



**Kismet International, Inc.,
Kismet Int. Limo & Teaneck Taxi Service,
Petitioner,**

**STATE OF NEW JERSEY
DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT**

v.

**New Jersey Department of Labor
and Workforce Development,
Respondent.**

**FINAL ADMINISTRATIVE ACTION
OF THE
COMMISSIONER**

**OAL DKT. NO LID 11773-17
AGENCY DKT. NO. DOL 17-012**

Issued: December 3, 2021

The appeal of Kismet International, Inc., Kismet Int. Limo & Teaneck Taxi Service (Kismet or petitioner), concerning an assessment by the New Jersey Department of Labor and Workforce Development (Department or respondent) for unpaid contributions by petitioner to the unemployment compensation fund and the State disability benefits fund for the period from 2012 through 2015 (“the audit period”) was heard by Administrative Law Judge (ALJ) Kimberly A. Moss. In her initial decision, the ALJ concluded that Kismet had failed to present sufficient proofs to establish that the individuals who performed driving services for Kismet during the audit period were bona fide independent contractors exempt from coverage under the New Jersey Unemployment Compensation Law (UCL), N.J.S.A. 43:21-1 et seq. Consequently, the ALJ affirmed the Department’s assessment and dismissed petitioner’s appeal.

The issue to be decided is whether the drivers whose services were engaged during the audit period by petitioner were employees of petitioner and, therefore, whether petitioner was responsible under N.J.S.A. 43:21-7 for making contributions to the unemployment compensation fund and the State disability benefits fund with respect to those individuals during the audit period.

Under the UCL, the term “employment” is defined broadly to include any service performed for remuneration or under any contract of hire, written or oral, express or implied. N.J.S.A. 43:21-19(i)(1)(A). Once it is established that a service has been performed for remuneration, that service is deemed to be employment subject to the UCL, unless and until it is shown to the satisfaction of the Department 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).

This statutory criteria, commonly referred to as the “ABC test,” is written in the conjunctive. Therefore, where a putative employer fails to meet any one of the three criteria listed above with regard to an individual who has performed a service for remuneration, that individual is considered to be an employee and the service performed is considered to be employment subject to the requirements of the UCL; in particular, subject to N.J.S.A. 43:21-7, which requires an employer to make contributions to the unemployment compensation fund and the State disability benefits fund with respect to its employees.

Relative to Prong “A” of the ABC test, the ALJ concluded that all of the drivers had been subject to control or direction by Kismet over the performance of their duties. In support of this conclusion, the ALJ listed the following findings of fact:

- (1) The drivers were required to log on to Kismet’s web application (app) and transport passengers who had been identified by Kismet’s app as in the driver’s zone;
- (2) The customers of Kismet arranged for pickup through the Kismet website or app and Kismet set the rate;
- (3) Kismet requires the drivers to wear professional attire;
- (4) Kismet’s website states that its drivers are trained;
- (5) The contract between the drivers and Kismet states that the drivers must be flexible and available when needed;

- (6) The drivers are prohibited from soliciting or diverting any customer to themselves during the contract and two years after the end of the contract;
- (7) Drivers are required to give two weeks' notice for an extra day off and four weeks' written notice of vacation;
- (8) All eight of the drivers who responded to a questionnaire from the Department as to whether they were independent contractors stated that they were directed by Kismet as to what customers to pick up, where to pick up the customers, and how to perform their duties;
- (9) Six of the drivers who responded to the questionnaire stated that Kismet controls their hours of work;
- (10) Six of the drivers who responded to the questionnaire stated that they were restricted from working for other limousine companies and worked exclusively for Kismet;
- (11) Five of the drivers who responded to the questionnaire stated that they needed permission from Kismet to change their route;
- (12) Seven of the drivers who responded to the questionnaire stated that they cannot hire other people to perform their duties for Kismet; and
- (13) Kismet can deny drivers access to its app.

Relative to Prong "B" of the ABC test, the ALJ concluded that the services performed by all of the drivers had been performed both in the usual course of Kismet's business and in Kismet's place of business. Specifically, the ALJ stated the following:

The issue as to Prong "B" of the ABC test is whether the transportation services performed by the drivers for Kismet were performed outside the usual course of the business or outside of all the places of business of the enterprise for which such services were performed. Customer transportation is the business of Kismet, and the drivers performed customer-transportation services in the usual course of Kismet's business. There is no doubt that the drivers do not work out of Kismet's office in Teaneck, but the question is, what is Kismet's place of business?

In Carpet Remnant Warehouse v. New Jersey Dep't of Labor, 125 N.J. 567 (1991), the Court stated that the B portion of the ABC test "refers only to those locations where the enterprise has a physical plant or conducts an integral part of its business." Carpet Remnant, 125 N.J. at 592. In this matter, an integral part of Kismet's business is conducted in

the cars driven by the drivers. It is a customer transportation business. The vehicles are an extension of Kismet's place of business.

Relative to Prong "C" of the ABC test, the ALJ concluded with regard to all of the drivers, with the exception of three during 2015 (Lenny Schwab, Woo Son, and Sadettin Aslin), that Kismet had failed to meet its burden of establishing that they were customarily engaged in an independently established trade, occupation, profession or business. Regarding Lenny Schwab, Woo Son and Sadettin Aslin, the ALJ found that Kismet had met its burden under Prong "C" for 2015, because tax records subpoenaed from Uber Technologies, Inc. (Uber) by Kismet, revealed that in 2015 Schwab, Son and Aslin had earned more money from Uber than from Kismet.

Based on the foregoing, the ALJ concluded that all of the drivers were employees. She affirmed the Department's assessment and dismissed petitioner's appeal. Petitioner did not file exceptions. Respondent filed a single "exception;" however, more a point of clarification. That is, respondent stated the following:

The Department agrees with the decision of Judge Moss and believe[s] it should be affirmed in its entirety as it was a well-reasoned, detailed evaluation of the facts presented.

However, I would like to clarify on aspect of Judge Moss [sic] ruling. Judge Moss concluded Sadettin Aslin, Lenny Schwab, and Woo Son, were customarily engaged in an established trade, occupation, profession or business passing the "C" prong of [the ABC test]. This conclusion was based on the evidence that was found on the drivers' Schedule Cs, which indicated that their income from Uber was higher than monies earned [from] Kismet. The Judge concluded [that] Kismet exercises Direction and Control over all the drivers and all of the drivers' services were performed in the usual course of Kismet's business, and in Kismet's place of businesses. Since [the ABC test] dictates all three prongs of the test must be met for a driver to be considered not in covered employment, the Judge's final order that all of the drivers who were subject to the audit did not pass the ABC test should be affirmed.

Upon *de novo* review of the record, and after consideration of the ALJ's initial decision, as well as the exception filed by respondent, I hereby accept the ALJ's recommended order affirming the Department's assessment and dismissing petitioner's appeal.¹

¹ I affirm the ALJ's recommended order, but I do not agree with the ALJ that Kismet has met its burden under Prong "C" of the ABC test for 2015 relative to Lenny Schwab, Woo Son and Sadettin Aslin *solely* on the basis of evidence establishing that each earned more during that year driving for Uber than for Kismet. Certainly, the amount of remuneration one receives from a putative employer relative to that received from others for the performance of the same service is among the most important of the "C" Prong factors

