COURT OF APPEALS
DECISION
DATED AND RELEASED

AUGUST 20, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0728

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

FRANK D. HURST CORPORATION,

Plaintiff-Appellant,

v.

TAMARA A. JOHNSON and LABOR AND INDUSTRY REVIEW COMMISSION,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Frank D. Hurst Corporation appeals the circuit court's judgment affirming LIRC's decision that Tamara A. Johnson was Hurst's "employe" as defined in § 108.02(12), STATS., for unemployment compensation purposes. On appeal, Hurst contends that LIRC's decision is not supported by the facts in the record. We reject Hurst's contention and affirm the judgment.

The facts are undisputed. Hurst is a national photographic processing lab that retouches negatives for photographers. Johnson worked for Hurst from September 3, 1991, until she was laid off on December 31, 1991. She returned to work on January 2, 1992, to be trained as a negative retoucher. Johnson then worked periodically for Hurst in its retouching department until February 24, 1993.

Johnson retouched negatives in her home for Hurst between February 24, 1993, and December 24, 1994. Johnson did not retouch negatives for any company other than Hurst during this time, nor did she advertise or hold herself out to the public to perform such services. She never again did retouching work after she stopped working for Hurst.

On October 27, 1993, Hurst and Johnson entered into a written independent contractor agreement wherein Johnson agreed to perform photograph retouching for Hurst at her own residence. The agreement described Johnson as an independent contractor, and provided that although Hurst would have no control over the details or hours of Johnson's work, the services would be performed in a "workmanlike" manner.

Johnson purchased the supplies and machines necessary to complete the retouching work. She routinely picked up her work assignments at the Hurst photo lab. After finishing the work, she returned the retouched negatives to the Hurst photo lab. There she completed forms created and provided by Hurst for billing and invoice purposes. Hurst paid Johnson on a weekly basis at a piecework rate set by Hurst. If Hurst or the photographer was dissatisfied with Johnson's work, Hurst deducted an amount from Johnson's pay accordingly.

Between April 1, 1993, and December 23, 1994, Johnson was employed full time by Sherl-Dean Gardens and then by Best Craft Furniture. Johnson applied for unemployment compensation benefits when she was laid off from Best. As a result LIRC made an initial determination that Johnson had been an employe of Hurst. Hurst appealed, and the administrative law judge (ALJ) ruled that Johnson had been Hurst's employe. LIRC affirmed the ALJ's decision and the circuit court upheld LIRC's decision. Hurst now appeals.

Pursuant to § 108.02(12), STATS., a two-step analysis is used to determine whether Johnson was Hurst's employe for unemployment benefit purposes. First, we must consider whether the individual performed services for pay. ***Keeler v. LIRC***, 154 Wis.2d 626, 631, 453 N.W.2d 902, 904 (Ct. App. 1990). In pertinent part, § 108.02(12) provides the following:

> (12) **Employe**. (a) "Employe" means any individual who is or has been performing services for an employing unit, in an employment, whether or not the individual is paid directly by such employing unit; except as provided in par. (b) or (e).

If the individual has worked for pay, then we must decide whether the individual is exempted from employe status by the provisions in § 108.02(12)(b), STATS. ***Id.*** According to the statute:

> (b) Paragraph (a) shall not apply to an individual performing services for an employing unit if the employing unit satisfies the department as to both the following conditions:
>
> 1. That such individual has been and will continue to be free from the employing unit's control or direction over the performance of his or her services both under his or her contract and in fact; and
>
> 2. That such services have been performed in an independently established trade, business or profession in which the individual is customarily engaged.

If the employing unit fails to carry its burden as to either subsection of the test, the individual is by definition an employe. ***Larson v. LIRC***, 184 Wis.2d 378, 385-86, 516 N.W.2d 456, 459 (Ct. App. 1994).

This court reviews the findings of the commission, not the circuit court. ***Id.*** at 386, 516 N.W.2d at 459. The application of § 108.02(12)(b), STATS., to a set of facts often presents a mixed question of law and fact. ***Keeler***, 154 Wis.2d at 632, 453 N.W.2d at 904. However, because the underlying facts of this case are undisputed, LIRC's decision that Hurst failed to bear its burden under § 108.02(12)(b)1, STATS., is a conclusion of law. *See* ***Lifedata Medical Servs. v. LIRC***, 192 Wis.2d 663, 670, 531 N.W.2d 451, 454 (Ct. App. 1995). As such, we review it de novo but give some weight to LIRC's decision given the agency's knowledge and expertise in the area. ***Id.***[1]

[1] We recognize that the determination of an individual's employment status under the statute has received inconsistent treatment in the courts. It has been reviewed deferentially as a question of fact, ***Princess House, Inc. v. DILHR***, 111 Wis.2d 46, 54, 330 N.W.2d 169, 173 (1983), under a mixed standard as a question of law and fact, ***Keeler v. LIRC***, 154 Wis.2d 626, 632, 453 N.W.2d 902, 904 (Ct. App. 1990), and de novo as a question of law, ***Lifedata Medical Servs. v. LIRC***, 192 Wis.2d 663, 671, 531 N.W.2d 451, 454 (Ct. App. 1995). Because our conclusion in this case is the same regardless of the standard applied, we decline to resolve the discrepancy in these cases.

We must first determine whether Johnson performed services for Hurst for pay. *See* ***Keeler***, 154 Wis.2d at 631, 453 N.W.2d at 904. LIRC concluded that Hurst paid Johnson $774.25 for her work in 1994 and Hurst does not contest that finding. Second, we must consider whether Johnson is exempted from the definition of "employe" by the provisions found in § 108.02(12)(b), STATS. *See* ***id.*** at 631, 453 N.W.2d at 904. Hurst must prove both of the following: (1) it lacked control and direction over Johnson; and (2) Johnson was customarily engaged in an independently established trade, business or profession when she performed the services. Section 108.02(12)(b), STATS.

The ALJ found many instances of Hurst's direction and control of Johnson's services, and decided that the application of § 108.02(12), STATS., rather than the parties' independent contractor agreement, defined Johnson's employment status. LIRC agreed, noting specific examples of Hurst's direction and control. Both Hurst and the photographer could refuse to pay Johnson for substandard work. Unlike an independent contractor relationship, where the person contracting for services has the right to sue the independent contractor for damages if the contract is not properly performed, Hurst and the photographer had the right to independently determine whether Johnson's work was satisfactory, and to refuse to pay Johnson on that basis. Hurst created and supplied forms on which its logo was printed to Johnson to be used for billing and invoice purposes. Although Johnson was not required to use the forms, the provision and use of the forms indicate some direction and control by Hurst. In addition, Hurst set Johnson's piecework wage and reviewed and raised it annually.

We also consider whether Johnson was customarily engaged in an independently established trade, business or profession when she worked for Hurst. Section 108.02(12)(b)2, STATS. The ALJ decided that she was not, and LIRC agreed. When we evaluate this question, we consider the following factors: whether Johnson's services were directly related to or "integrated into" the business activity conducted by Hurst; whether Johnson advertised the existence of an independent business; whether Johnson assumed the financial risk of the undertaking; whether Johnson was economically dependent on Hurst, and whether Johnson had a proprietary interest in the enterprise. *See* ***Keeler***, 154 Wis.2d at 632-34, 453 N.W.2d at 904-05.

By its very nature, Johnson's retouching work was directly related to Hurst's photo lab business. Johnson neither advertised nor held herself out to the public as a provider of retouch services. Instead, she merely transferred into her home the work she had once done in Hurst's lab. She was not economically dependent on Hurst because she earned a total of $774.25 and worked full time for another company during the ten months she worked in her home for Hurst. Although she purchased the supplies and machines required to do the work, she had no proprietary interest in Hurst's business. For these reasons, LIRC concluded that Johnson was not customarily engaged in an independently established trade, business or profession when she performed the services, and we agree.

Because Johnson performed services for pay, and Hurst failed to carry its burden of proof under § 108.02(12)(b), STATS., we affirm LIRC's conclusion that Johnson was Hurst's employe as defined by § 108.02(12) for unemployment compensation purposes.

By the Court.—Judgment affirmed.

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