

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

V

Nutfield Publishing LLC

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 V unpaid vacation pay

Employer: Nutfield Publishing LLC, 2 Litchfield Rd, Londonderry, NH 03053

Date of Hearing: February 13, 2017

Case No.: 54367

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed \$1,950 in unpaid vacation pay for 2016.

The employer denies the claimant was due any vacation pay for 2016. The employer notifies employees in January, via email, of the years' benefits. The employer did not offer any benefits for 2016, therefore, no email was sent.

Further, the employer argues the claimant's status changed to an independent contractor, rather than an employee.

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.

Nutfield Publishing, LLC argued that the claimant simply did not get paid if he did not write a story.

The New Hampshire Supreme Court opined in Caswell v. BCI Geonetics, Inc. 121 N.H. 1048, that RSA ch. 275 is entitled "Protective Legislation," and we should construe it with that purpose in mind. Further, the definition of "employee" pertaining to this section is set forth in RSA 275:42 II:

"The term 'employee' includes any person suffered or permitted to work by an employer. For the purposes of claims for wages under RSA 275:51, any person in the service of another shall be conclusively presumed to be an employee, not an independent contractor, if it shall have been determined to be more likely than not that the relationship can be terminated summarily, with a right to no more than compensation already earned."

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 (e), or (f). The claimant testified that he did not hold himself out to be in business for himself. The claimant was not responsible for the satisfactory completion of work, and he could not be held contractually responsible for failure to complete the work.

The claimant argues he received three weeks of vacation pay for 2016 in January 2016. As he did not use any vacation time in 2016, he argues he is due the full three weeks of vacation pay upon his separation.

The employer argues they did not offer any vacation benefits or paid holidays for 2016. They issue an email each year providing notice of the benefits for the year. They issued an email in February 2013 stating the paid holidays, sick pay and vacation pay allotment for 2013 and an email in December 2013 stating only the paid holidays for 2014. No further emails had been issued for 2015 or 2016 providing for paid holidays, sick pay or vacation pay as none were offered.

The employer credibly testified that no one in the company had received vacation pay for 2014, 2015 or 2016.

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 did notify the claimant of the annual practices as related to vacation leave, though the employer could have been clearer as to the fact that the annual emails were specific to the current year sunsetting on December 31. However, the claimant was employed long enough to know the practice of the employer.

Therefore, the Hearing Officer finds the employer did not offer vacation pay for the years of 2014, 2015 or 2016.

The Hearing Officer finds the claimant failed to prove by a preponderance of the evidence he is due the claimed vacation pay.

DECISION

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 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 failed to prove by a preponderance of the evidence that he is due any vacation pay, it is hereby ruled the Wage Claim is invalid.

Melissa J. Delorey
Hearing Officer

Date of Decision: March 1, 2017

Original: Claimant
cc: Employer

MJD/das