

**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 V unpaid employee expenses

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

**Date of Hearing:** December 13, 2016

**Case No.:** 54159

**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 worked for the employer for five months. She did receive one promotion during her employment. She was employed at an hourly rate of \$15.00. The claimant is alleging that she was not paid for three weeks of wages and one of the paychecks in question was returned with a service fee of \$15.00.

The claimant testified that she reported her time and was paid for all hours worked except for the last three pay periods. The claimant testified that she never worked until 4 am at the restaurant. The claimant did testify that she had the combination to the safe in the restaurant although she very seldom used the safe or had to get into the safe.

The claimant did testify that she stopped any direct deposit of her wages and that she received checks directly to her. She was never paid in cash. The claimant also testified that she was a roommate of the General Manager.

A witness for the employer did testify that the last order for the kitchen was for 9:00 pm. He did not believe that the claimant ever worked until 4:00 am. The employer further provided testimony that the claimant was paid several times until 4:00am with premium pay.

It is the position of the employer that the claimant was overpaid by more than \$200.00 for the term of her employment. Her wages were issued by the General Manager, her roommate. The claimant was paid one check that "bounced" at her bank and she was charged a service fee of \$15.00.

### **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.

#### **RSA 275:43 V**

Vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, when such benefits are a matter of employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, when due.

This part of the law places an issues such as expenses suffered by an employee on behalf of the employer, are considered wages once the expense is suffered.

It is the finding of the Hearing Officer, based on the written submissions and the testimony of the parties, that the Wage Claim is valid. The claimant has the burden to show that there are wages due and owing and she did bear this burden for the Wage Claim.

The employer was credible in their presentation that a substantial payment of overtime was made for hours worked when the restaurant was closed. It appears that the claimant was paid for these hours and received the wages. The employer was credible in their testimony that the claimant should have known that there was extra wages for time not worked.

However, there was a check issued by the employer or the agent authorized to issue checks. This check was deposited and there was a stop payment and the claimant suffered a service charge of \$15.00. The check was issued and received by the claimant and deposited by

the claimant. The Hearing Officer finds that this check was issued by the proper authority on behalf of the employer. The claimant had no knowledge that the check was to be stopped.

The claimant also testified that there were wages due for the week prior to issuance of the above referenced check that did not clear and there were wages due for the pay period after the check was issued. The employer does not have the right to offset overpayments by withholding wages. There are methods to recoup overpayments but an employer cannot just stop the payment of wages. If there was a problem with the keeping of time or the issuing of checks, both were the responsibility of ownership and they had an agent in place to do this record keeping.

The employer did not provide any evidence of time worked after the August 30, 2016 date. The only record was submitted by the claimant. The three pay periods in question total an amount of \$1,957.00 and there was a service fee of \$15.00 for the check with a stop order that was suffered by the claimant.

Based upon the check which did not clear due to stop order (and the associated service fee) and the two pay periods for which work was performed where there were no checks issued because the employer had felt that had previously paid too much, the Wage Claim is valid in the amount of \$1,972.00.

#### **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 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 \$1,972.00.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED] in the total of \$1,972.00, 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: January 9, 2017  
Original: Claimant  
cc: Employer  
TFH/das