

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

V

NE Innovation Center LLC

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 unpaid vacation pay
RSA 275:43-b unpaid salary
RSA 275:44 IV liquidated damages
RSA 275:42 I/II employer employee relationship

Employer: NE Innovations Center LLC, 99 Bow St, Ste. 100E, Portsmouth, NH 03801

Date of Hearing: March 15, 2017

Case No.: 54314

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed \$34,283.84 in unpaid accrued wages for salary earned between June 23, 2014 and July 29, 2016. He also alleges he is due \$1,384.62 in unpaid vacation pay. He argues he was an employee and an owner. He further seeks liquidated damages.

NE Innovations Center LLC (hereafter "NEIC") denies the claimant is an employee, but a partner. He has never earned "wages in employment". Further, they argue that that all the conditions have not yet been met in order for any payments to be made to any parties. They also disagree, within a few thousand dollars, as to the amount claimed.

FINDINGS OF FACT

The claimant began his working relationship with NEIC June 23, 2014. He believed this relationship was that of an employee/employer, as the offer letter repeatedly used the words employment and employee. On December 31, 2015, the claimant received shares in SV 2013, an investment unit of the company, making him an owner as well. His working relationship with NEIC was terminated by NEIC on July 30, 2016, however, he remains an owner.

The parties disagree as to whether the claimant was an employee or owner of the company.

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 does in the LLC. Neither party presented any case law on this issue of a worker who has an ownership in a LLC 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, NEIC (hereafter "the employer"), in consideration of direct or indirect gain or profit, to engage in any employment, under RSA 275:42 II, in addition to his ownership role.

The claimant argues he is due \$34,284 in earned but unpaid salary, which should have been paid within seventy-two hours of his separation from employment. The claimant agrees that not all of the triggering events have occurred according to the offer letter to pay the accrued salary, however, he feels his separation from the employer is the event that causes the payment of the accruals to be due.

The employer agrees the claimant has accrued and earned salary, but in a lesser amount of \$32,283.84. However, they disagree that the earned but unpaid salary is due, as the written offer letter states, in relevant part, "Accruals will be paid out based on an agreed budget to commence after a minimum of two NEIC SV 2013 cash units have been successfully closed."

Two NEIC SV 2013 cash units have been successfully closed. However, no budget has been agreed upon for any payments.

The "salary accruals" as used in the offer letter, and which have accrued to the claimant's benefit, are on the books for payment at a later date, once a budget has been agreed upon. It is noted there is a discrepancy between the parties as to the actual dollar amount of the salary accruals.

RSA 275:49 I requires that an employer inform employees of the rate of pay at the time of hire. Lab 803.03 (a) requires that an employer inform employees in writing of the rate of pay at the time of hire and prior to any changes. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer properly notified the claimant of the salary accrual terms. They notified the claimant when the salary accruals would be payable, including the events that need to occur before payments are made, similar to commissions.

The claimant's argument that his separation from employment is the triggering event which requires the salary accruals to be paid out is not found persuasive. It is the conditions of the written policy that signal the payment of the salary accruals.

The Hearing Officer finds that the salary accruals sought by the claimant are not yet due, as the events necessary in the written offer letter for June 23, 2014, have not

been met. The Hearing Officer makes no findings on the amount the claimant is seeking as due.

As the wages are not yet due, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence that the claimed wages are due.

The claimant seeks \$1,384.62 in unpaid vacation pay, due upon his separation. He argues this represents five unpaid vacation days, based on an annual salary of \$72,000. He alleges he accrued seven days for 2016 prior to his July 30, 2016, termination, and had used two days, leaving a balance of five days.

The employer argues they did not have an official policy, but a more functional "take what you need" policy. No one at the employer tracked vacation time.

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 employer noticed the claimant via his June 23, 2014, offer letter that "Currently vacation time is credited one (1) day per month."

The policy does not indicate any policy regarding vacation time pay at separation of employment.

The employer has the obligation to provide employees with a written policy regarding vacation pay, including how it is obtained and how it is treated upon separation. The employer failed to provide a complete written policy.

Pursuant to the written policy, the claimant had accrued seven vacation days at the time of separation. He agreed he used two days, leaving a balance of five days.

The written policy does not inform the claimant that he would not be paid for accrued, but unused vacation time at termination. Because the handbook does not specifically inform the claimant that he would forfeit these benefits at termination, the Hearing Officer finds that the claimant earned, and is now due, the claimed vacation pay.

The claimant based his vacation pay on an annual salary of \$72,000. At the time of his separation, he received a \$4,000 monthly salary, with \$2,500 in salary accrual. Vacation payments would be based on his monthly salary cash payment of \$4,000, or annualized to \$48,000, as this is how he would receive the payments for vacation pay had he used the time during his employment. \$48,000 on a daily basis, for a five day week (as used by the claimant), would be \$184.62. The claimant had a total of five days of vacation pay pursuant to the written policy, for a total of \$923.08 due in unpaid vacation pay.

The claimant also seeks liquidated damages on these claims.

No wages for salary accruals were found to be due at this time. However, even if wages had been found to be due, the claimant would have failed to prove by a preponderance of the evidence liquidated damages were due.

RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer, "willfully and without good cause fails to pay" all wages within the timeframe required by statute. The New Hampshire Supreme Court defined "willfully and without good cause" in Ives v. Manchester Subaru, Inc. 126 NH 796 to mean, "voluntarily, with knowledge of the obligation and despite the financial ability to pay the wages owed". The Court continued, "an employer acts willfully if, having the financial ability to pay wages which he knows he owes, he/she fails to pay them".

The employer provided credible testimony that they did not believe the claimant was due any wages at the time of his separation.

The Hearing Officer would have found that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay him all wages due in the time required because the employer had a genuine belief that the wages were not yet owed.

The claimant seeks liquidated damages on the vacation pay, which was found to be due in the amount of \$923.08.

The employer provided credible testimony that they believed the vacation policy was "take what you need" and not an accrual policy, so no vacation time accumulated. Further, they believed the claimant was an owner of the company, and not an employee.

The Hearing Officer would have found that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay him all vacation pay due in the time required because the employer had a genuine belief that the he was not due any vacation pay.

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 failed to prove 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 invalid.

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 \$923.08.

As RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer willfully and without good cause fails to pay wages due in the time frame required by statute, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay wages due in the time frame required, it is hereby ruled that the portion of the Wage Claim for liquidated damages is invalid.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$923.08, less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: March 31, 2017

Original: Claimant
cc: Employer

MJD/das