

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**

██████████ ██████████

v.

**South Bay Real Estate**

**DECISION OF THE HEARING OFFICER**

**Appearances:**

**Nature of Dispute:** RSA 275:43 I Weekly, Unpaid Wages  
RSA 275:42 I/II Definitions, Employer / Employee Relationship

**Claimant:** ██████████ ██████████

**Employer:** South Bay Real Estate

**Date of Hearing:** September 10, 2018

**Case No.:** 57514

**BACKGROUND AND STATEMENT OF THE ISSUES**

The employer manages a motel / cottage property in Laconia, NH where the claimant was assigned to work

The claimant worked as a housekeeper and occasionally performed yard work and moved furniture within the complex.

The current issue concerns alleged unpaid wages as a result of the employer stopping payment on the claimant's final check in lieu of money the employer felt she was owed.

The employer argues she and the claimant had a verbal agreement whereby the claimant was to reimburse the employer via weekly payroll deductions for the cost of liability insurance. The employer alleged the claimant owes her an amount that is in excess of the amount of her final check.

On the basis of the claimant's assertions she is owed unpaid wages she filed a Wage Claim with the Department on July 13, 2018. A Notice of Wage Claim was forwarded to the employer on July 16, 2018. The employer's objection was received on July 25, 2018; a Notice of Employer's Objection was forwarded to the claimant on the same day. The claimant requested a hearing on August 1, 2018 and a Notice of Hearing were forwarded to the parties on August 21, 2015. Accordingly, a Hearing was held at the Department on September 10, 2018.

## **FINDINGS OF FACT**

The employer testified she hired the claimant as an independent contractor and that she worked four weeks.

The employer testified she required the claimant to have liability insurance. She stated the claimant could not afford to pay the full cost of the insurance upfront. So, because she wanted to help the claimant out, she offered the claimant the option of weekly payroll deductions in the amount of two (2) hours' worth of wages. The employer testified it was the same arrangement the parties had in previous years. The parties agreed to this arrangement. The parties also agree there was no written agreement concerning this arrangement.

The claimant received four (4) pay checks. On each of the four checks there is an itemization for the balance owed for the liability insurance.

The claimant testified that on June 2, 2018 she went to work believing that she was supposed to work but was told there was no work for her. She left, taking her paycheck for the previous week; she believed she had been let-go. The employer believed she quit.

The employer testified that she did not fire the claimant and did not want her to leave. Rather, there was no work for her on that day (June 2, 2018) being it was early in the season.

The claimant deposited her paycheck into her bank account and was subsequently informed by the bank that a "stop payment" had been placed on the check. The claimant incurred a \$15.00 fee to her bank account as a result.

The employer testified she stopped payment on the check because the balance the claimant owed for the liability insurance was greater than the amount of her paycheck, and the claimant still owes her \$361.00.

## **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 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 employer testified the claimant was hired 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 employer fails to show the claimant meets the following criteria.

Criterion (b) requires "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." The claimant did not work independently; she took direction from the employer on the days she worked.

Criterion (e) reads: "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." This Hearing Officer asked the claimant if she performed the same work for other business's, was she in business for herself or was the business registered with the New Hampshire Secretary of State. She responded "no" to these questions.

Criterion (f) reads: "The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work." No contract for services between the parties, either verbal or written, was offered by either party.

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

RSA 275:43 I requires, in-part, employers to pay all wages due an employee within 8 days after expiration of the week in which the work is performed, on regular paydays designated in advance by the employer and **at no cost to the employee (emphasis this writer's)**. This statute does not permit employers to withhold wages from employees resulting from unlawful deductions.

RSA 275:48 states in-part that no employer may withhold or divert any portion of an employee's wages unless the employer is required or empowered to do so by state or federal law, including payroll taxes or the employer has a written authorization by the

employee for deductions for a lawful purpose accruing to the benefit of the employee as provided in regulations issued by the commissioner. The deduction for the cost of liability insurance is not a provision listed in the regulations, and therefore, it is an unlawful deduction. The claimant cannot agree to an arrangement that is prohibited by statute.

Both parties agree the employer stopped payment on the claimant's final check. As a result of the employer's action the claimant incurred a \$15.00 fee against her banking account. RSA 275:43 I requires employers to provide employees their wages at no cost.

As this Hearing Officer finds the claimant to be an employee, and based upon the employer's testimony acknowledging the claimant did work for her, and that she did withhold her final check in lieu of the remaining balance owed for liability insurance, an unlawful deduction, the claimant did prove by a preponderance of evidence she is owed \$110.00 in wages plus \$17.00 for the unlawful deduction for liability insurance plus \$15.00 in bank fees for the employer's stopping payment on her paycheck for a total amount of \$142.00.

Whether or not the claimant is owed wages for the day (June 2, 2018) she reported to work and was told there was no work for her, or if she is owed wages for previous weeks' and years' unlawful deductions were not addressed in this Decision as these issues were not "Noticed" as required by Lab 204.03 Notice of Hearing (b)(d).

### DECISION

Based on the testimony and evidence presented, and as RSA 275:43 I requires that an employer pay all wages due an employee at no cost to the employee and as this Department finds that the claimant proved by a preponderance of the evidence that she is owed unpaid wages, it is hereby ruled that this Wage Claim is valid in the amount of \$142.00.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED] [REDACTED] in the amount of \$142.00, less applicable taxes, with a statement of such deductions within 20 days of the date of this Order.

[REDACTED] \_\_\_\_\_  
Hearing Officer

Date of Decision: October 11, 2018

Original: Claimant

Cc: South Bay Real Estate