Neutral Citation [2016] IEHC 722

THE HIGH COURT

RECORD NO: 2016-37-CA

IN THE MATTER OF THE UNFAIR DISMISSALS ACTS, 1977-2015

MONNIE MCKAYED

Plaintiff

AND

FORBIDDEN CITY LTD. T/A TRANSLATIONS.IE

Defendant

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 16th day of November 2016

Issue addressed in this judgment

1. The issue addressed in this judgment is whether or not the plaintiff was an employee of the defendant in the context of a claim by the plaintiff that he was unfairly dismissed and is entitled to certain compensation pursuant to the Unfair Dismissals legislation. The defendant is an Arabic translator, and the defendant was and is a company in the business of providing interpretation and translation services, including interpretation services for suspects being interviewed while in Garda detention and persons being interviewed in the context of asylum applications. It is a necessary precondition to the plaintiff's claim that he was unfairly dismissed that he was, at the relevant time, an employee of the defendant, and this preliminary issue is the sole issue addressed in the judgment.

Procedural History

2. The matter was originally dealt with by a Rights Commissioner, who found in favour of the plaintiff by a determination dated the 3rd August 2011. The matter was subsequently dealt with by the Employment Appeals Tribunal (the EAT), in a decision dated the 14th January 2015, which came to the conclusion that the plaintiff was not an employee of the defendant. The EAT, applying the approach set out in *Minister for Agriculture v. Barry* [2009] 1 I.R. 215, decided that there was insufficient 'mutuality of obligation' in the arrangements between the plaintiff and defendant for there to be a contract of employment. The plaintiff appealed to the Circuit Court in accordance with section 10(4) of the Unfair Dismissals Act 1977, and by a decision dated 4th February 2016, the President dismissed his appeal against the determination of the EAT.

3. The Master of the High Court by order on consent, dated the 5th April 2016, extended the time for serving and lodging a Notice of Appeal against the Circuit Court order, and the plaintiff appealed to the High Court in respect of the decision of the Circuit Court. The matter having come on for hearing before this Court on the 24th October 2016, I heard argument at that stage on the preliminary point as to whether the plaintiff was an employee of the defendant. The defendant was represented by counsel and the plaintiff represented himself.

Facts

4. It was not in dispute that the plaintiff started doing work for the defendant company in July 2008. Evidence was called at the hearing before me, on behalf of the respondent company, to prove that the Plaintiff had signed a document on the 8th August 2008, which set out the terms of the working arrangements between them. The witness called was one Ms. Li, who was managing director in the respondent company, and she said that this document was a standard form document signed by all their interpreters/translators. She produced a document dated the 8th August 2008. The Plaintiff objected that this particular copy produced was not the document he signed; however, he accepted that he had signed a different document on the same date which was identical in its terms except that he had written the word 'none' at the bottom of the document. This document was entitled 'Memo re Declaration of Interests' and provided as follows:

> "I hereby re-affirm my agreement that I represent FC translations in court, Garda stations and in similar and related areas of operation of FC translations. Including visits to new commercial customers introduced to me through the company.
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> I agree to not work for another company operating competitively in the same area as FC Translations. Unless I have declared this fact to company management, and I will consider at all times the sensitive and trustworthy area in which I am engaged. And so, in doing, I prioritise work for FC Translations and I do not represent any competitor parties operating in the same areas. Especially where that work could lead to confusion or is likely to be considered a conflict of interest, howsoever arising,
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> I will abide by the rules, standards, codes of conduct and the methods of operation adopted by the company and that may be adopted in the future and communicated directly to me, or, written. I will not engage in any dishonest practice regarding any aspect of the company's work, or conduct my business or behaviour in any manner possibly resulting in negative reaction, while representing FC translations,
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> In return, the company will prioritise me for work in these fields to ensure that it is in my interest and benefit to remain part of FC translations. The company will maintain good relations and will place a high level of trust in me knowing that I not only represent myself but also many others working with the company on sensitive public and legal matters. The company will arrange appointments for me and endeavour to maintain sufficient work for me, and promptly pay me on receipt of correctly submitted invoices or time sheets."

5. The Declaration of Interests also contained a declaration of conflicts of interest, which read as follows:

> "According to the terms of our agreement, I declare here, so as to highlight potential conflicts of interest, or situation arising, that, I work for these ompanies/groups/individuals etc. listed below, operating in the same area as FC translations, whether or not I am providing interpreting/translation, freely or for reward, howsoever trivial."

The plaintiff said that he had handwritten the word 'none' under this paragraph.

6. Mr. McKayed did not call evidence as such, but made certain factual assertions while he was on his feet making submissions. He also relied on certain additional documents handed in to the court.

7. One of these documents was a Code of Conduct which he had been required to sign and did sign on the 8th August 2008. I do not set out here all of the Code, but Mr. McKayed drew attention to the following passages within it in the course of his submissions:

"Procedure

You will:

• Not enter into discussion, give advice or express opinions or give reactions to any of the parties;

• Intervene only:

o To point out that a party may not have understood something

o To alert the parties of a possible missed cultural inference

o To ask for the interpreting process to be accommodated and inform all parties present of the reason for the intervention;

o To ask for clarification

o To advise the court that there is no equivalent term in the language concerned to the term being used.

o To advise the court that you require a break due to lapses in your concentration occur during lengthy periods of simultaneous or consecutive interpreting

• **Not delegate work, nor accept delegated work, without the consent of the company and the client.**

• Convey the exact meaning of what has been said without adding, omitting or changing anything; making explanation only where a cultural misunderstanding may be occurring, or where there is no direct equivalent for a particular term. Only in exceptional circumstances should a summary be given (if this is consented to by all parties) provided the meaning of what is being summarised is not distorted.

• Be reliable and punctual at all times.

• Must state (in a criminal trial) if you were involved in interpreting at the police station on the same case.

• Not have discourse with any client or defendant at any time.

• Not be interviewed by the media.

• Not accept offers or lifts or to share taxis or other means of transport with any client, defendant, accused or solicitor before or after any appointment.

• Not disclose any information learnt in the course of any interview, to anybody.

• Not permit any questioning or interview by solicitors except in court on foot of a court order.

• **You will not allow the distribution of your phone number or that of any co-worker to any defendants, clients or solicitors. All such queries should be directed to the company's office. Give the company business card if requested.**

• Be required to make an oath or affirmation in court in the presence of a judge.

• Be required to make statements to gardai concerning the accuracy of the information you translate." (emphasis added)

8. The following was also contained in the code in a section entitled 'ethical and professional rules':

"*You will:*

• Respect confidentiality at all times and not take advantage of any information gained during your work.

• Act in an impartial and professional manner;

• Not discriminate against parties, either directly or indirectly, on the grounds of race, colour, ethnic origin, age, nationality, religion, gender, sexuality or disability;

• Not give advice, legal or otherwise, to an accused or witness in the case, nor enter into discussion with them (other than to confirm language/dialect match) or have any discourse with them outside of the interview or court sitting.

• Not be left alone with any defendant or accused at any time.

• Disclose any information, including any criminal record, which may make you unsuitable in any particular case.

• Disclose immediately if the interviewee or immediate family is known or related to you.

• Disclose any business, financial, family or other interest which you might have in the matter being handled.

• Not accept any form of reward, whether in cash or otherwise, for interpreting work other than payment by FC

Translations.

• Not accept commissions or rewards for work done from clients or defendants.

• **Not pass on your appointed work to others; all appointments are scheduled by the office.**

• Declare immediately any previous involvement in the assignment and any involvement or relationship with the accused or any witness in the case.

• **Not engage in any behaviour that may reflect poorly on FC Translations and by default your co-workers.**

• Disclose any information, including any criminal record, which may make you unsuitable for any particular assignment

• Be excluded from work on discovery of breaches of the codes of conduct or if found to have a criminal conviction or if you fail any security checks.

• Declare any difficulties you have with dialect or technical terms and if these cannot be satisfactorily remedied, withdraw from the assignment.

• **Dress neatly and professionally at all times, Casual clothing, jeans, trainers, t-shirts, work uniforms, leathers, etc, must not be worn in court.**

• Arrive at least 10 minutes before the starting time of your appointment. If you cannot get there on time, you should inform the company.

• Turn your mobile phone/pager to silent before entering court rooms or beginning an assignment in hospitals." (emphasis added)

9. To this Code was attached a statement of confidentiality which read as follows:-

"Any information you obtain in the course of your assignment is confidential and is not to be given by you to anyone outside the company, whether during the assignment or after it has been finished, unless we give you written permission to do so. You must also comply with the provisions of the Data Protection legislation.

You will not use any information you obtain in the course of your assignment for any purpose other than as authorised by the company. The right to all such information rests with the client or the company as appropriate and permission to access and use this information can only be given by the company and it is required to seek the permission from the relevant clients concerned.

You must keep safe any document provided to you in the course of an assignment; you must make sure they are not copied, in whole or in part, and you must return them to us, at the end of the assignment.

FC Translations will not be responsible for any claims made against you, on the grounds (for example) of incompetent interpreting or unprofessional conduct, or any action you take that could be considered aiding or abetting criminal activity.

I accept this assignment, having read and understood the terms and conditions set out above. I understand that if I breach any of these terms and conditions, particularly those relating to confidentiality, criminal or civil proceedings may result."

10. The plaintiff also asserted a number of facts which he said were features of his arrangement with the defendant company, including (a) that he had received work over a period of approximately two and a half years, which was evidenced by certain time sheets submitted to the court; (b) that the company provided training for him, evidenced by a certificate of attendance at a one-day training course on the 27th March 2010; (c) that he was paid hourly, at a rate that was reduced over time; (d) that the company told him where to attend and what to do there; (e) that he was not registered for VAT; (f) that the name and logo of the company were displayed on his identification badge when doing the work; (g) that he was to provide the company details and phone number when working, and not his own; (g) that he submitted invoices at the request of the company; (h) that sick pay, holiday pay and pension were not covered; (i) that he could be called at any time, 24 hours, 7 days a week, which he described as a requirement that he be 'on call' for the company. I did not hear evidence from Ms. Li on these matters because the position of the defendant company on the preliminary issue was that the contract between the parties clearly demonstrated the absence of the mutuality of obligation which was necessary to an employment contract, and that it was not necessary in those circumstances to enter into a detailed consideration of all the features of his working arrangement with the defendant company.

The legal submissions

11. Counsel on behalf of the defendant argued that the situation was governed by *Minister for Agriculture v. Barry* [2009] 1 I.R. 215, and that the first issue to be addressed by the Court was whether there was 'mutuality of obligation' between the parties. It was argued that the requisite mutuality of obligation was lacking in circumstances where the defendant company had no control over the hours of interpreting work that might become available as a result of suspects being arrested or persons seeking asylum, and had not in any regard guaranteed any particular volume or hours of work to the plaintiff or that there would necessarily be work on an ongoing basis. Emphasis was laid on the precise terms of the written contract signed by the plaintiff. In those circumstances, it was argued, it was not necessary for the Court to proceed to any further examination of the remaining features of the arrangement between the parties, because the High Court in *Barry* had described the 'mutuality of obligation' principle as a 'filter' for, or *'sina qua non'* of, an employment contract.

12. Without summarising all of the plaintiff's oral and written arguments in detail, the following is, I hope, a fair summary outline of his arguments. The plaintiff contended that the decision of the High Court in *Barry v Minister for Agriculture* [2009] 1 I.R. 215 was wrong and should not be applied to his case. He challenged the appropriateness of the mutuality of obligation principle described in the *Barry* case. He said that there was no reference to the 'mutuality of obligations' principle in the leading Supreme Court decision of *Denny & Sons (Ireland) Ltd v. Minister for Social Welfare* [1998] 1 I.R. 34. He cited various authorities (including *Cornwall County Council v Prater* [2006] EWCA Civ 102; *Stephenson v Delphi Diesel Systems* [2003] ICR 471; and *James v Greenwich Case* C-256/01) to suggest that the definition of mutuality provided in *Barry* is not universally accepted. He further directed the Court's attention to a

decision of the Indian Supreme Court, *Harjinder Singh vs Punjab State Warehousing Corp* (Civil appeal No. 587 of 2010) and a decision of the ECJ, *Allonby v Accington and Rosendale Community college* [2004] ECR 1-873, again to support his argument that the cogency of the mutuality of obligations test has not been universally accepted. The plaintiff also made reference to the 'Report of the Employment Status Group- PPF', prepared by the Employment Status Group, set up under the Programme for Prosperity and Fairness, noting that the mutuality of obligation test was not afforded a prominent role or quoted as a *sine qua non* to establish employment status in that document. He also referred to an academic article by Nicola Countoris, entitled "Uses and Misuses of 'Mutuality of Obligations' and the Autonomy of Labour Law", published by the UCL Labour Rights Institute (UCL Labour Rights Institute On-Line Working Papers - LRI WP 1/2014) which was a critique of the way in which the 'mutuality of obligation' concept, originally developed by M. Freedland, had been implemented in English court judgments. The plaintiff argued the mutuality of obligations principle should not be applied and/or dominant and that, having regard to all the factors in his case, the Court should find that there had been a contract of employment in his case.

13. The plaintiff also argued that, in any event, the evidence available to the court did support the existence of mutuality of obligations within the accepted meaning of that concept. In particular, he suggested that mutuality of obligations subsisted in an implied agreement for future work on an ongoing basis between the parties, as well as in the terms of the written document, the 'Declaration of Interest.' He argued that over the course of dealings between the parties, a mutual obligation had built up whereby the applicant was paid for the work done and was obliged to provide his own work and skill in the performance of a service for the employer, and the employer had an obligation into the future to provide him with work.

Discussion of the authorities

14. The question of whether the arrangements between the parties amounted to a contract 'of service', or to put it another way, whether he was an employee, is a question which falls to be determined with reference to Irish authority, that is to say, decisions of the Irish courts which are of binding effect upon me.

15. The question of how to approach the question of whether the relationship between two parties is one of employment has been the subject of many authorities. A leading case in modern Irish law is the decision of the Supreme Court in *Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. The decision in *Denny* arose in the context of an individual, S.M., who worked as a shop demonstrator, and whether she was an 'insurable person' under the Social Welfare Acts. The features of the working relationship were as follows. S.M. was interviewed and placed on a panel. When a store requested a demonstration for a product, a demonstrator on the panel was contacted, sent to the store and carried out a demonstration. The demonstrator submitted an invoice to the appellant which was signed by the store manager. The demonstrator was paid a daily rate and given a mileage allowance. Under her contract with the appellant company, she was not eligible to become a member of a trade union or the appellant's pension scheme. She was employed under yearly renewable contracts from 1991 to 1993. Her written contact of employment for 1993 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 48-50 weeks a year, carrying out approximately 50 demonstrations a year. She was required to comply with any reasonable directions given by the owner of the store, but the demonstrations were not supervised by the appellant. She was supplied with written instructions as to how to carry out her work. She was furnished with the materials for carrying out the demonstrations. She required the consent of the appellant before sub-contracting any of the demonstrations assigned to her. At first instance, a deciding officer decided that she was an employee and an appeals officer affirmed the decision. A review was refused by the Chief Appeals Officer. The High Court (Carroll J.) refused to set aside the decision of the Appeals Officer on appeal pursuant to provisions of the social welfare legislation. The Supreme Court dismissed the appeal. In a judgment delivered by Keane J., it was held that in deciding whether a person was employed under a contract of service or under a contract for services, each case must be considered on its own facts and the general principles developed by the courts. It is worth quoting the relevant passage from the judgment of Keane J., which is as follows:-

> "The criteria which should be adopted in considering whether a particular employment, in the context of legislation such as the Act of 1981, is to be regarded as a contract "for service" or a contract "of services" have been the subject of a number of decisions in Ireland and England. In some of the cases, different terminology is used and the distinction is stated as being between a "servant" and "independent contractor". However, there is a consensus to be found in the authorities that each case must be considered in the light of its particular facts and of the general principles which the courts have developed: see the observations of Barr J., in *McAuliffe v. Minister for Social Welfare* [1995] 2 I.R. 238.
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> At one stage, the extent and degree of the control which was exercised by one party over the other in the performance of the work was regarded as decisive. However, as later authorities demonstrate, that test does not always provide satisfactory guidance. In *Cassidy v. Ministry of Health* [1951] 2 K.B. 343, it was pointed out that, although the master of a ship is clearly employed under a contract of service, the owners are not entitled to tell him how he should navigate the vessel. Conversely, the fact that one party reserves the right to exercise full control over the method of doing the work may be consistent with the other party being an independent contractor: see *Queensland Stations Property Ltd. v. Federal Comissioner of Taxation* [1945] 70 C.L.R. 539.
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> In the English decision of *Market Investigations v. Min. of Soc. Security* [1969] 2 Q.B. 173, Cooke J., at p. 184 having referred to these authorities said:-
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> > 'The observations of Lord Wright, of Denning L. J. and of the judges of the Supreme Court suggest that the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'. If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.'
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> It should also be noted that the Supreme Court of the Irish Free State in *Graham v. Minister for Industry and Commerce* [1933] I.R. 156, had also made it clear that the essential test was whether the person alleged to be a "servant" was in fact working for himself or for another person.
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> 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.

The question remains as to whether the appeals officer, in the light of the legal principles to which I have referred, was entitled to arrive at the conclusion he did on the facts as found by him. I have no doubt that he was. 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 in issue in the case decided by Cooke 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 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.

The written agreement was undoubtedly drafted with understandable care with a view to ensuring, so far as possible, that Ms. Mahon was regarded in law as an independent contractor. However, as I have already pointed out, although this was a factor to which the appeals officer was bound to have regard, it was by no means decisive of the issue. When he took into account all the circumstances of her employment, he was perfectly entitled to arrive at the conclusion, as he did, that she was employed under a contract of service."

16. The defendant in the present case relied heavily upon the judgment of the High Court (Edwards J.) in *Minister for Agriculture and Food v. Barry and Ors* [2009] 1 I.R. 215 for the proposition that a *sina qua non* of any employment relationship is what is known as 'mutuality of obligation.' It was argued, further, that such mutuality of obligation was absent in the present case and that this was determinative of the issue, without the necessity for the Court to address any remaining matters.

17. The case of *Barry* concerned the position of temporary veterinary inspectors who carried out work at meat processing plants and whether they were employees of the Minister for the purposes of statutory payments under the Redundancy Payments Acts and the Minimum Notice and Terms of Employment Acts following the termination of their retainer with Galtee Meats plant in Mitchelstown, Co. Cork on the closure of that plant in 2004. The EAT ruled that they were employees. The appellant Minister appealed to the High Court on the basis that the EAT had misdirected itself in law. Edwards J. engaged in a detailed analysis of the authorities and ultimately allowed the appeal and remitted the case to the EAT for decision. Having set out the facts of the case, including the features of the work undertaken by the veterinary inspectors, he addressed the relevant legal principles. In the first instance, he held that the EAT had erred in limiting the issue before it to a binary question as between a contract of service and a contract for service, when there were other possibilities. The EAT should have questioned whether there was one contract or more than one contract, and, if more than one, the scope and nature of each. He said that one possibility to be considered was that each time the inspectors worked, they entered a separate contract governing that particular engagement, and by virtue of a course of dealing over a lengthy period of time that course of dealing "became hardened or refined into an enforceable contract, a kind of over-arching master or umbrella contact" which itself might be either a contract of service or a contract for services, or perhaps a different type of contract altogether.

18. He then noted that the EAT had adopted a two-stage process in reaching its decision; (1) it applied a mutuality of obligation test; and (2) it applied the 'enterprise' test. He observed:

"The appellants have no difficulty with the fact that the mutuality of obligation test was applied but they vehemently dispute the purported finding of mutuality of obligation on the evidence that was before the tribunal. They also say that the Employment Appeals Tribunal was incorrect to apply the so called enterprise test as it is not determinative of the issue, and the Employment Appeal Tribunal's belief to the contrary is grounded in a misconstruction of Keane J's judgment in *Henry Denny & Sons (Ireland) Ltd. v Minister for Social Welfare* [1998] 1 IR 34."

19. It is clear from this introduction to his section on mutuality of obligation that there was no dispute between the parties in that case that the principle did apply as a fundamental precondition to a finding of an employment relationship. Unlike the present case, the point was not argued, it had in effect been conceded.

20. The Court then went to address the issue of 'mutuality of obligation' in the following passage: -

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

[47] The requirement of mutuality of obligation is the requirement that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present, then either there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract of service. It was characterised in *Nethermere (St Neots) Ltd. v. Gardiner* [1984] I.C.R. 612 at p. 632 as the "one *sine qua non* which can firmly be identified as an essential of the existence of a contract of service." Moreover, in *Carmichael v. National Power plc.* [1999] I.C.R. 1226 at p.1230 it was referred to as 'that irreducible minimum of mutual obligation necessary to create a contract of service.' Accordingly the mutuality of obligation test provides an important filter. Where one party to a work relationship contends that that relationship amounts to a contract of service, it is appropriate that the court or tribunal seized of that issue should in the first instance examine the relationship in question to determine if mutuality of obligation is a feature of it. If there is no mutuality of obligation it is not necessary to go further: whatever the relationship is, it cannot amount to a contract of service. However, if mutuality of obligation is found to exist, the mere fact of its existence is not, of itself, determinative of the nature of the relationship and it is necessary to examine the relationship further."

21. He then proceeded to examine the facts of the case and concluded that the EAT's finding of mutuality of obligation was flawed. The EAT had decided that an 'implied agreement' was reached that the inspectors would carry out the inspection and certification of meat 'on an ongoing basis' and on this basis there was mutuality of obligation. The Minister argued before the High Court that that there was no evidence of any such 'implied agreement' and that, on the contrary, the evidence was that the Minister "had no control over the level of work that was available for temporary veterinary inspectors, as this was a matter entirely within the control of the processing plants" and that the appellant was "thus unable to give, and did not give, a commitment to the respondents at any stage as to the level of work available to them, and the respondents were at all times well aware of this." In addition, they were entitled to decline work at the very least 16% of shifts offered to them without any consequence to their contracts. Edwards J considered these points 'well made.' He referred with approval to the decision in the English case of *O'Kelly v. Trusthouse Forte plc* [1983] ICR 728, which concerned an 'umbrella contract' with regard to casual catering staff used by the banqueting department of a hotel company. The claimants lost their claim for unfair dismissal compensation on the basis the important ingredient of mutuality of obligation was missing. The matter ultimately arrived before the Court of Appeal, in which it was held that even if there was an umbrella contract, it was one 'for' not 'of' employment. Edwards J said that it was difficult to see the EAT could reach a conclusion other than that arrived in the *O'Kelly* case, in the present case. He considered the finding of the EAT in relation to an implied agreement to be untenable and therefore the finding of mutuality of obligation, which was predicated upon it, flawed.

22. He then went on to consider what he described as the second stage of the process, and the EAT's approach to this. He examined the decision in the *Denny* case and concluded that the EAT had misdirected itself in law in believing that the Supreme Court had approved 'a single composite test'; that the 'enterprise test' was determinative in its approach to the issues of control and integration.

23. He referred to *Denny* for the proposition that every case had to be considered in light of its particular facts by reference to the general principles developed by the courts, and that it was unhelpful to speak of 'tests' as no one test could constitute a measure or yardstick of universal application. All potential aids to the drawing of the appropriate inferences stood in their own stead, and the general principles such as 'enterprise', 'control' or 'integration' did not represent an exhaustive list.

24. It may be noted that the *Barry* case returned to the EAT for a second examination in light of the judgment of Edwards J., and that further evidence was heard in January 2009. Having heard the evidence, the EAT reached a second determination. Regarding the mutuality of obligation principle, the EAT took the view that, notwithstanding the view of Edwards J., there was sufficient mutuality of obligation to allow the veterinary inspectors to be classified as possible employees. However, as regards the remaining factors, it interpreted the judgment of Edwards J. as 'directing' the EAT to find that the veterinary inspectors were self-employed and not employees. This second determination of the EAT was in turn appealed to the High Court (Hedigan J.), but the matter was then appealed to the Supreme Court, which set aside the High Court decision on the basis that the central question on the appeal had not been addressed (*Barry v. Minister for Agriculture and Food* [2015] IESC 63). Accordingly, it cannot be said that the Barry case has reached a stage where there is a definitive and final ruling as to whether there was mutuality of obligation on the facts of that case. The Supreme Court did not comment on the 'mutuality of obligation' aspect of the judgment of Edwards J.

25. However, the mutuality of obligations test was addressed again in *Ahktar Mansoor v. Minister for Justice, Equality and Law Reform* [2010] IEHC 389, where it was applied by the High Court (Lavan J.). The plaintiff was a doctor who attended a Garda station to obtain a blood or urine sample from an individual charged with driving under the influence of alcohol. The detainee threw the contents of a urine sample over his head and face. The plaintiff contended that the defendant owed him a duty to take reasonable care for his safety as an employee, while the defendant denied this duty, arguing that the plaintiff was providing medical services as an independent contractor. Delivering judgment, Lavan J said: -

> "Given the significance of the distinction it is unfortunate that no definitive line of authorities, or indeed legislation, can be identified so as to provide a clear test. There is no, as Edwards J. described it in *Minister for Agriculture and Food v. Barry* [2009] 1 I.R. 215 " 'one size fits all' test". This uncertainty was eluded to by Keane J. in the leading Irish case of *Denny (Henry) & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 where he observed that 'each case must be considered in the light of its particular facts and of the general principles which the courts have developed'. Having said this, a number of important factors can and have been distilled from the case law which assist in determining whether or a person is an independent contractor or an employee. These include, but are importantly not limited to, (a) whether the person is engaged in business on his or her own account; (b) whether they are referred to as an employee under the contractual arrangement; (c) whether the person is responsible for their own tax affairs; (d) whether the person is free to engage people as substitutes when he or she is not available; (e) the level of control exercised by the employer who engaged him or her; and (f) whether he or she is entitled to payments that normally accrue to employees, such as pension contributions, sick pay, maternity leave, annual leave etc.
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> Although important, I do not believe it is necessary for me to consider all of these factors in this case. Before a tribunal is required to consider the above factors an important filtering mechanism must first be traversed; a task that is not completed here. This mechanism has been described recently by Edwards J. as the 'mutuality of obligations test'. Simply put the test requires the employer to provide work for the employee and that the employee is obliged to complete that work. The following passage from his judgment in *Minister for Agriculture and Food v. Barry* [2009] 1 I.R. 215 is worth quoting in detail:-
>
> > 'the mutuality of obligation test provides an important filter. Where one party to a work relationship contends that that relationship amounts to a contract of service, it is appropriate that the court or tribunal seized of that issue should in the first instance examine the relationship in question to determine if mutuality of obligation is a feature of it. If there is no mutuality of obligation is not necessary to go further. Whatever the relationship is, it cannot amount to a contract of service.' [Emphasis added]
>
> In that case the respondents worked as temporary veterinarian inspectors at a meat processing plant. When the plant closed they sought redundancy payments on the basis that they were employed on a contract of service basis. On appeal to this Court on a point of law it was concluded that there was no mutuality of obligation. Critical factors that influenced the Court included the fact that the respondents had no control over the amount of work they would be given, this was entirely at the discretion of the meat plant. In addition, their contracts provided that they could opt out of at least 16% of the work offered to them and that this would have no effect on their contracts of engagement.
>
> In my view the mutuality of obligation test is not satisfied in this case and that it is not required to decide anything further on this matter. It is clear that the defendants were not obliged to give the plaintiff work. Nor could the defendants possibly predict the number of drink driving offences that may occur on any given night. In addition, it was open to the defendants to call a number of general practitioners to assist them and although the plaintiff, along with a

number of other G.Ps. may have been on a contact or duty list, were the plaintiff to declare that he were unavailable for work, he could face no sanction or rebuke from the defendants. He simply would not be paid. The plaintiff performed a set task for a fixed sum. Likewise, if the defendants elected to engage a different G.P. on any given occasion, the plaintiff would have had no reasonable grounds for objecting to this. I therefore find that the plaintiff was at all materials times an independent contractor, engaged by the defendants under a contract for services."

26. It is clear, therefore, that the High Court in the *Ahktar* case applied the approach described by Edwards J. in the *Barry* case, namely that the 'mutuality of obligation' issue should be addressed in the first instance, and that it serves the function of a 'filter' for cases which may fail in *limine*.

27. Further, in *Brightwater Selection (Ireland) Ltd. v. Minister for Social and Family Affairs* [2011] IEHC 510, the High Court (Gilligan J.) again engaged in a thorough review of the authorities as to when a contract of employment exists and examined the role of the 'mutuality of obligations' concept in such an analysis. In the course of his review, he cited the *Barry* case with approval and, expressing his conclusions on the issue of mutuality of obligation, he said:-

> "48. Mutuality of obligation exists where there is an obligation on a body to provide work to an individual, and a corresponding obligation on the individual to perform the work. It is clear from a perusal of the authorities that no definitive test has been set out by the courts to be used in the context of determining whether a person is engaged under a contract of employment and it follows that a court or tribunal, in making such determination, should have regard to all relevant considerations. It is quite straightforward to derive from the case-law, and set out in the abstract, a non-exhaustive list of considerations that should be taken into account, such as inter alia: whether one party has the power of deciding what work is to be done and the manner in which it is to be done; whether the work of the engaged person is an integral part of the business; whether the person provides their own work or skill in the performance of some service; how the person is engaged and dismissed; how the person is remunerated; who chooses the times of work; who provides the workplace and so forth. As a tribunal should take into account all the relevant circumstances, mutuality of obligation is undoubtedly a consideration that regard should be had to, and indeed, is an important factor in determining the employment relationship.
>
> 49. The mutuality consideration is by no means a determinative test, but is an irreducible minimum of a contract of service. Although the existence of mutuality of obligation is not determinative, without mutuality no contract of service can exist. It would be logical, therefore, for a court or tribunal to begin their analysis of the employment relationship by determining whether such mutuality exists and then inquire further into the relationship.
>
> 50. In the case at hand, although the Appeals Officer did mention the phrase 'mutuality of obligation', he did not engage in a substantive appraisal of whether the appellant was under any duty to provide work to Ms. Keenan, nor whether Ms. Keenan was under any duty to perform work given to her by the appellant. I am of the opinion that, in the circumstances, mutuality was a highly relevant consideration and that regard should have been had to the existence or otherwise of mutuality in the relationship in question. In failing to address the issue, the Appeals Officer erred in law."

28. The approach that the High Court should adopt to previous decisions of the Court should be noted at this juncture, because the plaintiff has invited the Court to depart from the Barry decision. The appropriate approach has been made clear in a number of cases, including *In the Matter of Worldport Ireland Limited (in Liquidation)* [2005] IEHC 189 and *Kadri v Governor of Wheatfield Prison* [2012] IESC 27.

29. In *In the Matter of Worldport Ireland Limited (in Liquidation)* [2005] IEHC 189 Clarke J outlined the proper approach of the High Court when dealing with previous decisions of that Court:

> "It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. *Huddersfield Police Authority -v- Watson* [1947] K.B. 842 at 848, *Re Howard's Will Trusts, Leven & Bradley* [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered."

30. In *Kadri v Governor of Wheatfield Prison* [2012] IESC 27, Clarke J, sitting as a member of the Supreme Court, again considered the issue of the binding nature of consistent High Court case law, confirming his earlier decision in *Worldport*, finding that,

> "2.1 The jurisprudence of the High Court regarding the proper approach of a judge of that Court when faced with a previous decision of another judge of that Court is consistent. The authorities go back to the decision of Parke J. in *Irish Trust Bank v. Central Bank of Ireland* [1976-7] I.L.R.M. 50. Similar views have been expressed in my own judgment in *In Re Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189, by Kearns P. in *Brady v. D.P.P.* [2010] IEHC 231, and most recently by Cross J. in *B.N.J.L. v. Minister for Justice, Equality & Law Reform* [2012] IEHC 74 where Worldport was expressly followed.
>
> 2.2 It seems to me that that jurisprudence correctly states the proper approach of a High Court judge in such circumstances. A court should not lightly depart from a previous decision of the same court unless there are strong reasons, in accordance with that jurisprudence, for so doing."

31. These authorities make it clear that it is only in exceptional circumstances that this Court would choose not to follow an earlier decision of the High Court. The exceptional circumstances identified were: (1) where it is clear that the initial decision was not based upon a review of significant relevant authority; (2) where there is a clear error in the judgment, or (3) where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. It is clear that the judgment in *Barry* was based upon a detailed review of relevant authorities and that it is also a relatively recent decision of the Court. It has been followed in two subsequent High Court cases, as

described above. The only possible ground on which the plaintiff can be said to be advancing his case is (2), namely that there was a 'clear error' in the judgment. The plaintiff relies, for example, on a journal article in an academic publication which argues that the 'mutuality of obligation' concept is not a useful one in such cases. He refers to decisions in other jurisdictions to suggest that a different view should be taken. At its height, the plaintiff's argument is that there are differences of opinion in the common law authorities and among academics as to the usefulness of the 'mutuality of obligations' issue as part of the overall consideration of whether there is an employment relationship between two parties. This is very far from being a 'clear error' of the sort envisaged by Clarke J. in the *Worldport* case. The issue of how to determine whether a contract of employment exists has been before many courts on many occasions, and while there have been many differences of opinion at different times and in different places, the position today in this jurisdiction is that the approach identified in Barry, and applied in *Ahktar* and *Brightwater*, is appropriate. While the Supreme Court in the *Denny* case did not refer to the 'mutuality of obligations' test, presumably because of the facts of the case, there is nothing in that case which indicates that the test may not usefully be used as a filtering mechanism to identify clear cases of a relationship other than an employment relationship.

Application of the Mutuality of Obligations test

32. On the assumption that I am correct that the Court should follow the approach in the *Barry* case, it is necessary to examine whether there was mutuality of obligations in the arrangements between the plaintiff and defendant in the present case.

33. I have set out above the arrangements between the parties as set out in a number of documents. These documents deal in considerable detail with the obligations of the plaintiff. Considerably less is said about the obligations of the defendant. Indeed, the only relevant written terms concerning the defendant's obligations are the following statements in the 'Declaration of Interests' document:

> "In return, the company will *prioritise me for work* in these fields to ensure that it is in my interest and benefit to remain part of FC translations. The company will maintain good relations and will place a high level of trust in me knowing that I not only represent myself but also many others working with the company on sensitive public and legal matters. The company *will arrange appointments for me and endeavour to maintain sufficient work for me,* and promptly pay me on receipt of correctly submitted invoices or time sheets." (emphasis added)

34. The reference to prioritisation in the highlighted extract above is simply a promise that, as between translators, priority would be given to the plaintiff. The second highlighted extract uses the term 'endeavour'. Whether one substitutes other words or phrases such as 'try', 'attempt', to 'use efforts', 'strive', or 'exert oneself', it is clear that the concept of 'endeavouring' can be contrasted with words or phrases such as 'guarantee' or 'shall provide work'. The word 'will' in the phrase 'will arrange appointments for me', upon which the plaintiff laid emphasis, applies only to the arrangement of individual appointments but does not, in my view, override the plain words of the ensuing phrase 'endeavour to maintain sufficient work for me'. Accordingly, it is in my view plain that the defendant's side of the bargain was merely to try to give the plaintiff work but that there was no guarantee of work, in circumstances where the defendant itself had no control over the amount of work that might come to it from the Garda Siochana or other State entities.

35. The plaintiff relied upon the fact that he had written the word 'none' under the last paragraph of the 'Declaration of Interests' document which required a declaration of the names of other companies, groups or individuals for which the plaintiff was providing translation services. He said that this indicated that he had an exclusive arrangement with the defendant company and therefore was their employee. I do not accept this argument. The fact that the defendant in fact had no other arrangement with any other interpretation or translation company does not mean that he was not legally entitled to have such an arrangement and the very fact that there was such a clause in the contract underlines the fact that, from the defendant's point of view, he was entitled to work for others as well as the defendant; all that was being required here was that he disclose those names in order to prevent potential conflicts of interest in the actual work of interpreting/translating.

36. The plaintiff asserted that the same document required him not to work for any other company in the first line of the second paragraph which says: 'I agree to, not work for another company operating competitively in the same area as FC Translations'. However, the next line of the document is 'Unless I have declared this fact to company management'. The punctuation is poor but the meaning is clear.

37. Later in the same paragraph, it says:

> "And in so doing, I prioritise work for FC Translations and I do not represent any competitor parties operating in the same areas. Especially where that work could lead to confusion or is likely to be considered a conflict of interest, howsoever arising."

38. There is some inconsistency in the wording of the document here, but again, it seems to me that the overall meaning is that priority was to be given to work for the defendant company, but work for other companies was not prohibited provided there was no conflict of interest.

39. Further, I am not convinced by the argument on behalf of the plaintiff that an obligation to provide work to the plaintiff arose from the fact that work had in fact been given to him on a regular basis for a particular period by the defendant. If this approach were determinative of the issue, none of the previous authorities in which this issue had arisen could have reached any conclusion other than that the individuals in question were employees, be they veterinary inspectors, shop demonstrators, casual hotel workers, or home-workers for a clothes company, as they had all carried out work on a regular basis for a period of time; but that is not how those cases were approached by the various courts which examined them. In other words, the fact that work was given regularly for a period of time is not determinative of whether one party had a legal obligation to provide the other party with work.

40. Finally, the plaintiff asserted that he was 'on call 24/7'. In reality, what seems to me to be the position is that he was liable to receive a telephone call requesting that he carry out some work at any time of day or night. However, he was free to refuse that work if he chose to do so. No person could ever be 'on call 24/7' on a permanent basis, in the normal sense of the phrase 'on call', which means that the person has an obligation to work if so required. It may well be that if he had been telephoned, the plaintiff would in fact have responded affirmatively on every occasion because he needed the work. However, his factual dependence on the defendant company does not transform the working arrangements between them, legally speaking, into a contract of service.

41. In the circumstances, I am of the view that the defendant company was not under a contractual obligation to furnish the defendant with any, or any particular, volume of work into the future and that the requisite mutuality of obligation for an employment contract was therefore absent. Accordingly, the plaintiff's situation vis-à-vis the defendant company was not one of an employee and in light of that conclusion, the plaintiff's claim must be dismissed and no further determinations are required in this case.