

Case Reports

2024/6

Pizza delivery drivers categorised as employees rather than independent contractors for the purposes of income tax legislation (IR)

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Summary

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A judgment of the Supreme Court of Ireland concluded that certain pizza delivery drivers should be categorised as employees rather than independent contractors for the purposes of Irish income tax legislation. The Revenue Commissioners (the Irish tax authority) conducted an investigation into income, and the tax and social insurance payable thereon, in respect of delivery drivers of Karshan (Midlands) Ltd (trading as Domino's Pizza), on the basis that the delivery drivers were employees, rather than independent contractors, for the purposes of the Taxes Consolidation Act 1997 (the '1997 Act'). The Supreme Court held that the question of whether a person is an employee should be resolved by reference to the following five questions:

1. Does the contract involve the exchange of wage or other remuneration for work provided?
2. If so, is the agreement one where 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 worker to render the agreement one that is capable of being an employment agreement?
4. If questions 1–3 are answered in the affirmative, then the decision-maker must then determine whether the terms of the contract between the employer and worker and the reality of the working arrangements are consistent with a contract of

employment, or whether they point to some other form of contract.

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.

Legal background

The question of whether a worker was an employee or independent contractor arose because emoluments arising from employment contracts are chargeable to income tax, whereas those in respect of independent contractors are taxable on a separate basis under the 1997 Act. In other words, employees' income tax is deducted at source, whereas independent contractors' income tax is subject to a self-assessment after the fact. An employer is accordingly obligated to ensure that it deducts income tax and social insurance from employees' wages or salaries, whereas a person procuring the services of an independent contractor is not so obligated.

Facts

Factual background

Karshan (Midlands) Ltd ('Karshan'), a pizza production and delivery service, engaged delivery drivers in the Irish midlands to provide delivery services and to promote Domino's brand logo.

The contractual position on paper

Each delivery driver entered into an overarching written agreement of indefinite duration with Karshan, which indicated that it "wished to subcontract the delivery of pizzas ... and the contractor is willing to provide these services ...". The agreement described each driver as an 'independent contractor' and required them to acknowledge that Karshan "has no responsibility or liability whatsoever for deducting and/or paying PRSI or tax on any monies [they] may receive under this agreement". Each driver was required to provide their own vehicle, although the agreement provided that they could rent such a vehicle from Karshan on certain terms. The drivers were required to wear Domino's branded clothing and to affix Domino's logos to the vehicle. While no minimum service was expected from the drivers, they were nonetheless restricted from offering their services to a competitor of Domino's. Importantly, the drivers

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were contractually entitled to engage a substitute and were not entitled to receive any work from Karshan; the obligation to provide work was purely discretionary. The drivers were contractually entitled to determine their own hours of work, although they had to inform Karshan of their unavailability. Delivery drivers were also expected to furnish invoices in respect of work completed for Karshan.

The contractual position in practice

In practice, drivers could not rent a vehicle from Karshan; some delivery drivers were required to fold boxes while waiting for deliveries to be ready; Karshan furnished prepaid invoices for signature by most drivers; the drivers were required to fill out an ‘availability sheet’ (i.e., a roster); and each driver clocked in and out of Karshan’s computerised system.

Proceedings before the Tax Appeals Commission

The Revenue Commissioners commenced an investigation into Karshan’s income tax compliance and concluded, on a preliminary basis, that the company had mis-categorised the delivery drivers as independent contractors for the purposes of Irish income tax legislation. Karshan challenged this assessment by the Revenue Commissioners before the Tax Appeals Commission (‘TAC’), the independent statutory authority tasked with hearing appeals against assessments made by the Revenue Commissioners.

The TAC determined that the Revenue Commissioners’ characterisation of the delivery drivers as employees (working under ‘contracts of service’) rather than independent contractors (working under ‘contracts for services’) for income tax purposes was correct. The Commissioner in this case concluded that the written agreement between Karshan and its delivery drivers constituted an overarching or umbrella agreement supplemented by multiple individual contracts in respect of each assignment or roster for work. Karshan subsequently challenged this decision in the High Court.

Judgment of the High Court

In the High Court, Karshan challenged the Commissioner’s decision on the ground that she had erred in law in her interpretation and/or application of the common law concepts of the contract of employment concerning mutuality of obligation, substitution, integration and the terms of the overarching written agreement between Karshan and its delivery drivers.

The High Court concluded that the common law concept of mutuality of obligation did not entail an obligation to provide – and a corresponding obligation on the worker to complete – work on an *ongoing* basis. While Karshan was not contractually obligated to provide work to its drivers, once work was provided, a series of obligations arose. Specifically, the drivers’ overarching right to cancel their shift was qualified by their obligation to engage a substitute, to provide advance notice to Kar-

shan and to work out the remainder of the shifts in the series which had been agreed. In other words, while the drivers were initially required to initiate or offer their services to Karshan, once a roster had been agreed, a degree of mutuality of obligations arose. In relation to the issue of substitution, the High Court noted that the reality was that “one driver was replaced with another driver from [Karshan’s] pool of drivers”. The substitute was not a sub-contractor of the driver; they were paid by Karshan. In relation to the issue of integration, it was clear that delivery drivers were ‘fundamental’ to Karshan’s business. As to the written terms, the High Court concluded that the Commissioner looked at ‘the reality of the relationships’ between Karshan and the delivery drivers.

Judgment of the Court of Appeal

On appeal by Karshan, the Court of Appeal overturned, by a majority, the judgment of the High Court. The Court of Appeal determined that the Commissioner had erred in her application of certain British case law. The Court of Appeal also concluded that there was “no evidence of any practice which was inconsistent with the terms of the written agreement” save for three issues – the non-availability of cars for hire, the preparation of invoices by Karshan for most of its drivers and the performance by some drivers of non-contractual work for Karshan – “none of which is relevant to the question of mutuality of obligation”. In addition, the Court of Appeal held that the Commissioner erred in concluding that the drivers were ‘required’ to initiate an agreement with Karshan to obtain work as this was contrary to the express terms of the agreement. The Court was particularly critical of her assumption that the terms of the overarching written agreement between Karshan and its delivery drivers applied, by implication, to each discrete individual contract for work. Furthermore, the drivers were not obligated to work under the overarching agreement or under any individual agreement nor were they obligated (as opposed to entitled) to engage a substitute. Moreover, the fact that there may be mutual obligations under an individual or discrete contract for work did not necessarily entail that such contract was an employment contract; if it did, then every contract for services would be an employment contract.

The Court of Appeal also partially disagreed with the Commissioner’s approach to the questions of substitution. While the Court of Appeal was of the view that the drivers were not under any obligation to secure a substitute if they were unavailable, nonetheless it was reasonable to conclude that the practical application of the overarching contract was “more akin to the swapping of shifts between drivers”. However, on the question of integration, the Court of Appeal upheld the Commissioner’s reasoning on the basis that it was open to her to

conclude that the drivers were integrated into Karshan's business, notwithstanding the fact that it was possible to outsource a delivery business or to have genuinely independent contractors who wear branded uniforms.

Judgment of the Supreme Court

On appeal by the Revenue Commissioners, the Supreme Court conducted a comprehensive review and analysis of some of the core legal authorities in Ireland, Britain and other common law jurisdictions governing the test for employment status. Focussing in particular on the common law concept of mutuality of obligation, which has become dominant since the 1980s, the Supreme Court noted that the key underlying feature of this concept, as argued by Karshan, was the notion of 'future stability'. This feature was, according to Karshan, embedded in four factors: a requirement of continuity; a forward-looking element; an obligation on the part of the employer to provide work; and an obligation on the part of the employee to perform work.

In respect of the first of these factors, the Court was of the view that "such a requirement is likely to both encourage the assertion of legal fiction over factual reality and undermine the overall objective of ensuring that all relevant circumstances of each case are faithfully assessed". Nor was there a requirement for a forward-looking element. In respect of the mutual obligations to provide and perform work, the Supreme Court noted that, for a contract of service to exist, there is no requirement that the employer provide work to the employee; rather, "the obligation resting on an employer may vary as between the provision of work, payment for work, retention upon the books, or the conferring of some benefit which is non-pecuniary". Nonetheless, there must be an obligation resting on the employee to perform the work personally. Such factors indicated mutuality of obligation in the true sense, which is a necessary (but not sufficient) requirement for the existence of a contract of employment.

In addition to responding to Karshan's manner of pleading the common law concept of the mutuality of obligations, the Supreme Court reflected on the broader test for employment status, of which that concept forms but one part. Specifically, the following questions were identified as requiring answers in determining whether a person in any given case is an employee:

- i. Does the contract involve the exchange of wage or other remuneration for work?
- ii. 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?
- iii. 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?
- iv. 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.

- v. 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.

In answering these questions in the context of the case before it, the Supreme Court concluded that the TAC was entitled to conclude that the delivery drivers were employees of Karshan for the purposes of the 1997 Act. As the Court put it:

The evidence disclosed close control by [Karshan] over the drivers when at work, and while there were some features of their activities that were consistent with their being independent contractors engaged in business on their own account, the [TAC] was entitled to conclude that the preponderance of the evidence pointed to the drivers carrying on [Karshan's] business rather than their own. Insofar as it was relevant, the [TAC] was correct to conclude that the drivers were ... obliged to attend for work when they agreed to be rostered.

Commentary

While it must be remembered that this is ultimately a taxation case, this was the first time in nearly 20 years that the Supreme Court of Ireland had an opportunity to reflect on some of the considerations relevant to the test for employment status. It is important to note that there are different bodies (e.g., the Workplace Relations Commission/Labour Court, Social Welfare Appeals Office and Revenue Commissioners/TAC, etc) that determine employment status, depending on the particular branch of law in question (e.g., employment law, tax law, social welfare law, etc). The Supreme Court purported to comprehensively outline the appropriate test to be applied in all such circumstances. In particular, the Supreme Court extensively reviewed the common law concept of mutuality of obligation as a *de minimis* requirement for the existence of a contract of employment. In its analysis of this concept, the Supreme Court adopted a more or less functional approach, expressing its willingness to see the 'factual reality' underlying any potential 'legal fiction'. This strongly contrasts to the approach adopted in the Court of Appeal, which was much more formal in nature and analytically rigorous. At least some of the logic of the Court of Appeal – especially that concerning the implication of terms from the overarching contract between

Karshan and its delivery drivers into the discrete contracts of employment – is difficult to disagree with.

The five questions posed by the Supreme Court which should be taken into account in determining whether a person is an employee are not revolutionary; rather, they are essentially clarificatory in nature. This is nonetheless welcome, particularly in the light of broader developments and changes in the Irish labour market. They will help other Irish authorities – such as the TAC, the Workplace Relations Commission and the Social Welfare Appeals Office – to address the increasingly complex contractual structures of working relationships. In addition, the Supreme Court’s considered reflections contribute to a broader trend, occurring throughout Europe, in response to the so-called ‘gig economy’ to attempt to reconcile the legitimate needs of business with the economic vulnerability of precarious workers.

Subject: Employment status

Parties: The Revenue Commissioners – v –
Karshan (Midlands) Ltd T/A Domino’s Pizza

Court: Supreme Court of Ireland

Date: 20 October 2023

Case number: [2023] IESC 24

Internet publication: https://www.courts.ie/view/judgments/e4ee7c3d-0e02-4a33-82b7-26458d895138/9a4ca200-86dd-417d-a020-58cddc6b3f61/2023_IESC_24.pdf/pdf