



THE COURT OF APPEAL

APPROVED

Neutral Citation Number: [2022] IECA 124

Court of Appeal Record Number 2020/53

**Whelan J.
Costello J.
Haughton J.**

BETWEEN

KARSHAN (MIDLANDS LIMITED) TRADING AS DOMINO'S PIZZA

APPELLANT

- AND -

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 31 day of May, 2022

1. This is an appeal of the order of the High Court of 21 January 2020 in respect of a case stated by way of appeal for the opinion of the High Court pursuant to s. 949AQ of the Taxes Consolidation Act 1997 (“the TCA”), and of a judgment delivered on 20 December 2019, [2019] IEHC 894. The case stated arose following an oral hearing in July 2016 by a Tax Appeal Commissioner (“the Commissioner”). The central issue in the appeal is whether delivery drivers who deliver pizzas for the appellant are employees of the appellant. The Commissioner made a determination on 8 October 2018 that pizza delivery drivers engaged by the appellant:

- (1) worked during the relevant tax years of assessment (2010 and 2011) under contracts of services and are taxable under Schedule E of the Taxes Consolidation Act 1997 (“the TCA”); and

(2) did not work under contracts for services, thereby being self-employed, and taxable pursuant to Schedule D of the TCA, as the appellant had contended.

2. The appellant appealed the determination to the High Court by way of case stated. The High Court (O'Connor J.) dismissed the appeal and the appellant has appealed to this court. This is my judgment in respect of the appeal.

Background

3. The appellant trades as Domino's Pizza. It manufactures and delivers pizzas and ancillary food items to customers who place orders by telephone, internet and by attending at their stores. The appellant engages drivers to deliver the pizzas to its customers. Each driver entered into a written agreement with the appellant. It recites that:-

"... the company wishes to subcontract the delivery of pizzas, the promotion of its brand logo and the contractor [each driver] is willing to provide these services to the company on the terms hereinafter appearing."

4. The agreement states that the contractor shall be retained by the company as an *"independent contractor"* within the meaning of and for all purposes of that expression (Clause 1). At Clause 17, the contractor confirms that he or she is aware that any delivery work undertaken for the company *"is strictly as an independent contractor"*. The driver acknowledges that the company *"has no responsibility or liability whatsoever for deducting and/or paying PRSI or tax on any monies [they] may receive under this agreement"*.

5. Each driver is required to provide his or her own delivery vehicle in a roadworthy and safe condition. Clause 4 states that a driver could rent a delivery vehicle from the company on certain terms. Clause 5 requires the contractor to insure the vehicle with a reputable insurance company within the State for business use. If the driver does not have

the appropriate business insurance, the company “*is prepared to offer same (third party only) at a pre-determined rate.*”

6. At Clause 3, the company agrees to pay the contractor according to the number of deliveries successfully undertaken, “[i]n addition the company shall pay for brand promotion through the wearing of fully branded company supplied clothing and/or the application of company logos affixed temporarily to the contractor’s vehicle.” Clause 9 states “... the company does not warrant a minimum number of deliveries.” The driver is entitled to engage in a similar contract delivery service for other companies at the same time as the contract is in force, but this right “*does not extend to delivering similar type products into the same market area from a rival company at the same time, where a conflict of interest would be possible*” (Clause 11). Clauses 12 and 14 were the focus of the debate between the parties and I set them out in full:-

“12. 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.

...

14. The Company does not warrant or represent that it will utilise the Contractor’s services at all; and if it does, the Contractor may invoice the Company at agreed rates. The Company, furthermore, recognises the Contractor’s right to make himself available on only certain days and certain times of his own choosing. The Contractor, in turn, agrees to notify the company in advance of his unavailability to undertake a previously agreed delivery service.”

The agreement may be terminated without notice (Clause 15).

7. In addition, the drivers were required to sign a document entitled “*Social Welfare and Tax Considerations*” which the Commissioner held provided:-

“This is to confirm that I am aware that any delivery work I undertake for Karshan Limited is strictly as an independent contractor. I understand that, as such, Karshan Limited has no responsibility or liability whatsoever for deducting and/or paying PRSI or tax on any monies I may receive from this or any of my other work related activities.”

8. The drivers were also required to sign a document entitled *“Promotional Clothing Agreement”* which provided for a deposit to be paid in respect of a branded crew shirt, baseball cap, name tag and driver jacket.

9. In her written determination, the Commissioner set out the oral evidence and the terms of the written contract between the appellant and the driver. At para. 38 of her determination, the Commissioner set out her findings of fact based on the evidence from the witnesses, together with the documentary evidence. Her findings were:

- (a) that the practice was that drivers would fill out an *“availability sheet”* approximately one week prior to a roster being drawn up indicating their availability for work, and that the roster would be drawn up by a store manager based on the availability sheets;
- (b) that the substitution clause permitted drivers to substitute another of the appellant’s drivers when they were unavailable and that the substituted driver would be paid by the appellant in respect of this shift of work. The substitute could also be arranged by the appellant, if required;
- (c) that drivers were required to wear a fully branded uniform of a cap, shirt, jacket and name tag; that they were also required to wear black trousers and black shoes and to be presentable in their appearance generally; that this was subject to checks by managers and that a deposit was requested by the appellant in

respect thereof. In addition, drivers were provided with branded magnetic signs to affix to their cars as brand promotion for the appellant;

- (d) the drivers were required to provide their own vehicles for delivery and there were no company cars available for rent by drivers;
- (e) drivers were required to use their own phones in contacting customers, where necessary;
- (f) drivers were required to provide certification of business use insurance, and where a driver did not possess such insurance, the appellant would provide insurance for a charge on the appellant's policy. The appellant required drivers to ensure that their NCT certificates were up to date;
- (g) the appellant limited the number of pizzas¹ that drivers could deliver to two per time and managers would intervene to preclude a driver taking two deliveries if other drivers were waiting to take a delivery;
- (h) some drivers folded boxes while waiting for deliveries and some drivers were requested to do so by their managers;
- (i) in the case of many drivers, the appellant would prepare invoices that the drivers would sign;
- (j) the drivers clocked-in and clocked-out on the computerised system in use in the appellant's business using their driver numbers and this and other relevant information was collated and maintained by the appellant;
- (k) on commencement of a shift, drivers would be provided with a cash float by the appellant which the driver would return at the end of his shift;

¹ This is an error as she clearly means deliveries.

- (l) the drop rate was €1.20 per drop with an additional 20c payable for insurance, and the drop rate was stipulated by the appellant and was not negotiable. The brand promotion/advertising rate was €5.65 per hour.

10. In addition to these express findings of fact, the Commissioner recorded the evidence that the drivers were entitled to substitute another of the appellant's drivers in the event that they were unable to attend for a rostered work shift. Mr. Paliulis, store manager, gave evidence that there would be "*follow up*" if an "*employee*" did not attend for work, having been rostered. He stated that if a driver failed to turn up, it was the manager's obligation to find a replacement and that the replacement would be paid for the work. The Commissioner records that two drivers gave evidence that they employed an accountant to look after their records and others gave evidence that the appellant would pre-prepare invoices that the drivers would sign. The appellant stated that the clocking-in/clocking-out system was not for time recording purposes but was to allow the appellant to maintain a record in relation to which drivers attended and on which days and to correlate this information with invoices.

11. The Revenue Commissioners submitted to the Commissioner that the written agreement did not accurately reflect the true agreement between the parties as evidence indicated that certain matters did not take place in accordance with the terms of the written contract. The Commissioner held that in its day-to-day operations there were three departures from the terms of the written agreement:-

- (1) there were no company vehicles available for rent although the contract stipulated that company vehicles may be rented by drivers for the purposes of carrying out their duties (Clause 4);

- (2) not all drivers prepared invoices for submission to the appellant as required by the contract. There was evidence from several drivers that the appellant prepared invoices which the drivers signed;
- (3) some drivers were asked to perform work which was not stipulated in the contract, *i.e.* the assembly of boxes in store while waiting for a delivery.

12. The Commissioner determined that the drivers worked under multiple contracts of services and were therefore taxable in relation to the emoluments arising from their service in accordance with s. 112 and Schedule E of the TCA. Her determination will be considered in detail later in this judgment. The appellant asked the Commissioner to state a case for the opinion of the High Court which she did, raising a number of questions as follows:-

- “I. Whether, upon the facts proved or admitted, I was correct in law in my interpretation and application of the concept of mutuality of obligation set out at pages 20-28 (paragraphs 53-87) of my determination.*
- II. Whether, upon the facts proved or admitted, I was correct in law to determine that it was not necessary to consider whether the umbrella contract contained mutuality of obligation, for the reasons set out at pages 49-51 (paragraphs 156-166) of my determination.*
- III. Whether, upon the facts proved or admitted, I was correct in law in the interpretation and application of the concept of ‘integration’ contained at pages 36-39 (paragraphs 114-125) of the determination.*
- IV. Whether, upon the facts proved or admitted, I was correct in law in the interpretation and application of the concept of ‘substitution’ contained at pages 30-34 (paragraphs 90-105) of the determination.*

- V. *Whether I erred in law and acted in breach of natural and constitutional justice in having regard to authorities which were decided after the appeal hearing was completed in July 2016, and in failing to invite the parties to address me in relation to those authorities which were handed down after the appeal hearing completed in July 2016.*
- VI. *Whether I erred in law having regard to United Kingdom/English authorities which are based on a different statutory regime, namely, section 230 of the Employment Rights Act 1996 and, in particular, the reference therein to an intermediate category of 'worker' as defined per that legislation.*
- VII. *Whether I erred in law in determining that I was not bound by a previous decision of the Social Welfare Appeal's Office dated 19 August 2008 and when finding that the Social Welfare Appeals Office and the Tax Appeals Commission are different adjudication bodies subject to different statutory schemes, whether I erred in law in failing to give any or adequate weight to the said previous decision as set out at pages 5-8 (paragraphs 11-20) of my determination.*
- VIII. *Whether upon the facts proved or admitted, I erred in law by failing to give proper weight to the actual terms and conditions of the express agreement as between the appellant and the drivers.*
- IX. *Whether upon the facts proved or admitted, I erred in law in my findings in respect of; the manner in which rosters were set, requests to drivers to fold boxes, the nature of the ordering system, the nature of substitution, sanction for unreliability, payment of an hourly rate, clocking-in, nature of prohibition of work for others and opportunity to make profit."*

The decision of the High Court

13. The High Court identified four core issues arising from the case stated:

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

14. The trial judge first identified the jurisdiction of the High Court on an appeal by way of case stated. He quoted the well-known passage of Kenny J. in *Mara v. Hummingbird Limited* [1982] ILRM 421, at p. 426:-

*“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 from 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 the 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.” (emphasis added)

15. He then referred to the Supreme Court decision in *Ó Culachain (Inspector of Taxes) v. McMullan Brothers Ltd.* [1995] 2 I.R. 217. Blayney J., speaking for the court, held that the following principles apply when a court has before it a case stated seeking its opinion as to whether a particular decision was correct in law:-

- “(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.”*

16. The trial judge stated, on the question of mutuality of obligation, that he understood the determination of the Commissioner to be that *“the initiation of the relevant contract for each roster depended on a driver making himself available”*. He held that, in so concluding, the Commissioner did not err in her characterisation of the umbrella and hybrid agreements (para. 49).

17. At paras. 50-51 he held:-

“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 (UK) v. Revenue & Customs Commissioners [2011] UKUT 433 (TCC), [2011] All ER (D) 229 (Nov)] 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 [Minister for Agriculture v. Barry [2008] IEHC 216, [2009] I.R. 215] 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.”

18. At para. 53, he held that the written “*umbrella*” contract required a driver to initiate an agreement with the appellant. He accepted the Commissioner’s finding that once rostered by the appellant there was a contract which “*retained mutual obligations*”. 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*”. He held that the drivers had “*ongoing obligations*”. He therefore concluded that the Commissioner did not err in her determination under the heading of mutuality of obligation.

19. The appellant argued that the drivers had a right of substitution pursuant to Clause 12 of the written agreement but that there was no *requirement* on a driver to arrange for the work to be done by another person. It submitted that the right of substitution was inconsistent with a contract of employment. The trial judge held that the Commissioner did not err in holding that the drivers did not hire assistants and that rather one driver was replaced by 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 the substitute left it to the appellant to prepare invoices for them respectively.”

20. He held that the Commissioner did not err in determining 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.”

21. In *Re Sunday Tribune Ltd* [1984] I.R. 505, the High Court applied the “*integration*” test to determine whether or not a person works under a contract for services, *i.e.* whether a person is employed as part of the business and his or her work is done as an integral part of the business. The appellant argued that the Commissioner erred in her application of this test when she focussed on whether the kind of work done by the drivers (*i.e.* pizza deliveries) is integral to the business of the appellant rather than whether the drivers formed part of the appellant’s organisation. The trial judge held that the Commissioner had regard to the integration of the drivers into the business of the appellant and that her reasoning was not flawed. In particular, she looked at the requirement for the 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 customers of the appellant.

22. The High Court dismissed the appellant’s arguments that the Commissioner failed to have adequate regard to the terms of the written agreement in the following 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. ”

23. Accordingly, the High Court dismissed the appeal and replied to the nine questions in the case stated that the Commissioner:

1. Correctly interpreted and applied the concept of mutuality of obligation.
2. Was correct in determining that it was not necessary to consider whether the “umbrella” contract contained mutuality of obligation.
3. Correctly interpreted and applied the concept of “integration ”.
4. Correctly interpreted and applied the concept of “substitution ”.
5. Did not err in having regard to authorities which were decided after the appeal hearing was completed in July 2016, or in failing to invite the parties to address her on those authorities.
6. Did not err in law in having regard to the United Kingdom/English authorities which are based on s. 230 of the UK Employment Rights Act 1996 and on an intermediate category of “worker” as defined by that legislation.
7. Did not err in law in determining that she was not bound by a previous decision of the Social Welfare Appeals Office, or that she did not err in law in failing to give any or adequate weight to the said previous decision.
8. Did not err in law by failing to give proper weight to the actual terms and conditions of the express agreement as between the appellant and the drivers.
9. Did not err in law in diverse findings regarding: the manner in which rosters were set, drivers folding boxes, the nature of the ordering system, the nature of substitution, sanction for unreliability, payment of an hourly rate, clocking-in, the nature of prohibition of work for others and opportunity to make a profit.

The determination of the Commissioner

24. The trial judge correctly identified the principles to be applied by the High Court and this court on appeal in relation to a case stated. The court must determine, *inter alia*, whether the decider erred in law. For this reason, I turn to the detail of the determination of the Commissioner after considering the judgment of the High Court. I have already set out the findings of fact of the Commissioner. The primary findings of fact are not challenged. It is her inferences from the primary facts and her application of the law to the primary facts, the written agreement and the inferences drawn from both which are challenged by the appellant. It is necessary therefore to consider the determination of the Commissioner in greater detail in light of the principles in *Mara v. Hummingbird* and *Ó Culachain*.

25. The Commissioner took as her starting point the decision in *Minister for Agriculture v. Barry* [2008] IEHC 216², [2009] 1 I.R. 215. The Commissioner noted that the High Court held that the analysis must start with a consideration of whether the relationship was subject to one or more contracts. She quoted para. 43 where Edwards J. stated:-

“43. 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 just one contract, or to more than one contract. The second question involved the scope of each contract. The third question involved the nature of each contract.”

26. She then quoted the following para. 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

² The Commissioner gives the incorrect citation.

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 contracts 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.”

27. She concluded that this was authority for the proposition that individuals carrying out work may work under multiple individual contracts as opposed to one single contract. She noted the respondent’s argument that, in this instance, there was an over-arching umbrella contract “*of the type referred to by Edwards J.*” and that the umbrella contract, represented by the written agreement, was supplemented by multiple individual contracts in respect of each assignment of work, with each assignment involving one or more shifts of work depending on the particular agreement. The respondent relied upon the decision in *Weight Watchers (UK) Limited & Ors. v. Revenue & Customs Commissioners* [2011] UKUT 433 (TCC), [2011] All ER (D) 229 (Nov). The Commissioner quoted where Briggs J. stated:-

“Contractual arrangements for discontinuous work may, at least in theory, fall into at least three categories. The first consists of a single over-arching or umbrella contract containing all the necessary provisions, with no separate contracts for each period (or piece) of work. The second consists of a series of discrete contracts, one

for each period of work, but no over-arching or umbrella contract. 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 the periods during which the Leader's work is carried out."

28. She quoted para. 79 of the judgment of Briggs J.:-

"... the FTT [First Tier Tribunal] concluded that, in relation to any specific meeting or series of meetings, Leaders conducted them pursuant to specific contracts for the taking of those meetings, rather than pursuant to any general umbrella agreement. Further, I am equally satisfied that the FTT concluded that, in addition to meeting-specific contracts, there was indeed an overarching or umbrella contract between WWUK [Weight Watchers (UK)] and each Leader, dealing in particular with obligations of Leaders affecting them otherwise than when taking meetings."

29. The Commissioner then answered the first question Edwards J. said should be addressed by holding that the contractual arrangements in this case fall within the hybrid category described by Briggs J. at para. 30 of the judgment in *Weight Watchers*. At para. 45 of her determination she said:-

“... I find that the structure of the contractual arrangements in this appeal comprises one overarching umbrella contract supplemented by multiple individual contracts in respect of assignments of work.”

30. She held that the legal basis for holding that there were individual contracts arising under umbrella contracts in these types of hybrid contractual arrangements was to be found in para. 81 of the judgment in *Weight Watchers* where Briggs J. held that the First Tier Tribunal (FTT) was:-

“... correct to conclude that there were meeting-specific contracts between WWUK and its Leaders. I consider that the key to that conclusion lies in Condition 6, which requires the Leader to obtain WWUK’s specific approval ... in relation to the fixing of the time, date and place of any meetings or series of meetings. Furthermore, the first sentence of Condition 6 refers expressly to that process being one which requires the Leader to agree to take any such meetings. It follows in my judgment that in relation to any particular meetings or series of meetings, the umbrella agreement constituted by the Conditions, the MOA and the Policy Booklets is no more than an agreement to agree, requiring a further and distinct contract-making process for the conduct of any particular meeting or (more usually) series of meetings. Condition 6 plainly places the initiative for concluding such meeting-specific contracts upon the Leader, who must propose the relevant timing, dating and venue of any meeting or series of meetings for WWUK’s agreement.”

31. On the basis of these authorities, she concluded at para. 49 of her determination:-

“Thus in the within appeal, the umbrella contract required a driver, in accordance with Clause 14 thereof, to initiate an agreement with the Appellant in relation to his availability for work by ‘mak[ing] himself available on only certain days and certain times of his own choosing’. 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.”

32. She said that there was no impediment to separate engagements of work constituting contracts of service, citing *Quashie v. Stringfellows* [2013] I.R.L.R. 99.

33. She then considered whether mutuality of obligation was present. She quoted para. 47 of Edwards J.’s judgment in *Barry*:-

“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 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. ... Accordingly, the mutuality of obligation test provides an important filter. While one party to a work relationship contends that the relationship amounts to a contract of service, it is appropriate that the court or tribunal seized with that issue should in the first instance examine the relation 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.”

34. She noted that the mutuality of obligation is “*an irreducible minimum of a contract of service*”, quoting *Brightwater Selection (Ireland) Limited v. Minister for Social and Family Affairs* [2011] IEHC 510. She said that the parties agreed that while an individual is working there is a contract in existence in which the mutuality of obligation is present. She said that the mutuality of obligation requirement must be satisfied in respect of the entirety of each contract i.e. it “*must be present for the period of the existence of the contract alleged to amount to a contract of employment and not just in respect of the period of time when the work is being carried out by the drivers.*” Relying on para. 31 of

Weight Watchers to the effect that this irreducible minimum must subsist “*throughout each relevant discrete contract, not merely during the potentially shorter period when the contracted work is actually being done*” she held that individual contracts resulted from the driver notifying the appellant of his availability for work and the appellant placing his name on the roster in respect of a specific shift or series of shifts (para. 64). She accepted the submission of the respondent that the fact that a driver could exercise a choice in respect of the shifts for which he was available did not alter the fact that the relationship between the driver and the appellant was, and is, governed by these contracts and they contained mutual obligations to perform personal service. She accepted that mutuality “*was present for the entire duration of such contracts*”, notwithstanding the provisions of Clause 12 and Clause 14 of the written agreement.

35. She held:-

“75. The import of the above clauses is that they do not set out expressly the circumstances in which a driver is at liberty not to turn up for a shift for which he is rostered. In accordance with the dicta of Briggs J. [in Weight Watchers]... the contract assumes that there are or may be such circumstances so that, without breach of contract, the driver may propose not to take a particular shift.

76. The appellant contended that the drivers had no obligations whatsoever as they could choose not to turn up for any shift, safe in the knowledge that no sanction would be imposed. However, the contract envisages cancellation ‘should the contractor be unavailable at short notice’ together with a requirement of advance notification in accordance with Clause 14. Thus the contract aims to some extent, to regulate the circumstances of cancellation by a driver.”

36. She referred to Condition 10 in the contract in *Weight Watchers* as similarly providing for advanced notification in relation to cancellation. She considered *Weight*

Watchers and two other English cases, *Pimlico Plumbers Limited v. Smith* [2018] UKSC 29, [2018] 4 All ER 641 and *Autoclenz Ltd v. Belcher & Ors.* [2011] UKSC 41, [2011] 4 All ER 745 and then she concluded in paras. 81-84 as follows:-

“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 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 of obligation 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.”

37. On this basis, she was satisfied that mutuality of obligation was present for the duration of the individual contracts.

38. She held at para. 164 of her determination:-

“164. The multiple individual contracts, comprising contracts of service, are taxable in accordance with section 112 TCA 1997. It is not necessary to embark upon an analysis of the nature of the umbrella contract and whether it is a contract of or for. It is not necessary to consider whether the umbrella contract contained mutuality of obligations.” (emphasis as in original)

39. She did not analyse the over-arching written contract to ascertain whether mutuality of obligation was present. Having found that mutuality of obligation was present in the discrete individual contracts, she then proceeded to analyse whether they were contracts of service or contracts for services.

40. She started by quoting from the judgment of Keane J. in *Henry Denny & Sons (Ireland) Limited v. Minister for Social Welfare* [1999] 1 I.R. 34. While it is a lengthy quote it is appropriate to reproduce it in this judgment:-

*“... The criteria which should be adopted in considering whether a particular employment, in the context of legislation such as the Act of 1981, is to be regarded as a contract “for service” or a contract “of services” have been the subject of a number of decisions in Ireland and England. In some of the cases, different terminology is used and the distinction is stated as being between a “servant” and “independent contractor”. However, there is a consensus to be found in the authorities that **each case must be considered in the light of its particular facts and of the general principles which the courts have developed**: see the observations of Barr J., in *McAuliffe v. Minister for Social Welfare* [1995] 2 I.R. 238.*

*At one stage, the extent and degree of the control which was exercised by one party over the other in the performance of the work was regarded as decisive. However, as later authorities demonstrate, that test does not always provide satisfactory guidance. In *Cassidy v. Ministry of Health* [1951] 2 K.B. 343, it was*

pointed out that, although the master of a ship is clearly employed under a contract of service, the owners are not entitled to tell him how he should navigate the vessel. Conversely, the fact that one party reserves the right to exercise full control over the method of doing the work may be consistent with the other party being an independent contractor: see Queensland Stations Property Ltd v. Federal Commissioner of Taxation [1945] 70 C.L.R. 539.

In the English decision of Market Investigations v. Min of Soc Security [1969] 2 Q.B. 173, Cooke J., at p. 184 having referred to these authorities said:-

*“The observations of Lord Wright, of Denning L.J. and of the judges of the Supreme Court suggest that the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'. If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. **No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The** most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.”*

*It should also be noted that the Supreme Court of the Irish Free State in *Graham v. Minister for Industry and Commerce* [1933] I.R. 156, had also made it clear that the essential test was whether the person alleged to be a “servant” was in fact working for himself or for another person.*

*It is, accordingly, clear that, while **each case must be determined in the light of its particular facts and circumstances**, in general a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive. **The inference that 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 he or she derives from the business is dependent on the efficiency with which it is conducted by him or her.**” (emphasis added)*

41. The Commissioner referred to the fact that a number of tests had been developed by the courts to establish whether an individual is working under a contract of service or a contract for services. She then applied these various tests to the appeal before her. She considered the question of substitution and personal service, control, integration, the enterprise test, the opportunity to profit, bargaining power and the categorisation of employment status by the parties. In relation to substitution, she noted that if a driver was rostered for a shift but was “unable to turn up” he had an entitlement under Clause 12 of the written agreement to arrange for the work to be done by another of the appellant’s drivers. In such a situation, the driver who performed the work who was not originally

rostered would be paid for the work. Alternatively, the appellant could arrange for another one of its drivers to perform the work.

42. She considered a number of authorities where the significance of a right of substitution was considered. In *Pimlico Plumbers*, the individual plumber was permitted to substitute another Pimlico operative and the court held that the contract was one for personal services. In *Ready Mixed Concrete v. Minister for Pensions* [1968] 2 QB 497, a delivery driver was entitled to appoint a substitute who worked for the driver as opposed to the driver's employer and in those circumstances the court held that the driver was an independent contractor. In *McAuliffe v. Minister for Social Welfare* [1995] ILRM 189, the substitution clause permitted the individuals to substitute a relief driver to be paid by the driver. The court concluded that the individuals involved were independent contractors and not employees. In *Henry Denny*, if the shop demonstrator was unable to do the work herself "*she was required*" to arrange for the work to be performed by someone else approved by the company, and she was found to be working under a contract of service. In *Tierney v. An Post* [2000] 1 I.R. 536, a sub-post office master was required to obtain the permission of An Post for the employment of any person in the post office, and the court concluded that it was a contract for services. In *Weight Watchers*, the substitution clause required team leaders to find a "*suitably qualified replacement*" in the event that they were unavailable. The Commissioner said that Briggs J. held that the substitution clause in *Weight Watchers* (which permitted either a leader or Weight Watchers (UK) Limited to find a suitably qualified replacement to do the work) did not make the replacement leader the original leader's delegate, but gave rise to an entirely new contract in relation to that particular meeting between Weight Watchers (UK) Limited and the replacement leader.

43. In relation to this appeal, the Commissioner held that the driver may find a substitute to contract directly with the employer to do the work in circumstances where the substitute received payment for the work, as opposed to the original driver. At para. 97 she said:-

“In other words, the driver is relying upon a qualified right not to do or provide the work in stated circumstances, one of the qualifications being that he find a substitute to contract directly with the employer to do the work instead.”

44. At para. 100 she concluded that the substitution clause in this case was similar to that in *Weight Watchers*:-

“... and the same legal consequences arise. The substitution of one of the appellant’s other drivers, by the original rostered driver or by the appellant, gives rise to an entirely new contract between the appellant and that other driver in relation to that particular work assignment.”

45. She concluded on the issue of substitution as follows:-

“101. The appellant in the within appeal submitted that the substitution clause was wide enough to permit, without breach of contract, the drivers never to turn up for work at all and the substitution clause was therefore consistent with drivers being independent contractors. This is plainly incorrect. Any drivers substituted in the context of the within appeal would have been remunerated directly by the appellant for carrying out contractual obligations for the appellant. They were not sub-contractors for the original driver.

102. Where an original driver was replaced by a substitute, the agreement between the substitute and the appellant constituted a new contract and it replaced any contract between the original driver and the appellant in respect of that particular shift. This arrangement was akin to the swapping of shifts between drivers. It does not suggest that the drivers’ contract with the appellant was a contract for services

unless, inter alia, the original rostered driver was being remunerated by the appellant for the work being done by the substitute driver, but this was not the case.

...

105. In this appeal, if a driver was rostered for a shift but was unable to attend, he was required to arrange for the work to be done by another person approved by the appellant, i.e. another of the appellant's drivers. Once the original rostered driver confirmed his unavailability, the substitute entered into a contract with the appellant and was paid directly by the appellant for performing the work. The absence of an ability to genuinely sub-contract is a factor which indicates that the drivers worked under contracts of service as opposed to contracts for services."

46. The Commissioner considered the issue of the employment status of the drivers from the perspective of integration. She referred to the decision in *Re Sunday Tribune Limited* [1984] I.R. 505, at p. 507, where Carroll J. held that:-

"The test which emerges from the authorities seems to me, as Denning L.J. said, whether on the one hand the employee is employed as part of the business and his work is an integral part of the business, or whether his work is not integrated into the business but is only accessory to it..."

47. The Commissioner said that in order to ascertain how integrated an individual is in respect of a business, one must identify and consider the core aspects of the business. She said the component of delivery to the business was extremely important. The appellant's business comprised two core aspects, namely; the production of pizzas and the delivery of pizzas. She rejected the idea that it was possible in the circumstances for a business to outsource to contractors the very service it was established to provide: *"it is not simply a pizza business, it is a pizza delivery business."* On that basis, she held that the work of the drivers was integral to the business and not merely accessory to it. She was of the view

that if the contractors were truly independent of the appellant, they would not be wearing Domino's branded clothing, would not be driving Domino's branded vehicles and would not be using Domino's imprinted bags for the pizzas. She was of the view that the Domino's logo would be predominantly, perhaps fully, absent in the process of delivering the pizza.

48. As regards the categorization of employment status by the parties, the Commissioner noted that it was well-established that minimal weight would be attributed to the categorisation given by the parties to their working relationship. She referred to the decision of Murphy J. in *Henry Denny* and the decision of Geoghegan J. in *Castleisland Cattle Breeding Society Limited v. Minister for Social and Family Affairs* [2004] 4 I.R. 150 and *Barry*. At para. 152, she concluded that the law was clear in relation to the matter of categorisation. She said:-

"... Legal analysis must take into account the terms of the written contract but must focus also on the operation of the contract, the correct legal interpretation of its terms and the indications which arise on foot of the relevant legal tests and their application."

49. At para. 155 she determined:-

"... that the framework in the within appeal is one of an overarching umbrella contract supplemented by individual contracts in respect of assignments of work. As regards the individual contracts, I have conducted an analysis based on the components of: substitution and personal service, control, integration, the enterprise test, opportunity to profit and bargaining power. The application of these tests leads to the conclusion that these contracts are contracts of service. The law is unambiguous as regards the minimal weight to be attached to the description of the drivers in the written contract as 'independent contractors'. I determine that the

individual contracts entered into between the appellant and its drivers in respect of assignments at work involving one or more shifts, comprise contracts of service.”

50. Accordingly, she concluded that the drivers worked under multiple contracts of service and were taxable in relation to the emoluments arising therefrom, in accordance with s. 112 of the TCA.

The appeal

51. As I have stated, the company appealed by way of case stated to the High Court and the Commissioner stated a case raising nine questions for the determination of the High Court. The High Court determined that there were, in effect, four core issues for determination; mutuality of obligations, substitution, integration and whether the Commissioner failed to give proper weight to the actual terms of the contract. The High Court upheld the decision of the Commissioner in full. The appellant appealed the decision of the High Court to this court in respect of each of the nine issues set out in the case stated, though the appeal focussed on the four core issues identified by the trial judge.

Case law

52. In *Henry Denny*, Keane J. (as he then was) said that each case must be determined in light of its particular facts and circumstances (p. 50). In *Castleisland Cattle Breeding Society Limited v. The Minister for Social & Family Affairs* [2004] 4 I.R. 150, at para. 23, Geoghegan J. held:-

*“... There is nothing unlawful or necessarily ineffective about a company deciding to engage people on an independent contractor basis rather than on a “servant” basis but, as this court has pointed out in Henry Denny Ireland Limited v. Minister for Social Welfare [1998] 1 I.R. 34 and other cases, **in determining whether the new contract is one of service or for services the decider must look at how the contract is worked out in practice as mere wording cannot determine its nature.***

Nevertheless, the wording of a written contract still remains of great importance. It can, however, emerge in evidence that in practice the working arrangements between the parties are consistent only with a different kind of contract or at least are inconsistent with the expressed categorisation of the contract. In this case, apart from matters of minor detail, the written contract seems to have been the contract that actually worked.” (emphasis added)

53. It is thus important both to consider the terms of the written agreement between the appellant and the drivers, and whether in practice the working arrangements between the parties are consistent only with a different kind of contract or at least are inconsistent with the express categorisation of the contract. Terms and conditions *describing* the relationship between the parties are, in the words of Murphy J. in *Henry Denny*, of marginal value as “*they are not contractual terms in the sense of imposing obligations on one party in favour of the other. They purport to express a conclusion of law as to the consequences of the contract between the parties.*” This observation does not apply to the *substantive* terms of the written agreement. It is therefore of considerable significance that the Commissioner determined that in three specific respects – and no more – the operation of the agreement “day to day” differed from the written terms. It follows that, save in these three specific instances, the written agreement was the contract actually operated by the parties to it.

54. Before considering how the written terms of the agreement and the working arrangements of the parties should be characterised, one must first determine whether the Commissioner erred in law in concluding that the threshold test of mutuality of obligation was satisfied in this case by the multiple individual contracts and that it was not necessary to consider whether it was met in the over-arching agreement.

55. The parties agreed that “*mutuality of obligation*” is a *sine qua non* of an employment relationship. The concept was first discussed in *Barry* by Edwards J. In that case, the respondents were veterinary surgeons who worked for the Minister as temporary veterinary inspectors at meat plants in County Cork. Following closure of the plants, the respondents claimed to be entitled to redundancy payments. These were contingent on them having been employees who were employed at all material times by the Minister under a contract of service. Edwards J. noted that the work relationship between each of the respondents and the Minister was a very unusual one, and he did not regard it as a straight choice between a single contract of service and a single contract for services: there were wider possibilities and it was unjustifiable to limit the possibilities to just two. He then set out paras. 43 and 44, which are quoted at paras. 25 and 26 above. It is important to note that he contemplated three possible scenarios. The third possibility envisaged by Edwards J. was 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 services*, 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 over-arching or master umbrella contract to offer and accept employment. This master or umbrella contract could be either a contract of service or a contract for services, or perhaps a different type of contract altogether. In that case, there was in fact no over-arching master contract comparable to the written agreement in this case and Edwards J. made no finding that an over-arching contract had come into existence in *Barry*. The only contracts under discussion in *Barry* were the individual short contracts with each temporary vet, which could have been either contracts of service or contracts for service.

56. Edwards J. proceeded to consider the issue of mutuality of obligation and it is worth quoting what he said in full:-

“47. 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.”

57. In *Mansoor v. Minister for Justice, Equality and Law Reform* [2011] 1 I.R. 562, the High Court (Lavan J.) dismissed the claim of the plaintiff that he was an employee of the defendant on the grounds of the absence of mutuality of obligation. The plaintiff was a doctor who provided medical services at a garda station in respect of the taking of blood or urine samples from persons suspected of committing drink/driving offences. Lavan J. quoted *Barry*, that if there is no mutuality of obligation it is not necessary to go further in the analysis as, whatever the relationship is, it cannot amount to a contract of service. The

focus of the case was on whether the Minister was under an obligation to provide work for Dr. Mansoor, though it also addressed the issue of whether Dr. Mansoor was required to work if called on to attend at a garda station. At para. 22 of the judgment, he held that the test was not satisfied in the case before him:-

“22. ... It is clear that the defendants were not obliged to give the plaintiff work. Nor could the defendants possibly predict the number of drink driving offences that may occur on any given night. In addition, it was open to the defendants to call a number of general practitioners to assist them and although the plaintiff, along with a number of other general practitioners may have been on a contact or duty list, were the plaintiff to declare that he were unavailable for work, he could face no sanction or rebuke from the defendants. He simply would not be paid. The plaintiff performed a set task for a fixed sum. Likewise, if the defendants elected to engage a different general practitioner on any given occasion, the plaintiff would have had no reasonable grounds for objecting to this.”

58. He therefore found that the plaintiff was at all material times an independent contractor.

59. In *Brightwater Selection (Ireland) Limited v. Minister for Social and Family Affairs* [2011] IEHC 510, Gilligan J. considered whether an employment agency was the employer of the workers whom it placed with third parties. Ms. Keenan registered with an employment agency, Brightwater. Brightwater arranged for an interview for Ms. Keenan for a position in the administration department of UCD and she was subsequently offered a temporary position as a financial accountant. Her only interaction with Brightwater consisted of filing weekly timesheets and the corresponding payment by Brightwater of Ms. Keenan's salary into a designated bank account. Brightwater deducted and paid the tax and the employee and employer's element of social insurance contributions. There was

no obligation on Brightwater to provide work for Ms. Keenan, nor any corresponding obligation on Ms. Keenan to work on behalf of Brightwater. Brightwater claimed that it was due a refund of the employer's element of the social insurance contributions it had paid in respect of agency workers, and the case of Ms. Keenan was selected as a test case for determining the insurability of agency workers and the associated entitlement to a refund. Gilligan J. cited the decision of Lord Irvine L.C. in *Carmichael and Leese v. National Power Plant* [1999] 1 W.L.R. 2042 in relation to part time guides:-

“... that the documents did no more than provide a framework for a series of successive 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 C.E.G.B. 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 accommodating to the other. ... The 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 C.E.G.B.'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 on the C.E.G.B. to provide casual work, nor on Mrs. Leese and Mrs. Carmichael to undertake it, was imposed. There would therefore be an absence of the irreducible minimum of mutual obligation necessary to create a contract of service ...”.

60. Gilligan J. then cited, with approval, the decision of Edwards J. in *Barry* and, in particular, his description of the requirement of mutuality of obligation. At paras. 48 and 49, Gilligan J. said:-

“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. ...

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.”

61. In *McKayed v. Forbidden City Limited t/a Translations.ie* [2016] IEHC 722, Ní Raifeartaigh J., in the High Court, again considered the mutuality of obligation test. The plaintiff in that case was a translator. He received work over a period of approximately two and a half years. The company provided training for him and he was paid an hourly rate which reduced over time. He was told by the company where to attend and where to work. He was not registered for VAT, and the name and logo of the company were displayed on his identification badge when he was working. He was to provide the company details and phone number when working and not his own. He submitted invoices at the request of the company. Sick pay, holiday pay and pension contributions were not covered by the company. He could be called at any time, 24-hours, seven days a week. The defendant argued that there was an absence of the mutuality of obligation necessary for an employment contract and therefore Mr. McKayed was not an employee of the company. The plaintiff argued that the evidence supported the existence of mutuality of obligation and that the requirement subsisted in an implied agreement for future work on an ongoing basis between the parties as well as in the terms of the written document. He argued that over the course of dealings between the parties, a mutual obligation had built

up whereby the applicant was paid for the work done and was obliged to provide his own work and skill in the performance of a service for the employer, and the employer had an obligation into the future to provide him with work. The High Court considered the prior authorities and the appropriateness of departing from *Barry* in the context of *In the matter of Worldport Ireland Limited (in liquidation)* [2005] IEHC 189 and *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27. At para. 31 of her judgment she held:-

“... The issue of how to determine whether a contract of employment exists has been before many courts on many occasions, and while there have been many differences of opinion at different times and in different places, the position today in this jurisdiction is that the approach identified in Barry, and applied in [Mansoor] and Brightwater, is appropriate. While the Supreme Court in the Denny case did not refer to the ‘mutuality of obligations’ test, presumably because of the facts of the case, there is nothing in that case which indicates that the test may not usefully be used as a filtering mechanism to identify clear cases of a relationship other than an employment relationship.”

62. She then applied the mutuality of obligation test to the facts before her. She held, at para. 34, that the defendant agreed *“merely to try to give the plaintiff work but that there was no guarantee of work, in circumstances where the defendant itself had no control over the amount of work that might come to it from the Garda Síochána or other State entities”*. She noted that the appellant was entitled to work for others as well as the defendant. She rejected the argument that an obligation to provide work to the plaintiff arose from the fact that work had, in fact, been given to him on a regular basis for a particular period by the defendant. At para. 39 she said:-

“... If this approach were determinative of the issue, none of the previous authorities in which this issue had arisen could have reached any conclusion other than that the

*individuals in question were employees, be they veterinary inspectors, shop demonstrators, casual hotel workers, or home-workers for a clothes company, as they had all carried out work on a regular basis for a period of time; but that is not how those cases were approached by the various courts which examined them. In other words, **the fact that work was given regularly for a period of time is not determinative of whether one party had a legal obligation to provide the other party with work.***” (emphasis added)

63. She concluded that the defendant, the putative employer, was not under a contractual obligation to furnish the plaintiff with any, or any particular, volume of work into the future and that the requisite mutuality of obligation for an employment contract was therefore absent.

64. The Commissioner did not address these authorities, other than *Barry*, in any detail. Her determination instead placed great emphasis on the decision of the Upper Tribunal in *Weight Watchers*. It is to this authority I now turn.

Does *Weight Watchers* apply?

65. In view of the reliance by the Commissioner, the High Court and the respondent on the judgment of The Upper Tribunal in *Weight Watchers (UK) Limited & Ors.*, it is necessary to consider the judgment in detail and to determine whether the Commissioner erred in law in her application of the case to the facts in these proceedings. At para. 30, Briggs J. set out the three theoretical categories into which contractual arrangements for discontinuous work may fall, which I have quoted at para. 27 above. In relation to the hybrid class, Briggs J. held that it may be 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. In that case, the question in dispute was whether the PAYE regime, and the applicable national insurance

regime, applied to the work done by the Leaders. Briggs J. held, in para. 31, that in cases of discrete contracts for periods of work it is necessary to show that *“the requisite irreducible minimum of mutual work-related obligation subsists throughout each relevant discrete contract, not merely during the potentially shorter period when the contracted work is actually being done.”* Where the discrete contract is for a series of separate events the *“relevant period”* during which mutuality of obligation must subsist is the whole of the period of the discrete contract.

66. Applying this analysis to the facts in this case (assuming for the purposes of the argument that there are a series of discrete contracts and not simply one written agreement), the irreducible minimum of mutual work-related obligations must subsist for each rostered period (of one or more shifts) and mutuality of obligation must subsist throughout the whole of the rostered period, typically a week.

67. Briggs J. rejected the argument in *Weight Watchers* that there was only a single overarching or umbrella contract with no separate process of contracting for each meeting or series of meetings in para. 81 of his judgment (which is set out at para. 30 above). In so doing, he relied on Condition 6 of the written contract which provided:-

“The Leader shall, in his/her discretion fix the time, date and place of any Weight Watchers meetings as he/she agrees to take. All arrangements for the hire of halls or other meeting places require specific approval from the Area Service Manager. Such arrangements will be in the name of Weight Watchers who will be responsible for paying all hiring charges.”

68. Briggs J. emphasised the fact that the condition *required* the Leader to agree to take any such meetings and required the Leader to obtain WWUK’s specific approval in relation to the fixing of the time, date and place of any meetings or series of meetings. This led Briggs J. to conclude that, in relation to any particular meeting or series of

meetings, the umbrella agreement constituted no more than an agreement to agree, requiring a further and distinct contract making process for the conduct of any particular meeting or series of meetings.

69. WWUK argued that even if there were specific contracts for each series of meetings, nonetheless the contracts did not satisfy the test of mutuality of obligation. It argued that even after agreeing a series of meetings, the Leader could simply decide not to conduct one or more or all of them. Thus, there was no contractual obligation on the Leader to work, even after making an agreement relating to a series of meetings. Briggs J. rejected this argument based upon an express term of the contract:-

*“88. ... The language of Condition 10 does not set out expressly the circumstances in which a Leader is at liberty not to take a particular meeting. Rather, it assumes that there are or may be such circumstances so that, **without breach of contract**, the Leader may propose not to take a particular meeting. Since those circumstances are not confined to cases of inability to take the meeting, it may reasonably be inferred that a Leader may propose not to take a particular meeting due to circumstances falling short of inability, such as a family wedding or funeral, in which the Leader is for good reason unwilling to take that particular meeting. **But such a proposal by no means leaves the Leader free of any work-related obligation to WWUK, either in relation to that meeting or the series of meetings which she has agreed to take.***

*89. First, in relation to the particular meeting, the Leader is by implication **obliged** first to try and find a suitably qualified replacement and secondly, if that fails, to request Weight Watchers’ assistance by giving her ASM as much prior notice as possible. **It is only when the replacement Leader has been found (by the original Leader or Weight Watchers) or in default, the particular meeting cancelled, that***

the original Leader's work-related obligations in relation to that meeting entirely cease.

90. Secondly, it is plain from ***the language of Condition 10*** that where, as usual, a series of meetings has been agreed, a proposal by a Leader not to take a particular meeting ***leaves her obligation to take the remainder of the series intact***. It is in my judgment absurd to suppose that a Leader could, because of Condition 10, first agree to conduct a series of meetings and then, without notice to Weight Watchers, simply fail to attend any of them, without a breach of contract.” (emphasis added)

70. A number of points arise from these passages. Briggs J.'s starting point was whether a Leader was “*at liberty*” not to take a particular meeting once the Leader had agreed to that meeting or series of meetings. Secondly, he implies a requirement that the Leader must have “*good reason*” for failing to take a meeting. Accordingly, once a Leader has agreed to take a particular meeting or series of meetings, the Leader is obliged, by implication, first to try to find a suitably qualified replacement and secondly, to request “*the assistance*” of the company by giving her contact as much prior notice as possible. If neither the Leader nor Weight Watchers have organised a replacement, then the particular meeting will be cancelled. It is at that point that the original Leader's “*work-related obligations in relation to that meeting entirely cease*”, but not before. Finally, Briggs J. held that the substitution clause (condition 10) could not be construed to entitle the Leader to agree to conduct a series of meetings and then simply fail to attend to take any of them, without a breach of contract. He rejected the argument that the Leader's right not to take a particular meeting was unfettered. At para. 92 he held:-

“92. ... It was fettered as a matter of ***implication by the need to show some good reason for proposing not to take a meeting***, albeit a reason which might fall short of inability. It was further fettered by the continuing obligations to seek to find a

suitably qualified replacement, to notify the ASM if unable to do so, so as to seek Weight Watchers' assistance, and to conduct all subsequent meetings in the series which had been agreed." (emphasis added)

71. He held that there was mutuality of obligation and the substitution clause did not alter this conclusion.

72. In my judgment, the contract(s) in this case differ(s) critically from the contract(s) in *Weight Watchers*. It is always important to bear in mind the observations of Keane J. in *Henry Denny* that each case must be determined in light of its particular facts and circumstances, and so these differences can be decisive in any given case. The critical differences in my view are as follows:

- (1) Briggs J.'s analysis places great weight on obligations on the Leaders under the terms of the contracts, both the umbrella contract and the meeting-specific agreements. He held that Condition 6 expressly required the Leader to agree to take meetings and this led to his conclusion that the condition "*plainly places the initiative*" for concluding the meeting-specific contracts upon the Leader. In addition, Condition 6 requires the Leader to obtain WWUK's specific approval in relation to the fixing of the time, date and place of any meetings or series of meetings. There are no such equivalent terms in the contractual arrangement under consideration here and the Commissioner made no findings of fact that there were such terms. Rather, at para. 49 of the determination she interpreted the written agreement between the parties and held that Clause 14 "*required*" a driver to initiate an agreement with the appellant in relation to his availability for work. This is a matter of the construction of the contract rather than a finding of fact, and I shall return to the construction of the contract in due course. It is sufficient for present

purposes merely to note the significant differences between Condition 6 and Clause 14.

- (2) Briggs J. rejected the argument that there was an absence of mutuality of obligation in the meeting-specific agreements. He did so on the basis that the substitution clause in the agreement (Condition 10) between each Leader and WWUK did not warrant such a conclusion, rather than on an express clause stating that the company was not obliged to offer any work and the Leader was not required to perform any work offered, such as Clause 14. It was accepted by the respondent that Clause 14 did not oblige the appellant to provide work to the drivers, nor the drivers to work for the appellant. This express clause precluded the conclusion reached by Briggs J. in relation to a contract which contained no such equivalent clause.
- (3) Briggs J. held that a Leader did not have an unfettered right not to take a particular meeting and this meant that there was an obligation on a Leader to work within the meaning of the mutuality of obligation test. He said the Leader's right to refuse to work was fettered as a matter of implication by the need to show some "*good reason*" for proposing not to take a meeting. In this case, there is no requirement on a driver to show good reason for not undertaking a delivery service. Clause 12 expressly confers a right to engage a substitute delivery person should the driver be unavailable at short notice. It was not argued, and the Commissioner did not hold, that, as a matter of implication, the driver could only do so on the basis of some "*good reason*". Thus, the first fetter identified by Briggs J. does not apply in this case.
- (4) Briggs J. held that there was a continuing obligation on a Leader to seek to find a suitably qualified replacement. On the other hand, Clause 12 in the contract in these proceedings confers a *right* to engage a substitute driver but does not confer an

obligation so to do. The driver agrees in Clause 14 to notify the company in advance of his unavailability to undertake a previously agreed delivery service. Taking this term at its height, this could be construed as an obligation to notify the company in advance of his unavailability. But I do not accept that an obligation to give notice of a driver's unavailability to undertake a previously agreed delivery service thereby becomes an obligation to perform work within the meaning of the jurisprudence on mutuality of obligation. It is, by definition, an obligation of notice, not of performance of work.

- (5) The final fetter identified by Briggs J. was the obligation to conduct all subsequent meetings in the series which had been agreed. Briggs J. held that the Leader's right to substitute was not an unfettered right and the right of substitution in relation to a particular meeting did not absolve the Leader of the obligation to take the remainder of the series of meetings. There is no such obligation on a driver to work the remaining shifts for which he may have been rostered by the appellant. First, the contention that a driver may fail to attend without breaching any contract is not based on a right of substitution (as in *Weight Watchers*), but rather is based primarily on Clause 14. Counsel for the respondent accepted that there is a want of mutuality of obligation in the written agreement. He argued that mutuality of obligation arises in the specific roster contracts. However, he did not assert that if a driver failed to attend for any time allotted to him on the roster, he was in breach of contract. He accepted that even after a roster had been drawn up, and an individual discrete contract arose between the appellant and each rostered driver, the driver was not obliged to work at the time for which he was rostered. This absence of obligation is supported by the fact that there was no sanction if a driver failed to attend or indeed if he failed to notify the appellant of his unavailability. The evidence found by the

Commissioner was simply that a manager would “*follow up*”. It was accepted that this could simply be to ensure that there had not been a failure of communications.

There was thus no finding that if a driver failed to attend at a time he or she was rostered by the appellant, that this constituted a breach of contract by the driver.

73. In my judgment, the Commissioner erred in her analysis and application of *Weight Watchers* to the contractual arrangements as found by her in this case and the High Court erred in failing to identify this error.

The true terms of the Contract

74. Before proceeding to analyse mutuality of obligation in the circumstances of this case, it is important to record that the Commissioner held that the written agreement between the appellant and the drivers “*reflect[ed] the true agreement of the parties*” save in three respects. The first, relating to the non-availability of company cars for hire, is not relevant to the issue of mutuality of obligation. The second and third matters were that the appellant prepared the invoices for some drivers which were signed by those drivers, and that in some instances the drivers were asked to, and performed, work which was not stipulated in the contract, *i.e.* they assembled boxes while waiting for deliveries. As these were deviations which applied to *some* drivers and not all, the Commissioner correctly did not hold that the practice of the parties was inconsistent with the written agreement, or that it was modified by these changes. The reliance placed by the respondent on these findings is misplaced. They do not establish how the contract was worked out in practice, in the words of Geoghegan J. in *Castleisland Cattle Breeders*, merely that the terms were not always followed to the letter. As Geoghegan J. held in that case, the wording of a written contract remains of great importance, though if there is evidence that *in practice* the working arrangements between the parties are consistent only with a different kind of contract or are inconsistent with the expressed categorisation of the contract, this will

override that written categorisation. However, in this case there was no evidence of any practice which was inconsistent with the terms of the written agreement. This is very significant in light of the Commissioner's finding that the written agreement reflected the true agreement between the parties save for these three issues, none of which is relevant to the question of mutuality of obligation.

Did the Commissioner err in holding that the threshold test of mutuality of obligation was satisfied?

75. In my judgment, the Commissioner erred in her construction of the contract between the appellant and the drivers and thereby fell into error in concluding that the mutuality of obligation test was satisfied in this case. She did so predominantly because she misapplied *Weight Watchers* to the case without fully appreciating or giving due weight to the differences between the facts in the two cases, but also because she misinterpreted the written agreement.

76. The written agreement did not oblige the drivers to work and therefore they were not *required* to initiate an agreement with the appellant, contrary to her determination at para. 49. This conclusion is contrary to the express terms of Clause 14, and there was no basis to conclude that this clause did not reflect the agreement of the parties. Indeed, counsel for the respondent accepted that the drivers were not obliged to work under the terms of the written agreement. His argument was that the only means of giving effect to that agreement was for the driver to initiate engagement by indicating when he would be prepared to work. It then fell to the appellant to decide whether or not to roster the individual at all, or at any of the times he or she nominated. He contended that this was how the determination ought to be read. While this may be so as a matter of language, it is not in fact how the Commissioner proceeded and does not reflect the fact that in so doing

she was applying the decision in *Weight Watchers* where there was an express contractual obligation on the Leaders to initiate the individual contracts as found by Briggs J.

77. More fundamentally, while she records the requirement that mutuality of obligation must subsist for the entirety of the period of the discrete contract, and the fact that the parties agreed that it was not sufficient to show mutuality of obligation while the work was being undertaken, she did not analyse the arrangements in this case from this perspective. She simply accepted that mutuality was present for the entire duration of the contracts she found arose from the submission of an availability sheet by a driver, and the creation of a weekly roster by the appellant. She made no findings as to the terms of the contracts which she held arose as a result of the rostering arrangements, and she did not find as a fact that the terms of the written agreement did not apply to these individual contracts. She accepted by implication that the individual contracts were governed by the terms of the written contract and she made no findings which would entitle her, or a court, to hold that the written agreement did not apply.

78. She then concluded that neither Clause 12 nor Clause 14 altered her conclusion; but, she did so by misconstruing the clauses and she thereby erred in law. She approached the clauses by saying that they did not set out expressly the circumstances in which a driver *is not at liberty to turn up for a shift*, without actually considering whether he was in fact obliged “to turn up for a shift” at all. If there was no such obligation, then the clause would not address the circumstances in which a driver could fail to turn up for work, so to say it did not address this point does not answer the question. The central question remained whether the driver was obliged to perform work. Clause 14, as was acknowledged by counsel for the respondent, does not impose an obligation on the driver to work. In Clause 14, a driver agrees to notify the appellant, in advance, of his unavailability to undertake a previously agreed delivery service. This does not imply that

he may only be unavailable for some (good) reason, as in *Weight Watchers*. It follows that there is no implied term that if he is simply unavailable for whatever reason and fails to turn up, that he will breach his contract. The Commissioner did not find that there was in fact such an implied term in the individual discrete contract. The clause only requires the driver to notify the appellant if he will be unavailable to undertake a previously agreed delivery, it does not require him to undertake the delivery absent a good reason for not doing so. The appellant recognises the right of the driver to make himself available on only certain days and certain times of his own choosing. The notification requirement does not, in my view, fetter this freedom of the driver not to work if he so chooses.

79. The Commissioner rejected the argument of the appellant on the basis that the contract envisaged “*cancellation ‘should the contractor be unavailable at short notice’ together with a requirement of advance notification*” and that this regulated the circumstances of cancellation by the driver. This conclusion is based upon a misconstruction of the two clauses. Clause 12 confers a right on a driver to engage a substitute driver should he become unavailable at short notice. It does not impose an obligation to do so, despite the fact that, on occasion, the Commissioner wrongly refers to this is an obligation or requirement. It does not restrict in any way his freedom not to make himself available for work (whether at short notice or otherwise). Accordingly, it is not relevant to the assessment of whether there is an obligation on a driver to perform work offered to him by the appellant. As the agreement in Clause 14 to notify the appellant if a driver is unavailable is likewise unfettered, it follows, in my judgment, that the Commissioner erred in her construction of the agreement. She did so due to a failure to give full effect to the differences between the facts in this case and those in *Weight Watchers*, and to have due regard to the actual agreement of the parties.

80. At para. 81 of the determination, she said that the reasoning in *Pimlico Plumbers* and *Autoclenz*, to the effect that a clause which provides that the provider of work has no obligation to offer work and the putative recipient no obligation to accept work does not mean that mutuality of obligation is absent, were of assistance to her analysis. However, this conclusion is contrary to the Irish authorities *Barry*, *Mansoor*, *McKayed* and *Brightwater*, all of which state clearly that for mutuality of obligation to be present there must be an obligation to provide work on one party, and an obligation to perform the work on another party. She does not consider these authorities in her analysis at this point and her failure to do so, and her misstatement of the law in Ireland as a result, is an error of law by the Commissioner.

81. The Commissioner erred in paras. 82 and 83 of the determination. As I have said, the driver's "right to cancel a shift" (even if it may be so described) was not qualified by any *requirement* to engage a substitute or by a requirement to provide advance *notice* to the appellant. He or she was not under an obligation "*to work out the remainder of the shifts in the series which had been agreed*" because a driver remained free at all times not to work, regardless of the rostering arrangements. Counsel for the respondent accepted that, notwithstanding the fact that an individual may be rostered to attend for a particular shift, the driver was under no obligation to "turn up". As this was based upon Clause 14, it logically applies to every period of time for which a driver was rostered on any occasion.

82. Further, if a driver was not obliged to work a rostered shift, the requirement that mutuality of obligation subsists for the duration of the individual discrete contracts cannot be satisfied. The implications of the absence of an obligation on a driver to work a particular rostered shift were not correctly identified by the Commissioner.

83. There was no sanction for any failure to attend for any shift; at most, there would be "*follow up*" in such circumstances. It was accepted by counsel for the respondent that this

did not necessarily entail any sanction. Thus, there was no basis in fact for concluding that a driver could be sanctioned for failure to undertake a previously agreed delivery service. The Commissioner failed to give any weight to the absence of a sanction for a failure to attend for work, and the implications of this for the contention that a failure to attend would amount to a breach of contract by a driver. There was, in fact, no basis for the Commissioner to conclude that there was an obligation to work out the remainder of the shifts, contrary to her conclusion in para. 82.

84. In *Barry*, Edwards J. identified the relevant obligations as the obligation of the employer to provide work for the employee and the corresponding obligation on the employee to perform work for the employer. These are the obligations which are at issue in assessing mutuality of obligation. They are not to be confused with the obligation to perform the work once undertaken and to pay for the work so undertaken. Counsel for the appellant submitted that the test must be applied before the workers actually “*do the work*”. One must ascertain whether the employer has an obligation to provide work to the employee prior to actually reaching agreement to provide and to perform that work. Counsel submitted that the Commissioner and the High Court erred in merely looking at the obligations between the parties as they arose at the moment when “the [driver] turns up in the depot [of the appellant] and is assigned a particular delivery job”. At that point, there was an obligation on the driver to deliver the pizza and on the appellant to pay the agreed fee. Counsel submitted that these obligations were not the obligations that are necessary to satisfy the mutuality of obligation test in this context. If that were so, then every contract for services would be converted into, and treated as, an employment contract because even in a contract for services, both parties assume obligations to each other. I agree. Furthermore, this analysis is consistent with the requirement that the obligations exist for the relevant period of the individual contracts and not merely for the

potentially shorted period while the work is actually being performed. It further underscores the error in the approach of the Commissioner in this case, in my view.

85. The Commissioner did not address the question whether the appellant was obliged to provide work for the drivers under the individual contracts, nor make any findings in relation to this aspect of the working arrangements of the parties. This is an important omission as there must be an obligation on the putative employer to provide work, not merely an obligation on the worker to perform the work (*Mansoor; McKayed*). There was no obligation on the appellant to utilise the services of a driver even if the driver offered to make himself available for work by completing the availability sheet for any particular week. The appellant was free to roster any driver it chose and to decline the offer of any individual driver to attend at any given time. The mutuality of obligation on the part of the appellant therefore depended upon the terms of the individual contracts created by the rostering of drivers for one or more shifts. It must apply for the duration of the individual contract and it was not sufficient if the obligations only applied during the shorter periods when the work offered was actually being performed. Examples of an availability sheet and a roster were not included in the case stated and there was no suggestion that they included any written terms of agreement. This meant that the Commissioner was required to infer, from the practice of the parties, the terms of these individual contracts insofar as they supplemented or differed from the written agreement. She made no particular findings as to the terms of the individual contracts as such. While the rostering was no doubt prepared on the basis of informed expectation of a particular number of orders occurring during a given shift, the appellant could not predict the number of deliveries which would be required on any given shift (as in *Mansoor*). If it turned out that there was in fact no need for the services of a driver on any particular shift, the driver had no cause for complaint that he was not afforded an opportunity to work. It is important to

acknowledge that even if he did not make any deliveries, he would nonetheless be paid the promotional sum due for wearing the uniform of the appellant. These facts ought to have been assessed by the Commissioner and she ought to have set out why she concluded that mutuality of obligation applied to the appellant in these circumstances. She did not address the judgment in *McKayed*. In that case, the defendant had agreed merely to try to give the plaintiff work but that there was no guarantee of work as the putative employer had no control over the amount of translation work that might be required by An Garda Síochána or other state entities, the plaintiff was entitled to work for others and, while work had regularly been provided, the High Court held that this did not amount to a legal obligation to provide the other party with work. Each of these factors was present in this case also. If she was to reach a conclusion which differed to that of the High Court on similar facts she was required to explain why she distinguished the facts in the appeal before her from the facts in *McKayed*. Despite these criticisms, I conclude, on the basis of *Ó Culachain*, that there is evidence pointing towards one conclusion, and evidence pointing to the opposite; her implicit conclusion, that there was an obligation on the appellant to provide work under the individual contracts, is not one which no reasonable Commissioner could have arrived at and it is not possible to say that this point was based on a mistaken view of the law, and therefore her decision on this point ought not to be overturned.

86. Notwithstanding this conclusion, in relation to the obligation of the appellant to provide work to the drivers listed on the rosters, for the reasons given above, I conclude that the Commissioner erred in law in her assessment of and her conclusion that mutuality of obligation existed in the multiple individual contracts in this case, and that the trial judge erred in law when he failed to identify this error. In my judgment, there was no mutuality of obligation for the relevant period of the multiple individual contracts and

therefore the irreducible minimum for a contract of service to exist was in fact absent in this case. While the Commissioner did not determine whether mutuality of obligation was met in the umbrella agreement, counsel for the respondent accepted that it was not, and, in my judgment, he was correct to concede the point. That being so, there was no mutuality of obligation in the over-arching agreement either. It follows that, as a matter of law, the agreements cannot have been contracts of service and the drivers were therefore not employees and their emoluments were not taxable pursuant to Schedule E for the relevant years of assessment.

87. A number of English authorities were opened to the court by the parties in relation to this issue, but I do not consider it necessary to discuss them in this judgment. The task of this court in this case stated is to determine whether the Commissioner erred in law in her interpretation of the working arrangements of the parties. I have done so by reference to her reasoning and the relevant Irish authorities, and those English authorities upon which she relied. I have not analysed the issue by reference to the English cases as it was not necessary to the task in hand. Having said that, it is important to observe that these authorities must be used with caution in the Irish context. There has been significant statutory intervention in England and many of the authorities turn on the statutory definition of a “worker”, an intermediate category between an employee and an independent contractor, which does not exist in Irish law.

88. I have also not addressed the appellant’s argument that the Commissioner erred in holding that there were individual discrete contracts entered into by the appellant and the individual drivers who were rostered for work on any given week. The issue for this court is to answer the questions in the case stated and it must do so by reference to the determination and the case stated. As I have concluded that the Commissioner erred in her finding that mutuality of obligation existed in the discrete individual contracts, and there

was no argument that the over-arching agreement met the test, it was simply unnecessary so to do. I have proceeded on the assumption that this was the correct analysis without finding that it, in fact, was correct.

Substitution

89. The appellant argued that the fact drivers are permitted to arrange for a substitute to carry out their work is a factor that weighs in favour of them being independent contractors as opposed to employees. The substitution clause in this instance is Clause 12 where the appellant accepts the driver's "*right to engage a substitute delivery person should the [driver] be unavailable at short notice*". The Commissioner was inconsistent in her interpretation of this clause. At para. 38(b) of the determination, she found that the substitution clause "*permitted*" drivers to substitute another, and at para. 90 she held that a driver has "*an entitlement*" to arrange a substitute. On the other hand, at para. 82 she found that there was a "*requirement*" to engage a substitute and, at para. 105, that a driver was "*required to arrange*" a substitute. As I have said, the latter findings were incorrect. The right to engage a substitute applied "*should the [driver] be unavailable at short notice*". The driver could be unavailable for any reason and on any occasion. He was not obliged to engage a substitute but if he chose to exercise his right to do so, the substitute "*must be capable of performing [driver's] contractual obligations in all respects*". This was a limitation on the choice of substitute available to a driver, but there was no such fetter on the right to engage a substitute once it had arisen, *i.e.* when the driver became unavailable at short notice. If a substitute was arranged, the substitute was paid by the appellant and the original driver was not paid. The appellant's case was simple: an unfettered right to substitute another one was inconsistent with an obligation of personal performance and thus, inconsistent with a contract of service.

90. The Commissioner identified two lines of authority from the Irish and English case law she cited. If a worker was *required* to arrange a substitute and the substitute was paid directly by the company, that was more consistent with a contract of service (*Henry Denny*). On the other hand, if the worker was *permitted* to engage a substitute and the substitute was paid by the original worker, this was more consistent with a contract for services (*Ready Mixed Concrete; McAuliffe*). She considered the analysis by Briggs J. at paras. 32-34 in *Weight Watchers* as discussed in para. 42. She correctly said that the driver “*may find a substitute to contract directly with the employer to do the work in circumstances where the substitute receives payment for the work as opposed to the original driver.*” The difficulty is that the second sentence in this paragraph is incorrect. She states “[i]n other words, the driver is relying upon a qualified right not to do or provide the work in stated circumstances, one of the qualifications being that he finds a substitute to contract directly with the employer to do the work instead.” The driver is not obliged to find a substitute and the driver is not reliant upon a “*qualified right*” not to do or provide the work. There are no “*stated circumstances*” which limit the driver’s right not to do or provide the work. Accordingly, she failed to recognise that the substitute clause in this case falls between the two categories identified in the earlier authorities. In this case, the driver is permitted to engage a substitute, but the substitute is not a sub-contractor of the driver; the substitute would perform a replacement contract directly with the appellant. As a result of her failure properly to construe Clause 12, her conclusion that the “*type of substitution clause is consistent with a contract of service*” is flawed.

91. The Commissioner recorded at para. 101 of her determination that the appellant argued that the substitution clause was wide enough to permit, without breach of contract, the drivers never to turn up for work at all, and that the substitution clause was therefore consistent with the drivers being independent contractors. She rejected the submission as

being “*plainly incorrect*” on the grounds that any drivers substituted would have been remunerated directly by the appellant for carrying out contractual obligations for the appellant. They were not sub-contractors of the original driver. There was an entirely new contract between the appellant and the other driver in relation to that particular work assignment. She interpreted the authorities to mean that the driver’s contract with the appellant was not a contract for services “*unless, inter alia, the original rostered driver was being remunerated by the appellant for the work being done by the substituted driver*” and as this was not the case, it was a factor which indicated that the drivers worked under contracts of service as opposed to contracts for services.

92. The appellant argued that the Commissioner erred at para. 102 in asserting a legal necessity for the originally rostered driver to pay the substitute in order for that contract to be a contract for services. It argued that the real issue was: does the right of substitution negate a contract of service?

93. The appellant relied on the very recent decision of the Court of Appeal in England and Wales in *The Independent Workers Union of Great Britain v. The Central Arbitration Committee and Rooffoods Limited trading as Deliveroo* (“*Deliveroo*”) [2021] EWCA Civ 952. The issue in the case was whether the Deliveroo “worker” was a worker within the statutory definition of the Trade Union and Labour Relations (Consolidation) Act 1992. Underhill L.J. stated that an essential part of the definition was that a putative worker “*should agree to perform work or services “personally” for the other party ... [p]rima facie if the express terms of the contract permit the putative worker to provide the work or services in question through someone else, i.e. a substitute, that requirement is not satisfied.*” Underhill L.J. noted that this requirement was subject to two qualifications:-

“7. First, it is established in the case-law that the requirement of personal performance may be satisfied notwithstanding that the worker has a right to engage a

substitute in some, limited, circumstances. The position is summarised at para. 84 of the judgment of Sir Terence Etherton MR in Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51, [2017] ICR 657, as follows:

"Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

8. Second, in Autoclenz Ltd v Belcher [2011] UKSC 41, [2011] ICR 1157, the Supreme Court held that the employer was not entitled to rely on a substitution clause in order to deny a claim for worker status if it did not reflect the true agreement between the parties and was in that sense a sham. The principles underlying the decision in Autoclenz have recently been elucidated in Uber v Aslam , to which I will have to return below."

94. Underhill L.J. held that the CAC was entitled to conclude that the riders in question were not in an employment relationship with Deliveroo:-

“The particular feature on which it relied was its finding that riders are, genuinely, not under an obligation to provide their services personally and have a virtually unlimited right of substitution.”

95. He held that an obligation of personal service (subject to the limited qualifications acknowledged in *Pimlico Plumbers*) is *“an indispensable feature of the relationship of employer and worker”*.

96. The appellant argued that the drivers are not under an obligation to provide their services personally, and they have a virtually unlimited right of substitution under Clause 12, and this negates the existence of a contract of service.

97. The Commissioner, and this court on appeal, is required to consider all the facts and circumstances of the particular working arrangements. While the Commissioner erred in concluding that the drivers were obliged to engage a substitute if they found themselves unavailable to work at short notice, I do not believe that this error is fatal to her overall conclusions in relation to substitution. The drivers were permitted to substitute another of the appellant’s drivers if they were unavailable and the substitute could also be arranged by the appellant if required. The substitute driver would be paid by the appellant in respect of the shift actually worked and the original driver would not be paid. In these circumstances, it was open to the Commissioner to conclude that this was more akin to the swapping of shifts between drivers. The Commissioner was required to consider how the contract worked out in practice (*Castleisland Cattle Breeding*) and her conclusion, that the arrangement was akin to the swapping of shifts rather than through substitution by way of subcontracting, was a conclusion which, on the facts, it was open for her to arrive at. I do not accept that the right to engage a substitute simpliciter automatically negates a contract

of service. It is necessary to consider how the clause could work in practice and whether it was a genuine right of substitution. In this case, the drivers had an unfettered right of substitution but no particular interest in ever exercising this right: the substitute would be paid for the work, not the originally rostered driver. The driver was not obliged to turn up for work and was subject to no sanction if he did not attend when rostered to work. He simply lost the opportunity to be paid for deliveries carried out and brand promotion. There was evidence pointing towards an unfettered right of substitution and evidence that it was not a genuine right of substitution. Applying the fifth point in *Ó Culachain*, it was open to the Commissioner to conclude as she did, and this court on appeal from a case stated ought not to interfere with her conclusions. For this reason, I would reject the arguments of the appellant on this point and I conclude that the Commissioner did not err in law in relation to the actual right of substitution in these proceedings, notwithstanding her error in the interpretation of Clause 12.

Integration

98. The degree to which a putative employee is integrated into the business of a putative employer is a matter which is relevant in assessing whether the working arrangements amount to a contract of service or for services. Carroll J. described the integration test in *Re Sunday Tribune Limited*, cited at para. 46 above. This was cited by the Commissioner at para. 115 of her determination. The appellant submitted that the relevant enquiry under the “*integration*” test is not solely whether the kind of work done is integral to the business but asks rather whether the particular individual concerned is himself or herself so personally integrated into the business of the putative employer as to lead to the conclusion that the contract amounts to a contract of service. The appellant argued that the Commissioner erred by focussing on the extent to which the function of pizza delivery was

integral to the appellant's business, rather than on the extent to which the individual drivers were themselves integrated into the business of the appellant.

99. The Commissioner found that the appellant's business comprised two core aspects; the production of pizzas and the delivery of pizzas, and therefore delivery was a core function of the business. Applying the test in *Sunday Tribune*, the Commissioner said "*I do not consider that the delivery service can be considered accessory to the production of the pizzas because, Domino's is not simply a pizza business, it is a pizza delivery business*". She therefore concluded that:-

"... where it can be established that a driver carries out a service which the business was established to provide, the work of the drivers is integral to the business and is not merely accessory to it. The integral nature of the work of the drivers to this business raises the implication that in ordinary course they would be employees. Domino's has purported to outsource their delivery function but at the same time in requiring drivers to wear branded uniforms, to brand their vehicles and to carry bags imprinted with the company logo, they seek to reassure customers that they are dealing with Domino's personnel. The branding also serves as a form of promotion of the business of the appellant."

100. She concluded that if they were truly independent contractors that this would not occur. She concluded that:-

"Domino's pizza delivery service is integral and fundamental to their business. It follows that the work of the drivers in delivering the pizzas is an integral part of the business and is not merely accessory to it."

101. The appellant argued that in so concluding she failed properly to apply the integration test as determined by Carroll J. in *Sunday Tribune*. In that case, the liquidator of the company applied to court to determine if three reporters were employees of the

company. If the integration test applied by the Commissioner had been adopted, and it was only necessary to consider whether the work they performed was integral or accessory to the business of the newspaper, all three reporters would clearly have been employees, since writing newspaper articles is the essence of a newspaper. However, that was not the outcome in *Sunday Tribune*. One journalist was required to attend and participate in the company's editorial conferences. Carroll J. stated that "*her employment was an integral part of the business of the newspaper*" and concluded, on this basis, that she was an employee. On the other hand, the third journalist had provided regular articles for the newspaper, but each article was commissioned separately by the company. Carroll J. found that she was not an employee because she did not satisfy the control test, nor was she an integral part of the business of the newspaper. At p. 510 she said:-

"I am of opinion that her employment was not an integral part of the business of the newspaper. In my opinion, she was a freelance contributor who secured commissions in advance. She was under no obligation to contribute on a regular basis.

Presumably, if she did not negotiate a commissioned article, the company's editor would get articles from some other source. Therefore, I am satisfied that she was not employed under a contract of service but was an independent contractor in respect of the articles she did provide."

102. The appellant argues that the drivers were in a very similar situation to the third claimant in *Sunday Tribune*. They too are under no obligation to work on a regular basis and if they do not work, the appellant will engage the services of another driver. The third journalist was a freelance contributor who secured commissions in advance. If she was commissioned to write a piece of a certain length, she did so, and she was paid on the basis of the house agreement between the company and the National Union of Journalists.

103. The appellant relied on the decision in *Deliveroo* as authority for the proposition that it is possible to outsource the delivery of food, even though Deliveroo's business involved the delivery of prepared food and drink from restaurants and other food outlets to customers' homes or other premises. The collection and delivery of items is carried out almost entirely by cyclists referred to as "riders". After initial assessment and training, riders enter into a written supplier agreement with Deliveroo and download an app which enables them to indicate when they are available to be offered work in a zone for which they are registered. There is no obligation on a rider to be available at any particular times or for any particular duration. If they are available, the app will offer jobs on the basis of which rider is closest to the point of collection. The rider has three minutes in which to decide whether to accept: again, there is no obligation to do so. If they do accept, they then collect and deliver the food and are paid on a fee per delivery basis. There were strict uniform requirements, a Deliveroo-branded equipment pack and high vis jackets. The essential physical tools of the job, the phone and the bike, were provided by the rider.

104. The appellant argues that *Deliveroo* is authority for the proposition that the reliance by the Commissioner on the fact that drivers were expected to wear uniforms and to place a temporary logo on their vehicles when making deliveries, did not mean that the drivers were employees of the appellant or that they could not be independent contractors.

105. In fact, in para. 82 Underhill L.J. held:-

"... Even if I were wrong to treat the absence of a right of personal service as decisive, it may be that the CAC's decision could be supported on the alternative basis that it was decisive when taken together with these features. However, I am reluctant to decide the case on that basis, even by way of alternative, in circumstances where there was no such overall assessment by the CAC."

106. It seems to me therefore that *Deliveroo* cannot be an authority for the proposition which was put forward as an alternative basis for finding the deliverers to be contractors, but on which Underhill L.J. declined to decide the case.

107. In my judgment, it was open to the Commissioner to have regard to the fact that the drivers did not simply deliver the pizzas on the equivalent of a commission basis. They were provided with uniforms they were expected to wear, and they were expected to place a temporary logo on their vehicles when making deliveries. In effect, they had two roles: delivery of pizzas and brand promotion. They entered into a separate agreement in relation to brand promotion and were paid separately for this service. In my judgment, it was open to the Commissioner therefore to conclude that the drivers were integrated into the business of the appellant, notwithstanding the fact that it is possible to outsource a delivery business, as argued by the appellant, or the fact that it is possible to have genuinely independent contractors who wear branded uniforms. I therefore conclude that there was no error on the part of the Commissioner in her conclusion on this issue.

Consideration of the terms of the written agreement

108. I do not propose to address this heading separately as I have considered the terms of the written agreement already in the context of the discussion of mutuality of obligation and substitution.

The appeal from the decision of the High Court

109. The High Court concluded that the Commissioner did not err in her determination in relation to the nine issues raised in the case stated. In my judgment, she erred in relation to the assessment of mutuality of obligation. The High Court also erred, in my opinion, in its approach to the mutuality of obligation test. At para. 50, the trial judge said that he:-

“... 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.”

(emphasis as in original)

110. Contrary to this dicta, Irish authorities on mutuality of obligation are unambiguous in requiring an ongoing reciprocal commitment to provide and perform work on the part of the employer and the employee respectively.

111. The decision of the Commissioner is not based on any finding that there is an “ongoing” requirement, and indeed this seems to be based on a misreading of *Barry*. The conclusion of the High Court, that *Barry* can be distinguished because the claims therein were for redundancy payment, is not borne out by any reading of the judgment, nor the subsequent decisions in *Mansoor*, *Brightwater* and *McKay*, which have applied the dicta in *Barry* uniformly in a variety of contexts. There is no suggestion in any of the authorities that the dicta on the nature of mutuality in *Barry* was limited to the context of statutory redundancy payments or other statutory employment rights protection. On the contrary, the language of mutuality was universal: mutuality is a *sine qua non* for all contracts of service. It is not dependant on the context in which the issue of mutuality of obligation is raised for determination in the absence of any different statutory test.

112. Further in para. 50, the trial judge said that:-

“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.”

113. To adapt the law is to modify or change it. The Commissioner did not purport to do so. It was not open to her to adapt the law to modern means of employment at all. She

certainly was not entitled to do so by opting to follow English law rather than established Irish precedent to the contrary. It was not open to the High Court to introduce such a significant change (or indeed this court) either. Such a change is for the Oireachtas and must be prospective.

114. For the reasons I have already explained, I believe that the Commissioner erred in her reliance upon *Weight Watchers*. More fundamentally, it was not open to either the Commissioner or the High Court to affect a policy change. In this regard, the observations of Underhill L.J. in his dissenting judgment in *Uber BV v. Aslam* [2018] EWCA Civ 2748, at paras. 164 and 166, well express the point I wish to make:-

“164. The question whether those who provide personal services through internet platforms similar to that operated by Uber should enjoy some or all of the rights and protections that come with worker status is a very live one at present. There is a widespread view that they should, because of the degree to which they are economically dependent on the platform provider. My conclusion that the claimants are not workers does not depend on any rejection of that view. It is based simply on what I believe to be the correct construction of the legislation currently in force. If on that basis the scope of protection does not go far enough the right answer is to amend the legislation. Courts are anxious as far as possible to adapt the common law to changing conditions, but the tools at their disposal are limited, particularly when dealing with statutory definitions. ... [I]n cases of the present kind the problem is not that the written terms misstate the true relationship but that the relationship created by them is one that the law does not protect. Abuse of superior bargaining power by the imposition of unreasonable contractual terms is, of course, a classic area for legislative intervention, and not only in the employment field.

...

166. Even if it were open to the Courts to seek to fashion a common law route to affording protection to Uber drivers and others in the same position, I would be cautious about going down that road.” (emphasis added)

115. I agree with these sentiments and they are, of course, reinforced by the separation of powers established under the Constitution.

116. Insofar as it may be possible to read para. 51 of the judgment of the High Court as implying that the principle in *Barry* is qualified or modified in some way by reason of the fact that it arose in the context of determining whether or not the individuals concerned were entitled to redundancy entitlements which depended on their length of service, I would hold that this is an error.

Conclusions

117. In my judgment, the Commissioner erred in finding that there was mutuality of obligation in the contractual arrangements between the appellant and the drivers. That being so, it was not possible that the drivers were engaged on a contract of service and this conclusion ought to have been dispositive of the issue before her.

118. The trial judge erred in upholding her determination and in failing to identify her errors in that regard, and in the other matters I have set out above.

119. In my judgment, it was open to the Commissioner to reach the conclusions she did in relation to both substitution and integration as there was evidence she was entitled to accept to support her conclusions and, applying the principles in *Ó Culachain*, neither the High Court nor this court ought therefore to overturn her decisions in respect of these two issues.

120. The findings on substitution and integration are not determinative of the status of the drivers as the want of mutuality of obligation precludes them from being employees of the appellant.

121. Haughton J. in a concurring judgment has indicated that he also would allow the appeal. Whelan J. in a dissenting judgment has indicated that she would not allow the appeal. Accordingly, the court will allow the appeal and set aside the judgment and order of the High Court and the decision of the Appeal Commissioner. It will make a declaration that pizza delivery drivers engaged by the appellant who worked during 2010 and 2011 did so under contracts for services as self employed independent contractors. As the appellant has been successful on the appeal, the provisional view of the court is that costs should follow the event and the appellant should be entitled to the costs of the appeal and of the High Court. If any party wishes to contend that the court should make a different order it may within ten days of the issuing of this judgment request the office of the Court of Appeal to arrange a short hearing in relation to the form of the order and/or the costs of the appeal. If the hearing does not result in an alteration of the indicative order, the party requesting the hearing may be required to pay the additional costs thereby incurred.