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Rights of Firemen Under the Indiana Workmen's Compensation Act: City of Fort Wayne v. Hazelett

RIGHTS OF FIREMEN UNDER THE INDIANA WORKMEN'S COMPENSATION ACT

City of Fort Wayne v. Hazelett

The plaintiff filed a claim under the Workmens Compensation Act for compensation for the death of her husband resulting from an accidental injury suffered while in the performance of his duties as a fireman of the City of Fort Wayne. The Industrial Board awarded compensation, and the City appealed. Held, for appellant. A fireman in the service of the municipality is not an employee within the scope of the act.[1]

The Indiana Act provides that " 'employer' shall include . . . any municipal corporation within the state . . . using the services of another for pay," and " 'employee' shall include every person in the service of another under any contract of hire or apprenticeship, written or implied."[2] The sole question presented by the principal case is whether

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[17] Kern v. The Clev., Cin., Chi. and St. Louis Ry., 204 Ind. 595, 185 N.E. 446 (1933).

[18] Cleveland, Cin., Chi. and St. Louis Ry. v. Shelly, 96 Ind. App. 273, 170 N.E. 328 (1932).

[19] Reeds Administratrix v. Illinois Cent. Ry., 182 Ky. 455, 206 S.W. 794 (1918).

[20] 213 Ind. 16, 8 N.E.(2d) 986, 11 N.E.(2d), 183 (1937),

[21] 204 Ind. 595, 185 N.E. 446 (1933).

[22] Douglas v. New York, New Haven and Hartford R.R., 279 U.S. 377, 49 S. Ct. 355, 73 L. ed 747 (1929).

[1] City of Fort Wayne v. Hazlett, 23 N.E.(2d) 610 (Ind. App. 1939).

[2] Ind. Acts 1929, c. 172, § 73, p. 536; BURNS IND. STAT.ANN. (1933) § 40-1701.

or not a member of a city fire department is an employee within the scope of this act.

The question may be thus resolved: Is the person seeking recovery under the Workmens Compsensation Act, whose employer is a governmental agency, an "employee" or a "public officer?"[3] The remuneration accompanying a governmental office is held to be an incident of that office, a mere stipulation accompanying the office to enable the officer better to perform his duties.[4] As to those who are not officers, there is, in the absence of any express agreement, an implied obligation on the part of the employer to pay for his services.[5] This would lead to the conclusion that the existence of a contract of hire is a result of the determination as to whether or not there exists an office or an employment, and not a test for such determination.

A number of tests have been applied by the courts to determine whether one in the service of the public is an officer or an employee, so that considerable confusion is apparent in the field.[6] One of the principal tests that has been applied is that based on the exercise of sovereign authority. If there is vested in the servant any authority to exercise a measure of the sovereign powers he is held to be a public officer.[7] The fact that a person serves in the performance of what is a governmental function should not be conclusive, for he is not by that fact that vested with sovereign authority.[8]

Another test arises in those cases where it has been held that one cannot be an officer unless his position is created as such by law.[9] That the position or even its duties are provided for by law is not conclusive;

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[3] But one may be neither an officer nor an employee under contract. See Schmueser v. Copelin, 99 Ind. App. 209, 192 N. E. 123 (1934); In re Moore, 97 Ind. App. 492, 187 N. E. 219 (1933).

[4] Sibley v. State, 89 Conn. 682, 96 Atl. 161 (1915); State v. Hawkins, 44 Ohio St. 98, 5 N. E. 228 (1886); Leonard v. Terre Haute, 48 Ind. App. 104, 93 N. E. 872 (1911).

[5] 1 WILLISTON, CONTRACTS (Rev.Ed.1936) § 36; Lockwood v. Robbins, 125 Ind. 398, 25 N. E. 455 (1890); Weesner v. Weesner, 71 Ind. App. 237, 124 N. E. 710 (1919); Louisville N. A. & C. R. R. v. Hubbard, 116 Ind. 193, 18 N. E. 611 (1888); Palmer v. Miller, 19 Ind. App. 624, 49 N. E. 975 (1898).

[6] 1 MECHEM, PUBLIC OFFICERS (1890) p. 1 ff. See State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 Pac. 411 (1927); 53 A. L. R. 583, 595 (1928).

[7] St. Joseph County v. Claeys, 103 Ind. App. 192, 5 N. E.(2d) 1008 (1937); Reissner v. Board of Sch. Comm'rs, 103 Ind. App. 202, 4 N. E.(2d) 581 (1936); State ex rel. Attorney-General v. Jennings, 57 Ohio St. 415, 49 N. E. 404 (1898); *cf.* Shelmadine v. Elkhart, 75 Ind. App. 493, 129 N. E. 878 (1920); State v. Nattkemper, 86 Ind. App. 85, 156 N. E. 168 (1926); Brinson v. Board of Commissioners, 97 Ind. App. 354, 186 N. E. 891 (1933); Keene v. Board of Comm'rs of Jasper County, 105 Ind. App. 641, 16 N. E.(2d) 967 (1938); McNally v. Saginaw, 197 Mich. 106, 163 N. W. 1015 (1917).

[8] Atlanta v. Hatcher. 31 Ga. App. 611, 121 S. E. 864 (1924). *cf* St. Joseph County v. Claeys, 103 Ind. App. 192, 5 N. E.(2d) 1008 1937); Reissner v. Board of Sch. Comm'rs, 103 Ind. App. 202, 4 N. E. (2d) 581 (1936).

[9] St. Joseph County v. Claeys, 103 Ind. App. 192, 5 N. E.((2d) 1008 (1937); Mason v. Los Angeles, 130 Cal. App. 224, 20 P.(2d) 84 (1933); Murphy v. Industrial Comm., 355 Ill. 419, 189 N. E. 302 (1934).

the position must be established as an office.[10] Other facts, as whether or not a person is required to give bond or take oath, are sometimes considered but are merely evidentiary.[11] It seems that there are really but two basic tests for determining if a position is a public office. Either it must be specifically created as such by law or there must be delegated to it some portion of the sovereign powers. It is not evident that these elements are present in the case of a fireman.

The court in the principal case apparently assigns as the main reason for its decision the fact that the selection of members of city fire departments is regulated by statute,[12] so that the city is not under complete freedom of contract in such matters; and thus concludes that a fireman does not serve under "contract of hire." But the mere fact that the city is not under complete freedom of contract is of no consequence, for this would not preclude the formation of a contract of hire.[13]

The proposition that the statute providing for firemen's pensions, being in existence at the time the Workmens Compensation Act was passed, creates a presumption that the legislature did not intend to include firemen within the coverage of the latter act may offer a sufficient basis for the principal decision. But pensions generally are held to be bonuses only, and are paid in consideration of past services.[14] Benefits provided for by the Workmens Compensation Acts on the other hand, are considered to be compensation for injuries sustained and losses resulting therefrom.[15] Thus it has been held that the two acts, being founded on different theories, are not inconsistent, and that a recovery under one should not preclude a recovery under the other.[16] The validity of this distinction in Indiana depends on whether

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[10] St. Joseph County v. Claeys, 103 Ind. App. 192, 5 N. E. (2d) 1008 (1937); Murphy v. Industrial Comm., 355 Ill. 419, 189 N. E. 302 (1934).

[11] Shelmadine v. Elkhart, 75 Ind. App. 493, 129 N. E. 878 (1920); State v. Nattkemper, 86 Ind. App. 85, 156 N. E. 168 (1926); Keene v. Board of Comm'rs of Jasper County, 105 Ind. App. 641, 16 N. E. (2d) 967 (1938); Blynn v. Pontiac, 185 Mich. 35, 151 N. W. 681 (1915).

[12] Ind. Acts 1905, c. 129, §§ 159, 160, 1933, c. 86, § 1935, c. 282, § 1, BURNS IND. STAT. ANN. (1933), §§ 48-6102, 48-6105.

[13] For other examples of statutory limitations on the freedom of contract, see Indiana statutes relating to hiring of teachers: BURNS IND. STAT. ANN. (1933), §§ 28-4304 to 4310, 28-4314, 28-5005. The Indiana court has held teachers to be employees rather than officers of the school corporation. Kostanzer v. State ex rel. Ramsey, 205 Ind. 536, 187 N. E. 337 (1933). Another instance of such limitations is apparent in the National Labor Relations Act, 49 STAT. 449, 29 U. S. C. A., § 151 ff. The ability of employer and employee to enter into contract relations cannot be disputed under this act.

[14] Dickey v. Jackson, 181 Iowa 1155, 165 N. W. 387 (1917).

[15] Jackson v. Wilde, 52 Cal. App. 259, 198 Pac. 822 (1921).

[16] Dickey v. Jackson, 181 Iowa 1155, 165 N. W. 387 (1917); Jackson v. Wilde, 52 Cal. App. 259, 198 Pac. 822 (1921); Markley v. St. Paul, 142 Minn. 356, 172 N. W. 215 (1919). *But cf.* Bross v. Detroit, 262 Mich. 447, 247 N. W. 714 (1933). Where a distinction is based on the fact that firemen pay for the protection afforded by the pension system, see State v. District Court, 134 Minn. 26, 158 N. W. 790 (1916).

the courts hold that payments under the pension statute are in the nature of a bonus or compensation.[17]

The principal case is in accord with the general weight of authority throughout the United States. The answer to the problem presented, however, depends largely on the peculiar wording of the particular statutes involved.[18] In Indiana, firemen have been held to be municipal employees for other purposes.[19] No sufficient reason is apparent why any distinction should be made for the purposes of this act.[20] Moreover, in view of the general terminology used in the act to define "employer" and "employee", and of the avowed purpose of the courts to extend the coverage of the act in so far as possible,[21] it is believed that a better result would have been to hold that firemen are "employees" under the Workmens Compensation Act.

ATTACHMENT OF INCOME OF SPENDTHRIFT TRUST

Schwager v. Schwager

Defendant is beneficiary of a spend-thrift trust set up by his mother's will subsequent to divorce of son by his first wife. The will provided that if the trustees apprehend that the interest of the beneficiary is threatened to be diverted they shall divert the income and principal from distribution to the defendant and use the same as they deem expedient to support and maintenance of the beneficiary and members of his family then dependent on him for support, not however, including his first wife or any of his children by her. The plaintiffs, divorced wife and children (two of whom are minors), sue to attach the income or corpus of the trust for alimony and support. Held, No recovery allowed; under Wisconsin law a testator may dispose of his property as his judgment may dictate, the courts cannot change or modify a will or substitute in its place one which they deem more equitable or just.[1]

Trusts in which the interest of the beneficiary cannot be assigned by him or reached by his creditors have come to be known as "spendthrift trusts". It is immaterial whether or not the beneficiary is in fact a spendthrift. The purpose of the settlor in creating the trust is to protect the beneficiary against his own folly, inefficiency or misfortune.[2] Cases upholding the restraint of alienation of trust income

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[17] BURNS IND. STAT. ANN. (1933), §§ 48-6506, 6507.

[18] McDonald v. New Haven, 94 Conn. 403, 109 Atl. 176, 10 A. L. R. 193, 201 (1920). See Note (1932), 81 A. L. R. 478; Stene, *Application of State Workmen's Compensation Laws to Public Employees and Officers* (1932), 17 Minn. L. Rev. 162.

[19] City of Peru v. State ex rel. McGuire, 210 Ind. 668, 119 N. E. 151 (1936).

[20] SEE Fahler v. City of Minot, 49 N. Dak. 960, 194 N. W. 695 (1923).

[21] McDowell v. Duer, 78 Ind. App. 440, 133 N. E. 839 (1922); In re Duncan, 73 Ind. App. 270, 127 N. E. 289 (1919).

[1] Schwager v. Schwager, 109 F.(2d) 754 (C.C.A. 7th, 1940).

[2] SCOTT, LAW OF TRUSTS (1939) 742.