

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

J.E.M. PROPERTY SERVICES

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:42 I/II employee/employer relationship

Employer: J.E.M. Property Services, 30 Dugout Rd., Hudson, NH 03051

Date of Hearing: July 22, 2014

Case No. 47715

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on March 3, 2014. 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 June 26, 2014.

The claimant testified that he went to work for the employer on November 4, 2013. He worked until November 216 and was not paid for his work. He said that he had a hiring agreement with the owner's son. The owner did pay him \$800.00 but the claimant never claimed it on his federal income tax. He was staying with the owner's family during this period of time.

The employer testified that he heard from his son that the claimant was not living at home and so he was invited to live with the owner's family because it was very cold to be living in a car. The claimant came to the owner's house and had no money for necessary grooming items or for clothes. The owner allowed the claimant to live at his house and gave him a loan of \$200.00 to go and get the necessary items.

The claimant said that he was hired by the owner's son and with the hours he worked, at minimum wage, he is due \$856.00. He showed a series of e-mails or texts to the owner's son asking for his wages.

The owner said that he took the claimant into his home because he was a friend of his sons and had no place to live. The employer said that he asked the claimant to do some work around his house to help offset the room and board, laundry and meals. He did give the claimant \$800.00 in cash for his help around the house.

The employer found it strange that if the claimant was working for the employer, he never approached the owner about wages. It appears that all communications were with the owner's son who is not a principal in the company.

The owner also said that he was trying to help out the claimant who was having car problems. He does have people who work for him but they are all sub-contractors. The owner said that the first he heard about wages being owed was when he received a copy of the Wage Claim.

FINDINGS OF FACT

RSA 275:43 I. 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.

803.01 (a). Pursuant to RSA 275:43, I and II, every employer shall pay all wages due to his/her employees within 8 days, including Sundays, after the expiration of the workweek on regular paydays designated in advance. Biweekly payments of wages shall meet the foregoing requirement if the last day of the second week falls on the day immediately preceding the day of payment. Payment in advance and in full of the work period, even though less frequently than biweekly, also meets the foregoing requirement.

This is the part of the law that mandates an employer to pay an employee all wages due at the time the wages are due and owing.

RSA 275:42 I reads: "The term "employer" includes any individual, partnership, association, joint stock company, trust, corporation, the administrator or executor of the estate of a deceased individual, or the receiver, trustee, or successor or any of the same, employing any person, except employers of domestic labor in the house"RSA:42 I reads: "The term "employer" includes any individual, partnership, association, joint stock company, trust, corporation, the administrator or executor of the estate of a deceased individual, or the receiver, trustee, or successor or any of the same, employing any person, except employers of domestic labor in the house of the employer, or farm labor where less than 5 persons are employed." of the employer, or farm labor where less than 5 persons are employed."

RSA 275:42 II reads: "Employee" means and includes every person who is permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, but exempts any person who meets the following criteria:

(a) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.

(b) The person has control and discretion over the means and manner of performance of the work in achieving the result of the work.

(c) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this criterion does not prohibit the employer from reaching agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.

- (d) The person holds himself or herself out to be in business for himself or herself.
- (e) The person is not required to work exclusively for the employer.

These sections of the law show when a person is an employee or when they do not meet the criteria of an employee.

It is the finding of the Hearing Officer, based on the written submissions and the testimony presented for the hearing, that the Wage Claim is invalid. The claimant has the burden to show that there are wages due and owing and he did not meet this burden.

The employer was credible in the presentation that he was trying to help out a friend of his son who was not doing so well. The employer took the claimant into his house. He gave him a loan for clothes and necessary toiletries and also paid \$800.00 to work around the house.

The claimant accepted the money and testified that he never filed any required taxes on the money. This action appears to bolster the employer's position that the claimant was not an employee and was not hired to do a specific job/

The finding of the Hearing Officer is that there is no employer/employee relationship and so there is no Wage Claim to be heard in this forum.

DECISION AND ORDER

This Department must first to determine whether the claimant was an employee or an independent contractor. RSA 275:42 II defines "employee" as, "means and includes every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, but shall not include any person exempted from the definition of employee as stated in RSA 281-A:2, VI(b)(2), (3), or (4), or RSA 281-A:2, VII(b), or a person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, or any person who meets all of the following criteria:

- (a) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.
- (b) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.
- (c) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.
- (d) The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.
- (e) The person holds himself or herself out to be in business for himself or herself.
- (f) The person has continuing or recurring business liabilities or obligations.
- (g) The success or failure of the person's business depends on the relationship of business receipts to expenditures.
- (h) The person receives compensation for work or services performed and remuneration is not determined unilaterally by the hiring party.
- (i) The person is responsible in the first instance for the main expenses related to the

service or work performed. However, this shall not prohibit the employer or person offering work from providing the supplies or materials necessary to perform the work.

(j) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.

(k) The person supplies the principal tools and instrumentalities used in the work, except that the employer may furnish tools or instrumentalities that are unique to the employer's special requirements or are located on the employer's premises.

(l) The person is not required to work exclusively for the employer”.

There is no finding that the claimant was an employee.

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 Department finds the claimant failed to prove by a preponderance of the evidence that he was not paid all wages due, it is hereby ruled that the Wage Claim is invalid.

/s/

Thomas F. Hardiman
Hearing Officer

Date of Decision: August 12, 2014

Original: [REDACTED]
cc: J.E.M. Property Services

TFH/klt