

ROBERT E. BEAUDREAU,
Plaintiff

vs.

**LABOR & INDUSTRY REVIEW
COMMISSION and DEPARTMENT OF
INDUSTRY, LABOR & HUMAN RELATIONS,**
Defendants

COPY

DECISION
Administrative Review
Case #94-CV-555

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**ENFORCEMENTS
SECTION**

Plaintiff Robert Beaudreau (Beaudreau) appeals a decision of the defendant Labor and Industry Review Commission (LIRC) finding that Helen Banz and May Moua were employees of his under §108.02(12), Wis. Stats. He also asserts that equitable estoppel should prevent the Department of Industry, Labor and Human Relations (DILHR) from collecting unemployment compensation taxes for the period before the department made the initial employment status determination.

Because the workers were clearly integrated into Beaudreau's business and only Schremp demonstrated any actions necessary to show an independently established business, the determination that Banz and Moua were employees is affirmed. Since Beaudreau made the initial determination of status relying upon other sources, failed to change the relationship after initial advice to include them as employees and reliance upon the letter of July 7th was not reasonable, the determination that equitable estoppel is not applicable is likewise affirmed.

FACTUAL & LEGAL ENVIRONMENT

Factual Background:

Beaudreau started and operated a business under the name Quality Time which manufactured and sold linens for adjustable beds. He had no experience himself in either sewing or fabricating such linens and thus needed others to do this for him. Having little start-up capital for the payment of employees, he acquired a brochure from the Small Business Administration which listed 20 common-law factors to determine whether a particular individual is an employee or independent contractor. He then attempted to structure the relationship with

the individual sewers to avoid creating an employment relationship, including having them sign contracts indicating they were independent contractors and not employees.

In April of 1992, Beaudreau submitted an Employer's Report to the Unemployment Compensation Division of the Wisconsin Department of Health and Social Services (Department). He listed the sewers working for him as independent contractors and not as employees. In May the Department returned the report and sought additional information of the status of the listed individuals; requesting that he list his sewers as employees unless he established that they were in fact independent contractors. Beaudreau returned the report again listing the sewers as independent contractors. The Department again responded on July 7, 1992 stating that while it appeared "thus far" that he did not have any unemployment compensation liability and that the workers were independent contractors, they sought further information from Beaudreau concerning their status.

On November 6, 1992, the department determined that Helen Banz (Banz), May Moua (Moua) and Erma Schremp (Schremp) were not independent contractors but rather employees under the Unemployment Compensation Act. Beaudreau appealed. The administrative law judge affirmed this determination. Upon appeal the LIRC affirmed the determination as to Banz and Moua but reversed as to Schremp. This appeal followed.

Legal Environment:

The parties dispute the standard of review and deference owed to the decision of the LIRC. Beaudreau contends that the application of undisputed facts to the determination of whether individuals were engaged in "independently established businesses" under §108.02(12)(b)2 is a question of law, citing *Grutzner S.C. vs LIRC*; 154 Wis.2d 648, 652; 453 N.W.2d 920 (CA., 1990). LIRC asserts that it is a finding of fact conclusive on a reviewing court if supported by any credible evidence in the record, citing *Transport Oil vs Cummings*; 54 Wis.2d 256, 267; 195 N.W.2d 649 (1972) and *Sears, Roebuck & Co. vs ILHR Dept.*; 90 Wis.2d 736, 744; 280 N.W.2d 240 (1979).

Factual findings made by the LIRC are conclusive unless it is not supported by substantial and credible evidence or if fraud is involved. See §102.23(1) and (6) Wis. Stats. Drawing

inferences from the undisputed facts also constitutes a fact-finding function, **Vande Zande vs DILHR; 70 Wis.2d 1086; 236 N.W.2d 255 (1975)**. But any legal conclusions drawn from the facts are questions of law subject to independent judicial review. **Nottelson vs DILHR; 94 Wis.2d 106; 287 N.W.2d 763 (1980)**. Even then, the construction and interpretation given to a statute by the administrative agency charged with the duty of enforcing it is entitled to "great weight" when the agencies interpretation "reflects a practice or position long continued, substantially uniform and without challenge by governmental authorities and courts." **Eau Claire County vs WERC; 122 Wis.2d 363; 362 N.W.2d 429 (CA, 1984)**. Here, the facts are uncontroverted; it is the legal conclusion of whether from those facts the individuals constitute employees or independent contractors that is in dispute.

This exact determination has recently been held to be a conclusion, and hence a question, of law. Moreover, since the court found that this determination has often been disputed by the courts, the determination of the LIRC is not entitled to "great weight" and is reviewed de novo. **Larson vs LIRC; 184 Wis.2d 378, 386-388; 516 N.W.2d 456 (CA, 1994)**.

EMPLOYEE or INDEPENDENT CONTRACTOR

Twenty Factor Brochure:

Beaudreau places much emphasis upon his reliance on the *Employee or Independent Contractor? - 20 Common Law Factors* brochure that he received from the Small Business Administration. He argues that in structuring the relationships with these workers, he relied upon this document. But this reliance is misplaced and not binding on either the LIRC or the court. A person may be an independent contractor at common law but an employee under the Unemployment Compensation Act. **Princess House, Inc. vs ILHR Dept.; 105 Wis.2d 743, 747; 314 N.W.2d 922 (CA, 1981)**. The determination of whether a particular individual is an "employee" [§108.02(12)(a)] or whether they fall under the "independently established business" exception [§108.02(12)(b)] is controlled solely by statute and case law, not upon common law.

Plaintiff further argues that the contract with Banz and Moua specifically provides that they were engaged as independent contractors and not as employees. However, the conditions of unemployment compensation are not subject to a private agreement but must be determined

under the applicable statutory provisions. **Graebel Moving & Storage vs LIRC**; 131 Wis.2d 353, 355; 389 N.W.2d 37 (CA, 1986).

Finally, because the Unemployment Compensation Act is remedial in nature, it should be liberally construed to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status. **Princess House**, *supra* at page 62. There the court stated:

The purpose of the Unemployment Compensation Act is to avoid the risk or hazards that will befall those who, because of employment, are dependent upon others for their livelihood. Sec. 108.02(3)(b)2 [now sec. 108.02(12)(b)2], Stats., is designed to exclude from coverage those persons who are unlikely to be dependent upon others, even though they may perform services for others, because they have their own separately established business. **Princess House**, *supra* at page 69.

Therefore, while Beaudreau's clearly intended to create a network of "independent contractors" to fabricate his products, the determination of whether he did must be based upon the statute and case law.

Independent Contractor Test:

Under Wisconsin law an "employee" is any individual who performs services for an employing unit regardless of whether they are paid directly by such employing unit. See §108.02(12)(a), Wis. Stats. There are two components to the independent contractor exception contained in §108.02(12)(b), Wis. Stats.

"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."

The parties apparently do not dispute that Banz and Moua satisfy the independence requirement but focus their argument on whether they were engaged in an independently established business.

Wisconsin case law has established five factors which are to be used as guidelines when analyzing whether an employer/employee or independent contractor relationship exists under the Unemployment Compensation Act. **Keeler vs LIRC; 154 Wis.2d 626, 633-634; 453 N.W.2d 902 (CA, 1990)**. The weight and importance of these factors varies according to the specific facts of each case, and the guidelines are not to be applied mechanically. *Ibid.* They are;

1. Integration: Whether the work performed by the individual are related to the business activities conducted by the employing unit.
2. Advertising or Holding Out: Does the individual advertise or hold themselves out to the public or at least a certain class of customers.
3. Entrepreneurial Risk: Has the individual assumed the financial risk of the business undertaking.
4. Economic Dependence: Does the individual perform services for both the employing unit and others or is he or she economically dependent on the employing unit. If so, public policy behind the Unemployment Law would favor the dependent person having access to unemployment compensation benefits.
5. Proprietary Interest: This factor not only includes ownership of the various tools, equipment, or machinery necessary to perform the services involved but the concept of proprietary control; the ability to sell or give away some part of the business enterprise.

In reviewing these factors here, Banz and Moua have more indications of being employees than does Schremp.

Integration: All three worked out of their home and owned their own sewing machinery. Despite the lack of physical integration, all three were highly integrated into Beaudreau's business in that without his raw materials and product specifications they could not produce the specialized linens and he would not have had the finished product his business depended upon for sale and, hopefully, profit.

Advertising/Holding Out: The each had subtle differences in advertising and holding out as a separate business. Neither Banz or Moua advertised for additional business while Schremp

did. Banz had a separate business name but only provided some of her own creations to the elderly craft shop on consignment. Moua had a full-time job as a machine operator but in the sewing business did not advertise or otherwise seek other work, although voluntarily making some items for the United Hmong Association. Schremp, however, not only advertised for additional work but had some; making sweatshirts for resale and doing alteration work for area clothing stores.

Entrepreneurial Risk: All three had significant investment in their own sewing equipment but that alone does not determine entrepreneurial risk. The machines had innate value and could be sold to realize some income. However, none of them had any actual risk in the linens those machines produced for Beaudreau. He provided the plans, specifications and raw materials for his specialized linens; they followed his plans, met his specifications and used his materials to complete the finished product for which he paid them. They were paid for their work regardless of whether Beaudreau sold some, none or all of that which they made. Beaudreau alone had the responsibility of marketing and selling the product; incurring the risk that if the product would not sell he would suffer an economic loss. They could profit from their labors even if Beaudreau could not make a sale. Schremp alone among the workers faced the same risk in every sweatshirt she made hoping to resell at a profit.

Economic Dependence: Both Banz and Moua were highly dependent upon the income from Beaudreau to earn the money they needed to make the payments on their sewing equipment with nearly 100% of their linen income come from Beaudreau alone. Moua had no prior experience in sewing and therefore Beaudreau had Banz do the necessary training. After working for Beaudreau, Banz did not obtain any sewing work. Schremp, however, earned only about 10% of her linen income from the work she did for Beaudreau and hence was not economically dependent upon him.

Proprietary Interest: All the workers owned their own sewing equipment but that is only the tangible aspects of a proprietary interest. Assets alone do not give a *business* value. A product or service to sell, inventory and accounts receivable contribute to it. But clients, special production techniques, a reputation for quality products and on-time delivery; are the intangible aspects that give a business enterprise commercial value. Of the workers, only Schremp did that

which is necessary to produce commercial value in her enterprise---advertising, her own products and developing her own cliental. Neither of the others showed any entrepreneurial spirit or proprietary interest that went beyond mere asset ownership.

Therefore, Banz and Moua did not establish "an independently established trade, business or profession" and hence are employees under the Unemployment Compensation Law.

EQUITABLE ESTOPPEL

Beaudreau also seeks a finding and order preventing the collection of unemployment compensation taxes for the period from January 1, 1991 until the department's initial determination November 6, 1992. The plaintiff asserts that the doctrine of equitable estoppel is applicable because he relied to his detriment on the letter of July 7, 1992¹ believing that his sewers were not subject the unemployment compensation law.

The Department counters by arguing that the letter requested more information on the employees indicating that the investigation was continuing and only noted that "thus far" no liability was shown. Moreover, the Department's letter of May 26, 1992² clearly indicated that the sewers should be included as employees and not as independent contractors; an instruction he ignored.

Because Beaudreau has failed to show by clear, satisfactory and convincing evidence that he reasonably relied upon the Department, equitable estoppel is not available to him.

¹ The July 7, 1992 letter from department to the plaintiff provides in relevant parts:

"WE ALSO NEED THE NAMES, SOCIAL SECURITY NUMBERS, BUSINESS NAMES, ADDRESSES, COPIES OF ADVERTISING, OF ALL INDIVIDUALS YOU HAVE CONSIDERED INDEPENDENT CONTRACTORS."

* * *

"Thank you for sending us your Employer's Report....Your report thus far indicates no liability under the Wisconsin Unemployment Compensation Law."

² The May 26, 1992 letter from Department provides in part:

"SINCE YOU HAVE BEEN UNABLE TO ESTABLISH THAT WORKERS SEWING FOR YOU ARE INDEPENDENTLY ESTABLISHED BUSINESS PEOPLE, THEY MUST ALSO BE INCLUDED AS EMPLOYEES ON THIS REPORT."

Despite this language, the plaintiff again listed the sewers as independent contractors in the amended Employer's Report submitted to the department.

Equitable Estoppel Standards:

The defense of equitable estoppel consists of action by one which induces reasonable reliance by another to his detriment. **Amtronix Industries, Inc. vs LIRC**; 115 Wis.2d 108, 116; 339 N.W.2d 802 (CA, 1983). Elements of equitable estoppel are (1) action or nonaction by person against whom estoppel is asserted (2) upon which person asserting estoppel reasonably relies (3) to that person's detriment. **St. Paul Ramsey Medical Center vs DHSS**; 186 Wis.2d 37, 47; 519 N.W.2d 681 (CA, 1994). The party who asserts equitable estoppel must prove its elements by clear, satisfactory and convincing evidence. *Ibid.*

State agencies are not immune from equitable estoppel but the doctrine is not applied as freely against governmental agencies. **Fritsch vs St. Croix Cent. School Dist.**; 183 Wis.2d 336, 344; 515 N.W.2d 328 (CA, 1994). Estoppel may be applied against the state only if the elements of estoppel are clearly present and it would be unconscionable to allow the state to revise an earlier position. **Sanfelippo vs Dept. of Revenue**; 170 Wis.2d 381, 391; 490 N.W.2d 530 (CA, 1992).

Application of Standards:

For equitable estoppel to apply, reliance on action or nonaction of another must be reasonable. **Stuart vs Stuart**; 140 Wis.2d 455, 462; 410 N.W.2d 632 (CA, 1987).

Beaudreau never requested the Department's determination of the workers status but instead relied upon the SBA brochure to structure the relationship between he and the workers. On May 26, 1992 the Department had clearly informed him that as of that date he had not established the sewers as independent contractors and advised him to list him has employees on his report. He did not. Based upon this, there could not be any reasonable reliance upon the Department prior to the July 7, 1992 letter.

The letter of July 7th does not give an "all clear" as Beaudreau asserts. First, in all capital letters, the letter requests further information on the "individuals you have considered independent contractors" from the plaintiff. This request should have alerted Beaudreau that the Department had not finalized its' decision on whether the workers were independent contractors or employees. Second, the language that "...your report thus far indicates no liability" is

limited by the "thus far" clause. Again, Beaudreau should have been alerted that a final determination on the employment status of the workers had not yet been made.

Finally, there was no actual reliance on, or detriment caused by, the letter. The plaintiff had structured the relationship with the workers on the basis on the SBA brochure. He did not alter the relationship even after the Department advised him to report the workers as employees on May 26th. The plaintiff originally and independently made the determination that the workers were independent contractors and continued to report them as such, despite the questions raised and the requests for documentation by the department.

Because there was no department action prior to July 7 on which plaintiff could rely, equitable estoppel does not apply for the period prior to July 7, 1992. Since the July 7 letter clearly indicated that more information was needed, that the investigation was continuing and gave only a tentative "thus far" comment, reliance upon that letter was not reasonable. Moreover, Beaudreau made the original determination that they were independent contractors based upon the SBA brochure and maintained that position even after the Department had advised him to report them as employees. He was relying upon his own sources and not the Department. Therefore, the doctrine of equitable estoppel is not available to him.

CONCLUSION

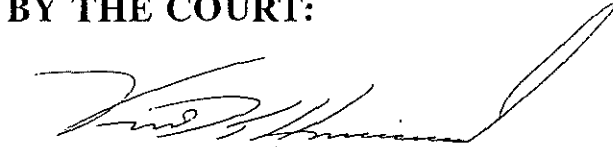
Both Banz and Moua were significantly integrated into Beaudreau's business and economically dependent upon business from him. They did not advertise or hold themselves out for business to others. They assumed no risk in the products they made, receiving the raw materials from and being paid by Beaudreau regardless of whether or not he sold anything. They did not do anything to indicate that they had created an independently established business. Therefore, the determination of the LIRC that they were employees rather than independent contractors is affirmed.

Moreover, because there was nothing to rely upon prior to the July 7th letter, that reliance upon the July 7th letter was not reasonable and Beaudreau himself made the determination that the workers were independent contractors from other sources and did not alter

that determination even after advised to the contrary, reliance upon the doctrine of equitable estoppel is not available. Accordingly, the determination of the LIRC is affirmed.

Dated at Wausau, Wisconsin this 12th day of June, 1995.

BY THE COURT:



Vincent K. Howard
Judge, Circuit Court Branch 4
Marathon County, Wisconsin

xc: George Goyke
Peter W. Zeeh
Labor & Industry Review Commission