THE HIGH COURT

[2024] IEHC 662

[Record No. 2023/249 MCA]

BETWEEN

PADRAIC HANLEY

APPELLANT

AND

PBR RESTAURANTS LTD TRADING AS FISH SHACK CAFÉ

RESPONDENT

JUDGMENT of Ms. Justice Bolger delivered on the 19th day of November 2024

1. This is an application pursuant to s. 10A of the Unfair Dismissals Act, 1977 as amended (hereinafter referred to as 'the Unfair Dismissals Act') to set aside the determination of the Labour Court of 26 June 2023. For the reasons set out below I allow this appeal, set aside the determination of the Labour Court and remit the matter to the Labour Court for a fresh hearing.

Background

2. On 21 October 2020, the applicant (the appellant in the within proceedings) submitted a number of complaints to the Workplace Relations Commission (hereinafter referred to as 'the WRC') including one of unfair dismissal pursuant to s. 8 of the Unfair Dismissals Act. Those complaints were lodged by way of a workplace relations complaint form that was filled out online by entering information in the boxes provided and confirming specified options within the dropdown menu that was provided. For his unfair dismissal complaint, the applicant selected the complaint option of "unfair dismissal". In the box entitled "Unfair Dismissal Type" he filled out *"I was unfairly dismissed. I have at least 12 months service"*. Under "Selected Redress Option" he stated, "*Complaint seeking*

adjudication by the Workplace Relations Commission under Section 8 of the Unfair Dismissals Act, 1977". The form allowed for some narrative comment and the applicant set out what he said was a breakdown in his relationship with management which he said led to a *"sham redundancy"*.

3. The adjudication officer found that a preliminary issue arose in the applicant's s. 8 unfair dismissal claim about his qualifying length of service and whether he was an employee or a self-employed person from August 2008 to December 2019. She applied a 'mutuality of obligation' test and found that *"as the person with an obligation to provide work for others,* [the applicant] *was an employer and not an employee."* She considered the enterprise test, contract, control, pay, tax and social insurance and concluded that, prior to December 2019, the applicant was an employer and self-employed person and not an employee and therefore lacked the necessary twelve months service to bring a claim of unfair dismissal.

4. The applicant appealed to the Labour Court by way of an Employment Rights Appeal Form which required brief details such as name and address. The form does not allow the insertion of any ground of appeal and the only required description of the claim is the legislation under which the decision under appeal was made and, in relation to an equality appeal, the ground on which discrimination is alleged to have occurred. This applicant confirmed, at p. 8 of the appeal form, that his appeal related to s. 8 of the Unfair Dismissals Act. He furnished written submissions to the Labour Court in advance of the hearing in accordance with the Labour Court rules (to which I return below), most of which focussed on his claimed status as an employee from 2008 to December 2019. The applicant described his dismissal as *"a targeted and calculated move to expel all members of the Hanley family from the business."* The Labour Court allowed the parties to submit new evidence that had not been put before the adjudication officer.

5. The first of three days of hearing before the Labour Court took place on 23 June 2022. It is common case between the parties that this was the first occasion on which the applicant's representative referred to the applicant having been dismissed wholly or partly for having made protective disclosures, which would obviate the need to satisfy the normal twelve month service requirement for a claim of unfair dismissal. The applicant contended that this was part of the factual submissions previously made in the WRC claim form about the deterioration in the relationship between him and management in the months leading up to his purported redundancy.

6. The Labour Court invited submissions on whether it had jurisdiction to consider that argument. At para. 42 of his submissions on this point the applicant stated that:

> *"…even if the Labour Court should find against the Claimant on the issue of whether he was an employee for 12 months, the matter should not be disposed of on that preliminary point until the Court has heard evidence to determine whether the dismissal was based wholly or mainly on the making of a protected disclosure."*

The respondent disputed that proposition and stated in its submissions to the Labour Court:

> *"…the Claimant is artificially trying to extend the scope of the appeal and effectively create a new head of claim, Unfair Dismissal as a result of a protected disclosure and the Respondent would state that the Court does not have jurisdiction to grant this application. The Court can only deal with what is correctly before it on appeal."*

The determination of the Labour Court

7. It is not possible in this judgment to identify the location of extracts from the Labour Court's determination by reference to a paragraph or page number, as would normally apply, because the Labour Court's twelve page determination contains neither. I therefore can only refer to what the determination states and must leave it to the reader to work out where that is found in the determination.

8. The Labour Court summarised what was before it as follows:

> *"Accordingly, there are two preliminary matters for the Court to consider i.e. if it has jurisdiction to consider arguments that this case arises from a Protected Disclosure and, if not, whether the Complainant has the required service to claim the protections of the Act."*

The Labour Court can deal with a jurisdictional issue as a preliminary issue but in doing so the Labour Court must, as a creature of statute, act within its statutory powers and obligations. Section 44(1) of the Workplace Relations Act 2015 (hereinafter referred to as the 'WRC Act') is applied to the Unfair Dismissals Act by s. 8A of the Unfair Dismissals Act and subs. (a) provides as follows:

> *"44. (1)(a) A party to proceedings under section 41 may appeal a decision of an adjudication officer given in those proceedings to the Labour Court and, where the party does so, the Labour Court shall—*
>
> > *(i) give the parties to the appeal an opportunity to be heard by it and to present to it any evidence relevant to the appeal,*

(ii) make a decision in relation to the appeal in accordance with the relevant redress provision, and

(iii) give the parties to the appeal a copy of that decision in writing.

9. The Labour Court has introduced its own rules in accordance with ss. 20(5) and 20(6) of the Industrial Relations Act, 1946. The applicable rules to this appeal were the 2022 Rules which have, since then, been replaced by 2024 Rules. Rule 43 of the then applicable 2022 Rules provides:

"An appeal of an Adjudication Officer's Decision shall be by way of a de novo hearing of the complaint(s) to which the appeal relates."

Rule 52 provides:

"The Court may, in its discretion, give a preliminary ruling on any aspect of the case where it is satisfied that time and expense may be saved by the giving of such a ruling are/or where it has the potential to be determinative of the case."

Those rules purport to allow the Labour Court a wide discretion to make a preliminary ruling on any aspect of a case but that discretion must be exercised in accordance with the court's statutory appellate jurisdiction pursuant to s. 44(1) of the WRC Act.

10. In considering its jurisdiction and the requirements of s. 44(1), the Labour Court cited its own decision in *Dawn Country Meats Ltd v. Hill* DWT 141/2012 which related to the Organisation of Working Time Act 1997. A different adjudication structure applied at the time (prior to the changes introduced by the WRC Act in 2015) but the Labour Court described the decision as enunciating principles that remain unchanged. The Labour Court concluded that its jurisdiction under s. 44 of the Act was solely that of an appellate body from decisions of adjudication officers and that *"[t]he Court has no jurisdiction to act as a court of first instance."* In applying that principle to the appeal before it, the Labour Court condemned the applicant as:

"…seeking to have the legal opportunities provided by the Protected Disclosure legislation to be applied to him. That is, by any definition, an entirely new claim and new claims must be heard at first instance. They cannot be introduced upon appeal."

The Labour Court went on to determine that it did not have jurisdiction to hear a claim under the Protected Disclosures Act and that it does not have jurisdiction to:

"…enlarge the scope of the appeal under the Unfair Dismissals Act to allow arguments, that were not made at first instance, that the Complainant was dismissed

for having made Protected Disclosures, within the meaning of the Protected Disclosures Act."

11. The Labour Court then proceeded to consider the applicant's employment status from 2008 to 2019 and cited the decision of the High Court in *Minister for Agriculture and Food v. Barry and Others* [2009] 1IR 215 which it said:

> *"…determined that a contract of service required 'mutuality of obligation', in that an employer is required to provide work for an employee who is required to perform it. Barry J. observed that if there is no mutuality of obligation, '…it is not necessary to go further.'"* (The Labour Court refers to Barry J. but the judge who decided the case was Edwards J.).

The Labour Court concluded, largely on a mutuality of obligation assessment, that the applicant was not an employee from 2008 to 2019 and therefore found that it did not have jurisdiction to consider the applicant's appeal.

The appellant's appeal to this court

12. The appellant's grounds of appeal to this court are twofold:

1. A restatement of his submissions to the Labour Court that the Labour Court was required to hear the evidence on protected disclosures and not decide on the preliminary issue of his employment status alone.
2. An assertion that the Labour Court erred in law in determining the appellant was not an employee before December 2019 and in applying a mutuality of obligation test to his situation.

I will assess the Labour Court's determination pursuant to both grounds of appeal.

1. Protected Disclosure Evidence

The Labour Court's jurisdiction to determine a preliminary issue

13. The decision of the Supreme Court in *Fitzgibbon v. The Law Society of Ireland* 2015 1 IR 516 is a significant judgment that sets out the scope of a decision maker's appellate jurisdiction and is relied on by both sides to this appeal. Ms. Fitzgibbon had appealed findings and sanctions made by the Law Society's Complaints and Client Relations Committee to the High Court pursuant to s. 11 of the Solicitors (Amendment) Act, 1994. The High Court held, as a preliminary issue, that the nature of the appeal hearing would not be a *de novo* rehearing of the complaints but would be a review of a specialist tribunal *"whereby the finding would be reviewed and oral evidence would be called only as necessary."* The

appellant appealed to the Supreme Court and argued that her appeal should be a *de novo* hearing with oral evidence. The Supreme Court disagreed and held that the appeal pursuant to s. 11 was an appeal on a point of law only and not a *de novo* appeal. In doing so Clarke J. (as he was then) set out what was involved in a *de novo* hearing. He stated at para. 102:

> *"It seems to me that the critical characteristics of a de novo appeal are two fold. First, the decision taken by the first instance body against whose decision an appeal is brought is wholly irrelevant. Second, the appeal body is required to come to its own conclusions on the evidence and materials properly available to it. The evidence and materials which were properly before the first instance body are not automatically properly before the appeal body. It seems to me that, by defining an appeal as a de novo appeal, any legally effective instrument necessarily carries with it those two requirements."*

He went on at para. 107:

> *"In summary, therefore, it seems to me that the use of the term 'de novo appeal' or similar terminology, carries with it a requirement that the appellate body exercise its own judgment on the issues before it without any regard to the decision made by the first instance body against whom the appeal lies."*

He did recognise at para. 103 that, *"…the process at first instance may narrow the issues which truly remain alive in whatever adjudicative proceedings are under consideration."* He gave the example of the *de novo* appeal to this court from almost all civil decisions of the Circuit Court which are considered by the High Court judge *"…afresh on the basis of the evidence presented on the appeal and without attaching any weight to the decision made by the Circuit Court Judge",* although the pleading exchanged in the Circuit Court may have narrowed the issues between the parties. Clarke J. concluded that *"the issues remain thus narrowed on any appeal."*

14. Both the Labour Court in its determination and the respondent's submissions to this court, relied on the approach adopted by the Labour Court in its previous decision in *Dawn Meats*. Crucially that determination predates the decision of the Supreme Court in *Fitzgibbon* where the Supreme Court found that both decision and the approach of the first instance body was *"irrelevant"* and that no regard was to be had to its decision, other than insofar as the process, in particular by way of pleadings, may have narrowed the issue. The analysis adopted by the Labour Court in *Dawn Meats* was that *"the nature of the claim remains the*

same as that dealt with at first instance". That is very different to what the Supreme Court said in *Fitzgibbon* about the decision of first instance being "*irrelevant"* and the obligation of the appellate body to *"exercise its own judgment... without any regard"* to that first instance decision. In the light of the binding decision of the Supreme Court, it simply cannot be said, as the Labour Court purported to say in *Dawn Meats* and endorsed in the decision impugned here, that the Labour Court's *"jurisdiction is founded upon the decision of the Rights Commissioner".*

15. The statutory jurisdiction of the Labour Court in dealing with an appeal of an unfair dismissal decision is found in s. 44(1)(a)(i) which clearly requires the Labour Court to *"give the parties to an appeal an opportunity to be heard by it and to present to it any evidence relevant to the appeal"*. The appellant expressly relied on that subsection in submitting to the Labour Court that it should hear how he said he was unfairly dismissed for having made a protected disclosure. The Labour Court declined to hear that evidence and instead proceeded to determine his unfair dismissal claim as one that had nothing to do with protected disclosures, an issue on which it had heard no evidence. In refusing to hear the appellant's evidence and arguments on what he said was his protected disclosure and the reason for his dismissal, the Labour Court fell into a clear error of law and acted in a manner that was inconsistent with its obligations pursuant to s. 44 and with the concept of a *de novo* appeal as determined by the Supreme Court.

16. Where a party to an appeal does not agree to the court determining a preliminary issue (other than in relation to a jurisdictional issue such as time where there is a clear jurisdiction to determine jurisdiction as a preliminary issue) then no matter how efficient a preliminary determination might appear to be, the Labour Court is required to allow that party to be heard and to present its evidence including any new evidence it may wish to raise, in accordance with section 44.

The right of a non-participating party before the WRC to an appeal

17. A party to a claim brought before the WRC who did not participate in the hearing before the adjudication officer (or indeed in a written determination by the Director General of the WRC as is permitted by s. 47(1) of the WRC Act) is, nevertheless, not precluded from bringing an appeal to the Labour Court and running their appeal there, nor should they be. They may be subject to a fine of €300 in accordance with s. 71 of the WRC Act and the Workplace Relations Act (Fees) Regulations 2015 (S.I. 536 of 2015). The fact that there is

a statutory basis for the potential financial consequence for the party who did not attend before the adjudication officer but nevertheless wishes to invoke their statutory right to appeal, confirms that such a party is entitled to so appeal and to run their case before the Labour Court for the first time.

18. The approach adopted by the Labour Court in this case would mean that a party who did participate before the adjudication officer, such as this appellant did, would be put in a less favourable position than the party who did not participate before the adjudication officer, by virtue of their first instance participation. That is neither fair nor was it, as is clear from s. 44(1), the intention of the Legislature.

The purported right of an employer to defend themselves from an accusation at first instance

19. The Labour Court held in the impugned decision that:

> *"…an employer who faces an accusation of having retaliated against an employee for having made a Protected Disclosure is entitled to the opportunity to defend themselves from such an accusation at first instance".*

The Labour Court went on to say that the appellant *"cannot rectify the failure to provide this opportunity by seeking to enlarge his claim upon appeal".* In effect, the Labour Court found an employer has a right to defend themselves from an accusation at first instance which right trumps the right of an appellant to rely on matters identified in s. 6 of the Unfair Dismissals Act as rendering a dismissal (including a selection for redundancy) unfair where those matters were not raised before the adjudication officer at first instance. The Labour Court's analysis would mean that an employer has the right to be shielded from a complainant raising new s. 6 matters in any appeal of a s. 8 Unfair Dismissals Act claim. No such right exists nor could it, given the nature of the statutory appeal to the Labour Court afforded by s. 44(1) of the WRC Act and legal construct of a *de novo* appeal as recognised by the Supreme Court in *Fitzgibbon.* The Labour Court fell into an error of law in asserting any such right and relying on it to prevent this appellant from raising new s. 6 issues in his appeal of his s. 8 Unfair Dismissals Act claim.

Was the appellant entitled to include protected disclosures in his appeal to the Labour Court?

20. The appellant raised protected disclosure issues in his s. 8 unfair dismissal claim for the first time in his appeal before the Labour Court. That was a new ground for the appellant's

claim of unfair dismissal which, up to then, had been based on his condemnation of the redundancy as a sham redundancy that was procedurally flawed and which he claimed occurred against a background of a deteriorating relationship with management. However, even with the inclusion of this new s. 6 ground, his claim was and remained a claim of unfair dismissal pursuant to s. 8 of the act. The respondent submitted to this court that the appellant seeks to *"create a new head of claim, namely, unfair dismissal as a result of a protected disclosure"* (at para. 39 of the respondent's written submissions). That misunderstands the nature and scope of a s. 8 Unfair Dismissals Act claim. It is not a Protected Disclosures Act claim and no such claim has ever been made by the appellant. It is and always was a s. 8 Unfair Dismissals Act claim, as was made clear in the drop box options offered to a person filling out their complaint form, where the only option for an unfair dismissal claim is s. 8, which is exactly what was selected and activated by this appellant. Section 8 does not identify grounds for a claim or scope out the different scenarios that may arise. It is s. 6 of the Unfair Dismissals Act which sets out the various circumstances in which a dismissal may be deemed fair or unfair. The complaint form does not categorise a s. 8 unfair dismissal claim by reference to the grounds set out in section 6.

21. The Labour Court fell into an error of law in treating the appellant's appeal as a Protected Disclosures Act claim as it clearly did in holding it *"does not have jurisdiction to hear a claim under the Protected Disclosures Act."* The appellant never brought a Protected Disclosures Act claim either before the WRC or the Labour Court. His claim was always a s. 8 Unfair Dismissals Act claim and both in making his claim at first instance and on appeal to the Labour Court, he was entitled to include grounds scoped out in s. 6 including issues relating to alleged protected disclosures.

22. Unlike most civil claims where she who asserts must prove, s. 6(1) of the Unfair Dismissals Act places the burden to prove a dismissal is fair on the employer by deeming any dismissal to have been unfair unless it is proved to have been fair:

> *"Subject to the provisions of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal."*

Section 6(2) goes on to set out over 20 separate situations in which a dismissal will be deemed to be unfair, without prejudice to the generality of subsection 1. One of those is at (ba), *"the employee having made a protected disclosure"*, which was inserted by s. 11(1)(b)

of the Protected Disclosures Act, 2014. The fact that the Unfair Dismissals Act was amended in this way by the Protected Disclosures Act and that the definition of protected disclosure is deemed, by s. 1 of the Unfair Dismissals Act, to be the meaning given by the Protected Disclosures Act, does not mean that a s. 8 claim of unfair dismissal which seeks to rely on, *inter alia*, the employee having made a protected disclosure, somehow becomes a Protected Disclosures Act claim. The claim remains a s. 8 Unfair Dismissals Act claim. Section 6 includes a dismissal for having made a protected disclosure in what is deemed to be an unfair dismissal. The same situation is included in what might enable a person dismissed by reason of redundancy to challenge their redundancy as an unfair dismissal, or the more colloquial term of *"sham redundancy"* that was used by the appellant in his WRC claim form and in his submissions to the Labour Court. Section 6(3)(a) of the Unfair Dismissals Act sets out how a dismissal on grounds of redundancy will be deemed to be unfair where a person has been selected for a reason that would, in itself, be an unfair dismissal. The subsection provides as follows:

> *"the selection of that employee for dismissal resulted wholly or mainly from one or more of the matters specified in subsection (2) of this section or another matter that would not be a ground justifying dismissal, or…"*

23. Thus, in accordance with s. 6(3)(a), if an employee is elected for redundancy wholly or mainly for having made a protected disclosure, that will be deemed to be an unfair dismissal. That very argument was made by the appellant before the Labour Court in seeking to run his s. 8 Unfair Dismissals Act claim, clearly set out at para. 15 of his submissions to the Labour Court where he said:

> *"The Claimant was selected for redundancy unfairly and denied fair procedures during the process. This was as a result of the breakdown of the relationship between the parties in which the Claimant's protected disclosures had been central. The process to remove the Claimant from his employment followed directly on these concerns being raised."*

24. The Labour Court fell into an error of law in asserting that the appellant was attempting to run a Protected Disclosures Act claim before it and in finding that it did not have jurisdiction to deal with the protected disclosures aspect of the appellant's case.

The Labour Court's monetary jurisdiction

25. Section 7 of the Unfair Dismissals Act sets out the remedies available to an adjudication officer or to the Labour Court on appeal in the event of a finding that a dismissal was unfair. It is open to an adjudication officer or the Labour Court to award reinstatement, reengagement or compensation. Other than the award of four weeks renumeration that s. 7(1)(c)(ii) allows in the absence of any evidence of financial loss, any compensation awarded is in respect of *"financial loss attributable to the dismissal"* as per section 7(1)(c)(i). Section 7(1)(c)(i) provides that the compensation awarded must not exceed 104 weeks remuneration but s. 7(1A) extends that to 260 weeks for a case falling within s. 6(2)(ba), i.e. where the dismissal result wholly or partly from the employee having made a protected disclosure. The respondent's counsel submitted that this created what he referred to as a "*new jurisdiction"* that was not available to the adjudication officer and said this was a further reason why the Labour Court could not allow the appellant to raise protected disclosure issues that had not been raised before the adjudication officer. However, this submission confuses the monetary jurisdiction of the Labour Court (and of the adjudication officer) pursuant to s. 7, with the Labour Court's jurisdiction to hear an appeal pursuant to s. 44(1) of the WRC Act. The fact that a particular redress is available for a particular finding does not render the underlying claim anything other than a s. 8 Unfair Dismissal Act claim and does not alter the jurisdiction of the Labour Court to hear an appeal pursuant to s. 44(1) of the WRC Act, albeit that the Labour Court can award a different and potentially more valuable redress than the actual financial loss that the employee has suffered as a result of their dismissal.

2. <u>Employment status</u>

26. The respondent contends that allowing the appellant to rely on what he said were protected disclosures in his appeal to the Labour Court would render the employment status issues moot. That is not necessarily so. Certainly, a claim that a dismissal resulted wholly or partly on the employee having made a protected disclosure does not require the twelve months service qualification that is applicable to most claims for unfair dismissal. However, if the Labour Court were to reject the appellant's arguments about his purported protected disclosures having wholly or partly led to his dismissal, the court would still have to consider the other points raised by the appellant including the alleged procedural unfairness of the redundancy process. I, therefore, proceed to consider the appellant's appeal to this court

that the Labour Court erred in determining that he was not an employee prior to December 2019.

27. The Labour Court decision was made prior to the decision of the Supreme Court in *The Revenue Commissioners v. Karshan (Midlands) Trading as Dominos Pizza* [2023] IESC 24 which analyses the law on determining the status of a person providing services as either an employee or an independent contractor. The respondent suggests that this court in considering this appeal on a point of law, should assess the legality of the Labour Court's determination by reference to the law as it was at the time, i.e. prior to the Supreme Court's decision in *Karshan*. In doing so he says the Labour Court correctly applied the mutuality of obligation test and *"could not have erred in its engagement with the test vis a vis a case that was only delivered after the Labour Court determination"* (at para. 46 of the respondent's submissions). There is no authority for the proposition that this court, on an appeal on a point of law, should ignore a recent decision of the Supreme Court and instead endorse a legal analysis from an earlier decision of the High Court which was, in effect, set aside by the Supreme Court or at the very least, highly qualified by it.

28. Employment law is a fast moving area where a vast number of cases are dealt with by the WRC and the Labour Court almost every day with only a small number proceeding as far as this court. When they do, the decisions of this court, and more significantly any decisions of the Court of Appeal or the Supreme Court and the Court of Justice of the European Union, will add to the relevant jurisdiction and inform the WRC and the Labour Court on how the law should be applied, as well as enabling employers and employees to be properly advised on what they might expect if they litigate their workplace disputes. The respondent suggests that the analysis they have urged on this court will affirm the finality of litigation. However, this litigation, like almost all protective employment litigation, does not necessarily end at the Labour Court. Rather it ends at whatever stage either party chooses not to invoke whatever rights of appeal they have. The appellant has appealed on a point of law to this court and is entitled to expect that the law will be applied as it currently is and not within a historic and now somewhat irrelevant previous analysis.

29. Moving now to a consideration of the decision of the Supreme Court in *Karshan,* which re-evaluated how a service provider's employment status is to be determined. The court concluded that such a determination required the following five questions to be asked:

"(i) Does the contract involve the exchange of wage or other remuneration for work?

(ii) If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?

(iii) If so, does the employer exercise sufficient control over the putative employee to render the agreement one that is capable of being an employment agreement?

(iv) If these three requirements are met the decision maker must then determine whether the terms of the contract between employer and worker interpreted in the light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, are consistent with a contract of employment, or with some other form of contract having regard, in particular, to whether the arrangements point to the putative employee working for themselves or for the putative employer.

(v) Finally, it should be determined whether there is anything in the particular legislative regime under consideration that requires the court to adjust or supplement any of the foregoing."

In reaching that conclusion, Murray J. held at para. 206:

"It cannot be disputed that a contract of employment can only arise where the putative employee agrees to provide their own work and skill to the employer. However, the contention that there could only be a contract of employment if the employer agrees to provide the employee with work is misplaced. This was proposed as part of the test urged by Karshan because it was necessary to the theory of ongoing and future obligations for which it contended. The argument led it to take issue with the apparent implications of an aspect of a suggestion by the majority of the Court of Appeal (on this point, Costello and Whelan JJ.) that when the worker did honour the rostering arrangement and attend at Karshan's premises, the Commissioner was entitled to conclude that Karshan was under a legal obligation to pay the drivers the brand/promotion fee. That obligation, Karshan said, could not give rise to a contract of employment because it was not an obligation to provide work to the drivers (in the form of deliveries), and this was what was required before there could be a contract of employment. At the same time,

> *however, the distinction between an ongoing obligation on the employer to provide work and other forms of consideration moving from the employer was important to the conclusion of the majority in the Court of Appeal: it was because the employer had to have previously promised work that there was insufficient mutuality where he simply gave work, or promised to do so for the duration of a shift, and was paid for it when it was done."*

At para. 210 he explained how previous analysis had increasingly assessed the necessity to establish mutuality of obligation as a:

> *"…defining feature that in itself differentiates a contract of service from a contract for services. The consequence has been to assume that the 'mutual obligations' that subtend a contract of employment are in all cases necessarily and categorically different from those that underlie a relationship of employer and independent contractor."*

30. The impugned determination of the Labour Court clearly suffers from that incorrect analysis. Whilst the Labour Court considered the control and business on one's own account tests, ultimately it relied heavily on the presence or absence of mutuality of obligation as analysed by Edwards J. in *Barry* in stating that a contract of service requires mutuality of obligation. The Labour Court, in applying what it believed the law binding on it at that time was, found the appellant was not an employee during that time and that he was not *"obliged to carry out work for an employer prior to December 2019"*.

31. This court must apply the law as it is now, having been interpreted by the Supreme Court. The analysis of the Labour Court suffers from the same errors as the Supreme Court condemned as a *"fundamental error in Karshan's legal analysis"* at para. 210 of the Supreme Court's decision, cited above.

<u>Conclusions</u>

32. The Labour Court fell into errors of law as set out above. I therefore set aside the determination of the Labour Court and remit the matter to the Labour Court for a rehearing of the appellant's appeal from the WRC.

Counsel for the appellant: Michael Kinsley BL

Counsel for the respondent: Paul Twomey BL