

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

International Municipal Signal Association

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 V unpaid vacation pay
RSA 275:43 V unpaid sick pay
RSA 275:44 IV liquidated damages

Employer: International Municipal Signal Association,

Date of Hearing: August 1, 2018

Case No.: 57180

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant originally asserted, through the filing of his wage claim, that he was owed \$100,000 in unpaid vacation pay and sick pay due upon his separation from employment. He further sought liquidated damages on these wages.

At the hearing, the claimant acknowledges that he had received the claimed vacation pay and sick pay prior to the hearing. He wished to continue with the claim for liquidated damages as these wages were paid later than allowed by statute. He now seeks \$98,291.04 in liquidated damages (\$65,697.12 for the late vacation pay and \$32,593.92 for the late sick pay).

The employer argues that vacation and sick pay are not wages pursuant to ACAS Acquisitions (Precitech) Inc. v. Stephen C. Hobert 155 N.H. 381, and therefore there is no basis for liquidated damages.

FINDINGS OF FACT

The parties are engaged in a suit in another jurisdiction regarding issues which are separate from today's proceedings.

The parties agree the employer terminated the claimant's employment for cause on April 30, 2018. They disagree with the validity of that reason.

The employer provided the claimant a separation letter dated April 30, 2018, on that date during the meeting terminating his employment. This letter, signed by Todd Lohman, the then current President of the International Municipal Signal Association,

noticed the claimant that all wages, including salary, vacation pay and sick pay would be provided to him in a lump sum payment on May 29, 2018.

The employer paid the claimant his regular salary on the next regular pay day of May 3, 2018, which is within the requirements of RSA 275:44 I.

The employer paid the claimant the noticed vacation pay on May 17, 2018.

The employer paid the claimant the noticed sick pay on July 24, 2018.

The claimant seeks liquidated damages as the employer paid the vacation pay and sick pay later than allowed under RSA 275:44 I.

In order to determine if liquidated damages are due, we must first determine if the payment of vacation pay and sick pay are wages under RSA 275:43 V.

The employer argues that vacation and sick pay are not wages pursuant to ACAS Acquisitions (Precitech) Inc. v. Stephen C. Hobert 155 N.H. 381, and therefore there is no basis for liquidated damages.

The New Hampshire Supreme Court determined in ACAS Acquisitions (Precitech) Inc. v. Stephen C. Hobert 155 N.H. 381 that, "We agree with the trial court that because severance benefits were offered only in connection with the sale of Precitech and only then to a few employees on terms negotiated individually with those employees, granting severance benefits was not a matter of practice or policy at ACAS. Therefore, we conclude that the defendant's severance benefits do not meet the definition of wages in RSA 275:42, III and RSA 275:43, III (now RSA 275:43 V). "

RSA 275:42 III reads, the term "wages" means compensation, including hourly health and welfare, and pension fund contributions required pursuant to a health and welfare trust agreement, pension fund trust agreement, collective bargaining agreement, or other agreement adopted for the benefit of an employee and agreed to by his employer, for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission, or other basis of calculation.

RSA 275:43 V reads vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, when such benefits are a matter of employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, when due.

Unlike the issue of severance in ACAS Acquisitions (Precitech) Inc. v. Stephen C. Hobert 155 N.H. 381, the employer agrees granting both vacation pay and sick pay are part of the practice and policy of the employer. In this case, it is only the terms and conditions of the payment of the vacation pay and sick pay upon separation of employment that differ for the claimant, from those in the employee handbook.

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 and sick 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.

In addition to the April 30, 2018, separation letter that noticed the claimant that vacation pay and sick pay would be provided to him on May 29, 2018, the employer notified the claimant, via his December 18, 2015, third consecutive employment agreement, that he would receive both vacation pay and sick pay benefits during his employment, and that both benefits are payable upon separation from employment.

Further, section 2 Compensation, Benefits and Reimbursements (d) of the employment agreement states that to the extent there is a conflict between the terms of this Agreement and Association's standard employee benefits, the terms of this Agreement shall govern.

Section 3 Term and Termination of Agreement, (d) (ii) states, in the event this Agreement and the Executive's employment hereunder are terminated for Cause pursuant to Section 3(b)(ii) above, the Association's sole obligation to the Executive shall be the provision of all payments or benefits pursuant to Section 2 above, which have been earned but have not provided through the date of termination.

Therefore, under the policy and practice of the employer, vacation pay and sick pay are considered wages and pursuant to the written notice in the employment agreement, they became due at the separation of employment.

We now turn to the issue of liquidated damages. The claimant argues the employer willfully and without good cause failed to pay all wages due, vacation pay and sick pay, within the required timeframe set forth in RSA 275:44 I, whenever an employer discharges an employee, the employer shall pay the employee's wages in full within 72 hours.

The employer terminated the claimant on April 30, 2018. The claimant's wages, including vacation pay and sick pay, were due on May 3, 2018, which also was the next regular pay day. The payments for vacation pay and sick pay were paid more than ten days after the May 3, 2018.

The employer provided the claimant a separation letter dated April 30, 2018, on that date during the meeting terminating his employment. This letter, signed by Todd Lohman, the then current President of the International Municipal Signal Association, noticed the claimant that all wages, including salary, vacation pay and sick pay would be provided to him in a lump sum payment on May 29, 2018.

The employer paid the claimant the noticed vacation pay on May 17, 2018.

The employer paid the claimant the noticed sick pay on July 24, 2018.

The employer argues that there was no evidence that Mr. Lohman, the President of International Municipal Signal Association would have any way to know of this statute.

The Hearing Officer does not find this argument persuasive. Mr. Lohman, as President of the company, had access to the claimant's employment agreement which

could not more clearly delineate that the payment of the vacation pay and sick pay were due to the claimant. Further, he signed the separation letter stating that these payments would be made by the arbitrary date of May 29, 2018.

The employer made no argument that they did not have the financial ability to pay the claimant's wages.

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 Hearing Officer finds it more likely than not that the employer was aware of the payments due to the claimant. It is found that the claimant proved by a preponderance of the evidence that the employer was aware of the payments due to the claimant, had the financial ability to make the payments, and chose not to do so.

DECISION AND ORDER

Based on the testimony and evidence presented, 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 proved 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 Wage Claim for liquidated damages is valid in the amount of \$98,291.04 (\$65,697.12 + \$32,593.92) assessed at 10% of the unpaid wages due per day for each day of nonpayment past the statutory limit until equal to the amount of wages due.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$98,291.04 (\$65,697.12 + \$32,593.92), less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: August 21, 2018

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

MJD/nm