Neutral Citation Number: [2011] IEHC 510

THE HIGH COURT

2010 459 SP

IN THE MATTER OF THE SOCIAL WELFARE CONSOLIDATION ACT 2005

BETWEEN

BRIGHTWATER SELECTION (IRELAND) LIMITED

APPELLANT

AND

MINISTER FOR SOCIAL AND FAMILY AFFAIRS

RESPONDENT

JUDGMENT of Mr. Justice Paul Gilligan delivered the 27th day of July, 2011

Introduction

1. This is an appeal on a point of law against the decision of an Appeals Officer dated 15th April, 2008 which upheld a Deciding Officer's decision which had found that Ms. Kerrie-Anne Keenan was employed under a contract of service by the Appellant during the period 14th March, 2002 to 30th September, 2002 and that her employment was insurable for all benefits and pensions under the Social Welfare Acts at PRSI Class A rate of contribution.

2. The appellant referred the decision under appeal to the Chief Appeals Officer pursuant to s. 318 of the Social Welfare (Consolidation) Act 2005 (hereafter referred to as "the 2005 Act"), but the Chief Appeals Officer declined to revise the decision because it did not appear to her that the decision of the Appeals Officer was erroneous by reason of some mistake having been made in relation to either the law or the facts.

Factual Background

3. Ms. Keenan registered with the appellant in June 2001. The appellant arranged for an interview for Ms. Keenan for a position in the administration department of University College Dublin (hereafter referred to as "U.C.D.") on 6th March, 2002. Ms. Keenan was subsequently offered a temporary position as a financial accountant on 13th March, 2002 and commenced her engagement with U.C.D. on 14th March for a 31 week period.

4. The only interaction between Ms. Keenan and the appellant consisted of the filing of weekly timesheets and the corresponding payment by the appellant of Ms. Keenan's salary into a designated bank account. Tax and the employee and employer's element of social insurance contributions were deducted and paid by the Appellant to the Revenue Commissioners. There does not appear to have been any obligation on the appellant to provide work for Ms. Keenan nor any corresponding obligation on Ms. Keenan to work on behalf of the appellant.

5. Following a newspaper article in which a spokeswoman for the Minister for Social and Family Affairs indicated that a significant refund would be made to employment agencies due to a lacuna in the law, the appellant engaged in discussions and correspondence with the respondent for the purposes of procuring a refund of the employer's element of the social insurance contributions. After a process of consultation, the appellant and respondent agreed that Ms. Keenan would be selected as the mutually agreed agency worker for the purposes of a test case for determining the insurability of agency workers and the associated entitlement to a refund.

6. The Deciding Officer within the Department of Social and Family Affairs determined that, while Ms. Keenan was under the day to day control and direction of U.C.D. with regard to how she carried out her work, she was employed by the appellant based on the agreement between the parties entitled 'Terms of Employment for Temporary Workers'. The decision of the Deciding Officer was appealed to the Social Welfare Appeals Officer. After an oral hearing in which both sides made submissions, the Appeals Officer affirmed the decision of the Deciding Officer on 17th April, 2008.

Relevant Statutory Provisions

7. Section 9 of the Social Welfare (Consolidation) Act 1993 (hereafter referred to as "the 1993 Act") defines an "employed contributor" as follows:-

> "a) every person who, being over the age of 16 years and under the pensionable age, is employed in any of the employments specified in Part I of the First Schedule, not being an employment specified in Part II of that schedule, shall, subject to paragraph (b), be an employed contributor for the purposes of this Act, and
>
> b) every person, irrespective of age, who is employed in insurable (occupational injuries) employment shall be an employed contributor and references in this Act to an employed contributor shall be construed accordingly, and
>
> c) every person becoming for the first time an employed contributor shall thereby become insured under this Act and shall thereafter continue throughout his life to be so insured."

8. Part I of the First Schedule to the 1993 Act specifies the type of employments referred to by section 9 and originally included 11 different categories of employment. The first category includes:-

> "Employment in the State under any contract of service or apprenticeship, written or oral, whether expressed or implied, and whether the employed person is paid by the employer or some other person, and whether under one or more employers, and whether paid by time or by the piece or partly by time and partly by piece, or otherwise or without any money payment."

Refund Entitlement
9. The appellant commenced operations in 1999, at which time it was informed that it was required to operate Pay As You Earn tax (hereafter referred to as "PAYE") and Pay Related Social Insurance contributions (hereafter referred to as "PRSI") and that it was required to pay both the employee's and the employer's contributions thereto on behalf of all the temporary staff it placed with user enterprises. On 16th March, 2003, following the publication of an article in the Sunday Tribune, the appellant became aware that other employment agencies were not operating the employer's element of the PRSI contribution. Subsequently, the appellant became aware that another agency, PARC Aviation, had not paid the PRSI contribution for a number of years as a result of a decision made by the Social Welfare Appeals Officer which determined that the agency workers employed by PARC were not employees under a contract of service.

10. Following this decision, the Social Welfare (Miscellaneous Provisions) Act 2003 (hereafter referred to as "the 2003 Act") was introduced, section 19 of which amended the 1993 Act by inserting *inter alia* the following in section 9:-

> "(4) For the purposes of this Part, with regard to employment specified in paragraph 13 (inserted by section 19 of the Social Welfare (Miscellaneous Provisions) Act 2003, of Part 1 of the First Schedule, the person who is liable to pay the wages or salary of the individual concerned in respect of the work or service concerned is deemed to be the individual's employer."

11. Section 19 of the 2003 Act also inserted the following paragraph into Part 1 of the First Schedule to the 1993 Act:-

> "13. Employment whereby an individual agrees with another person, who is carrying on the business of an employment agency within the meaning of the Employment Agency Act 1971 and is acting in the course of that business, to do or perform personally any work or service for a third person (whether or not the third person is a party to the contract and whether or not the third person pays the wages or salary of the individual in respect of the work or service)."

Prior to the introduction of the 2003 Act, there was no obligation on employment agencies to operate tax and social insurance contributions on the monies paid to agency workers. An agency worker could only be regarded as an employee of the employment agency if they were engaged under a contract of service.

12. The appellant submits that the dispute between the appellant and the respondent concerns whether Ms. Keenan was employed under a contract of service and further submits that Ms. Keenan was not employed under such contract.

13. The agreement between the appellant and Ms. Keenan is pursuant to the 'Terms of Engagement for Temporary Workers', paragraph 8 of which provides *inter alia* as follows:-

> "a) PAYE Employees;
>
> When engaged on a temporary assignment, Brightwater Selection is solely responsible for your remuneration. You will be paid an hourly rate which will be determined prior to the commencement of an assignment and subject to deductions for the purposes of PRSI, PAYE or any other purpose for which the Company is required by law to made [sic] deductions. Payment of wages will be made weekly and only after receipt of a time sheet signed by the Client agreeing the hours worked by you."

Appeal Process
14. Section 327 of the 2005 Act provides 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."

15. The statutory appeal provision provides only for appeal on a point of law to this Court.

16. A question arises as to the court's jurisdiction to interfere with the decision of the Appeals Officer on appeal. In *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 IR 34, Hamilton C.J. expressed the view 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 unsustainable 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 appeal or judicial review."

17. The question of what constitutes a matter of law, and what constitutes a matter of fact was addressed by the Supreme Court in *National University of Ireland Cork v. Ahern* [2005] IESC 40, where McCracken J., with whom the other members of the Court agreed, stated:-

> "The respondents submit that the matters determined by the Labour Court were largely questions of fact and that matters of fact as found by the Labour Court must be accepted by the High Court in any appeal from its findings. As a statement of principle, this is certainly correct. 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 on 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 by account by it in determining the facts,

is clearly a question of law and can be considered on an appeal…"

18. In the determination of whether or not to allow an appeal, therefore, this Court must consider whether the Appeals Officer based the decision on an identifiable error of law or a finding of fact that is not sustainable. It follows that the impugned elements of the Appeals Officer's decision should be looked at in some detail at this juncture.

Control

19. The Appeals Officer concluded at page 28 and 29 of his decision as follows:-

> "In considering the control test I am clearly satisfied that Ms. Keenan was clearly subject today-today [sic] control which was exercised over her work by UCD. However I am also satisfied that overall there was a much greater degree and level of control exercised by Brightwater over Ms. Keenan, particularly with regard to terms of engagement, the requirement of her to notify them of any changes in relation to responsibility, hours worked, pay, grievances, sickness, permanent employment, to produce a times sheet and to follow various other instructions."

20. The appellant submits that the Appeals Officer incorrectly relies on the 'Terms of Engagement for Temporary Workers' and that the purpose of that agreement was to facilitate the manner in which the appellant conducted its business rather than an instrument to exercise control over Ms. Keenan by the appellant.

21. In determining whether control exists, the alleged employer must not only have the right to tell the individual what work to do, but also to dictate the manner in which this work was done. In *Roche v. Kelly*, [1969] IR 100, Walsh J. stated that:-

> "while many ingredients may be present in the relationship of master and servant, it is undoubtedly true that the principal one, and almost invariably the determining one, is the fact of the master's right to direct the servant not merely as to what to be done but as to how it is to be done."

22. In the subsequent case of *In re Sunday Tribune* [1984] IR 505, Carroll J. held:-

> "The simple test is whether the employer possessed the right not only to control what work the employee was to do but also the manner in which the work was to be done."

23. Control, although not determinative of the issue of employment, is an important factor to be taken into account when deciding whether an individual is employed under a contract of service. The Appeals Officer does not appear to have directed his mind to whether the appellant in the case at hand possessed the power to direct the manner in which work was to be done by Ms. Keenan. In so doing, he erred in law. The correct test, although it is far from a stand-alone criterion, is whether the body in question possessed or exercised the right to control the individual both as regards the work to be done and also as regards the manner in which the work is to be done.

Interpretation of the PARC Decision

24. The Appeals Officer states in his decision as follows:-

> "Having considered the Appeals Officer's decision in the Parc Aviation case I am not satisfied that the engaged persons in the Parc Aviation case can be compared to Ms. Keenan in that they were expert and highly skilled aircraft maintenance engineers who used their own specialized tools whereas she was only a temporary accountant."

25. The appellant submits that the Appeals Officer erred in law in interpreting the decision in *PARC Aviation* Appeal No. 98/12147. However, I believe that drawing the distinction between the instant case and that of the appellants in *PARC* was a matter of fact within the jurisdiction of the Appeals Officer and, as such, should not be disturbed unless it is unsustainable. I believe that the finding of fact was one the Appeals Officer was entitled to hold and, as such is sustainable by the factual matrix.

Contracts *Sui Generis*

26. It is open to a court or tribunal to hold that an individual is engaged under neither a contract of service nor a contract for services, but instead under a contract sui generis. In *Construction Industry Training v. Labour Force Ltd.* [1970] 3 All ER 220, Cooke J. concluded as follows:-

> "I think there is much to be said for the view that, where A contracts with B to render services exclusively to C, the contract is not a contract for services, but a contract *sui generis*, a different type of contract from either of the familiar two."

27. It was held on the facts of that case that no contract existed between the end-user and the agency worker, and that the contract between the agency and the agency worker was not a contract of service. The contract was described as a contract *sui generis*, or contract of its own kind.

28. In *Minister for Labour v. PMPA Insurance Company* [1986] JISLL 215, the High Court in Ireland adopted a similar approach. There, a typist had been employed by PMPA on a temporary basis, and had been engaged through an employment agency. Under the terms of the contract, the agency would pay PMPA and it was PMPA who controlled and supervised the typist's work. Barron J. considered the decision in *Construction Industry Training* and held that two separate contracts existed; one between PMPA and the agency and the other between the typist and the agency. Barron J. found, however, that no contract existed between PMPA and the typist. Barron J. stated as follows:-

> "So far as [PMPA] was concerned its rights and duties in relation to the employee were enforceable only under its agreement with the [agency] and against the [agency]. So far as the employee was concerned her rights and duties equally were enforceable solely under the terms of her agreement with the [agency] and against the [agency]. In such a contractual situation I see no room for any implied contractual relationship between [PMPA] and the employee."

29. In *Minister for Agriculture and Food v. John Barry & Ors.* (7th July, 2008, Unreported) HC, the respondents had worked as temporary veterinary inspectors (TVIs) at a meat factory. In order to become a TVI, each respondent had to apply for approval from the appellant. Once approved, each respondent applied in writing to the appellant to be included on a TVI panel, from which they would periodically selected to do work. The EAT decided that the respondents had all been employed under contracts of service and

had therefore been employees of the appellant. Edwards J. held that the EAT had erred in law by formulating the issue as a straight choice between a contract of service or a contract of services and stated that other possibilities should have been considered, such as whether each respondent was employed under a single contract (either of service or for services), or whether on each selection they entered into a new contract, or whether the relationship had been refined into an enforceable "umbrella" contract by virtue of a course of dealing over a lengthy time. Edwards J. stated as follows:-

> "It is possible that the Employment Appeals Tribunal decided of its own motion to adopt this approach, and there was no demurral by the parties, or it may be that this approach was suggested by the parties and agreed to by the tribunal. However, even if was the case that the parties themselves were of the view that it was a straight choice between a single contract of service and a single contract for services, that would not have been decisive of the matter or binding on the tribunal. It seems to this court that there were a much wider range of possibilities, and it was unjustifiable to limit the possibilities to just two."

30. It is well accepted that other characters of contract exist outside of the 'contract of service' and 'contract for services' classifications. In the case at hand, I am of the opinion that the Appeals Officer erred in law in failing to direct his mind to whether the contract between the appellant and Ms. Keenan constituted a contract *sui generis*, or indeed in failing to consider the existence of an alternative category to those of 'contract of service' or 'contract for services'.

Mutuality of Obligation

31. The English courts have attempted to resolve the issue of the employment status of agency worker on the basis of whether 'mutuality of obligation' existed between the parties. It should be noted in advance that the majority of the case-law in relation to the concept of mutuality of obligation concerns the determination of employment status as between agency worker and end-user, and not as between agency worker and the agency itself. Nonetheless, an analysis of the jurisprudence in this area is necessary in order to determine the importance of the concept as regards the determination of employment status.

32. In *Nethermere (St Neots) Ltd. v. Taverna and Gardiner*, [1984] IRLR 240, the concept of 'mutuality of obligation' was described as "an irreducible minimum" of a contract of service. Stephenson LJ described mutual obligations as follows:-

> "… a continuing obligation on the employer to provide work and pay and a continuing obligation on the employee to do the work provided."

33. Stephenson LJ went on to ask:

> "Does the law require any and what mutual obligations before there can be a contract of service?"

34. The Judge concluded:

> "There must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service."

35. The mutuality of obligation approach can have harsh results, particularly for more casual working arrangements. In *Carmichael and Leese v. National Power Plc.* [1999] 1 WLR 2042, the applicants were engaged as tour guides and worked on a 'casual as-required basis'. The defendants paid the workers, and deducted income tax and national insurance payments from their wages, and the workers wore the company uniform, received company training and used a company vehicle where necessary. The industrial tribunal found that the applicants were not employees, which decision was ultimately upheld by the House of Lords. Although the court held that documentation was not determinative of the existence or otherwise of a particular relationship, Lord Irvine LC concluded:-

> "… that the documents did no more than provide a framework for a series of ad hoc contracts of service or for services which the parties might subsequently make; and that when they were not working as guides they were not in any contractual relationship with the CEGB. **The parties incurred no obligations to provide or accept work**, but at best assumed moral obligations of loyalty in a context where both recognised that the best interests of each lay in being accommodated to the other… [T]he words imposed no obligation on Mrs. Leese and Mrs. Carmichael, but intimated that casual employment on the pay terms stated could ensue as and when the CEGB's requirements for the services of the guides arose.
>
> If this appeal turned exclusively – and in my judgment it does not – on the true meaning and effect of the documentation of March 1989, then I would hold as a matter of construction that no obligation of the CEGB to provide casual work, nor on Mrs. Leese and Mrs. Carmichael to undertake it, was imposed. There would therefore be **an absence of that irreducible minimum of obligation necessary to create a contract of service...**" (Emphasis added)

36. The English Court of Appeal has adopted an imaginative approach in relation to agency workers in order to take into account the atypical nature of their employment status. In *Dacas v. Brook Street Bureau (UK) Ltd.* [2004] EWCA Civ 217, the courts signified their willingness to imply a contract of employment in the absence of an express agreement between the agency worker and end-user. The applicant in that case was registered with an employment agency. The agreement between the applicant ant the agency expressly stated that it did not give rise to a contract of employment. The applicant was assigned to work as a cleaner in a hostel for a Borough Council. Her work was done at the council's premises and under its supervision and control. The agency had a separate contract with the council that set the applicant's rates of pay, and the agency paid the applicant's wages from payments made to it by the council. The Employment Tribunal held that the applicant was neither employed by the agency nor the council. The applicant only appealed the decision as against the agency, but the court considered what the position would have been had she appealed against the council. Mummery LJ stated:-

> "The formal written contracts between [the applicant] and [the agency] and between [the agency] and the Council relating to the work to be done by her for the Council may not tell the whole of the story about the legal relationship affecting the work situation. They do not, as a matter of law, necessarily preclude the implication of a contract of service between [the applicant] and the Council. There may be evidence of a pattern of regular mutual contact of a transactional nature between [the applicant] and the Council, from which a contract of service may be implied by the tribunal. I see no insuperable objection in law to a combination of transactions in the triangular arrangements, embracing an express contract for services between [the applicant] and [the agency], an express contract between [the agency] and the Council and an implied contract of service between [the applicant] and the Council, with [the agency] acting in certain agreed respects as an agent for [the applicant] and as an agent for the Council under the terms of the express written agreements.

> I approach the question posed by this kind of case on the basis that the outcome, which would accord with practical reality and common sense, would be that, if it is legally and factually permissible to do so, the applicant has a contract, which is not a contract of service, with the employment agency, and that the applicant works under an implied contract, which is a contract of service, with the end-user and is therefore an employee of the end-user with a right not to be unfairly dismissed. The objective fact and degree of control over the work done by [the applicant] at West Drive over the years is crucial. The Council in fact exercised the relevant control over her work and over her. As for mutuality of obligation, (a) the Council was under an obligation to pay for the work she did for it and she received payment in respect of the work from [the agency], and (b) [the applicant], while at West Drive, was under an obligation to do what she was told and to attend punctually at stated times."

37. The court concluded that the applicant was an employee based on the element of control exercised over the applicant and the existence of mutuality of obligation.

38. The Court of Appeal in *James v. Greenwich London Borough Council* [2008] EWCA Civ 35, limited the circumstances in which a contract of employment could be implied between an end-user and the agency worker. Mummery LJ held that:-

> "[The Employment Appeals Tribunal was] entitled to conclude that [the applicant] was not an employee of the Council because there was no express or implied contractual relationship between her and the Council. Her only express contractual relationship was with the employment agency… The Council's only express contractual relationship was with the agency. There were no grounds for treating the express contracts as anything other than genuine contracts."

39. Mummery LJ pointed out that the mutuality of obligation test was only of critical importance in deciding whether the agreement between the parties is a contract of employment, and not of significant assistance in cases where the question is whether or not a contract existed between the parties at all:-

> "[In] this case the question of the presence of the irreducible minimum of mutual obligation, which was addressed by the ET and … the Council …, was not the essential point. The mutuality point is important in deciding whether a contract, which has been concluded between the parties, is a contract of employment or some other kind of contract. In this case, on the findings of fact by the ET about the arrangements, how they operated in practice, about the work done by [the applicant] and the conduct of the Council, there was no contract at all between [the applicant] and the Council: there was no express contract and there were insufficient grounds for requiring the implication of a contract."

40. A comprehensive test was adopted by McKenna J. in *Readymix Concrete (South East) Ltd. v. Minister for Pensions and National Insurance*, [1968] 2 QB 497, where he adopted an open-ended approach to the question of determining employment status, stating:-

> "A contract exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work for his master. (ii) He agrees, expressly or implicitly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with it being a contract of service… The servant must be obliged to provide his own work and skill. Freedom to do a job by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be."

41. In *Diageo Global Supply v. Mary Rooney* [2004] ELR 133, the Irish Labour Court applied the three-pronged test formulated by MacKenna J. in *Ready Mixed* to the question of whether an agency worker was under a contract of employment. The applicant worked part-time for the respondent company and was under the supervision and control of the company, but her wages were paid by a recruitment agency. First, the court held that the applicant did work under a contract for the respondent company:-

> "While the agreement was not reduced to writing it defined the rights and duties of the parties *inter se*, and there was valuable consideration. There was also mutuality of obligations in the sense that the respondent undertook to provide work and the claimant undertook to perform that work. Whilst it was agreed that the consideration, in the form of wages, would be paid through IRC, this does not mean that consideration did not pass from the respondent. The court is satisfied that IRC were acting on behalf of the respondent in paying the claimant's wages from funds provided by the respondent."

42. Secondly, the court held that the contract between the applicant and the respondent company was one of service largely because of the control exercised over the applicant by the respondent, particularly as the respondent directed the applicant as to her work at all times. Third, while accepting that payment of her remuneration through the agency was not consistent with a finding of a contract of employment, the court was satisfied that the agency was at all times acting on behalf of the respondent.

43. For illustrative purposes, the test in *Henry Denny & Sons v. Minister for Social Welfare* [1998] 1 IR 34, should be set out at this juncture. Keane J. (as he then was) referred to the English decision of *Market Investigations v. Minister of Social Security* [1969] 2 QB 173, where Cooke J. noted that no exhaustive list could be compiled of considerations which are relevant in determining whether a person is under a contract of employment. Keane J. concluded that:-

> "[W]hile each case must be determined in the light of 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 the person is engaged in business on his or her own 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 she derives from the business is dependent on the efficiency with which it is conducted by him or her."

44. In *Minister for Agriculture and Food v. John Barry & Ors.* (7th July, 2008, Unreported), Edwards J., as set out above, first held that the EAT had erred in law by formulating the issue as a straightforward choice between a contract of service or a contract of services. Edwards J. secondly held that the EAT had erred in law in its approach to the correct test to be applied. The EAT had first looked at whether mutuality of obligation existed between the parties. Edwards J. held that, while the mutuality of obligation approach was an important filter, in that in its absence the Court need not go further in examining the relationship, the existence of such an obligation could not be determinative of the issue. He further held that the EAT had been incorrect in deriving a mutuality of

obligation from an implied agreement as between the parties where he found that no such agreement existed.

45. Edwards J. described the requirement of mutuality of obligation as follows:-

> "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. It was characterised in *Nethermere (St Neots) Ltd. v. Gardiner* [1984] I.C.R. 612 at p. 632 as the 'one sine qua non which can firmly be identified as an essential of the existence of a contract of service.' Moreover, in *Carmichael v. National Power plc.* [1999] I.C.R. 1226 at p.1230, it was referred to as 'that irreducible minimum of mutual obligation necessary to create a contract of service'. Accordingly the mutuality of obligation test provides an important filter. Where one party to a work relationship contends that that relationship amounts to a contract of service, it is appropriate that the court or tribunal seized of that issue should in the first instance examine the relationship in question to determine if mutuality of obligation is a feature of it. If there is no mutuality of obligation it is not necessary to go further: whatever the relationship is, it cannot amount to a contract of service. However, if mutuality of obligation is found to exist, the mere fact of its existence is not, of itself, determinative of the nature of the relationship and it is necessary to examine the relationship further."

46. Thirdly, Edwards J. held that the EAT had misconstrued the decision of Keane J. in *Henry Denny* when they had referred to it as a "single composite test", the enterprise test. Edwards J. held as follows:-

> "Contrary to a misapprehension held in some quarters, I do not believe that it is a correct interpretation of the passage in question to regard it as the formulation by Keane J. of "a single composite test", either for determining the nature of the work relationship between two parties, or even for determining whether a particular employment is to be regarded as governed by a contract for services or a contract of service which is a somewhat narrower issue. To the extent that this passage from his judgment has given rise to a degree of confusion, I believe that this confusion derives primarily from misguided attempts to divine in the judgment the formulation of a definitive, "one size fits all", test in circumstances where the judge was not attempting to formulate any such test. In relation to the rush to discern a test, and to label it, it seems to this court that this is a classic example of the type of situation where a particular approach that has been advocated is subsequently labelled conveniently, but mis-characteristically, as the "such and such test", a step that is taken with the intention that it should be helpful, but which proves to be ultimately unhelpful, because the so called test turns out to be insufficiently discriminating. Put simply, such loose labelling can often create more problems than it solves. In the context of trying to correctly characterise the nature of a work relationship between two parties, I think it can sometimes be unhelpful to speak of a "control test", or of an "integration test", or of an "enterprise test", or of a "mixed test", or of a "fundamental test" or of an "essential test", or of a "single composite test" because, in truth, none of the approaches so labelled constitutes a "test", in the generally understood sense of that term, namely, that it constitutes a measure or yardstick of universal application that can be relied upon to deliver a definitive result."

47. Edwards J. concluded that every case must be considered in the light of its particular facts and it is for the court or tribunal considering those facts to draw the appropriate inferences from them. This case emphasises that no one test can be determinative of the issue and that the court or tribunal in any given case should consider a wide range of factors in coming to its conclusion.

48. Mutuality of obligation exists where there is an obligation on a body to provide work to an individual, and a corresponding obligation on the individual to perform the work. It is clear from a perusal of the authorities that no definitive test has been set out by the courts to be used in the context of determining whether a person is engaged under a contract of employment and it follows that a court or tribunal, in making such determination, should have regard to all relevant considerations. It is quite straightforward to derive from the case-law, and set out in the abstract, a non-exhaustive list of considerations that should be taken into account, such as *inter alia*: whether one party has the power of deciding what work is to be done and the manner in which it is to be done; whether the work of the engaged person is an integral part of the business; whether the person provides their own work or skill in the performance of some service; how the person is engaged and dismissed; how the person is remunerated; who chooses the times of work; who provides the workplace and so forth. As a tribunal should take into account all the relevant circumstances, mutuality of obligation is undoubtedly a consideration that regard should be had to, and indeed, is an important factor in determining the employment relationship.

49. The mutuality consideration is by no means a determinative test, but is an irreducible minimum of a contract of service. Although the existence of mutuality of obligation is not determinative, without mutuality no contract of service can exist. It would be logical, therefore, for a court or tribunal to begin their analysis of the employment relationship by determining whether such mutuality exists and then inquire further into the relationship.

50. In the case at hand, although the Appeals Officer did mention the phrase 'mutuality of obligation', he did not engage in a substantive appraisal of whether the appellant was under any duty to provide work to Ms. Keenan, nor whether Ms. Keenan was under any duty to perform work given to her by the appellant. I am of the opinion that, in the circumstances, mutuality was a highly relevant consideration and that regard should have been had to the existence or otherwise of mutuality in the relationship in question. In failing to address the issue, the Appeals Officer erred in law.

51. There was some disagreement between the parties as to the effect of the decision in *Prater v. Cornwall County Council* [2006] 2 All E.R. 1013. My finding in the instant case is that the Appeals Officer erred in law in failing to consider whether mutuality of obligation existed, and it would be superfluous for the Court to determine the effect of *Prater* on this area of the law.

Power of Remittal

52. This appeal was brought by way of Special Summons. Order 38, rule 9 of the Rules of the Superior Courts provides as follows:-

> "On the hearing of any special summons, the Master, in a case within his jurisdiction, or the Court, as the case may be, may give judgement for the relief to which the plaintiff may appear to be entitled or may dismiss the action or matter or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the questions in issue in the action or matter as may seem just."

53. This Court is given a broad discretion as regards the orders it may make in relation to proceedings commenced by way of Special Summons.

54. In *Flynn v. Primark* [1997] E.L.R. 218, Barron J. held that the Labour Court had applied the wrong principle and remitted the matter to the Labour Court "to consider and determine the issue". Similarly, in *National University of Ireland, Cork v. Ahern* [2005] 2 I.R. 577, the Supreme Court held that the Labour Court's decision "was not based on the proper consideration of the surrounding circumstances or the underlying facts". The court held that there was an error of law and remitted the matter to the Labour Court for reconsideration.

55. In the circumstances, I believe that the appropriate way to deal with this case is to remit the matter to the Appeals Officer for reconsideration in light of the findings made by this Court.