

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

First Choice Hospitality LLC dba Social 24

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43-b unpaid salary

Employer: First Choice Hospitality LLC dba Social 24, 191 Park Lane, Massapepqua
NY 11758

Date of Hearing: January 5, 2016

Case No.: 51771

BACKGROUND AND STATEMENT OF THE ISSUES

This hearing was consolidated with two other hearings for the claimant against separate employers, comprised of similar principals. Separate decisions have been issued for these hearings.

The claimant asserts she is owed \$5,500.00 in unpaid salary for pay periods worked between April 13, 2014 and June 29, 2014, or eleven weeks at \$500.00 per week.

Ms. Budinski, the sole member of First Choice Hospitality LLC dba Social 24, denies the claimant was an employee and further that she did not receive all monies due. She argues the checks the claimant received were expense reimbursement checks and bonuses, not wages. The claimant also quit on April 23, 2014, and she did not see her again until after the business changed names after June 29, 2014.

FINDINGS OF FACT

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 or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations.

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

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

The Hearing Officer finds that the claimant was an employee of an employer, not an independent contractor, because the claimant does not meet the criteria in (b), (c), (d), (e), or (f). The claimant testified credibly that the employer dictated the means and manner of the work to be performed, and the time during which the work was to be performed. The claimant did not hire her own assistants. The claimant did not hold herself out to be in business for herself and did not have any recurring business liabilities or obligations, nor did she register with the state as a business. The claimant was not responsible for the satisfactory completion of work, and she could not be held contractually responsible for failure to complete the work.

The employer operated under the name First Choice Hospitality LLC dba Social 24 from at least February 2, 2014 through June 29, 2014, when the employer changed the company to 24 Depot LLC dba Zaboo. Larysa Budinski was the sole member of these LLC's. Orest Romanick purchased 24 Depot LLC dba Zaboo on August 4, 2014, at which time the name changed to Kempshall LLC dba Zaboo, with Mr. Romanick as the sole member and Ms. Budinski in a management role.

The claimant worked for the employer operating as First Choice Hospitality LLC dba Social 24 (hereafter "the employer") from February 2, 2014 through June 29, 2014, when the business closed. She received a weekly salary of \$500.00.

Nazar Lopushansky, Larysa Budinski's son, hired the claimant to help Ms. Budinski with the business. The claimant provided credible testimony that Mr. Lopushansky represented to her that he was an owner of the business.

The claimant did quit at one point because she was frustrated that she had not received any salary. However, Mr. Lopushansky called her the following day to ask her to come back, which she did.

The claimant received her regular wages, via multiple check sources, between February 2, 2014 and April 12, 2014. She provided credible and persuasive testimony that she performed work for the benefit of the employer but did not receive any salary between April 13, 2014 and June 29, 2014, when the business closed.

Mr. Lopushansky, as a representative of Kempshall LLC, Larysa Budinski or Nazar Lopushansky, signed a promissory note for the claimant on September 30, 2014, outlining monies due to the claimant, including \$11,000 in wages for work performed April 27, 2014 through September 14, 2014, or twenty-two weeks at \$500 per week. Though the weeks outlined on the promissory note do not match the claimed weeks exactly, they are sufficiently similar to indicate the employer was aware of the wages owed to the claimant.

The Hearing Officer does not find the employer's argument that the claimant quit and did not return until after the business had changed names, credible or persuasive. The employer's argument that Mr. Lopushansky was not authorized to act on her behalf is also not credible or persuasive, as the employer was aware that Mr. Lopushansky had hired the claimant and continued to work with her during her employment with all three entities.

The Hearing Officer finds the claimant proved by a preponderance of the evidence that she is due the claimed wages in the amount of \$5,500.00.

DISCUSSION

The claimant has the burden of proof in these matters to provide proof by a preponderance of evidence that her assertions are true.

Pursuant to Lab 202.05 "Proof by a preponderance of evidence" means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

The Hearing Officer finds the claimant met her burden in this claim.

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 RSA 275:43-b requires that a salaried employee received their salary, in full, for any pay period in which they perform any work, and as this Department finds that the claimant proved by a preponderance of the evidence that she was not paid all wages/salary due, it is hereby ruled that the Wage Claim is valid in the amount of \$5,500.00.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$5,500.00, less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: January 26, 2016

Original: Claimant
cc: First Choice Hospitality LLC dba Social 24, 191 Park Lane, Massapepqua
NY 11758

MJD/mjd