

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



V

**Stephanie Gladys and Paul Cote dba Fat Dog Kitchen**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid wages

**Employer:** Stephanie Gladys and Paul Cote dba Fat Dog Kitchen

**Date of Hearing:** October 2, 2018

**Case No.:** 57650

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant asserts she is owed \$2,815.47 in unpaid wages for hours worked between January 7, 2017 and February 25, 2018, and tips she was forced to give to other staff members. She worked for tips only and did not receive an hourly rate from Fat Dog Kitchen.

Fat Dog Kitchen denies the claimant was not paid for all time worked. She was not an employee but casual labor. She received 100% of all tips from the restaurant.

**FINDINGS OF FACT**

This Department must first to determine whether the claimant was an employee of an employer or 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 New Hampshire Supreme Court opined in Caswell v. BCI Geonetics, Inc. 121 N.H. 1048, that RSA ch. 275 is entitled "Protective Legislation," and we should construe it with that purpose in mind. Further, the definition of "employee" pertaining to this section is set forth in RSA 275:42 II:

"The term 'employee' includes any person suffered or permitted to work by an employer. For the purposes of claims for wages under RSA 275:51, any person in the service of another shall be conclusively presumed to be an employee, not an independent contractor, if it shall have been determined to be more likely than not that the relationship can be terminated summarily, with a right to no more than compensation already earned."

Fat Dog Kitchen's only argument, that the claimant was "casual labor" as used by the IRS and as used for years by their bookkeeper, is not persuasive. Casual labor is defined under this jurisdiction only under RSA 276-A Youth Employment. There are no categories for "casual labor" under the definitions or exemptions of employee in any section of the statutes under this Department's jurisdiction.

The testimony by both parties supports the conclusion that the claimant is an employee, not an independent contractor, as the claimant does not meet all the criteria set forth in RSA 275:42 II to be exempted from the definition of employee. Therefore, the Hearing Officer finds the claimant is an employee of an employer, Stephanie Gladys and Paul Cote dba Fat Dog Kitchen (hereafter "the employer").

The claimant worked for the employer as a waitress from January 7, 2017 through February 25, 2018, when she quit.

The claimant argues she worked for tips only, and did not receive the proper subminimum hourly rate of \$3.27 for 691 hours of work performed in 2017 and 118 hours of work performed in 2018. She provided credible testimony that she worked the hours for which she is seeking wages. She also provided credible evidence, previously submitted, in the form of a spreadsheet for hours and dates worked.

She made no argument regarding any amount tipped out to other employees.

The employer argues that the claimant received more than the required hourly rate from the tips she received. The employer's bookkeeper argues that the tax forms reflect an hourly rate paid and tips received. She did not argue that the employer actually paid the claimant an hourly rate.

The employer did not argue that the claimant did not work the hours claimed, only that she made her own hours and “came and went” as she wanted.

RSA 275:43 I requires an employer to pay employees for all hours worked on designated payday. Pursuant to RSA 279:21, the claimant meets the criteria to be considered a tipped employee, and the employer may pay the claimant a subminimum wage rate of not less than 45% of the applicable minimum wage, \$7.25, which equals \$3.27.

Tips are defined in RSA 279:1 XII as “tips” means money given to an employee by a customer, in cash or its equivalent, or transferred to the employee by the employer pursuant to directions from a credit card customer who designates a sum to be added to the bill as a tip, or added as a gratuity or service charge to a customer's bill, in recognition of service performed and 275:42 III defines 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.

The employer is precluded from failing to pay an hourly rate to an employee and then using the tips to show an accounting that the tips cover any hourly rate she should have received from the employer.

### **CONCLUSIONS**

Because the claimant does not meet all the criteria set forth in RSA 275:42 II (a) through (g), she is considered to be an employee. This Department does not have classifications of employee, such as casual labor, for non-minor workers.

As the claimant provided credible and persuasive testimony that she received tips only and no hourly rate from the employer and the employer agrees they did not pay her an hourly rate from their revenue, the Hearing Officer finds the claimant proved she worked 809 (681 + 118) hours and is owed the claimed wages in the amount of \$2,645.43 (809 \* \$3.27).

The claimant made no argument regarding tipping out to other employees, therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence she is due the claimed deductions.

### **DECISION AND ORDER**

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 proved by a preponderance of the evidence that she is owed the claimed wages, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$2,645.43.

As the claimant made no argument regarding a policy to “tip out” other employees, and as this Department finds the claimant failed to prove by a preponderance of the evidence that she was not paid all wages due, it is hereby ruled that this portion of the Wage Claim is invalid.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$2,645.43, less any applicable taxes, within 20 days of the date of this Order.

[REDACTED]  
Hearing Officer

Date of Decision: October 9, 2018

Original: Claimant  
cc: Employer