

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF LABOR  
CONCORD, NEW HAMPSHIRE

[REDACTED]

v.

Lake Life Lessons, LLC

**AMENDED**  
**DECISION OF THE HEARING OFFICER**

Nature of Dispute: RSA 275:43 I Unpaid Wages  
RSA 275:42 I / II

Employer: Lake Life Lessons, LLC [REDACTED]

Date of Hearing: May 7, 2018

Case No.: 56933

**BACKGROUND AND STATEMENT OF THE ISSUES**

The current issue concerns alleged unpaid wages. The claimant contends the employer owes him \$4,500.00 plus an undetermined bonus amount. The owner of the business holds the claimant has been paid all money due him.

The owner and claimant had been friends; the claimant worked for the business beginning the 2015 summer season. The business offers summer-season watersports instruction, lake tours, charters and a water taxi service. Just prior to the 2017 season the parties entered into a verbal agreement. The claimant offered operational management services; in-turn the owner was to compensate the claimant \$16, 500.00 for the 2017 summer season.

On the basis of the claimant's assertions he is owed unpaid wages he filed a Wage Claim with this Department on March 26, 2018; a Notice of Wage Claim was forwarded to the employer on March 27, 2018. On April 2, 2018 the Department received the employer's objection; a Notice of Employer's Objection was forwarded to the claimant this same day. The claimant requested a Hearing on April 11, 2018 and Notices of Hearing were forwarded to the parties on April 18, 2018. Accordingly a Hearing was held at the Department of Labor on May 7, 2018.

### **FINDINGS OF FACT**

The parties agree the claimant was to be paid in weekly installments from July 1, 2017 through Sept 9, 2017, the first two weeks at \$750.00 each, then \$1,500.00 per week thereafter.

The claimant did not submit invoices for his work or complete a time record.

The claimant had access to the business's banking account in order to pay vendors and incidental expenses.

The parties agree there was a verbal agreement between them for the 2017 Summer Season; they disagree as to the terms of the agreement.

There were no conditions placed upon the amount of time or days the claimant was to spend working.

The claimant testified he was fired on, or about August 20, 2017. He regarded the quality of work worked very hard didn't do anything wrong doesn't know why he was fired. The parties agree the claimant's last day of work was August 16, 2017.

The parties had a meeting on August 16, 2017 to discuss issues that had come up between them; the employer felt they were beginning to affect business. The employer testified he offered the claimant a few days away from the business and the employer further testified the claimant informed him that if he were to leave for a few days he would not be coming back to the business. The claimant testified he does remember making the statement.

The employer testified that the claimant quit and did not work the three remaining weeks of the season from August 16<sup>th</sup> through September 9<sup>th</sup>.

The claimant testified that he and the employer entered into a verbal agreement whereby the claimant would receive a bonus of 25% of the business's sales for the season in excess of \$60,000.00.

### **DISCUSSION AND 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's pleading suggests he was an employee of the business.

The employer and claimant regarded the claimant as 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.

The claimant's testimony that he considered himself to be an independent contractor does not negate the statutory definition of "employee" as defined in RSA 275:42 II.

This Hearing Officer finds the employer failed to demonstrate that the claimant fully meets criteria (e) and (f) under RSA 275:42 II.

With regard to criteria (e) neither party demonstrated that the claimant is registered as a business with the New Hampshire Secretary of State or did the parties show that the claimant experienced any business expenses or obligations. The claimant had access to the business's banking account to pay for incidental expenses and pay vendors.

With regard to criteria (e) neither party submitted a signed agreement that would demonstrate any contractual liability on the part of either party.

Thus the claimant cannot be considered to be exempt from the definition of employee. Therefore, for the purposes of this Decision, this Hearing Officer finds the claimant to be an employee.

The employer argues that the parties agreed to a weekly payment arrangement and thus he is not obligated to pay the claimant for weeks that he did not work. The parties agree the claimant was paid \$750.00 for his first two weeks of work and then \$1,500.00 per week thereafter.

The claimant argues he agreed to being paid \$16,000.00 for the 2017 summer season and that the payment schedule was for the employer's ease of bookkeeping. The claimant testified he would have been content with a one-time payment of \$16,000.00. None-the-less the parties agree the claimant was paid a weekly salary.

Therefore, as a salaried employee RSA 275:43-b applies. This statute states in-part: "A salaried employee shall receive full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked;" and "II. Employers may prorate salary to a daily basis when a salaried employee is hired after the beginning of a pay period, terminates of his own accord before the end of a pay period, or is terminated for cause by the employer."

It is difficult for this Hearing Officer to judge what was concluded between the parties in their meeting at the claimant's home on August 16, 2017. The employer holds the claimant reported to him that if he were to take a few days off, as offered, he would not come back. The claimant testified he does not have a recollection of saying that.

The claimant offered up evidence of text messages and an email he sent to the employer which he holds demonstrate his desire to finish out the season. The email is dated August 20, 2017; the text message thread begins on August 20, 2017.

This Hearing Officer is not persuaded by the employer's argument that the claimant quit. Thus, consistent with RSA 275:43-b the employer would be required to pay the claimant for the entire weekly pay period. The employer's records indicate he paid the claimant on Fridays. The claimant's last day of work was August 16, 2017, a Wednesday. Due to the employer's poor record keeping it is unclear if the claimant was paid for the entire week ending August 19, 2017. The employer's records show the claimant being paid \$2,795.11 on August 16, 2017 with a notation in the memo section of the check reading "work & equipment." What portion is pay for work and what portion is pay for "equipment" is not clear. Therefore, it is unknown to his Hearing Officer if the claimant was paid his full salary for his last week of work as is required by RSA 275:43-b. Therefore, this Hearing Officer finds the claimant did not prove by a preponderance of evidence he is owed the \$4,500.00 he claims.

The claimant contends he is owed a bonus of 25% of the business's sales for the season in excess of \$60,000.00 based upon a verbal agreement between the parties. The claimant testified he predicted the business would have achieved the \$60,000.00 by the end of the season based upon earlier month's revenue and projections of revenue from booked business. The claimant did not provide credible data demonstrating the validity of his argument. Therefore, this Hearing Officer finds the claimant did not prove by preponderance of evidence he is owed a bonus he claims.

**AMENDED DECISION**

Based on the testimony and evidence presented, and pursuant to RSA 275:42 II the claimant is considered to be an employee for the purposes of this Decision and as RSA 275:43 I requires that an employer pay all wages due an employee and as RSA 275:43-b requires employers to pay salaried employees their full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked and as this Department finds the claimant did not prove by a preponderance of evidence he is owed additional wages, it is hereby ruled that this Wage Claim is invalid.

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Hearing Officer

Date of Amended Decision: July 30, 2018

Original: Claimant

CC: Lake Life Lessons, LLC