

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF LABOR  
CONCORD, NEW HAMPSHIRE

██████████  
v.

Groundhog Landscaping & Property Maintenance, Inc.  
CASE #100746

**DECISION OF THE HEARING OFFICER**

**APPEARANCES:** Claimant, self-represented  
Nicholas Makris, representing the employer

**NATURE OF DISPUTE:** RSA 275:43, I — Weekly (unpaid wages)  
RSA 275:43, V — Weekly (unpaid vacation pay).

**DATE OF HEARING:** March 23, 2022

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant filed a wage complaint on January 11, 2022, alleging that he missed some days of work the first week in January due to COVID and the employer refused to pay him weekly salary. His claim was for \$1,150.00. Notice of the claim was mailed to the employer on January 13, 2022. The employer did not file an objection to the claim. The claimant requested a hearing and a notice of hearing was sent on February 28, 2022.

**FINDINGS OF FACT**

The following findings are based on the testimony of the claimant, employer's representative, exhibits offered by both parties, and matters of record in the Department file.

Claimant is 41 years old. He lives with his wife and six children in Franklin. He has a high-school diploma. He has worked for the employer from March of 2015 until he resigned in January 2022. He was the sales manager. He visited customer residences and sold landscaping services and products. During the winter months when there was little landscaping activity, he also plowed snow for the employer. He was paid a weekly salary of \$1,150.00. Pay

periods ran from Monday to Sunday, with payday the following Friday. Claimant was paid in hand.

Nicholas Makris, 48, of Bedford, has been a partner with the company for 10 years. The company has about 80 employees. It provides employees with 10 days per year of personal time off plus holidays. PTO is accrued at the rate of 0.883 days per month. PTO generally has to be approved in advance. Senior employees such as the claimant are sometimes allowed to take PTO time before it has been accrued, but always subject to pre-approval.

Mr. Makris testified that, while he was somewhat flexible with senior employees regarding the use of PTO, when it came to snow plowing duties, he was not flexible. If it snowed and an employee was scheduled to plow, the employee could not take PTO in lieu of working that day.

Claimant submitted a set of text messages in support of his testimony regarding the events of January 3–7, 2022. Mr. Makris submitted vacation request forms signed by the claimant for the year 2021 to show claimant's awareness and use of the procedure for requesting PTO.

Monday, January 3, 2022 was the first day of a new pay period. Before work that day, claimant texted to Mr. Makris that he could not come in because his wife was sick. He said he would be back in tomorrow. Shortly afterwards, he texted the employer again that his wife had tested positive for COVID. During a subsequent telephone conversation that day, claimant told Mr. Makris that his wife was on quarantine in the bedroom for 10 days and he did not believe he would be able to come in at all that week.

He testified that Mr. Makris said, "Looks like you'll be using all your time off at the start of the year," or words to that effect. Claimant said he took that comment as approval for him to take the time off. Mr. Makris testified that he made it clear to the claimant in that conversation that he could have a few PTO days but only on the condition that he would come in and plow on Friday if it snowed as had been forecast.

Before work on Tuesday, January 4, Mr. Makris texted the claimant that snow was likely Friday. The message continued, "You will need to be here no matter what so make preparations." Claimant responded that his wife was in quarantine and was unable to care for the kids, so he was not going to be able to work Friday. To which Mr. Makris responded, "Well you have to figure it out, Ryan, because if you no show you are getting laid off."

On Thursday morning, January 6, another employee of the company texted the claimant to remind him that snow was likely on Friday and checking to see if he was coming in. Claimant said he would not be in because now he, too,

had tested positive for COVID on January 5 and he was sick. Claimant did not work on Friday, January 7.

Claimant and Mr. Makris spoke by telephone on Monday, January 10. Mr. Makris told claimant that he would not be paid for the week he was out, January 3–7, or for the current week January 10–15. He said the claimant could return to work the following Monday, January 17.

At that point, the claimant informed Mr. Makris that he was quitting.

### **DISCUSSION AND CONCLUSIONS**

The claimant had the burden of proving by a preponderance of the evidence that he was owed unpaid wages. Proof by a preponderance as defined in Lab 202.05 is a demonstration by admissible evidence that a fact or legal conclusion is more probable than not. The hearing officer is charged with evaluating the testimony and exhibits in the case and deciding the issues presented, based upon “reliable, probative, and substantial evidence,” Department Rule Lab 204.07(n).

The claimant argued that by company policy he had 10 vacation days available and the employer should have allowed him to use them. He further stated that, when Mr. Makris told him, “Looks like you’re going to be using all your PTO at the start of the year,” he took that as meaning he could take the PTO time he needed without losing pay. Based on this understanding, he was demanding his full salary for the week of January 3–7, \$1,150.00.

The employer argued that as of January 3, 2022, claimant had not accrued any PTO. Furthermore, the claimant knew from the conversation on Monday January 3, 2022, that permission to “front” the PTO before it was earned was conditioned on claimant performing his plowing duties if it snowed on Friday. Claimant denied that Mr. Makris set this condition in the telephone call.

Mr. Makris’ text messages on Tuesday January 4 clearly state that the claimant would have to plow if it snowed Friday and if he didn’t, he would be laid off. Also, the way the messages are worded suggest that this requirement had been discussed previously.

By his own admission, Mr. Makris sometimes let senior workers such as the claimant use PTO before it had been earned. In this case, it is found that he was willing to let claimant use some PTO time before it was earned, with the proviso that if it snowed Friday, claimant would have to work that day and could not use PTO. This requirement was communicated to the claimant by telephone on January 3 and by text on January 4. Claimant was also told that if it snowed Friday and he did not show up for work, he would be laid off.

RSA 275:43, V in pertinent part provides that personal days

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.

"[W]hen due" is a reference to contingencies specified in the employer's policy that the employee must meet in order to be eligible for the benefit in question.

By not showing up to plow on Friday, claimant failed to meet the contingencies set by his employer to be eligible to use PTO days that had not even been earned yet. Thus, he was not entitled to claim those PTO days and they were equivalent to unexcused absences.

Moreover, by not showing up for work on Friday, it is the case that the claimant did not perform any work during the week of January 3–7. Pursuant to RSA 275:43-b, I(a), a salaried employee is generally required to be paid full salary for any pay period in which he performs any work but is not entitled to his salary for any pay period in which he performs no work.

Thus, the employer was within its rights to refuse to pay the claimant for the week of January 3–7 when he did not perform any work. To the extent the claimant believed he still should be paid his full salary, such a belief was not reasonable in light of the above findings and the provisions of RSA 275:43-b.

Based on the foregoing, it is found that the claimant failed to meet his burden of proving that he was entitled to his weekly salary for January 3–7, 2022.

### DECISION

Based on the testimony and documentary evidence and the findings set forth above, the claims for unpaid PTO and salary are respectfully ruled to be **invalid**.

April 5, 2022  
Date of Decision

  
George A. Stewart, Hearing Officer

GAS/nd