

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

v.

Woodaman Electric, Inc.

CASE #62116

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Nancy Smith, representing the employer

NATURE OF DISPUTE: RSA 275:43, I, V — Weekly (unpaid wages/vacation)
RSA 275:44, IV — Employees Separated from Payroll
before Pay Days (liquidated damages)
Statutory Interest

DATE OF HEARING: March 17, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on February 3, 2021, alleging that, upon separation from employment, he did not receive a payout for his unused, earned vacation time. He claimed that he is owed for 88 hours. He also seeks an award of liquidated damages and statutory interest. Notice of claim was sent to employer on February 4, 2021. The employer filed an objection on February 9, 2021. In its objection, the employer admitted that the claimant is owed for 11.08 hours of vacation time. Notice of hearing was sent to parties on February 23. Both parties participated remotely by telephone under a standing order of the Department, necessitated by the COVID-19 state of emergency.

FINDINGS OF FACT

The following findings are based on the testimony of the claimant, employer's witnesses Nancy Smith and Scott Rondeau, exhibits offered by both parties, and matters of record in the Department file. During the course of the hearing, both parties acknowledged under oath that their written submissions to the Department were true, and those statements are treated herein as part of the testimony in the case.

It was not contested that the claimant was entitled to 40 hours of paid vacation per year and that unused vacation could be carried over to the next year. It was also not contested that the employer had a practice of paying unused vacation time to employees upon separation from the company. The issue in this case was the calculation of claimant's accrued vacation pay.

The claimant testified that he was never told one way or the other whether the 40 hours of vacation time had to be earned over time worked or was available to be used at the start of the employment year. It was his assumption that the 40 hours did not have to be earned through time, and that it was all available to him from the beginning of each year, subject, of course, to the employer's pre-approval for purposes of scheduling.

The claimant is 22 years old and lives in Pembroke. He has a high school diploma and currently attends technical school. Before starting with the employer, he worked as an apprentice for another electrical contractor for about a year and a half. He was hired by the employer as an apprentice on December 30, 2019.

Claimant was paid weekly at \$20.00 per hour. Pay periods ran from Thursday to Wednesday, with pay day being the Thursday eight days after the pay period. Claimant generally received his pay checks in hand.

Claimant testified that he was told that the employer provided 40 hours of paid vacation time per year for the first two years. Unused vacation pay could be carried over to the next year. He also understood that the company paid out unused vacation pay upon an employee's separation from employment.

In early January 2021, claimant was told that he was being laid off for lack of work, but that he might be recalled if work picked up. His last day worked was Thursday, January 7, 2021. This was the first day of a new pay period. A few days later he was told by telephone to go ahead and file for unemployment because he wasn't being called back. He received his final paycheck in the mail on the next regular payday, January 21, 2021, showing gross earnings of \$580.00 for 29 hours. It did not appear to include any payment for vacation pay, although claimant understood that 24 of the 29 hours were vacation hours, as he only worked five hour during the last pay period.

However, the accompanying paystub showed 88 remaining vacation hours and 32 vacation hours taken, in a somewhat cryptic format. Based on this information, claimant concluded that he had 88 hours unused as of his separation date and he initiated the instant wage claim based on that number. At \$20.00 per hour, the vacation payout would be \$1,760.00.

Claimant testified that he did not take any vacation time during his first year until December 31, 2020, when he used one day (eight hours). He also

took three vacation days (24 hours) following his last work day, January 7, 2021. He was asked to explain how he could be entitled to 88 hours when he had worked for the company just over 12 months and had already taken 32 hours. He answered that he was relying on the information on his last paystub.

Nancy Smith has worked for the employer off and on since 1988. She is the office administrator. She testified that the employer normally has 18 employees but is currently down to 14. She testified that it came to her attention in early 2021 that many of the employees were confused about the company's vacation policies and the manner in which vacation accounts were reported on the paystubs. She prepared a letter summarizing the policies (employer's exhibit). The letter was dated January 14, 2021 and was given to all employees; claimant's copy was mailed to him. (The claimant testified he never saw the letter until after he filed the instant claim.)

The January 14, 2021 letter described the vacation policy as follows:

- 1-3 years—you earn 40 hours, per year
- 3-5 years—you earn 80 hours per year
- 5+ years—you earn 120 hours per year

These hours become effective on your hire date for the 1st year. Years 2+, they become available on the anniversary date of your employment. They are not available until that time. If you have extenuating circumstances, you may ask for an advance of your time.

For example, your hire date is 5/1/2019. 40 hours are available to use from 5/1/2019-5/1/2020. You earn .77 hours of time per week (40 hours divided by 52 weeks)....

If you decide to end your time with us, your earned vacation time will be prorated as such.

Employer's exhibit.

As far as claimant's last paycheck, Ms. Smith testified that he was paid for 29 hours at \$20.00 per hour, totaling \$580.00. The 29 hours consisted of five hours worked on January 7 plus 24 hours (three days) of vacation pay.

In its written objection, the employer admitted that it still owed the claimant vacation pay for 11.06 hours, computed as follows: Of the 40 hours available in the first 12 months, claimant used 32 (eight on December 31, 2020 plus 24 for the three paid vacation days following his last day at work). That left eight hours. The employer also credited the claimant for working the first four weeks into his second year of employment, resulting in an additional accrual of 3.08 hours.

Scott Rondeau, 46, is the operations manager for the company. He supervised the claimant over the course of the claimant's employment. Regarding vacation policy, he did not remember a specific conversation with the claimant but testified that he told all employees that vacation time had to be earned through the year.

He testified that the company's paystubs were confusing as to how they accounted for vacation time. The claimant came to him at the end of December and showed him his paystub, saying that there must be some mistake because the number shown for vacation remaining was too high. Mr. Rondeau did not know what the problem was but said he would try to have it clarified or fixed. That led to the clarification memo prepared by Nancy Smith.

DISCUSSION AND CONCLUSIONS

The claimant had the burden of proving by a preponderance of the evidence that he was owed unpaid wages, i.e., unused vacation time on separation. 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 vacation pay. RSA 275:43, V provides that

Vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, 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.

There was no evidence that the claimant ever received advance written notification of the policies relating to vacation pay. In this regard, Department administrative rule Lab 803.03 (Notification and Records) provides that:

(b) Every employer shall provide his or her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses, severance pay, personal days, payment of the employee's expenses, pension, and all other fringe benefits per RSA 275: 49.

(c) Pursuant to RSA 275:49, every employer shall inform his or her employees in writing of any change to such employees rate of pay, salary, or employment practices or policies as referred to in Lab 803.03 (a) and (b) prior to the effective date of such change.

(f) Pursuant to RSA 279:27 and RSA 275:49, VI, relative to record keeping requirements, every employer shall:

(6) Maintain on file a signed copy of the written notifications, signed by the employee and provided to each employee as required by Lab 803.03 (a), (b), and (c) above.

(Emphasis added.)

Compliance with rule gives an employer a ready means of resolving good-faith disputes such as the present one. But an employer's failure to follow this rule does not relieve the claimant of his burden of proving entitlement to vacation

pay or any other benefit. In particular, non-compliance (or absence of evidence of compliance) does not give a claimant carte blanche to demand benefits never granted by policy or practice.

In this case, the claimant admitted knowing that the employer's policy was to grant 40 hours each year for the first two years. He admitted that he had taken a total of 32 hours vacation time as of his last paycheck. And he recognized that there was something wrong with the vacation accounting system shown on the paystubs. In light of this evidence, it was not reasonable for him to read "88.00 hours VAC Remain" on his last paystub as a statement of his unused accrued vacation balance. Therefore, despite the employer's failure to prove compliance with Lab Rule 803.03(f)(6), the claimant's demand for 88 hours' vacation pay is rejected as it was as not supported by the evidence.

The employer conceded that it owes the claimant for 11.06 unused, accrued vacation hours; at \$20.00 per hour, this comes to \$221.20 due as a vacation payout.

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

I. Whenever an employer discharges an employee, the employer shall pay the employee's wages in full within 72 hours.

III. When work of an employee is suspended as a result of a labor dispute, or when an employee for any reason whatsoever is laid off, the employer shall pay in full to such employee not later than the next regular payday, as designated under RSA 275:43, either through the regular pay channels or by mail if requested by the employee, wages earned at the time of suspension or layoff.

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. ***

(Emphasis added.) Pursuant to paragraph IV, 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). In the same opinion, 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."

That standard is satisfied in this case. The evidence does not permit a finding that this was "an accident or an act committed on the basis of a mistake of fact." At most, the employer was operating under a mistake as to law. But every person is presumed to know the law, Town of Nottingham v. Newman

(N.H. 2001). RSA 275:44 clearly lays out time limits for paying final wages to an employee who has been separated from payroll before payday. The employer knew or should have known that the claimant had a separation payout coming for his unused vacation time. By its own admission, it did not pay him the full amount of vacation pay he was due. Thus, claimant proved he was entitled to liquidated damages.

Claimant testified that he was told in early January that he was being laid off but might be called back. His last day worked was Thursday, January 7, 2021. A few days later, he was told that he should file for unemployment compensation because he would not be called back. He received his final paycheck on the next regular payday.

If claimant had been fired, he would have been due his full final wages within 72 hours of his last day worked; if laid off, by the next regular paycheck. Given that the claimant testified he was laid off and he did not specifically claim that he should have received his paycheck within 72 hours of his last day worked, it is found that the claimant was in fact laid off on that date. Pursuant to RSA 275:44, III, he should have received his full wages by the next regular pay day, January 21, 2021. On that date, he received only a partial payment of what he was owed. In addition to the \$580.00 he received, he should have been paid \$221.20 for his 11.06 accrued vacation hours.

For each countable day after January 21, 2021 during which the amount remained unpaid, damages accrued at ten percent of the total due, up to a maximum amount equal to the unpaid amount. By February 3, 2021, when claimant filed the instant claim, more than 10 countable days had passed; therefore the maximum award of \$221.20 had already been reached.

Claim for interest. Pursuant to RSA 524:1-b, simple interest begins to accrue from the date of writ, which in this case corresponds to the date the claim was filed, February 3, 2021, and continues through the date of judgment, April 9, 2021. Galloway v. Chicago-Soft, Ltd. (N.H. 1998). Interest applies to the total salary due plus liquidated damages. Using the applicable annual interest rates, set via RSA 336:1, the total award of interest is as follows:

Principal: \$221.20 + \$221.20	\$442.40
Feb. 3, 2021 thru Apr. 9, 2021 (66 days) at 2.09 percent per annum	\$ 1.16
Total	\$443.56

DECISION

As RSA 275:43, V considers vacation pay, if a matter of employment practice or policy or both, to be wages, when due, and as the Department finds that the claimant proved by a preponderance of the evidence that he was due a vacation payout upon separation, it is hereby ruled that this portion of the Wage Claim is **valid to the extent of \$221.20.**

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 proved 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 **valid to the extent of \$221.20.**

To the total principal due of \$442.40, **statutory interest of \$1.16**, computed from the date the claim was filed through the date of decision, is added.

The employer is hereby ordered to send a check to the Labor Department, payable to _____, in the amount of \$443.56, less applicable deductions for the unpaid wage component of \$221.20 but not for the liquidated damage award or statutory interest, within 30 days of the date of this Order.

April 9, 2021
Date of Decision


George A. Stewart, Hearing Officer

GAS/sw