Neutral Citation No. [2005] IEHC 5

THE HIGH COURT

[1998 No. 1868 P]

BETWEEN

PHILIP KIRWAN

PLAINTIFF

AND

TECHNICAL ENGINEERING AND ELECTRICAL UNION

DEFENDANT

Judgment of Miss Justice Laffoy delivered 14th January, 2005.

1. At the hearing of these proceedings, which were initiated by a plenary summons which issued on 11th February, 1998, the only relief sought by the plaintiff was a declaration that he is and continues to be employed by the defendant pursuant to a contract of service.

2. The defendant is a registered trade union within the meaning of the Trade Union Act, 1871 which was formed on the amalgamation in 1991 of two unions: the National Engineering and Electrical Trade Union (NEETU) and the Electrical Trade Union. Prior to the amalgamation, the plaintiff was the branch secretary of the Drogheda branch of NEETU. He was first elected to that position in 1981. Following the amalgamation, he was elected branch secretary of the Drogheda branch of the defendant (the Branch) and he continues to hold that position. The Branch is one of the largest branches of the defendant, comprising about 1,400 members.

3. From 1966 until 1982 the plaintiff was a full-time employee of Irish Cement Limited in Drogheda. In 1982 he availed of voluntary redundancy. Thereafter he continued to be the branch secretary of the Drogheda Branch of NEETU. He was frequently appointed the delegate by the Branch in connection with the functions of the Branch and, in that capacity, he represented and negotiated on behalf of members of the Branch in relation to various industrial relations issues at various levels – in the workplace, before a Rights Commissioner, and before the Labour Court and such like. For this work he received remuneration on the basis of an hourly rate and he also received travelling and subsistence expenses. Initially the hourly rate reflected the rate he was paid while employed by Irish Cement Limited. Later he received the hourly local craft rate recognised by the Construction Industry Federation. Because he was available and because he was good at the work, he was, in effect, the permanent delegate of the Branch from 1983 onwards.

4. After the plaintiff's employment with Irish Cement Limited terminated, from mid-1983 until 1985 or 1986 he was in receipt of disability benefit from the Department of Social Welfare. The plaintiff's evidence was that the then Financial General Secretary of NEETU raised the matter with the Department of Social Welfare and the Department found that the plaintiff was working for NEETU, whereupon his entitlement to disability benefit ceased and his only source of income was the remuneration he received from NEETU. The documentary record held by the defendant is not consistent with the plaintiff's evidence in this regard. The defendant put before the court a decision of a deciding officer under s. 111 of the Social Welfare Consolidation Act, 1981 on the issue as to whether the plaintiff was in insurable employment under the Social Welfare Acts from 20th December, 1981 onwards. The deciding officer decided on 17th February, 1986 that he was not. The deciding officer gave the following reasons for his decision:

> "Mr. Kirwan was elected to the Office of Branch Secretary of the NEETU in accordance with the Union's Rules and was re-elected to the Office by an AGM each year. The payments he receives in respect of his services as Branch Secretary are by way of allowances and expenses as provided under Rule 12 of the Union Rules. Rule 12.2 states that 'idle members shall be paid for lost-time plus expenses for delegation during working hours'. Mr. Kirwan, as Branch Secretary, may be suspended or expelled from office by the Regional Executive Council under Rule 11 for conduct prejudicial to the interests of the Union.
>
> I consider that as an elected Officer of the Union Mr. Kirwan is not employed under contract of service by the Union. I am holding therefore that he is not insurably employed while carrying out the clerical/negotiation activities of a Branch Secretary of the NEETU during the period from July, 1983 and I decide accordingly."

5. Under the rules of the defendant adopted on the amalgamation (the Rules) there is provision for the election of branch officers, including the branch secretary, by the Committee of a branch. Officers are elected for a two-year period and are eligible for re-election. The duties of the branch secretary are set out in detail in the Rules. It is provided that, where the position is part-time, the branch secretary shall have a quarterly salary payable as directed by the National Executive Council (NEC) of the defendant. Since the amalgamation the plaintiff has been in receipt of such a quarterly salary, the quantum of which is based on a scale which reflects the number of members of the Branch.

6. The Rules also provide for the appointment of delegates. Rule 178 deals with the appointment of members of the Union to act as delegates by the NEC. Rule 179 provides that any branch shall have power to appoint delegates for any purpose of the business of the branch, subject to the Rules. Remuneration of delegates is dealt with in Rule 180 which provides as follows:

> "When any member is delegated to the Union's business he/she shall be paid as follows:
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> (a) For all time lost from his/her work.
>
> (b) A delegation fee.
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> (c) Where necessary to stay away from home overnight, an overnight allowance for each night.
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> (d) In addition, members are entitled to subsistence, travelling expenses.
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> (e) Where suitable public transport is not available and where the use of a member's car has been sanctioned by a Branch or the EMC [the Executive Management Committee], a mileage allowance shall be paid.
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> …
>
> The amounts of the above fees, allowances and travelling time shall be as laid down by the NEC from time to time."

7. In early 1995, at a time when the plaintiff was under medical care and was unable to function on behalf of the defendant, the

Branch raised with the General Secretary of the defendant the issue of the plaintiff's non-eligibility for social welfare benefits of any kind and indicated that it was most anxious that the General Secretary would take whatever actions were necessary to rectify the situation. At the end of April, 1995 the Branch was furnished with a document from the General Secretary and Treasurer of the defendant entitled "Administrative Information and Guidance for the attention of all Branch Committees" (the 1995 Document). This document dealt with the then established position in relation to PRSI contributions and income tax payments in connection with payments to branch officers, delegates and shop stewards. It discloses that the defendant had entered into a special collective agreement with the Inspector of Taxes whereby PAYE at the rate of 30% would be deducted from all payments made by the defendant, which would include the PRSI contribution Class K deduction in respect of health contributions at the rate of 2.25%. The document also set out the changes to the Terms of Amalgamation consequent on the agreement. In relation to payments to delegates it was expressly provided that, in the event that the delegation included a member who happened to be unemployed, that member was entitled to be paid lost-time during normal working hours at the minimum basic union rate applying within his or her relevant industry, but that the payment should be fully processed for PAYE. As I understand it, lost-time in this context was notional and the entitlement was that the unemployed member would be paid at the relevant rate for the time during which he was engaged on the defendant's business.

8. Although the plaintiff may have thought otherwise at the time, the fact that under the new arrangements he would be paid by Head Office in the future and PAYE deductions would be made by Head Office, did not resolve the plaintiff's difficulty. What the plaintiff wanted was that a PRSI contribution Class A should be paid in relation to the payments he received for acting as delegate. He pursued the matter with the Department of Social Welfare. On 23rd October, 1996 he received a decision of a deciding officer under s. 247 of the Social Welfare (Consolidation) Act, 1993 to the effect that during the period from 30th June, 1992 his employment with the defendant was insurable under the Social Welfare Acts at PRSI Class A for all benefits and pensions provided his reckonable earnings were above a certain weekly threshold, which they were. The defendant appealed that decision. The decision of the appeals officer, which was communicated to the plaintiff on 23rd December, 1997, was in the following terms:

> "I decide that Philip Kirwan, during the period from 30 June 1992 to date, was employed by Technical Engineering and Electrical Union, in employment which is insurable for all benefits under the Social Welfare Acts at the standard Class A rate of contribution."

9. The reasons ascribed by the appeals officer for the decision were as follows:

> "The fundamental issue for decision here is whether Mr. Kirwan's engagement by Technical Engineering and Electrical Union was or was not under a contract of service. The Deciding Officer of the Department of Social Welfare decided that there was a contract of service present. I have reached the same conclusion.
>
> It seems to [me] that having regard to the recognised tests, as established by the courts in this area, e.g. nature of control, whether or not a person is in business on his own account, extent of integration of a person's activities with the engaging party's undertaking, point to a contract of service."

10. Immediately following the communication of the appeals officer's decision the EMC, at a meeting on 8th January, 1998, resolved, as an interim measure, that Rule 180 of the Rules be strictly applied "as regards payment of lost time". The branches were to be notified of this decision. The letter to the branches was dated 20th January, 1998. It disclosed that not only the plaintiff, but two other members of the defendant who were being delegated by their branches to carry out branch business and who were unemployed, had obtained decisions from the Department of Social Welfare that they should be paying the full rate of PRSI and that the defendant should be paying the employer's rate. Prior to the decisions, the defendant had applied PRSI Class K "in line with advice and agreement from the Revenue Commissioners". The branches were informed that, in view of the decision of the appeals officer, Rule 180 would be applied "as written". All branches were instructed that only members "who incur lost-time from their work should be paid lost- time". The branches were informed that the EMC was investigating how unemployed members and delegations should be dealt with in accordance with the Rules in the light of the appeals officer's decision.

11. No evidence was adduced at the hearing as to the outcome of the investigations or as to how the defendant has dealt with the issue of payment to unemployed delegates generally.

12. In relation to the plaintiff, he was informed of the decision of the EMC at a meeting with the General Secretary on the day following that meeting, 9th January, 1998. From the plaintiff's perspective the practical effect of the decision of the EMC was that he would not be paid for acting as a delegate as hitherto. He sought legal advice and thereafter he adopted the stance that he was the holder of the post of branch secretary of the Branch, but was also discharging executive functions as a full-time employee pursuant to a contract of service. The defendant rejected this contention, asserting that the plaintiff is an elected branch official who is entitled to a quarterly stipend in accordance with the Rules of the defendant and, also, when appointed a delegate on union business, he is entitled to certain compensation under the Rules, although not compensation under para. (a) of Rule 180 because he is not in employment. The defendant accepted the decision of the appeals officer and implemented it. It also, on a without prejudice basis, undertook to continue making payments to the plaintiff pending the outcome of these proceedings.

13. The plaintiff has not been working for the defendant since April, 2000 because of ill health. However, he has been able to draw disability benefit from the Department of Social Welfare because the defendant implemented the decision of the appeals officer and paid the contributions due at Class A rate, including arrears of contributions. Although it is not relevant to the issues which arise in these proceedings, the plaintiff has also been in receipt of a pension from Irish Cement Limited since 1997.

14. Before considering the legal submissions made on behalf of the parties, I think it appropriate to make some general observations in relation to the position of the plaintiff as disclosed in the evidence. First, while I cannot reconcile the plaintiff's evidence as to the circumstances in which he was found to be ineligible for disability benefit in the mid-1980s with the documentary record, I think that for present purposes the crucial period is the period after the amalgamation when the plaintiff's relationship with the defendant was established. Secondly, it is not surprising that the plaintiff was confused as to the nature of his relationship with the defendant after the amalgamation. On the one hand, he acknowledged that a minute of an EMC meeting held on 23rd November, 1995 was essentially a correct reflection of his position at the time: he had never claimed to be a full-time employee of the defendant; he simply wanted "an A1 stamp to be paid on all lost-time payments he received". On the other hand, his evidence was that he believed that he was working on behalf of the defendant and that the defendant was paying him. After the agreement with the Revenue Commissioners, the motivation for which was clearly to centralise responsibility for taxation in Head Office and to ensure full compliance by the defendant with the law, what happened in practice was that the plaintiff submitted chits for payment for notional lost-time in accordance with the 1995 Document and travelling and subsistence expenses via the Branch to Head Office. The sums claimed were paid by Head Office after deduction of PAYE and PRSI at Class K rate. At the end of the tax year, the plaintiff was furnished with a P60 in the standard form issued to employees, which showed gross pay during the year, the amount of tax deducted and the amount

of PRSI deducted. It is common case that after the amalgamation, in addition to acting as branch secretary, the plaintiff was effectively a permanent delegate. This is reflected in the chits he submitted on which he claimed for notional lost-time on the basis of an eight hour day on the days he worked at the rate provided for in the 1995 Document – the minimum basic union rate applicable to the craft of fitter. While the chits put in evidence suggest that by 1997 the plaintiff was working five days per week for the defendant, it is common case that he was not entitled to sick pay or paid holidays, and he did not participate in a pension scheme. In my view, the plaintiff's perception of his status at the relevant time cannot be determinative of his actual status. Thirdly, although the plaintiff understandably felt aggrieved when he was told at the meeting on 9th January, 1998 that Rule 180 was going to be strictly applied henceforth, I am satisfied on the evidence that the defendant has always treated the plaintiff in a proper and honourable fashion.

15. It is important to identify what the issue in this case is. It is not an appeal on a point of law from, or a review of, the decision of the appeals officer communicated on 23rd December, 1997. In fact, it is not clear on what evidence the appeals officer grounded his decision. The issue is whether the plaintiff is employed by the defendant pursuant to a contract of service and that issue falls to be determined in accordance with the evidence adduced at the hearing applying common law principles.

16. Counsel for the plaintiff relied on the decision of the Supreme Court in *Henry Denny & Sons (Ireland) Ltd. v. The Minister for Social Welfare* [1998] 1 I.R. 34 and on a number of authorities cited in it. That case concerned an appeal on a question of law under s. 300(4) of the Social Welfare (Consolidation) Act, 1981, as contained in the Social Welfare (Consolidation) Act, 1993, from a decision of an appeals officer that a woman who was engaged as a shop demonstrator by Denny was employed on a contract of service and was not an independent contractor. The facts in that case were that the demonstrator was placed on a panel and signed a written twelve-month contract of employment, which was renewed from year to year. The manner in which she was employed was that, when a store requested a demonstration for a product, a demonstrator on the panel was contacted, sent to the store and carried out the demonstration. The demonstrator then submitted an invoice to Denny which was signed by the store manager. The demonstrator was paid at a daily rate and was given a mileage allowance. As a shop demonstrator under her contract of employment the demonstrator was not eligible to become a member of the Denny pension scheme or of a trade union. Her written contract of employment described her as an independent contractor and purported to make her responsible for her own tax affairs. She worked an average of 28 hours a week for 48 to 50 weeks a year and carried out approximately 50 demonstrations a year. The demonstrations were not carried out under the supervision of Denny, but she was required to comply with any reasonable directions given by the owner of the store and she had been provided with written instructions as to how she was to carry out her work. She was supplied by Denny with the materials for performing the demonstration and required the consent of Denny prior to subcontracting any of the demonstrations assigned to her. Having reviewed the authorities, Keane J. as he then was, stated as follows (at p. 50):

> "It is, accordingly, clear that, while each case must be determined in the light of its particular facts and circumstances, in general a person would 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."

17. Applying the foregoing principles to the facts as found by the appeals officer, Keane J. held that the appeals officer was perfectly entitled to arrive at the conclusion that the demonstrator was employed under a contract of service stating:

> "Obviously, having regard to the nature of the work for which she was employed, there was no continuous supervision of Ms. Mahon by the appellant. That cannot be regarded as a decisive factor, any more than it was in the case of the market researcher, the nature of whose employment was an issue in the case decided by Cook J. On the other side of the equation are the facts that Ms. Mahon was provided by the appellant with the clothing and equipment necessary for the demonstration and made no contribution, financial or otherwise, of her own and that the remuneration she earned was solely dependent on her providing the demonstrations at the times and in the places nominated by the appellant. The amount of the money she earned was determined exclusively by the extent to which her services were availed of by the appellant: she was not in a position by better management and employment of resources to ensure for herself a higher profit from her activities. She did not as a matter of routine engage other people to assist her in the work: where she was unable to do the work herself, she had to arrange for it to be done by someone else, but the person in question had to be approved by the appellant."

18. Keane J. also pointed out that while the appeals officer had to have regard to the terms of the written agreement, they were by no means decisive of the issue. This was a theme also dealt with by Murphy J. in the following passage of his judgment at p. 53:

> "On behalf of the appellant it was conceded that these provisions were not of decisive importance. In my view their value, if any, is marginal. These terms are included in the contract but 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. Whether Ms. Mahon was retained under a contract of service depends essentially on the totality of the contractual relationship express or implied between her and the appellant and not upon any statement as to the consequence of the bargain. Certainly the imposition of income tax and the manner of its collection falls to be determined in accordance with the appropriate legislation and the regulations made thereunder as they impinge upon the actual relationship between the parties and not their statement as to how liability should arise or be discharged.
>
> The terms and conditions governing the engagement of Ms. Mahon were not 'the unique source' of the relationship between her and the appellant. I am satisfied that the appeals officer was correct in his conclusion that he was required to consider 'the facts or realities of the situation on the ground' to enable him to reach a decision on the vexed question whether the respondent was an employee or an independent contractor. In seeking to ascertain the true bargain between the parties rather than rely on the labels ascribed by them to their relationship the appeals officer was expressly and correctly following the judgment of Carroll J. in In *Re Sunday Tribune* [1984] I.R. 505."

19. The decision in the Denny case was followed recently by the Supreme Court in *Castleisland Cattle Breeding Society Limited v. Minister for Social and Family Affairs* [2004] I.E.F.C. 42. In his judgment, with which the other four members of the court concurred, Geoghegan J. stated as follows:

> "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 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."

20. Counsel for the defendant submitted that this case could not be decided by reference to the principles set out in the Denny case. In that case, there was no question but that there was a contractual relationship between the demonstrator and Denny and the only question was whether the contractual relationship was an employer/employee relationship or the demonstrator was an independent contractor. The issue here, it was submitted, is whether there was a contract between the parties at all. Counsel for the defendant submitted that the relevant principles applicable in this case are to be found in a series of decisions of English Courts and Tribunals in relation to what might be broadly called the voluntary sector. I will deal with these authorities chronologically.

21. The earliest was the decision of the Court of Appeal in *Rogers v. Booth* [1937] 2 All E.R. 751. The applicant in that case was an officer in the Salvation Army. When working in the Army's Hall she fell over a bucket and sustained injuries. On her claim for compensation under the Workmen's Compensation Act an issue arose as to whether she was a "workman" which was defined in that Act as "any person who has entered into or works under a contract of service or apprenticeship with an employer …". The determination of that question involved the construction of the "Orders and Regulations for Officers of the Salvation Army" to which officers of the Army were required to subscribe. That document expressly provided that the Army did not recognise the payment of salary in the ordinary sense; that is, the Army neither aimed at paying nor professed to pay its officers an amount equal to the value of their work; but rather to supply them with sufficient for their actual needs, in view of the fact that, having devoted themselves to full-time Salvation service, they were thereby prevented from otherwise earning a livelihood. When the applicant became an officer she signed a form affirming that she understood and agreed, *inter alia*, that, although permitted to receive an allowance according to the official scale, no allowance was guaranteed to her, and she would have no claim against the Salvation Army, or against anyone connected therewith, on account of any allowance not being received by her. On those facts, Sir Wilfrid Greene M.R. concluded as follows (at p. 755):

> "The circumstances that a monetary sum is paid to officers who enter into this relationship is, in my opinion, quite insufficient to change the relationship from what it would otherwise be. It is quite obvious that, if officers are devoting the whole of their lives to this service, the Army would make provision to maintain them, and that it in effect does. But that does not mean that the sum which is paid has any similarity to wages or salary, or any payment given contractually for services given or for services rendered. It is a maintenance payment, to enable them to carry on the work that they have undertaken. It appears to me, therefore, that the [applicant] cannot establish, not merely a contract of service, but also any contractual relationship at all which could possibly become a contract of service or be a contract of service …"

22. In *Davies v. Presbyterian Church of Wales* [1986] I.C.R. 280 the issue was whether the applicant, who was ordained as a Minister of the Presbyterian Church of Wales and was inducted into a full-time paid pastorate in accordance with the Church's Book of Rules, was an "employee" of the Church within the meaning of a particular statutory provision before he was dismissed from his pastorate. The House of Lords held that he was not. In his opinion, Lord Templeman summarised his position as follows (at p. 290):

> "Until the applicant was deprived of his pastorate in accordance with the procedures laid in the book of rules, he was entitled to be paid his stipend out of the income of the sustentation fund and to occupy his manse. But the committee of the sustentation fund were not liable to pay the stipend otherwise than out of the income of the fund and the managing trustees of the manse were not liable to discharge the rates and expenses of the manse otherwise than out of voluntary contributions and church funds made available to them for that purpose. There was no contract of service between the applicant and the church, only obligations on the part of the church to administer church property in accordance with the trusts contained in the book of rules, and an obligation to ensure that no member of the church was unlawfully deprived of a benefit from church property to which that member was entitled under the rules. There is indeed an agreement between all the members of the church to perform and observe the provisions of the book of rules, but that agreement will only be enforceable at law in respect of any property rights to which a member is entitled under the terms of the agreement. By no stretch of imagination can such an agreement constitute a contract of service."

23. *Birmingham Mosque Trust Ltd. v. Alavi* [1992] I.C.R. 435 concerned an appeal to the Employment Appeal Tribunal against a decision of an industrial tribunal that a professor of Islamic studies who had been appointed Director and Khateeb of the Mosque by the Trust responsible for its maintenance, whose duties involved both religious and administrative functions, was an "employee" of the Trust within the meaning of a particular statutory provision. On the appeal, it was held that, where an applicant had religious learning and had been appointed to perform religious duties, an industrial tribunal should address following questions:

> (1) Whether he had a contract, which included consideration of whether –
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> (a) there was sufficient certainty of offer and acceptance for the parties to be *ad idem* and
>
> (b) there was an intention to create a contractual relationship; and
>
> (2) If there was a contract, whether it was a contract of service.

24. The matter was remitted to the Industrial Tribunal to consider these questions.

25. The most recent of the English decisions cited by the defendant was the decision of the Employment Appeals Tribunal in *South East Sheffield Citizens' Advice Bureau v. Grayson* [2004] I.C.R. 1138. The issue in that case was whether an unpaid volunteer was an "employee", within the meaning of a particular statutory provision, of a Citizen's Advice Bureau. In its judgment, the Tribunal stated as follows (at para. 21):

> "We consider that the crucial question which was before the [industrial] tribunal was not whether any benefits flowed from the bureau to the volunteer in consideration of any work actually done by the volunteer for the bureau, but whether the volunteer agreement imposed a contractual obligation upon the bureau to provide work for the volunteer to do and upon the volunteer personally to do for the bureau any work so provided, being an obligation such that, were the volunteer to give notice immediately terminating his relationship with the bureau, the latter would have a remedy for breach of contract against him. We cannot accept that the volunteer agreement imposed any such obligation. Like many

> similar organisations, similarly dependent upon the services of volunteers, the bureau provides training for its volunteers and expects of them in return a commitment to work for it, but the work expected of them is expressed to be voluntary, it is in fact unpaid and all that the volunteer agreement purports to do is to set out the bureau's expectations of its volunteers. In our view, it is open to such a volunteer at any point, either with or without notice, to withdraw his or her services from the bureau, in which event we consider that the bureau would have no contractual remedy against him. We find that it follows that the advisors and other volunteers were not employed by the bureau within the meaning of the definition …"

26. In this case, the general thrust of the submissions made on behalf of the defendant was that the relationship of the defendant and the plaintiff was governed solely by the Rules. His status as branch secretary depended on his election to that office. His status as a delegate was voluntary, not contractual. He did not have an entitlement to be appointed a delegate, nor was he under any continuing obligation to be a delegate. There was no contract, let alone a contract of service, between the defendant and the plaintiff.

27. Only one of the authorities to which the court was referred concerned the relationship of a member of a trade union and the trade union. That was the decision of the High Court in England, cited by counsel for the plaintiff, in *Amalgamated Engineering Union v. Minister of Pensions and National Insurance* [1963] 1 W.L.R. 441. It concerned a claim for benefit in respect of injury by a member of a trade union who suffered the injury while riding his motor cycle in the course of the performance of his duties as a "sick steward" of the union. The applicant, who was an employee of a public corporation, had become a sick steward by nomination under the rules of the union. He could have been fined had he refused to act. Neglect of duties would have led to fining and, eventually, to dismissal. The rules laid down the duties of the sick steward, which were, primarily, to visit sick members once a week, make payments to him, account for monies and such like. The issue for the court was whether, at the time of the accident, the applicant was "in insurable employment" as defined statutorily and, in particular, whether the particular arrangement whereby a member of the union was appointed a sick steward and paid for performing the duties of a sick steward (one shilling for each visit and travelling expenses) came within the meaning of "contract of service" in the relevant statutory provision. As a matter of construction of the relevant statutory provision it was held that there had to be a contract which provided for employment of one person by another person and, if so, the provisions as to employment were contract of service provisions, as opposed to contract for services provisions. In my view, there is nothing innovative or of significance in the judgment of Megaw J. on the contract of service and contract for services dichotomy. What is of interest for present purposes is that, on his construction of the rules, Megaw J. resolved the "very difficult question" as to whether or not a member was obliged to accept appointment as a sick steward without having consented to nomination for that office on the basis that he was so obliged. Having so found, he considered that he should not hold that there was a separate contract other than the contract of membership. However, once the contract provided for employment it was not a case of having to weigh and balance the employment provisions of the contract against the other provisions. It was a matter of considering whether the employment was of the nature of contract of services or of the nature of contract for services. The fact that there were other provisions of membership within the contract did not mean that the employment could not be insurable employment.

28. While I have considered the English authorities referred to by counsel in some depth, in my view, none of them dealt with circumstances analogous to the plaintiff's circumstances. The defendant's invocation of the decision of the Court of Appeal in the *Rogers* case and the decision of the House of Lords in the *Davies* case might be of assistance if the relationship of the plaintiff and the defendant since the amalgamation had fallen wholly within the parameters of the Rules. It did not. On the other hand, even if it had, the plaintiff's invocation of the decision of the Queen's Bench Division in the *Amalgamated Engineering Union* case would be of limited relevance because, in my view, the Rules are not open to the construction that a member who is appointed a delegate is obliged to accept the appointment.

29. The reality of the relationship between the plaintiff and the defendant in the period between the amalgamation and 9th January, 1998 was that it was not governed solely by the rules. This reality is reflected in the 1995 document and in the resolution of 8th January, 1998 to apply Rule 180 strictly. In addition to the provisions in the Rules for the employment of full-time officials, which are not relevant, the Rules contained provisions for the remuneration of branch officers, including a part-time branch secretary. They also provided for the functions of the union being performed by delegates either appointed at national level by the NEC or at branch level by the branch. The Rules provided for a delegate who had part of his wages or salary docked because of absence from normal work while on the defendant's business being compensated. The Rules envisaged a wide range of potential delegates: all of the members of the union. However, the Rules did not envisage what happened in the plaintiff's case – that a member who was otherwise unemployed would become a delegate on an almost continuous and permanent basis over a long period and would be remunerated for his work on a time basis at an hourly rate appropriate to his craft. Aside from the election of the plaintiff as branch secretary and his remuneration for holding that office, which was in accordance with the Rules, the work the plaintiff performed for the defendant and the manner in which he was remunerated for it was governed by arrangements outside the Rules. I have come to the conclusion, admittedly with some degree of diffidence, that those arrangements were contractual.

30. Moreover, when one compares the realities of those arrangements with the realities of the employment of the demonstrator in the *Denny* case by Denny, very little material difference is discernible. The plaintiff worked for the defendant rendering personal service. The work involved the conduct of the defendant's business in accordance with the Rules and the objectives, policy and overall direction of the defendant. In return, the plaintiff received remuneration which was real remuneration in that it was based on the appropriate hourly rate applicable to his craft. The totality of the remuneration was measured exclusively by the work actually performed by the plaintiff. He worked in and from the offices of the Branch located in Drogheda and he used the office equipment, such as it was, and the office supplies provided by the defendant. In no sense could it be said that the plaintiff was in business on his own. Therefore, I have come to the conclusion that the plaintiff was and continues to be employed by the defendant pursuant to a contract of service.

31. I have had to overcome a number of concerns in reaching the conclusion I have reached. First, and it is important that I emphasise that this point was not raised by any party, it could be contended that the position of the plaintiff vis-à-vis the defendant up to 9th January, 1998 was anomalous and irregular having regard to the provisions of the Rules. Secondly, the court has been asked to make a declaration as to the existence of a contract of service without being asked to determine the precise terms of the contract. Finally, the court has been asked to make such declaration without any exploration of the ramifications of the declaration.

32. The order will be a declaration in the terms sought by the plaintiff.