

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Treeno Software Inc

DECISION OF THE HEARING OFFICER

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

Employer: Treeno Software Inc, 951 Islington St, Portsmouth NH 03801

Date of Hearing: June 8, 2016

Case No.: 52654

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant originally asserted, through the filing of his wage claim, that he was owed \$11,478.26 in unpaid salary for the month of March 2016 and \$12,375.00 in unpaid vacation pay/paid time off (PTO), due upon his separation.

At the hearing, he amended his claim for unpaid vacation pay to \$8,608.68 for twelve days at a daily rate of \$717.39.

Treeno Software Inc argues the claimant was not an employee, but the founder of the company, as well as an owner, a corporate officer and an employer. Therefore, the Department of Labor is not the proper venue for this claim.

FINDINGS OF FACT

The parties agree the claimant did not receive the \$11,478.26 due in claimed wages for his salary in March 2016, nor the \$8,608.68, or twelve days at \$717.39 per day, in accrued but unused vacation pay, upon his resignation from the employer on March 23, 2016.

The employer argues that because the claimant was the founder, owner, and corporate officer of the company, that he is not an employee and the Department of Labor is not the proper venue for this claim.

This Department must first to determine whether the claimant was an employee of this employer. 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 New Hampshire Supreme Court, in W. Bradford Caswell v BCI Geonetics Inc. 121 NH 1048, opined "The question in this case is whether an officer of a corporation is an "employee" within the context of a back pay claim under RSA ch. 275. We hold that he is." and "Nowhere does RSA 275:42 V bar one in the position of the plaintiff [vice president and officer of the corporation] from being an employee for purposes of pay or hours protection under RSA ch. 275. We find no ambiguity in the use of the word "employee" and accordingly answer the question in the affirmative."

Caswell is distinguishable from the instant case because he did not have any ownership of the corporation, as the claimant did. Neither party presented any case law on this issue of a corporate officer who has an ownership in the corporation and who is also an employee.

The Hearing Officer finds that the claimant meets the definition of employee as he was permitted, required, or directed by any employer, Treeno Software Inc (hereafter "the employer"), in consideration of direct or indirect gain or profit, to engage in any employment, under RSA 275:42 II.

Because the claimant was an employee of the employer, performed work during March 2016, and did not receive his monthly salary for March 2016, the Hearing Officer finds the claimant proved by a preponderance of the evidence he is due the claimed salary in the amount of \$11,478.26.

The claimant seeks \$8,608.68, or twelve days at \$717.39 per day, in accrued but unused vacation pay.

The claimant provided credible testimony that the employer did not have a handbook prior to September 2015. However, prior to the implementation of the handbook, all employees received three weeks of vacation pay with a maximum accrual of 120 hours annually. No policy existed prior to September 2015 or in the current employee handbook prohibiting accrued vacation time from rolling into the following year.

RSA 275:49 III requires that the employer make available to employees in writing, or through a posted notice maintained in an accessible place, employment practices and policies regarding vacation pay. Lab 803.03 (b) requires employers to provide his/her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses, severance pay, personal days, payment of the employees expenses, pension and all other fringe benefits per RSA 275: 49. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The written policy effective September 2015 notifies employees "You will be paid for all earned accrued and unused PTO when you leave the company."

The Hearing Officer finds the claimant proved by a preponderance of the evidence he is due the claimed vacation pay, in the amount of \$8,608.68 under the employer's past practice and current written policy.

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 Department finds that the claimant proved by a preponderance of the evidence that he is owed the claimed wages, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$11,478.26.

As RSA 275:43 V considers vacation pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant proved by a preponderance of the evidence that he is due the claimed vacation pay, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$8,608.68.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$20,086.94 (\$11,478.26 + \$8,608.68), less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: June 28, 2016

Original: Claimant
cc: Employer

MJD/aph