

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



V

**White Birch Gourmet LLC**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid wages  
RSA 275:44 IV liquidated damages  
RSA 275:42 I/II employer/employee relationship

**Date of Hearing:** April 17, 2019

**Case No.:** 58521

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant asserts he is owed \$420 in unpaid wages for \$175 for January 29, 2019, \$175 for January 30, 2019, and \$70 for a partial day worked on February 5, 2019. He seeks to hold the employer liable for liquidated damages.

White Birch Gourmet LLC argues the claimant was a contractor, not an employee, and they rightfully deducted damages the claimant made to their vehicles from his final payment.

**FINDINGS OF FACT**

The claimant worked for the employer as a delivery driver from July 2014 through February 5, 2019, when he quit. He received a daily rate of \$175.

There is no dispute between the parties that the claimant worked January 29, 2019, January 30, 2019, and a partial day of approximately four hours on February 5, 2019.

White Birch Gourmet LLC did not pay the claimant his final payment because they made deductions for damages the claimant made to their vehicles, which exceeded the amount he was due.

The claimant did not provide any written authorization for any deductions from his wages.

## DISCUSSIONS AND CONCLUSIONS

White Birch Gourmet LLC asserts the claimant is a contractor, rather than an employee, though he admits he does not truly know the difference and will accept the determination of the Department.

The claimant mistakenly argues that it is the burden of White Birch Gourmet LLC to prove he is an independent contractor. However, he further argues he does not meet the criteria in (b), (c), and (d) below.

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."

White Birch Gourmet LLC's assertion that the claimant is a contractor is not persuasive given that the claimant did not have a contract with White Birch Gourmet LLC. Further, the testimony by both parties supports the conclusion that the claimant is an employee, not an independent contractor, as claimant did not meet the criteria in (c) because he did not have control over the time the work was performed nor (e) does not hold himself out to be in business for himself.

Therefore, the Hearing Officer finds the claimant is an employee of the employer, White Birch Gourmet LLC (hereafter "the employer").

The claimant bears the burden to prove he is due the claimed \$420 in unpaid wages for the work performed.

The parties agree on the days worked and the wages earned.

The employer argues that they made deductions from the claimant's wages for damages he caused to their vehicles.

The claimant argues the employer is violating RSA 275:48 by making deductions from his wages for damages.

RSA 275:48 Withholding of Wages I (b) Allows an employer to make certain deductions from an employee's wages if they have first secured a written authorization by the employee for deductions, which for a lawful purpose accruing to the benefit of the employee as provided in regulations issued by the commissioner, but none of those exceptions apply to the facts of this case.

As the employer is precluded from making deductions from the claimant wages, the Hearing Officer finds the claimant proved by a preponderance of the evidence he is due the claimed \$420.

The claimant alleges the employer should be held liable for liquidated damages on his final wages because the employer purposely failed and did not pay within the timeframe required by RSA 275:44 II.

The claimant has the burden to prove by a preponderance of the evidence that the employer voluntarily, with knowledge of the obligation and despite the financial ability to pay the wages owed, fails to pay them.

The employer believed he was allowed to withhold damages from the claimant's wages, as he has done with other employees.

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 employer persuasively argues he held a genuine belief it was allowable to make deductions from the claimant's wages for damages, as he has done with other employees.

Because the employer held a genuine belief he could withhold wages from the claimant for damages, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay all wages due.

### **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 he is owed the claimed wages, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$420.

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 failed to prove 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 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 \$420, less any applicable taxes, within 30 days of the date of this Order.

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[REDACTED]  
Hearing Officer

Date of Decision: April 30, 2019

Original: Claimant  
cc: Employer