

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

v.

Macdonald Motors, Inc.
CASE #62208

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Mary Macdonald, representing the employer

NATURE OF DISPUTE: RSA 275:43, I — Weekly (unpaid wages)
RSA 279, 21, VIII — Minimum Hourly Rate (unpaid overtime)
RSA 275:44, IV — Employees Separated from Payroll before Pay Days (liquidated damages)

DATE OF HEARING: April 15, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The complaint was filed on February 19, 2021 and amended on February 23 and February 25, 2021. Claimant alleged that the employer owes him for one day's pay mistakenly deducted from his paycheck for the week following Christmas, for 55.02 hours of unpaid overtime, for 34 hours vacation pay, for four hours worked but not paid, and for an award of liquidated damages for failure to pay his final wages within 72 hours of his termination. He also requested statutory interest on the total owed.

Notice of claim was sent to employer on February 22, 2021. Claimant acknowledged on February 25, 2021 that all of his original claims had been satisfied with exception of the ones for overtime and liquidated damages. In an objection received on March 1, 2021 the employer asserted that the claimant is paid as a flat-rate technician and, as such, is not entitled to overtime.

Notice of hearing was sent on March 17, 2021. 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 representative Mary Macdonald, 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.

Claimant is [redacted] and lives in Gorham. He has a high-school diploma and a certificate in automotive repair. He has been an auto mechanic for 10 years, including some time owning his own repair business. He worked for the employer, a Ford dealership in Center Conway, from August 12, 2019 through February 18, 2021.

Claimant worked weekdays and some Saturday mornings. He was paid weekly. Pay periods ran from Thursday to Wednesday with pay day on the immediately following Friday. Claimant received his paychecks in hand.

With regard to his claim for overtime, claimant testified that up until March 18, 2020, he was paid as a flat rate technician at a \$21.00 per flat rate hour.¹ The company then put him and other mechanics on furlough due to COVID-19. The furlough lasted until May 25, 2020. He testified that, after the furlough, the employer gave him and the other flat rate mechanics the option of being paid straight time or continuing on the flat rate. He said there was very little work at that time, due to the business shutdowns and travel restrictions in place due to COVID-19. He testified that, with so little work, the flat rate scheme "just wouldn't work"—his earnings would have gone way down. He testified that he opted to be paid straight time at \$21.00/hour.

Claimant testified that, from his return to work up until his termination, he worked a total of 55 hours of overtime, but was paid only his regular rate for it. He calculated that the total due for unpaid overtime was \$577.71.

With regard to his claim for liquidated damages, claimant testified that he worked four hours on Thursday, February 25, 2021 and he was fired on that date. He returned to the dealership on Monday, February 22, 2021 to receive his final paycheck and retrieve his tools. The employer did not give him his check because he had not made an appointment or called in advance so he could

¹ Under the flat rate system, each job is assigned a standard time for completion ("the flag time") and the technician is credited with for working the flag time. If the job is listed as a two-hour task, he is paid for two hours flag time regardless of his clock time. Under the pay plan effective January 16, 2020, the employer also paid an efficiency bonus when his flag time was 70% or less of clock time and a productivity bonus when his flagged hours exceeded 40.1 on a five-day work week and 44.1 when the work week included Saturday mornings. (Employer's Exhibit, signed by claimant.)

complete the exit process. He was also told he had to return his uniforms. Claimant left the premises and later instructed the employer to mail him his final check. He received his final paycheck for \$798.00, covering four hours' wages and 34 hours' vacation time, on February 25, 2021. (Employer's exhibits.)

Mary Macdonald, 57, is part owner of the business. She testified that the claimant was always paid as a flat rate technician according to the terms of a form signed by the claimant (employer's exhibit). She denied that he was given the option to switch to straight time work after the furlough. She admitted that business was down significantly for a time after the furlough. However, the employer qualified for government assistance due to the COVID-19 pandemic; one condition of receiving this assistance was that the employer must ensure that employees continued to receive their usual wages notwithstanding the economic slowdown due to the pandemic. The employer used the government assistance to ensure that the claimant continued to receive his usual earnings, regardless of the fact that business was slow. As a flat rate technician paid at \$21.00 per flat-rate hour, claimant was not entitled to overtime.

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).

Claim for overtime. The claimant testified that his earnings went down significantly after he returned from furlough; he said he had pay stubs to prove that. He did not offer any documentary evidence to support this claim.

Claimant's testimony that he was switched over to a straight-time status after the furlough is not credited. Claimant testified that he did not bring up the OT situation until he was fired. Had he been missing overtime ever since July 2020, it is unlikely he would have waited so long to bring it up. Ms. Macdonald's testimony is credited, that there was no change in the flat rate payment policy after the furlough and that the employer used the government assistance funds to ensure that the claimant and other employees continued to receive their usual wages despite the slowdown in work. Claimant failed to prove that he was entitled to overtime pay. See 29 C.F.R. 779.372 (Nonmanufacturing establishments with certain exempt employees under 29 U.S.C. 213(b)(10)).

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

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

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. * * *

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). The Court also 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." The statutory requirement of payment within 72 hours of discharge is plain and simple. Discharge occurred on Thursday, February 18, 2021. The 72-hour time limit ended some time on Sunday February 21. Claimant came in to pick up his check on Monday, February 22; he usually received his paycheck in hand. He was told the check was not available because he had not made an appointment or called in advance to complete the exit process; he also had to return his uniforms. These are not valid grounds for withholding final wages. Thus, claimant proved he was entitled to liquidated damages.

For each countable day upon which the final wages of \$798.00 remained unpaid, after the day when the 72-hour time limit expired, damages accrued at ten percent of the total due, i.e., \$79.80, up to a maximum amount equal to the wages due. The time period from February 22 to February 25, 2021 encompassed four countable days. This results in a total award of \$319.20.

Claim for interest. Pursuant to RSA 524:1-b, simple interest begins to run from the date of writ, which in this case corresponds to the date the claim was filed, February 19, 2021, and continues to run through the date of judgment, May 7, 2021. Galloway v. Chicago-Soft, Ltd. (N.H. 1998). Using the applicable annual interest rate, set via RSA 336:1, the total award of interest is as follows:

Principal: \$319.20	
February 19–May 7, 2021 (78 days)	
at 2.09 percent per annum	\$1.43

DECISION

As the claimant worked as a flat-rate technician for an auto dealer, at a rate of \$21.00 per flat-rate hour, he was not entitled to overtime pay, therefore his claim for overtime pay is **invalid**.

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, and as this Department finds that the claimant proved by a preponderance of the evidence that the employer acted willfully and without good cause, it is hereby ruled that this portion of the Wage Claim is **valid** to the extent of \$319.20.

To this amount, statutory interest of \$1.43 is added.

The employer is hereby ordered to send a check to the Labor Department, payable to _____, in the amount of **\$320.63**, within 30 days of the date of this Order.

May 7, 2021
Date of Decision


George A. Stewart, Hearing Officer

GAS/cb