

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**



**V**

**INNOVATIVE WELLNESS SOLUTIONS, LLC**  
**dba GOOD KARMA CAFÉ**

**DECISION OF THE HEARING OFFICER**

**Appearances:** Richard J. Lehmann Esq., Attorney for the Claimant  
R. Matthew Cairns Esq., Attorney for the Employer

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

**Employer:** Innovative Wellness Solutions, LLC dba Good Karma Café  
PO Box 640  
Exeter, NH 03833

**Date of Hearing:** September 10, 2014

**Case No. 47862**

**BACKGROUND AND STATEMENT OF THE ISSUES**

A Wage Claim was filed with the Department of Labor on March 31, 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 August 20, 2014.

Two partners got together and decided to start a Vegan Restaurant. One of the partners, Brett, had a background in this type of establishment and the other partner, Ed, was to provide the financial backing. At the start of the hearing there was a question to determine if Brett's fiancée (the Claimant) was also a partner. It is determined that the Claimant was not a partner but did become an employee. The Wage Claim process is the proper forum to hear this claim for wages. The claimant was an hourly employee.

The claimant stated that she worked 15 hours a day at the start of the business (Monday through Thursday). She also worked for sixteen hours a day on Friday and Saturday. On

Sunday she worked another eight hours. The claimant said that she was working about 100 hours per week for the first six months of the Café's operation. The second six months she worked around 70 hours per week and after one year, her workweek was around 50 hours a week.

The testimony shows that the claimant was at the restaurant for a great deal of time but the time records, submitted by her fiancée, Brett, show that all hours worked were paid for by the Café. The claimant did have some expertise in the preparation of vegan recipes and was an asset to the startup business.

The employer (Ed) stated that the other partner (Brett) came to him one day and said that his lease had been cancelled and he did not have anywhere to live. It was decided to take rent out of the business and get a rental for Brett and his fiancée, the Claimant. It was also allowed for them to eat most, if not all of their meals, at the Café.

It appears from the testimony that the claimant did spend a great deal of time at the Café. However, as an hourly employee she was recorded when working and she was paid for those hours.

The employer testified that at the start of the business there were two partners, not three. One partner was to provide financial backing and the other was to run the business. The partner who ran the business (Brett) was responsible for the open hours, the food preparation, ordering supplies, payroll and staffing. At the start, prior to the opening, there was a great deal of family help in getting the Café set up and prepared for the opening. The employer said that this was not scheduled time with any employees. One of the witnesses made it clear that this cleaning and setting up was done by family and friends to get the business going.

The managing partner hired his fiancée and made her an hourly employee with time recorded. The managing partner was responsible for the payroll and the debts incurred. This never changed until near the end of the relationship when the managing partner said that he was going to be salaried. The financial partner said that this was not a part of the start-up plan. The managing partner was to be able to live for a year on his savings before any profits were realized and distributed.

The financial partner said that he was shocked when about a month after the opening the business partner said that he had lost his apartment lease and had nowhere to live. The rent then became part of the cost of running the business. It was also recognized that the managing partner and the claimant factored the meals into the cost of doing business.

At some point near the end of the claimant's employment she was given a \$500.00 bonus by the managing partner. It was around the time the managing partner and the claimant went to the Bahamas for a vacation. When the financial partner saw this amount appear in the records, he stopped payment on the check. It was around this period of time that the partnership was dissolved.

### **FINDINGS OF FACT**

RSA 275:42 I/II 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 houseRSA: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 are the sections of the law that describe when there is the employer/employee relationship or when the criteria are not met.

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

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 in part and valid in part. The claimant has the burden to show that there are wages due and owing and she met part of this burden.

The Hearing Officer finds that there is an employer/employee relationship. The claimant was an hourly employee and not a partner in the business. There were two partners who set up the business. One was a financial partner and the other was a managing partner. If the claimant had some sort of working relationship with the managing partner, it was not made clear during the hearing. The claimant was an hourly employee of the Café.

The claimant worked a schedule for the employer and was paid at an hourly rate. The claimant may have "hung out" at the Café but the managing partner never considered this as scheduled work. It does appear that this relationship worked for the period of time of the claimant's employment. It was only sometime after the Café ceased doing business as a Vegan Café that the Wage Claim was filed. The facts were echoed in another Wage Claim, filed by the managing partner that was withdrawn before testimony was to begin.

The employer was credible that his personal family relationship with the managing partner was the genesis of the idea of the Vegan Café. One partner was to provide the working capital while the other partner managed the day to day business. This relationship seemed to work over the period of months the Café was opened. The business appeared to be starting to make money when the partnership broke up.

The financial partner testified that he left the day to day operations in the hands of the managing partner. It appears that he stepped in to stop payment on a check that was issued to the claimant. This was out of the norm because the managing partner had control of the payroll. It is the finding that this check should not have been stopped because it was a form of wages to the claimant. If there was a problem the partners should have dealt with that on their own.

The finding of the Hearing Officer is that all hourly wages has been paid but that the claimant is due the \$500.00 bonus she received from the managing partner.

This Wage Claim was complicated because the managing partner and the claimant had a personal relationship.

### **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".

The claimant was an employee of the company.

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 that she was not paid all wages due, it is hereby ruled that the Wage Claim is valid in the amount of \$500.00.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED] in the total of \$500.00, less any applicable taxes, within 20 days of the date of this Order.

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Thomas F. Hardiman  
Hearing Officer

Date of Decision: October 7, 2014

TFH/klf