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

v.

**Muse Paintbar, L.L.C.**
**CASE #62115**

## DECISION OF THE HEARING OFFICER

**APPEARANCES:** Beth Deragon, Esq., representing the claimant

Christopher Pyles, Esq., representing the employer

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

RSA 275:43-b —Payment of Salaried Employees (unpaid salary)

RSA 275:43, V — Weekly (unpaid vacation pay/PTO)

RSA 275:43, V — Weekly (unpaid employee expenses)

RSA 275:43, I — Weekly (unpaid bonus)

RSA 275:44, IV — Employees Separated from Payroll before Paydays (liquidated damages)

**DATE OF HEARING:** April 13, 2021 (record held open until April 27, 2021)

## BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed on January 26, 2021. As the claim was amended on February 3, 2021, she advanced five claims: two days' unpaid wages from the last pay period in which she worked; a separation payout for four weeks' paid vacation; unreimbursed expenses for one month of COBRA benefits; an unpaid, annual bonus for 2020; and an award of liquidated damages based on the employer's failure to pay her the final wages within statutory time limits.

Notice of claim was sent on February 3, 2021. Employer filed an objection on March 11, 2021. Claimant requested a hearing. Notice of hearing was sent on March 17, 2021. Both parties participated remotely by video conference under a standing order of the Department, necessitated by COVID−19. The record was held open until December April 27, 2021 for submission of written closing arguments. Both parties timely responded.

## FINDINGS OF FACT

The findings are based on the testimony of the claimant, her witness Arpit Bhoti, employer's witnesses Jeff Hagar and Curt Friedberg, exhibits offered by both parties, and matters of record in the Department file. With their closing arguments, the parties submitted a statement of undisputed facts, which is incorporated by reference herein, whether specifically referenced or not.

Claimant is 49 years old and lives in Alton. Prior to working for the employer, she ran a consulting and management business based in Atlanta, Georgia.

The employer, founded in 2012 and incorporated in Delaware, operated a national chain of "painting bars" where customers could engage in artistic and entertainment activities while enjoying food and alcoholic beverages. The company experienced financial challenges and in 2017 entered into a lender/borrower relationship with Chatham Capital Management. Jeff Hagar is a partner at Chatham Capital. On August 30, 2019, the employer was placed in receivership on a petition filed by Chatham Capital in the United States District Court for the District of Delaware. The court-appointed receiver was GGG Partners, L.L.C. Er. Exh. Tab 1. Curt Friedberg is a principal at GGG.

In October 2019, claimant's consulting firm was hired by the employer[1] as an independent contractor, to perform marketing and CEO-type duties. Cl. Exh. 2. On November 8, 2019, the receiver offered claimant a permanent position as CEO at an annual base salary of $300,000, with a provision for an annual bonus equal to 60 percent of annual base salary when EBITDA (earnings before interest, taxes, depreciation, and amortization) targets were met. The actual targets were to be set by the employer at its sole discretion. (The target for 2020 was subsequently set at $4.5 million.) The offer letter recited that the foregoing terms "will be incorporated into your employment agreement." Cl. Exh. 1. Claimant testified that the salary was less than what she had been making, but she took the job because of the opportunity it offered in the event of a turnaround, which she believed she could accomplish. Claimant's first day as CEO was November 9, 2019.

Claimant signed a contingent employment agreement on December 1, 2019. Cl. Exh. 3. The parties to this agreement were EAD, L.L.C. and the claimant. Signing for the EAD was Brian Reynold, managing partner; he was also a team leader at Chatham Capital. The agreement incorporated the terms of the salary and bonus provisions from the offer letter and specified the EBITDA target for 2020. It included a provision for pro-ration of bonus in case of

[1] Given GGG's status as receiver and Chatham Capital's status as funding entity during the pendency of the Delaware proceeding, the terms "employer" and "company" used herein without further specification are meant to include Muse Paintbar, GGG, and Chatham Capital.

termination of employment. It also provided for four weeks' paid vacation per calendar year, "subject to the terms and conditions set forth in the Company's vacation policy...." The agreement recited that the offer of employment was expressly contingent upon EAD's acquisition of the property and operations of Muse Paintbar, L.L.C., then in receivership. As it turned out, the acquisition of Muse Paintbar by EAD did not occur.

Claimant helped to write and implement Muse's Employee Handbook, which included a vacation policy. The vacation policy provided that full-time managers would accrue vacation time at a rate of 2.31 hours every week, which comes to 120 hours (three weeks) per year. The Handbook states, "If employment is terminated for any reason, accrued unused vacation time will be paid upon termination in accordance with state law." On December 9, 2019, claimant signed an acknowledgment that she had received the employee handbook and read and agreed to abide by the policies and procedures contained in it. Er. Exh. Tab 6.

In March 2020, claimant moved to New Hampshire, where she continued to work from a home office. In or around July 2020, at the claimant's recommendation, the company hired Arpit Bhoti as CFO. Mr. Bhoti had previously worked with the claimant for a different company.

In October 2020 Mr. Bhoti gave notice that he was leaving the company for another job. Claimant advocated for a transition package for Bhoti in which he would receive prorated bonus payments for his achievements during his five-month tenure, and also in consideration of his agreement to stay on for the additional two months after giving notice. Mr. Bhoti did receive partial bonus payments equal to about 2/3 of what he believed he earned.

During a conference call with claimant and Mr. Hagar on November 3, 2020, Chatham Capital team leader Brian Reynolds stated that no bonuses would be paid out for 2020. The company had lost millions of dollars that year and it was clear it would not meet the $4.5 million EBITDA target. (Mr. Friedberg testified that the company had $6.6 million in revenue for 2020 and $12.5 million in expenses; the company barely covered its payroll.)

In a series of emails with the claimant on December 1–2, 2020, Mr. Hagar questioned why Mr. Bhoti had received any bonus payments at all and stated that no further such payments were to be made to him. Er. Exh. Tab 14. Claimant strongly disagreed with this decision to not pay Bhoti his final bonus installment. At 10:30 p.m. on December 2, 2020 she sent an email to Jeff Hagar, notifying him that she was resigning, effective immediately. Er. Exh. Tab 15.

Claimant testified that she continued to do some work on the company's behalf for the next two days. On December 3, 2020, she responded to an email from Dropbox regarding the employer's email account there. She also took

phone calls from Mr. Bhoti, who was still employed by the company, to discuss transitioning projects she had been involved in. She responded to a call from a bank officer regarding a PPP loan the bank had made to the company. On December 4, she took another call from Mr. Bhoti to continue the previous day's conversation. She also took a call from a landlord of a property occupied by Muse Paintbar.

Mr. Hagar denied that the company asked or permitted the claimant to do any work after she resigned.

As part of claimant's exit package from her prior employer, she had twelve months of pre-paid health insurance through COBRA. In November 2020 the pre-paid coverage ended and she was going to have to pay them herself. She testified that, in a telephone conversation on October 22, 2020, Jeff Hagar verbally suggested that she "expense" the COBRA payments. Mr. Hagar testified that he never agreed to reimburse her for these payments, which he considered personal expenses rather than employment-related expenses. The employer did reimburse claimant for the November premium but not for December. Mr. Hagar testified that the November payment was in error, as neither expense was eligible for reimbursement.

Claimant's final paycheck was prorated for the partial pay period she worked; she was not paid for December 3 and 4. Her final check did not include a payout for vacation time. She never received reimbursement for her December 2020 Cobra premium and she never received a bonus.

## DISCUSSION AND CONCLUSIONS

The claimant had the burden of proving by a preponderance of the evidence that she 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).

Claim for unpaid wages. Claimant admitted that she resigned effective December 2, 2020 before payday and thus was not entitled by law to receive her full salary for the pay period. See, RSA 275:43, 4-b, II (pro-ration allowed when employee terminates of her own accord). However, noting that the employer, upon receipt of her resignation, did not instruct her to cease all work on behalf of the company, claimant testified that she worked for the two days following her resignation.

With respect to the email communications, the employer characterized them as mere personal announcements. Employer submitted examples of such

personal announcements, Er. Exh. Tabs 15–19. It is noted that these were not the communications claimant relied on in her claim that she performed work for the company.

To the extent that the claimant was simply announcing her departure from the company and providing personal contact information, it is found that these efforts did not constitute work on the employer's behalf and did not constitute work for which she was entitled to be paid. To the extent that claimant's communications touched on ongoing company business (communications with Dropbox and with the bank officer), it is found that, having voluntarily resigned without notice, claimant was without authority to engage in company business and it was improper for her to do anything other than refer the caller back to current company officials. The annoyance of receiving calls and emails intended for company officials was a price she paid for her decision to resign so abruptly.

On the other hand, Mr. Bhoti was still working for the company. According to the claimant's testimony, Mr. Bhoti reached out to her to talk about outstanding projects. However, Mr. Bhoti was due to leave the company's employ shortly (he left December 9, 2020). Mr. Bhoti did not corroborate claimant's testimony regarding the December 3 and 4 telephone calls. No documentary evidence was provided supporting the proposition that the calls were about ongoing company business.

One thing the employer's exhibits did demonstrate is that the claimant was using the company's email and mobile phone accounts to make these communications after she resigned, starting at around 8 a.m. on December 3, 2020. Standard business practice following an abrupt resignation by a top executive would be immediately to terminate any such access to company telephones and emails. Be that as it may, the company's failure immediately to terminate claimant's access to company communications resources does not equate to license for the claimant to continue working after her abrupt resignation. Also, the claimant provided no authority for the questionable proposition that an employer must affirmatively order an individual who has resigned not to engage in further business or else be held liable for payment based on work allegedly done after the resignation.

The claimant failed to prove that she worked for the company after December 2, 2020,

Claim for unpaid bonus. A bonus award, when due, is considered part of wages, pursuant to RSA 275:42, III. "When due" is a reference to contingencies specified in the description of the employers' bonus plan that the employee needs to meet in order to be eligible for the bonus. It is the claimant's burden to prove that the employer offered her such a plan and that she met the contingencies entitling her to receive the bonus.

It was not contested that the annual bonus offered to the claimant in the November 8, 2019 letter was contingent upon company performance generating an EBITDA target set by the company, and that the target for 2020 was $4.5 million. However, claimant testified that the original target level was unattainable due to COVID-19 and that the company had requested her to submit a revised bonus plan in October 2020, which she did. Based on her revised bonus plan, she would have been entitled to a bonus of $180,000 for 2020. Given her departure December 2, 2020, she pro-rated this to $165,000. She also pointed to the fact that Mr. Bhoti received a pro-rated bonus for 2020 as evidence that the original $4.5 million EBIDA-targeted bonus was revised.

Mr. Hagar testified that the EBITDA targets were never changed and remained in effect. The claimant's suggested revisions were not implemented. Mr. Bhoti was treated as a special case; the company agreed to pay him a bonus in consideration of his agreeing to stay on with the company for two months instead of leaving after two weeks' notice. Mr. Friedberg corroborated this testimony. Mr. Bhoti confirmed that his bonus payments were negotiated. He also confirmed that the company had refused to pay the final installment of his negotiated bonus; he understood their decision and was "letting that go." (Email read into the record by Mr. Bhoti.)

The evidence of the negotiated agreement with Mr. Bhoti and the two partial payments does not establish a contrary practice on the part of the employer. Other than Mr. Bhoti, no other employee received an annual bonus for 2020. The claimant failed to prove that the contingencies entitling her to a bonus for 2020, pro-rated or otherwise, were satisfied.

Claim for unreimbursed December 2020 COBRA expenses. Pursuant to RSA 275:43, V, employee expenses that are reimbursable as matter of employment practice or policy constitute wages when due.

Upon hiring by the employer, the claimant already had pre-paid insurance from her previous employer through October 31, 2020, therefore she did not opt-in to the employer's health plan from the beginning. But she asked for reimbursement of her continuing COBRA payments for November and December 2020, planning to join the employer's plan in January 2021. She was repaid for the November premium (according to the company, inadvertently). Thus, her claim was limited to the December premium, $1,636.74.

In her closing statement, claimant cited a provision of the Employment Agreement regarding reimbursement "for all reasonable, documented out-of-pocket business expenses incurred by [sic] in the performance of her duties." Cl. Exh. 6 (emphasis added.) Claimant argued that the COBRA payments were business expenses and thus were reimbursable.

Claimant's reliance on the Employment Agreement is misplaced for two reasons. First, that agreement never took effect, as the triggering contingency—purchase of Muse by EAD—never occurred. Second, COBRA payments do not fall within the scope of business expenses, as the term is commonly used in the employment context. A company's agreement to pay an employee's health insurance premiums would ordinarily fall within the category of benefits. To prove entitlement to such a benefit, claimant had to prove the company had a practice or policy of providing this benefit.

In this regard, claimant testified that, when she explained her situation to Mr. Hagan in a telephone conversation on October 22, 2020, he suggested that she submit them as expenses, saying, "You're expensing them, right?" Mr. Hagar did not deny uttering those particular words, but denied ever agreeing to reimburse claimant for her COBRA payments. Nevertheless, the company did repay her for November, but after she resigned, it refused to repay her for December.

Crediting the claimant's testimony regarding her conversation with Mr. Hagar and the evidence of payment for the November 2020 premium, claimant satisfied her burden of proving that the company had a practice of repaying her for the COBRA benefits until she could sign on to the company's policy in January 2021.

However, her claim for reimbursement of the entire December COBRA expense fails. She resigned on December 2, 2020. She did not prove that Mr. Hagar's verbal suggestion that she "expense" the premiums obligated the company to reimburse her for COBRA coverage after she was no longer an employee by virtue of her abrupt resignation.

Claimant proved that she was entitled to the benefit while she remained an employee, i.e., for the first two days of December. The pro-rated benefit would be 2/31 x $1,636.74, or $102.30.

Claim for Unpaid Vacation Pay. Vacation pay, when such a benefit is a matter of employment practice or policy, is considered wages when due. RSA 275:43, V.

Relying on the provisions of the Employee Agreement, claimant argued that she was entitled to 20 days of vacation per anniversary year. By her reckoning, 20 days were awarded on her first day of employment, November 9, 2019. She used five vacation days from her hire date through her anniversary date of November 9, 2020, leaving 15 days unused. She was awarded an additional 20 days on November 9, 2020, giving her a total of 35 days unused as of her resignation. Finally, she argued that, by practice and policy, the employer paid out unused vacation time to separating employees.

The employer did not contest that it had a policy or practice of paying out a separating employee's unused accrued vacation time. However, it contended that, as of claimant's separation date, she had no unused accrued vacation time remaining.

As discussed earlier, claimant's reliance on the provisions of the Employee Agreement is misplaced, as that agreement never went into effect. Instead, the Employee Handbook, which the claimant acknowledged and agreed to be bound by, is found to be the operative document as to vacation policy. The Handbook policy regarding vacation time provided that full-time managers would accrue vacation hours at a rate of 2.31 hours every week, which comes to 120 hours (three weeks) per year. It is found that claimant was a full-time manager and thus eligible for this benefit.

By her November 9, 2020 anniversary date, claimant had accrued 120 hours. From November 9 through December 2, 2020, she accrued an additional eight hours. Thus it is found that her total accrued time as of her last day at work was 128 hours (16 days) of vacation time.

Claimant conceded she had used five vacation days prior to November 9, 2020 but none after that. Cl. Exh. 002. By reference to claimant's calendar and emails, Mr. Friedberg calculated that claimant took a total of 29.75 vacation days during the course of her employment. Er. Exh. Tab 21.

Mr. Friedberg's testimony on this point is found to be speculative, and the documents he relied upon—claimant's calendar entries and emails and text messages—unreliable, as they were not intended to be, and did not purport to be, vacation records. In particular, the claimant's references to being on PTO are ambiguous as she sometimes appeared to be transacting business while describing herself as "on PTO" or "out of the office." The one exception was the text message from June 30, 2020, which clearly references a day off for kayaking and hiking. Er. Exh. Tab 21 (unnumbered page).

Salaried employees cannot be charged for vacation time whenever they are away from work; they are entitled to their full salary without respect to actual hours worked. RSA 275:43-b, I. Employers are not required to keep records of hours worked by salaried employees, Lab 803.03 (g). In light of this statutory and regulatory framework, implementation of a paid vacation policy for salaried employees requires that the employer keep clear and accurate records as to vacation time requested, approved, and used. Apropos is Lab 803.03 (Notification and Records), in pertinent part,

> (f) Pursuant to RSA 279:27 and RSA 275:49, VI, relative to record keeping requirements, every employer shall:
>
> ***
>
> (4) Make such good records as shall show the exact basis of remuneration of an employee's compensation....

According to the Employee Handbook, the employer had in place a system for tracking vacation requests, for both salaried and hourly employees. See Er. Exh. Tab 5 at page 26. Had the employer applied this policy to the claimant, the instant dispute over vacation time would likely have been avoided. That said, it remained the claimant's burden to prove that she was entitled to the vacation payout.

The claimant's testimony that she took five vacation days is credited, but one day is added for June 30, 2020, as discussed earlier, giving a total of six. Subtracting this from the 16 days of accrued vacation time leaves 10 days unused vacation time. Pursuant to company policy, claimant was entitled to a payout on separation for this time. Claimant's imputed daily salary was $1,153.85. At this rate, she was entitled to a vacation payout of $11,538.50

Claim for liquidated damages. RSA 275:44 provides, in pertinent part,

> IV. If an employer willfully and without good cause fails to pay an employee wages as required under paragraphs I, II or III of this section, such employer shall be additionally liable to the employee for liquidated damages in the amount of 10 percent of the unpaid wages for each day except Sunday and legal holidays upon which such failure continues after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller. * * *

Thus, an award of liquidated damages for improper withholding of wages requires a finding that the employer acted "willfully and without good cause." Our Supreme Court has construed this expression as a unitary phrase, meaning "voluntarily, with knowledge that the wages are owed and despite financial ability to pay them." Ives v. Manchester Subaru, Inc. (N.H. 1985). The Court stated, "A willful act is a voluntary act committed with an intent to cause its results. It is not, by contrast, an accident or an act committed on the basis of a mistake of fact." The Court went on to explain that RSA 275:44 "was not intended to impose liability where the employer's refusal to pay wages is based upon bona fide belief that he is not obligated to pay them."

The claimant argued that the employer's ability to pay was demonstrated by its payments to Mr. Bhoti; and that the employer, the receiver GGG, and the funding entity Chatham Capital "had a history of intentionally not paying out to spite executive-level employees to see if they would fight the issue." The latter assertion was an apparent reference to claimant's final question on cross-examination of Mr. Friedberg, "This wasn't the first time that Muse has run afoul of wage and hour violations, is it?" The employer objected to the question. On inquiry, it appeared the reference was to a Massachusetts wage claim, the details and outcome of which were not provided at the hearing or noticed in advance of the hearing. The objection was sustained on grounds of relevance.

In this case, the claimant prevailed on her claim for a COBRA payment, but the claim was substantially reduced by proration. She also prevailed on her claim for vacation pay; that claim was also substantially reduced. Litigation of the

issues presented required the testimony of four witnesses filling over two hours, voluminous exhibits (34 in total), and lengthy written closings by attorneys for both sides.

The claimant did not prove that the employer's refusal to pay the wages found to be due was willful and without good cause. Thus, an award of liquidated damages is not warranted.

## DECISION

Upon consideration of the evidence and arguments submitted, it is found that the claim for unpaid expenses is **valid** to the extent of $102.30. The claim for unpaid vacation time on separation is **valid** to the extent of $11,538.50. The claim for wages for December 3–4, 2020 is **invalid**. The claim for a 2020 bonus is **invalid**. The claim for liquidated damages is **invalid**.

The employer is hereby ordered to send a check to the Labor Department, payable to , in the amount of $11,640.80 less applicable, standard payroll deductions for the vacation pay award of but not for the expense reimbursement award, within 30 days of the date of this Order.

May 25, 2021
Date of Decision

George A. Stewart, Hearing Officer

GAS/sf