EMPLOYMENT AND SECURITY

CHAPTER 268

DIVISION OF EMPLOYMENT AND SECURITY

268.01 TRANSFER OF POWERS AND DUTIES.

Where the director of the division of employment and security errs in dismissing an appeal for lack of jurisdiction, the case will be remanded to the director with directions to proceed to decide the appeal on its merits. Where the director has jurisdiction of an appeal from a determination of a referee, it is the duty of the director to decide the appeal on its merits and not dismiss it for lack of jurisdiction. Christgau v Fine, 223 M 452, 27 NW(2d) 193.

268.02 POWERS AND DUTIES OF DIRECTOR OF EMPLOYMENT AND SECURITY.

Strikes and boycotts. Right to picket in non-labor disputes. 19 MLR 817.

268.03 DECLARATION OF PUBLIC POLICY.

Ordinarily statutory directions not relating to the issuance of the thing to be done, compliance wherewith is a matter of convenience rather than substance, are not mandatory. They are directory only, as distinguished from the substantive provisions relating to the essence, which are mandatory. Bielke v American Crystal Sugar Co. 206 M 309, 288 NW 584.

It is plain that the unemployment compensation act does not impose any duty or obligation upon the employer in favor of the employee. It is only against the special fund, created by legislation, that employee may assert his claim. The employer's only duty is to pay the proper amount into the fund. Stevens v Division of Employment, 207 M 431, 291 NW 890.

The legislature is not bound to occupy the whole field. It is free to recognize degrees of harm and may confine its restrictions to those classes where the need is most urgent. Classification being a legislative matter, that the court does not see all the facts justifying the classification does not warrant declaring the law invalid. To declare the law invalid the court must find the classification such as could not reasonably and intelligently be classified as it was. Eldred v Division of Employment, 209 M 58, 295 NW 412.

One of the expressed legislative purposes was "encouraging employers to provide more stable employment." The prospect that observance of constitutional limitations will work serious inconvenience in the administration of a legislative act does not justify the denial of due process of law in making administrative decisions. Juster v Christgau, 214 M 115, 7 NW(2d) 501.

L. 1943, c. 650 s. 6 (1) (2) changes the method of review by the supreme court under the unemployment compensation law from direct appeal to certiorari, but makes no substantial change in the scope of the review. Richard v Federal Cartridge Co. 217 M 136, 14 NW(2d) 118.

Whether an individual performing service for another is an independent contractor or an employee is, ordinarily a question of fact, the deciding factor being the right of control. It is not the fact of actual interference with control, but the **right** to interfere therewith, which distinguishes an independent contractor from a servant or agent. Rochester Dairy v Christgau, 217 M 463, 14 NW(2d) 780.

L. 1943, c. 650, s. 2, is not unconstitutional as violative of the federal and state constitutions affording to all persons the equal protection of the laws and requiring

that taxes be uniform upon the same class of subjects. State v Donovan, 218 M 606, 16 NW(2d) 897.

Where substantially the same provisions are involved in both the federal and the state employment and security acts, the interpretation adopted by the United States Supreme Court will be followed. The retroactive application of the war risk contributions act to a period antedating the enactment of the statute, all within the same calendar year, is to a transaction period sufficiently recent not to be violative of due process of law under the federal and state constitutions. State v Industrial Tool Works, 220 M 591, 21 NW(2d) 33.

The levy of an income tax involves the taxing power, whereas the enactment of employment and security act, and all contributions levied thereunder, result from an exercise of the police power. Contributions assessed against an employer is not a direct tax upon property, but is an excise tax or a tax on the right or privilege to employ labor. The war risk contributions act, enacted under the police power to relieve the unemployment hazards resulting from war time economy is to be liberally construed; and where substantially the same provisions are involved in both federal and state employment and security acts, the interpretation adopted by the United States Supreme Court will be followed. State v Industrial Tool Works, 220 M 608, 21 NW(2d) 31.

A member of the legislature may be a member of the advisory council for the division of employment and security. 1944 OAG 280, June 16, 1943 (280-H).

Former employment means most recent employment. 1944 OAG 152, July 8, 1943 (885-A).

If an applicant is offered his former employment but cannot accept same because unable to perform the work, his wage credits should not be canceled because such former employment is not suitable, having due regard to his physical fitness. 1944 OAG 148, Sept. 17, 1943 (885-C-2).

Any remuneration paid by the government to citizens who serve the government in time of war is a mere gratuity at the hands of the government; and the Minnesota division of employment and security is not required to deduct mustering-out payments paid to an ex-serviceman under the employment and security act. 1944 OAG 145, March 15, 1944 (885-C-1); 1944 OAG 144, April 11, 1944 (885-C-1).

Common-law marriage in Minnesota; a problem in social security. 22 MLR 177.

Extension of coverage of unemployment compensation. 23 MLR 173.

268.04 DEFINITIONS.

Subd. 12, amended by L. 1947 c. 574 s. 1.

Subd. 17, amended by L. 1947 c. 432 s. 1.

Subd. 26, amended by L. 1947 c. 432 s. 2.

See, annotations under section 268.03.

Labor rendered in a greenhouse on the grounds of a cemetery is not agricultural labor as that term is used in the unemployment compensation act. A public cemetery corporation is not a corporation organized and operated exclusively as a charitable corporation within the meaning of chapter 268. Christgau v Woodlawn Cemetery, 208 M 263, 293 NW 619.

Whether an individual performing service for another is an individual contractor or an employee is ordinarily a question of fact, the deciding factor being the right of control. In the instant case the claimant was employed by farmers at a fixed price per 100 lbs. of milk hauled to a dairy, using his own equipment and judgment in the performance of the contract. He was paid by the dairy company which in turn reimbursed itself by deductions from amounts due to farmers for the milk sold. The holding that the milk hauler was an independent contractor and not an employee of the dairy company was affirmed by the supreme court, and it was held that the dairy company was not liable for unemployment contributions in regards to such hauler. Rochester Dairy v Christgau, 217 M 460, 14 NW(2d) 780.

"Recent transactions" defined. State v Industrial Tool Works, 220 M 591, 21 NW(2d) 42.

"Employing unit" defined and distinguished. El Queeno v Christgau, 221 M 197, 21 NW(2d) 601.

Where a copartnership reorganized and thereafter two separate corporate entities succeeded to a portion of the enterprise of said copartnership, such successor corporations are not entitled to the contribution rate of the predecessor corporation even though said corporations are controlled by the same interests as controlled the copartnership. El Queeno v Christgau, 221 M 197, 21 NW(2d) 601.

Larsen, employed under full time contract as an instructor at the University of Minnesota, was permitted under his contract to do a limited amount of consultive work outside his scheduled hours. He earned $5,074.90 working for the appellant. He was not an employee within the meaning of the employment and security act, particularly section 268.04. Castner v Christgau, 222 M 61, 24 NW(2d) 229.

Where a person is retained to perform certain specialized services outside of his regular fulltime employment as a university instructor; where he is rendering similar services for other firms at the same time; where he performs such services either in his own home or otherwise as he determines; where he works without supervision and at such time as he determines and performs the services according to his own methods and subject to control only as to results, the master and servant relationship does not exist so as to bring such employment within the terms and provisions of the employment and security act. Castner v Christgau, 222 M 61, 24 NW(2d) 228.

Where the tavern owner contracted with a band leader, the latter was an independent contractor and the members of the orchestra were not employees of the tavern keeper who was not liable for social security or federal unemployment tax. Biltgen v Reynolds, 58 F. Supp. 909.

Brokers who sold flour and feed manufactured by the milling company, but who were not under the company's control, and who represented other companies in the same line, were independent contractors and not employees within the social security, federal insurance contributions, and federal unemployment tax acts. Cannon Valley v United States, 59 F. Supp. 785.

"Employment" defined. 1944 OAG 150, June 18, 1943 (885-C-2).

"Mustering-out" pay defined. 1944 OAG 145, March 15, 1944 (885-C-1).

Certain truck drivers hauling live stock are within the Minnesota employment and security law even though the man who employs them has less than eight rendering services. OAG April 12, 1945 (885-D-1).

The "calendar quarter," contemplated by section 268.06, subd. 11, is a completed quarter, and when the war ends officially, contributions terminate at the end of the previous quarter. OAG Aug. 21, 1945 (885-D-1).

268.05 UNEMPLOYMENT COMPENSATION FUND.

It is plain that the unemployment compensation act does not impose any duty or obligation upon the employer in favor of the employee. It is only against the special fund created by legislation that the employee may assert his claim. The employer's only duty is to pay the proper amount into the fund. Stevens v Division of Employment, 207 M 431, 291 NW 890.

268.06 CONTRIBUTIONS FROM EMPLOYERS.

Subd. 3, amended by L. 1947 c. 32 s. 1.

Subd. 5, amended by L. 1947 c. 432 s. 3.

Subd. 6, amended by L. 1947 c. 432 s. 4.

Subd. 10, amended by L. 1947 c. 32 s. 2.

Subd. 11, amended by L. 1947 c. 32 s. 3, and L. 1947 c. 432 s. 11.

Subd. 14, amended by L. 1947 c. 32 s. 4.

Subd. 15, amended by L. 1947 c. 32 s. 5.

Subd. 16, amended by L. 1947 c. 32 s. 6.

Subd. 17, amended by L. 1947 c. 32 s. 7.

Subd. 20, amended by L. 1947 c. 600 s. 7.

Subd. 22, amended by L. 1947 c. 32 s. 8.

Subd. 24, amended by L. 1947 c. 432 s. 5.

See, annotations under section 268.03 and 268.04.

In fixing employer's current rate of contributions under war risk contributions act reference in the act to antecedent facts such as payroll of a predecessor employing unit during a preceding year in determining the amount of employer's credits is not a denial of "due process of law." State v Industrial Tool Works, 220 M 591, 21 NW(2d) 35.

Stipulation to the effect that subsequent to reorganization the succeeding corporations and the prior copartnership were being conducted as one employing unit and one employer is not binding on the director, nor does it permit him to assign to any of the units involved a rate different from that prescribed by the provisions of the act, which, for corporations commencing business, is fixed at 2.7 per cent by virtue of subd. 7. El Queeno Co. v Christgau, 221 M 197, 21 NW(2d) 601.

The provision permitting an employer to file an application for a lower contribution rate within 30 days allowed for taking an appeal to the director is directory. Christgau v Fine, 223 M 452, 27 NW(2d) 193.

Charges made to employer's account and which have become final cannot be cleared by giving retroactive effect to subsequent amendment. 1944 OAG 153, Oct. 14, 1943 (885-D-2).

"Of such employer" as used in subdivision 16 defined. OAG Aug. 3, 1945 (885-D-1).

Effective period of war risk act terminates at the end of the calendar quarter prior to the date of the end of the war. OAG Aug. 21, 1945 (885-D-1).

Credit to employees for voluntary contributions relating to benefit charges as provided by L. 1947, c. 432, s. 5, is valid as to 1948 and subsequent years, but is not retroactive, and cannot include or apply to 1946 and 1947. OAG June 4, 1947 (825-D-1) (825-D-2).

Tax provisions of the social security act. 22 MLR 299.

Nature of "contributions" under the unemployment compensation law. 26 MLR 260.

Priority and effect of liens on the distribution of insolvent estates between federal and state claims for employment taxes. 31 MLR 479.

268.07 BENEFITS PAYABLE; TIME PAYABLE.

Subd. 3, amended by L. 1947 c. 432 s. 6.

Subd. 6, repealed by L. 1947 c. 32 s. 9.

See, 1944 OAG 145, March 15, 1944 (885-C-1); 1944 OAG 144, April 11, 1944 (885-C-1), noted under section 268.03.

268.08 WHO ARE ELIGIBLE TO RECEIVE BENEFITS.

Construing L. 1943, s. 4 (C), as requiring an applicant for unemployment benefits under the employment and security act section 268.08 (3) as amended, to be available both for work in his usual trade or occupation and for suitable work in any other trade or occupation for which he is reasonably fitted, if evidence is sufficient to establish that applicant has a prospect of returning to work in his own trade within a reasonable time, then, under section 5 (E) (1) of said act, work in another trade or occupation which would otherwise be suitable, becomes unsuitable, and

applicant need not hold himself available therefor to be eligible for employment benefits under the act. Berthiaume v Christgau, 218 M 65, 15 NW(2d) 115.

Two week's waiting period cannot be served concurrently with weeks of disqualification to which a claimant may be subject either for failure to apply for or accept suitable work, or during labor dispute, or separation for family reasons. OAG Feb. 19, 1946 (855-C-1).

Power of national labor relations board to order employment of applicants denied work because of labor affiliations. 26 MLR 277.

Significance of variations in state laws, see schedule. 28 MLR 390.

268.09 DISQUALIFIED FROM BENEFITS.

Subd. 3, amended by L. 1947 c. 432 s. 7.

Regulations 15 and 16 of the division of employment and security do not authorize the division or its director to invoke a conclusive presumption or estoppel against an employee who has not given notice of separation of an employee from his employment, so as to prevent such employer from establishing the actual facts as to such separation in proceedings to determine his rate of contribution to the unemployment compensation fund. Juster v Christgau, 214 M 109, 7 NW(2d) 502.

In an action for unemployment compensation benefits, where the defense asserted that claimant has disqualified himself under the provisions of section 268.09 by a refusal to accept available suitable work, the finding of the director of state division of employment and security, that the employment offered was not suitable and that claimant was justified in not accepting it, is sustained. Claimant's occupation was that of a steam-cleaner in a dry cleaning department, while the work offered to him was employment in the garage together with some driving of trucks, and there was reason to believe that claimant could in the near future obtain employment at his regular occupation. Bowman v Troy Launderers, 215 M 226, 9 NW(2d) 506.

Where claimant was suspended and three weeks later was offered an opportunity to return to work, which he refused, he is held to have discontinued voluntarily and without good cause. Richard v Federal Cartridge, 217 M 37, 14 NW(2d) 118.

Where an employee is impelled to terminate his employment because of sickness or disease brought about by conditions arising directly out of such employment, such termination is an involuntary act within the meaning of section 268.09 and does not result in cancelation of the employee's credits or his disqualification for benefits under the employment and security act. Fannon v Federal Cartridge Corp. 219 M 306. 18 NW(2d) 249.

Conflict between the running of the waiting period and weeks of ineligibility. 1944 OAG 149, June 16, 1943 (885-C-2).

Under this section where it says an individual is not to be disqualified where he separated from his employment "to accept employment offering substantially better conditions of work or substantially higher wages" it meant employment in the sense of a "job" or "position" as these terms are commonly understood, and such job or position would not be limited to that of a so-called "covered employer" under the act. 1944 OAG 150, June 18, 1943 (885-C-2).

Effect of the 1943 amendment of the disqualification provision (see also 1945, c. 376 s. 6). 1944 OAG 148, Sept. 17, 1943 (885-C-2).

A separation from employment resulting from a force over which an employee has no control and which is not attributable to the employer does not constitute a voluntary quit resulting in cancelation of wage credits. 1944 OAG 151, Oct. 12, 1943 (885-D-2).

Charges made to employer's account and which have become final cannot be cleared by giving retroactive effect to a subsequent amendment. 1944 OAG 153, Oct. 14, 1943 (885-D-2).

The attorney general interprets the law and renders an opinion thereon. The administrator applies such advice to the discoverable facts and proceeds accordingly. OAG Jan. 21, 1944 (885-G-2).

Good cause for failure of military trainee on separation to apply for former employment. 1944 OAG 144, April 11, 1944 (885-C-1).

A two weeks waiting period cannot be served concurrently with the weeks of disqualification where the employee fails to apply for or accept suitable work or during the progress of a labor dispute or to assume certain family obligations. OAG Feb. 19, 1946 (885-C-1).

One out of employment because of labor dispute who obtains new employment after resignation may be entitled to wage credit benefits earned with the employer against whom the strike was declared. OAG Feb. 21, 1946 (885-C-2).

The marital rule provides for cancelation of all an employee's wage credits and renders them ineffective as a basis for unemployment benefits in case the employee is dismissed from her employment by reason of her employer's adoption of such rule, and such employer has posted a notice continuously for not less than six months subsequent to June 30, 1947. OAG Aug. 4, 1947 (885-C-2).

Unemployment due to a labor or trade dispute. 25 MLR 956.

268.10 CLAIMS FOR BENEFITS.

Subd. 4, amended by L. 1947 c. 600 s. 1.

It is plain that the unemployment compensation act does not impose any duty or obligation upon the employer in favor of the employee. It is only against the special fund, created by legislation, that employee may assert his claim. The employer's only duty is to pay the proper amount into the fund. Stevens v Division of Employment, 207 M 431, 291 NW 890.

Courts of law may review administrative action of an executive or administrative officer or tribunal to determine whether such action is within the law, constitutional or statutory. The prospect that observance of constitutional limitations will work serious inconvenience in the administration of a legislative act does not justify the denial of due process of law in making administrative decisions. The director of the division of employment and security cannot fix an employer's rate of contribution to the unemployment fund without at some stage of the proceedings granting the employer notice and an opportunity to be heard on the merits. Juster v Christgau, 214 M 108, 7 NW(2d) 501.

Where there is any evidence reasonably tending to sustain the findings of the director they will not be disturbed on review. In reviewing an order or determinaiton of an administrative board, the supreme court will go no further than to determine whether the evidence was such that the board might reasonably make the order or determination which it made. Chellson v State Division, 214 M 336, 8 NW(2d) 45; Ley v Doherty, 215 M 104, 9 NW(2d) 327.

The work offered to the employee was not suitable, and claimant was justified in not accepting it and is not disqualified from receiving benefits. Bowman v Troy Launderers, 215 M 226, 9 NW(2d) 506.

Where substantially the same provisions are involved in both the federal and state employment and security acts, the interpretation adopted by the United States Supreme Court will be followed. The war risk contributions act, enacted under the police power to relieve the unemployment hazards resulting from a war time economy, is to be liberally construed. The retroactive application of the war risk contributions act to a period antedating the enactment of the statute, all within the same calendar year, is to a transaction period sufficiently recent not to be violative of due process of law under the federal and state constitutions. State v Industrial Tool Works, 220 M 592, 21 NW(2d) 31.

Practice under this section, Fannon v Federal Cartridge, 219 M 308, 18 NW(2d) 249.

Limited availability for shift employment; a criterion of eligibility for unemployment compensation. 28 MLR 387.

268.11 EMPLOYERS COVERAGE.

Subd. 3, amended by L. 1947 c. 600 s. 2.

268.12 ADMINISTRATION.

Subd. 3, amended by L. 1947 c. 600 s. 3.

Subd. 5, amended by L. 1947 c. 600 s. 4.

Subd. 6, amended by L. 1947 c. 600 s. 5.

Subd. 14 (New), HISTORY. 1947 c. 600 s. 6.

The procedural portion of a remedial statute, particularly one directing adoption by an administrative board of rules for its operation, cannot, in the absence of expression of legislative intention to that effect, control the substantive portions of the same statute, prescribing the rights and obligations thereby created. Statutory directions, not relating to the essence of the thing to be done, are directory only as distinguished from substantive provisions relating to the essence, which are mandatory. Bielke v American Crystal Sugar Co. 206 M 308, 288 NW 584.

Regulations 15 and 16 do not authorize the division or its director to invoke a conclusive presumption or estoppel against an employer who has not given notice of separation of an employee from his employment, so as to prevent such employer from establishing the actual facts as to such separation in proceedings to determine his rate of contribution to the unemployment compensation fund. (See, dissenting opinions) Juster v Christgau, 214 M 124, 7 NW(2d) 501.

The director may in his discretion determine the degree of generality or specificness of the notice so long as it is not so specific as to conflict with section 268.12. A notice to an employer which disclosed the wage credits earned from each other employer in a base period would conflict with section 268.12. 1942 OAG 89, May 26, 1941 (885).

The division of employment and security is compelled to disclose to the claimant prior to a hearing before an appeal tribunal the facts upon which a disqualification is being considered. 1942 OAG 91, Oct. 9, 1942 (885-C-2).

Members of the legislature may serve on the advisory council. 1944 OAG 280, June 16, 1943 (280-H).

268.13 RECIPROCAL BENEFIT ARRANGEMENTS.

Subd. 1, amended by L. 1947 c. 432 s. 8.

Subd. 2, amended by L. 1947 c. 432 s. 9.

Subd. 3, amended by L. 1947 c. 432 s. 10.

Under this section, under agreement with other state agencies, credits in Minnesota may be added to credits from another state, so that the applicant may be eligible for compensation. OAG May 31, 1945 (885-b).

Sections 268.05, 268.13, 16.16, and 16.17 support the action of the director of the division of employment and security in entering into an interstate arrangement relating to reciprocal wage credits. OAG Nov. 29, 1946 (885-B).

268.16 COLLECTION OF CONTRIBUTIONS.

Section 268.16 authorizes the director to limit the interest in certain cases, but not the contribution. 1944 OAG 146, Sept. 17, 1943 (885-D-1).

Refund of mistakenly paid contributions in excess of benefits actually paid employees. 1944 OAG 147, Oct. 12, 1944 (885-D-1).

Notwithstanding the provisions of subd. 5 of this section, any employee's contribution based on first assigned rate in excess of the amount redetermined by L. 1945 c. 376, should be refunded. OAG Dec. 31, 1945 (885-D-2).

268.22 SAVING CLAUSE.

In fixing an employer's current rate of contributions under the war risk contributions act, it is not a denial of due process of law to refer to antecedent facts such as the payroll of a predecessor employing unit during a preceding year in determining the amount of the employer's credits. No vested right may be acquired as against amendatory legislation. The act is liberally construed. State v Industrial Tool Co. 220 M 593, 21 NW(2d) 31.