Neutral Citation Number [2008] IEHC 216

THE HIGH COURT

Record No: 2007 No. 334 SP

IN THE MATTER OF THE REDUNDANCY PAYMENTS ACTS, 1967 TO 2003
AND IN THE MATTER OF THE MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
AND IN THE MATTER OF AN APPEAL FROM DETERMINATION No. 26/43 OF THE EMPLOYMENT APPEALS TRIBUNAL
AND IN THE MATTER OF AN APPEAL BY THE MINISTER FOR AGRICULTURE AND FOOD

BETWEEN

THE MINISTER FOR AGRICULTURE AND FOOD

APPELLANT

AND

JOHN BARRY, CONOR O'BRIEN, MARY O'CONNOR, MICHAEL SPRATT AND CIARAN DOLAN

RESPONDENTS

Judgment of Mr. Justice John Edwards delivered on the 7th day of July, 2008

Introduction

1. The respondents are veterinary surgeons who worked for the appellant as Temporary Veterinary Inspectors (hereinafter TVI's) at the Galtee Meats Plant at Mitchelstown Co Cork. Following the closure of that plant in October 2004 the respondents claimed entitlement to payments from the appellant pursuant to the Redundancy Payments Acts 1967 – 2003 and under the Minimum Notice and Terms of Employment Acts 1973-2001. However, any entitlement to the payments claimed was contingent on them having been employees who were employed at all material times by the appellant under a contract of service. The appellant contended that they had not been employees employed under a contract of service and in each case refused to make the payments claimed. Each of the respondents respectively brought an appeal against the refusal in their case to the Employment Appeals Tribunal (hereinafter the EAT). The EAT decided to consider on a conjoined basis a preliminary point in each appeal, namely whether the respondents as TVI's "were employed under a contract of service or a contract for service by the Department of Agriculture and Food." By a determination dated the 12th of March 2007 the EAT ruled that the respondents were employed under a contract of service, and therefore they were employees.

2. This appeal is brought pursuant to s. 40 of the Redundancy Payments Acts 1967-2003 and s. 11 (2) of the Minimum Notice and Terms of Employment Act 1973 – 2001, which each provide for an appeal on a question of law against a decision of the Employment Appeals Tribunal. The appellant contends that the EAT misdirected itself as to the applicable law, alternatively it failed to correctly apply the law to the facts before it. Specifically it is alleged that the EAT failed to apply the correct test as to whether the respondents had been employed on a contract of service or a contract for services and/or failed to correctly apply that test to the facts before it.

The Court's jurisdiction to review - appeal on a question of law

3. In *Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare* [1998] 1 IR 34 Hamilton C.J. cautioned:

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

4. This begs the question whether a determination by the EAT of the nature of a work relationship between two parties is properly to be characterised as a matter of law, as matter of fact or as a mixed question of law and fact. Some assistance is provided by the case of *National University of Ireland Cork v. Ahern* [2005] 2.I.R.577 cited by the appellant. In that case the Supreme Court considered what is meant by a "*question of law*" in the context of an appeal from the Labour Court under s. 8(3) of the Anti-Discrimination Pay Act 1974. McCracken J, with whom the other members of the Supreme Court agreed, stated:

> "The respondents submit that the matters determined by the Labour Court were largely questions of fact and that matters of fact as found by the Labour Court must be accepted by the High Court in any appeal from its findings. As a statement of principle, this is certainly correct. However, this is not to say that the High Court or this court cannot examine the basis upon which the Labour Court found certain facts. The relevance, or indeed admissibility, of the matters relied on by the Labour Court in determining the facts is a question of law. In particular the question of whether certain matters ought or ought not to have been considered by the Labour Court and ought or ought not to have been taken into account by it in determining the facts, is clearly a question of law, and can be considered on an appeal under s. 8(3)."

5. I find the judgment of Sir John Donaldson M.R. in the English case of *O'Kelly and others v. Trusthouse Forte P.L.C.* [1983] I.C.R 728 also provides me with considerable assistance on this question. At page 761 of the report the Master of the Rolls stated:

> "The judgment of the appeal tribunal in this case suggests that there is a difference of judicial view as to whether the question 'Is a contract a contract of employment or a contract for services?' is a mixed question of fact and law or a question of law, but I do rather doubt whether the triple categorisation of issues as 'fact' 'law' and 'mixed fact and law' is very helpful in the context of the jurisdiction of the appeal tribunal.
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> The appeal tribunal is a court with a statutory jurisdiction. So far as is material, that jurisdiction is limited to hearing appeals on questions of law arising from any decision of, or arising in any proceedings before, an industrial tribunal: s.136 (1) of the Employment Protection (Consolidation) Act 1978. If it is to vary or reverse a decision of an industrial tribunal it has to be satisfied that the tribunal has erred on a question of law.
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> Whilst it may be convenient for some purposes to refer to questions of "pure" law as contrasted with "mixed" questions of fact and law. the fact is that the appeal tribunal has no jurisdiction to consider any question of mixed fact and law until it has purified or distilled the mixture and extracted a question of pure law.
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> The purification methods are well known. In the last analysis all courts have to direct themselves as to the law and then apply those directions in finding the facts (in relation to admissibility and relevance) and to the facts as so found. When reviewing such a decision, the only problem is to divine the direction on law which the lower court gave to itself.

> Sometimes it will have been expressed in its reasons, but more often it has to be inferred. This is the point of temptation for the appellate court. It may well have a shrewd suspicion, or gut reaction, that it would have reached a different decision, but it must never forget that this may be because it thinks that it would have found or weighed the facts differently. Unpalatable though it may be on occasion, it must loyally accept the conclusions of fact with which it is presented and, accepting those conclusions, it must be satisfied that there must have been a misdirection on a question of law before it can intervene. Unless the direction on law has been expressed it can only be so satisfied if, in its opinion, no reasonable tribunal, properly directing itself on the relevant questions of law, could have reached the conclusion under appeal. This is a heavy burden on an appellant. I would have thought that all this was trite law, but if it is not, it is set out with the greatest possible clarity in *Edwards v. Bairstow*, [1956] A.C. 14."

6. He further stated (at page 762):

> "There is no doubt that there are pure questions of law which throw a court back to questions of fact. The most obvious example is what length of notice is required to terminate a contract which does not expressly make provision for termination. This is a pure question of law and the answer is 'Such time as is reasonable in all the circumstances.' Applying that direction to facts whose nature, quality and degree are known with complete precision will no doubt always produce the same answer. But this is not real life. In reality every tribunal of fact will find and assess the factual circumstances in ways which differ to a greater or lesser extent and so can give rise to different conclusions, each of which is unassailable on appeal. In this sense, but in this sense alone, their conclusions are conclusions of fact. More accurately they are conclusions of law which are wholly dependent upon conclusions of fact.
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> The test to be applied in identifying whether a contract is one of employment or for services is a pure question of law and so is its application to the facts. But it is for the tribunal of fact not only to find those facts but to assess them qualitatively and within limits, which are indefinable in the abstract; those findings and that assessment will dictate the correct legal answer. In the familiar phrase 'it is all a question of fact and degree.'"

The Primary Facts

7. The EAT heard evidence in the matter over four days in 2006. The respondents in the present appeal were the moving parties before the tribunal. Each of them testified in their own behalf, and evidence was also adduced on behalf of all of them from the Chief Executive of Veterinary Ireland. The appellant in the present appeal was the respondent before the tribunal and adduced evidence from an official in its salaries section, from an Assistant Principal Officer in its personnel division, and from a former permanent Veterinary Inspector at the Galtee Meats plant. The Court has been provided with a transcript of the evidence and it is fair to say that it was largely uncontroversial. Though I am sure it would have been possible to produce one, the Court has not been presented with an agreed summary of the evidence. Rather both sides, in their respective legal submissions, have sought independently to distil from the evidence a summary of the primary facts. While both summaries appear to the Court to be fair and succinct, I propose for the purposes of this judgment to adopt the summary presented by the respondents, simply because it contains rather more detail than that presented by the applicant. The primary facts as summarised by the respondents are as follows:

Factual Background

> "The above-entitled claims have been instituted pursuant to the Redundancy Payments Acts, 1967-2007 and pursuant to the Minimum Notice and Terms of Employment Acts, 1973-2001. All five of the respondents are qualified Veterinary Surgeons and all of them worked as Temporary Veterinary Inspectors ("TVI's" or in the singular "TVI") for the appellant, in the Galtee Meat Processing Plant, in Mitchelstown, County Cork, which said Plant closed in October 2004, resulting in the termination of the respondents' employment with the Appellant.
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> The respondents lodged claims with the Employment Appeals Tribunal on 21 April 2005. It is the contention of the respondents, that they worked under a "contract of service" for the appellant, and they are entitled to redundancy payments, as well as payments pursuant to the Minimum Notice and Terms of Employment Acts, 1973-2001. The appellant entered an Appearance on 3 June 2005. The appellant contends that the five respondents who worked as TVI's were engaged by the Appellant at meat plants on a "contract for services" basis (i.e. contractors) to assist the Appellant's full-time veterinary staff at the plants, as an integral part of the appellant's Meat Inspection Service (MIS).
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> The appellant has asserted that this was reflected in the fact that the TVI's were private veterinary practitioners who were also in business on their own account, and that they could and did continue in private practice alongside undertaking TVI work for the appellant. It is accepted that four out of the five respondents worked as Veterinary Surgeons in private practices. The appellant has accepted that the remuneration, which was paid to the respondents, was paid on an hourly fee basis at rates which were fixed at intervals between the appellant and the respondents' Union, namely Veterinary Ireland. Veterinary Ireland is a Trade Union, affiliated to the Irish Congress of Trade Unions (ICTU). The appellant was the only potential employer of TVI's as the appellant is the only body with the requirement of the services of TVI's in Ireland.
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> The respondents are all members of the Trade Union, Veterinary Ireland. One of them was the Union Shop Steward at the Mitchelstown plant. Examples of the Union raising the question of the TVI's status over many years were cited to the Employment Appeals Tribunal, and evidence was given that the appellants 'generally shun it and say no'.
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> The general lack of clear legal definitions on employment status for many years led to considerable confusion. The situation, however, was regularised in 2001 with the publication of a Code of Practice, arising from the Report of the Employment Status Group, established under the Programme for Prosperity and Fairness (PPF). Represented on this Group were Department of Finance, IBEC, ICTU, The Department of Social and Family Affairs and The Revenue Commissioners.
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> This Report sets out an extensive check-list of criteria to be used in determining whether an individual is an employee. As was presented in evidence to the Employment Appeals Tribunal, analysis of the criteria established by this key Employment Status Group indicated clearly that TVI's fit into the "Employee" category under each and every relevant heading.

TVI Approval Procedure

The Appellant and the Irish Veterinary Union (an earlier name for Veterinary Ireland) negotiated and provided the respondents, and all TVI's nationwide, with written conditions, in respect of the Operation of TVI Panels in January 1999. On appointment by the Appellant, each TVI was provided with "Conditions of Engagement of Part-Time Temporary Veterinary Inspectors" (the "Conditions"), which were subsequently updated at various times up to June 2004 (See Exhibit A).

All of the respondents were TVI's. In order to become a TVI, each respondent had to apply for approval from the appellant. Once Departmental approval had been granted, each respondent had to then complete a two week training course in meat inspection, at his or her own expense. He/She then applied in writing to the appellant's Personnel Division for inclusion in a TVI panel or panels at one or more of the meat factories. It was pre-determined that a TVI could not be listed on more than four panels at any one time, and that the TVI could only hold one regular shift.

Rostering TVI's onto panels:

(1) The appellant directed that the respondents could have their names placed on a maximum of four panels, (i.e. four meat plants), but must hold only one regular shift. They defined "regular" as attendance on more than 50% of "kill days" in the previous three months. The appellant directed that the respondents would not be allowed to work two shifts on the same day at one or more meat plants, unless it was a last resort to enable meat plants to continue when no other TVI was available. The panels operated on the basis of seniority, availability and suitability.

(2) In the Conditions, the appellant set out that they would make every effort to facilitate the respondents working in the meat plant of their choice, although the Conditions stated that this would not always be possible.

(3) The Conditions provided that the appellant's full-time Veterinary Inspector ("VI") in consultation with the factory management, would determine the inspection points and the TVI manning levels of each meat plant and would also determine in advance how the roster periods were required based on anticipated slaughter numbers for the period in question.

Functions of TVI's

The Conditions set out the functions of a TVI as follows:

> *"The functions of the TVI's are to assist the permanent veterinary staff at meat plants. The TVI's will be assigned to and perform these functions by direction of the VI at the meat plant. The VI has overall responsibility for setting the manning levels (i.e. the number of TVI's required (1) to cover the inspection points in the slaughter hall and (2) to be engaged during the day for ante-mortem duties), for the control and monitoring of meat inspection operations and ensuring that TVI's perform their allocated duties satisfactorily."*

Reporting Structure

(1) The appellant's VI at the meat plant rostered the respondents and it was he/she who had overall responsibility for setting the manning levels required. The function of each of the respondents was to assist the VI at the meat plant in the Meat Inspection Service ("MIS"). A TVI was assigned to and performed those functions at the direction of the VI. The VI set the inspection points on the line, and checked the TVI's work on a regular basis. The VI ensured that meat was inspected in accordance with the relevant legislation.

(2) The Conditions provided that where a TVI was not performing his/her duties as required by the VI, or was persistently late in attending his/her rostered shifts, the VI would notify him/her accordingly. After three such notifications the VI reserved the right, in consultation with the Personnel Division, to remove that TVI from his position of seniority on the panel or, as a final measure, to remove him/her from the panel altogether.

Personal Protective Equipment ("PPE") and Materials – Investment in the Enterprise

(1) Each respondent was provided with all of the required personal protective clothing by the appellant, and all of the equipment necessary for the respondents' duties was available and was provided by the appellant at the meat plant.

(2) The Conditions further provided that the respondents (TVI's) engaged must use/wear the personal protective equipment (PPE) provided by the appellant and the VI had to ensure compliance with this requirement.

(3) All of the knives, scabbards, wellingtons and white coats used by the respondents for their work were provided by the appellant, and were kept by the appellant at the meat plant.

Hours of Work

(1) The Conditions of Engagement provided that in respect of remuneration it was to be the rates, negotiated from time to time by the appellant and Veterinary Ireland, which would be paid. The hours of attendance were also as agreed between the appellant and Veterinary Ireland from time to time. They further set out that "Actual times of attendance and departure must be entered in the daily attendance sheets by all TVI's". The VI had an attendance book in his office, and the respondents were required to "sign in" and "sign out".

(2) The Conditions of Engagement further provided that the minimum roster period in the morning was determined to be

either 2, 2¼, 2½ or 3 hours and the minimum roster period in the afternoon was 2¼ to a maximum of 4 hours, with an additional ½ hour in exceptional circumstances.

(3) If a respondent was unavailable to attend a specific shift, he/she had to notify the VI who would then appoint the next most senior TVI on the panel to perform the shift.

(4) The respondents were not allowed to employ assistants to carry out their work. They had to carry out the work personally. They could not subcontract the work, and they could not supply a substitute Vet from their private practice to carry out the work.

(5) The respondents were provided with flexible working conditions, in keeping with those of the full-time staff employed by the appellant.

(6) The respondents had occasionally swapped shifts, which was worked out as between the respondents. The respondents asserted that this practice had ceased.

Payment & Insurance

(1) The respondents were paid an hourly rate. The respondents had previously been paid a shift rate, which was then changed to a rate of pay per hour by agreement with the respondents' Trade Union, following a ballot of Union members. . PAYE and PRSI were deducted by the appellant from the hourly rate of pay. The appellant deducted the employee status PAYE, and an 'Employer's' PRSI contribution of 10.75% was paid by the appellant in respect of each respondent. The respondents were insurable for all purposes under PRSI. The respondents were not obliged to maintain their own professional indemnity insurance. The appellant accepted that the Department of Finance delegated sanction to the appellant by way of letter dated 22 June 1973 to link TVI rates to the minimum of the full-time VI scale.

(2) Each of the Claimants was issued annually with a P60 from the Appellant, which named the appellant as the "Employer" and each of the respondents as the "Employee". The appellant deducted the respondents' Union subscriptions from the respondents' salaries when asked in writing to do so by the respondents and their Union.

(3) The respondents did not charge VAT, and were not paid VAT. VAT was chargeable on TB testing, which was carried out by some of the respondents for the appellant as a separate matter in their own private practices.

Training

(1) Once a TVI was approved, the appellant required that the TVI would undergo a course in meat inspection at his own expense.

(2) The Appellant provided additional training for the respondents, in respect of their role in the slaughter plants, which was carried out in 2000/2001 by a full-time Superintendent Veterinary Inspector of the appellant. The training seminars were facilitated by Veterinary Ireland.

(3) If changes in procedure arose, the VI would inform the respondents and would distribute any new circulars from the appellant in relation to changes in legislation. The VI held a meeting in a hotel with the respondents and other TVI's in order to bring about uniformity in the Meat Inspection Service ("MIS"). The legislative requirements were enforced by the VI, who supervised and was responsible for the respondents.

Absence from Panels – Disciplinary Action

(1) The Conditions, provided that inability to attend would not give rise to disciplinary action in the following cases:

(a) Where called in under 24 hours;

(b) Occasional inability to attend for practice reasons (in such cases notice must be given to the VI at the meat plant);

(c) Annual leave – 5 "shift" weeks i.e. a week in which a minimum of one shift normally falls;

(d) Sick leave subject to medical certification;

(e) Maternity leave (respondent Mary O'Connor took two maternity leaves, and returned to the same position on the panel on both occasions);

(f) Leave of absence for reasons other than private practice:

(i) Academic studies (verification required) and

(ii) Charitable or development work outside Ireland.

(2) The Conditions provided that in relation to such leave of absence, written confirmation had to be received in advance from the VI, that the TVI's seniority on the panel in question would not be affected.

(3) The Conditions also provided for circumstances where disciplinary action would arise. In particular, where a TVI had regular shifts at a meat plant and was persistently turning down a percentage of such shifts, this would then result in a

loss of seniority. The guideline as to what constituted persistent was 16% of shifts within any three month period. A record of non-availability was to be maintained by the VI who was required to consult the Appellant's Personnel Division in advance of any decision being taken in relation to a loss of seniority. The Conditions of Engagement provided VIs had to keep a written record of the non-availability of TVI's.

(4) The Conditions further set out that the VIs would have to consult with the appellant's Personnel Division in the Department in advance of any proposed changes to TVI panels, and that no change could be implemented without the written approval of the Personnel Division. In that regard, any such changes would have to comply with TVI's Conditions of Engagement and the Appellant set out that TVI's could not therefore be placed on, promoted, demoted or removed from panels by VIs unless written approval was obtained in advance from the Personnel Division.

(5) The respondents were entitled to annual leave in the amount of five shift weeks."

The Issues

8. Clearly the work relationship between each of the respondents and the appellant was a very unusual one, and one which it is not easy to classify. The Court is somewhat surprised that the EAT decided to deal with the matter by hearing a preliminary point as to "whether the temporary veterinary inspectors were employed under a contract of service or a contract for service by the Department of Agriculture and Food."(my emphasis) because posing the question in that way immediately limited the possibilities to just two. It is not clear why this done. It is possible that the EAT decided of its own motion to adopt this approach, and there was no demurral by the parties, or it may be that this approach was suggested by the parties and agreed to by the tribunal. However, even if was the case that the parties themselves were of the view that it was a straight choice between a single contract of service and a single contract for services, that would not have been decisive of the matter or binding on the tribunal. It seems to this court that there were a much wider range of possibilities, and it was unjustifiable to limit the possibilities to just two.

9. 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 more than one contract. The second question involved the scope of each contract. The third question involved the nature of each contract.

10. As I have stated there were various possibilities. It was of course possible that each of the respondents, respectively, were employed under a single contract which, upon a thorough examination of the circumstances, might fall to be classified as either a contract of service or a contract for services. However, another possibility was that on each occasion that the T.V.I.'s 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 TVI's worked they entered a separate contract governing that particular engagement, which might be either a contract of service or a contract for service, but by virtue of a course of dealing over a lengthy period of time that course of dealing became hardened or refined into an enforceable contract, a kind of overarching master or umbrella contract if you like, to offer and accept employment which master or umbrella contract might conceivably be either a contract of service or a contract for services or perhaps a different type of contract altogether. This notion of an umbrella contract, though controversial, has featured in several English cases involving particular classes of workers such as outworkers, casual workers, and piece workers. See for example, *Airfix Footwear Ltd –v- Cope* 1978 I.C.R. 1210 and *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612.

The complaint that the EAT misdirected itself as to the applicable law.

11. The EAT adopted a two stage process in reaching its decision as to the nature of the relationship between the parties. In the first instance the tribunal applied a mutuality of obligation test, and thereafter it applied the so-called enterprise test. The appellants have no difficulty with the fact that the mutuality of obligation test was applied but they vehemently dispute the purported finding of mutuality of obligation on the evidence that was before the tribunal. They also say that the EAT was incorrect to apply the so-called enterprise test as it is not determinative of the issue, and the EAT's belief to the contrary is grounded in a misconstruction of Keane J's judgment in *Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare* [1998] 1 IR 34.

Mutuality of Obligation

12. Although it has been conceded by the appellants that the EAT correctly identified that the requirement of mutuality of obligation has to be satisfied if a contract of service is to exist, I think that it is appropriate nonetheless to elaborate just a little on what this test involves, having regard to the fact that the purported finding of mutuality of obligation is disputed.

13. 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] ICR 612 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] ICR, 1226 at 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.

14. The EAT's ruling on the issue of mutuality of obligation was in the following terms:

> "…in the case herein the five TVI's have an implied agreement reached with the Department of Agriculture & Food and the TVI's to carry out inspection of meat and certification of same on behalf of the Department of Agriculture & Food on an ongoing basis, hence the majority finds there is mutuality of obligation."

15. The appellant contends that there was no evidence before the EAT upon which it could conclude that any "*implied agreement*" had been reached between the appellant and the respondents to carry out inspection of meat and certification of same on the appellant's behalf on an ongoing basis. Nothing in the arrangements that existed as between the parties, which had been reduced to writing, indicates that this was in fact the case. Moreover they say there was significant and uncontested evidence to the contrary before the EAT which it inexplicably chose to overlook. This was to the effect that the appellant had no control over the level of work that was available for TVI's as this was a matter entirely within the control of the processing plants, here Galtee. The appellant was

thus unable to give, and did not give, a commitment to the respondents at any stage as to the level of work available to them, and the respondents were at all times well aware of this. Furthermore, the uncontested evidence concerning the arrangements entered into between the appellant and the respondents was that the latter were entitled to decline to work at the very least 16% of the shifts offered to them without that refusal having any consequences for their contracts.

16. In the Court's view these points are well made. Moreover, the tribunal's belief as to the nature of the contractual arrangements between the parties is wholly unclear. The determination speaks not of the implication of a term into a clearly indentified contract (whether that contract be one of service or for services), but rather of "an implied agreement" which could either connote such a contract or, alternatively, an overarching umbrella contract. The case of *O'Kelly and others v Trust House Forte Plc,* [1983] I.C.R.728 provides an example of where the latter type of contract was contended for. In that case the banqueting department of a hotel company kept a list of some 100 casual catering staff who were known as "regulars" because they could be relied upon to offer their services regularly and in return were assured of preference in the allocation of available work. These workers claimed to be entitled to unfair dismissal compensation on the basis that they had been employees employed under a contract of service but the hotel disputed this and contended that they were independent contractors supplying services and not employees. The issue went before an industrial tribunal and the claimants lost on the basis that the important ingredient of mutuality of obligation was missing. The claimants appealed successfully to an appeals tribunal. The appeals tribunal's decision was in turn appealed to the Court of Appeal. In the course of his judgment Sir John Donaldson M.R. said

> "Although I, like the appeal tribunal, am content to accept the industrial tribunal's conclusion that there was no overall or umbrella contract, I think that there is a shorter answer. It is that giving the applicants' evidence its fullest possible weight, all that could emerge was an umbrella or master contract for, not of, employment, It would be a contract to offer and accept individual contracts of employment and, as such, outside the scope of the unfair dismissal provisions."

17. Even if the Court were certain (which it is not) that the EAT considered that a single contract existed, said to be a contract of service, and that a term was to be implied into that contract committing the appellant to offer, and the respondents to accept, work on an on-going basis, one would have to query the basis for implying such a term. The classical situation wherein a term may be implied at common law was identified in the well known *Moorcock* case (1889) 14 PD 64 as being one in which a term not expressly agreed upon by the parties is to be inferred on the basis of the presumed intention of the parties. The proposition received a somewhat wider formulation in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 wherein McKinnon J said at p227:

> "*Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course'."

18. The Irish Courts have approved the so called "official bystander test" many times and McKinnon J's formulation has been interpreted so that a term may be implied if it is necessary to give business efficacy to the contract. However, there was nothing in the evidence before the EAT that would have entitled it to presume an intention on the part of the parties that the appellant should be obliged to offer, and the respondents should be obliged to accept, work on an on-going basis, so as to justify the implication of the term contended for on the basis of the presumed intention of the parties. Neither would implication of the term be regarded as necessary to give business efficacy to the agreement. In the circumstances I cannot see how the term contended for might legitimately have been implied.

19. Moreover, if as is possible, the EAT's ruling were to be interpreted as supporting the implication of an overarching umbrella agreement in a situation where individual contracts, either of service or for service, also existed, it is difficult to see how in any case the tribunal could ultimately reach a conclusion other than that arrived at by Sir John Donaldson MR in the *O'Kelly* case.

20. In all the circumstances I regard the EAT's finding that there was an implied agreement reached between the Department of Agriculture & Food and the TVI's to carry out inspection of meat and certification of same on an ongoing basis to be untenable. Their finding of mutuality of obligation was predicated on the existence of this implied agreement and, accordingly, must be regarded as flawed.

The so-called Enterprise Test

21. Having decided that there was mutuality of obligation the tribunal proceeded to what it characterised as "the second stage in the process" and stated:

> "The second stage of the test in the process requires a determination as to whether the contract binding the parties is one of service or one for service. The fundamental test for determining this question was set down in the *English decision of Market Investigations v. Minister for Social Welfare* (1969) 2 QB 173. Here it was held that the Court should consider if the person was performing the service as a person in business on his own account. If the answer to that question is yes then the contract is one for service. If the answer is no then the contract is one of service.

22. This approach was adopted in this jurisdiction by the Supreme Court in the case of *Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare*, [1998] 1 IR 34"

23. At a later stage in its ruling the Tribunal further stated:

> "Following the decision in the Supreme Court in the case of *Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare and Tierney v. An Post* there is now a single composite test for determining if a person is engaged on a contract of service or a contract for service. It involves looking at the contract as a whole and asking is the person in business on his or her own account? If the answer is yes then the contract is one for service. If the answer is no then the contract is one of service.
>
> The question of control and integration should no longer be regarded as conclusive tests in themselves but as elements to be taken into account in applying the enterprise test."

24. (The *Tierney* case is reported at [2000] 1 IR 536.)

25. It is clear from a consideration of the case law cited to the Court by the parties that the summary statement of principle as formulated in the latter quotation did not originate with the tribunal, but rather was borrowed without attribution from an earlier determination of the Labour Court in a case of Western People Newspaper v. A Worker, EDA047, 24th May 2004 and reproduced verbatim by the EAT.

26. The appellant contends that the EAT misconstrued Keane J's judgment in *Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare*. It is therefore necessary to scrutinise that judgment with great care with a view to identifying precisely what is the *ratio decidendi* of it. It may also be of assistance in that regard to examine how it was applied by the Supreme Court in the Tierney case in 1999, and again in 2004 in the case of *Castleisland Cattle Breeding Society Ltd v. The Minister for Social and Family Affairs* [2004] 4 I.R. 150, and also most recently by Gilligan J in the High Court in *Electricity Supply Board v The Minister for Social Community and Family Affairs & Others* [2006] IEHC 59.

27. The principal judgment in the Supreme Court appeal in the *Henry Denny* case was delivered by Keane J with whom Hamilton C.J. and Murphy J agreed. The *ratio decidendi* of the case (about which I will say more in a moment) is to be found in the following passages from that 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 Comissioner of Taxation* [1945] 70 C.L.R. 539.

28. 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."

29. 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.

30. 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."

31. (For cross referencing purposes, the passages just recited are reproduced at paras 5.1 and 5.2 of the appellant's written legal submissions, and on pages 10 and 11 of the respondents' written legal submissions)

32. In the course of their written legal submissions, amplified by oral submissions in court, Counsel for the appellant submitted (at paras 7.6 to 7.8 thereof):

> "7.6 … at what it described as the second stage of the process, the EAT applied an incorrect test to establish the existence of a contract of service/contract for services.
>
> 7.7 Contrary to what is expressly stated in its decision, the so-called enterprise test is not determinative of the issue. That conclusion appears to be grounded in a misconstruction of the passages from the judgment of Keane J in *Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare* [1998] 1 IR 34 set out at paragraph 5.2, above. Moreover it is incorrect to assert that questions of control and integration are to be regarded merely as elements to be taken into account in applying the enterprise test.
>
> 7.8 Far from relying principally upon what the EAT describes as "*the enterprise test*", that described by Keane J contains the following four elements at least:
>
> · *"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."*

34. In their submissions Counsel for the respondents did not engage directly with the appellant's contention that the EAT was incorrect to apply the so-called enterprise test as it is not determinative of the issue, and that the EAT's belief to the contrary is grounded in a misconstruction of Keane J's judgment in the *Henry Denny* case. Rather, their written submissions are primarily addressed to the merits of the substantive issue as to whether the respondents were employed under contracts of service or contracts for services. In so far as they seek to address at all the issue as to what precisely is the state of the law post Henry Denny, they rely on recently published views of the eminent Solicitor, Dr Mary Redmond, a renowned employment law specialist. They state:

> "Redmond, in her book, *'Dismissal Law in Ireland'*, 2nd Edition, 2007, sets out at Page 35 that "*In Ireland the criterion traditionally applied by the Civil Courts to determine the relationship of employee was that of control, whereby the subordinate nature of the relationship is regarded as central to the contract of employment: Roche. v. Kelly & Co., Limited,* [1969] I.R. 100".
>
> Redmond sets out that the '*control test*' then gave way to the so-called '*integration test*' which asked "*Did the servant form part of the alleged master's organisation?*". She sets out that likewise, this failed to provide a clear answer and a '*mixed test*' was then developed. Redmond sets out that "*This is applied in two stages. The first question to ask is whether there is control. This is a necessary but not a sufficient test. It must then be determined whether the provisions of the contract are consistent with it's being a contract of service. There may be indications, for example, that a worker is an entrepreneur rather than an employee. In this event the fundamental test to be applied is whether the person who has engaged himself to perform particular services is in business on his own account*". Having reviewed the case law, Redmond concludes at Page 40, that "*Each case must depend on its own facts*".

35. The *ratio decidendi* in any particular case consists of the general reasons given for the decision or the general grounds upon which it is based, detached or abstracted from the specific peculiarities of the particular case which gives rise to the decision. I have considered with great care the judgments in the *Henry Denny* case and I consider the *ratio decidendi* of it to be encapsulated in the statement of Keane J that in considering whether a particular employment is to be regarded as a contract "for service" or "of service" …"each case must be considered in the light of its particular facts and of the general principles which the courts have developed". I believe that the general principles referred to are those which have been identified as potentially being of assistance to a court or tribunal in the drawing of appropriate inferences.

36. In the course of his judgment Keane J sought to elucidate some of the general principles that the courts have developed, of particular relevance to the case then before him. It was in the course of him doing so that the oft quoted passage (which for identification purposes bears reiteration) appears. He said:

> "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."

37. This particular passage was subsequently quoted, and relied upon, in the judgments in the *Tierney, Castleisland*, and *ESB* cases respectively. However, although it represents an important summary of some of general principles that the courts have developed, it cannot be said to fully encapsulate the *ratio decidendi* of the *Henry Denny* case. It doesn't do so it because it omits one very important general principle developed by the courts which assumed a significant importance in that case and also, coincidentally, in the *Tierney, Castleisland*, and *ESB* cases respectively. A very important "particular fact" common to the *Henry Denny, Tierney, Castleisland*, and *ESB* cases, respectively, was that in all of those cases there existed a contractual document which purported to contain the expression of an agreed intention of the parties that their relationship should be governed by a contract for services. The existence of that particular fact brought into play the "general principle" that a characterisation or description as to the status of a party contained in a contract intended to govern a work relationship is not to be regarded as decisive or conclusive of the matter. That principle was uncontroversial in the *Henry Denny* case, having been accepted by parties from the outset. Although it was referred to by Keane J elsewhere in his judgment, it is not referred to in the passage under consideration. It is in fact dealt with in greater detail in the judgment of Murphy J who points out that the principle in question was first enuciated in the judgment of Carroll J in In *re Sunday Tribune Ltd* [1984] I.R. 505. Accordingly, the celebrated passage from the judgment of Keane J contains only part of the *ratio* for the court's decision. However, the earlier statement that "each case must be considered in the light of its particular facts and of the general principles which the courts have developed" can be regarded as the true *ratio*, though admittedly it lacks specificity with respect to identification of the general principles referred to.

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

39. Although it is true that various Courts, both here and in England, have from time to time characterised as "tests" a variety of approaches to be employed as aids to discerning the nature of the work relationship between two parties, there has in recent years been a move away from this. It is, I think, telling that Keane J did not at any stage seek to characterise any of the general principles identified by him as tests. However, the seeds of confusion may well have been sown by the reference to "the fundamental test" in the passage from the judgment of Cooke J in *Market Investigations v. Min. of Soc. Security* cited by Mr Justice Keane, and then watered in by his subsequent reference to the judgment of the Supreme Court of the Irish Free State in *Graham v. Minister for Industry and Commerce*, wherein that Court spoke of what it characterised as "the essential test".

40. In *Market Investigations v. Min. of Soc. Security*, Cooke J, advocated applying what he characterised as "the fundamental test" by posing the question 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' He contended that 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. (This is in fact the so-called enterprise test, although Cooke J did not use that label.) The characterisation of this approach as "the fundamental test" was subsequently criticised by Stephenson L.J in the Court of Appeal in *Nethermere (St Neots) Ltd v Gardiner*. In that case the Court of Appeal was involved in reviewing the decision of an appeal tribunal that had, in turn, upheld the earlier decision of an industrial tribunal that certain home workers were employed by the appellant company under contracts of service. Referring to the conclusion reached by the industrial tribunal Stephenson L.J. said:

> "This conclusion is open to criticism. It adopts what Cooke J in *Market Investigations v Minister of Social Security*, (1969) 2 QB 173, 184G had called 'the fundamental test'. Megaw and Browne L.JJ had found that test 'very helpful' in *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 1 W.L.R. 1213. In *Young & Woods Ltd v. West* [1980] I.R.L.R. 201 I adopted it and Ackner L.J., at p.208, obtained much assistance from it. But to accept it as the 'fundamental' test is I think misleading, for it is no more than a useful test. Furthermore, it can only be applicable at all where there is nothing but a choice between the two kinds of contract, of service or for services. Here the form of the preliminary issue made the test apposite, though not fundamental; but, as I have indicated, it ruled out the question whether on the evidence there was a third kind of contract or even no contract at all, which would be as effective to deprive the industrial tribunal of jurisdiction as a contract for services."

41. Dillon L.J. agreed with Stephenson L.J in the *Nethermere (St Neots)* case and had this to say in his judgment (at p.633):

> "I do, however, for my part, find the use of the word 'fundamental' somewhat misleading. In some cases, as for instance, with a jobbing gardener or a carpenter or a music teacher, who is found to be carrying on the activities in question for several customers or clients as part of his or her own business, the test may be very helpful indeed, but in many other cases the answer to the question whether the person concerned is carrying on business on his or her own account can only come as the corollary of the answer to the question whether he or she was employed under a contract of service. I note that in the *Market Investigations* case Mr Justice Cooke had referred to a statement by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd,* (1947) 1 D.L.R. 161, 169 that
>
> > ' . . . it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior'.
>
> It is important to have in mind that each case must depend on its facts, and the same question, as an aid to appreciating the facts, will not necessarily be crucial or fundamental in every case."

42. This Court finds itself in complete agreement with the criticisms articulated by Stephenson L.J. and Dillon L.J respectively. Moreover, I am satisfied that it was not Keane J's intention to endorse Cooke J's approach as being "the fundamental test". That is quite clear from his statement 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." (my emphasis)

43. The words "in general" constitute a caveat that the approach in question is not one of universal application. By definition they contemplate the possibility of exceptions to what is generally true, even when the issue for determination is the narrower one represented by a choice between a contract of service and a contract for services. Quite apart from that, the approach advocated cannot treated as being of universal application where the issue for determination involves the broader question as to what is the nature of a particular work relationship between two parties, because in certain cases a work relationship is not capable of being defined in terms of a simple choice as to whether it is governed by a contract of service or a contract for services, for example in the case of a statutory office holder. As Stephenson L J has correctly pointed out, the relationship may be governed by a third kind of contract or even by no contract at all.

44. Having said all of that, once it is recognised that the approach advocated by Cooke J in *Market Investigations v. Min. of Soc. Security* does not represent a fundamental or definitive test, it may be considered apposite to use it in the circumstances of a particular case as an aid to drawing the correct inferences. In that situation a court or tribunal should not be criticised for doing so. As Stephenson L.J said, that approach has been found helpful and useful in many cases. It is likely to be particularly helpful and useful in most cases that come down to a choice between a contract of service and a contract for services. The important thing to remember, however, is that every case must be considered in the light of its particular facts and it is for the court or tribunal considering those facts to draw the appropriate inferences from them by applying the general principles which the courts have developed. That requires the exercise of judgment and analytical skill. In my view it is simply not possible to arrive at the correct result by "testing" the facts of the case in some rigid formulaic way, and I do not believe that the Supreme Court ever envisaged, or intended to suggest, that it could be.

45. In the circumstances, I find myself in agreement with the applicant that the tribunal misdirected itself on the law in the following respects:

1. They were incorrect in their belief that the Supreme Court in *Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare* approved "a single composite test";

2. They were incorrect in regarding the so-called enterprise test as determinative of the issue. It was not necessarily going to be determinative of the issue, and they were wrong in proceeding on the assumption that it would be. In the circumstances of the case it might legitimately have been applied as an aid to the drawing of appropriate inferences, and it was likely to be useful in that regard,

but they were incorrect to apply it in a formulaic way for the purpose of determining the issue;

3. It was incorrect to assert that questions of control and integration are to be regarded merely as elements to be taken into account in applying the enterprise test. They are not. Like the question of enterprise, questions of control and integration may also provide a court or tribunal with valuable assistance in drawing the appropriate inferences. All potential aids to the drawing of the appropriate inferences from the primary facts as found stand in their own stead, and no one is subsumed by another. Moreover, those mentioned do not represent an exhaustive list. There could be other factors that might also assist. However, depending on the circumstances of the particular case, some aids may prove more helpful or more useful than others. In the words of Dillon L.J., "the same question, as an aid to appreciating the facts, will not necessarily be crucial or fundamental in every case". It is for a court or tribunal seized of the issue to identify those aids of greatest potential assistance to them in the circumstances of the particular case and to use those aids appropriately.

Conclusion
46. In my view the EAT fell into error from the very outset in formulating the preliminary question in the way that it did, and in failing to have regard to all possibilities in determining the nature of the work relationship between the parties. That initial error was compounded by a finding of mutuality of obligation on a flawed and untenable basis. Further, the EAT misdirected itself in law in the manner outlined at some length above, based upon a misinterpretation of Keane J's judgment in *Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare* [1998] 1 IR 34. in all the circumstances I must allow the appeals under s. 40 of the Redundancy Payments Acts 1967-2003 and s. 11 (2) of the Minimum Notice and Terms of Employment Act 1973 – 2001, respectively. I will hear submissions as to what orders may be appropriate in the circumstances.