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Independent contractors after the *Karshan* case

Michael Kennedy

The question

- *The Revenue Commissioners v Karshan (Midlands) Ltd T/A Domino's Pizza* [2023] IESC 24
- Were pizza delivery drivers working for Domino's Pizza engaged as independent contractors under contracts for services or were they employees retained under contracts of service (for the purposes of the Taxes Consolidation Act)?

Background – the High Court

- The Tax Appeals Commission decided that the drivers were employees of Domino's Pizza.
- The High Court determined that the Commissioner was entitled to so decide.

Background - the Court of Appeal

- Reversed the decision of the High Court.
- The Commissioner erred in determining that the drivers were employees of Domino's Pizza.
- The drivers were independent contractors.

Decision – Supreme Court

- The Supreme Court allowed the appeal from the decision of the Court of Appeal.
- Held that the Commissioner was entitled to conclude that the drivers were employees of Domino's .

Mutuality of Obligation

- The Supreme Court stated that “... *the term ‘mutual obligations’ when used in this context has generated unnecessary confusion. This, I think, will be most effectively avoided in the future if the use of the phrase in this arena is discontinued*”.

Reformulated five-point test

The question of whether a contract is one of service or for services should, having regard to the well established case law, be resolved by reference to the following five questions:

1. Does the contract involve the exchange of wage or other remuneration for work?
2. If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?
3. If so, does the employer exercise sufficient control over the putative employee to render the agreement one that is capable of being an employment agreement?

Reformulated five-point test

4. If these three requirements are met the decision maker must then determine whether the terms of the contract between employer and worker interpreted in the light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, are consistent with a contract of employment, or with some other form of contract having regard, in particular, to whether the arrangements point to the putative employee working for themselves or for the putative employer.

5. Finally, it should be determined whether there is anything in the particular legislative regime under consideration that requires the court to adjust or supplement any of the foregoing.

The test - 1

Does the contract involve the exchange of wage or other remuneration for work?

“To qualify as an employment contract for the purposes of this initial hurdle, however, the consideration must involve a promise of some kind by the worker to work for the putative employer.

The obligations on the employer may be to provide work, to pay for work, to retain the worker on the books and/or to confer some benefit on the worker which is non-pecuniary.

They can fairly be described as ‘*mutual obligations*’ but...it seems better to simply describe the core requirement by reference to the exchange of wage or other remuneration for work”.

The test - 2

Has the worker agreed to provide their services to the employer personally?

Is the agreement, or is not, one for personal service? This is the essence of an employment agreement. At the same time, it is clear that some degree of limited substitution is permissible. This is presented in the cases in terms that a *'limited or occasional power of delegation'* will not necessarily be inconsistent with an employment contract.

The test - 3

Control

“...the decision-maker is concerned to establish a right of control, over what is to be done, at least generally the way in which it is to be done, the means to be employed in doing it, the time when and the place where it shall be done. That must take account of the nature of the employment and the control an employer would be reasonably expected to exert. If unskilled, close direction as to the means and manner by which the work is to be done is to be expected, while if skilled, the employer would not be expected to be in a position to direct the worker as to how to achieve the prescribed objective”.

The test - 4

All the circumstances of the employment

“...I think the right approach is to view the first three questions I have just identified as a filter in the form of preliminary questions which, if any one is answered negatively means that there can be no contract of employment, but if all are answered affirmatively, allow the interrogation of all of the facts and circumstances to ascertain the true nature of the relationship. This is what Keane J. in *Henry Denny* described as the consideration of ‘*all the circumstances of [the] employment*’. It is clear that the court in *Henry Denny* was concerned that the question of whether the worker was carrying on business on their own account was, at least generally, central to this”.

The test - 5

The legislative context

“It is reasonable to assume that when the Oireachtas refers to a ‘*contract of service*’ or to an ‘*employee*’ it is referring to a category of agreement the features of which are identified by reference to the common law tests to which I have referred earlier.

However, it is easy to overlook that when the phrase appears in legislation, the ascertainment of its meaning involves an exercise in statutory construction like any other....”

The Legislative Regime

- What are the definitions of “*contract of service*” and “*employee*” within the relevant legislative provisions?
- **Minimum Notice and Terms of Employment Act 1973** - “employee” means “an individual who has entered into or works under a contract with an employer, whether the contract be for manual labour, clerical work or otherwise, whether it be expressed or implied, oral or in writing, and whether it be a contract of service or of apprenticeship or otherwise and cognate expressions shall be construed accordingly”.

The Legislative Regime

- **Employment Equality Acts 1998-2021** - “contract of employment” means “(a) a contract of service or apprenticeship, or (b) any other contract whereby...an individual agrees with another person personally to execute any work or service for that person or...an individual agrees with a person carrying on the business of an employment agency within the meaning of the [Employment Agency Act 1971](#) to do or perform personally any work or service for another person (whether or not the other person is a party to the contract), whether the contract is express or implied and, if express, whether oral or written”.

The Legislative Regime

- **Unfair Dismissals Acts, 1977 to 2015** - “contract of employment” means “a contract of service or of apprenticeship whether it is express or implied and (if it is express) whether it is oral or in writing”.

The Legislative Regime

- **Section 13 of the Unfair Dismissals (Amendment) Act 1993**, states that “[w]here...an individual agrees with another person, who is carrying on the business of an employment agency within the meaning of the Employment Agency Act 1971, and is acting in the course of that business, to do or perform personally any work or service for a third person (whether or not the third person is a party to the contract and whether or not the third person pays the wages or salary of the individual in respect of the work or service), then, for the purposes of the [Unfair Dismissals Act 1977] as respects a dismissal...the individual shall be deemed to be an employee employed by the third person under a contract of employment...and...any redress under the [Unfair Dismissals Act 1977] for unfair dismissal of the individual under the contract shall be awarded against the third person”.

The Legislative Regime

- **National Minimum Wage Act 2000** - “contract of employment” means “a contract of service or...any other contract whereby an individual agrees with another person to do or perform personally any work or service for that person or a third person (whether or not the third person is a party to the contract)”.

To do

- If you have any arrangements with independent contractors, you should now examine those arrangements and how they operate in practice with a view to ensuring that the arrangements are consistent with contracts for services.

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Questions?