STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

v.
Summerwind Jewelers & Goldsmiths
CASE #62108

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Sara Sargent, representing the employer

NATURE OF DISPUTE: RSA 275:43, I & V— Weekly (unpaid wages/vacation pay/holiday pay)

DATE OF HEARING: April 21, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed on February 1, 2021, alleging she is owed a separation payout for unused vacation and holiday pay, which the employer refused to pay because she did not provide advance notice. Notice of claim was sent to employer on February 2, 2021. The employer's objection was received on February 11, 2021. The claimant requested a hearing and a notice of hearing was sent on March 17, 2021. Both parties participated remotely by telephone under a standing order of the Department, necessitated by COVID-19.

FINDINGS OF FACT

The following findings are based on the testimony of the claimant, employer's witnesses Sara Sargent and Melvin Reisz, exhibits and written statements offered by both parties, and matters of record in the Department file. Both parties acknowledged under oath that their written submissions to the Department were true and accurate, and those statements are treated herein as part of the testimony in the case.

Claimant is 31 years old and lives in Manchester with her husband and infant daughter. She has a bachelor's degree in fine arts from the New Hampshire Art Institute, awarded in 2009. Before working for the employer, she

worked for another jewelry retailer for three years, and before that, in retail for two to three years.

The employer has a jewelry store in Portsmouth. Sara Sargent is the manager. She has a bachelor's degree in art history and is a graduate gemologist. The store is a sole proprietorship owned by Melvin Reisz; Ms. Sargent is his daughter. Mr. Reisz started the business in 1972 in Perkins Grove, Ogunquit, Maine. He opened a second store in Portsmouth and eventually closed the Perkins Grove one. He is formally retired and his daughter runs the business. It has four employees, including Ms. Sargent.

In July 2019, the employer interviewed the claimant for a position as a fulltime salesperson. Another employee in the store had recommended her. The interview was with Ms. Sargent and Mr. Weisz and other current employees. Mr. Weisz testified that he informed the claimant that a two-week notice of separation would be expected. He acknowledged that he did not specifically tell her what the consequences would be for leaving the company without sufficient notice. Claimant did not recall whether notice was discussed in the interview, but she said she was certain that forfeiture of vacation and holiday time was not discussed.

On July 26, 2019, the employer sent the claimant a formal offer letter. The letter described the terms of employment and benefits. In pertinent part, it stated,

> Your paid benefits begin after the probationary period of 13 full-time weeks. There is no waiting period to use benefits until the end of the first year, which is quite unusual in the business world. If you leave this business, for any reason, benefits will be prorated, because they are earned as you work. Your first year benefits are 40 hours of vacation, 40 holiday hours, 24 sick hours, and 16 personal hours.

(Claimant's exhibit, emphasis added.)

In the offer letter, there was a reference to two-weeks' notice:

> I would like your first day to be Wednesday, August 14th. The day will begin with our weekly staff meeting at 9AM, and you will be here for the full day. You should plan to work Thursday, Friday, and Saturday (full days) as well that week and we will establish the remainder of your August schedule soon after you start. As an aside, I understand that you would like to give your current employer two weeks' notice, which is professional and appropriate. However, you may be aware it is sometimes customary in the jewelry industry to let people go immediately upon receiving notice. This is not always the case, but should it occur, you are welcome to begin your job here at Summerwind as soon as you become available.

(Emphasis added.)

The letter also explained that extra demands were placed upon employees during the holiday season, Thanksgiving through December:

> Please be aware that you must be available as needed between Thanksgiving and Christmas. Vacations are to be taken at other times of the year. The jewelry industry is highly dependant [sic] on the income in December and all employees are expected to work whatever hours are needed, including overtime, during that critical period of the year. We are open most evenings and Sundays in December and you will be required to work some of those.

(Emphasis in original.)

Ms. Sargent testified that the terms of employment set forth in the offer letter were accurate, adding that the letter did not cover all the potential issues regarding separation from employment. She also testified that no other written document had been provided to the claimant advising her of changes or additions to the terms contained in the letter.

Claimant started work on August 14, 2019. She generally worked a 40-hour week. The store could not operate with fewer than two employees on duty at all times. The employer posted monthly work schedules in the store, showing which employees worked on each day the store was open. Weekly pay periods ran from Sunday to Saturday and pay day was on the following Thursday. Claimant was paid by direct deposit. By the end of 2020, her hourly rate of pay was $17.00.

Claimant testified that in the fall of 2020 she and her husband were living in a leased apartment in Somersworth. There were problems with the neighbors and they very much wanted to find another place. They intended to stay in the area. Claimant was also expecting a baby in February. She testified that it was her intention to continue working for the employer after taking a three-month unpaid maternity leave.

Claimant worked the Sunday, Tuesday, Wednesday and Thursday before Christmas Day. The store was closed on Christmas Day. After Christmas Day, claimant was scheduled to work December 26–29 and New Year's Eve.

Claimant testified that, on Christmas Day, she was visiting her family in Manchester. They were discussing her living situation. Much to her surprise, the family offered to let her and her husband move in with them at their house in Manchester. The rent would be less than she was paying in Somersworth. She and her husband found the opportunity too good to pass up, considering that she was due in February and that she would be with family to help with the new baby. To avoid being required to pay January rent for the Somersworth apartment, they needed to make the move by the end of December.

Claimant testified that she determined it would not be feasible for her to commute from Manchester to Portsmouth and that she would have to resign from her job right away. So, on the afternoon of Christmas Day, she sent a text

message to her manager Ms. Sargent and to the owner Mr. Reisz, to let them know of her decision.

Ms. Sargent still had the text message on her telephone, and without objection from the claimant, she read it into the record. In the message, claimant apologized for "the terrible timing" but said that "an immediate opportunity to relocate closer to family and get ready for the baby" had arisen suddenly and she could not refuse it under the circumstances; therefore, she was tendering her resignation, effective immediately.

In her written response to the claim, Ms. Sargent stated that, as a consequence of claimant's sudden resignation, the company had to scramble to obtain coverage for the days on which claimant was scheduled to work after Christmas; the company ended up paying extra overtime to do so. On Sunday December 27, the store was unable to open at all because no other staff member was available on such short notice to make up the required two-person cohort.

It is understood that the claimant did not return to the employer's workplace after December 24, 2020. In a January 8, 2021 email to the claimant, Mr. Reisz noted that the claimant had cleared out her personal possessions before she left on her last day at work. (Claimant's exhibit.)

Claimant received her final week's pay on December 31, 2020, covering the pay period December 20–26, 2020. She was paid for the four days she worked during that period. The pay stub indicated that she had a balance of 40 vacation hours and 15.50 holiday hours. (Claimant's exhibit.) The cash value of Claimant's accumulated benefits was (40 hr +15.50 hr) x $17.00/hr = $943.50. Ms. Sargent conceded that the unused vacation and holiday balances shown on the final paystub were accurate.

In early January, claimant emailed the employer, requesting a payout of her unused vacation and holiday time. In a reply email, Mr. Reisz refused the request, stating that, by not providing two weeks' notice, the claimant had forfeited the right to those benefits. (Claimant's exhibit.) At the hearing, Mr. Reisz testified that, if claimant had given two weeks' proper notice, she would have been paid two weeks of severance, plus paid for any unused benefit hours.

Asked how this type of situation had been handled in the past, Ms. Sargent testified that, to the best of her recollection, no employee had ever left without giving two weeks' notice. She was certain the claimant was aware the store expected two weeks' notice from all employees, but she did not believe she had ever discussed with the claimant the consequences for leaving without advance notice.

DISCUSSION AND CONCLUSIONS

The claimant had the burden of proving by a preponderance of the evidence that she was owed unpaid wages. Proof by a preponderance as defined in Lab 202.05 is a demonstration by admissible evidence that a fact or legal conclusion is more probable than not. The hearing officer is charged with evaluating the testimony and exhibits in the case and deciding the issues presented, based upon "reliable, probative, and substantial evidence," Department Rule Lab 204.07(n).

RSA 275:43, V provides that

> Vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, when such benefits are a matter of employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, when due.

"[W]hen due" is a reference to specified contingencies the employee needs to meet in order to be eligible to receive the benefit in question.

In her written response to the instant claim, Ms. Sargent declared,

> [O]ur business has no formal or written policy on paying out unused benefits at the end of employment, other than that they are "prorated." Specifics as to what this meant are not given, and in the past, this has been at our discretion. In some cases, if an employee has overused benefit hours, they have actually had this taken out of their final paycheck to appropriately compensate the store for receiving unearned paid time off. We have based whether to pay earned but unused hours on the employee's performance and contribution to the business, length of employment, and the circumstances of termination or resignation, among other factors. Employees who are let go are typically paid severance, employees who quit are not. Earned but unused benefit hours are paid out, in addition to the full two weeks' notice or severance pay (regardless of whether the employee actually works those hours), to employees who leave on good terms, employing the customary professional courtesies regarding their departure.

Elsewhere in the response, she stated,

> As noted above, there is no written policy as to whether we will or will not pay an employee upon their resignation or termination for unused benefit hours, and NH has no law on the books requiring us to a) have such a policy in place or b) pay out these benefit hours, unless a policy exists (or if one does not).

The claimant countered that, based on the plain language of the offer letter, she reasonably believed that her unused benefits would be paid on a prorated basis if she left the business for any reason, she was never told that the company required two weeks' notice as a matter of policy or practice; more specifically, she was never informed that if she did not give two weeks' notice, she would forfeit a payout for any unused vacation or holiday time.

In this regard, RSA 275:49 (Notification, Posting, and Records) provides, in pertinent part,

> Every employer shall: ***
>
> III. Make available to his or her employees in writing or through a posted notice maintained in a place accessible to his or her employees employment practices and policies with regard to vacation pay, sick leave, and other fringe benefits;

Department administrative rule Lab 803.03 (Notification and Records) further provides that:

> (b) Every employer shall provide his or her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses, severance pay, personal days, payment of the employee's expenses, pension, and all other fringe benefits per RSA 275:49.
> * * *
> (f) Pursuant to RSA 279:27 and RSA 275:49, VI, relative to record keeping requirements, every employer shall:
> * * *
>
> (6) Maintain on file a signed copy of the written notifications, signed by the employee and provided to each employee as required by Lab 803.03 (a), (b), and (c) above.

Compliance with the statute and the implementing regulation gives an employer a ready means of resolving disputes such as the present one. The employer admitted that it had no formal, written policy and that the offer letter correctly stated its policies, as far as it went.

The offer letter is not a model of clarity with regard to the company's policies regarding notice upon separation and eligibility for payout of unused vacation and holiday time.[1] Although it refers to two-week notice as being "professional and appropriate," that reference is in the context of discussing what claimant's current employer might do; the letter does not come right out and say that the employer requires two weeks' notice. Just as importantly, there is no mention of notice in the portion of the letter dealing with benefits upon separation: "If you leave this business, for any reason, benefits will be prorated, because they are earned as you work." Immediately following that is the description of paid vacation and holiday benefits without any suggestion that these benefits are conditioned upon providing notice.

An employer's failure to follow this the statute and the implementing rule does not relieve the claimant of her burden of proving entitlement to the benefit in question. However, in this case, the claimant met that burden. The offer letter stated without qualification that, on separation for any reasons, the claimant would receive prorated benefits. Nowhere did the letter state that it was the employer's policy to require two weeks' notice, or that failure to give two weeks' notice would result in forfeiture of unused vacation and holiday time. Even if the

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[1] Ms. Sargent testified that, in light of the experience with the claimant, she recently changed the terms of the company's job-offer letter more explicitly to state the terms of the employer's policy as regards two-weeks' notice and the consequences for not providing it. She was advised that this remedial measure was a good employment practice but the information would have no bearing on the instant case, and it did not.

employer verbally informed the claimant in her interview that two weeks' notice was expected, as Mr. Weisz testified, there was no evidence that the claimant was informed that failure to give adequate notice would result in forfeiture of her unused vacation and holiday time.

The claimant's testimony that the unexpected opportunity to move to Manchester arose on Christmas Day is rendered suspect by the uncontested evidence that she cleared out her things before leaving work on December 24, 2020. But this chink in her credibility does not overcome the evidence of the offer letter and the employer's testimony that the claimant never was told that failure to give adequate notice would result in forfeiture of her unused vacation and holiday time.

To the extent that the employer argued that some of the claimant's benefits were awarded for the nine-week pandemic-induced shutdown when claimant did no actual work, that is not a defense to a wage claim.

It is recognized that the claimant's decision to wait until Christmas Day to give notice to the employer, when she apparently could have done so earlier, resulted in financial loss to the employer that could have been avoided had the claimant let the employer know at the earliest possible time. This decision should not be taken as an endorsement of the claimant's conduct in this case.

Nevertheless, it is found that, based on the offer letter and other communications from the employer, the policy, as it was communicated to the claimant, was that she would receive a payout for her accumulated vacation and holiday pay on separation, whatever the reason, without any requirement of advance notice.

DECISION

Having carefully considered the testimony and exhibits, it is found that the claimant proved that she was entitled to receive a payout for her unused vacation and holiday time. Consistent with the terms outlined in the offer letter, the total annual benefit is prorated to account for the fact that claimant worked only 51 weeks: 51/52 x 943.50 gives $925.36.

The employer is hereby ordered to send a check to the Labor Department, payable to , in the amount of $925.36, less applicable deductions, within 30 days of the date of this Order.

May 3, 2021
Date of Decision

George A. Stewart, Hearing Officer

GAS/cb