-3. The preponderance of the evidence in the record supports those findings. However, the order concluded that although claimant was off work and sought benefits during her educational employer's customary break period, OAR 471-030-0074(4) did not apply because she was furloughed due to the pandemic rather than because it was customary for her to be off work during the break period and the rule did not anticipate such furloughs or layoffs. Order No. 20-UI-157805 at 3-4. However, that conclusion is inconsistent with the plain language of OAR 471-030-0074(4), is not supported by the record, and for those reasons, Order No. 20-UI-157805 should be set aside, at least in that part.

Order No. 20-UI-157805 also concluded that although the record showed that claimant had reasonable assurance of returning to work after the "furlough," because it did not show that she had reasonable assurance of returning to work "after the customary recess period," the record failed to show that claimant had "reasonable assurance" as required under statute. Order No. 20-UI-157805 at 4. However, the record was not sufficiently developed to support a conclusion that claimant had "a contract or a reasonable assurance" of work during the term following the recess period at issue as required by ORS 657.167(1) and OAR 471-030-0075 (April 29, 2018), and must be remanded for that reason.

The record fails to show that the provisions of OAR 471-030-0075 were addressed or even considered at the December 15, 2020 hearing. OAR 471-030-0075 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.

First, the record fails to clearly show when claimant received an offer of employment that was scheduled to begin on August 24, 2020, and whether it was written or oral. It also fails to show whether the economic conditions of the offer were considerably less in the 2020-2021 academic year than the employment in the 2019-2020 academic year. Although the record shows that claimant worked at the same or a slightly greater wage on and after August 24, 2020 than she did before her furlough, it fails to show a comparison of the hours worked during those two periods. The record needs to be developed to determine whether the employer's work offer met the requirements of OAR 471-030-0075(1)(c).

The record also fails to show whether the offer claimant received provided claimant with "reasonable assurance" as required by ORS 657.167(1). Broadly, OAR 471-040-0075(3) requires three separate findings to conclude that an individual had reasonable assurance of returning to work after the break period: the "agreement" (i.e., the 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 on August 24, 2020, during PJA's break period, that she accepted the offer, and that she ultimately did return to work at that time. Although this evidence is relevant to the determination of whether claimant had reasonable assurance, it is insufficient to show claimant had reasonable assurance that she would perform services during the 2020-2021 academic year without further inquiry into all three of the factors required by OAR 471-040-0075(3).

The record fails to show whether the offer extended to claimant contained any contingencies within the employer's control such as those listed in OAR 471-040-0075(3)(a). In that regard, the record must be developed regarding the terms of the offer, whether it was extended in letter or other printed form, and the nature of any discussion that occurred when the offer was made, to determine whether any contingencies within the employer's control regarding continuing employment were mentioned.

The record also needs to be developed with regard to whether the totality of circumstances showed that it was highly probable there would be a job available for claimant during the 2020-2021 academic year considering the factors listed in OAR 471-040-0075(3)(b). For example, the Department's witness presented evidence that claimant had stated in response to a Department inquiry about any difference in

the offer of work she received from those of previous years that, "the contingencies are related to the attendance of kids." Transcript at 10-11. The Department's witness then added, "That's not something that the Employer has control over, so that's not something that we're looking at." Transcript at 11. However, OAR 471-040-0075(3)(b)(B) specifically lists "enrollment" as a factor to be considered when determining whether the totality of the circumstances showed that it was highly probable there would be a job available for claimant during the following academic year. It also lists potentially related factors such as "funding," "budgeting," and "the number of offers made in relation to potential teaching assignments." Sufficient inquiry must be made regarding those factors to determine whether the totality of circumstances showed that it was highly probable there would be a job available for claimant during and for how much of the 2020-2021 academic year.

The record also needs to be developed regarding whether it was "highly probable" that any contingencies not within the employer's control, and upon which the offer of work was made, would be resolved in accordance with OAR 471-040-0075(3)(c). The record fails to show what effects, if any, pandemic-related government mandates on educational institutions had on the employer's need for claimant to return to work. Inquiry should therefore be directed toward any other circumstances regarding pandemic-related government mandates on educational institutions which would contribute to the totality of the circumstances to be considered under OAR 471-030-0075(3)(c). To the extent that any contingencies—such as changing legal requirements resulting from the pandemic—were *not* within the employer's control, inquiry and analysis must also focus on whether it was "highly probable" that those contingencies would be met.

Lastly, although PJA offered claimant an opportunity to return to work on August 24, 2020, which she accepted, the record must be clarified with regard to *when* that offer was made. *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"). When asked at hearing whether "on or about July 1, 2020" claimant knew she would be returning to her job, claimant responded, "Yeah, I knew." Transcript at 23. Although the Department typically determines an individual's eligibility for benefits on a week-to-week basis, there is no law under which the Department may find an individual both eligible and ineligible for benefits within a single week. The *Nickerson* court also determined that there is no law under which benefits "earned (in the sense of having been qualified for)" during the first part of the week may be retroactively "declared to be unearned" due to a claimant's changed circumstances later in the week, namely, receipt of a mid-week job offer. Here the record appears to show that having begun week 27-20 (June 28, 2020 to July 4, 2020) without reasonable assurance, claimant may have received reasonable assurance later during that week, "on or about July 1, 2020." Without clarification regarding the actual date on which the employer's offer was received, it cannot be determined whether or not claimant had reasonable assurance during week 27-20.

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, and whether the economic conditions of any employment offer claimant received met the requirements of OAR 471-030-0075(1)(c), Order No. 20-UI-157805 is reversed, and this matter is remanded.

DECISION: Order No. 20-UI-157805 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Alba and D. P. Hettle.

DATE of Service: February 11, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-157805 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