

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Akumina Inc

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages, bonus and incentive pay
RSA 275:43-b unpaid salary
RSA 275:44 IV liquidated damages

Employer: Akumina Inc, 30 Temple St Ste 301, Nashua, NH 03060

Date of Hearing: June 27, 2017

Case No.: 55070

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed the following:

- \$50,000 in unpaid bonus, which was the balance of a \$200,000 bonus of which he received \$150,000 in November 2015;
- \$51,145.84 in unpaid wages which were part of a 15% reduction in wages and promised to be returned;
- \$7,671.88 for an unpaid incentive payable upon the return of the 15% reduction in wages;
- \$3,472.22 in unpaid salary for his final pay period of work; and
- the employer should be held liable for liquidated damages in the amount of \$106,405.14.

He received a final payment from the employer in the amount of \$5,884.80, which he agrees should be deducted from the claim above.

At the hearing, he clarified the unpaid salary of \$3,472.22 had been satisfied in the final payment of \$5,884.80 and was not at issue for this hearing.

The employer denies the claimant is due any further wages. He is not due the deferred wages or incentive on those wages as his employment terminated, which forfeited those benefits. He is not due the balance of the November 2015 bonus as the employer has not secured Series A funding.

Further, the employer is not willful in their failure to pay the wages being claimed by the claimant as they hold a genuine belief that those wages are not due.

FINDINGS OF FACT

The claimant is a founding member of Akumina Inc, which began approximately November 2011. He is a shareholder and held the positions of Chief Operating Officer (COO), Director, Secretary and Treasurer, until his termination on March 24, 2017. The parties agree he was also an employee in an employment role.

The claimant argues he is due a \$50,000 bonus, which represents the balance of a \$200,000 bonus, of which he received \$150,000, in November 2015.

The employer argues that the claimant is not due the balance of \$50,000 as the employer has not secured Series A funding, a prerequisite for the payment, as the claimant clearly understood as proven through the submitted testimony before the Superior Court in another matter.

The employer notified the claimant via a November 19, 2015, letter that, "In addition [to his base salary] – you will receive a bonus of \$200,000 to be paid at the end of Q2 or sooner in alignment of a Series A raise. You are being offered a \$150k draw advance on this bonus to be paid immediately." It is noted that the claimant drafted this letter which he presented to Edward Rogers, the other founding member of the company, for signature. The employer introduced a transcript from a Superior Court proceeding in which the claimant states that there were communications with the employer that the payment of this bonus is tied to a Series A raise of capital for the company. The Series A raise of capital has not occurred as of the date of this hearing.

The written notice to the claimant on November 19, 2015, expressly informed him that he earned the bonus of \$200,000 and he had received \$150,000. Pursuant to this notice, he earned the full bonus. However, pursuant to his own sworn testimony before the Superior Court, the payment of the balance of \$50,000 is not due until a Series A raise of capital occurs.

The Hearing Officer finds the claimant has earned the \$200,000 bonus with a balance of \$50,000 remaining for payment, however, the payment of this \$50,000 is not yet due as the employer has not yet raised the capital under the Series A financing under the terms clearly understood and testified to in the Superior Court by the claimant.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence that the balance of the \$50,000 bonus is due for payment at this time.

The claimant further asserts that he is due deferred salary in the amount of \$51,145.84 and a "kicker" incentive of \$7,671.88 for having had to defer salary.

The employer experienced a negative impact of an accounting error which necessitated a reduction of wages amongst the staff. The claimant's wages were reduced by 15%.

The employer initially sent an email to staff on February 29, 2016, which originally characterized the wage reduction as a "pay cut".

However, the parties agree this reduction was actually a deferral with the understanding it would be repaid upon a Series A capital raise. They also agree an incentive would be paid to employees for having had their wages temporarily reduced

The employer now argues that the claimant is not due any of the deferral or incentive as his employment terminated prior to the Series A capital raise.

As the Series A capital raise has not occurred as of the date of the hearing, the Hearing Officer finds that the deferred wages and related incentive are not due at this time. No ruling is made on the employer's argument that the claimant's separation from employment forfeits these claims at this time.

As no wages were found to be due, no liquidated damages can be awarded.

However, even if wages had been found to be due, the claim for liquidated damages would have failed.

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 believed the payments for any bonus and the deferred wages and related incentive were contingent upon Series A financing.

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 owed until the Series A capital raise occurred.

DISCUSSIONS

The claimant's attorney attempted to submit documentation to the Hearing Officer of July 12, 2017, after the hearing had closed on June 27, 2017. This documentation was returned to the claimant's attorney on the date of receipt and was not reviewed nor considered for this Decision.

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 this Department finds that the claimant failed to prove by a preponderance of the evidence that he is owed the claimed bonus, deferred wages and incentive, it is hereby ruled these portions of the Wage Claim is invalid.

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.

Melissa J. Delorey
Hearing Officer

Date of Decision: July 21, 2017

Original: Claimant
cc: Claimant's Attorney
Employer
Employer's Attorney

MJD/das