

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

VANITY HAIR STUDIO

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 | unpaid wages
RSA 275:48 | illegal deductions

Employer: Vanity Hair Studio, 33 Deer St, Ste 3A, Portsmouth NH 03801-3765

Date of Hearing: December 15, 2015

Case No. 51618

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on October 1, 2015. The notice was sent to the employer and there was an objection. The objection was sent to the claimant and there was a request for a hearing. The Notice of Hearing was sent to both parties on November 5, 2015.

The claimant testified that she worked for the employer for a year and a half. She was paid either an hourly rate or a commission. At the start of her work, she was given an employee manual that showed the employer's policies and practices. The claimant testified that her last day of work was September 24, 2015. The claimant feels that she was suspended from employment and then terminated from her position at the Salon.

The claimant testified that she had four areas for the Wage Claim. On her last pay period she had an offset of her commissions by \$96.00. Relative to the pay period from September 1, 2015 until September 14, 2015 the claimant testified that the employer used the improper percentage formula for her commissions and this resulted in an underpayment of \$71.00. There was also a previous offset of commissions in the amount of \$32.32.

The claimant further testified that the employer had a policy of a "back bar" deduction. This deduction came about when an employee used products, supplied by the employer, in the course of their job function(s). There was a charge for each product and this was deducted from the employee's wages. The claimant testified that she was told that this process was illegal in New Hampshire and she feels that the costs were illegally deducted from her wages. The

claimant testified that she is owed \$1,145.00 in “back bar” deductions over the course of her employment.

The claimant presented a witness who testified that she worked in the business, although not with the claimant and that she never had “back bar” deductions taken out at any place where she worked.

The employer testified that she had owned the Salon for eight years and currently has seven employees. The employer testified that she hired the claimant to work on selected wedding parties during the busy wedding season. At this time the claimant was an hourly employee with a set pay scale. The claimant was provided with an employee manual at the start of her work with the employer. The claimant worked in an hourly position until October when she became a regular employee with a number of clients and fell under the commission structure outlined by the employer.

The “back bar” process was a part of the employment agreement and is a standard practice in the industry. The employer testified that she did not discuss the practice with the claimant and never had the claimant question the practice until near the end of the claimant’s tenure with the employer. The commission structure was incremental based on the volume of charges for services.

The employer testified that she has a payroll service that issues checks and another payroll service that calculates the commissions for wages to forward them to the payroll company. The employees fill out their time and service sheets to be entered into the system.

The employer did admit that there was a mistake in her objections to the Wage Claim when she stated that the commission was based on a \$2,000.00 level to attain the 50% commission. She corrected this to show that it was a \$1,000.00 level and that she had made a mistake in the objection.

The employer presented a witness who testified that he has been in the business for 26 years. He testified that he ran a large chain of salons for seventeen years and operated two salons on his own for the past six years. This witness testified that in his experience the process of the “back bar” was common place in the industry. A review of the employer’s practices leads him to believe that there were no violations of law.

FINDINGS OF FACT

RSA 275:43 I Weekly. Every employer shall pay all wages due to employees within 8 days including Sunday after expiration of the week in which the work is performed, except when permitted to pay wages less frequently as authorized by the commissioner pursuant to paragraph II, on regular paydays designated in advance by the employer and at no cost to the employee:

- (a) In lawful money of the United States;
- (b) By electronic fund transfer;
- (c) By direct deposit with written authorization of the employee to banks of the employee's

choice;

(d) By a payroll card provided that the employer shall provide to the employee at least one free means to withdraw up to and including the full amount of the employee balance in the employee's payroll card or payroll card account during each pay period at a financial institution or other location convenient to the place of employment. None of the employer's costs associated with a payroll card or payroll card account shall be passed on to the employee; or

(e) With checks on a financial institution convenient to the place of employment where suitable arrangements are made for the cashing of such checks by employees for the full amount of the wages due; provided, however, that if an employer elects to pay employees as specified in subparagraphs (b), (c), or (d), the employer shall offer employees the option of being paid as specified in subparagraph (e), and further provided that all wages in the nature of health and welfare fund or pension fund contributions required pursuant to a health and welfare fund trust agreement, pension fund trust agreement, collective bargaining agreement, or other agreement adopted for the benefit of employees and agreed to by the employer shall be paid by every such employer within 30 days of the date of demand for such payment, the payment to be made to the administrator or other designated official of the applicable health and welfare or pension trust fund.

RSA 275:48 I Withholding of Wages. No employer may withhold or divert any portion of an employee's wages unless:

(a) The employer is required or empowered to do so by state or federal law, including payroll taxes.

(b) The employer has a written authorization by the employee for deductions for a lawful purpose accruing to the benefit of the employee as provided in regulations issued by the commissioner, as provided in subparagraph (d) or for any of the following:

- (1) Union dues;
- (2) Health, welfare pension, and apprenticeship fund contributions;
- (3) Voluntary contributions to charities;
- (4) Housing and utilities;
- (5) Payments into savings funds held by someone other than the employer;
- (6) Voluntary rental fees for non-required clothing;
- (7) Voluntary cleaning of uniforms and non-required clothing;
- (8) The employee's use of a vehicle under RSA 261:111, III;
- (9) Medical, surgical, hospital, and other group insurance benefits without financial advantage to the employer, when the employee has given his or her written authorization and deductions are duly recorded;
- (10) Required clothing not covered by the definition of uniform;
- (11) Legal plans and identity theft plans without financial advantage to the employer when the employee has given his or her written authorization and deductions are duly recorded; and
- (12) For any purpose on which the employer and employee mutually agree that does not grant financial advantage to the employer, when the employee has given his or her written authorization and deductions are duly recorded. The withholding shall not be used to offset payments intended for purchasing items required in the performance of the employee's job in the ordinary course of the operation of the business. Nothing in this subparagraph shall prohibit a charitable organization from withholding from an employee's wages a voluntary contribution to

such charitable organization.

(c) The deductions are pursuant to any rules or regulations for medical, surgical, or hospital care or service, without financial benefit to the employer and openly, clearly, and in due course recorded in the employer's books.

(d) Upon an employee's written request, an employer may deduct the following items from the employee's wages, provided that the employer shall provide a written itemized accounting of such requested deductions to the employee at least once per month:

(1) Voluntary contributions into cafeteria plans or flexible benefit plans, or both, as authorized by section 125 or section 132 of the Internal Revenue Code.

(2) Voluntary payments by the employee for the following:

(A) Child care fees by a licensed child care provider.

(B) Parking fees.

(C) Pharmaceutical items, gift shop, and cafeteria items purchased on site of a hospital by hospital employees.

(3) Voluntary installment payments of legitimate loans made by the employer to the employee as evidenced by a document that includes the following:

(A) The time the payments will begin and end.

(B) The amounts to be deducted.

(C) A specific agreement regarding whether the employer is allowed to deduct any amount outstanding from final wages at the termination of employment.

(4) Voluntary payments for the recovery of accidental overpayment of wages when the following conditions are met:

(A) The recovery is agreed to in writing.

(B) The deduction for the overpayment begins one pay period following the date the parties execute the written agreement.

(C) The written agreement specifies:

(i) The date the recovery of the overpayment will begin and end.

(ii) The amount to be deducted, which shall be agreed upon by the employer and the employee but which shall, in no event, be more than 20 percent of the employee's gross pay in any pay period.

(iii) A specific agreement regarding whether the employer is allowed to deduct any amount outstanding from final wages at the termination of employment.

(5) Voluntary payments for the recovery of tuition for non-required educational costs paid by the employer for the employee to an educational institution when the specific deduction is authorized in writing prior to the deduction as evidenced by a document that includes the following:

(A) The time the payments will begin and end.

(B) The amounts to be deducted.

(C) A specific agreement regarding whether the employer is allowed to deduct any amount outstanding from final wages at the termination of employment.

(6) Voluntary payments for the employee's use of a health or fitness facility that is sponsored by the employer for the benefit of its employees and that is located within the employer's facility or workplace, or operated by a private health and fitness facility that offers discounted memberships of 50 percent or more to all employees of the employer, as evidenced by a document that includes the following:

(A) The time the payments will begin and end.

(B) The amounts to be deducted.

(C) A specific agreement regarding whether the employer is allowed to deduct any amount outstanding from final wages at the termination of employment.

(e) The employee requests in writing that deductions may be made for contributions to a political action committee from the employee's wages.

(f) The employer has a written request from the employee, made at the time of the original request without coercion or pressure, that authorizes the employer to deduct from the employee's final wages at the termination of employment any amount the employee may owe for voluntary payments for vacation pay, paid time off pay, earned time pay, personal time pay, annual pay, sick pay, sick dependent pay, and bereavement pay made pursuant to a written employment policy as required by RSA 275:49, III, when the payments have been requested and paid to the employee in advance of eligibility.

It is the finding of the Hearing Officer, based on the written submissions and the testimony of the parties, that the Wage Claim is valid in part and invalid in part. The claimant has the burden to show that there are wages due and owing and she did meet this burden in part of the Wage Claim.

It is the finding of the Hearing Officer, based on the evidence and the testimony provided for the hearing, that the claimant has prevailed in part of the claim. It was very apparent to the Hearing Officer that there was a great deal of animosity between the parties. It is also apparent that the claim is based on the period of time when the relationship was ending. The claimant worked for a year and a half under the policies and the practices of the employer. It is evident that she accepted her wages without challenge for the greater part of the employment relationship.

The claimant testified that she learned that the employer was making illegal deductions from wages. These deductions were the "back bar" process. The Hearing Officer finds these deductions for the back bar product were not deductions from wages, as the commissions had not yet been calculated. The employer used the cost of the service minus deductions, including bar back, to determine the commissions/wages to be paid to the claimant. This is an acceptable practice in New Hampshire. The employer provided credible testimony that this process is accepted in the industry. It is also worth mentioning that the claimant worked in this system for about a year, without questioning the action.

The claimant was credible in her testimony about offsets to commissions. It was very difficult to understand the process of the employer in determining commissionable wages. The formula that was in place was presented to the Hearing Officer by both parties and in one case the employer admitted to reading the total to be used, not in accordance with the formula. The Hearing Officer finds that the factoring of \$2,000.00 as opposed to the written \$1,000.00 would lead to a wrong figure. However, if the formula was in place with the Payroll Company, this should not have happened.

The Hearing Officer finds that the calculation of commissions was not as clear as it should be. The string of e-mails shows that this was not handled in a timely fashion. The Hearing Officer finds that the claimant was credible in her request for offsets that were not accurate. The Wage Claim is valid in the amount of \$199.32.

DECISION AND ORDER

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Hearing Officer finds that the claimant proved by a preponderance of the evidence that she was not paid all wages due, it is hereby ruled that the Wage Claim is valid in the amount of \$199.32.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED] in the total of \$199.32, less any applicable taxes, within 20 days of the date of this Order.

Thomas F. Hardiman
Hearing Officer

Date of Decision: January 5, 2016

TFH/slh