



# EMPLOYMENT TRIBUNALS

*Claimant*

*Respondents*

Miss V Mittal

v

Granite Search and Selection Limited

Heard at: London Central (by CVP)

On: 21 October 2021

Before: Employment Judge Brown

## Representation

For the Claimant: In person

For the Respondent: Ms D Spencer, Finance Director

## JUDGMENT

The judgment of the Employment Tribunal is that:-

- 1 The Respondent's name is Granite Search and Selection Limited. The name of the proceedings is changed accordingly.
- 2 The Respondent failed to pay the Claimant 2 days' holiday pay accrued on termination of her contract. The Respondent shall pay the Claimant £192.30 gross for accrued but untaken holiday pay on termination of her contract.
- 3 The Respondent breached the Claimant's contract by failing to pay the Claimant her notice pay. The Respondent shall pay the Claimant £2,083 gross notice pay. The Respondent will first need to deduct tax and National Insurance contributions that would have been paid on this sum.
- 4 The Claimant's other claims for breach of contract and/or unlawful deductions from wages fail and are dismissed.

## REASONS

1. By a claim form presented on 13 October 2020, the Claimant brought complaints of failure to pay 13.6 days holiday pay, failure to pay one month's

notice pay and failure to pay commission-type payments. The commission-type payment was in respect of "Referral pay for Dan Laming who completed 1 year with Granite 2,000 GBP".

2. The Respondent defended the claim. In its Response, it said that the Claimant has resigned on 26 May 2020 and was paid until 31 July 2020, longer than her contractual notice period, due to covid. The Respondent also said that the Claimant had accrued 12.25 days' holiday pay during the relevant holiday year and had taken 12.5 days, on 2 & 3 January, 21 January, 4-11 May and 18-22 May 2020. The Respondent also said that the Claimant had claimed a referral bonus payment, but that all payments in addition to basic pay, for example commission and bonuses, were discretionary. It said that, upon resigning, an employee is not paid bonuses.

3. At the start of the hearing, I clarified the issues in the claims.

4. The Claimant did not agree that she resigned on 26 May 2020. She contended that she sent her resignation on 26 May 2020, but giving the date for her resignation as 31 July 2020, when her furlough would end.

5. The Claimant agreed that she had taken annual leave in 2020 on the following dates: 2 & 3 January 2020.

6. The Respondent agreed that the Claimant had not taken leave on 21 January 2020.

7. The Claimant did not agree that she had taken leave on 4 – 11 May 2020 or 18 – 22 May 2020 . The Claimant contended that, on 4 – 11 May 2020 she was working for the Respondent, but that it had backdated her pay and said she was on furlough. She said that, on 18 – 22 May 2020, she was on furlough. She said that the Indian High Commission gave her the opportunity to fly to India on a repatriation flight, but she was not on holiday and had never said that she was unable to work.

8. The Respondent said that, apart from 21 January 2020, the Claimant was on annual leave on all dates set out in the ET3 Response and that the Respondent was never told that the Claimant was not taking the holidays she requested.

9. The Claimant claimed that the Respondent had failed to pay her a referral payment which she was due during her employment. The parties agreed that referral payments were different to commission. The Respondents produced a "Referrals" document, dated 4 April 2019, during the hearing. I recalled Ms Mittal to give evidence about this document.

10. The Respondent said that, after a resignation, the Respondent does not make payments other than basic salary. Any other payments are discretionary.

11. I asked the Respondent at the start of the hearing what was its correct title. Ms Spencer confirmed that its name is Granite Search and Selection Limited. By consent, I amended the title of the Respondent on the pleadings.

12. I heard evidence from the Claimant and from Ms Spencer, the Respondent's Finance Director and Mr Camisotti, the Respondent's Group Operations Director. Both parties had produced Bundles of documents and both parties made submissions.

13. Ms Spencer had given a witness statement. She asked me to read ps 44, 45 – 46, 47, 48, 49 – 51 of the Respondent's Bundle.

14. The Claimant had made 2 witness statements. The second was in answer to the Respondent's statement and disclosure. Ms Spencer did not object to me reading it. Claimant said that the Respondent had provided documents late. She said that p44 was a false document which should be excluded

15. I said that I would read all the documents and would decide, when making my decision, whether I accepted that they were accurate. Both parties could give evidence and address me on this.

## **Findings of Fact**

### **The Claimant's Contract of Employment**

16. The Claimant's terms of employment with the Respondent were contained in an "Offer of Employment/Contract of Employment" dated 5 December 2018. That offer said that the employment would be on the terms set out in the letter "together with the enclosed Terms and Conditions". It said that, if there were "any discrepancies between the Terms and Conditions of Employment and the content of the Offer Letter, the Offer Letter shall take precedence."

17. Clause 3 of the Claimant's Employment Contract (Respondent Bundle "RB" page 28 ) provided that the Claimant's salary would be £25,000 per year.

18. By clause 4 Commission/Bonus the contract provided:

" At the Directors discretion, you will be entitled to receive a commission payment which is calculated in accordance with Schedule 1 (see enclosed). Your commission payment will be made to you by BACS transfer, 2 periods in arrears of the end of the period the revenue was invoiced, on the proviso that the respective invoice has been paid by the Client. ...

...

The Company reserves the right in its absolute discretion to terminate, substitute or amend the commission arrangements applicable to you without notice at any time or to exclude you from any participation in any commission arrangements without giving any reason." "

19. It was therefore an express term of the Claimant's employment that commission payments were at the Directors' discretion and that the Company

had the right to terminate, substitute or amend the commission arrangements without notice at any time and without giving any reason.

20. Clause 6 Holidays provided that the Claimant was entitled to 22 working days paid holiday, "plus birthday" and 8 days public holiday. It also provided that 3 days of the holiday entitlement was required to be reserved for the Christmas/New Year break. .

21. There was no provision for payment of contractual holiday pay on termination of employment in the offer letter.

22. However, in the attached terms and conditions, cl 8 provided, "The holiday year is from 1 January to 31 December each year. You are entitled to paid holiday including public and bank holidays. ...

On termination of employment, the Company reserves the right to pay holiday in lieu, or you may be required to take outstanding holiday during the notice period. If your employment is terminated as a result of misconduct you will only receive payment for any statutory holiday that has accrued.

Annual holiday entitlement accrues week by week during the holiday year and must be taken during the year.

Accrued and unused holiday cannot be carried over into the next holiday year and you will not be entitled to receive any payment In lieu In respect of any accrued and unused holiday."

23. By cl 9, the Claimant's notice period was one month following successful completion of her probationary period.

### **Annual Leave**

24. On 28 January 2020 Ms Spencer authorised the Claimant's holiday request for 4 – 11 May 2020, 5 days holiday, p50.

25. On the same day she authorised the Claimant's holiday request for 18 – 22 May 2020, 4 days, p51.

26. I accepted the Ms Spencer and Mr Camisotti's evidence that the Claimant never changed her holiday dates and they remained booked on the Respondent's holiday system.

27. The Claimant told me that Ms Spencer asked employees to work from home from the week 18 – 22 March 2020. She said that she had continued to work for the Respondent in May 2020 but that the Respondent had later backdated her furlough pay.

28. I did not accept her evidence on this. I found that the Claimant was notified, by letter of 17 April 2020, that she would be placed on furlough from 20 April 2020, RB p44.

29. The Claimant contended that that letter had been fabricated and that she had never received it. I rejected that evidence. I noted that, on 28 April 2020, Toni Camisotti, Group Operations Director, had emailed the Claimant saying, “..I appreciate you are keen to carry on, but as discussed we have agreed that last week you would join the furlough scheme.”, p45. The Claimant received that email but sent no reply to it at the time, contradicting what Mr Camisotti had said, whether from her company email account or her personal email account.

30. I accepted Ms Spencer’s evidence that she had sent the 17 April letter to the Claimant. I also accepted Mr Camisotti’s evidence that the Claimant had agreed to go on furlough in April 2020. The Claimant agreed, in evidence, that she was removed from access to the Company’s email account after 28 April 2020. All this, including Mr Camisotti’s email of 28 April 2020, indicated that the Claimant was on furlough by late April 2020.

31. On 17 May 2020 at 12.03, the Claimant emailed Mr Camisotti saying, “I am now confirmed to go on my holiday (India) and I’ll see you when I am back”, p47.

32. The Claimant told me in evidence that she had booked holiday, but told Mr Camisotti verbally in the week 8 – 13 May 2020 that she would not be going to India. She said that Mr Camisotti told her verbally, “ I have made up my mind and you are going on holiday and I am going to backdate your furlough payments by 1 month and all the contractors you have placed and managed I will be taking them off you and they will be now managed by Granite Search”.

33. The Claimant said that Ms Camisotti spoke to her aggressively and said that he required written confirmation that the Claimant was travelling on holiday to India. The Claimant said that this was why she sent written confirmation she was going on holiday, even though her flights had been cancelled. She said that, after she had sent this email to Mr Camisotti, she had been contacted by the Indian High Commission offering her a repatriation flight to India, if she was on furlough and was going to provide urgent care to family members. The Claimant said that this was not a holiday, C appendix 1 pp 40 - 44. She said that she was willing to work and had only had communication difficulties for about a day during her quarantine.

34. I did not find the Claimant to be a reliable witness on this. In evidence, she did not listen to questions and talked over the questioner. She was not willing to answer the questions she was asked.

35. I noted that, on 17 May 2020 at 20.08, the very same day as the Claimant had told Mr Camisotti that she was confirmed to go on her holiday to India, Air India had issued the Claimant with a ticket to fly from London to Mumbai, departing on 19 May 2021.

36. The Claimant told me that the Indian High Commission had contacted her on 17 May 2020, after she emailed Mr Camisotti, to arrange a repatriation flight. I considered that it was highly unlikely that the Commission would have coincidentally contacted the Claimant that day AND the Claimant would have

been able to satisfy the Commission of her entitlement to a repatriation flight AND the Claimant would have made all the arrangements for the repatriation flight, including the issue of a ticket within the 8 hours following her email to Mr Camisotti.

37. I considered it very likely, by contrast, that the Claimant had sent her email to Mr Camisotti on 17 May 2020, confirming her holiday, because she had already been told by the High Commission that she would be repatriated that week.

### **Resignation**

38. The Claimant told me that, when she arrived in India, she was contacted by Mr Camisotti who said to her, "You have two choices either I terminate your contract on a month 's notice or the second choice is I want you to submit a post-dated resignation letter dated 31/07/2020 as that is the last day for the Government furlough scheme want the resignation letter submitted no later than 26/05/2020. Should I not receive the letter I will terminate your contract and you will not be entitled to a reference. Did you get what I have just said? Now repeat it back to me".

39. The Claimant said that she had therefore been harassed and blackmailed into submitting a post-dated resignation letter.

40. I did not accept the Claimant's evidence as to the circumstances in which she sent the resignation letter. It did not make sense that Mr Camisotti would say threaten the Claimant with dismissal for no reason. Such conduct would be entirely inconsistent with the professional and friendly tone of, for example, his 28 April 2020 email, p45. I preferred Mr Camisotti's evidence that the Claimant said that she would resign when she discovered that she would not be paid commission on furlough.

41. On the 26 May 2020 at 22:19, the Claimant emailed Mr Camisotti, giving her name and address and saying "31.7.20 As per our conversation last week Friday, Please find notice of resignation from the position of an Associate at Granite Search.", p48.

42. Mr Camisotti replied on 28 May 2020 time 22:22 "What date are you wanting to work until as your last day". The Claimant replied, asking Mr Camisotti to confirm her last working day. Mr Camisotti did not reply.

43. On 31 July 2020 the Claimant emailed Mr Camisotti, asking him how he wished the Claimant to serve her notice. Ms Spencer wrote back, stating that the Claimant's resignation took place with immediate effect. Ms Spencer said that the Claimant had waived her notice period.

44. I found that the Claimant had sent an email to Mr Camisotti with a post-dated resignation, giving the date of resignation as 31/07/2020. The Claimant had emailed Mr Camisotti, attempting to clarify her last day of work, but he had not replied. I considered that, if there was any lack of clarity on Mr Camisotti's

part about the date of the Claimant's resignation, or termination of contract, he did not take the opportunity to resolve the lack of clarity.

### **Referral Scheme**

45. The parties agreed that the Respondent operated a "referral scheme", which was a form of commission. They agreed that it was different to the Respondent's normal commission scheme. They agreed that the referral scheme was not mentioned in the Claimant's contract of employment, but was a written document which was available on the Respondent's internal IT system. Mr Camisotti told me that, at present, the scheme is displayed on a TV monitor in the Respondent's offices.

46. The Respondent produced the scheme in evidence. As stated above, I recalled the Claimant to give evidence about the scheme.

47. The Claimant told me that the scheme the Respondent produced was the wrong scheme and that, under the true scheme, she was entitled to receive a further payment after 12 months.

48. I did not accept the Claimant's evidence on this. The Respondent produced the computer file for the scheme, showing that it had been created on 4 April 2019. I found as follows. The Respondent operated a referral scheme which it amended from time to time. At the time of the Claimant's resignation, the relevant referral scheme was dated 4 April 2019.

49. The scheme provided that, if an employee referred a contact who was then employed by the Respondent as a "Biller", the employee who referred the contact would be paid £1,000 after the contact had been employed for 8 weeks, £2,000 after the contact had been employed for 6 months and a further £2,000 after the contact had been employed for 18 months.

50. The scheme said, "All payments are at the directors discretion".

51. In 2019 the Claimant had referred a contact, Dan Laming, to the Respondent. Mr Laming was employed by the Respondent as a biller from 8 July 2019. The Claimant received payments under the referral scheme in respect of Mr Laming after he had been employed for 8 weeks and 6 months. By the date of the Claimant's resignation, Dan Laming had completed 1 year's employment with the Respondent. I accepted the Respondent's evidence that Mr Laming left his employment before 18 months.

### **Relevant Law**

52. The *Employment Rights Act 1996 (Coronavirus, Calculation of Week's Pay) Regulations 2020 (SI 2020/814)* were made on 29 July and came into effect on 31 July 2020. The explanatory notes state that the regulations seek to ensure 'for the benefit of furloughed employees whose employment is terminated, that the calculation of statutory entitlements relating to termination is based on their normal pay, rather than their furlough pay'.

53. Holiday continued to accrue during furlough. Employees can be required to take holiday during furlough, so long as they were not sick so as not to have the benefit of the holiday.

54. Under Regs 13 & 13A Working Time Regulations 1998 workers are entitled to take paid holidays and to be paid holiday pay. The right under Reg 13 is 4 weeks; the right under Reg 13A is 1.6 weeks, meaning that a worker has a right to 5.6 weeks paid holiday. Under Regulation 14 WTR 1998, an employee is to be entitled to be paid, at termination of employment, the proportion of holiday that he is entitled to in proportion to the holiday year expired but which has not been taken by the employee during that time.

55. Regulation 14(3) provides for calculation of the amount of holiday pay due in these circumstances as follows:  $(A \times B) \text{ less } C$ , where A is the period of leave to which the worker is entitled, B is the proportion of the leave year expired and C is the period of leave taken.

56. Holiday pay is paid gross. By Reg 30 WTR a worker can bring a claim in Employment Tribunal in respect of unpaid holiday pay under Regulation 14.

57. s13 Employment Rights Act 1996 a worker has the right not to suffer unauthorized deductions from wages. By s27 ERA 1996 “wages” is defined. By s27(1), “In this Part “wages”, in relation to a worker, means any sums payable to the worker in connection with his employment, including: a) any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise. ...” .

58. By Employment Tribunals (Extension of Jurisdiction) England & Wales Order 1994 the Employment Tribunal has jurisdiction with regard to contractual claims arising or outstanding at the termination of the employment of an employee.

59. In awarding damages for wrongful dismissal, in order to put the employee in the position they would have been in had the contract been performed, account must be taken of the tax and National Insurance contributions that would have been paid. Tribunal awards are tax free up to £30,000. Damages for wrongful dismissal in awards made below this amount are therefore calculated on the basis of net pay.

## **Discussion and Decision**

### **Holiday**

60. There was a narrow dispute between the parties about how many days' holiday the Claimant had accrued before 31 July 2021. Ms Spencer told me that the Claimant had accrued 12.5 days' holiday between 1 January – 31 July 2021. She agreed, in submissions, that she had not taken the Claimant's birthday into account in calculating this. The Claimant contended that she had accrued 13.6 days, because she was entitled to an extra holiday on her birthday, 20 May 2021. I accepted that the Claimant was indeed, contractually entitled to an extra day's



holiday on 20 May, pursuant to Clause 6 of her contract. Clause 6 provided that the Claimant was entitled to 22 working days paid holiday, "plus birthday" and 8 days public holiday.

61. As the Claimant was entitled to leave on 20 May 2021 anyway, she had only taken 4 additional days' holiday in her week of annual leave 18 – 22 May 2021.

62. It was agreed that the Claimant had not taken leave on 21 January 2021. I found that the Claimant had taken annual leave on 4 – 11 May and 18 – 22 May 2020. She had booked these days as leave and had never notified the Respondent that she would not take leave on these days. I rejected the Claimant's evidence that she continued to work after 28 April 2020. I rejected her evidence that she was not on leave on 18 – 22 May 2020. I found that she specifically confirmed to Mr Camisotti, on 17 May 2020, that she would be going to India on holiday, as planned.

63. Accordingly, the Claimant had accrued 13.6 days' leave and had taken 11 days on 2 & 3 January (2 days) , 4 – 11 May (recorded as 5 days on Respondent's system) and 18 – 22 May ( recorded as 4 days on the Respondent's system). She was therefore entitled to be paid for 2 full days' holiday on termination of her employment.

64. It was agreed that the Claimant's weekly gross pay was £480.77 for a 5 day week. Her daily gross pay was £96.15. The Respondent shall pay the Claimant  $£96.15 \times 2 = £192.30$  gross for her 2 days' holiday.

### **Notice**

65. The Claimant submitted a letter of resignation which she dated 31 July 2020. If there was any ambiguity about that, Mr Camisotti failed to resolve it, despite being given an opportunity to do so by the Claimant.

66. Under the Claimant's contract of employment, she was entitled to be paid 1 month's notice.

67. The Claimant was therefore entitled to be paid 1 month's notice following her resignation dated 31 July 2020. She was not paid her notice pay.

68. The Claimant's salary was gross £25,000 per year. Her gross monthly pay was £2,083. The Respondent shall pay this sum to the Claimant for her notice pay. The Respondent will first need to deduct tax and National Insurance contributions that would have been paid on it, because the Claimant does not have to pay tax on Tribunal awards up to £30,000.

### **Referral Fee**

69. Under the terms of the Respondent's referral scheme which was in operation at the time Mr Laming was employed in July 2019, the Claimant was only entitled to be paid a final £2,000 when Mr Laming had been employed for 18

months. He never was employed for 18 months so the Claimant was not entitled to be paid this final sum. Her claim in this regard is dismissed.

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Employment Judge Brown

Dated: ...4 November 2021.....

Judgment and Reasons sent to the parties on:

04/11/2021.

For the Tribunal Office