

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF LABOR  
CONCORD, NEW HAMPSHIRE

v.

Seacoast Imported Auto d/b/a Honda Barr  
CASE #62150

DECISION OF THE HEARING OFFICER

**APPEARANCES:** Claimant, self-represented  
Johanna Medina, representing the employer

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

**DATE OF HEARING:** March 29, 2021

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant filed a wage and hour complaint on February 5, 2021, alleging she was not paid her promised salary. She also alleged that she was not paid for two sick days when she was out while awaiting a COVID-19 test. Her claim is for \$953.16 in unpaid wages and \$400.00 for unpaid sick days.

Notice of claim was sent to employer on February 8, 2021. Employer filed no objection and a notice of hearing was sent out on March 4, 2021. Both parties participated in the hearing remotely by video conference, 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 representative, exhibits offered by the claimant, and matters of record in the Department file.

Claimant is \_\_\_\_\_ years old and lives in \_\_\_\_\_. She has an associate's degree in English. Prior to working for the employer, she worked for Exeter Subaru as a service advisor for six years. She testified that in June of 2020, she was recruited to come to work for the employer. She was recruited by Eileen Barry, a former co-employee who was now general sales manager for the employer. She was offered a new-car sales position in the employer's business development center. The job entailed making and promoting sales over the

internet. The regular pay was a \$600.00/week draw against commissions, but for the first four weeks, she was promised a minimum pay of \$1,000.00 a week.

Claimant's first day at work was July 27, 2020. The next day she signed a payment plan setting forth a compensation that included the guarantee of \$1,000.00 a week for the first four weeks. The commission arrangement that was to take effect after the first four weeks was the same as what was in the offer letter except that it did not refer to a \$600.00 per week minimum or draw. Without objection from the claimant, the employer submitted a copy of the payment plan, bearing the claimant's signature dated July 28, 2020 and that of Ms. Barry, dated August 13, 2020.

Claimant testified that she was paid weekly. Pay periods were Sunday to Saturday, with pay day the following Thursday or Friday. She received her paychecks in hand.

Claimant testified that she was paid \$1,000.00 for her first week but her next paycheck was for only \$600.00. She questioned the amount and was told it was a mistake and would be corrected. The following week, her third week of employment, she only received \$360.00, and the week after that, her fourth week, \$500.00. She testified that she was never given advance notice that her salary for the first four weeks was going to be reduced.

Claimant said that she thought she had to worked an additional week after her fourth week, until August 28, 2020. According to the employer's check register report, submitted at the hearing without objection from the claimant, the claimant's last day worked was Friday, August 21. In any event, the claimant stated that her wage claim was limited to her first four weeks and any disagreement about work done after that date was not at issue in the instant proceeding.

Claimant testified that during her third week of employment, she was out sick and not allowed to return to work until she could provide a negative COVID-19 test. She was out for two sick days for which she was not paid during that week. This was the basis of her claim for sick pay. According to time records provided by the employer without objection from the claimant, she missed three days, from August 11-13, 2020.

Johanna Medina, 33, is the employer's office manager. She could not explain specifically why the claimant had not received her minimum guaranteed salary of \$1,000.00 for each of the first four weeks. She testified that the claimant could have earned even more than her minimum, in the event her commissions exceeded that amount. However, because commissions were not figured on a weekly basis but a monthly basis, claimant's guaranteed amounts could not be settled on a weekly basis. Claimant was being paid at a weekly rate

of \$600.00, with the guaranteed balance to be made up monthly as commissions were settled up.

Ms. Medina testified that claimant received just four payroll checks, one for each of the four weeks of her employment. Without objection from the claimant, she submitted a check register report covering the entire year of 2020, showing four payments to the claimant, as follows:

August 6, 2020	\$1,000.00
August 14, 2020	\$ 600.00
August 20, 2020	\$ 360.00
August 27, 2020	\$ 500.00
Total	\$2,460.00

Ms. Medina acknowledged that this appeared to represent a shortfall of \$1,540.00 from the \$4,000.00 expected under a guarantee of \$1,000.00 a week for four weeks. She was unable to explain why the claimant had still not received payment. However, she did point out that the claimant had missed three days' work during the week of August 9-15 and one day during the week of August 16-22.

With regard to the claim for sick pay, Ms. Medina testified that, per company practice and policy stated in its employee handbook, employees are not eligible for sick time benefits until they have worked six months.

#### 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).

The claimant's testimony as to the terms of her employment was corroborated by the employer's documentary evidence. She was hired at a minimum salary of \$1,000.00 a week for four weeks. There was no evidence that the employer provided advance notice that it was changing this agreement.

Even if the employer's testimony is credited, that the \$1,000.00 guarantee would not be realized on a weekly basis but only at the end of the month when commissions were settled, no reason was offered for the employer's failure to make good on the guarantee by sometime in September.

From annotations on the employer's time records for the employee, it could be inferred that the employer pro-rated the claimant's salary to account for

days missed from work during weeks three and four. However, New Hampshire law generally requires that salaried employees "receive full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked," RSA 275:43-b, I. There are certain exceptions to this rule, enumerated in RSA 275:43-b, I (a)-(e) and RSA 275:43-b, II:

**275:43-b Payment of Salaried Employees. -**

I. A salaried employee shall receive full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked; provided, however, a salaried employee may not be paid a full salary in each of the following instances:

- (a) Any pay period in which such employee performs no work.
- (b) When an employee receives a disciplinary suspension without pay in accordance with the Fair Labor Standards Act, as amended, for any portion of a pay period, and written notification is given to the employee, at least one pay period in advance, in accordance with a written progressive disciplinary policy, plan or practice and the suspension is in full day increments.
- (c) If an unpaid leave of absence for a salaried employee is allowed pursuant to a written bona fide plan, policy or practice for absences, of a full day or more, of an employee caused by bereavement leave.
- (d) Any portion of a work day or pay period for leave taken under, and in accordance with, the federal Family and Medical Leave Act of 1993, as amended, if written notification from the employer stating the reason for such leave is given to the employee and placed in the employee's personnel file.
- (e) If the salaried employee voluntarily, without coercion or pressure, requests time off without pay for any portion of a pay period, after the employee has exhausted any leave time pursuant to a written bona fide leave plan, practice or policy and such leave time requested by the employee is granted by the employer.

II. Employers may prorate salary to a daily basis when a salaried employee is hired after the beginning of a pay period, terminates of his own accord before the end of a pay period, or is terminated for cause by the employer.

Clamant performed work during the third and fourth pay periods. She was not on disciplinary suspension, unpaid leave of absence, or FMLA, and she did not request the time off after exhausting leave time. She also did not terminate of her own accord before the end of the pay period, and she was not terminated for cause. Therefore, the employer could not lawfully dock her regular salary for the time missed from work.

The claim for unpaid salary is therefore found to be valid to the extent of \$1,540.00.

As to the claim for sick time, the claimant did not contest the employer's testimony that it is not available to employees with less than six months' employment. It is therefore found that the sick time claim is not valid.

**DECISION**

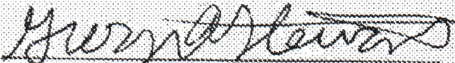
Having considered the testimony and exhibits, it is found that the claimant proved that she was not paid her full salary for weeks two, three, and four of her

employment, and that she is owed wages due of \$1,540.00. Therefore, her claim under RSA 275:43, I is **valid**.

Pursuant to the employer's practice and policy, at the time of her termination, she was not entitled to a sick time benefit, and therefore her claim under RSA 275:43, V is **invalid**.

The employer is hereby ordered to send a check to the Labor Department, payable to \_\_\_\_\_ in the amount of \$1,540.00, less applicable payroll deductions, within 30 days of the date of this Order.

April 14, 2021  
Date of Decision

  
George A. Stewart, Hearing Officer

GAS/SW