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Unemployment Insurance--Benefits--Distinction Between an Employee and an Independent Contractor (In re Morton, 284 N.Y. 167 (1940))

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son, offered no evidence, but he contended: that the prosecution had failed to establish a *prima facie* case against him; and that Section 435 of the Charter of the City of New York[1] was unconstitutional, *ergo* the police commissioner had no authority to regulate parking, and the magistrate acquired no jurisdiction. *Held,* that the defendant was guilty of the traffic infractions with which he was charged. *People* v. *Rubin,* 284 N. Y. 392, 31 N. E. (2d) 501 (1940).

In scholastic fashion the defendant argued that from the facts proved by the prosecution, *viz.,* that the defendant was the registered owner of an automobile which had been unlawfully parked, one could not infer that the defendant was a traffic infractor. Such an inference, asserted the defendant, rebuts itself because, if a man were the registered owner of two or more automobiles which were unlawfully parked simultaneously, since it is physically impossible for one man to operate more than one automobile at one time, it could not logically be inferred that the registered owner of two or more automobiles committed more than one of such traffic infractions simultaneously. The court pointed out that the evidence showed that the defendant owned only one automobile, therefore his reasoning did not apply to his own case. As the defendant offered no evidence to refute the inference which was raised against him, the inference prevailed.[2] A rebuttable presumption, similar to the rebuttable inference in question, exists in civil cases,[3] and such an inference has been utilized in the criminal law.[4]

Although it had previously been adjudicated a constitutional delegation of legislative power,[5] the defendant averred that Section 345 of the Charter of the City of New York authorized the police commissioner to regulate *traffic,* but not *parking.* The court decided, however, that the power to regulate traffic necessarily includes the power to regulate parking,[6] hence the police commissioner was empowered to regulate parking by implication.[7] The defendant urged that the sec-

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[1] N. Y. CITY CHARTER § 435 ("The police department and force shall have the power and it shall be their duty to . . . regulate, direct, control and restrict the movement of vehicular and pedestrian traffic for the facilitation of traffic and the convenience of the public as well as the proper protection of human life and health . . . The commissioner shall make such rules and regulations for the conduct of pedestrian and vehicular traffic in the use of the public streets, squares and avenues as he may deem necessary . . . The violation of such rules and regulations shall be triable by a city magistrate and punishable by not more than thirty days' imprisonment or by a fine of not more than fifty dollars, or both.").

[2] People v. Dyle, 21 N. Y. 578 (1860).

[3] Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406 (1915); Piwowarski v. Cornwell, 273 N. Y. 226, 7 N. E. (2d) 111 (1937).

[4] Commonwealth v. Ober, 286 Mass. 25, 189 N. E. 601 (1934); People v. Kayne, 286 Mich. 571, 282 N. W. 248 (1938); People v. Marchetti, 154 Misc. 147, 276 N. Y. Supp. 708 (1934).

[5] Cherubino v. Meenan, 253 N. Y. 462, 171 N. E. 708 (1930).

[6] People v. Lewis, 167 Misc. 139, 3 N. Y. S. (2d) 508 (1938).

[7] N. Y. VEHICLE AND TRAFFIC LAW Art. VI (entitled in part: "Provisions Applying to Highway Traffic . . ."); N. Y. VEHICLE AND TRAFFIC LAW § 86 ("Parking . . ." is part of the title, and § 86 is within art. VI).

tion in question was unconstitutional, nevertheless, for it deprived him of a trial by jury.[8] In this respect the Federal Constitution does not apply to trials in the state courts.[9] The court by relating the New York Constitution to the Vehicle and Traffic Law and the Penal Law, clearly demonstrated that the defendant had not suffered any substantial impairment of his constitutional rights.[10]

A. C. H.

UNEMPLOYMENT INSURANCE — BENEFITS — DISTINCTION BETWEEN AN EMPLOYEE AND AN INDEPENDENT CONTRACTOR.—This is a proceeding in the matter of the claim of Margaret Morton against the Spirella Co., Inc. for unemployment insurance benefits under the Unemployment Insurance Law.[1] Respondent manufactures and sells made-to-order ladies' undergarments. Claimant was engaged as a corsétière pursuant to a written contract which in part provided as follows: the company agreed to grant an exclusive sales territory to claimant, to give her the benefit of the company's training in corsetry and salesmanship; to furnish her with the company's products at the prices published in the company's wholesale price list, etc. By the express terms of the contract, claimant was obligated to pursue respon-

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[8] U. S. CONST. Art. III, § 2 (". . . trial of all crimes shall be by jury."); N. Y. CONST. Art. VI, § 18 ("Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provisions shall remain inviolate forever; . . .").

[9] Eilenberker v. Plymouth County, 134 U. S. 31, 10 Sup. Ct. 424 (1890).

[10] N. Y. CONST. Art. VI, § 18 ("Courts of Special Sessions and inferior local courts of similar character shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law, and the legislature may authorize them to try such offenses without a jury."); N. Y. VEHICLE AND TRAFFIC LAW § 2(29) (". . . no jury trial shall be allowed for traffic infractions."); N. Y. PENAL LAW § 2(6) (". . . traffic infractions . . . are not crimes."); Matter of Cooley v. Wilder, 234 App. Div. 256, 255 N. Y. Supp. 218 (4th Dept. 1932).

[1] N. Y. LABOR LAW § 502.

"Definitions. As used in this article:

1. 'Employment', except where the context shows otherwise, means any employment under any contract of hire, express or implied, written or oral, including all contracts entered into by helpers and assistants of employees, whether paid by employer or employee, if employed with the knowledge actual or constructive of the employer, in which all or the greater part of the work is to be performed within this state. . . . But for the purposes of this article, 'employment' shall not include:
   (1) Employment as a farm laborer;
   (2) Employment by an employer of his spouse or minor child.
   . . .
2. 'Employee' means any person, including aliens and minors, employed for hire by an employer in an employment subject to this article, except any person whose wages exceed three thousand dollars in any calendar year." (L. 1935, c. 468.)

dent's methods of corsetry and salesmanship, and, as a matter of practice, was expected to begin her day's work at 9 A. M. and to work at least thirty hours a week. The modeling garments, samples, and advertising literature were supplied by respondent, and had to be returned upon termination of the contract; claimant's calling card was imprinted with her name together with that of respondent's; a report card had to be filed each week showing claimant's daily activities, and she was required to attend the school of instruction conducted by respondent's manager. The sole question to be determined is whether claimant is an employee or independent contractor of the respondent company. *Held,* the Appeal Board [2] was warranted in determining that claimant was an employee, and not an independent contractor. *In re Morton,* 284 N. Y. 167, 30 N. E. (2d) 369 (1940).

While an employer may elect to engage an independent contractor rather than an employee, no written agreement relating to employment may preclude an examination by the Appeal Board to determine whether the actual relationship is such as to bring the parties within the scope of the law.[3] The power and duty of weighing the evidence does not rest with the courts for, by virtue of the statute, it has been placed upon the administrative authority which acts in a quasi-judicial capacity.[4] In referring to the procedure under a parallel statute it has been said that the board's findings of fact, if supported by evidence, shall be conclusive. Where there is conflict in the testimony produced or where reasonable men might differ as to the credibility of testimony, the duty of weighing the evidence and making the choice rests solely upon the board.[5] This rule has been applied in recent cases arising before the National Labor Relations Board, the Interstate Commerce Commission and the Federal Trade Commission.[6]

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[2] The state establishes an Appeal Board of three members appointed by the governor.

[3] Instant case, 30 N. E. (2d) at 372.

[4] N. Y. LABOR LAW § 534 ("A decision of a referee under any provision of the article, if not appealed from, shall be final on all questions of fact and law. A decision of the Appeal Board shall be final on all questions of fact and unless appealed from, shall be final on all questions of law").

[5] Matter of Stork Restaurant, Inc. v. Boland, 282 N. Y. 256, 26 N. E. (2d) 247 (1940).

[6] United States v. Louisville & Nashville R. R., 235 U. S. 314, 35 Sup. Ct. 113 (1914); Fed. Trade Comm. v. Pac. States Paper Trade Ass'n, 273 U. S. 52, 47 Sup. Ct. 255 (1927); Fed. Trade Comm. v. Algoma Lumber Co., 291 U. S. 67, 54 Sup. Ct. 315 (1933); Florida, *et al.* v. United States, 292 U. S. 1, 54 Sup. Ct. 603 (1934) (involving a finding of the Interstate Commerce Commission); Washington, Virginia & Maryland Coach Co. v. N. L. R. B., 301 U. S. 142, 57 Sup. Ct. 648 (1937); Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 59 Sup. Ct. 206 (1938); Agwilines, Inc. v. N. L. R. B., 87 F. (2d) 146 (C. C. A. 5th, 1936); N. L. R. B. v. Wallace Mfg. Co., 95 F. (2d) 818 (C. C. A. 4th, 1938); N. L. R. B. v. Ky. Fire Brick Co., 99 F. (2d) 89 (C. C. A. 6th, 1938); N. L. R. B. v. Nebel Knitting Co., 103 F. (2d) 594 (C. C. A. 4th, 1939); Magnolia Petroleum Co. v. N. L. R. B., 112 F. (2d) 545 (C. C. A. 5th, 1940); N. L. R. B. v. Skinner & Kennedy S. Co., 113 F. (2d) 667 (C. C. A. 8th, 1940); Matter of Chetney v. Manning Co., 273 N. Y. 82, 6 N. E. (2d) 105 (1937);

The distinction between an employee and an independent contractor is as follows: the employee is one who undertakes to achieve an agreed result and to accept the directions of his employer as to manner in which the result shall be accomplished; the independent contractor is one who agrees to achieve a certain result but is not subject to the orders of his employer as to the means which are used.[7] The absence of any right on the part of the employer to control the manner in which the stipulated work is to be done is, in many instances, treated as the sole *indicium* of the independence of the contract.[8] Because such a distinction has occasioned criticism, the following brief and simple formula has been proposed: "An independent contractor is a person employed to perform work on the terms that he is to be free from the control of the employer as respects the manner in which the *details* of the work are to be executed."[9]

In interpretation of the New York Unemployment Insurance Law, the Division of Placement and Unemployment Insurance has said: "In defining 'independent person' generally the precedent laid down by the courts in workmen's compensation cases will be followed: generally an independent person does the work of the principal with whom he contracts without supervision by such principal as to his method of doing it and has his own financial responsibility. He usually receives a lump sum agreed upon in advance rather than pay by the day or hour and is not bound to regular hours of work, nor subject to discharge."[10] The general concept evolved by a long line of tort cases and expressed by many eminent writers on the subject has been

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Met. Life Ins. Co. v. N. Y. State Labor Relations Bd., 280 N. Y. 194, 20 N. E. 390 (1939).

[7] P. T. Collier & Son Co. v. Hartfeil, 72 F. (2d) 625 (C. C. A. 8th, 1934); Miss. River Fuel Corp. v. Young, 188 Ark. 575, 67 S. W. (2d) 581 (1934); May v. Farrell, 94 Cal. App. 703, 271 Pac. 789 (1929); Wight v. H. G. Christman Co., 244 Mich. 208, 221 N. W. 314 (1928); Hexamer v. Webb, 101 N. Y. 377, 4 N. E. 755 (1886).

"What then is the test of this distinction between a servant and an independent contractor? The test is the existence of the right of control over the agent in respect of the manner in which his work is to be done. A servant is an agent who works under the supervision and direction of his employer; an independent contractor is one who is his own master. The servant is a person engaged to obey his employer's orders from time to time; an independent contractor is one who is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it . . . he is bound by his contract but not by his employer's orders." Instant case, 284 N. Y. at 172, citing SALMOND, TORTS.

[8] "The employment is regarded as independent when the person renders service in the course of an occupation representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." 4 MECHEM, AGENCY (1st ed. 1888) § 747, quoted with approval in Bibb v. Norfolk & W. R. R., 87 Va. 711, 14 S. E. 163 (1891).

"An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand." POLLACK, TORTS (11th ed.) 80.

[9] Note (1922) 19 A. L. R. 226.

[10] 1 C. C. H., N. Y. UNEMPLOYMENT INS. SERV. (1937) § 7215.

applied to cases arising under the Workmen's Compensation Law.[11] The same rule also has been applied to cases arising under the Unemployment Insurance Law, the result in the particular cases depending upon the facts present in each instance,[12] and also to unemployment insurance cases in other jurisdictions.[13] It can be seen from the nature of the problem that the degree of control which must be reserved by the employer in order to create the employer-employee relationship cannot be stated in terms of mathematical precision, and that various aspects of the relation may be considered in arriving at the conclusion in a particular case.[14]

R. G.

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[11] N. Y. WORKMEN'S COMPENSATION LAW § 23; Matter of Beach v. Velzy, 238 N. Y. 100, 143 N. E. 805 (1924); Matter of Pierce v. Bowen, 247 N. Y. 305, 160 N. E. 379 (1928); Matter of Glielmi v. Netherland Dairy Co., 254 N. Y. 60, 171 N. E. 906 (1930).

[12] Compare Matter of Scatola, 282 N. Y. 689, 26 N. E. (2d) 815 (1940), with Matter of Levine, 283 N. Y. 577, 27 N. E. (2d) 439 (1940).

[13] Jack & Jill, Inc. v. Tone, 126 Conn. 114, 9 A. (2d) 497 (1939); Schomp v. Fuller Brush Co., 124 N. J. L. 487, 12 A. (2d) 702 (1940).

[14] Instant case, 284 N. Y. at 173, citing RESTATEMENT, AGENCY § 220.