THE HIGH COURT

[2019 No. 31 R]

BETWEEN

KARSHAN (MIDLANDS) LIMITED TRADING AS DOMINOS PIZZA

APPELLANT

AND

REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 20th day of December, 2019

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Introduction

1. This is an appeal by way of case stated for the opinion of the High Court pursuant to s. 949AQ of the Taxes Consolidation Act 1997 (**"TCA"**). The appeal relates to a determination of Tax Appeals Commissioner Gallagher (**"the Commissioner"**) dated 8th October, 2018, which decided that pizza delivery drivers engaged by the appellant (**"the drivers"**) worked during the relevant tax years of assessment (2010 and 2011) under contracts of services and are taxable pursuant to schedule E of the TCA (**"the determination"**). The appellant contends that the drivers operate under contracts for services, are therefore self-employed, and taxable pursuant to schedule D of the TCA.

Contracts and performance

2. The determination noted facts admitted or proven which are included in the following summary:-

(i) The written agreement between the appellant and each driver *inter alia*:-

a. Identified each driver retained by the appellant as an "*independent contractor*";

b. Stipulated that drivers were paid according to the number of deliveries successfully undertaken;

c. Provided for payments by the appellant to drivers for brand promotion through the wearing of branded clothing and or logos affixed temporarily to vehicles used by drivers. Clothing and logos were provided by the appellant to the drivers;

d. Required drivers to use their own cars and motor insurance. (The provision made for drivers to rent cars was not operated);

e. Offered drivers appropriate business use insurance on a third party basis at a pre-determined rate;

f. Did not warrant a minimum number of deliveries and drivers consequently assumed financial risks and rewards "*in keeping with all self-employed individuals*";

g. Obliged drivers to provide invoices and maintain their own records;

h. Required drivers to maintain the confidentiality of trade information and secrets of the appellant;

i. Allowed drivers to engage a substitute driver provided that substitute could perform all contractual obligations of the driver to the appellant;

j. Did "*not warrant or represent*" that the appellant "*will utilise*" the services of each driver "*at all*" while drivers had the right to notify the appellant of days and times on which they were available;

k. Confirmed in the final clause of the contract that the driver undertook work for the appellant "*strictly as an independent contractor*".

(ii) All drivers were required to sign a document to confirm that the appellant "*has no responsibility or liability whatsoever for deducting and/or paying PRSI or tax*" on monies which the appellant paid for their work.

(iii) Drivers were required to pay a deposit for clothing provided by the appellant.

(iv) Rosters were drawn by a store manager of the appellant after drivers had filled out "*an availability sheet*" approximately one week beforehand.

(v) The substitute, whether chosen by the drivers or the appellant, was paid by the appellant.

(vi) The branded uniform of cap, shirt, jacket and name tag together with the black trousers and black shoes were mandatory and subject to checks by managers of the appellant.

(vii) Drivers had to use their own phones to contact customers if necessary.

(viii) Drivers were obliged to provide the appellant with certificates of business use insurance.

(ix) The appellant ensured that drivers would only get two deliveries at a time and one delivery if another driver was waiting.

(x) Some drivers were required to fold boxes while waiting for deliveries to be ready.

(xi) The appellant furnished prepaid invoices for signature by many drivers.

(xii) Drivers clocked in and clocked out on the appellant's computerised system using driver numbers resulting in the collating and maintenance of that information by the appellant.

(xiii) Drivers were given a cash float which was returned at the end of each shift.

(xiv) A non-negotiable sum of €1.20 was paid to drivers per drop with an added 20c for insurance and drivers were also paid €5.65 per hour in respect of brand promotions.

Core issues

3. Counsel for the appellant ultimately contended that the Commissioner erred in law in her interpretation and/or application of the following concepts:-

(i) Mutuality of obligations;
(ii) Substitution;
(iii) Integration;
(iv) Terms of the contract, specifically that the Commissioner failed to give proper weight to the actual terms of the contract.

The Court therefore proceeds to analyse the submissions made under each of those headings.

Jurisdiction of the High Court on an appeal by way of case stated

General

4. Kenny J. in *Mara (Inspector of Taxes) v. Hummingbird Ltd* [1982] ILRM 421 at p. 426 explained:-

"*A case stated consists in part of findings on questions of primary fact, e.g. with what intention did the taxpayers purchase the Baggot Street premises. These findings on primary facts should not be set aside by the courts unless there was no evidence whatever to support them. The commissioner then goes on in the case stated to give his conclusions or inferences on these primary facts. These are mixed questions of fact and law and the court should approach these in a different way. If they are based on interpretation of documents, the court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as is the commissioner. If the conclusions from the primary facts are ones which no reasonable commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable commissioner could draw.*"

5. Blayney J. in *Ó Culachain v. McMullan Brothers Ltd* [1995] 2 I.R. 217, cited by the Supreme Court in *Mac Cárthaigh v. Cablelink Ltd* [2003] 4 I.R. 510, further summarised as follows at pp. 222-223:-

"*(1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.*

(2) Inferences from primary facts are mixed questions of fact and law.

(3) If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside

(4) If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw.

(5) Some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree and the judge's conclusions should not be disturbed (even if the court does not agree with them, for we are not retrying the case) unless they are such that a

> *reasonable judge could not have arrived at them or they are based on a mistaken view of the law.*"

6. Reference to "*judge*" in the above extract applies equally to the Tax Appeals Commissioner.

Burden of proof

7. Substantive issues of fact described in the case stated are not disputed although the interpretation of the umbrella contract provision for substitution looms. The appellant, as the relevant taxpayer, bears the burden of establishing that the drivers were engaged under a contract for services. An appeal by way of case stated is different from a consultative case stated where a more expansive approach can be taken. In this appeal the Court is restricted to identifying the law and applies a deference to the Commissioner who has experience in determining facts with an eye to the applicable law. There was indeed an intricate if not complex factual matrix with which the Commissioner grappled.

8. The determination explained the law which the Commissioner applied. Counsel for the appellant through this case stated process sought to identify errors of law made by the Commissioner. Under the heading "mutuality of obligations" and "integration", the submissions concerned the explanation and application of the law by the Commissioner. On the other hand, the appellant confined its challenge under the "substitution" and "terms of the written contract" to the application of the law by the Commissioner. In other words, the appellant has the burden of specifying and establishing the errors of law made in the Commissioner's statement of the law for the concepts known as "mutuality of obligations" and "integration". The appellant then has the onus to establish that the Commissioner misapplied the law specifically and in general, taking account of the four above mentioned concepts.

Function of this court

9. Between the extreme examples of "contract of service" and "contract for services" inevitably lies an intermediate range which may lead to different conclusions by those applying the relevant legal principles. Therefore, special circumstances and an overview of the factual position concern a forum of first instance rather than a court with a jurisdiction that is inherently deferential to the fact finder.

10. The Commissioner heard evidence from nine witnesses including a number of drivers. The Commissioner has the necessary skill and experience to elicit and determine all facts that are relevant. There is no *de novo* appeal hearing.

11. Mummery L.J. in *Brent London Borough Council v. Fuller* [2011] EWCA Civ 267, [2011] ICR 806, at para. 30, explained the function at an appeal tribunal which can equally apply to this Court:-

> "*The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focussing too much on particular passages or turns of phrase to the neglect of the decision read in the round: these are all appellate weaknesses to avoid.*"

12. In summary, the burden of proof on the appellant is indeed onerous. The structure of this judgment is to explain impacting submissions made by the parties under a heading for each of the concepts. Then the Court gives its reasons for its decision on specifics and generally.

Mutuality of obligation

13. The appellant submits that mutuality of obligation is the *sine qua non* of an employment relationship. There must be an obligation on the employer to give the employee work and there must be an obligation on the employee to carry out the work for the employer. The Commissioner held in this case that there was an overarching umbrella contract supplemented by multiple individual contracts in respect of each assignment or roster of work. The requirement of mutuality was satisfied in the individual contracts.

14. The principal case cited by the Commissioner was *Weight Watchers (UK) Ltd v. Revenue and Customs Commissioners* [2011] UKUT 433 (TCC), [2011] All ER (D) 229 (Nov) (**"*Weight Watchers*"**). It is worth summarising the facts to create context. "Leaders" were engaged by Weight Watchers which is known to promote meetings of those wishing to lose weight. Leaders were required to arrange and conduct those meetings. The appellant (Weight Watchers) appealed determinations that the leaders were subject to PAYE and a contribution similar to PRSI.

Appellant's submissions

15. According to the appellant the "*so-called supplemental multiple individual contracts … are at the heart of the decision under appeal*" in respect of each assignment or roster of work. The appellant emphasises that clause 14 of the contract recognises the freedom of a driver to work when he or she chooses. The Commissioner was incorrect in relying upon English law and should have applied the law in Ireland as understood by the appellant. The appellant challenges the findings in the following paragraphs:-

> "*82. In this appeal, the right of a driver to cancel a shift was qualified by the requirement to engage a substitute, to provide advanced notification to the appellant and to work out the remainder of the shifts in the series which had been agreed.*
>
> *83. I agree with the reasoning of Briggs J. in Weightwatchers (UK) Ltd and I conclude that a contract which provides drivers with the right to cancel shifts at short notice does not relieve a driver of work related obligations in the manner contended for by the appellant.*
>
> *84. Thus I determine that the requirement of mutuality of obligation were satisfied in the individual contracts entered into between the Appellant and the drivers, each contract representing an assignment of work (comprising one or more shifts), and that these obligations were not invalidated by clauses 12 and/or 14 of the written agreement, and were not invalidated on any other basis*."

16. By relying on English cases, the appellant submits that the Commissioner failed to follow Irish case law (discussed below) which "*posits a strict view of mutuality that goes significantly beyond the work/wage exchange and requires an ongoing reciprocal commitment to provide and perform work on the part of the employer and employee respectively*."

17. The appellant also focused on para. 49 of the determination:-

> "*Thus in the within appeal, the umbrella contract required a driver … to initiate an agreement with the Appellant in relation to his availability for work …. Once the Appellant rostered a driver for one or more shifts of work, there was a contract in place, in respect of which the parties retained mutual obligations*."

to submit that the Commissioner was "*legally incorrect*" because the umbrella agreement did not require a driver to initiate an agreement with the appellant.

18. The appellant cites Ní Raifeartaigh J. in *McKayed v. Forbidden City Limited* [2016] IEHC 722 (unreported, High Court, 16th November, 2016), where the contract in that case committed the employer to "*endeavour to maintain sufficient work for*" the worker. There the plaintiff claimed that he was an employee so that he could maintain a claim under the unfair dismissals legislation. The appellant submits that such a clause is stronger for a worker than exists in the contract before this Court. Ní Raifeartaigh J. found that there was an absence of mutuality in *McKayed* and the appellant contends that a similar finding should be made in this case. Thus, where the appellant specifically does not warrant or represent that the appellant will utilise the services of the driver, the mutuality of obligations cannot be found to exist.

19. The appellant argues that *McKayed* contained factual elements which pointed more strongly towards employment than those in the current case and yet the court held that there was no mutuality of obligation.

Revenue's submissions

20. The respondent (**"Revenue"**) submits that the contractual relationship between the appellant and the drivers as found by the Commissioner does indeed comprise a hybrid contract consisting of an overarching umbrella contract supplemented by individual contracts in respect of each assignment or roster of work.

21. The hybrid contract description appears in the judgment of Briggs J. in *Weight Watchers*, and more particularly at para. 30:-

> "… *The third, hybrid, class consists of an over-arching contract in relation to certain matters, supplemented by discrete contracts for each period of work. In this hybrid class, it may be (and is, in the present case) sufficient if either the over-arching contract or the discrete contracts are contracts of employment, provided that any contract or contracts of employment thus identified sufficiently resolve the question in dispute. Where, as here, the question is whether the PAYE regime and the applicable* [national insurance] *regime apply to the work done by the leaders, it is clearly sufficient if there is identified either a single over-arching contract of*

employment or a series of discrete contracts of employment which, together, cover all periods during which the leader's work is carried out."

22. Revenue notes clause 14 of the contract: "*The Company … recognises the Contractor's right to make himself available on only certain days and certain times of his choosing.*" Revenue argues that this requires a driver to initiate an agreement with the appellant in relation to his availability for work.

23. Revenue refers to the material fact as found by the Commissioner that the practice, in relation to rostering of shifts, was that the drivers filled out an "availability sheet" approximately one week prior to the drawing up of a roster. The roster was drawn by a store manager based on the availability sheets. Thus, the Commissioner found that once the appellant rostered a driver for one or more shifts, there was a contract containing mutual obligations.

Minister for Agriculture v. Barry

24. Both parties cite the judgment of Edwards J. in *Minister for Agriculture v. Barry* [2008] IEHC 216, [2009] I.R. 215 (**"*Barry*"**) in support of their positions concerning the applicable law.

25. The ongoing saga of the temporary veterinary inspectors (**"vets"**) who worked at a meat processing plant in Mitchelstown, Co. Cork, which closed in October 2004, is worth outlining.

26. The vets lodged claims with the then Employment Appeals Tribunal (**"EAT"**) on 21st April, 2005, contending that they worked under a "*contract of service*" for the appellant Minister (**"the Minister"**) and that they were entitled to redundancy payments. The Minister had given directions that the vets could have their names placed on a maximum of four panels (i.e. four meat plants) but could hold only one regular shift. The panels operated on the basis of seniority, availability and suitability. Details of the functions, reporting structure, equipment and materials provided by the Minister, hours of work, payment of PAYE and PRSI, training and disciplinary proceedings, and annual leave entitlements were set out in paras. 16 to 41 of the judgment of Edwards J.

27. The EAT decided to hear a preliminary point about whether the vets were employed under a contract of service or a contract for services. Edwards J. found at para. 43 as follows:-

"*In each instance it was incumbent on the tribunal to ask three questions. The first question was whether the relationship between each respondent and the appellant was subject to one contract, or more than one contract. The second question involved the scope of each contract. The third question involved the nature of each contract.*

[44] As I have stated, there were various possibilities. It was, of course, possible that each of the respondents, respectively, was employed under a single contract which, upon a thorough examination of the circumstances, might fall to be classified as either a contract of service or a contract for services. However, another possibility was that on each occasion that the temporary veterinary inspectors worked they entered a new contract, and these contracts, depending on the circumstances, might fall to be classified as contract of service or contracts for services. A third possibility is that on each occasion that the temporary veterinary inspectors worked they entered a separate contract governing that particular engagement, which might be either a contract of service or a contract for service, but by virtue of a course of dealing over a lengthy period of time that course of dealing became hardened or refined into an enforceable contract, a kind of overarching master or umbrella contract, if you like, to offer and accept employment, which master or umbrella contract might conceivably be either a contract of service or a contract for services or perhaps a different type of contract altogether. This notion of an umbrella contract, though controversial, has featured in several English cases involving particular classes of workers, such as outworkers, casual workers and piece workers: see, for example, Airfix Footwear Limited v. Cope *[1978] I.C.R. 1210 and* Nethermere (St. Neots) Limited v. Gardiner *[1984] I.C.R. 612.*"

28. Under the heading mutuality of obligation Edwards J. at para. 47 stated:-

"*The requirement of mutuality of obligation is the requirement that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. 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*."

29. Edwards J. found that the vets "… *were entitled to decline to work at the very least 16% of the shifts offered to them without that refusal having any consequences for*

their contracts" (para. 49) and that there was no commitment to "… *work on an ongoing basis*" (para. 51) which led him to find that the determination by the EAT concerning the mutuality of obligations was flawed. Edwards J. did not find that the vets worked pursuant to a contract for services but rather found that the EAT was in error when considering each question about which they should have asked themselves.

30. Following the order for remittal made by Edwards J., the EAT felt that it had been instructed to change its original determination and found, in its second determination dated 31st July, 2009, that the vets were engaged under a contract for services.

31. The judgment delivered by the High Court, *Barry v. Minister for Agriculture* [2011] IEHC 43 (unreported, High Court, Hedigan J., 9th February, 2011) led to the Supreme Court overturning the High Court in *Barry v. Minister for Agriculture* [2015] IESC 63 (unreported, Supreme Court, 16th July, 2015). Charleton J., in the concluding paragraph of his concurring judgment, explained:- "*The case of whether the vets were employed by the respondent Minister or were, instead, self employed persons doing shifts at the Mitchelstown meat plant is a matter of fact for the* [EAT] *on a rehearing of the matter.*" (para. 17).

32. The saga continues because the subsequent ruling of the EAT is now the subject of further High Court proceedings which were commenced by the issue of a special summons on 28th April, 2017, with record number 2017/199 SP.

33. The consideration of the claims made by the vets indicate some of the difficulties arising in first instance applications of the law to facts established where there is a dispute about whether workers have a contract of services or a contract for services. In truth, there is no comprehensive statutory or common law definition of a "contract for services" or "contract of service" even though those terms are regularly used. Those adjudicating at first instance, whether a commissioner or court, may be tempted to adopt a box-ticking exercise when considering if an appellant or claimant is an employee or not. In fact, classification needs a careful and flexible understanding of relationships.

Substitution

34. Clause 12 of the agreement provided:-

"*The Company accepts the Contractor's right to engage a substitute delivery person should the Contractor be unavailable at short notice. Such person must be capable of performing the Contractor's contractual obligations in all respects.*"

35. The Commissioner found as a material fact that the substitution clause permitted drivers to substitute another of the appellant's drivers when they were unavailable and that the substitute driver would be paid by the appellant in respect of that shift of work.

Appellant's submissions

36. The appellant submits that the Commissioner wrongly concluded "*that the drivers were not genuinely entitled to sub-contract the performance of their duties*" apparently "*based on two factors: first, that any replacement drivers were paid directly by the appellant and, second, that such drivers had to be approved of by, and entered into a separate contract with, the appellant.*"

37. The appellant contends that there was no requirement to arrange for the work to be done by another person. There was indeed a right of substitution but there was no obligation, according to the appellant. This Court is only concerned with the application of the law which concerns "*substitution*" and is not concerned with the findings of fact made by the Commissioner.

38. The various judgments relied upon by the appellant:-

(i) *Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare* [1997] IESC 9, [1998] I.R. 34, (**"*Henry Denny*"**);

(ii) *Castleisland Cattle Breeding v. Minister for Social Welfare* [2004] IESC 40, [2004] 4 I.R. 150 (**"*Castleisland*"**);

(iii) *Tierney v. An Post* [1999] IESC 66, [2000] 1 I.R. 531 (**"*Tierney*"**);

(iv) *ESB v. Minister for Social Community and Family Affairs & Ors* [2006] IEHC 59, [2006] ITR 63,

contemplate, according to the appellant, that the right (as opposed to the obligation) to substitute a worker for oneself is not in itself indicative of the employment relationship.

39. The appellant contends that the distinction posited in *Weight Watchers* between two distinctive forms of substitution is not recognised in Irish law. The appellant further submits that the right of an employer to approve substitutes does not indicate an employment relationship. The fact that the appellant exercised a significant measure of control over the drivers' choice of delegates is insufficient to indicate the existence of an employment relationship, according to the appellant.

Revenue's submissions

40. Revenue submits that in reality, the drivers did not have freedom to substitute but could nominate a replacement approved by and paid for directly by the appellant.

41. Relying on *Weight Watchers*, Revenue contends that true substitution occurs when the person (the driver in this appeal) is free to have the work performed by himself or by some other person and that he (the driver) will be paid for the work. Critical, according to Revenue, is the provision for payment to the replacement driver by the appellant.

42. Revenue distinguished the facts described in the judgment of the Supreme Court in *Castleisland* where statutory regulations were found to have required approval. Revenue also distinguishes *Tierney* where the applicant there was entitled to employ others to assist in the post office business. In this appeal, the replacement of one driver for another driver requires selection from a pool of drivers maintained by the appellant.

Integration

43. Integration is a concept which was described by Denning L.J. in *Stevenson Jordan and Harrison Ltd v. MacDonald and Evans* [1952] 1 TLR 101 at p. 111 as follows:-

> "*One feature which seems to run through the instances is that, under a contract of service,* ***a man is employed as part of the business and his work is done as an integral part of the business*** *whereas under a contract for services, his work, although done for the business is not integrated into it but is only accessory to it.*" (emphasis added.)

Appellant's submissions

44. The appellant emphasises the integration test applied in *Re Sunday Tribune Ltd* [1984] I.R. 505 (**"*Sunday Tribune*"**) when submitting that the Commissioner implied that the sole issue to be determined is whether the kind of work done by the drivers (i.e. pizza deliveries) is integral to the business of the appellant. The integration test, according to the appellant "*is entirely different from a test of integration which merely asks whether the work being performed was integral to the business*" which "*was erroneously applied*" by the Commissioner. The appellant submits that the drivers must be regarded as "*only accessory*" to the business of the appellant. If the broader integration test had been applied (i.e. did the drivers form part of the appellant's organisation?) there should have been a finding of contracts for services between the drivers and the appellant because the drivers, as opposed to their work, were not integral to the business of the appellant.

Revenue's submissions

45. Revenue submits that the drivers play a vital role and are essential components of the appellant's business. Revenue distinguishes the facts in *Sunday Tribune* on the basis that each of the reporters there had different roles for the newspaper. In this appeal the drivers are engaged under similar terms and conditions which fact supports the integration of the drivers.

Terms of the contract

46. The Commissioner found the following facts:-

(i) Contrary to clause 4 of the contract, vehicles were not available to rent;
(ii) The appellant prepared invoices which the drivers signed;
(iii) Some drivers were asked to assemble boxes when time permitted.

47. The appellant argues that the Commissioner erred in law in failing to give proper weight to the actual terms and conditions of the contract. The appellant submits that the Commissioner erred in her statement at para. 155 of the determination: "[t]*he law is unambiguous as regards the minimal weight to be attached to the description of the drivers in the written contracts as 'independent contractors'.*" The appellant argues that the Commissioner effectively paid little or no attention to the wording used in the written (alleged) umbrella contract.

48. Revenue refer to repeated judicial statements (Keane and Murphy JJ. In *Henry Denny* at pp. 51 and 53 respectively, and Geoghegan J. in *Castleisland* at p. 161) to the effect that the decisive factor is to look at how the contract is worked because wording is not definitive of the nature of the work.

Conclusions

Mutuality

49. The description by the Commissioner about an obligation for drivers to initiate an agreement should be taken in context. The Court understands that the initiation of the relevant contract for each roster depended on a driver making himself available. The Commissioner did not err in characterising the umbrella and hybrid agreements.

50. The Court is not persuaded that mutuality of obligations always requires an obligation to provide work and to complete that work on an *ongoing basis* in the manner contended for by the appellant. "Ongoing" does not necessarily connote immediate continuation or a defined period of ongoing. There is no binding precedent to suggest that the ongoing basis between the appellant and the drivers does not meet the criteria required. The appellant bears the burden of establishing that the application of "ongoing" as found by the Commissioner was an error of law. This case is concerned with whether the Commissioner misstated or misunderstood the law about the mutuality of obligations. The Commissioner, in relying upon *Weight Watchers* did not go against Irish law but rather recognised the necessity to adapt to modern means of engaging workers. The appellant agreed to provide work when the appellant needed the driver, who notified the appellant about his or her availability. The Commissioner considered the facts and applied her understanding of the law which the appellant has not established to have been incorrect. The appellant has not discharged its burden to establish that the Commissioner misunderstood or misapplied the law in Ireland concerning the concept of mutuality.

51. The reference in *Barry* to the need for an ongoing series of mutual obligations should be understood having regard to the claims in *Barry* which related to redundancy entitlements that depended on length of service. Revenue correctly submits that hybrid contracts of employment are relevant in tax or PRSI cases such as that now before the Court. Undoubtedly, umbrella and hybrid contracts require more ongoing commitments in unfair dismissal, redundancy and other labour rights cases due to the statutory triggers based on defined periods of employment. The

Commissioner took the facts into account when applying the law which is admittedly difficult to summarise for all circumstances. Mutuality of obligations can occur under an umbrella contract which is modified by the operation of ongoing relationships that carry obligations for both sides of the contract of employment.

52. The appellant sought to distinguish the findings in the judgments in *Pimlico Plumbers Ltd v. Smith* [2018] UKSC 29, [2018] 4 All ER 641 and *Autoclenz Ltd v. Belcher* [2011] UKSC 41, [2011] 4 All ER 745 that there were agreed number of hours despite the written express terms to the contrary. Paragraphs 81 to 84 of the determination set out following are logical and understandable:-

> "*81. While there are differences in* Pimlico *and in* Autoclenz *(i.e. the contract in* Pimlico *specified a minimum number of hours to be worked while the contract in* Autoclenz *did not actually reflect what was agreed between the parties) the reasoning in these cases is of assistance insofar as it does not support the proposition that if there is such a clause (i.e. a clause which provides that the provider of work has no obligation to offer work and the putative recipient has no obligation to accept work) that mutuality of obligation is absent.*
>
> *82. In this appeal, the right of a driver to cancel a shift was qualified by the requirement to engage a substitute, to provide advance notification to the Appellant and to work out the remainder of the shifts in the series which had been agreed.*
>
> *83. I agree with the reasoning of Briggs J. in* Weight Watchers (UK) Ltd. *and I conclude that a contract which provides drivers with the right to cancel shifts at short notice does not relieve a driver of work related obligations in the manner contended for by the Appellant.*
>
> *84. Thus I determine that the requirement of mutuality was satisfied in the individual contracts entered into between the Appellant and the drivers, each contract representing an assignment of work (comprising one or more shifts), and that these obligations were not invalidated by clauses 12 and/or 14 of the written agreement, and were not invalidated on any other basis.*"

53. The written "umbrella" contract did indeed require a driver to initiate an agreement with the appellant.

54. I cannot criticise the Commissioner's findings that:

(i) A driver who wanted work had to put his name on the availability sheet;
(ii) Once rostered by the appellant, there was a contract which retained mutual obligations.

55. In the circumstances the right to cancel a shift at short notice imposed obligations to engage a substitute and to work out the remainder of the shifts in the series.

56. This scenario is different from the engagement of a self-employed tradesman or solicitor. Drivers, unlike those service providers, work rosters and shifts. A self-employed plumber may agree to service a boiler but the plumber has inherently tremendous latitude in that task unlike the drivers who had ongoing obligations.

57. This Court has not been satisfied by the appellant that the Commissioner erred in the determination under the heading mutuality of obligations.

Substitution

58. The reliance by the appellant on the Supreme Court judgment in *Castleisland* conveniently overlooks the fact that the inclusion of terms requiring approval for substitutes occurred in that social welfare appeal due to the necessity to comply with statutory regulations for artificial inseminators. The appellant imposed the terms about substitution.

59. The Commissioner determined that "[t]*he absence of an ability to genuinely subcontract is a factor which indicates that the drivers worked under contracts of service as opposed to contracts for services.*" The Commissioner did not err in applying the fact that drivers did not hire assistants; rather one driver was replaced with another driver from the appellant's pool of drivers. The substitute was paid by the appellant. A substitute was not a sub-contractor of the driver. Moreover, the driver and substitute left it to the appellant to prepare invoices for them respectively.

60. This factor of substitution does not avail the appellant as is urged on its behalf. The appellant has failed to satisfy this Court that the Commissioner erred in her application of the law in this regard.

Integration

61. Paragraphs 120 to 125 of the determination contain a detailed consideration and description of the appellant's delivery service and elements of integration which point to satisfying the integration test. The Commissioner cited *Uber BV v. Aslam* UKEAT/0056/12/DA, [2018] IRLR 97 (**"*Uber*"**) concerning a minimum wage claim for Uber drivers (which was upheld (2-1) in the Court of Appeal in *Uber BV v. Aslam* [2018] EWCA Civ 2748, [2019] 3 All ER 498, on 19th December, 2018) in support of her conclusion that the pizza delivery service is fundamental to the business "*and is not merely accessory to it*."

62. The Commissioner did not hear either side about whether *Uber* (the Court of Appeal judgment was delivered after the date of her determination) could be distinguished. The appellant submits that *Uber* relates to a category of "workers" which is an intermediate category between "independent contractors" and "employees" provided for under s. 230(3)(b) of the UK Employment Rights Act 1996.

63. Despite the indignation expressed on behalf of the appellant, the distinction between a "worker" and an "employee" in the UK legislation was not central to the reliance placed by the Commissioner on *Uber* and the other UK judgements cited in the determination for the integration and mutuality issues.

64. This case stated is not a judicial review of the procedures adopted by the Commissioner. The Court repeats that the appellant bears the onus of satisfying this Court that the Commissioner erred in her application of the law in relation to integration.

65. Having read paras. 120 to 125 of the determination with the objective of scrutinising the submission that the Commissioner focussed only on the nature of the delivery business as opposed to the functions and obligations of the drivers, I conclude that the Commissioner did have regard to the integration of the drivers into the business of the appellant. The reasoning in the determination is not flawed; the Commissioner looked at many factors, including the requirement for drivers to:-

(i) Wear uniforms and place logos on their cars;

(ii) Reassure customers that they were dealing with personnel of the appellant;

(iii) Maintain a coherent operation under the care of the appellant;

(iv) Take telephone orders from the appellant and not the customers of the appellant.

Written terms

66. Written terms in an umbrella agreement, which can be used piecemeal or in ways which will suit the practicalities of those who engage and those who work, were interpreted by the Commissioner at first instance with an eye on the reality of the relationships between drivers and the appellant. The words of Keane J. in *Henry Denny* (p. 53) about the written terms having "*marginal*" value echo in this regard. Moreover, Geoghegan J. in *Castleisland* at p. 150 referred to the necessity to "*…look at how the contract is worked out in practice as mere wording cannot determine its nature*". In short, this Court sees no real merit in the submissions made on behalf of the appellant under this heading. The Commissioner found the facts, summarised her understanding of the law and applied same without an error which has been established to the satisfaction of this Court.

Point not pursued

67. The Court appreciates the concession for the appellant that the decision of the Social Welfare Appeals Office in August 2008 concerning a self-employed worker for a pizza enterprise using the same trading name as that of the appellant has no effect or relevance to the matters under consideration in this Court.

Order

68. Therefore, the Court will make an order to the effect that the Commissioner was correct in law and I will hear counsel about the precise terms of the order for each question.

Postscript

69. When the parties returned to Court to discuss the order, the respondent addressed the Court about the wording at para. 36 by referring to the actual written submissions. Paragraph 36 above now incorporates the precise wording used in the submissions with the consent of both parties.