

RECENT CASES

CASE NOTE

Domino Dancing: Mutuality of Obligation and Determining Employment Status in Ireland

Acceptance Date May 28, 2024; Advanced Access publication on July 30, 2024.

ABSTRACT

It has taken a while, but what has been described as the first ‘gig economy’ case has been decided by the Irish Supreme Court. Although the case did not involve the use of a platform to organise work, it did require the Supreme Court to rule on the question of the employment status of pizza delivery drivers, all of whom were labelled as ‘independent contractors’ in the contracts between the company and the drivers. The case was taken by Revenue, which contended that the drivers, in fact, should have been classified as employees for tax purposes. The Supreme Court took the opportunity to present a long and detailed judgment on the correct approach to determining employment status, and, in particular, on the role of ‘mutuality of obligations’ in this consideration, with an extensive review of case law from the UK. This analysis discusses the case, with a particular emphasis on the view taken by the Court on mutuality of obligations in the context of ‘casual work’.

1. INTRODUCTION

Litigation involving the determination of employment status continues apace across Europe, particularly, but by no means exclusively, in the context of platform work.¹ In late 2023, the Irish Supreme Court handed down

¹At end of December 2023, for example, reports on the same day carried news that while the labour court in Brussels had ruled that couriers for Deliveroo were employees, and not independent contractors (<https://www.brusselstimes.com/850660/deliveroo-delivery-staff-must-be-considered-employees-court-rules>), a provisional agreement on the draft platform work

a significant ruling on the question of employment status in *The Revenue Commissioners v Karshan (Midlands) Ltd t/a Domino's Pizza*². Although the case did not feature the use of platform technology, the Supreme Court was clearly aware that it was addressing the question before it, the employment status of pizza delivery drivers, in the context of ongoing debate and controversy surrounding 'gig' work.³ In a lengthy and detailed ruling, the Supreme Court carefully analysed Irish jurisprudence, as well as a wealth of case law from the Appeal Courts and employment tribunals of England and Wales, and the House of Lords/UK Supreme Court (indeed almost half the judgment is taken up with analysing precedent from these courts and tribunals), in proposing how to approach the thorny question of determining employee status. This note will analyse the decision, and discuss the approach to determining employment status laid down by the Supreme Court with a particular focus on three elements; the role of 'mutuality of obligations'; the relative weight to be accorded to the express contractual terms set down by the parties and the implications of a possible divergence in approaches to the meaning of 'employee' in tax, social security and employment law.

2. EXTRA TOPPINGS: THE DISPUTE IN THE DOMINO'S CASE

The dispute in the Domino's case related to a demand by the Revenue Commissioners for payments by Karshan (the respondent in the Supreme Court appeal) in respect of pizza delivery drivers Revenue alleged had been misclassified as independent contractors, when they were, in fact, employees. Karshan disputed that the drivers were employees, and a decision was issued by a Tax Appeal Commissioner in 2018. The Commissioner determined that the drivers in question worked under *contracts of service* during the relevant

directive (brokered by the Spanish Council Presidency), sensationally failed to secure a qualified majority in the Committee of Permanent Representatives (Coreper), with the directive's proposed legal presumption of employment status being the main stumbling block (<https://www.brusselstimes.com/851131/eu-bill-on-digital-platform-workers-hits-temporary-snag>).

²[2023] IESC 24 ('Karshan'; the judgment can be accessed at https://www.courts.ie/acc/alfresco/e4ee7c3d-0e02-4a33-82b7-26458d895138/2023_IESC_24.pdf/pdf#view=fitH). Murray delivered the unanimous judgment of the Court.

³'The parade of carters, dockers, cattle drovers, delivery drivers, railroad unloaders, market researchers, supermarket demonstrators and homeworkers who have marched through the earlier cases show the common law grappling with the application of the principles applied to differentiate a contract of service from a contract for services to what is now called the "gig economy" long before that phrase was invented' (Ibid. [195]).

years of tax assessment (2010 and 2011), and so upheld Revenue's contention that they were taxable as employees, and not self-employed persons. The determination was appealed by way of a case stated to the Irish High Court, where O'Connor affirmed that the Commissioner was correct in law, and upheld her determination.⁴ Karshan appealed to the Court of Appeal, which overturned the High Court decision (by a 2-1 majority) and found that the drivers were not employees.⁵ Revenue appealed to the Supreme Court, where a seven-judge Court issued its decision in October 2023 (the sole decision was delivered by Murray on behalf of the Court).

There are many reasons that the case is of interest beyond its implications for domestic law. First, Ireland is one of the jurisdictions where the 'binary divide' between employees and the self-employed remains; there is no 'intermediate' category, such as the 'limb (b) worker' definition set out in s 230(3) of the UK's *Employment Relations Act 1996*.⁶ It is important, though, to note that there is no uniform definition of 'employee' or 'contract of employment' set out in Irish legislation. Under the legislation at issue in the case (s 112 of the *Taxes Consolidation Act 1997*), the focus is simply on whether or not the person is in 'employment' (ie works under a 'contract of service'), as is also the case in relation to, for example, unfair dismissals and redundancy legislation. However, wider definitions also apply. Strikingly, the *Payment of Wages Act 1991* includes within the meaning of contract of employment (in s 2) an almost identical formulation to the 'limb (b) worker' definition:

any other contract whereby an individual agrees with another person to do or perform contract) whose status by virtue of the contract is not that of a client or customer of any profession or business undertaking carried on by the individual, and the person who is liable to pay the wages of the individual in respect of the work or service shall be deemed for the purposes of this Act to be his employer.

We will return to this question of legislative definitions below.

⁴[2019] IEHC 894.

⁵[2022] IECA 124.

⁶Michael Doherty and Valentina Franca, 'The (Non/)Response of Trade Unions to the "Gig" Challenge' (2020) 13 (1) *Italian Labour Law e-Journal* 125. 'There was some discussion of this issue by the various courts in front of which the Domino's case was argued, particularly in the context of the precedential value of certain UK caselaw, where it was "worker" (rather than "employee") status that was at issue, in respect of which "there is a specific and broader statutory definition"' (*Karshan* (n.2) [83]).

Second, the case contains many of the factual aspects which are typical of contemporary employment status disputes. In particular, the *written agreement* between the company and each driver, *inter alia*:

- identified each driver as an ‘independent contractor’;
- stipulated that drivers were paid according to the number of deliveries successfully undertaken and provided payments to drivers for brand promotion through the wearing of branded clothing and or logos (supplied by the company);
- required drivers to use their own cars and motor insurance;
- required drivers to provide certification of business use insurance and, where they did not have such insurance, the company would provide insurance on its policy for a charge;
- did not warrant a minimum number of deliveries and obliged drivers to provide invoices and maintain their own records;
- allowed drivers to engage a substitute driver provided that substitute could perform all contractual obligations of the driver;
- did ‘not warrant or represent’ that the company would utilise the services of each driver ‘at all’, while drivers had the right to notify the appellant of days and times on which they were available.

We will return to these last two clauses below. The written documentation between the parties was at pains to stress that the company had ‘no responsibility or liability whatsoever for deducting and/or paying PRSI [i.e. social insurance] or tax’ on monies which the drivers were paid for their work.

In essence, the relationship operated as follows. Rosters were drawn up by store managers, after drivers had filled out an ‘availability sheet’ approximately one week beforehand. Evidence before the Tax Commissioner indicated that store managers would ensure that rostered drivers would only get two deliveries at a time (and one delivery if another driver was waiting). Evidence was also given that some drivers were required to fold boxes while waiting for deliveries to be ready. While the contract provided that drivers were to invoice the company weekly at agreed rates (a non-negotiable sum of €1.20 was paid to drivers per drop with an added 20c for insurance, and drivers were also paid €5.65 per hour in respect of brand promotions), evidence was provided that the company furnished prepaid invoices for signature by many drivers.

The third aspect of the case of general interest is that the Supreme Court took the opportunity to provide a wide-ranging review of jurisprudence on the various ‘tests’ used by courts and tribunals to determine employment

status, which will be familiar to labour lawyers everywhere, especially those in common law jurisdictions. In particular, the Supreme Court addressed the thorny issue of how ‘mutuality of obligations’ was to be fed into such determinations.

3. THIN CRUST: MUTUALITY OF OBLIGATIONS AND EMPLOYMENT STATUS

It was commonly accepted amongst the 11 judges that ultimately heard this case in the three different courts that the High Court decision of Edwards in *The Minister for Agriculture and Food v. Barry*⁷ appears to have been the first time in which an Irish court used the term ‘mutuality of obligation’ (although it had been acknowledged in the case law of employment tribunals before then). The parties before the High Court appeared to have conceded that the requirement of ‘mutuality of obligation’ was a *precondition* to an employment relationship. Edwards formulated this *sine qua non* of the employment contract as follows:

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... in *Carmichael v. National Power PLC* [1999] ICR 1226 at 1230 it was referred to as ‘that irreducible minimum of mutual obligation necessary to create a contract of service’.⁸

In *Karshan*, the Supreme Court found that there was an overarching ‘umbrella contract’ (the drivers had to notify the company of their availability), which was then supplemented by multiple individual contracts (the company would roster drivers for shifts). It was these rostered periods that the Court found constituted an employer–employee relationship; as a result of this finding, the Court did not have to consider the status of the ‘umbrella’ contract and explicitly left this question open for determination in a future case.

However, the Supreme Court made some comprehensive, and welcome, findings in relation to the use (and misuse) of the concept of ‘mutuality of

⁷[2008] IEHC 216. This case dealt with claims under redundancy and minimum notice legislation, which required claimants to demonstrate continuous service working under a contract of service.

⁸*Ibid.* [13].

obligations'. Much argument in the case focussed on clause 14 of the written agreement, and the implications of this for whether the parties owed each other mutual obligations:

The Company does not warrant or represent that it will utilise the Contractor's services at all; and if it does, the Contractor may invoice the company at agreed rates. The Company, furthermore, recognises the Contractor's right to make himself available on only certain days and certain times of his own choosing. The Contractor, in turn, agrees to notify the Company in advance of his unavailability to undertake a previously agreed delivery service.

The company argued forcefully (and successfully before a majority in the Court of Appeal) that the clause (and the overall thrust of the written agreements) clearly illustrated that mutuality of obligation, which was a *sine qua non* of an employment contract, was absent. Drivers could unilaterally choose not to provide their services, even though they had agreed to be rostered for work, without any risk of a sanction being imposed, and under the overarching contract, the company was not required to provide work to the drivers at all. The Supreme Court addressed in depth what it referred to as the 'version' of mutuality of obligations contended for by the company. This, essentially, contained four elements: the mutual commitments in question had to present some type of continuity (be 'ongoing'); they had to have a forward-looking element ('extending into the future'); there had to be an obligation on the part of the employer to 'provide' work; and there had to be an obligation on the part of the employee to 'perform' work.⁹

The Supreme Court noted that the centrepiece of the company's case assumed that it was not possible for a contract of employment to come into being unless the obligations on the employer and employee had some permanence borne of a commitment on the part of the employer to offer work into the future, and on the worker to agree to do the work when offered. Based on its extensive review of case law, the Supreme Court found such a contention to be ahistorical, appearing nowhere in a century of jurisprudence. The Court referred to *Market Investigations Ltd v. Minister of Social Security*,¹⁰ where part-time market research interviewers were found to be employees working under a series of contracts of service, a decision which was applied in the Irish Supreme Court in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare*,¹¹ where a demonstrator of the appellant's

⁹ *Karshan* (n.2) [189].

¹⁰ [1969] 2 QB 173.

¹¹ [1998] 1 IR 34.

food products at supermarkets was deemed to work under a contract of service. In neither case was there an ongoing obligation to provide or to accept work, and, indeed, in *Henry Denny*, the worker could find herself attending a supermarket premises to conduct a demonstration which did not proceed and, in that situation, receiving no remuneration (travelling expenses aside).

Senior Counsel for Revenue¹² traced the judicial origins of the ‘mutuality of obligations’ principle to a decision of the English Employment Appeal Tribunal (‘EAT’) in 1978, *Airfix Footwear Ltd. v. Cope*,¹³ where the EAT proceeded on the basis that the question of whether there was an obligation to provide and to accept work was *relevant* to the identification of an employment relationship, but where it was not decided that it was *dispositive* of whether a contract of employment existed. The Supreme Court also referred to the decision in *O’Kelly v. Trusthouse Forte Plc*,¹⁴ where it concluded that none of the judgments in the case supported the view that the employer be under an ongoing obligation to provide work other than while the job was being done, before a contract of employment could arise from a single engagement. Murray concluded on this point that

[i]f the Court of Appeal in *Nethermere* (which is in truth the origin of this jurisprudence) suggested otherwise, it adopted an interpretation of *O’Kelly* which I find difficult to locate in that decision... From that point, the language used in some of the English cases may have proceeded on the basis that unless the employer was on some form of a continuous basis obliged to offer work and the employee was obliged to do it, there could never be a contract of employment, but the decisions in *McMeechan* and *Prater* show that this is emphatically not the case in that jurisdiction today.¹⁵

Moreover, in addition to the lack of support in the authorities for imposing a requirement of ongoing obligations of this nature as a precondition to the existence of an employment contract, the Supreme Court felt that strong *policy* reasons existed for not doing so, namely 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’.¹⁶

¹² Anthony Kerr SC, the distinguished labour law academic at the Sutherland School of Law, University College Dublin.

¹³ [1978] ICR 1210.

¹⁴ [1983] ICR 728.

¹⁵ *Karshan* (n.2) [199] referring to *Nethermere (St. Neots) v. Gardiner* [1984] ICR 612; *McMeechan v. Employment Secretary* [1997] ICR 549 and *Cornwall County Council v. Prater* [2006] IRLR 362.

¹⁶ *Karshan* (n.2) [201].

As regards to the related argument that mutual commitments had to have a forward-looking element, the Supreme Court identified a practical problem; the company's case was that there be some distance between the execution, and agreement, of the executory contract, but how far into the future these 'future' obligations had to extend was not clear. The situations in which a worker would simply turn up at an employer's premises, agree to do a job in return for payment and then begin it, acting as an employee for this one-off engagement, would be rare indeed. Moreover, where, as in this case, there was an overarching agreement the employment inevitably would not be quite so transitory or impermanent.

The Supreme Court then addressed the argument that, for mutuality of obligations to exist, there had to be an obligation on the employer to provide work. While it was not controversial that a contract of employment can only arise where the putative employee agrees to provide their own work and skill to the employer, the contention that a contract of employment could only come into existence if the employer agrees to provide the employee with work was, the Court found, misplaced. The only 'mutuality' required is that the consideration is such as to involve in some way the provision of *or payment for* work that must be personally done by the worker; this locates the agreement in the 'the employment field'.¹⁷ Once in that field, the contract, though not *necessarily* a contract of employment, is *capable* of being classified as such.

The Supreme Court concludes its lengthy consideration of the concept of 'mutuality of obligations' by stating:

The fact is that the term 'mutuality of obligation' has, through a combination of over-use and under-analysis been transformed in employment law from what should have been a straightforward description of the consideration underlying a contract of employment, to a wholly ambiguous label. That ambiguity has enabled it to morph from *merely describing the consideration that must exist before a contract is capable of being a contract of employment, to its being presented as a defining feature that in itself differentiates a contract of service from a contract for services...* 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 (emphasis added).¹⁸

¹⁷ *per* Elias J. in *James v. Greenwich LBC* [2007] ICR 577, 581–2.

¹⁸ *Karshan* (n.2) [210–1].

This clear rejection of the (mis)use of the ‘mutuality of obligations’ concept by the Supreme Court is the most welcome aspect of the decision, and endorses the comment by Adams et al that the test is one whose ‘origins are contentious and whose effects are potentially highly confusing’.¹⁹ It is refreshing, also, to see the Supreme Court explicitly refer in the judgment to academic criticism of how Mark Freedland’s conceptualisation of ‘mutual obligations’ has been misapplied in the courts and tribunals:

It has been persuasively argued that, in fact, while Freedland identified a two tiered structure for the contract of employment, his main purpose in so doing was not to introduce a second structural limb for a work relationship to be classified as a contract of employment, but to provide a conceptual basis for understanding the evolving law on the breach and termination of the contract of employment, N. Countouris ‘Uses and Misuses of Mutuality of Obligations and the Autonomy of Labour Law’ UCL Labour Rights Institute On-Line Working Papers (2014).²⁰

Mutuality of obligations, therefore, will remain a part of Irish law, and the question of whether a worker has an ongoing right to be offered work into the future, and where so offered an obligation to perform it, is clearly *relevant* to the question of whether the worker is an employee; however, it is not a *sine qua non* of an employment relationship. A note of caution, though, must be sounded at this point. The Supreme Court was clear that it was deciding, on the basis of the case before it, on the situation where an employment relationship was present on the basis of a series of discrete contracts (for the periods during which the drivers worked there was an exchange of labour and wage). It explicitly reserved its position on the distinct question of, in cases where *continuous service* over a period is relevant, whether it is possible for an overarching or umbrella contract to constitute an employment contract *without* mutual promises of the obligation to offer and/or accept work. We will return to this issue below.

4. DEEP PAN: DETERMINING EMPLOYEE STATUS

The Supreme Court went on to take the opportunity to clarify the correct approach decision-makers should take when determining whether a person works under a contract of service or not. Here, Murray emphasised that

¹⁹ Zoe Adams et al, *Deakin and Morris’ Labour Law* 7th ed (Oxford: Hart, 2021), 135.

²⁰ Karshan (n.2) [53].

what is at issue is not so much an application of ‘tests’ as a ‘multi-factorial’ analysis, where, first, it is necessary to assess all relevant features of the relationship, identifying those that are, and those that are not, consistent with an employment contract, and determining the correct characterisation based upon the sum of those parts. In this respect, the Supreme Court noted the ground it was covering was well-trodden, and that the approach set out in *Ready Mixed Concrete (South East) Ltd. v. Minister for Pensions and National Insurance*²¹ and developed in *Market Investigations*²² remained that from which to work.

The Supreme Court refashioned this approach to posit five questions (emphasis added):²³

- (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.

We will discuss specific aspects of this approach in more detail below. However, it is worthwhile to make some brief comments which may be of general interest. The Supreme Court emphasised that the first three questions operate as a filter; if any one of these is answered negatively then there can be no contract of employment, but if all are answered affirmatively, the decision-maker must proceed to interrogate all of the facts and circumstances to ascertain the true nature of the relationship.²⁴ The Court

²¹[1968] 2 QB 497.

²²*supra* (n.10).

²³*Karshan* (n.2) [253].

²⁴*Ibid.* (n.2) [236].

reemphasised (in relation to the first question) its findings on ‘mutuality of obligations’. In relation to *control*, the Court is clear that what is at issue here is ‘whether there is a sufficient framework of control in the sense of ultimate authority, rather than the concept of day-to-day control envisaged by the older cases.’²⁵

The fourth question requires that the contract itself must be interpreted in the light of the factual matrix in which it was concluded;²⁶ involves a consideration of all elements of the relationship and does not depend on any presumption arising from the ‘filter’ questions (so that, eg, the question of *control* may well be relevant again here in that *the extent* of the control may point to one or other conclusion as to the nature of the parties’ relationship); and (following *Market Investigations* and *Henry Denny*) necessitates the elevation of the issue of whether the facts were consistent or not with the workers carrying on business on their own account.²⁷ Finally, on this question, Murray J addresses the well-known ‘integration test’. This, according to the Supreme Court, should be viewed as doing no more than articulating possible features of some employment arrangements that may negate or support control, and/or might otherwise suggest that the worker is so divorced from the employer’s undertaking that they cannot be properly viewed as being employed within it; its elevation ‘to the status of a specific test to be interrogated in all cases creates unnecessary duplication.’²⁸

Having outlined the correct approach to determining employee status, the Supreme Court (fairly briefly) applied it to the facts of the case. It was clear, the Court found, that there was a *contract in place*, which was capable of being an employment contract, for the periods during which the drivers worked (there was an exchange of labour and wage). The substitution clause in place was also considered; it provided:

²⁵ Ibid. (n.2) [232]. It remains to be seen if the concept of control here will be interpreted by the Court to include the broad range of tools used by contemporary firms to exercise control over their workforce, and, in particular the use of ‘algorithmic management’ practices, used extensively (but not exclusively) in the context of platform work; Joe Atkinson and Hitesh Dhorajiwala, ‘The Future of Employment: Purposive Interpretation and the Role of Contract after Uber’ (2022) 85(3) *MLR* 787, 798. The explicit reference to the piece by Atkinson and Dhorajiwala in the judgment (*Karshan* (n.2) [128]) gives some cause for hope!

²⁶ *Castleisland Cattle Breeding Society Ltd v. The Minister for Social Welfare* [2004] IESC 40.

²⁷ Murray J. noted the criticism that the third limb of the *Ready Mixed Concrete* case (as refashioned here) is somewhat circular (it neither indicates what the core features of the contract of service are nor which features are inconsistent with it) but that this criticism overlooks unavoidable difficulties in achieving both ‘certainty and flexibility’ (*Karshan* (n.2) [253]).

²⁸ *Karshan* (n.2) [249–50].

The Company accepts the Contractor's right to engage a substitute delivery person should the Contractor be unavailable at short notice. Such person must be capable of performing the Contractor's contractual obligations in all respects.

In evidence before the Tax Appeal Commissioner, it was established that the company would pay the substitute directly (if engaged). The Supreme Court found that the Commissioner was entitled to conclude that the right of substitution was sufficiently limited to maintain the element of *personal service* required (it could only be availed of if a driver was unavailable at short notice, and substitutes, essentially, had to be drawn from the ranks of other Karshan drivers); it was, in the Commissioner's words 'akin to the swapping of shifts between drivers'.²⁹

Equally, the Commissioner was entitled to find evidence of requisite *control* (eg over the manner in which the drivers dressed, the time the drivers were there, the number of deliveries the drivers were to undertake, the involvement of the local manager in the preparation and filling out of invoices, the fact that some drivers when at the premises were directed to make up pizza boxes and that, on the evidence, a failure to comply with that requirement entitled the manager to send the driver home for the remainder of the shift).

In terms of the fourth question (all the circumstances of employment), the Commissioner was entitled to conclude the drivers were not carrying on business of their own account (eg they did not take calls from customers, did not employ (or have the right to employ) others to undertake the tasks, they took no credit or economic risk, they worked exclusively from the company's premises, and their ability to maximise their own profits was very limited; some of the factors considered under the rubric of the control test were also relevant to that conclusion—the drivers were required to wear uniforms, to carry branding on their vehicles, etc). Nothing about the legislative regime involved indicated any adjustment to these findings was required.

5. HOLD THE CHEESE: INTERPRETING EMPLOYMENT CONTRACTS AND STATUTES

Many aspects of the Supreme Court's ruling in *Karshan* are extremely welcome, both in substance (notably the extensive discussion of mutuality of

²⁹Ibid. (n.2) [256].

obligations), form (the engagement with academic thought; notably pieces by Countouris, and Atkinson and Dhorajiwala) and process (given the ‘systemic importance’ of the issue to those involved in the provision of a wide range of services in the economy (and those who hire them), the court made it clear to the parties that it wished the issue argued in full and by reference to all relevant authority).³⁰ Nonetheless, some important issues were, explicitly or implicitly, left open.

One is the weight to be accorded to the express terms of written contract between the parties. The Supreme Court makes clear that the position adopted by the UK Supreme Court in *Autoclenz Ltd v. Belcher*,³¹ as explained in *Uber BV v. Aslam*,³² has not yet been endorsed by the Irish courts. While the Irish Supreme Court in both the *Henry Denny* and *Castleisland* decisions makes clear that decision-makers must take into account the actual dealings between the parties, this is in the context of assisting the court in determining, where an agreement purports to characterise the relationship between the parties, what, as a matter of law, the *agreement* actually is (using established principles of contract law). The issue of whether the court can (as set out in *Autoclenz* and *Uber*):

*disregard provisions of a detailed written contract of employment that define the legal rights and obligations of the parties (as distinct from purporting to describe the legal consequences of those rights and obligations) where those provisions are inconsistent with the manner in which the parties have conducted themselves, raises more complex questions (emphasis added).*³³

The Supreme Court in *Karshan* did not close the door on a future court deciding that interpretation of contracts in the employment sphere would require a modification of general principles of contractual interpretation. The Court noted the *dicta* of Whelan (who dissented from the Court of Appeal majority in *Karshan*, and upheld the decision that the drivers were employees) who felt that the relative bargaining power of the parties in work-related contracts (particularly, as here, where one party had drafted the agreement) pointed to the conclusion that what had to be ascertained was the true nature of the agreement between the parties ‘as gleaned from the documentation and from the operation of the agreement in question in practice over time’; the court had to look ‘beyond the label imposed on

³⁰ Ibid. [191–2].

³¹ [2011] UKSC 41.

³² [2021] UKSC 5.

³³ *Karshan* (n.2) [241].

the arrangement' in order to evaluate whether, on its true construction, the agreement accorded with that label.³⁴ Similarly, the Supreme Court noted that the analysis of Lord Leggatt in *Uber* 'might well be thought of as persuasive' in reflecting 'the disparity of bargaining power' between worker and employer, and the importance of ensuring that the determination of whether a person is or is not an employee 'should not lightly depart from the reality of the relationship as evidenced by the behaviour of the parties'.³⁵ However, Murray was emphatic in emphasising that, 'if new rules that fundamentally depart from the established general law of contract are to be suggested for the construction and application of written agreements governing the exchange of labour, these need to be rigorously justified, and precisely defined'.³⁶ In this regard, it may be that the Irish position is closer to that of Underhill LJ's dissenting Court of Appeal judgment in *Uber*, where he 'rejected the premise that *Autoclenz* authorises a court to rewrite apparently unfair bargains' and where he held that 'if it was possible to construe the facts consistently with the way the relationship was represented in the agreement, *Autoclenz* required that the court do so'.³⁷

Of course, in *Uber*, the UK Supreme Court emphasised that the theoretical justification for the *Autoclenz* approach could, crucially, be located not just in relation to *contractual* inequality of arms, but in the fact that the rights asserted by the claimants were created by *legislation*, that the question was one of *statutory* interpretation, and that the optimal way to proceed was to adopt a purposive approach to the relevant employment statutes.³⁸ Again, the Supreme Court in *Karshan* noted that, for such an approach to be adopted in Irish law, would need to await a different case in which the issue arose on the facts.

The Supreme Court's caution in relation to the interpretation of employment contracts is unsurprising. However, it does leave the state of play uncertain for a large number of businesses and workers. The problems with applying traditional contract law principles to the employment sphere are well-understood. As Lord Leggatt pointed out in *Uber*, allowing written contractual terms to characterise an individual's employment status, even as

³⁴Ibid. (n.2) [178].

³⁵Ibid. (n.2) [242].

³⁶Ibid. (n.2) [243]. He noted that the High Court of Australia had adopted a very different approach to *Autoclenz* in *CFMMEU v. Personnel Contracting Pty Ltd* [2022] HCA 1.

³⁷Zoe Adams, 'One Step Forwards for Employment Status, Still Some Way to go: The Supreme Court's Decision in *Uber v Aslam* Under Scrutiny' (2021) 80 *CLJ* 221, 222.

³⁸Jeremias Adams-Prassl, '*Uber BV v Aslam*: "[W]ork Relations ... Cannot Safely be Left to Contractual Regulation"' (2022) 51 (4) *ILJ* 955.

a *prima facie* starting point, poses difficulties due to the unequal bargaining power that exists between employers and workers, which results in a lack of negotiation and the employers' ability to dictate the formal terms of the relationship.³⁹ The point can be clearly illustrated when one considers substitution clauses. As noted above, in *Karshan*, the Supreme Court, endorsing the approach of Etherton MR in *Pimlico Plumbers Ltd. v. Smith*,⁴⁰ found that the substitution clause was sufficiently limited to maintain the required element of personal service necessary for a contract of employment. However, the Court was clear that the conclusion was based on how the substitution clause 'operated in practice (which involved a consideration of the *implementation, not a contradiction, of the clause*)' (emphasis added).⁴¹ This approach seems to chime with the recent decisions in *Independent Workers Union of Great Britain v. the Central Arbitration Committee and Rooffoods Ltd. trading as Deliveroo*,⁴² where, notwithstanding *Uber*, the English Courts upheld a clause guaranteeing a genuine and unfettered right of substitution, even where the clause was almost never actually relied on in practice, as it was not the place of courts and tribunals to question the business prudence of the company in drawing up the clause.⁴³

As Bogg and Ford point out 'a detailed concentration on the scope and meaning of the substitution clause is liable to result in missing the broader canvas. To date, the case law on substitution clauses has examined them in a rather formalistic way, and in isolation from the wider contractual context'.⁴⁴ The result of this formalistic approach is often that the casual nature of the working relationship will be a strong indicator of *self-employed* status;

agreements that in fact place much of the economic risk on the worker will be construed as self-employment; no distinction being drawn between situations where that risk is voluntarily assumed, and situations in which the worker has

³⁹ Atkinson and Dhorajiwala (n.25) 795.

⁴⁰ [2017] EWCA Civ. 51, [84].

⁴¹ *Karshan* (n.2) [257].

⁴² [2021] EWCA Civ. 952; [2023] UKSC 43.

⁴³ Even where, as here, it appeared that the clause was introduced in order to defeat the claim; Joe Atkinson and Hitesh Dhorajiwala, 'IWGB v RooFoods: Status, Rights and Substitution' (2019) 48(2) ILJ 278, 292. For a discussion of the Supreme Court decision (2023) UKSC 43, see Nicola Countouris, *Not Delivering—The UK 'Worker' Concept Before the UK Supreme Court in Deliveroo* <https://global-workplace-law-and-policy.kluwerlawonline.com/2024/01/23/not-delivering-the-uk-worker-concept-before-the-uk-supreme-court-in-deliveroo/>.

⁴⁴ Alan Bogg and Michael Ford, 'The Death of Contract in Determining Employment Status' (2021) 137 *LQR* 392, 397.

little choice but to submit to an arrangement by which they are required to take such risk as a condition for access to employment.⁴⁵

The problem may be even more acute in Ireland than in the UK when it comes to *statutory* interpretation. As was repeatedly stated throughout the determination of the Tax Appeal Commissioner, and the judgments in the High Court, Court of Appeal, and Supreme Court, the resolution of the issue did not require any *continuity of employment* or period of *service threshold* to be met. As noted above, in Ireland employee status is defined differently in different statutes; the legislation that uses the wider definition relates, for example, to guaranteeing payment of wages and the rationale appears to be that casual workers, who do not fall within the traditional ‘employee’ category should not be denied these basic protections, ‘the primary purpose of which do not depend on the employment relationship being regular and long-term.’⁴⁶ So, it is arguable that there is clear *statutory intent to exclude* forms of casual work from the scope of certain employment protections statutes, most of which, however, presuppose a model of employment which is stable, full-time and characterised by contracts of indefinite duration. Conlon (in a prescient piece from 2014 on mutuality of obligations) notes that the combination of statutory ‘continuous employment’ qualification periods being introduced and the rise in intermittent work patterns led to advocates acting for employers questioning whether workers who worked intermittently were employees for the purpose of employment rights legislation and whether they satisfied the statutory continuity thresholds; ‘in fact, these *two separate questions were sometimes conflated* to ask whether the employee was employed on a long-term/continuing basis’ (emphasis added).⁴⁷

There may be at least two ways to approach this issue. One, suggested by Conlon himself, relates to provisions in the statutes themselves on how ‘continuity’ may be satisfied. Under the *Redundancy Payments Act 1967*, for example, there is a threshold of 104 weeks continuous service. However, continuity is not broken (under Schedule 3 of the Act) where an employee’s period of service is interrupted by ‘any cause (other than the voluntary

⁴⁵Zoe Adams, ‘Labour Law and the Labour Market: Employment Status Reconsidered’ (2019) 135 *LQR* 611, 631.

⁴⁶Brenda Daly and Michael Doherty, *Principles of Irish Employment Law* (Dublin: Clarus Press, 2010), 43.

⁴⁷Michael Conlon, ‘Mutuality of Obligation’ Before the Irish Courts (2014) 11(2) *Irish Employment Law Journal* 44, 47.

leaving of the employment concerned by the employee) ... authorised by the employer'. As Conlon notes 'if the end of the shift is treated as a dismissal within the statute, it must be arguable that there is merely an interruption for a reason "other than the voluntary leaving of the employment by the employee... but authorised by the employer"', and therefore, continuity is not broken.⁴⁸ This, though, would have to be assessed in the context of the statutory intent issue noted above. A second approach relates to the prohibition in employment rights statutes on 'contracting out', where the written terms of an agreement purport to classify the legal relationship in order to avoid statutory liability.⁴⁹ Here, however, it seems unlikely that the courts would void a clause, even if its possible object was to exclude statutory protection, if its operation were not contradicted by the facts on the ground.⁵⁰

6. CONCLUSION (SOMETAKE-AWAYS ...)

The Irish Supreme Court has reserved its position on some key questions relating to the determination of employment status. It is to be hoped, not only that the Court will follow its UK counterpart in moving away from an overly narrow, and formalistic contractual approach to the issue, but also (and admittedly from a rather pollyannaish perspective) towards a consideration of why, or in what conditions, it might be appropriate to impose conditions on, or re-structure, a written agreement between the parties that *imposes* casual working arrangements, where no real alternatives are open to the weaker party.⁵¹

The analysis presented here suggests that movement by the Courts might require the Irish legislator to address the coherence of the statutory concept of 'employee' in the context of litigation across the globe on employment status, and EU legislative proposals on platform work. However, there is an

⁴⁸Ibid. 50. See also *Cornwall County Council v. Prater* (n.15). Under s 2 (4) of the *Unfair Dismissals Acts 1977–2015*, the continuous service of an employee in his employment shall not be broken by the dismissal of the employee by his employer followed by the 'immediate re-employment' of the employee.

⁴⁹Section 2 (5) of the *Unfair Dismissals Acts 1977–2015* provides that the dismissal of an employee followed by his re-employment by the same employer not later than 26 weeks after the dismissal shall not operate to break the continuity of service of the employee with the employer if the dismissal was wholly or partly for or was connected with the purpose of the avoidance of liability under this Act.

⁵⁰Bogg and Ford (n.44); *Deliveroo* (n.42).

⁵¹Adams (n.45).

additional consideration for the legislator (indeed the public interest) here, which concerns the interaction between employment rights and taxation. The Supreme Court concluded that the drivers were employees for tax purposes, emphasising that the situation might be otherwise in the context of employment rights legislation. The Court, however, also noted that in 2008 a Social Welfare Deciding Officer had decided, in a case involving the *same employer*, that similarly positioned drivers were *not* employees. The Tax Appeal Commissioner determined that she was not bound by this decision as the Social Welfare Appeals Office and the Tax Appeals Commission are different adjudication bodies, subject to different statutory schemes. Both bodies are even more distinct from the employment tribunals in Ireland (the Workplace Relations Commission, and, on appeal, the Labour Court), which have different aims and purposes, approaches, histories, institutional competences, routes of appeal and are staffed by personnel with different backgrounds. All of these bodies, however, have a jurisdiction in determining employee status (and are the primary finders of facts). The higher courts, dealing with point-of-law appeals, frequently refer to tax/social insurance and employment rights jurisprudence interchangeably. It may be that there are good reasons for treating different areas of law separately,⁵² but as Dhorajiwala points out:

the central question is whether the nature of [the] relationship vis-à-vis another entity is one of employment. That the consequences which flow upon identifying that relationship in an employment context (as opposed to a tax context) are different does not change the underlying purpose of both regimes, which is to identify a specific kind of relationship (viz. employment) between a worker and a counterparty.⁵³

As noted by Adams et al, fragmenting the status of workers across different areas of law can produce real hardship;⁵⁴ the example given by the authors is where casual workers, treated as employees for tax purposes and who have their income tax deducted at source, fail to qualify as employees for labour law purposes. This is precisely the situation that could face some of the

⁵²Adams et al (n.19), 111.

⁵³Hitesh Dhorajiwala, 'PAYER Beware: Analysing the Treatment of Employment Status in Atholl House and Kickabout' (2023) 52(3) *ILJ* 751, 768. In Ireland, see Department of Finance (2018). *The Use of Intermediary-type Structures and Self-employment Arrangements: Implications for Social Insurance and Tax Revenues*, <http://www.dsfa.ie/en/downloads/ReportIntermediaryStructuresSelfEmploymentJanuary2018.pdf>.

⁵⁴Adams et al (n.19).

Domino's delivery drivers following the decision in *Karshan*. Furthermore, while there is a natural inclination amongst academic labour lawyers to focus on vulnerable workers, the same issue applies here in relation to more economically powerful workers, who utilise the vehicle of personal service companies.⁵⁵

Whether it be vulnerable casual workers or higher-earners seeking to minimise tax liabilities, there is a clear issue for the State, legislators and courts if diverging approaches to determining employee status in different legislative contexts provide powerful incentives for parties (notably those with bargaining power) to structure working arrangements in a way that reflect not reality but economic self-interest, at a significant cost to the taxpayer and the rights of those most in need of employment protection.

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<https://doi.org/10.1093/indlaw/dwae018>

⁵⁵Dhorajiwala (n.53) discussing the case of *HMRC v. Atholl House* [2022] EWCA Civ. 501, which was referenced a number of times by the Irish Supreme Court in *Karshan*.