

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

89 MAIN STREET BISTRO LLC

DECISION OF THE HEARING OFFICER

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

Employer: 89 Main Street Bistro, LLC., 89 Main Street, East Kingston, NH 03827

Date of Hearing: December 13, 2016

Case No.: 54158

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on October 13, 2016. The notice was sent to the employer and there was no written objection. The Notice of Hearing was sent to both parties on November 15, 2016. The employer was present at the hearing.

The claimant testified that she was due \$3,000.00 in wages. She stated that she worked from March until September of 2016, and she was a salaried employee paid at a salary of \$750.00 per week. The claimant testified that she was not paid for four pay periods.

The claimant did testify that she issued the time for the employees to be paid. She also said that she paid some of the wages in cash. There were some mistakes in the time cards when an employee did not clock out when leaving. The claimant did say that there was a payroll company; but she had to go outside of the normal process to make sure people were paid.

The claimant provided testimony that she was under great pressure to get the job done and that she often worked many hours in different jobs.

The employer provided testimony from a current employee who worked for the restaurant at the time the claimant was in charge. The witness said he was once six weeks behind in wages and since new management had taken over, everything is paid to date. He also testified that the new management found many unpaid bills when reviewing items during the takeover. It was the witness's testimony that under the new administration, everything is paid up to date.

The owner of the restaurant testified that the claimant was in charge of the restaurant operation. The owner testified that the claimant, during her employment, never mentioned that she was not being paid her wages.

The owner testified that a review of the books show several payments to the claimant that were not a part of wages. The owner testified that there was a safe in the kitchen and that the claimant set the combination. When the claimant separated service, she refused to give up the combination. A locksmith had to be hired to break into the safe. A record review show that there should have been \$12,000.00 in the safe but there was only \$25.00. The loss has been under police investigation.

The claimant made statements that she was paying employees and vendors in cash. There is no record to review for these payments. The employer maintains that all wages have been paid.

FINDINGS OF FACT

275:43 Weekly. –

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:

- (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.

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

275:43-b Payment of Salaried Employees. –

I. A salaried employee shall receive full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked; provided, however, a

salaried employee may not be paid a full salary in each of the following instances:

- (a) Any pay period in which such employee performs no work.
- (b) When an employee receives a disciplinary suspension without pay in accordance with the Fair Labor Standards Act, as amended, for any portion of a pay period, and written notification is given to the employee, at least one pay period in advance, in accordance with a written progressive disciplinary policy, plan or practice and the suspension is in full day increments.
- (c) If an unpaid leave of absence for a salaried employee is allowed pursuant to a written bona fide plan, policy or practice for absences, of a full day or more, of an employee caused by bereavement leave.
- (d) Any portion of a work day or pay period for leave taken under, and in accordance with, the federal Family and Medical Leave Act of 1993, as amended, if written notification from the employer stating the reason for such leave is given to the employee and placed in the employee's personnel file.
- (e) If the salaried employee voluntarily, without coercion or pressure, requests time off without pay for any portion of a pay period, after the employee has exhausted any leave time pursuant to a written bona fide leave plan, practice or policy and such leave time requested by the employee is granted by the employer.

II. Employers may prorate salary to a daily basis when a salaried employee is hired after the beginning of a pay period, terminates of his own accord before the end of a pay period, or is terminated for cause by the employer.

III. The employer may offset any amounts received by a salaried employee for jury duty or witness fees or military pay for a particular pay period, against the salary due for that pay period pursuant to a written bona fide leave plan, practice or policy.

This part of the law governs the payment of salaried employees.

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

The Hearing Officer finds that the claimant was lacking credibility in seeking unpaid wages. The claimant did admit that as the payroll administrator she bypassed the established payroll process and often paid in cash. The testimony of others shows that this was a fact. The records also show undocumented payments to the claimant without being for a purpose, such as expenses for the business operation.

The Hearing Officer places weight on the testimony that the claimant failed to turn over the combination of the safe and when opened by a professional there were substantial funds missing. Again the decision to pay in cash must be factored into the hearing decision. Specifically, the claimant testified that she paid payroll in cash, and based on all of the testimony presented, it is difficult to assign credibility to the statement that the claimant did not provide payment to herself.

The employer provided credible testimony that all wages and vendors bills are paid up to date under the new administration. The employer was also credible in the testimony that federal taxes were taken out of wages but not turned over to the proper taxing agency.

The Wage Claim is invalid.

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

Thomas F. Hardiman
Hearing Officer

Date of Decision: January 3, 2017
Original: Claimant
cc: Employer
TFH/das