

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



v.

B. J. Brickers Restaurant

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages

Employer: B.J. Brickers Restaurant, 289 Steppingstones Road,
Lee, NH 03861

Date of Hearing: February 1, 2018

Case No.: 56508

BACKGROUND AND STATEMENT OF THE ISSUES

The current issue concerns alleged unpaid wages.

The respondent holds that the claimant presented himself to her as an independent contractor and has been paid all money due him.

On the basis of the claimant's assertions he is owed unpaid wages the claimant filed a Wage Claim with this Department on December 12, 2017; a Notice of Wage Claim was forwarded to the employer on December 13, 2017. The employer's objection was received by this Department on December 29, 2017 and forwarded to the claimant this same day. The claimant and respondent requested a Hearing on this matter on January 5, 2018. A Notice of Hearing was sent to the parties on January 11, 2018. Attorney Benjamin King filed a Notice of Appearance for the claimant on January 31, 2018. A Hearing was held in regard to this matter on February 1, 2018.

At the beginning of the Hearing the claimant revised his claim from \$1,500.00 to \$700.00, and then revised it once again during the Hearing to \$950.00.

On February 21, 2018 the Department received notice of the claimant's attorney's withdrawal from this case per the claimant's request.

FINDINGS OF FACT

The claimant described his profession as a "Working Head Chef."

The respondent, Sandra Holl and her sister and partner Debra Holl, purchased land and a building in Claremont, NH with the intention of opening and operating a restaurant. The building was in need of significant repairs.

The owners used Craig's List to advertise for restaurant staff.

The claimant responded to the owners' advertisement on Craig's List and the parties subsequently met on October 21, 2017. However, the parties disagree as to the discussion that ensued.

The claimant testified the owners agreed to pay him \$250.00 for menu planning for which he was not paid. Further the claimant alleges he made an arrangement with the owners to pay for his relocation instead of a \$52,000.00 salary until the restaurant was up and running.

The respondent's reported understanding of the October 21, 2017 meeting drastically differs from the claimant's. The respondent testified she notified the claimant at that time she and her sister were not ready to open, were not hiring, and had no Worker's Comp Coverage so she couldn't hire anyone. The respondent described the claimant as eager to work, pushing her to give him a job that day. She testified the claimant informed her he owned an independent catering business and therefore she could hire him as an independent contractor

The respondent testified she and her sister regarded the claimant as a consultant, not an employee.

The respondent testified she never received a menu from the claimant and therefore doesn't feel she should have to pay the claimant the \$250.00.

The Claimant testified he and the owners agreed, beginning October 29, 2017, he would be paid \$700.00 per week, "working on getting the restaurant ready," and added he "was physically there every day."

The claimant acknowledges the owners paid him \$700.00 on November 2, 2017. He described the check as not being an "official pay check" because it did not have the company name on it.

The respondent holds that on November 2, 2017 the claimant reported to her and her sister that the building's roof and electrical system were in need of repair and that nothing could be done in the restaurant until the roof and electrical system were repaired.

The claimant testified he worked “two (2) weeks, maybe a week and a half (1 ½)” beginning the week of October 29, 2017, he later reported he worked through November 11, 2017.

The claimant testified that on November 11, 2017 while he was spray painting the bottom of stainless steel tables in the owners’ restaurant building he was electrocuted and “knocked out.” The claimant alleges he was terminated by the respondent on November 11, 2017 after the reported accident.

The respondent reports that in the morning of November 3, 2017 the claimant contacted her from the restaurant building. She reports she reminded him that it was he who had reported to her and her sister that nothing could be done in the restaurant until the roof and electrical systems were repaired. She instructed the claimant to leave the building and to leave his key behind, that she and her sister no longer needed his services.

It is the respondent’s position that the claimant reported the accident to her a number of hours later the same morning, November 3, 2017, after she directed him to leave the property.

The claimant submitted an exhibit at Hearing entitled “Salary Terms and conditions: James Bennett and Bricker Restaurant ownerships.” The exhibit reads in-part:

“Agreed upon terms: Menu planning: week of 10/23/17 \$250 total

For first two months: \$700 per week salary plus relocation expenses to be paid by owners. After that we will revert to the \$1,000 per week as advertised and I will find housing and take over living expenses.”

(a signature appears)

“All terms can be renegotiated if agreed upon by both parties.”

The respondent objected to the submission of this document.

DISCUSSION & CONCLUSIONS

The claimant has the burden of proof in these matters to show by a preponderance of the evidence that she is owed any additional wages. Proof by a preponderance of evidence as defined in Lab 202.05 means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

Prior to determining whether or not wages are owed to the claimant, the issue of employee/ employer relationship must be determined. The claimant asserts that he was an employee of the respondent. Specifically, the claimant argued he responded to an advertisement on Craig’s List during the month of October, 2017 for a “working head chef” for \$50,000.00 at B. J. Brickers in Claremont, NH. The parties agree that a meeting took place between the claimant and sisters and co-owners Sandra Holl and Debra Holl on October 21, 2017. The claimant testified the parties made “grand plans,” “to turn the place around” as the building was in need of extensive repair “and bring in a sports bar concept.” The claimant reports this meeting was his initial interview and he was hired immediately, on the spot, by the owners as a Head Chef.

The respondent argued that the claimant was an independent contractor. The respondent holds that the claimant was not an employee. After she informed the claimant she and her sister were not in a position to be hiring staff, the respondent told her he was in business for himself and could contract his services to them.

The claimant stated under cross examination he had a catering business, later in the hearing he amended this statement by saying he doesn't have a business that rather he caters and does wine tasting in the context of working as a chef.

Considering both of the parties testimonies and lack of evidence to demonstrate otherwise, it is the Hearing Officer's finding that it is more likely than not the claimant was an employee as defined in RSA 275:41:II. The statute assigns the burden of proof that a worker is a subcontractor and not an employee upon the employer. The Hearing Officer is not in receipt of any physical evidence required by the statute (a paper contract, business cards, Federal Identification Number or Social Security Number, marketing material, invoices, etc.) that would indicate the claimant is in business for himself.

The purpose of the \$700.00 payment the respondent made to the claimant is not made clear to the Hearing Officer, as to whether it was a payment for services rendered, wages paid, loan, etc.

Referring to exhibit #1 the respondent notes that the sole signature on the document is not hers and she would not otherwise agree to the terms.

The Hearing Officer notes the document is without date, nor is there a printed name below the illegible signature indicating its owner.

In the matter of the claimant's contention that he is owed \$250.00 for developing a menu for the owners, no physical evidence was produced supporting the allegation. No menu or accounting of time spent in the developing or completion of the menu was offered. Therefore, the hearing Officer finds the claimant did not meet his burden by demonstrating by a preponderance of the evidence he is owed \$250.00 from the owners.

The Hearing Officer questions the veracity of the claimant's testimony. The claimant contradicted himself a number of times during the Hearing (he testified he worked one and one-half weeks after October 29, 2017 then testified he worked two (2) weeks after October 29, 2017, he testified he had a catering business then he testified he didn't have a catering business, he submitted a claim to this Department for \$1,500 then changed the claim twice during the Hearing) and was frequently evasive with his responses to his own attorney's questions during direct examination.

The Hearing Officer finds the claimant did not meet his burden to prove by a preponderance of evidence that he is owed \$950.00 in wages including the \$250.00 he purports to be owed for menu development for the owners.

DECISION

Based on the testimony and evidence presented, and as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds that the claimant did not prove by a preponderance of the evidence that he is owed \$950.00 in wages from the respondent, it is hereby ruled that this Wage Claim is invalid.

Date of Decision: March 6, 2018

Original: Claimant
Cc: B. J. Brickers Restaurant, 289 Steppingstones Road, Lee, NH 03861
Attention: Sandra Holl