Ireland

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IMPLICATIONS FOR THE GIG ECONOMY IN IRELAND? ANALYSIS OF THE KARSHAN LIMITED V THE REVENUE COMMISSIONERS RULING

The implications for employment law of the rise in numbers of people working in the Gig Economy have received significant attention in many countries in recent years[1]. The changing nature of employment in a digital era has given rise to uncertainty regarding some of the core features of the traditional employment relationship. Thus, the employment status of those working in what is considered non-standard employment such as casual workers or those in the gig economy, has been tested through the courts on numerous occasions, with varying outcomes. Central to such cases is determining whether or not an employment relationship exists, notably whether individuals should be considered employees under a *contract of service* or independent contractors under a *contract for service* (or some intermediary category such as « worker status » as in the UK for example)[2]. Determining employment status is often the first step in cases, as the application of employment law, employee rights and other matters such as income tax and social insurance, is dependent on this status. For example, if it is found that an individual is an independent contractor rather than an employee, then claims for entitlements under employment law such as annual leave, national minimum wage and so on do not apply[3]. In late 2023 the Supreme Court in Ireland delivered a judgement in the long running case of Karshan Ltd. t/a Domino's Pizza v the Revenue Commissioners[4], which centred on the issue of employment status. Albeit the case centred on tax categorisation rather than employment law *per se*, the ruling is set to have critically important implications for the Irish employment law landscape into the future.

1 M. Doherty and V. Franca, « Solving the "Gig-saw"? Collective Rights and Platform Work », *Industrial Law Journal*, vol. 49, no. 3, 2020, p. 352 (https://doi.org/10.1093/indlaw/dwz026) ; A. Stewart et J. Stanford, « Regulating work in the gig economy: What are the options? », *The Economic and Labour Relations Review*, vol. 28, no. 3, 2017, p. 420 (https://doi.org/10.1177/1035304617722461).

2 J. Carby Hall, « The Uber Case », *Revue de Droit Comparé du Travail et de la Sécurité Sociale*, no. 4, 2021, p. 254.

3 *Ibid*.

4 [2023] IESC 24.

I - KARSHAN LTD. T/A DOMINO'S PIZZA V THE REVENUE COMMISSIONERS

The crux of the case concerned establishing the employment status of pizza delivery drivers working for Karshan (Domino's Pizza) to determine the taxation of the drivers' income under the Taxes Consolidation Act, 1997. While Karshan argued that the drivers were independent contractors and taxable under Schedule D of that Act, the Revenue Commissioners argued that these were employees and thus taxable under Schedule E of that Act for income tax (PAYE) and national social insurance (PRSI) purposes[5].

In the long-running case, the Revenue Commissioners first determined in 2014 that Karshan owed €215,718 in tax for the years 2010-2011 for the drivers, determining that they were employees, not contractors. This was despite an overarching written agreement which Karshan required drivers to sign confirming that they understood all delivery work undertaken was « strictly as an independent contractor » and a requirement to acknowledge that Karshan had « no responsibility or liability whatsoever for deducting and/or paying PRSI or tax on any monies [they] may receive under this agreement ». However, as demonstrated in the Autoclenz[6] case in the UK Supreme Court, the written agreement is only a part to consider and the « true agreement will often have to be gleaned from all the circumstances of the case ». Other factors may be taken into consideration such as the reality of the relationship and the differences in bargaining power between the parties to an employment contract.

The Tax Appeals Commission decided that the drivers were employees of Karshan, and on appeal, the High Court agreed. However, the High Courts' decision was subsequently overturned by a majority in the Court of Appeal[7] which determined that the (Revenue) « Commissioner erred in determining that the drivers were employees of Karshan » because there was no mutuality of obligation. The case was subsequently appealed to the Supreme Court.

II- THE SUPREME COURT JUDGEMENT

On October 20th, 2023, Mr. Justice Brian Murray published the long-awaited decision on behalf of the seven-judge sitting of the court. The 191-page judgement provided an in-depth analysis of previous jurisprudence and legislative history dating back to UK laws such as the Master and Servant Acts and Employers and Workmen Acts. It explored in detail the development of tests for determining employment status and provided important clarity on this in its' conclusions. Employment status is central to much labour legislation enacted since the middle of the twentieth century, yet as noted by J. Murray, legislation rarely identifies how one contractual formation (employee) should be distinguished from the other (independent contractor). Thus, a number of « tests » have been developed by the courts focusing on the extent

5 Pay As You Earn, income tax in Ireland and Pay Related Social Insurance. See Revenue Commissioners 27th October, 2023: Update following judgment delivered in The Revenue Commissioners v. Karshan (Midlands) Ltd. t/a Domino's Pizza.

6 *Autoclenz Ltd v Belcher & Ors* [2011] UKSC 41.

7 One judge of that court, Whelan, J. dissented.

to which an employer has *control* over the worker, the extent to which the worker is engaged in their own *enterprise*; the extent to which the work (or worker) is *integrated* into the employer's business or a combination of such tests.

The application of such tests to cases where work is performed on an occasional, casual, intermittent, or ad hoc basis, has been examined on numerous occasions in both the Irish and UK courts. Given the increasing use of precarious working arrangements such as zero hours contracts and work in the Gig Economy, the issue of employment status is often contested (see for example *Ticketline trading as Ticketmaster v Sarah Mullen*[8]*; Stack v Ajar-Tec Ltd.*[9]*; O'Kelly and Others v Trusthouse Forte plc*)[10]. However as noted by J. Murray, such forms of labour are « far from being new ». In the 1980s, in the UK, the concept of « mutuality of obligation » - the obligation for an employer to provide work and a worker to perform work - took central importance in several cases. This occurred to the point where the requirement for « mutuality » was interpreted as imposing a *sine qua non* of the employment relationship an ongoing obligation of some kind.

For example, in the case of *Minister for Agriculture and Food vs Barry and Ors*[11], in 2008, the concept of mutuality was to the fore, with Edwards, J. noting 'If such mutuality is not present, then either there is no contract at all or whatever contract there is, must be a contract for services or something else, but not a contract of service ». In *Carmichael and Leese v National Power plc.*[12] it was referred to as « that irreducible minimum of mutual obligation necessary to create a contract of service ». In other words, if mutuality of obligation is not established in the first instance, then there is no need to go any further as whatever relationship exists it cannot be one for a contract of service. It is this concept that Karshan primarily relied upon to argue that the delivery drivers were independent contractors rather than employees. Karshan defined its version of « mutuality of obligation » as: « an ongoing reciprocal commitment extending into the future to provide and perform work on the part of the employer and employee respectively »[13]. In doing so, commentators noted that Karshan relied on « mutuality of obligation in the Barry sense to describe not merely an obligation at the point at which work is done, that the worker do that work and that the employer pay them for it, but the obligation to offer and do work that extended into the future »[14].

However, in the Karshan case, J. Murray noted that the concept of mutuality of obligation was a « wholly ambiguous label » that was « overused and under analysed » in employment law. He noted for example that in the case of *Henry Denny and Sons (Ireland) v Minister for Social Welfare*[15] that the judge (Keane J.) made no reference in the course of his judgment to mutuality of obligation, nor to any

8 Labour Court, DWT1434 10th April 2014.

9 [2008] IEHC 216.

10 [1984] QB 90 (CA).

11 [2008] IEHC 216.

12 [1999] ICR 1226 (HL).

13 Transcript of Karshan Ltd. t/a Domino's Pizza v the Revenue Commissioners [2023] IESC 24.

14 A. Prendergast, « Supreme Court dismantles "mutuality of obligation" in Domino's Pizza ruling », *Industrial Relations News*, IRN 38, 26 October 2023.

15 [1997] IESC 9.

requirement that the employer or employees be under any continuing obligation to offer or accept work. In that case the individual (working as a demonstrator in supermarkets for the appellant's products) was determined to be employed under a (yearly renewable) contract of service based on several factors of the reality of the working relationship. Again, in this case, the contract stated she was an independent contractor.

J. Murray described Karshan's interpretation of mutuality as the « fundamental error in Karshan's legal analysis ». Indeed, in an interesting summary of previous cases dealing with the issue of employment status he noted:

> « The parade of carters, dockers, cattle drovers, delivery drivers, railroad unloaders, market researchers, supermarket demonstrators and homeworkers who have marched through the earlier cases show the common law grappling with the application of the principles applied to differentiate a contract of service from a contract for services to what is now called the *gig economy* long before that phrase was invented, but - until the 1980s - without any reference to *mutuality of obligation* in the sense in which Karshan uses that term »[16].

In a critical development for assessing the employment status of individuals, J. Murray suggested that use of the phrase mutuality of obligation be discontinued. The question of whether a contract is one « of service » or « for service » should be resolved, « having regard to the well-established case law » by reference to the following five questions:

1. Does the contract involve the exchange of wage or other remuneration for work?
2. If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?
3. If so, does the employer exercise sufficient control over the putative employee to render the agreement one that is capable of being an employment agreement?
4. If these three requirements are met the decision maker must then determine whether the terms of the contract between employer and worker interpreted in the light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, are consistent with a contract of employment, or with some other form of contract having regard, in particular, to whether the arrangements point to the putative employee working for themselves or for the putative employer.
5. Finally, it should be determined whether there is anything in the particular legislative regime under consideration that requires the court to adjust or supplement any of the foregoing.

16 Transcript of Karshan Ltd. t/a Domino's Pizza v the Revenue Commissioners [2023] IESC 24.

In his conclusion, it was noted that several issues were raised in relation to differentiating between a *contract of* and a *contract for* services. The most important issue that arose before the court:

> « Was the question of whether it is (as Karshan contended) a *sine qua non* of such a relationship that there be an ongoing reciprocal commitment extending into the future to provide and perform work on the part of the employer and worker respectively. The question of whether there is such an ongoing commitment will be relevant to whether a given worker is an employee and may be of particular importance in deciding if there is continuous employment for the purposes of certain statutory regimes, but as I explain in the course of this judgment, this is not a *sine qua non* of an employment relationship »[17].

Thus, the Supreme Court ruled that the drivers were employees of Karshan (Domino's) and not contractors:

> « The evidence disclosed close control by Karshan over the drivers when at work, and while there were some features of their activities that were consistent with their being independent contractors engaged in business on their own account, the Commissioner was entitled to conclude that the preponderance of the evidence pointed to the drivers carrying on Karshan's business rather than their own »[18].

Conclusion

The Karshan case has been a significant ruling in determining employment status of individuals, particularly those engaged in work without any guarantee of hours such as in the Gig Economy. What was critically important about the case is that it determined that any mutuality of obligation does not have to be ongoing, thus potentially resolving a legal barrier for workers engaged in on demand work. However, there are limitations to the ruling and its' potential application to employment law. The legislation on which the case was brought (Taxes Consolidation Act, 1997) does not involve any requirement of continuity or employment for a specific period of time, whereas much employment legislation does. The case noted that « the question of whether the drivers have continuous service for the purposes of other legislation, and in particular employment rights legislation, cannot be decided here ».

Nonetheless, commentators have described the judgement as « arguably one of the most significant employment law rulings in Ireland this century »[19] noting that it « is destined to become a frequently cited ruling and will have to be relied upon by decision makers in contested cases henceforth, unless superseded by EU law ». The EU Directive on Platform Work will no doubt be of relevance in future such cases. In

17 *Ibid.*

18 *Ibid.*

19 A. Prendergast, « Supreme Court dismantles "mutuality of obligation" in Domino's Pizza ruling », *op. cit.*

commenting on this case, the Irish Revenue Commissioners recommended that all businesses and their agents familiarise themselves with the details of the judgement, given that businesses are responsible for ensuring that the correct taxes are deducted from their employee's pay[20]. While the case involved the categorisation of workers' employment status for tax purposes rather than an application of employment rights *per se*, commentators have noted that it is already having a major impact in the area of employment relations and is prompting some companies to reassess how they designate worker status.

20 Revenue Commissioners, 27th October, 2023: Update following judgment delivered in The Revenue Commissioners v. Karshan (Midlands) Ltd. t/a Domino's Pizza