SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1424-21

KISMET INTERNATIONAL, INC., KISMET INT. LIMO & TEANECK TAXI SERVICE,

Petitioner-Appellant,

v.

NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT,

Respondent-Respondent.

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Argued May 23, 2023 – Decided August 2, 2023

Before Judges Geiger and Susswein.

On appeal from the New Jersey Department of Labor and Workforce Development, Docket No. 17-012.

Borce Martinoski argued the cause for appellant (Borce Martinoski, LLC, attorney; Borce Martinoski, on the briefs).

Ryan J. Silver, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney

General, attorney; Donna Arons, Assistant Attorney General, of counsel; Ryan J. Silver, on the brief).

PER CURIAM

Kismet International, Inc. appeals from a final agency decision by the Department of Labor and Workforce Development (Department) determining that Kismet owes $90,755.54 to the unemployment compensation and disability benefits fund. The Department conducted an audit and found that Kismet misclassified the bulk of its workers as independent contractors instead of as employees. Kismet contends the Department misapplied the so-called "ABC" statutory test used to distinguish employees from independent contractors for purposes of unemployment compensation. The governing statute presumes workers are employees unless the putative employer can satisfy all three prongs of the ABC test.

Following an extensive hearing before an Administrative Law Judge (ALJ), the Commissioner of the Department reviewed the record de novo, generally concurred with the ALJ's comprehensive findings, and concluded that Kismet failed to establish any of the three prongs, much less all of them. After carefully reviewing the record in light of the governing legal principles, we conclude Kismet has not shown that the Department's final decision is arbitrary, capricious, or unreasonable and therefore affirm.

I.

We discern the following procedural history and facts from the record. Kismet operates a taxi and limousine transportation company that allows customers to arrange rides on its website or through an application called Limosys. The drivers, who sign a year-long contract with Kismet, log in to the Limosys app and input when they are available and what geographic zone they are in. Limosys then directs the drivers to the customers' pickup and drop-off locations. In addition to tips, the drivers receive a portion of the fare set by Kismet. The drivers may either use their own vehicle or lease one from Kismet.

In 2016, the Department conducted an audit of Kismet for the years 2012 to 2015. The audit found that Kismet failed to contribute $90,755.54 to the unemployment and temporary disability benefits fund. The stated reason for the underpayment was Kismet's improper characterization of its drivers as independent contractors instead of employees.

Kismet contested the audit findings and was granted a hearing in the Office of Administrative Law (OAL). The ALJ held hearings over the course of five non-consecutive days between August 2018 and December 2019. On June 10, 2020, the ALJ issued a thirty-page decision upholding the auditor's

findings. The ALJ found Kismet did not prove it satisfied any of the three prongs of the ABC test.[1]

Kismet appealed to the Commissioner, who reviewed the record de novo and concurred with the ALJ's findings with one exception.[2] The Commissioner's final decision explained the relevant law and summarized the ALJ's findings. The final agency decision ordered Kismet to "immediately remit to the Department . . . $90,755.54 in unpaid unemployment and temporary disability contributions, along with applicable interest and penalties." This appeal follows.

Kismet raises the following contentions for our consideration:

> POINT I
>
> THE OAL JUDGE ABUSED HER DISC[RETION] SINCE HER FINDINGS ARE NOT SUPPORTED BY

[1] The ALJ did find that Kismet satisfied the third prong of the test with respect to three drivers in 2015. Those drivers had received greater renumeration from another driving service than they did from Kismet that year. This limited finding in Kismet's favor did not affect the ALJ's overall conclusion.

[2] The Commissioner's lone departure from the ALJ decision was in response to an exception the Department filed regarding the few drivers who received more income from other driving services than from Kismet. The Commissioner determined the renumeration those drivers received from other sources was an important factor but was insufficient to establish that they had an "independent business enterprise" for purposes of proving the third prong of the ABC test. Notwithstanding that minor disagreement, the Commissioner upheld the thrust of the ALJ's findings with respect to all three prongs.

"SUFFICIENT, CREDIBLE EVIDENCE" RESULTING IN A DECISION THAT WAS "ARBITRARY, CAPRICIOUS, OR UNREASONABLE" BY FINDING THAT [KISMET] FAILED TO MEET ITS BURDEN OF PROOF TO SATISFY PART A OF THE ABC TEST BY A "PREPONDERANCE OF THE EVIDENCE."

POINT II

THE OAL JUDGE ABUSED HER DISC[RETION] SINCE HER FINDINGS ARE NOT SUPPORTED BY "SUFFICIENT, CREDIBLE EVIDENCE" RESULTING IN A DECISION THAT WAS "ARBITRARY, CAPRICIOUS, OR UNREASONABLE" BY FINDING THAT [KISMET] FAILED TO MEET ITS BURDEN OF PROOF TO SATISFY PART B OF THE ABC TEST BY A "PREPONDERANCE OF THE EVIDENCE."

POINT III

THE OAL JUDGE ABUSED HER DISC[RETION] SINCE HER FINDINGS ARE NOT SUPPORTED BY "SUFFICIENT, CREDIBLE EVIDENCE" RESULTING IN A DECISION THAT WAS "ARBITRARY, CAPRICIOUS, OR UNREASONABLE" BY FINDING THAT [KISMET] FAILED TO MEET ITS BURDEN OF PROOF TO SATISFY PART C OF THE ABC TEST BY A "PREPONDERANCE OF THE EVIDENCE."

POINT IV[3]

THE OAL JUDGE ABUSED HER DISC[RETION] SINCE HER FINDINGS WERE NOT SUPPORTED BY "SUFFICIENT, CREDIBLE EVIDENCE" RESULTING IN A DECISION THAT WAS "ARBITRARY, CAPRICIOUS, OR UNREASONABLE" BY FAILING TO CONSIDER AND ANALYZE FACTORS FROM PERSUASIVE CASE LAW THAT [KISMET] MET TO SATISFY THE ABC TEST BY A "PREPONDERANCE OF THE EVIDENCE."

POINT V

[KISMET]'S CONSTITUTIONAL CLAIMS.

II.

The scope of our review is narrow. Appellate courts review decisions "made by an administrative agency entrusted to apply and enforce a statutory scheme under an enhanced deferential standard." East Bay Drywall, LLC v. Dep't of Lab. & Workforce Dev., 251 N.J. 477, 493 (2022) (citing Hargrove v. Sleepy's, LLC, 220 N.J. 289, 301–02 (2015)). That enhanced deference stems, in part, from "the executive function of administrative agencies." Mazza v. Bd. of Trs., Police & Firemen's Ret. Sys., 143 N.J. 22, 25 (1995). "An agency's

[3] Kismet lists twenty-four "factors from persuasive case law" as separate subpoints. Although we have considered all of Kismet's arguments, we do not reproduce the subpoints in this portion of our opinion.

determination on the merits 'will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.'" Saccone v. Bd. of Trs., Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). The party challenging the administrative action bears the burden of making that showing. Lavezzi v. State, 219 N.J. 163, 171 (2014).

On appeal, the judicial role in reviewing an administrative action is generally limited to three inquires:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law;
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> (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and
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> (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (quoting In re Stallworth, 208 N.J. 182, 194 (2011)).]

"When an agency's decision meets those criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field." In re Herrmann, 192 N.J. 19, 28 (2007).

Turning to substantive legal principles, the statutory framework at issue in this appeal, the Unemployment Compensation Law (UCL), N.J.S.A. 43:21-1 to -71, "was designed to act as a cushion 'against the shocks and rigors of unemployment.'" East Bay Drywall, 251 N.J. at 494 (quoting Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Lab., 125 N.J. 567, 581 (1991)). Whether a putative employer is required to pay into an unemployment benefits fund under N.J.S.A. 43:21-7 turns on whether its workers are employees or independent contractors. Id. at 484–85. Importantly for purposes of this appeal, "[b]ecause the statute is remedial, its provisions have been construed liberally, permitting a statutory employer-employee relationship to be found even though that relationship may not satisfy common-law principles [of employment]." Id. at 494 (second alteration in original) (quoting Carpet Remnant, 125 N.J. at 581).

The UCL sets forth the so-called ABC test for making that determination. Id. at 485; N.J.S.A. 43:21-19(i)(6)(A) to (C). Any service performed for renumeration under any express or implied contract is presumed to be employment unless the ABC test is satisfied. East Bay Drywall, 251 N.J. at 495. The statutory test reads:

> Services performed by an individual for renumeration shall be deemed to be employment . . . 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;
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> (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
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> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.
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> [N.J.S.A. 43:21-19(i)(6).]

Because the statutory ABC test is formulated in the conjunctive and presumes that services for renumeration constitute employment, the party challenging the Department's determination of an employer-employee relationship has the burden of "establish[ing] the existence of all three criteria." East Bay Drywall, 251 N.J. at 495 (quoting Carpet Remnant, 125 N.J. at 581).

The ABC test "is fact-sensitive, requiring an evaluation in each case of the substance, not the form, of the relationship." Id. at 496 (quoting Carpet Remnant, 125 N.J. at 581). "The factfinder must look beyond the employment contract and the payment method to determine the true nature of the relationship." Ibid. Because the Department found Kismet failed to meet any

of the requisite prongs, on appeal it must make a "clear showing" that each of those findings was "arbitrary, capricious, or unreasonable." Saccone, 219 N.J. at 380.

III.

We next address each prong in turn. "Part A of the test requires a showing that the provider of services 'has been and will continue to be free from control or direction over the performance of such services.'" Carpet Remnant, 125 N.J. at 582 (quoting N.J.S.A. 43:21-19(i)(6)(A)). "The person [challenging the agency finding] must establish not only that the employer has not exercised control in fact, but also that the employer has not reserved the right to control the individual's performance." Ibid. "An employer need not control every facet of a person's responsibilities, however, for that person to be deemed an employee." Ibid.

Kismet argues the Department's finding that its drivers were not free from control was not based on sufficient credible evidence, rendering it an arbitrary decision. We disagree. We are convinced the Department did not abuse its discretion in finding the facts indicating control of the drivers by Kismet outweigh the facts suggesting the drivers were free from its control. We reiterate

and stress that complete control is not required to maintain the presumption of employment. Ibid.

Stated another way, there are facts in the record suggesting the drivers operated independently from appellant's control in some respects; but there are also facts showing that, in other respects, Kismet either exercised control over its drivers or retained the authority to do so. The ALJ decision adopted by the Department fully outlines and evaluates those competing considerations. It is not our role to reweigh the evidence. East Bay Drywall, 251 N.J. at 493. Because appellant has not made a "clear showing" that this finding was "arbitrary, capricious, or unreasonable," we decline to substitute our judgment for the Department's with respect to the first prong. Saccone, 219 N.J. at 380.

Because Kismet must establish the Department was arbitrary, capricious, or unreasonable with respect to all three prongs, we could stop at this point and affirm. See East Bay Drywall, 251 N.J. at 496. In the interests of completeness, we proceed to address the remaining two prongs of the ABC test.

The second prong addresses whether the services rendered are outside the putative employer's usual course of business or are performed outside the putative employer's places of business. Carpet Remnant, 125 N.J. at 584. Kismet argues the ALJ and the Department erred as a matter of law in finding

that the driver's vehicles "are an extension of Kismet's place of business."[4] In Carpet Remnant, the Court rejected the notion that a carpet retailer's "places of business 'may broadly be said to extend to every geographical point of installation.'" 125 N.J. at 592. The Court explained, "[u]nder that definition of 'places of business,' for a person to satisfy the [prong] B standard's second alternative would be practically impossible. In our view, that phrase refers only to those locations where the enterprise has a physical plant or conducts an integral part of its business." Ibid.

The ALJ in this case noted that "[t]here is no doubt that the drivers do not work out of Kismet's office in Teaneck." The ALJ and Department nonetheless concluded that "an integral part of Kismet's business is conducted in the cars driven by the drivers." That conclusion is in tension with the reasoning in Carpet Remnant. Any such expansive interpretation of "places of business" would make it "practically impossible" to prove this portion of the second prong in the context of a transportation business. See id. at 592. Indeed, the finding that individual cars are Kismet's "place of business" comes close to reverting to the "every geographical point of installation" definition rejected by our Supreme

[4] We note that Kismet does not contend the drivers' services were outside the usual course of its business, which is an alternative basis for relief under this prong.

Court in Carpet Remnant. Ibid. We thus conclude the agency's interpretation of "places of business" for purposes of the second prong is overly broad, and thus unreasonable. Saccone, 219 N.J. at 380. But, as explained, prevailing on one prong of the ABC test is insufficient to entitle Kismet to relief.

The final prong of the three-part test is whether the drivers are "customarily engaged in an independently established trade, occupation, profession or business." N.J.S.A. 43:21-19(i)(6)(c). "[T]he [prong] C standard is satisfied when a person has a business, trade, occupation, or profession that will clearly continue despite termination of the challenged relationship." East Bay Drywall, 251 N.J. at 497 (second alteration in original) (quoting Carpet Remnant, 125 N.J. at 586). Importantly, "[t]he present tense of the verb, 'is' [as used in the statute], indicates that the employee must be engaged in such independently established activity at the time of rendering the service involved." Gilchrist v. Div. of Emp. Sec., 48 N.J. Super 147, 158 (App. Div. 1957). Stated another way, "[i]f the worker 'would join the ranks of the unemployed' when the relationship ends, the worker cannot be considered independent under prong C." East Bay Drywall, 251 N.J. at 497 (quoting Carpet Remnant, 125 N.J. at 585–86).

A non-exhaustive list of the relevant factors includes: "the duration and strength of the [worker]s' businesses, the number of customers and their respective volume of business, the number of employees, and the extent of the [worker]s' tools, equipment, vehicles, and similar resources." Carpet Remnant, 125 N.J. at 593. The amount of renumeration received from the putative employer compared to other sources is also an important consideration. Ibid. Notably, our Supreme Court has acknowledged that "even wholly dependent employees may choose to work for more than one employer." East Bay Drywall, 251 N.J. at 498.

Kismet offered very little evidence to demonstrate any of its drivers operated a truly independent business during the audit period. To a large extent, Kismet relies on the fact that drivers paid for expenses such as "car repair, tickets, materials, phone, parking, fuel, and insurance." In the absence of other indicia of independence, however, those facts seem to have more bearing on the payment structure of the drivers than their status as true independent contractors.

Although Kismet argues that some of its drivers worked for other passenger transportation companies, only four were shown to receive greater renumeration from another source than from Kismet. Though that is certainly a

relevant circumstance, it is not dispositive. As our Supreme Court has emphasized, and as the Department noted in its decision here, there is an important difference between multiple employment and an independent business. See East Bay Drywall, 251 N.J. at 498.

We deem it noteworthy that Kismet does not contend that any of the drivers ever worked for themselves, only that some worked for other companies. That fact is more indicative of those drivers being engaged in multiple employments rather than maintaining independent enterprises. It also bears noting that none of the drivers asserted they advertised for themselves. The record shows the only advertising was done by Kismet. Relatedly, Kismet only presented evidence that one driver had his own business cards.

Kismet also argues that its drivers are independent because they earned different amounts based on their initiative in accepting passengers. That argument is not persuasive. As our Supreme Court recognized, "the probative value of refusal to accept or complete work is limited." Id. at 499. In industries that pay hourly or by commission, there will naturally be divergent renumeration based on the workers' respective motivation and performance. Those differences do not alter the structure of the business relationship.

Nor are we persuaded by Kismet's argument that "none of the drivers in the audit period claimed unemployment insurance." (Emphasis omitted). The fact that no unemployment claims were filed by Kismet's workers does not mean it was exempt from making contributions to the fund. Indeed, as Kismet candidly acknowledges, "[n]othing in the record supports that any driver was terminated."

In sum, we are not persuaded Kismet provided sufficient evidence to prove that its drivers had independent occupations or businesses during the audit period. It is even more apparent that Kismet has not made a clear showing that the Department's finding with respect to the third prong was arbitrary, capricious, or unreasonable. See Saccone, 219 N.J. at 380. We reiterate the failure to prove all three prongs of the ABC test is fatal to Kismet's appeal. See East Bay Drywall, 251 N.J. at 495.

To the extent we have not addressed them, any remaining arguments raised by Kismet lack sufficient merit to warrant discussion.[5] R. 2:11-3(e)(1)(E).

[5] We note that Point V of Kismet's brief states that it "reserves its right to argue the unconstitutionality of the statu[t]e and/or statu[t]es due to free[dom] of contract, due process violation, vagueness, and any other constitutional claims that [Kismet] may have." It is not clear when, if ever, Kismet intended to argue

Affirmed.

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those claims; what is clear is that they are not properly before us in this appeal. We therefore deem those arguments waived, not reserved. See Petro v. Platkin, 472 N.J. Super. 536, 567 (App. Div. 2022) ("An issue that is not briefed is deemed waived upon appeal." (quoting N.J. Dep't of Env't Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015))).