SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1736-15T2

JPRC, INC. t/a LIQUID ASSETS,

Petitioner-Appellant,

v.

NEW JERSEY DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT,

Respondent-Respondent.

Argued July 25, 2017 – Decided August 4, 2017

Before Judges Reisner and Suter.

On appeal from New Jersey Department of Labor and Workforce Development, Docket No. 08-030.

John D. Williams argued the cause for appellant (Mr. Williams and Bradley J. Shafer (Shafer & Associates, P.C.) of the Michigan bar, admitted pro hac vice, attorneys; Mr. Williams and Mr. Shafer, on the briefs).

Anthony DiLello, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Mr. DiLello, on the brief).

PER CURIAM

Petitioner JPRC, Inc., t/a Liquid Assets (Liquid Assets) appeals from a November 12, 2015 Final Administrative Decision of the Commissioner of the Department of Labor and Workforce Development (DOL). The Commissioner determined that exotic dancers who worked at Liquid Assets' place of business[1] during the years 2002 through 2005 were employees, within the meaning of N.J.S.A. 43:21-19(i)(1)(A), and assessed Liquid Assets approximately $9000 for unpaid contributions to the unemployment compensation fund and the State disability benefits fund. We affirm.

On this appeal, there is no dispute that prior to 2003, petitioner treated the dancers as employees. In response to our question at oral argument, petitioner's attorney confirmed that point. Beginning in 2003, petitioner unilaterally restructured its relationship with the dancers, in an attempt to avoid having them classified as employees. Petitioner stopped paying the dancers any wages, and instead began charging them a small fee for the right to "perform," and required them to obtain all their compensation from the tips customers gave them and the fees the dancers charged customers for "private dances." However, the

[1] The establishment, variously described as a gentlemen's club or go-go bar, is no longer in business.

Commissioner determined that the evidence petitioner produced at the hearing failed to satisfy the "ABC" test set forth in N.J.S.A. 43:21-19(i)(6).

The ABC test consists of the following three factors, all of which an employer must satisfy to qualify for the exception set forth in section 6. See Hargrove v. Sleepy's, L.L.C., 220 N.J. 289, 305 (2015); Carpet Remnant Warehouse, Inc., v. N.J. Dep't of Labor, 125 N.J. 567, 581 (1991).

> (6) Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter . . . unless and until it is shown to the satisfaction of the division that:
>
> > (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
> >
> > (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
> >
> > (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.
>
> [N.J.S.A. 43:21-19(i)(6) (emphasis added).]

On this appeal, we will not disturb the Commissioner's decision so long as it is supported by sufficient credible evidence and is consistent with applicable law. See In re Musick, 143 N.J. 206, 216 (1996). Our review of legal issues is de novo, but we owe "great deference" to the Commissioner's interpretation of the statutes that the DOL is charged with enforcing. Hargrove, supra, 220 N.J. at 301-02 (citation omitted).

In its brief, petitioner contends that the dancers did not perform services "for remuneration" within the meaning of N.J.S.A. 43:21-19(i)(6), the Commissioner's factual findings were not supported by the record, and petitioner satisfied the ABC test.[2] After reviewing the record in light of the applicable legal standards, we find no merit in those arguments, and we affirm substantially for the reasons stated in the Commissioner's thorough written decision.[3] Petitioner's arguments do not warrant

[2]Petitioner also raises two constitutional issues; however, as presented on this appeal, those contentions are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). Petitioner's attempted analogy to theatre or concert hall performers is without merit, as those services are exempt from the unemployment statute. N.J.S.A. 43:21-19(i)(7)(M).

[3] The pertinent record in this case covered the years 2002 to 2005, as did the Commissioner's decision. Our opinion is limited to the record presented to us and the years covered by the agency's decision.

additional discussion, beyond the following brief comments. R. 2:11-3(e)(1)(E).

We agree with the Commissioner that petitioner's evidence in this case was insufficient to satisfy its burden of proof as to the ABC test. For example, petitioner's website described its premises as a "gentlemen's club" and a "go-go bar." The website focused on the "erotic" entertainment, featuring "over 20 girls daily," and promising prospective customers: "Our girls are beautiful, erotic, friendly, professional and talented dancers." Petitioner's advertising belied its claim that the dancers were merely incidental or peripheral to petitioner's business of serving food and drink. See N.J.S.A. 43:21-19(i)(6)(B). The club owner's 2012 testimony, that the club's then-current operation featured other forms of entertainment such as magicians and singers, did not pertain to the relevant time period, which was 2002 to 2005.[4]

As the Commissioner noted, petitioner presented little evidence concerning the individual dancers it alleged were independent contractors. Only one of the dancer-witnesses, J.F., worked at the club during even a portion of the relevant time

[4] Petitioner's financial records for 2002 to 2005 contained no documentation concerning any performers other than the exotic dancers.

period. The two other dancer-witnesses knew nothing about the operation of the club during the period 2002 to 2005. J.F. could not recall if she began working at Liquid Assets in 2002 or 2003, but testified that she left in 2003 and did not return for three years. J.F. confirmed that when she began working at Liquid Assets, the dancers were paid an hourly wage, plus whatever fees and tips they collected from the customers. She testified that at some point, petitioner imposed a new policy, under which the dancers were no longer paid a wage and were required to pay the club between $10 and $40 per shift for the right to work there.

Petitioner's ability to unilaterally impose a new mode of operation on its existing employees - for the avowed purpose of enabling petitioner to avoid paying unemployment taxes - did not demonstrate the dancers' independence as "contractors." See Special Care of N.J., Inc. v. Bd. of Review, 327 N.J. Super. 197, 211-12 (App. Div.), certif. denied, 164 N.J. 190 (2000). Rather, it evinced petitioner's control over their working conditions. In the context of this case, petitioner's evidence - that petitioner stopped paying the dancers any wages, required them to work entirely for tips and fees, and did not require them to report the tips and fees to petitioner for tax purposes - does not undermine the Commissioner's conclusion that the dancers performed their services for "remuneration" within the meaning of N.J.S.A. 43:21-

19. See N.J.S.A. 43:21-19(o) ("wages" include tips regularly received in the course of employment); N.J.A.C. 12:16-4.9 (such tips "are covered wages and are taxable to the maximum base even though the employee has not reported the entire amount to the employer.").

In summary, the Commissioner's decision was supported by substantial credible evidence and, accordingly, we affirm.

Affirmed.