Neutral Citation Number: [2006] IEHC 59

THE HIGH COURT

2002 No. 113SP
and 2002 No. 187SP

IN THE MATTER OF THE SOCIAL WELFARE (CONSOLIDATION) ACT 1993
ELECTRICITY SUPPLY BOARD

APPLICANT

AND

THE MINISTER FOR SOCIAL COMMUNITY AND FAMILY AFFAIRS, EAMONN SHERIDAN, HELEN KIELY, BRENDAN JOYCE, FRANCIS SLATTERY, JOHN MCALEER AND AIDAN BRADY

RESPONDENTS

Judgment of Mr. Justice Gilligan delivered on the 21st day of February, 2006.

1. The appeal of the ESB is on a point of law against the decision of the Appeals Officer of the first named respondent to classify six contract meter readers as being engaged under a contract of service rather than a contract for services for the purposes of social welfare contributions. The appeal is brought pursuant to section 271 of the Social Welfare (Consolidation) Act, 1993. The summonses were issued by way of appeal against the decisions of the Appeals Officer of 23rd January, 2002, and the Chief Appeals Officer of the 15th April, 2002. By Order of this Court on the 15th November, 2004, [Kelly J.] the proceedings were consolidated.

2. The ESB engages the services on a contractor basis of approximately 300 persons who are engaged in the task of reading electricity meters. This practice has been ongoing since in or about 1955. The contract meter reader is paid a fee at a rate agreed between the ESB and the meter reader in respect of the number of customer visits completed by the contract meter reader. A higher fee has been agreed for such meter readings in rural areas as against urban areas. The ESB also engages under contracts of employment, employees described as "Network Technicians" and as part of their duties and functions, such employees carry out *inter alia* meter reading work. It is accepted that they are employed under a contract of service.

3. The status for social welfare purposes of the contract meter readers has been the subject of adjudication by Appeals Officers of the Department of Social Community and Family Affairs on six occasions since 1955. All of these decisions confirmed their status as engaged under a contract for services. In August, 2000, six contract meter readers (the second to seventh named respondents herein) referred the matter of their classification for social welfare insurability purposes to the first named respondent for a decision. A report was prepared by a social welfare inspector of the first named respondent and forwarded to a Deciding Officer. The Deciding Officer on the 15th November, 2000, issued a decision confirming that the six contract meter readers were engaged under a contract for services and not a contract of service.

4. The decision of the Deciding Officer was appealed by the six contract meter readers to an Appeals Officer of the first named respondent. An appeal hearing was held before the Appeals Officer on 9th August, 2001. The Appeals Officer reversed the decision of the Deciding Officer in all six cases and found that for the purposes of social welfare insurability, the six contract meter readers were engaged under a contract of service.

5. By letter of 13th February, 2002, the ESB sought a revision of the decision of the Appeals Officer by the Chief Appeals Officer (CAO) pursuant to section 263 Social Welfare (Consolidation) Act, 1993. By letter of 15th April, 2002, the ESB was notified of the decision of the CAO refusing to revise, and, affirming the decision of the Appeals Officer.

6. The matter of the status of personnel engaged by the ESB as contract meter readers has been the subject of numerous decisions by Appeals Officers of the first named respondent over the years. There are six such decisions of Appeals Officers which confirm the status of meter readers as being engaged under a contract for services. These comprise two decisions in 1955, a decision in 1968, two further decisions in 1976 and a decision in 1994. These decisions have been accepted and relied upon by the ESB and the contractors (save these six in 2000) and the position adopted for over 50 years has been upheld by all decisions of Appeals Officers and the Deciding Officer in these six cases. One of those decisions which confirms the status of contract meter readers as being engaged under a contract for services is a decision in 1994 concerning the status for social welfare insurance purposes of Eamonn Sheridan, the second named respondent in the proceedings herein.

7. The six contract meter readers have been engaged by the ESB as meter readers for periods ranging respectively from 1966 (in respect of Eamonn Sheridan) through to 1998 (in respect of John McAleer). During the period of their engagement, the only reference made by any of these six contract meter readers regarding their status for social welfare insurance purposes was that made by Eamonn Sheridan which, as previously referred to herein, resulted in a decision of an Appeals Officer of the first named respondent in 1994 confirming his status as engaged under a contract for services. Since 1994, no other contract meter reader has referred the matter of their status to the first named respondent for a decision save for the present reference by the second to the seventh named respondents.

7. The appellant being the Electricity Supply Board seeks an order setting aside, reversing and/or quashing the decision of the Appeals Officer. The appellants also seek a declaration that the contract meter readers are insurable under Class S and are engaged under a contract for services.

8. The appellant claims that:

i. The Appeals Officer erred in law in failing to have regard for the written terms of the contract between the parties.

ii. The Appeals Officer wrongly held that there were new facts or evidence which justified a revised decision on the insurability of the meter readers to those arising from previous appeals.

iii. The Appeals Officer erred in her analysis of the distinction between contract meter readers and the full time meter readers and also as to the significance to be attached to the introduction of hand held devices for the purposes of data logging. The Appeals Officer misconstrued the terms of the contracts in concluding that there is a requirement for the meter readers to provide personal service and in ignoring the express terms which permit the use by the contract meter readers of substitutes and subcontractors to undertake the work.

iv. The Appeals Officer applied the incorrect legal principles. In particular, the Appellants place particular emphasis on the Appeals Officer's consideration of the right to sub-contract the task, the extent to which the meter reader may profit from the activity and the failure of the Appeals Officer to attach weight to the requirement for meter readers to carry insurance and provide an indemnity and provide their own transport. The Appeals Officer was also misdirected in her application of the law in considering matters extraneous to the terms of the contract in circumstances where the

contract regulates and governs all aspects of the contractual relationship.

Background

9. The respondent meter readers are all employed pursuant to a contract for meter reading services with the Electricity Supply Board. The contract specifically states that the meter reader is an independent contractor and shall not be an employee of the ESB.

10. The meter reader is entitled to use other persons in the provision of services under the contract and in these circumstances he shall ensure that such persons are suitably instructed and trained to do the work required. The "independent contractor" shall be responsible for making appropriate income tax and social welfare contributions from the remuneration he pays his personnel (if any) and any other levies required by law to be paid by an employer in respect of such persons and no responsibility shall lie with the ESB in this regard.

11. The meter reader is not the agent of the ESB and shall not make any contracts on behalf of the ESB or bind the ESB to any obligations or in any way act as an agent of the ESB.

12. The contract provides for summary termination of the meter readers contract in certain circumstances and also that the contract may be terminated by either party subject to 30 days notice in writing being given and in such a situation the meter reader shall be paid such amount as may be necessary to cover the work actually undertaken to the satisfaction of the ESB at that time. The extent of the liability of the ESB in the carrying out of the contract shall be limited to the settlement of that amount.

13. The contract provides for the allocation of meter reading equipment and certain required standards. The meter readers are provided with a handheld terminal described as a portable computer and certain associated communication equipment and a procedure is set out for the reporting of the relevant readings taken by the portable computer. The meter reader is required to report in detail on all matters found on reading a meter such as *inter alia* broken seals, faulty meters, damaged meters.

14. There are six two monthly billing periods for each customer and the meter reader is obliged under his contract to ensure at least one official reading per annum on all meters. He is also obliged to estimate the reading at least once per annum on all meters. Payment is only provided for the meter reader if he actually carries out a reading so that his payment conditions in effect are governed by the number of times he actually reads each meter and the maximum number of readings for any meter is five allowing for the one obligatory estimation. The meter reader conversely can estimate the meter five times thereby only necessitating one reading but it follows that he is then on an annual basis only paid for the one reading.

15. The contract provides that when the meter reader is carrying out his duties reading the meter he is responsible for all loss, damage or injury caused by himself and his employees, agents or sub-contractors in the course of or arising out of the provision of meter reading services.

16. The contract sets out the rates that are to be paid differentiating between urban rates and rural rates.

17. The meter reader is responsible pursuant to his contract for ensuring that any vehicle used by him has adequate and full insurance cover for the purpose of his employment with the ESB.

18. The meter reader is obliged to maintain comprehensive public liability insurance cover in amounts acceptable to the ESB for such liabilities.

19. The meter reader agrees to keep confidential any information obtained by him in the course of carrying out his contractual duties on behalf of the ESB.

20. Since the issue as regards the nature of the employment of persons in a similar position to that of the second to seventh named respondents employed pursuant to the contract for meter reading services with the ESB was previously decided by the Department of Social, Community and Family Affairs, the Appeals Officer found in her decision that two fundamental changes had occurred with regard to the employment of the meter readers. The first is that the relevant substitute employed by the meter reader must have ESB approval and must carry an ESB ID card and that an ID document supplied by the meter reader does not suffice. The second change is that the meter readers are provided with a handheld terminal which in effect is a portable computer whereas previously meter readers entered their readings on meter sheets in meter books.

21. With regard to the necessity for the substitute to have an ESB identity card, the factual situation appears to be that the meter reader has to apply to the ESB for approval of a nominated substitute who is then provided with an ESB identification card. The procedure accordingly in place allows the ESB to veto a nominated substitute and it appears that this has happened on an occasion. It is understandable that the procedure in place has been adopted for security purposes. The identification card itself carries the wording that the particular person is "authorised to read meters for billing purposes on behalf of the ESB" and on the card itself it is stated that it is "the property of the ESB".

22. The situation pertaining to the introduction of data loggers is that the data obtained during the day is downloaded daily and provides the ESB with instant information as regards the days meter readings. All the necessary equipment is provided by the ESB. The ESB do employ, pursuant to a contract of service, a number of full time meter readers and they too adopt the same procedure arising from the use of the data logger. The meter reader is obliged to enter the relevant reading in the data logger at the time when the reading is taken and the reader is not allowed to take manual readings and enter them later in the data logger. The meter reader is given instructions as to what date each meter is to be read. The meter readers are prohibited for both practical and security reasons from taking meter readings after dark. If a meter reader is unavailable on a particular day, the procedure in place is that the reading would probably be estimated unless it was possible for the ESB to provide a substitute meter reader.

23. The ESB makes out the relevant daily schedules for meter reading purposes and it was clarified on behalf of the ESB before the Appeals Officer that meter readers are not consulted in the setting up of schedules but if a particular schedule time did not suit a meter reader, he would be free to explain the reason to the ESB and an alternative would be accommodated.

24. In her judgment, delivered on 23rd January, 2002, the Social Welfare Appeals Officer reviewed the submissions made to her on behalf of the relevant parties and then 'commented' as follows:

"The issue in this case has already been decided on by Appeals Officers on numerous occasions over the years. In fact

one of those involved in this case i.e., Eamonn Sheridan, had his employment status decided by an Appeals Officer in 1994 (Ref. AP93/16838) What I must discern, therefore, is whether there are new facts or evidence which would warrant alteration of the decisions taken over the years.

Having examined reports or the previous appeals (copies placed on file) a number of significant points of difference arise in a situation which was always finely balanced.

It has been submitted, and accepted in the past that part-time meter readers were not required to give personal service, but were free to send a substitute, and the case of Mr. Eamonn Sherdian who has substituted for his wife seemed to support the submission. It has now emerged however, that the "Substitute" must have ESB approval, and must carry an ESB ID card. An ID document supplied by the meter reader does not, apparently, suffice. This evidence has not been challenged. It has been submitted to me that this limits, and indeed removes, the freedom of the individual meter reader to send substitute in his place. This is, I consider, a valid contention, and one which does not appear to have emerged in previous cases. ["She did not as a matter of routine, engage other people to assist her in her 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 Appellants." Ref. Supreme Court Judgment, *Henry Denny and Sons* 1997].

At the time of consideration of the earlier appeals, the meter readers were still entering readings on meter sheets in meter books. The[y] were not therefore in on-going contact with the ESB, and were operating free from supervision or control. Since the introduction of the "Data logger" however, this situation has been significantly altered. The extensive data is down-loaded daily and provides the ESB with a very effective monitoring mechanism. The control of his work pattern previously enjoyed by the meter readers has significantly diminished. In some cases, though very few, the meter reader has to report to ESB Offices to down-load the data. On this point, there has been a notable change in circumstances (more than the mere replacement of a manual by an electronic recording system) since the earlier decisions.

There is uncertainty as to whether the meter readers are free to engage in other work while under contract to the ESB. It may well be that at different hours or days, other work could be carried out by them, but the level of control exercised indirectly by the ESB would, I consider, preclude carrying out other business on meter reading visits. Even if such work were possible, I do not consider that the case would turn on the issue.

As regards holiday arrangements, the meter readers are allowed to estimate one bill per consumer, per annum. They are not paid for this estimated "Reading". I doubt if such an arrangement would have been proposed or accepted, unless the payment rates for actual reading took account of this "Free" period. If this is the case, then there is effectively, a holiday allowance. This however, is purely speculative, and the issue is not defining of, but rather a consequence of the nature of the employment contract. The same could be said to apply to the non-provision for paid sick leave. The non-provision for payment of travel expenses could suggest a Contract for Service, but again, is not necessarily defining of such Contract.

On the question of the "Entrepreneurial Test", it was contended that these meter readers have potential to be in business on their own behalf if meter reading is in the future contracted out by enterprises such as Bord Gais. At the moment, however, I am examining a situation where these men are engaged by the ESB to read ESB meters. They did not ply for hire, nor do they take financial risk, or stand to make a profit other than their earnings.

Full-time meter readers (located in the bigger urban centres) have always been employed under a Contract of Service. Given the alterations in the working conditions of the part-time meter readers, the distinction between them in relation to meter reading duties is now rather blurred. The authority given, or affirmed, by the Denny case to look at the actual operation of an employment contract has enabled me to look beyond the stipulation that the part-time meter readers are engaged on a contract which "Is not an employment contract". The details before me suggest very strongly that they are in fact in a master/servant relationship with the ESB, and I therefore consider that they are engaged under a Contract of Service. I further consider that this has been the position since the introduction of the "Data Logger" technology, said at the hearing to be in 1994. I must emphasise, however, that while I attach great importance to it, the introduction of this technology, with its inherent control mechanism, is not the only factor to have persuaded me to the view I have taken. I have carefully considered the overall picture, and the significance of all the new facts which have emerged since this issue was last examined by an Appeals Officer.

My decisions are on the individual files."

The Law

25. In *Deely v .Information Commissioner* (Unreported, High Court, 11th May, 2001) McKechnie J. noted at p. 17 that the remit of the Court in an appeal on a point of law encompassed the following:

(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings,

(b) it ought not set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw,

(c) it can however reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect, and finally,

(d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision. See for example *Mara (Inspector of Taxes) -v- Hummingbird Limited* [1982] I.R.L.M. 421, H*enry Denny and Sons (Ireland) Limited -v- Minister for Social Welfare* [1998] 1 I.R. 34 and *Premier Periclase -v- Valuation Tribunal* HC 24th June, 1999 U/R."

26. Budd J. in *Brides v. Minister for Agriculture* [1998] 4 I.R. 250 dealt with the position of the examining role of the High Court in an appeal such as this wherein he stated at pp. 274 - 275:

"Since this is an appeal on a point of law, it is not a rehearing. Accordingly, the facts as found by the Labour Court are binding on this court where those facts are supported by credible evidence and this court should be slow to disregard the inferences drawn by the Labour Court from its findings of fact unless the inferences drawn are wholly unwarranted on the

findings of fact made. The role of this court has been explained by Kenny J. in the Supreme Court in *Mara (Insp. of Taxes) v. Hummingbird* [1982] I.L.R.M. 421 at p. 426 in a case stated where the Income Tax Appeal Commissioners found, as a fact, that Hummingbird purchased premises in Baggot Street, Dublin, as an investment and so its sale was not in the course of trade.

27. At page 426 Kenny J. said:-

> "A case stated consists in part of findings on questions of primary fact, e.g. with what intention did the taxpayer purchase the Baggot Street premises. These findings on primary facts should not be set aside by the courts unless there was no evidence whatever to support them. The commissioner then goes on in the case stated to give his conclusion or inferences from these primary facts. These are mixed questions of fact and law and the court should approach these in a different way. If they are based on the interpretation of documents, the court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as is the commissioner. If the conclusions from the primary facts are ones which no reasonable commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable commissioner could draw. The ways of conducting business have become very complex and the answer to the question whether a transaction was an adventure in the nature of the trade nearly always depends on the importance which the judge or commissioner attaches to some facts. He will have evidence some of which supports the conclusion that the transaction under investigation was an adventure in the nature of trade and he will have some which points to the opposite conclusion. These are essentially matters of degree and his conclusions should not be disturbed (even if the court does not agree with them, for we are not retrying the case) unless they are such that a reasonable commissioner could not draw them or they are based on a mistaken view of the law."

28. Hamilton C.J. in his judgment in *Henry Denny and Sons (Ireland) Limited v. Minister for Social Welfare* [1998] 1 I.R. 34 at p. 37 dealt with the role of the court in an appeal such as this and succinctly stated at pp. 37 - 38 of the judgment:-

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

29. Keane J. in his judgment in Denny dealt with a number of relevant significant factors. At p. 48 of his judgment, he deals with the significance of the written agreement such as exists in this case wherein he stated:-

> "In the present case, both the appeals officer and the learned High Court Judge were of the view that the fact that Ms. Mahon was described in the written agreement as being employed as an "independent contractor" was not conclusive. It is accepted that they were correct in so holding. It is correct to say that the appeals officer appears to have taken the view that the importance of the terms of the written contract was somewhat diminished by the fact that Ms. Mahon wanted the job and accordingly had no option but to sign the contract. However, it is also clear from his report that he considered in some detail the actual terms of the written contract and also had regard to the manner in which the work was done by Ms. Mahon.
>
> If the appeals officer had erred in law in his construction of the written contract, then, in accordance with the principles explained by Kenny J., his decision would be liable to be set aside by the High Court. In the present case, however, it has not been shown that the appeals officer in any way misconstrued the written contract: he was, on the contrary, entirely correct in holding that he should not confine his consideration to what was contained in the written contract, but should have regard to all the circumstances of Ms. Mahon's employment. Equally, the High Court Judge was correct in the view she took that she should not interfere with his findings in this regard unless they were incapable of being supported by the facts or were based on an erroneous view of the law."

30. Keane J. goes on to state that there is a consensus to be found in the authorities that each case must be considered in the light of its own particular facts and of the general principles which the courts have developed.

31. Keane J. deals with the significance of the extent and degree of the control which is exercised by one party over the other in the performance of the work and states that at one stage this was regarded as decisive. He goes on to state at p. 49 of his judgment:-

> "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 in an independent contractor: see *Queensland Stations Property Ltd. v. Federal Commissioner of Taxation* [1945] 70 C.L.R. 539."

32. Keane J. at p. 50 of the judgment summarises the approach to be taken by the court in the following terms:-

> "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."

33. The legal principles at issue in this matter were further discussed in the decision of the Supreme Court in *Castleisland Cattle Breeding Society Limited v. Minister for Social and Family Affairs* (Unreported, Supreme Court, 15th July, 2004) wherein both the

judgments in *Denny* and *Mara* were followed, Geoghegan J. stating at p. 13 of the judgment that the principles as outlined by Keane J. in Henry Denny ought to have been applied by the Appeals Officer in the *Castleisland* case and in his view if they had been, there would have been a different result.

Submissions

34. The appeal in this case is brought pursuant to section 271 of the Social Welfare (Consolidation) Act, 1993. Section 271 provides:-

> "Any person who is dissatisfied with—
>
> (a) the decision of an appeals officer, or
>
> (b) the revised decision of the Chief Appeals Officer,
>
> on any question, other than a question to which section 265 applies, may appeal that decision or revised decision, as the case may be, to the High Court on any question of law."

35. It is submitted on behalf of the second named respondents that the tribunal's conclusions should not be disturbed (even if the Court does not agree with them as the Court is not retrying the case) unless they are such that a reasonable tribunal could not possibly draw such conclusions, or they are based on a mistaken view of the law: *Mara (Inspector of Taxes) v. Hummingbird Limited* [1982] I.L.R.M. 421.

36. Counsel for the Minster submits that the role of the High Court in considering appeals on a point of law from expert tribunals has been carefully circumscribed by case law as set out in *Henry Denny & Sons (Ireland) Limited t/a Kerry Foods v. Minister for Social Welfare* [1998] 1 I.R. 34.

37. It is submitted on behalf of the Minister that thus the Court is confined to a consideration of whether the Appeals Officer erred in law in reaching her determination.

38. The appellant claims that the respondents have sought to confine the scope of the Court in adjudicating an appeal on a point of law in a manner that is not consistent with the well established authorities. It is submitted that this is an overly restrictive position. The appeal is provided for by the Act of 1993.

39. The appellant contends that the Appeals Officer has fallen into error in the adjudication in respect of all four facets of the test as outlined in *Deely v. Information Commissioner* (Unreported, High Court, 11th May, 2001, McKechnie J.).

40. When this matter resumed hearing on 26th October, 2005, counsel for the individual respondents referred to the decision of Hanna J. in *Ryanair v. Labour Court* (Unreported, High Court, Hanna J., 14th October, 2005) wherein he stated at page 27 that:

> "if the applicant fails to establish that a decision of the Labour Court was irrational in the sense that there was no relevant material upon which it could ground such a decision or that such material could not properly be relied on or that the material and evidence offered by the appellant so conclusively and overwhelmingly trumped such case as was offered by the notice party to such an extent as to render a decision in its favour perverse then, in such circumstances, this aspect of the applicant's case would have to fail….The question is whether or not I am satisfied that there was no or no sufficient material or evidence before the Labour Court which would enable it to come to the conclusion which it did."

41. The respondents submit that the Court should adopt a similar approach in the instant case. The fact that the Court might not take the same view as the original decision-maker is not of itself enough. Only if there is no relevant material on which such a decision could be grounded should the court intervene.

Misconstruction and misinterpretation of the written contract

42. It is submitted on the appellants behalf that the Appeals Officer has not adequately or appropriately considered the actual terms of the contract between the ESB and the contract meter readers. Since 1995, the ESB and the contract meter readers have concluded annual written contracts setting out and regulating the terms, arrangements, nature and scope of the services to be provided by the meter readers. The only references to the written contract contained in the decision of the Appeals Officer are at pages 3 and 6 of her decision. It is claimed that an examination of the decision discloses that there has been a complete failure by the Appeals Officer to have regard for the terms of the contract and the manner in which they regulate and govern the relationship between the parties.

43. The appellant claims that in determining the nature of the contractual relationship between the parties, the Appeals Officer failed to have due regard to the intention of the parties which is reflected in the written contractual documents which they have executed.

44. The appellant refers to *Narich Property Ltd. v. Commissioner of Pay-Roll Tax* [1984] ICR 286 at p. 291 where the Court stated in relation to the importance of the written contract terms in the context of determining whether a relationship is one of employer/employee engaged under a contract or contract engaged under a contract for services:

> "In the present case, where there is no reason to think that the clause is a sham, or that it is not a genuine statement of the parties' intentions, it must be given its proper weight in relation to other clauses in the agreement."

45. In *Henry Denny*, Keane J. stated at p. 48:-

> "If the appeals officer had erred in law in his construction of the written contract, then, in accordance with the principles explained by Kenny J., his decision would be liable to be set aside by the High Court."

46. In the Supreme Court decision in *Castleisland Cattle Breeding Society Limited v. Minister for Social and Family Affairs*, (Unreported, Supreme Court, 15th July, 2004) Geoghegan J. stated at p. 15:-

> "[T]he 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."

47. The appellant submits that in applying these principles, the Appeals Officer has clearly erred in law to the approach adopted. No regard or weight has been afforded to very important terms of the contract, in particular, those terms which clearly do not oblige the meter reader to provide personal service and which do require the meter reader to make an investment in their business by way of the provision of transport, indemnity and insurance.

48. The respondents argue that there is no doubt that the Appeals Officer had the contract before her when considering the question posed and she conducted a lengthy oral hearing. Although she did not carry out a clause by clause analysis of the contract, her decision records a summary of the arguments made and the essential conclusions reached in respect of the contract. It is clear that the Appeals Officer took considerable care in coming to the conclusion that she did. Both sides were legally represented. It was a matter wholly within her discretion to decide what if any weight to attach to the various matters set before her. The fact that the appellant does not agree with her conclusion is not sufficient to set her decision aside. Nor is it appropriate for the Court to substitute its views for hers unless the Court comes to the conclusion that no reasonable tribunal could come to the conclusion which she did.

49. In the circumstances the fact that the written document describes meter readers as "independent contractors" cannot be regarded as determinative. Such a term purports to express a conclusion of law as to the consequences of the contract between the parties. In this regard it is submitted on behalf of the second to seventh named respondents that the decision in *Henry Denny & Sons (Ireland) Limited v. Minister for Social Welfare* [1998] 1 I.R. 34 is of considerable assistance in this case.

The importance of the requirement to provide personal service

50. The appellants claim that the Appeals Officer misconstrued the terms of the contract of the contract meter reader in concluding that the contract meter reader's freedom to use subcontractors is limited or removed. In her decision, the Appeals Officer found that the meter readers "do not have to render personal service and can send a substitute who would be paid by the reader themselves". The Appeals Officer noted that any substitute must have ESB approval and must carry an ESB I.D. card. She records at page 9 of her decision that "an ID document supplied by the meter reader does not, apparently suffice. This evidence has not been challenged". The Appeals Officer then noted that this limits and indeed removes the freedom of the individual meter reader to send substitutes in his place.

51. With regard to the requirement to provide personal service, the appellant claims that there is absolutely no ambiguity in the terms of the contract. Clearly, the contract meter reader is permitted to use other persons to carry out the work. The only prerequisite is that the person is suitably instructed and trained to do the work. The terms of the contract make it clear that the contract meter reader shall be responsible for tax and social welfare contributions in respect of such personnel and that no responsibility shall lie with the ESB in this regard.

52. The appellant claims that if the contract meter reader requests the ESB to supply an I.D. card, the ESB will do so. The introduction of an I.D. card for contract meter readers arose because of concerns for consumer safety and security.

53. The appellants refer to *Express and Echo Publications Limited v. Tanton (Ernest)*[1999] IRLR 367, U.K. Court of Appeal (Civil Division) 11/3/99, where Gibson LJ emphasised the importance of a contractual provision which allowed the contractor to assign the work to be performed by another party and referred to the decision of McKenna J. in *Ready Mix Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* [1968] 2 QB 497. Gibson LJ stated at p. 5 of his judgment:

> "In the *Ready Mix Concrete* case, McKenna J. regarded the freedom of the owner/driver to choose a competent driver to take his place at other times as a significant feature leading to the conclusion that the contract in that case was a contract for services and not a contract of service."

54. In this jurisdiction a similar approach to the importance of a requirement to provide personal service was adopted by Blayney J. in his decision in *Ó Coindealbháin (Inspector of Taxes) v. Mooney* [1990] 1 I.R. 422 where he stated at p. 431:

> "[I]n my opinion these features are inconsistent with the contract being one of service - they all point rather to its being one for services, in particular the absence of any requirement to perform the work personally and the obligation to provide and furnish the premises in which the work is to be performed. Both these features suggest that the respondent is an independent contractor."

55. It is submitted that the only basis for the conclusion of the Appeals Officer that the entitlement of the meter reader to send substitutes to do the work is limited was information tendered on behalf of the appellants at the hearing of the appeal regarding the requirement for the substitute to carry an I.D. card. It is submitted that such a finding flies in the face of the weight and preponderance of evidence, material and information that was before the Appeals Officer and in particular is in complete disregard of the express contractual provision and the evidence of the use of substitutes or subcontractors (including family members) that was before the Appeals Officer.

56. The appellant submits that in all of the leading cases in this area, the Court focussed on the contractual relationship between the parties and its operation and not on whether there was freedom to carry out work for someone else or to do other work whilst engaged in the work in question. The ability to work for someone else is but one factor to be considered.

57. The evidence before the Appeals Officer was that one of the meter readers had acted as a substitute for his wife who was contracted to the ESB as a meter reader. This is expressly acknowledged by the Appeals Officer at page 7 of her decision. The meter readers in their submissions acknowledge that the contract meter readers can use a substitute to carry out the work. The conclusion of the Appeals Officer that the requirement for a substitute to carry an ESB ID and to be approved by the ESB limits and indeed removes the freedom of the individual meter reader to send substitutes in his place is an inference that no reasonable decision maker could draw from the evidence, material and information available. None of the meter readers at the appeal hearing denied that they could use substitutes. Their submission rather was that the requirement for the substitute to carry ID and the notification procedure to the ESB in relation to the use of substitutes affected their flexibility in relation to the use of substitutes. A requirement for prior notification or even approval for the use of a substitute or the right to subcontract to another person does not nor can it logically justify the conclusion reached by the Appeals Officer that it limits or removes the freedom to use substitutes.

58. In *Tierney v. An Post* [2000] 1 I.R. 536, there was a clear and unambiguous provision in the written contract for the Postmaster to obtain approval for the use of substitutes. Keane J. in the Supreme Court stated at p. 545:

> "the fact remains that it is not normal to find in a contract of service that the employee can hire assistants to perform the work which he or she is employed to do."

59. However, it is submitted on behalf of the Minister that on a true construction of the relevant contractual provision, the contract meter reader is not permitted to subcontract but only permitted to use other people for assistance.

60. The respondents submit that the production of the identification card is a matter for the ESB. Indeed the ESB decides which information should be included in the ID card. They require details to be sent to them of the proposed substitute before the ESB can approve and authorise such a substitute.

61. The respondents claim that in effect the request for an ID card for a substitute triggers an opportunity to exercise a veto on the part of the ESB. It is clear that in requiring such information to be supplied the ESB are monitoring who attends the houses of ESB customers. In effect this is an acknowledgement that the person who arrives to read the meter is the "public face of the ESB". Indeed, the card itself provides that it is "the property of ESB".

Entrepreneurial Test
62. In considering the entrepreneurial test in her decision, the Appeals Officer has done so by reference to whether the contract meter reader is precluded from carrying out other business while on meter reading business.

63. At page 10 of her decision, the Appeals Officer states that the contract meter reader "did not ply for hire nor do they take financial risk or stand to make a profit other than earnings". The appellant claims that this approach is unreasonable and illogical. The appropriate issue in relation to this aspect of the matter is not whether the contract meter reader is or is not precluded from carrying out any other business at an ESB customer's home while on meter reading visits but rather, whether the contract meter reader makes investment and carries risk and can regulate and influence his profit, earnings and turnover by reference to the manner in which the work (any other work) is planned, carried out and conducted. It is claimed that the Appeals Officer has misunderstood the entrepreneurial test and misapplied same. The written contract provides for an investment to be made by the contract meter reader in insurance, indemnity and transport and furthermore allows the meter reader to manage their own time and regulate their earnings by reference to the use of employees, sub-contractors, substitutes or agents to carry out the work for them. The contract meter reader may be offered additional "grounds" that have been relinquished by another meter reader within their immediate area and can decline or accept the additional "grounds".

64. The appellant refers to the fact that there are six billing periods in the contract year for the contract meter reader. In the six billing periods, the only obligation on the contract meter reader is to estimate once and to read once. As to the other four potential customer readings, the contract reader can choose to estimate all four, read all four or estimate and read as he chooses. He does not get paid for estimates and the number of readings he chooses to carry out has a direct impact on his earnings.

65. In *Castleisland Cattle Breeding Society Limited v. Minister for Social and Family Affairs* (Unreported, Supreme Court, 15th July, 2004), Geogheghan J. emphasised the importance to be attached to provisions in the inseminators contract and evidence before the Appeals Officer in that case which allowed the inseminator "to make his own timetable".

66. In *Tierney v. An Post* [2000] 1 I.R. 536, the Court concluded that even a modest capacity to regulate or influence earnings or profit was a vital factor in determining that the contract in question of the postmaster was a contract for services.

67. The contract meter readers in their submissions have contended that the volume of work carried out by the meter reader is in reality determined by the ESB and that the meter reader is restricted in the amount of work they carry out by virtue of the control exercised by the ESB. The income earned by a meter reader is effectively capped by the number of "grounds" allocated to the meter reader by the ESB.

68. The fact that the contract contained a requirement for the meter reader to provide public liability insurance is noted by the Appeals Officer but she did not consider this to be a decisive factor in determining the relationship. The Appeals Officer noted that as a matter of fact the ESB had provided a group insurance scheme option to the meter readers.

69. The appellant submits that the group scheme is irrelevant and that the key point is that the contract obliges the meter reader to maintain their own public liability insurance. This requirement was deemed an extremely significant factor in *Castleisland* and is wholly consistent with a contract for services. Clearly the contract meter reader has to make an investment in the business. In *Ready Mix Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* [1968] 2 QB 497, the company insured the contractors vehicle and mixing unit and subsequently deducted the amounts paid from the charges made by the contractor. This was deemed to be consistent with a contract for services. In the case of the contract meter reader, the requirement to make an investment and provide the indemnity is in stark contrast to an employee who carries out meter reading work. Moreover, the meter reader may choose or not choose to avail of the ESB group scheme.

Control Test
70. The matter of the status of personnel engaged by the ESB as contract meter readers has been the subject of numerous decisions by Appeals Officers of the first named respondent over the years. The Appeals Officer states that these decisions "do have standing and cannot be lightly set aside".

71. The question posed by the Appeals Officer in determining this appeal is "whether there are new facts or evidence which would warrant alteration of the decisions taken over the years". The Appeals Officer relied upon alterations in the working conditions for the contract meter readers as a basis for her conclusions that the distinction between the six meter readers and the full-time permanent staff of the ESB who are also engaged in meter reading is "rather blurred" such as to justify a departure from all previous decisions of Appeals Officers. This finding is based on the introduction of data logger technology and also the fact that any relevant substitute employed by the meter reader must have ESB approval and must carry an ESB ID card and an ID document supplied by the meter reader does not apparently suffice.

72. It is well established in *Henry Denny* that the control test, as set down in *Ready Mix Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* [1968] 2 QB 497, once thought to be the dominant test in determining the status of a relationship is an important but not a decisive factor. The Appeals Officer considered how the introduction of the data logger technology together with the means through which recordings on that device are transmitted to the appellant increased the degree of control which the appellant exercised in fact over the functions of the meter readers.

73. The appellant submits that the introduction of data logger technology did not create any new distinction between the respective categories or any new conditions. The distinctions between those engaged in meter reading work for the ESB who are full time permanent employees and contract meter readers who are also engaged in meter reading work remain the same as they were when all previous decisions of the Appeals Officers were made. This is purely modernising technology adopted for the same end and purpose as

the filling out of meter sheets and in all material respects is the same as if the meter reader was writing on paper.

74. If anything, this technology affords the meter reader greater flexibility in their working arrangements in terms of planning and scheduling the work by virtue of speedier transmission of information regarding the customer meters to be read and allows the contract meter reader to have a greater influence over the regulation of their earnings and profit.

75. It is submitted on behalf of the respondents that the use of this equipment by both groups brings the two groups of meter readers much closer together and thus blurs the distinction. The appellant submits that this view is erroneous.

76. The respondents claim that the introduction of the data logging equipment is rightly regarded by the Appeals Officer as a matter of considerable significance. The equipment itself belongs at all times to the ESB. The time period within which information collected must be passed on to the ESB is dictated by the ESB, and the method of transmission (by modem into a telephone line) is also dictated by the ESB.

Conclusion

77. I take the view that the approach of this Court to an appeal on a point of law is that findings of primary fact are not to be set aside by this Court unless there is no evidence whatsoever to support them. Inferences of fact should not be disturbed unless they are such that no reasonable tribunal could arrive at the inference drawn and further if the Court is satisfied that the conclusion arrived at adopts a wrong view of the law, then this conclusion should be set aside. I take the view that this Court has to be mindful that its own view of the particular decision arrived at is irrelevant. The Court is not retrying the issue but merely considering the primary findings of fact and as to whether there was a basis for such findings and as to whether it was open to the Appeals Officer, to arrive at the inferences drawn and adopting a reasonable and coherent view, to arrive at her ultimate decision.

78. I take the view that the issue which the Appeals Officer had to decide in this case is to be approached on the basis that the written agreement existing between the parties is of considerable importance and has to be given due consideration but is not conclusive in its own right and therefore, following Keane J. in *Henry Denny & Sons (Ireland) Limited t/a Kerry Foods v. Minister for Social Welfare* [1998] 1 I.R. 34, the particular facts and circumstances of the case have to be considered.

79. 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 the person is performing the services for another person and not for himself. The degree of control exercised over how the work is to be performed is a factor to be taken into account but is not decisive. Factors to be considered include who provides the necessary premises and equipment or some other form of investment, whether others are employed to assist in the business, and whether the profit derived is dependent on the efficiency of the person concerned.

80. I take the view that the Appeals Officer adopted a reasoned approach in deciding the issue before her. She was entitled to look beyond the contract and in particular the stipulation as contained therein that part-time meter readers were engaged in a contract which is not "an employment contract". The Appeals Officer comes to the conclusion that it was not necessary for her to consider in depth as to whether or not meter readers were free to engage in other work while under contract to the ESB and she accepts that it may well be that at different hours of the day, other work could be carried out by the meter readers, however the level of control exercised indirectly by the ESB would in her opinion preclude carrying out other business on meter reading visits. She concludes this aspect by stating that even if such work were possible she does not consider that the case would turn on this issue.

81. The Appeals Officer gave consideration to the entrepreneurial test indicating that the meter readers were engaged by the ESB to read ESB meters and did not ply for hire nor did they take financial risk or stand to make a profit other than their earnings.

82. As regards the aspect of holiday arrangements, the Appeals Officer did not come to any definite conclusion merely indicating that the non provision for payment of travel expenses could suggest a contract of service but again in her view the situation was not necessarily defining of a contract of service.

83. The Appeals Officer clearly considered the contract in some detail and while she may not have carried out an in depth analysis of the contract her judgment records at length, a summary of the arguments made and the essential conclusions reached arising from the content of the contract. The Appeals Officer accepted that there were elements of the contract more consistent with a contract for services than a contract of service but took the view that the relevant features were not conclusive in determining the nature of the relationship.

84. The Appeals Officer indicated that she had to discern whether there were new facts or evidence which would warrant an alteration of the decisions taken over the years by previous appeals officers. She decided that two significant points of difference arose in the situation as presented before her and she quite reasonably describes the central issue as having always been finely balanced. The Appeals Officer bases her decision on the change brought about by the ESB in the procedure relating to substitutes being retained by the meter readers and the fact that they now have to be approved by the ESB and provided by the ESB with an identity card. She considers in the circumstances that it is a valid contention that this limits and indeed removes the freedom of the individual meter reader to send a substitute to do the work. I take the view that there was evidence of a change in the control element relating to the meter reader relying on a substitute and it was open to the Appeals Officer to have come to a conclusion that there has been a change in the level of control exercised in this regard and that the freedom of the meter reader in relation to the use of a substitute has been limited.

85. The Appeals Officer has also taken the view that the introduction of the data logger equipment has altered the level of control exercised by the ESB in relation to the meter readers working arrangements. The Appeals Officer noted the degree of control exercised and considered that the introduction of the data logger device together with the means through which recordings on that device are transmitted to the appellant increase the degree of control which the appellant exercised in fact over the functions of the meter readers. In my view it was open to the Appeals Officer to scrutinise the introduction of the data logging equipment and it does appear that this aspect was regarded by the Appeals Officer as a matter of considerable significance. The data logging equipment itself remains the property at all times of the ESB, any data obtained by the meter reader on the logging equipment is to be kept strictly confidential and not disclosed to any third party. The time period within which the information collected must be passed on to the ESB is a matter to be dictated solely by the ESB and the method of transmission by modem into a telephone line is also chosen by the ESB. It is also noted that the data logging equipment is now used by all meter readers engaged by the ESB both full time and those described as contract meter readers being the various individual respondents in this matter. In my view, there was evidence available to the Appeals Officer to enable her to draw the inference arrived at, having regard to the facts and circumstances surrounding the introduction and use of the data logger equipment, that the level of control exercised by the ESB had altered and was more representative of a master/servant relationship between the contract meter reader and the ESB.

86. It does appear that the Appeals Officer did carefully consider the overall picture and the significance of all the new facts which had emerged since this issue was last examined by an Appeals Officer.

87. I am satisfied that there are significant arguments to be made for and against the proposition that the individual respondent meter readers are employed pursuant to a contract of service. There are significant factual situations pertaining to the manner in which the contract meter reader carries out the prescribed duties which will tend to support the arguments for and against employment pursuant to a contract of service but as previously indicated the situation has probably always been finely balanced and I take the view that on the evidence available to her, the Appeals Officer was entitled to draw the inference that there was a change in the level of control that was exercised by the ESB over the individual respondent meter readers which entitled her to come to a conclusion that the individual meter readers were employed by the ESB pursuant to a contract of service.

88. In these circumstances I decline to set aside the decision as arrived at by the Appeals Officer and dismiss the application.