THE HIGH COURT

[2014 No. 191SP]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 327 OF THE SOCIAL WELFARE CONSOLIDATION ACT 2005

BETWEEN

THE NATIONAL MUSEUM OF IRELAND

Applicant

AND

THE MINISTER FOR SOCIAL PROTECTION

Respondent

AND

LORNA BARNES

Notice Party

Judgment of Ms. Justice Murphy delivered the 7th day of March, 2016.

1. The applicant in these proceedings, the National Museum of Ireland, challenges a determination by a social welfare appeals officer made sometime prior to 28th April, 2014 being the date when the decision was notified to the applicant. The determination, made pursuant to s. 327 of the Social Welfare Consolidation Act 2005, is that the notice party Ms. Lorna Barnes was in insurable employment with the applicant under the Social Welfare Acts at Class A from 1st January, 2004 to 31st July, 2011. The applicant challenges the determination on three grounds. The first ground is that the employment status of the notice party had earlier been determined by a decision of the Rights Commissioner Service on 28th September, 2012 and that the respondent is bound by such a decision. Alternatively, the applicant challenges the determination on the basis that the social welfare appeals officer (and/or deciding officer) erred in law and in a mixed question of law and fact in reaching its determination. Thirdly, they seek a declaration that the proceedings before the social welfare appeals officer were conducted other than in accordance with the requirements of fair procedures in that material which was not adverted to or dealt with in the course of the hearing formed a material ground of the determination and thus offended the principle of *audi alterem partem*.

Background

2. The notice party in this case is a specialist glass, ceramic, enamel and stone conservator. This is a niche field in which she has provided services of between 2 and 2.5 days per week to the applicant since 2004. The notice party commenced work with the applicant in 2000 when she was employed as a temporary technical assistant with a rate of pay of £261.35 per week. She left this position in April 2001. From April 2002 the notice party carried out eight days of work per month for the applicant pursuant to an informal arrangement.

3. From 1st January, 2004 to June 2011 the notice party was employed pursuant to various contracts for services which were expressed to be "*a contract for service and not a contract for employment*". The rate of pay for these contracts was considerably higher than that which she had earned as an employee and increased over the years from €170 to €220 per day. The notice party had a number of such contracts between 2004 and 2011. On three occasions in 2004 and 2005 the notice party's trade union was notified of, and approved, the respective contracts between the applicant and the notice party. Pursuant to the contracts, the notice party invoiced the applicant monthly for her work; was taxed on a self-employed basis and was required to submit a tax clearance certificate. She was also required to have public liability insurance as a condition of her contract. She was not required to record her hours and was not subject to the applicant's flexi-time policy or Personal Management Development Initiative as employees were. She was permitted to send a substitute provider subject to the approval of the applicant and was not required to submit sick certificates when absent. During the currency of these contracts, the notice party was a member of the conservation panels of the Heritage Council, the Hunt Museum and the Office of Public Works and she held herself out as being available to carry out other conservation works on a consultancy basis. She was also a member of the Institute of Conservator Restorers in Ireland and was listed on their membership page as being "*in private practice*" and "*available for consultation*".

4. In 2011, the applicant embarked on an overhaul of its procurement procedures across a range of service areas, including conservation services. It implemented a Single Operator Framework Agreement in respect of those services. Tenders were invited on the etenders.gov.ie website and, in certain cases, in the Official Journal of the European Union. The notice party states in her affidavit that she was advised in April 2011 that if she did not tender for her position she would not be allowed to continue working with the applicant and as a result, was obliged to enter the tender process. Mr. Anthony Read, Head of Conservation at the National Museum, in his affidavit, notes that the notice party does not specify who advised her and states that he did not do so. He acknowledges however that it was implicitly clear that it was necessary for her to tender and participate in the Single Operator Framework Agreement process in order for her to be awarded a contract as a conservator. In a tender submitted on 26th May, 2011, the notice party tendered for conservation services in respect of ceramics, glass, stone and plaster. At paragraph 2.2.1 of that document the notice party described herself as a "*part-time, sole trader*" and stated, at Appendix F, under the heading "Professional Experience":

> *"I am currently a freelance inorganic objects conservator working in Dublin. I am a consultant contract conservator working for the National Museum of Ireland two and a half days a week."*

From August 2011 to July 2013 the notice party carried out work for the applicant on the basis of a contract awarded pursuant to this tender process.

5. On 16th February, 2012, in the course of the contract, the notice party along with some of her colleagues in the National Museum

and with the assistance of the trade union IMPACT, brought a claim under the Organisation of Working Time Act 1997, that they were individuals to whom s. 19 and s. 21 of the 1997 Act applied and that, as such, they were entitled to payments from the National Museum for annual leave and public holidays. Their claim in this respect related to the annual leave year in currency at that time i.e. 1st April, 2011 to 31st March, 2012. However in order to invoke the provisions of the 1997 Act, the notice party and her colleagues had to satisfy the Rights Commissioner that they were employees of the National Museum to whom the relevant provisions of that Act applied. A preliminary issue in relation to the employment status of the claimants arose. The notice party's claim was that, notwithstanding her continuous engagement by the applicant since 1st January, 2004 pursuant to contracts for services, she had in fact functioned as an employee and that, from 2006, the HR Manager had insisted that her hourly rate correspond to the Assistant Keeper 2 (curatorial) payscale.

6. The claims of the notice party and her colleagues on the issue of status were heard by a Rights Commissioner of the Labour Relations Commission on 11th April, 2012. In summary, they submitted that there was a mutuality of obligation within the meaning of the decision in *Minister for Agriculture v. Barry* [2008] 19 ELR 245, and that applying the 'mixed test' set out in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 IR 34 their contractual relationships had all the hallmarks of a contract of service as opposed to a contract for services. They also relied on the Department of Social Protection's Code of Practice for determining Employment or Self-Employment Status for Individuals and submitted that they complied with each of the criteria for employees contained in that Code. The notice party's specific points in relation to that checklist were that she was directed in her work by the Head of Conservation; that she only supplied labour and not materials; that she received a fixed daily payment; that she could not subcontract her work; that she did not supply materials or equipment for her work; that she was not exposed to any financial risks; that she played no role in the investment or management of the museum; that she did not have the opportunity to profit; that she worked a set amount each week; that she travelled for the museum as a courier and on training courses and was reimbursed by the museum for any expenses incurred; that she had an informal time in lieu arrangement and was not paid overtime; that she had a staff pass, various museum keys, a museum email account and a telephone extension; that she worked on site; that she attended all Departmental meetings; that she was listed as a member of staff of the Conservation Department on the museum website; that she participated in departmental tours for the public and that she was treated as a member of staff by her colleagues.

7. The claims of the notice party and her colleagues were heard by a Rights Commissioner of the Labour Relations Commission on 11th April, 2012. The Rights Commissioner requested further submissions which were delivered on 26th July, 2012. On 28th September, 2012 the Rights Commissioner delivered his decision on the notice party's claims for holiday pay pursuant to the Organisation of Working Time Act 1997. Having outlined the relevant tests as set down by the case law in this area, and having noted that there were certain factual matters in dispute between the parties, the Rights Commissioner was satisfied that the mutuality of obligation test, the control test, the integration test and the taxation and VAT positions of the claimants did not provide conclusive indications that the relationship between the claimants and the National Museum was one of employer-employee. The Commissioner went on to consider the "*in business on one's own account test"* as set out in the Code of Practice for Determining Employment or Self-Employment Status of Individuals which stated:

> *"The overriding consideration or test will always be whether the person performing the work does so 'as a person in business on their own account'. Is the person a free agent with an economic independence of the person engaging the service? The economic test is paramount".*

8. The Commissioner then held:

> *"I find that the Castleisland Cattle and Smith v Media Lab cases are persuasive for the Museum's position that the express terms of the agreement between the parties may not be lightly discarded and that the informed decision of educated people – such as the Claimants in this case – should be enforced unless there are 'very weightly countervailing reasons to do so (sic)'.*
>
> *I note that the claimants applied for positions on the clear understanding that the contracts were for service. I note that the contract stated 'a contract for service not a contract of employment'. It also stated 'no provision for holidays or sick pay under the terms of this contract'.*
>
> *I also note that IMPACT Trade Union agreed to contracts for service and confirmed this acceptance in writing dated 10th May 2006. It stated 'Following our meeting of 28th July 2006 the National Museum's IMPACT branch committee has decided to approve the above Contract for Service'*
>
> *I note that it is IMPACT's position that in time the contracts became in effect contracts of service.*
>
> *However I further note that the claimants re-committed themselves to extending these contracts 'as a sole trader'. IMPACT's position is that they had to do so in order to retain work ".*

He continued:

> *"Under the circumstances I find that the claimants were highly educated persons who had the benefit of advice and they accepted contracts for service and operated them over a number of years. They subsequently committed themselves to renew these contracts for service and complied with a number of tender requirements in order to retain those positions.*
>
> *I find that they cannot on the one hand accept contracts for service and at the same time claim the opposite."*

On that basis he considered that the notice party, along with the other claimants, was not an employee and that he therefore did not have jurisdiction to hear her claim.

9. Ms. Anne Grady, Head of Administration with the applicant, asserts that this determination covered the period from 2004 onwards.

10. On 19th October, 2012, the notice party appealed the decision of the Rights Commissioner to the Labour Relations Commission as provided for under the 1997 Act. She subsequently withdrew that appeal.

11. In December 2012 the notice party applied to the SCOPE Section of the Department of Social Protection ("DSP") for a determination of her employment status, namely, whether she was in insurable employment with the applicant pursuant to the Social Welfare Consolidation Act 2005. This application came before a Deciding Officer of the SCOPE Section pursuant to s. 300 of the Social Welfare Consolidation Act 2005. That section provides as follows:

"(1) Subject to this Act, every question to which this section applies shall, save where the context otherwise requires, be decided by a deciding officer.

(2) Subject to subsection (3), this section applies to every question arising under—

(a) Part 2 (social insurance) being a question—

[…]

(iv) as to whether an employment is or was insurable employment or insurable (occupational injuries) employment,

(v) as to whether a person is or was employed in an insurable employment or insurable (occupational injuries) employment,

(vi) as to the rate of employment contribution which is or was payable by an employer in respect of an employed contributor,

(vii) as to who is or was the employer of an employed contributor."

12. On 14th February, 2013, the notice party brought a third claim in respect of her employment status. On this occasion she brought a complaint under the Protection of Employees (Fixed Term Work) Act 2003 on the grounds that her employer "*failed to offer a written statement setting out the objective grounds justifying the renewal of a fixed term contract and a failure to offer a contract of indefinite duration*". At this stage, the notice party had three separate applications in being relating to her employment status.

13. On 11th March, 2013, Ms. Anne Grady, Head of Administration of the National Museum, wrote to an employee of the Department of Social Protection to request that a formal statutory decision as to whether the notice party was in insurable employment be postponed on the basis that the notice party's appeal in relation to the determination of the Rights Commissioner to the effect that she was not an employee was pending. The respondent's employee refused this request on the basis that "*there are a number of separate Government areas that have roles with regard to the determination of employment status of an individual depending on the context "*. The letter further noted:

"Also, as you will know, it often comes down to a matter of opinion, weighting and balancing and that consensus as to employment status may not be possible in every case that it is possible to be employed (contract of service) and self-employed (contract for service) at the same time, and in different situations. Very briefly, as you will know, some of the considerations are mutuality of obligation; whether a person performing the work does so as a person in business on their own account (e.g. opportunities to profit, can subcontract to other people; provides own place of business and materials; has control over what, how, where and when the work is done; bears the cost of sub-standard work; is not integrated within the organisation etc. etc.).

The case has been discussed here and you will know that this is a very grey area with uncertain outcomes. The conclusion here, is that consensus with and acceptance of the Rights Commissioners determination is not possible, much of the findings are not conclusive. I also note that an Appeal is with the Labour Court against the Rights Commissioner's decision."

14. On 21st March, 2013, Ms. Grady wrote to the Rights Commissioner Service requesting that the notice party's claim under the Protection of Employees (Fixed Term Work) Act 2003 be adjourned pending the outcome of the notice party's appeal to the Labour Court in relation to her claim under the Organisation of Working Time Act 1997.

15. It appears that following an initial investigation of the notice party's claim pursuant to the Social Welfare Consolidation Act 2005, the DSP originally took the view that as there was a pending matter before the Labour Court it could not issue a decision. The notice party avers that she was advised by the respondent that while there was an appeal still in being they could not investigate the matter. Counsel for the respondent at the hearing subsequently adopted the position that the DSP could in fact have heard the application at that time.

16. In any event, on 7th May, 2013, the notice party wrote to her union representative to instruct him to withdraw her appeal before the Labour Court under the Organisation of Working Time Act 1997, scheduled for 22nd May, on the basis that she now intended to pursue the matter with the Scope Section of the Department of Social Protection. The notice party states that she applied to the DSP for a determination of her employment status so that she could access social welfare payments. The notice party cares for her son, who has special needs and is apparently unable to obtain assistance until the issues the subject matter of these proceedings have been determined.

17. On 21st May, 2013 the Deciding Officer in the Scope Section of the DSP determined, pursuant to s. 300 of the Social Welfare Consolidation Act, 2005 that the notice party was employed as a member of staff with the applicant and therefore was insurable under the Social Welfare Acts for all benefits and pensions at PRSI Class A for the period from 1st January, 2004 to 31st July, 2013. He set out the reasons for his decision as follows:

"She is subject to control, direction and dismissal. She works fixed hours for a monthly salary, payable on submission of invoice. The salary was set by her Head of Department. She worked office hours, 9.30 – 5.30, two days a week. The work is carried out at the facilities of the National Museum of Ireland and the museum decides where the work is carried out. She is treated as an ordinary employee as to how and when work is done and as to what work is done although her expertise would determine how and when the work is done. She does not receive holiday pay, sick pay or overtime but does have expenses refunded. She supplies labour only. She has to provide personal service. She is not free to take up similar work at the same time with another body. She reports to her head of department and contributes to monthly meetings to outline the progress of her work. She is directly answerable to the Head of Collections."

18. On 23rd May, 2013, the applicant wrote to the Rights Commissioner Service in relation to the notice party's complaint under the Protection of Employees (Fixed Term Work) Act 2003. The applicant attached a copy of the decision of the Rights Commissioner relating to the claim under the Organisation of Working Time Act 1997 delivered on 28th September, 2012. The applicant requested that the notice party's claim under the 2003 Act be discontinued on the basis of the decision of the Rights Commissioner that there

was no employer-employee relationship in existence and that therefore he did not enjoy jurisdiction to hear the claim. On 23rd May, 2013, the Rights Commissioner Service responded that this was not possible since:

> *"The Rights Commissioner Service provides an administration service for the Rights Commissioner and is not empowered to decide whether or not a complaint is valid. This is done at a Rights Commissioner hearing at which the Rights Commissioner will decide jurisdiction and the merits of the complaint based on all of the information provided by the parties, orally and in writing".*

Submissions were made in relation to this complaint but the notice party avers that it has been adjourned generally pending the determination of the within proceedings.

19. On or about the 5th June, 2013, the applicant appealed the decision of the Deciding Officer of the SCOPE Section of the DSP pursuant to s. 311 of the Social Welfare Consolidation Act 2005. The relevant portion of that section provides as follows:

> *"(1) Where any person is dissatisfied with the decision given by a deciding officer or the determination of a designated person in relation to a claim under section 196, 197 or 198, the question shall, on notice of appeal being given to the Chief Appeals Officer within the prescribed time, be referred to an appeals officer.*
>
> *(2) Regulations may provide for the procedure to be followed on appeals and references under this Part.*
>
> *(3) An appeals officer, when deciding a question referred under subsection (1), shall not be confined to the grounds on which the decision of the deciding officer or the determination of the designated person, as the case requires, was based, but may decide the question as if it were being decided for the first time".*

20. An oral hearing before an Appeals Officer was convened on 21st October, 2013. The applicant raised the matter of issue estoppel at this hearing, submitting that as the Rights Commissioner had made a binding finding of fact regarding the notice party's employment status, the notice party was estopped from raising the same issue in the Social Welfare Appeals Forum. The applicant stated that it had not raised this matter previously as the oral hearing was in effect the first opportunity it had had to address the issue.

21. In a preliminary decision of 17th December, 2013 the Appeals Officer concluded that issue estoppel did not arise "*as the Scope Section decision applies to many years and is based on a finding on the employer/employee relationship over the course of the employment*." He considered that the terms of s. 300 of the 2005 Act created an obligation to decide the case and noted that only a deciding officer or appeals officer can decide the issue of insurability. The Appeals Officer considered that there was no satisfactory explanation as to why the appellant did not raise this issue before engaging in the investigation of the notice party's employment status with the Department of Social Protection's SCOPE Section and noted that the fact of the decision of the Rights Commissioner was raised before the Deciding Officer and in earlier submissions before the Appeals Officer, yet no claim of estoppel was made until October 2014. Applying the case of *O'Hara v. ACC Bank* [2011] IEHC 367, the Appeals Officer found that it was not an abuse of process for the notice party to withdraw the Labour Court case to enable the respondent's investigation and decision.

22. Having made that preliminary decision, on 14th January, 2014 the hearing before the Appeals Officer resumed. On 28th April, 2014 the Appeals Officer delivered his finding on the applicant's appeal against the decision of the Deciding Officer and determined that the notice party was employed under a contract of service and was insurable under the Social Welfare Act at Class A. The applicant's appeal was partially upheld insofar as the Appeals Officer reversed the determination of the Deciding Officer in holding that from 1st August, 2011 the notice party worked in a self-employed capacity. However, in respect of the period from 1st January, 2004 to 31st July, 2011 the appeals officer held that the notice party was engaged under a contract of service.

23. In his decision, the Appeals Officer referred to the case of *Castleisland Cattle Breeding Society Limited v. The Minister for Social Welfare* [2004] 4 IR 150 as determining that employment status can only be determined by the actual working of the contract in practice and noted that the Supreme Court in that case placed considerable emphasis on the insurance held by the workers in question. He noted, in this regard, that the new arrangements of August 2011 required the notice party to have her own public liability insurance and considered this to mark a significant change in her status. He found that the issue of insurance was not raised until the new framework became operable in 2011. The Appeals Officer further considered that the notice party's contracts from 2004 to 2011 were generic and short on detail. While he noted that the notice party understood her status and raised no objection he further noted that the wording of the contract was not determinative and that the National Museum had been unable to outline what distinguished the notice party from other employees engaged in similar work. He suggested that it was agreed that the notice party's tax earnings and status were neutral as to the issue in question, however the applicant takes issue with this finding.

24. The Appeals Officer noted that there were arguments for and against the proposition that the notice party was an employee of the applicant. He considered there was evidence of mutuality of obligation in that the notice party had "*unusual security*" for a freelancer with ten days work every month between 2004 and 2011. He noted that the notice party's payment was fixed and that she was paid regular amounts and expenses at civil service rates. However he noted that in the new 2011 contract expenses were not to be paid. As regards the issue of control he considered that issues such as security clearance, the PMDS and flexi-time were inconclusive but considered that the notice party worked under the control and reporting requirements of the applicant from 2004 to 2011. He considered the issue of being in business on ones own account to be significant and did not consider this to be established in the case of the notice party. He considered that the notice party was not exposed to entrepreneurial risk and could not see how she could benefit from any efficiency. He also noted that her options for increasing income were "*limited if [not] non-existent*". He further noted that the notice party provided labour only and not premises, materials or additional contractors.

25. The Appeals Officer in his written decision placed emphasis on an email dated 7th April, 2005 in which, according to the Appeals Officer, Anne Grady of the National Museum "*stressed that those contractors such as Ms. Barnes 'were not normal suppliers because, in the main, NMI fees were their sole source of income and were therefore similar to salaries".* This email is referenced twice in the final part of the Appeals Officer's decision in the following passages:

> *"She did, during this time, work under the control and reporting requirements of the National Museum who in a description of Ms. Barnes' status emailed that these workers were not normal suppliers because, in the main, NMI fees were their sole source of income and were therefore similar to salaries.*
>
> *[…]*
>
> *This is quite a change from the previous arrangements in which the worker operated on an ad hoc basis and was indistinguishable from employee colleagues who the National Museum had described were not normal suppliers because,*

in the main, NMI fees were their sole source of income and were therefore similar to salaries".

26. The applicant subsequently requested that the Chief Appeals Officer carry out a review of the decision of the Appeals Officer pursuant to s. 318 of the 2005 Act. The Chief Appeals Officer did not vary the decision of the Appeals Officer. It is from the decision of the Appeals Officer that the applicant now appeals. The full text of the decision of the Appeals Officer is appended to this judgment.

27. The notice party states in her affidavit that her work with the applicant terminated on 31st July, 2013 with no notice or discussion. As already stated, she has lodged a case with the Labour Relations Committee seeking a contract of indefinite duration under the Protection of Employees (Fixed Term Work) Act 2003 but that that case has been adjourned generally until the determination of this matter.

Standard of Review

28. The appeal before this Court arises pursuant to s. 327 of the Social Welfare Consolidation Act, 2005 which states as follows:

> *"Any person who is dissatisfied with –*
>
> *(a) the decision of an appeals officer, or*
>
> *(b) the revised decision of the Chief Appeals Officer,*
>
> *on any question, other than a question to which section 320 applies, may appeal that decision or revised decision as the case may be, to the High Court on any question of law."*

29. In coming to its decision the Court notes that the appeal is one on point of law only. The Court notes in this regard, that the law, insofar as the identification of an employer-employee relationship is concerned, may be characterised as somewhat nebulous. As noted at para 3-20 of Cox, Corbett & Ryan, "*Employment Law*" (Dublin, 2009); "*the question as to what the correct test is to be applied in determining the legal status of a worker remains a vexed and complex one"*. The authors further note at para 3-10:

> *"It would seem that the approach that has now found favour in both Ireland and the United Kingdom is a general, multifaceted one. This approach views the relationship between the parties holistically and may be summarised by the question; was the worker in business on his or her own account? Variations of this have been called the 'mixed test', the 'multiple-factor test' or the economic reality test".*

The authors, at para 3-20, observe that "*from the decisions in Henry Denny and Castleisland Cattle Breeding Society Ltd. it would seem that the overarching question to be answered was whether the worker was in business on his or her own or was working for another*". In the case of *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 IR 34 Keane J. noted as follows at p. 50:

> *"While each case must be determined in light of its particular facts and circumstances, in general a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive. The inference that a person is engaged in business on his or her own account can be more readily drawn where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her."*

30. The case law suggests a number of other factors which are also to be taken into account including mutuality of obligation, as outlined in *Minister for Agriculture v. Barry* [2008] 19 ELR 245; the degree of control exercised by the employer as to how the work is to be performed, as referred to in *Henry Denny and Castleisland* and in the recent High Court decision of *Brightwater Selection v. Minister for Social and Family Affairs*; and the parties' own description of the relationship as considered in *Henry Denny* and in *Re Sunday Tribune Ltd* [1984] 1 IR 505. However, as noted by Keane J. in *Henry Denny: "each case must be considered in light of its own facts"*.

31. The Court notes, in this regard, that findings of fact are *prima facie* a matter for the Deciding Officer and Appeals Officer as provided for by s. 327 of the 2005 Act which provides for an appeal to this Court on a point of law. The Court further notes the extent of its jurisdiction to interfere with the decision of a statutory decision making body as set out by the Supreme Court in the decisions of *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 IR 34 and *National University of Ireland Cork v. Ahern* [2005] IESC 40. In *Henry Denny* Hamilton C.J. held that:

> *"…the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustained finding of fact by a tribunal, such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of judicial review".*

32. In addition, the Court is mindful of the limitations outlined by Gilligan J. in *ESB v. Minister for Social, Community and Family Affairs* [2006] IEHC 59:

> *"I take the view that the approach of this Court to an appeal on a point of law is that findings of primary fact are not to be set aside by this Court unless there is no evidence whatsoever to support them. Inferences of fact should not be disturbed unless they are such that no reasonable tribunal could arrive at the inference drawn and further if the Court is satisfied that the conclusion arrived at adopts a wrong view of the law, then this conclusion should be set aside. I take the view that this Court has to be mindful that its own view of the particular decision arrived at is irrelevant.*
>
> *The Court is not retrying the issue but merely considering the primary findings of fact and as to whether there was a basis for such findings and as to whether it was open to the Appeals Officers, to arrive at the inferences drawn and adopting a reasonable and coherent view, to arrive at her ultimate decision."*

33. In *National University of Ireland Cork v. Ahern* while McCracken J. accepted, as a matter of principle, that matters of fact as found by the Labour Court in that case, must be accepted by the High Court, he further held:

> *"However, this is not to say that the High Court or this court cannot examine the basis upon which the Labour Court found certain facts. The relevance, or indeed admissibility, of the matters relied upon by the Labour Court in determining the facts is a question of law. In particular, the question of whether certain matters ought or ought not to have been considered in determining the facts, is clearly a question of law and can be considered on appeal."*

34. Therefore, the role of the Court in this case is to consider, as Gilligan J. outlined in *Brightwater Selection (Ireland) Limited v. Minister for Social and Family Affairs* [2011] IEHC 510, "*whether the Appeals Officer based the decision on an identifiable error of law or a finding of fact that is not sustainable*".

35. The respondent and the notice party submit that the applicant has failed to identify a question of law in its special indorsement of claim and instead relies on the forty two grounds which were relied upon by the applicant before the Chief Appeals Officer as well as seeking a number of reliefs which were also sought before the Chief Appeals Officer. The notice party also draws attention to the case of *QL v. Minister for Justice and Equality, Ireland and the Attorney General* [2014] IEHC 507 in which the Court refused to overturn a decision on the basis of an alleged error of fact on the basis that, even if there had been such an error, it was not sufficiently material or serious to vitiate the decision made.

36. The Court however notes that the applicant has raised the issue of fair procedures and has complained that the Appeals Officer failed to have regard to all of the relevant evidence before it, failed in its duty to give reasons and breached the principle of *audi alterem partem* by failing to allow the applicant to address a matter of evidence to which he appeared to have significant regard. These are matters of law and therefore subject to review by this Court.

Matters to be Determined

37. The applicant contends that the earlier decision of the Rights Commissioner of 28th September, 2012 determined that the notice party was not an employee of the applicant and that the matter of issue estoppel thus arises. In the alternative the applicant complains about a want of fair procedures and in particular that the Appeals Officer failed to have regard to all of the relevant evidence placed before him; failed in his duty to give reasons for his decision and breached the principle of *audi alterem partem* by failing to allow the applicant address a matter of evidence to which he had material regard in arriving at his decision. The Court proposes to consider each complaint in turn.

Issue Estoppel

38. The applicant submits that the case brought before the Rights Commissioner by the notice party in April 2012 involved identical parties and identical issues to the present case. In a decision dated 28th September, 2012 the Rights Commissioner determined that the notice party was not an employee of the applicant. The notice party appealed that decision to the Labour Court but later withdrew her appeal and stated by letter of 7th May, 2013 that she had decided to do so "*as I now intend to pursue this mater with the Scope Section of the DSP*".

39. As such the applicant contends that the interpretation of the notice party's employment status has already been determined by a Rights Commissioner in proceedings which were appealed to the Labour Court and subsequently withdrawn and that upon discontinuance of that appeal the Rights Commissioner's determination became a final and binding determination of the notice party's employment status such that the Appeals Officer was bound by that determination and was not entitled to embark upon a second adjudication of the issue.

40. The application of issue estoppel to decisions of statutory decision making bodies was confirmed in this jurisdiction by Charleton J. in *O'Hara & Gallagher v. ACC Bank* [2011] IEHC 367. The requirements which must be established in order for an issue estoppel to arise were set out by the Supreme Court in *McCauley v. McDermott* [1997] 2 ILRM 486 in which Keane J. stated as follows:

> *"While the doctrine of what has come to be called 'issue estoppel' has been the subject of explanation and analysis in many modern decisions, its essential features were helpfully summarised as follows by Lord Guest in Carl Zeiss Steiftung v. Rayner & Keeler Limited (2) [1967] AC 853 at p. 935A:*
>
> *'The requirements of issue estoppel still remain (1) that the same question has been decided, (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which estoppel is raised or their privies".*

41. The applicant submits that each of the above elements is clearly met in the present case.

42. The respondent submits in the first instance that the applicant acquiesced and/or waived its entitlement to rely on the question of issue estoppel as it failed to raise this issue at the first opportunity before the Deciding Officer notwithstanding that it did mention the Right's Commissioner's decision. It notes the decision of *SM v. Ireland* [2007] 3 IR 283 and submits that this is authority for the proposition that it is incumbent on a body claiming an abuse of process to raise the issue at the earliest possible time.

43. The respondent further states that as per the decision of the English Court of Appeal in *Ako v. Rothschild Asset Management* [2002] ICR 899, the reason for withdrawing a claim can be relevant to whether issue estoppel arises.

44. However, the respondent's main argument in this regard is that the jurisdictions of the Rights Commissioner and the respondent are both limited to their specific statutory functions. Each, it maintains, has a separate and distinct jurisdiction. The respondent submits that issue estoppel does not arise as between the decisions of the Rights Commissioner and the decisions of the Deciding Officer and Appeals Officer of the respondent. Just as the respondent cannot determine the issue of holiday pay under the Organisation of Working Time Act 1997 the Rights Commissioner cannot determine the issue of insurability under the Social Welfare Consolidation Act 2005. The respondent submits that s. 300 of the 2005 Act creates an obligation on a Deciding Officer to decide whether or not an employment is or was insurable employment. Section 300(1) provides that "*subject to this Act, every question to which this section applies shall, save where the context otherwise requires, be decided by a deciding officer*" and s. 300(2) provides as follows:

> *"(2) Subject to subsection (3), this section applies to every question arising under—*
>
> *(a) Part 2 (social insurance) being a question—*

[…]

(iv) as to whether an employment is or was insurable employment or insurable (occupational injuries) employment,

(v) as to whether a person is or was employed in an insurable employment or insurable (occupational injuries) employment,

(vi) as to the rate of employment contribution which is or was payable by an employer in respect of an employed contributor,

(vii) as to who is or was the employer of an employed contributor."

45. The respondent submits that the Appeals Officer correctly applied the leading Irish authority on issue estoppel, namely, *O'Hara v. ACC Bank* [2011] IEHC 367. In that case Charleton J. found that:

> *"The essence of the claim being made in this case before the High Court is the same as that made before the Financial Services Ombudsman … The subject matter of the claim in these proceedings, misrepresentation leading to the purchase of bonds from a bank that also supplied the finance, is in essence the same."*

The respondent submits that different issues arise in the hearing before the Rights Commissioner under the Organisation of Working Time Act and the hearing in relation to insurable employment pursuant to the Social Welfare Consolidation Act 2005. There was therefore a different legal and factual issue before the Appeals Officer to that determined by the Rights Commissioner.

46. The respondent further submits that, in any case, the same decision was reached concerning the core timeframe. The difference is that the respondent considered the employment relationship from 2004 to 2011. The timeframe of the Rights Commissioner's decision, which was given as one decision for all three applicants before him, in the respondent's submission, is at best unclear.

47. Finally, the respondent submits that since a court has discretion to strike out a case on the basis of issue estoppel, the respondent must have a similar discretion. The respondent contends that the respondent Appeals Officer is entitled to considerable latitude in making that decision and in order to impugn the decision of the Appeals Officer, in this regard a clear error of law must be demonstrated by the applicant.

48. The notice party submits that the applicant's arguments on issue estoppel overlook the fact that it cannot point to any statutory provision which precluded either the Deciding Officer, the Appeals Officer or the Chief Appeals Officer from assessing the matter afresh for the purpose of deciding the question which they were bound by statute to determine, or which bound those bodies to adopt the decision of the Rights Commissioner.

49. The notice party further submits that the applicant's issue estoppel argument is entirely misconceived since the applicant fails to have regard to the Supreme Court case of *Meadows v. Minister for Justice* [2010] IESC 3 which the notice party submits is authority for the proposition that the Deciding Officer, the Appeals Officer and the Chief Appeals Officer would have been acting *ultra vires* if they had blindly adopted the decision of the Rights Commissioner on the question of the notice party's employment status, for it is well established that an administrative body which is empowered, pursuant to statute cannot abdicate its functions in that regard by simply adopting the decisions of other administrative bodies. The notice party relied on the following extract from *Meadows*, which concerned a challenge to the legality of a decision of the Minister for Justice in making a deportation order under the Immigration Act 1999, in support of this contention:

> *"Accordingly, before making a deportation order the Minister is required to consider in the circumstances of each particular case whether there are grounds under s. 5 [of the Refugee Act 1996] which prevent him from making a deportation order.*
>
> *[…]*
>
> *…If such material has been presented to him by or on behalf of the proposed deportee, as is the case here, the Minister must specifically address that issue and form an opinion. Views or conclusions on such issues may have already been arrived at by officers who considered a proposed deportee's application for asylum, at the initial or appeal stages, and their conclusions or views may be before the Minister but it remains at this stage for the Minister and the Minister alone in light of all the material before him to form an opinion … The fact that certain decisions have been made by officers at an earlier stage in the course of the application for refugee status does not absolve him from making that decision himself."*

50. The notice party also relies on the decision of *MM v. Minister for Justice* [2013] IEHC 9 in which Hogan J. held that the Minister had erred in not making his own assessment of the applicant's application for subsidiary protection status under the EC (Eligibility for Protection) Regulations 2006 and that it was unlawful for him to adopt the previous decision of the Refugee Appeals Tribunal.

Decision of the Court

51. The Court does not consider that issue estoppel arises in the instant case. The Organisation of Working Time Act 1997, the Protection of Employees (Fixed Term Work) Act 2003 and the Social Welfare Consolidation Act have all provided for different statutory mechanisms to resolve what are in essence, different issues arising from an employer-employee relationship. Each of those Acts provides for an ultimate appeal to the High Court on a point of law. None of the Acts provides that the decision of one decision making body is binding on the other. The legislature in its wisdom has seen fit to set up different statutory schemes to deal with different employment issues. Undoubtedly it would be far more efficient to have one body charged with the resolution of all issues relating to employment status. This however is a matter for the legislature and not the courts and as matters stand, employees enjoy rights to seek redress simultaneously from the Rights Commissioner and the Department of Social Welfare depending on the nature of their complaint.

52. The Court does however note that the decision of the Rights Commissioner in relation to the status of the notice party had been made known to the Appeals Officer and the Deciding Officer prior to their embarkation on their own decision-making process under the 2005 Act. That decision is based on largely the same factual circumstances and that decision must be at least of some persuasive authority such that one would expect the Appeals Officer and Deciding Officer to explain the basis on which they came to a conclusion in relation to the notice party's employment status which differs from that of the Rights Commissioner whose decision, in

the Court's view, seems more cogently formulated than those of the Deciding Officer and Appeals Officer of the SCOPE section of the respondent. Indeed, the Court's views in this respect would seem to be in accordance with the remarks of Kelly J. in *Mulholland v. An Bord Pleanala* [2006] 1 IR 153 where he held that a decision making body:

> *"…must give its reasons and considerations in a way which not only explains why it has taken a different course but must do so in a cogent way so that an interested party can assess in a meaningful fashion whether or not the respondent's decision is reasonably capable of challenge".*

Application of the Law by the Appeals Officer

53. The legal principles to be applied to the determination of an employment relationship have been the subject of numerous decisions of both the High Court and Supreme Court from the seminal decision of *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 IR 34 to more recent cases such as *Brightwater Selection v. Minister for Social and Family Affairs* [2011] IEHC 510. Those decisions have established various principles and tests to be applied in situations where a Court or decision maker seeks to ascertain the employment status of an individual. The principles, which are still evolving, include inter alia; that the decision maker should first consider whether a mutuality of obligation exists between the parties (*Minister of Agriculture v. Barry* [2008] IEHC 216); that the decision maker should have regard to the working of the contract in practice (*Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 IR 34; *Castleisland Cattle Breeding Society Limited v. Minister for Social Welfare* [2004] IR 150); that the degree of control exercised over how the work is to be performed is a factor to be taken into account (*Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare; Brightwater Selection v. Minister for Social and Family Affairs*) as is the tax status of the individual (*Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare; Castleisland Cattle Breeding Society Limited v. Minister for Social Welfare*). What is stressed in all of the decisions, is that the tests to be applied and the significance of the respective tests to the decision in question, is very much dependent on the facts of the particular case.

54. The applicant contends that the Appeals Officer erred in his application of the relevant legal principles to the facts of the case such that his decision is based on errors of law or mixed errors of law and fact. It relied on twenty five grounds at the hearing of the application in support of that contention, including that the Appeals Officer's failed to discharge his duty to give reasons and failed to give effect to the principle of *audi alterem partem*. The respondent submits that the requisite ingredients of the employment relationship are present such that the Appeals Officer's determination should stand. The notice party further submits that the Appeals Officer and Chief Appeals Officer correctly applied the relevant legal principles in their determinations and that such can be seen from their decisions.

Decision of the Court

55. The Courts have reiterated time and again that the employment status of an individual depends on the facts of each particular case. It is axiomatic therefore that in every case the decision maker should first set out the facts upon which his decison is based. Absent such findings of fact, the parties cannot know whether there has been a proper application of the legal principles. It appears to the Court that in this case there is a fundamental deficiency in the decision of the Appeals Officer. He has failed to set out clearly, or at all, the facts upon which his decision is based It further appears to the Court that all the other errors of which the applicant complains, such as a failure to deal with relevant evidence, the "*cherry-picking*" of evidence and the failure to give reasons, stem from this fundamental failure. In this context the Court notes that from the outset, the tone of the Appeals Officer's decision gives the impression that he is seeking to reject the applicant's claim rather than evaluate same. In the earlier part of his decision he sets out that the mere wording of the contract is not determinative; that the worker's tax status and earnings are neutral; and that the element of control is not indicative one way or the other. He fails to set out fully however, the facts which he does consider to be determinative and the basis upon which he has accepted those facts.

56. It is clear from the earlier decision of the Rights Commissioner, dated 28th September, 2012, that there were various factual matters which were in dispute between the parties. The Court notes in this regard, the remarks of Edwards J. in Barry to the effect that while it is a matter for the decision maker to consider the facts and draw the appropriate inferences from such facts it must do so "*by applying the general principles which the courts have developed*". Edwards J. further held in *DVTS v. Minister for Justice* [2007] IEHC 451:

> *"If there is a conflict with respect to the evidence, such that the tribunal cannot resolve that conflict, other than by preferring one piece of evidence over another piece of evidence for good and substantial reasons, then it is incumbent on the tribunal or court, as the case may be, to state clearly its reasons for doing so".*

In *Mulholland v. An Bord Pleanala* [2006] 1 IR 153 Kelly J. held that a decision making body:

> *"…must give its reasons and considerations in a way which not only explains why it has taken a different course but must do so in a cogent way so that an interested party can assess in a meaningful fashion whether or not the respondent's decision is reasonably capable of challenge."*

57. Therefore, the Court considers that, as a matter of law, the decision making body has an obligation to outline the facts before him; the disputes in relation to those facts; the reasons why he has preferred the facts advanced by one party, or has come to an interpretation based on those facts; and the weight he has accorded same. The Appeals Officer has not done so and for this reason alone, the Court considers his decision to be deficient. The Court has identified a number of instances where a conclusion has been reached for which there is no apparent evidence, including the Appeals Officer's finding that "*it is difficult not to conclude that the National Museum would have engaged Ms. Barnes as a part-time employee had it had the necessary sanction to do so".* The Court cannot find in the papers before it any factual or evidential basis for this conclusion. Nor is there any evidence that such an arrangement would have been acceptable to Ms Barnes, had it been on offer. Similarly, the Court cannot find an evidential or factual basis for the Appeal's Officer's conclusion that the notice party's "*options for increasing her earnings were limited or non-existent"*.

Audi Alterem Partem

58. The applicant makes a specific complaint that in coming to his decision, the Appeals Officer relied on the contents of an internal email which was not opened or referred to in the course of the hearing . Furthermore, criticisms are made by the applicant in relation to the weight placed by the Appeals Officer on the email of 7th April, 2005. The applicant argues that it is unclear why one aspect of the email in question has been referred to in preference to other parts of the same email which are consistent with its position that the notice party is not an employee and that it is also unclear why such parts have been preferred to the notice party's own conflicting characterisation of her work.

59. The email is referenced three times in the Appeals Officer's decision:

> *"In an email dated 7 April 2005, Ann Grady stressed that those contractors, such as Ms. Barnes, "were not normal suppliers because, in the main, NMI fees were their sole source of income and were therefore similar to salaries".*
>
> *[…]*
>
> *She did, during this time, work under the control and reporting requirements of the National Museum who in a description of Ms. Barnes' status emailed that these workers were not normal suppliers because, in the main, NMI fees were their sole source of income and were therefore similar to salaries.*
>
> *[…]*
>
> *This is quite a change from the previous arrangements in which the worker operated on an ad hoc basis and was indistinguishable from employee colleagues who the National Museum had described were not normal suppliers because, in the main, NMI fees were their sole source of income and were therefore similar to salaries".*

60. The applicant submits that such repeated references indicate, of themselves, that the statement in the email of 7th April, 2005 was of significance to the decision maker in reaching his determination. However the email in question was not opened or referred to in the course of the oral hearing. According to the applicant, the email was not put to it and at no point prior to the publication of the decision of the Appeals Officer was it aware that the short passage quoted from the email was of any relevance to the decision. As a result the applicant did not have an opportunity to comment on, explain or make submissions to the Appeals Officer in relation to the email. The applicant therefore submits that the hearing conducted by the Appeals Officer and the decision reached by him are flawed as the process was in breach of the principle of *audi alterem partem*.

61. The respondent submits that the applicant's complaints regarding the significance attached to the email of 7th April, 2005 are misplaced on the grounds that the terms of the email speak for themselves and the consideration thereof was a pure matter of fact for the respondent. Finally, the respondent submits that no significant reliance was placed on the contents of the email.

62. The notice party refers to the case of *HHA v. Refugee Applications Commissioner* [2014] IEHC 499 which she submits is authority for the proposition that the weight to be attached to evidence is a matter for the decision-maker. In *HHA* there were various pieces of evidence before the Commissioner. The Court found that the weight to be attached to each of the factors in question was a matter for the Commissioner and could not find any fault in the manner which he dealt with the evidence before him. The notice party further submits that it is clear from the decision of the Appeals Officer that no unnecessary weight was attached to the email and this was further averred to by him in his affidavit.

63. The applicant submits that it is well established that decisions of statutory bodies which determine the rights and liabilities of parties will attract an entitlement to procedural fairness. It further submits that this right carries with it an entitlement to address and make submissions on any document or evidence upon which the decision maker proposes to rely. In support of its contention the applicant cites the decisions of *ASO v. The Refugee Appeals Tribunal* [2009] IEHC 607 and *OOC v. The Minister for Justice* [2013] IEHC 278 in which the decisions of the relevant decision making bodies were held to have been flawed in circumstances where they were based on a consideration or construction of documents which the applicants had been given no opportunity to address. It further refers to the decision of Clarke J. in *Ashford Castle v. SIPTU* [2007] 4 IR 70 in which he states at paragraph 40 that there is an overriding requirement that any party adversely affected by the result of a process is entitled to a reasonable opportunity to deal with any factors which influence the decision.

64. The respondent submits that there was no breach of fair procedures and that in any event, arguments in relation to such issues are more properly a matter for judicial review. The respondent contends that the only issue identified by the applicant in this regard is the issue of the email, where a minor error only was made in relation to the author of same, which did not affect the substance of the content of the email. The respondent submits that there was a full appeal hearing, at which the applicant was represented by solicitor and counsel and following which a full and reasoned decision was issued which considered all relevant facts, material and submissions and which was further subjected to a s. 318 review.

65. The notice party responds to the applicant's complaint that information relied upon by the decision make ought to have been put to it for comment in accordance with fair procedures by referring to the remarks of Clarke J. in *BIGA v. Refugee Appeals Tribunal* (Unreported, High Court, Clarke J., 24th February, 2010). In that case the applicant took issue with the Tribunal's noting of the comments from the British Embassy in Kinshasa and the Belgian General Commissioner for Refugees in relation to the authencity of documents. She contended that the Tribunal was obliged to furnish her with an indication of the nature and source of the information before her before the decision was made, because she was entitled to know the case against her. Clarke J. stated as follows:

> *"The wording in s. 16(8) obliges the tribunal member to notify the applicant of 'the nature and source of any other information relating to the appeal which has come to the notice of the Tribunal in the course of an appeal'. The so called warning information was not specific to the applicant's appeal nor is there anything to suggest that the various statements made by the officials in the British and Belgian Embassies in Kinshasa came to the tribunal member's notice during the course of the applicant's particular appeal. The information was of a purely general nature which was not directed to the applicant's documents and as was pointed out by the respondents, could apply to any documents from any country of origin."*

66. Further, the applicant complains that the selected repetition of one short passage from the email is indicative of the cherry picking of evidence on the part of the Appeals Officer and thus is in contravention of the well established principle re-iterated by Edwards J. in *DVTS v. Minister for Justice* [2007] IEHC 451 that "*a judicial or quasi judicial tribunal must have regard to all of the evidence before it and cannot cherry pick the evidence*".

67. In this regard the applicant argues that it is unclear why a particular passage of the email is emphasised without any reasoned discussion of the notice party's own conflicting characterisation of her work as that of a "*part time, sole trader*" and a "*consultant contract conservator*". As such, the applicant submits that it is not possible to discern with any clarity why one piece of evidence is preferred over others and that for this reason the decision fails to comply with the duty to give reasons. The respondent however submits that the notice party's description of her employment situation is not determinative of the legal nature thereof and that the Appeals Officer was correct in law in having regard to the actual factual situation and not the various descriptions of the nature of the engagement. The respondent contends that the fact the notice party may have described herself as a "*part time, sole trader*", a "*consultant contract conservator*" or a "*freelancer*" is not relevant and is not incompatible with being a part-time employee of the applicant.

Decision of the Court
68. It appears to the Court that the Appeals Officer did place significant weight on the extracts from the email of the 7th April 2005 set out above, in arriving at his decision. It is common case that the e-mail was not adverted to during the hearing. The fact that the applicant was not afforded the opportunity to address the contents of the email of itself renders the hearing and the subsequent decision unsatisfactory.

69. Furthermore, in relying on the extracts from the email, the Appeals Officer has not explained why certain portions of the e-mail have been preferred over others and why the e-mail as a whole, has been preferred to other evidence before the Appeals Officer.

70. The Court considers in the first instance that the applicant should have been afforded an opportunity to address the content of the email in accordance with the principle of *audi alterem* partem and with the decisions of *ASO v. The Refugee Appeals Tribunal; OOC v. The Minister for Justice and Ashford Castle v. SIPTU*.

71. The Court further rejects the respondent's assertion that a "*full and reasoned decision was issued which considered all relevant facts, material and submissions*". In fact, it appears to the Court that all of the issues raised by the applicant, including those related to the email of 7th April, 2005, flow from the Appeals Officer's failure to demonstrate that he has considered all relevant facts by setting out clearly his findings of fact; the basis upon which he has arrived at such findings and the weight he has afforded to them. Since the Appeals Officer has not done so, it does appear on the face of his determination that he did to some extent engage in the "*cherry picking*" of evidence. The Court accepts the notice party's submission that the decision of *HHA v. The Refugee Applications Commissioner* provides authority for the proposition that it is open to the Deciding Officer and the Appeals Officer to make findings of fact and to attach whatever weight he considers fit to certain evidence on the basis of the totality of the evidence before him. However, in doing so, those officers must outline clearly what those findings are, the basis on which those findings have been reached and the basis on which they consider it appropriate to afford greater weight to certain evidence. While the Appeals Officer has averred that no unnecessary weight was attached to the email the Court disagrees with the notice party's submission that this is evident from his decision.

72. The Court considers that the case of *BIGA v. The Refugee Appeals Tribunal* to be of no assistance in circumstances where the information derived from the email at issue in this case cannot be said to be "*not specific to the applicants' appeal*" nor indeed was the matter at issue in the current case being considered under s. 16(8) of the of the Refugee Act 1996 (as amended), as was the case in *BIGA*.

73. For the foregoing reasons, the Court grants the applicant the reliefs sought at (iii), (iv) and (v) of the Special Indorsement of Claim and further orders that the matter be remitted to the Appeals Officer of the respondent so that the issue can be re-considered in light of and in accordance with, the findings of the Court set out herein.

THE HIGH COURT

[2014 No. 191SP]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 327 OF THE SOCIAL WELFARE CONSOLIDATION ACT 2005

BETWEEN

THE NATIONAL MUSEUM OF IRELAND

Applicant

AND

THE MINISTER FOR SOCIAL PROTECTION

Respondent

AND

LORNA BARNES

Notice Party

APPENDIX I

Decision of the Appeals Officer
The appellants have relied upon the leading Supreme Court cases involving the issue; *Henry Denny and Sons (Ireland) Limited v. Minister for Social Welfare* [1998] 1 IR 34 and *Castleisland Cattle Breeding Society Limited v. Minister for Social and Family Affairs* [2004] IESC 40. Both of these cases involved the employment status of workers employed under contract and many of the issues investigated and ruled upon feature in this appeal.

In *Denny*, the Supreme Court confirmed that the *'in business on one's own account test'* was the governing test:

> *'In general a person will be regarded as providing his or her services under a contract of employment and not as an independent contractor where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be considered is not decisive. The inference that the person is engaged in business, in his or her account, can be more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her'. Keane J.*

The reference to profit and efficiency is relevant here. The Supreme Court reasoned that where it is shown that a worker is not in

business on one's own account and there is the element of control, then employment exists. In *Denny*, a supermarket demonstrator was engaged by the company on a yearly basis. While the demonstrator's contract described her as self-employed, she was not found to be in business on her own account. The demonstrator provided labour only, provided no equipment and could only send a company approved substitute when unable to attend work. Furthermore, the level of control exercised was not deemed decisive.

There are similarities in this appeal to the *Denny* judgment. In this case, Ms. Barnes was engaged by the NMI from 2004 on a 2 year contract to provide 10 days' work a month and was paid on production of an invoice. The invoice initially only refers to the number of days '*conservation consultancy'* and the daily rate. This is remarkably similar to the invoice for the "*Contract of Service*" invoice submitted by the worker in 2002/2003 when she worked as an employee in the National Museum. At that time, she also submitted invoices for 'consultancy' at a daily rate. I consider that the method of payment is therefore not significant as the National Museum has paid a consultancy daily rate on submission of invoice to Ms. Barnes when described variously as an employee and contractor.

I am conscious that in *Castleisland*, the Supreme Court held that there was nothing unlawful in a company seeking to minimise costs by altering the employment status of its employees where the new contract is entered into voluntarily by both parties but the contractual question can only be resolved by reference to the actual working of the contract in practice. The Supreme Court held that, notwithstanding the requirement to examine the terms of the written contract, in determining whether a contract was one of service, or for services, an appeals officer was bound to examine and have regard to what was the real arrangement, on a day-to-day basis, between the parties. A statement in a contract to the effect that a person was an '*independent contractor'* was not a contractual obligation but merely a statement which might or might not be reflective of the arrangement between the parties. In *Castleisland*, the Supreme Court found that the contract did reflect the status of the workers as contractors. The Court also found that where former employees become dissatisfied with new arrangements, there is an onus on them to act quickly to seek a remedy. The Court regarded as '*of huge importance'* the fact that the AI men carried their own insurance.

The Supreme Court has therefore ruled that, in cases where a contract existed, the working of the contract in practice must be explored as mere wording could not determine the nature of the employment. The Supreme Court attributed little evidence to the element of control, transport and protective clothing and the fact that the workers (inseminators) had other business activity.

Furthermore, Geoghegan J. concluded that in altering the employment status, the company had not created a bogus contract and had made no secret of the reasons behind the change to the service procurement.

In this case, as in *Castleisland*, a key consideration must be the motivation behind the introduction of contract work and which Ms. Barnes entered into with the National Museum. Geoghegan J. attached '*great importance'* to the '*circumstances in which the contract was entered into*'. In this case, Ms. Barnes had sought more flexible working conditions as her one year old child had been diagnosed with a disability in December 2003 and her circumstances confined her to working part-time. This is admitted in her submission to the Labour Court which she subsequently withdrew. The museum did not, at any time, have sanction to engage the worker as an employee and sought to overcome this obstacle by engaging her under a contract for services and this was to the satisfaction of both parties. The museum had work which it required to be done and it could only engage contractors to do that work. This is quite different to the *Castleisland* case in which the Castleisland Breeding Society sought to reduce costs by altering the employment status of inseminators from contract of service to contract for services.

In this case, the National Museum had found itself in the situation where it had both employees and a contractor, Ms. Barnes, effectively doing the same work. It must be emphasised that the Museum did not seek to hide this fact and had notified the trade union to avoid any suggestion that this was a move towards replacing employees with sub-contractors, something that might have become an issue under the then national social partnership policy. The situation continued until 2011 and the introduction of the new agreement.

Mr. Lyons for the appellant, has argued that the worker refused employment and did not seek advertised openings as an employee. The worker rejected this assertion stating that no vacancies had arisen since 1995. The National Museum believed that some recruitment did recommence in the 2000s. In regard to union correspondence the NMI confirmed that union consultations had taken place in regard to workers who were engaged under contract (for services). Mr Lyons argued that contracts of employment had been offered to the worker but she had chosen not to accept a full-time job as she preferred her more favourable self-employment conditions. He asserted that as she had not applied for these full-time jobs and cannot now lament her present status. I cannot accept this argument as it had not been shown that the worker refused an opportunity to apply for suitable (to her) advertised posts within her occupation.

It was clarified that only two AK2 posts as technical assistances located in Dublin had been advertised with another two posts located in Castlebar. The worker conceded that the birth of her child and his diagnosis of deafness meant that her circumstances only allowed for her to work part-time until 2008 but the museum had facilitated her by offering her part-time work under contract for services. The worker claims she had been advised to '*keep her head down*' and her conditions would continue. This has been reported in the worker's written submission (later withdrawn) for the Labour Court appeal of the Rights Commissioners' findings. Mr Lyons for the National Museum contended that Ms Barnes did not apply for the advertised posts as they did not offer her the flexibility that her circumstances demanded.

What is clear is that the worker, Ms Barnes, had accepted the terms offered by The National Museum, with her eyes open. However, as in *Henry Denny*, her domestic circumstances were such as to put her at a disadvantage and she had little choice but to enter into whatever contract was on offer. While Ms Barnes is an educated person, who doubtless grasped the full implications of her contract, she was somewhat compromised by her domestic situation and understandably sought work on terms, particularly the part-time nature, which suited her. Those terms were at the time mutually satisfactory to both parties. While recognising the existence of the written contract, its importance is diminished by the circumstances of the case and the lack of attention paid to the detail and working of the contract.

In an e-mail dated 7 April 2005, Ann Grady stressed that those contractors, such as Ms Barnes, '*were not normal suppliers because, in the main, NMI fees were their sole sourse of income and were therefore similar to salaries*'.

Ms Barnes is a specialist in a niche field. She describes herself as a 'consultant contract conservator' and she does generate some additional income through such contract work. In *Castleisland*, the Supreme Court placed no great importance on the fact that the workers were allowed carry on other self-employment provided it did not interfere with contractual obligations.

Also in the *Castleisland* case, the Supreme Court regarded as important the fact that the new contractual arrangements required the workers to carry their own insurance. In this case, the worker also carried her own insurance but the evidence is that this only became a requirement under the new framework agreement. This therefore represented a significant change in her status. With the

introduction of the Single Operator Framework Tender in 2011, the tenderer must henceforth carry public liability insurance of €6.5 million. Ms Barnes has stated that the question of Public Liability Insurance was not raised until the new tendering process introduced in 2011. This was not disputed. This new framework became effective from 1 August 2011 and the worker accepted the terms on offer after reassurances from the NMI.

Sometime subsequently, it seems that the worker detected a change in the NMI's attitude to her and she then sought a determination of her employment status because she felt vulnerable and less confident that her contract would be renewed.

Ms Barnes was apparently satisfied with her working conditions up to 2011 and the contracts seem to have been rolled over bi-annually with no complications.

Geoghegan J in *Castleisland* noted that one of the workers in that case had worked from 1990 to 1999 *'without any claim being made by him that he was subject to the Social Welfare Acts and was under a contract of service'*. In this case, Ms Barnes worked from 2004 to 2011 without any complaint. She accepts that she only sought the protection of employee status when her contract with the National Museum became uncertain. The contract offered to and accepted by Ms. Barnes in the years 2004 to 2011 was a generic contract, short on specifics. The document did describe Ms Barnes' terms as *'a contract for service and not a contract for employment'*. This is a confusing term as the accepted terminology is contract for services (contractor status) and contract of employment (employment status). I am satisfied however that the worker understood her status and raised no objection. That said, the leading cases remind decision makers that the mere wording of the contract is not determinative and that the actual working of the contract is more important.

As has been stated, Ms Barnes is an expert in a niche field. Nonetheless, she provided labour only in the form of this expertise. There is no suggestion that she provided premises, equipment, additional contractors or materials. The National Museum was unable to outline what distinguished Ms Barnes from the museum's employees who engaged in similar work. Mr Lyons for the NMI rejected this bystander observation and suggested that it was wrong to pose such a question as the Supreme Court held in Castleisland that there was nothing wrong with altering the employment status of workers. The important difference between this case and the *Castleisland Cattle Breeding Society* judgment is that all of the inseminators retained by the society were moved from employee status to contractor status or made redundant. Those workers unhappy with this new contractor status accepted redundancy. Castleisland Cattle Breeding Society did not retain a mix of employees and contractors effectively doing the same work side by side. The Supreme Court found that there was nothing unlawful in an employer seeking to reduce overheads by altering the status of workers from contract of employment to contract for services. In this case, Ms. Barnes had been aware of her status down the years and her trade union was also informed. It is difficult not to conclude that the National Museum would have engaged Ms Barnes as a part-time employee had it had the necessary sanction to do so.

Ms Barnes has been shown to have other self-employment earnings, albeit not significant. Her main income resulted from the work done for the National Museum and this has been accepted by the NMI. The appellants have also accepted that the worker's tax status and earnings are neutral to the issue in question.

While I agree with the finding of the Rights Commissioner, those findings concerned the employment status under the new framework agreement. The situation was less clear in the preceding years. In *Minister for Agriculture & Food v. Barry & Ors* [2008] IEHC 216, the warnings issued by the High Court directed that:

> *"every case must be considered in light of its particular facts and it is for the court or tribunal considering these facts to draw the appropriate inferences from them by applying the general principles which the courts have developed. That requires the exercise of judgment and analytical skill. In my view it is simply not possible to arrive at the correct result by 'testing' the facts of the case in some rigid formulaic way". – Edwards J.*

In my view, this case presents arguments for and against the opposing finding of both the Right's Commissioner and the Deciding Officer from Scope Section. There is evidence of a mutuality of obligation as Ms Barnes worked for the National Museum 10 days per month between January 2004 and June 2011 and the contracts offered in 2004, 2006 and 2008 all anticipate 208 days' work over the 2 year contracts. The payment was fixed and paid in arrears on preparation of an invoice.

As the worker provided a specialised service, it is unlikely that she was free to send a substitute. Security as well as suitable qualifications and experience would be a consideration. I am not surprised that this issue remained unanswered as it had not arisen.

The element of control is not regarded as being indicative one way or the other. That Ms Barnes had security access is irrelevant. The absence of PMDS is not conclusive nor is the option of flexitime. In the past, absence of either did not represent an indication of self-employment status. The NMI has conceded that it was difficult to distinguish workers under contract for services from employees.

The question of being in business on one's own account is a significant consideration. I see no economic test indicating that the worker could profit from working in a more efficient manner. Her options for increasing her income were limited if non-existent. Ms Barnes worked 10 days a month and commenced on €170 per day, increasing to €210 by 2008. The worker was paid travel and subsistence separately at *'normal civil service rates'*. I also note that Ms Barnes also invoiced for daily consultancy work in 2002 and 2003 under an Invoice for Contract of Service. Copies of these invoices are on file and confirm the ongoing relationship between the National Museum and Ms. Barnes.

While there is a contradiction in a worker accepting a contract for services while claiming to be a worker, there is nothing unusual in seeking to have one's employment status confirmed. In this case, as in Henry Denny, the worker had little choice but to accept the terms being offered by the National Museum if she wanted the work. The National Museum wanted the conservation work done and did not have sanction to engage additional conservators as employees. There is no disputing that the part-time nature of the work offered did appeal to Ms. Barnes. The evidence submitted is that the worker was engaged on a *'gentleman's agreement'* and while a 2 yearly contract was drawn up and signed by both parties, no issues arose and the contracts were rolled over every second year. I believe that the Deciding Officer was correct in finding that the worker was not exposed to financial risk. Until a formal tendering process was introduced in 2011, the worker had an expectation that she would be re-engaged every two years which she was. She was paid a fixed amount over that 2 year contract and expenses were paid separately at normal public sector rates. I cannot see how this arrangement could be deemed to be in business on one's own account. The worker had no overheads and no prospects of enhancing her income.

Under the terms of the new contract, under 6.2 Expenses, expenses in respect of mileage or travel shall not be paid to the Framework Members in respect of the services provided. Furthermore, the Client (NMI) reserves the right to terminate the agreement by

providing 14 days' notice, under clause 9.1. The invitation to tender issued on 14 April 2011.

With the introduction of this Single Operator Framework Tender in 2011, Ms Barnes' relationship with the National Museum had altered. She correctly detected a change in the wind and saw her position with NMI as now uncertain and her contract was ultimately not renewed.

To conclude, I believe that three distinct periods of engagement can be identified.

Firstly, there was a period of employment which is not in dispute. The worker worked for the National Museum under a contract of service and was paid on submission of an invoice in the years 2002/2003. At that time, she described her service in her invoices as 'consultancy' and she was paid at a daily rate. I reference this period of employment for comparison only as the conditions were similar to the subsequent period when the worker was treated as a contractor by the National Museum.

The first period in question is the worker's status from 1 January 2004 when she re-commenced working with the National Museum. She was again paid for consultancy work on a daily rate and was paid on submission of an invoice. While her contract described that arrangement as a 'contract for service and not a contract for employment', the worker was offered 10 days' work per month for a period of 2 years. This is unusual security for a free lance contractor and tends towards evidence of a mutuality of obligation as Ms Barnes worked for the National Museum 10 days every month between January 2004 and June 2011 and the contracts offered in 2004, 2006 and 2008 all anticipate 208 days work over the 2 year contracts. The payment was fixed and paid in arrears on presentation of an invoice. From 2004 to 2011, the worker also did additional duties (non conservator) not covered by the contract and was listed as part of the National Museum's conservation team. The question of the worker being in business on her own account must be a significant consideration. I see no economic test indicating that the worker could have profited from working in a more efficient manner. Her options for increasing her earnings were limited if non-existent. Ms Barnes worked 10 days a month and commenced on €170 per day, increasing to €210 by 2008. The worker was paid travel and subsistence separately at 'normal civil service rates. It is difficult to anticipate how the worker could have been exposed to financial risk in the entrepreneurial sense.

She did, during this time, work under the control and reporting requirements of the National Museum who in a description of Ms Barnes' status e-mailed that these workers '*were not normal suppliers because, in the main, NMI fees were their sole source of income and were therefore similar to salaries*'.

The other period in question is from the introduction of the Single Operator Framework Tender which from 1 August 2011 introduced significant changes which influenced the Rights Commissioner in arriving at his finding. Under the new contract, it was stipulated that mileage or travel time shall not be payable (6.2), the worker must carry her own public liability insurance cover of €6.5 million (7.2) and the NMI reserves the right to terminate the contract by providing 14 days' notice. Tenders were invited through www.etenders.gov.ie and on the Official Journal of the EU.

Ms Barnes has stated that the question of Public Liability Insurance was not raised until the new tendering process introduced from 1 August 2011. Furthermore, any additional services requested must be the subject of a supplementary tender. This is quite a change from the previous arrangements in which the worker operated on an *ad hoc basis* and was indistinguishable from employee colleagues and who the National Museum had described: '*were not normal suppliers because, in the main, NMI fees were their sole source of income and were therefore similar to salaries*"'.