AN CHÚIRT UACHTARACH
THE SUPREME COURT

Supreme Court Appeal Number: S:AP:IE:2022:000109
[2023] IESC 24

O'Donnell CJ
Dunne J
Baker J
Woulfe J
Hogan J
Murray J
Collins J

BETWEEN

THE REVENUE COMMISSIONERS

APPELLANT

– AND –

KARSHAN (MIDLANDS) LTD T/A DOMINO'S PIZZA

RESPONDENT

Judgment of Mr. Justice Brian Murray delivered on the 20th of October 2023

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I ISSUES AND FACTS

This appeal

1. The distinction between those working relationships governed by contracts of employment and those in which the worker[2] is providing their services as an independent contractor is central to much of the labour legislation enacted since the middle of the twentieth century. It is also relevant to the scope of some social insurance and social security provisions, as well as to the tax treatment of the worker's earnings. Because legislation rarely identifies how one of these contractual formations is to be distinguished from the other, the courts have developed a series of *'tests'* to that end. Reflecting changes in economic and social conditions, the evolving nature of working arrangements, and the increasingly complex legal regimes in which they operate, these tests have developed from a base that was directed to the extent to which the employer *controlled* the operations of the worker, to a focus upon whether the worker was providing their labour by way of their own *enterprise*, to an examination of the degree to which the worker and their labour were *integrated* into the employer's business, culminating in various different formulations that sought, in one way or another, to combine some or all of the foregoing.

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[2] Throughout this judgment I will refer generically to the *'employer'* as one who pays for the labour of another, and the *'worker'* as the person performing the services in question, irrespective of whether the contract is one *'of'* or *'for'* service(s).

2. Central to the resolution of this appeal is the question of how these various approaches to the identification of an employment relationship should apply to those engaged in non-continuous, occasional, or intermittent work involving no ongoing obligation on the part of the employer to provide work, or on the worker to accept it when offered. This has become an increasingly prevalent form of labour. However, a consideration of many of the legal authorities considered in the course of this judgment demonstrates that it is far from being a new one.

3. That notwithstanding, from the early nineteen eighties courts in the United Kingdom have, in a sequence of cases involving so-called casual workers, posited as a prerequisite to the relationship of employer and employee a requirement that the employer and worker owe each other certain *'mutual obligations*.' Of course, every contract involves *'mutual obligations'*, but it has been suggested that some of these cases have interpreted this requirement as imposing as a *sine qua non* of the employment relationship an *ongoing* obligation of some kind on the employer to provide, and on the worker to perform, work. By definition, many arrangements pursuant to which such workers are called upon to work as and when the employer decides, and/or according to which (at least in theory) the worker can agree or not agree to do that work as they see fit, do not involve the exchange of mutual obligations for future performance envisaged by this interpretation of these cases.

4. Decisions of various tribunals and of the High Court in this jurisdiction have adopted such a test. While all of the parties to this case appear to have, for this

reason, accepted *a version* of a requirement of mutual obligations of this kind, they differed as to what precisely its constituents were, and as to whether what they respectively contended the requirement entailed was established on the facts of this case. Thus arises the question of whether this requirement properly forms part of Irish law and, if so, how it should be interpreted and applied.

5. The issue presents itself here in the context of drivers who provide delivery services for the respondent's pizza business. The respondent (*'Karshan'*) contends that these drivers were engaged as independent contractors under contracts for services, while the appellant (*'Revenue'*) argues that they were employees retained under contracts of service. The resolution of that dispute determines which of two legal regimes governs the taxation of the drivers' income. The Tax Appeals Commission (*'TAC'*) decided that the drivers were employees of Karshan, and the High Court (before which the matter came on an appeal by case stated from the TAC), determined that the Commissioner was entitled to so conclude (O'Connor J., [2019] IEHC 894). A majority of the Court of Appeal (Costello and Haughton JJ.) allowed an appeal against that finding, deciding that the Commissioner erred in determining that the drivers were employees of Karshan. One judge of that court (Whelan J.) dissented ([2022] IECA 124).

6. This court granted leave to appeal that decision ([2022] IESCDET 121), identifying the following issues:

(a) The proper construction of contracts where individuals work pursuant to an umbrella contract but where the work done is paid for on the basis of what are apparently individual tasks paid at a particular and set rate.

(b) The proper criteria whereby, under the Taxes Consolidation Act 1997, a worker should submit a tax return pursuant to Schedule D, as a self-employed person, or pursuant to Schedule E as a person engaged in an employment contract.

(c) The proper order of the court in light of the legal analysis.

The legislation

7. Cases involving the differentiation of contracts *of* service (employment) from contracts *for* services (no employment) have presented in a wide range of different legal contexts. While some of those questions (whether the employer is vicariously liable for the wrongs of the worker and whether the employer owed certain duties in contract or tort to the worker) have emerged from common law rules (many of which, as the law has developed, are no longer entirely dependent whether a worker is or is not an employee), much of the case law has arisen from specific statutory provisions. Many of the older cases were concerned with (or took account of) the provisions of legislation long since expunged from the statute-book – the Master and Servant Acts, Employers and

Workmen Acts, early twentieth century national insurance legislation, and the Workmen's Compensation Acts. As the twentieth century unfolded, the cases increasingly involved the application of modernised social security and tax legislation and different modes of statutory protection of employees' rights. Often (but not invariably) the same outcome has been obtained in the older cases irrespective of the underlying rule (for exceptions see the decisions in *Denham v. Midland Employers' Mutual Assurance Ltd.* [1955] 2 QB 437 and *Cross v. Redpath Dorman Long (Contracting) Ltd.* [1978] ICR 730, referred to by Whelan J. at para. 71 of her judgment in the Court of Appeal). In many of the cases the relevant statute imposed not merely the requirement of an employment contract before statutory protections were engaged, but also a period of continuous employment.

8. It is important that the statutory provisions in issue in this case involve no such requirement of continuity, nor is their application dependant on employment for a specific period of time. Instead, here, the question of whether a worker is or is not an employee or not arises because – generally speaking – emoluments arising from contracts for services are chargeable to tax in accordance with Case I Schedule D of the Taxes Consolidation Act 1997, as amended (*'TCA'*) while those received on foot of contracts of service are taxable in accordance with s. 112 and Schedule E of that Act. Section 18 TCA provides for the charge to tax under Schedule D and includes *inter alia* a charge to tax under Case I in respect of any trade. Those who are self-employed are subject to self-assessment provisions in Part 41A TCA, including the obligation to make a return and to pay preliminary tax and to register as a self-employed person.

9. Section 19 TCA provides for a charge to tax under Schedule E in respect of *inter alia* any office, employment or pension. The effect of s. 112 TCA is that income tax under Schedule E shall be charged for each year of assessment on every person having or exercising an office or employment of profit as defined under that Schedule in respect of all *'salaries, fees, wages, perquisites or profits whatever therefrom'*. Section 983 provides that *'employee'* means a person *'in receipt of emoluments'* while *'employer'* is defined as *'any person paying emoluments'*. Section 112(2)(a) defines *'emoluments'* as meaning anything assessable to income tax under Schedule E (a definition reflected in s. 983 TCA). In the case of an employee, they are required on commencing employment to register with Revenue while the employer is under separate obligations to register as such, and to deduct income tax, Universal Service Charge (*'USC'*) and Pay Related Social Insurance (*'PRSI'*) on the payment of emoluments to employees. None of these provisions afford any guidance as to how the question of whether in any given case a worker is or is not an employee, should be resolved.

The overarching contract

10. While trading as *'Domino's Pizza'*, Karshan manufactures and delivers pizza and ancillary food items to customers who place orders by telephone, over the internet, or by attending their stores in-person. It engages drivers to deliver the food so ordered, all of whom enter into a written agreement with it. Those

agreements are open-ended and of indefinite duration. One such agreement is reproduced in full as an appendix to this judgment. I will refer to it throughout as *'the overarching contract'*.

11. In summary, that agreement recites that Karshan wishes to subcontract the delivery of pizzas and the promotion of its brand logo and that the driver is willing to provide those services to Karshan. Clause 2 provides that the drivers (who are described throughout as *'contractors'*) shall be retained by Karshan (described throughout as *'the company'*) as independent contractors within the meaning of and for all purposes of that expression. Clause 17 solicits confirmation from the drivers that they understand that all delivery work undertaken for Karshan *'is strictly as an independent contractor'* and requires 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'*.

12. Clause 3 provides that Karshan will make two payments to drivers. The first depends on the number of deliveries which were successfully undertaken by them, while the second is a fixed rate for what was described in the contract as *'brand promotion'* through the wearing of fully branded company supplied clothing and/or the application of company logos affixed temporarily to the contractor's vehicle.

13. Clause 4 states that a driver can rent a delivery vehicle from the company on certain terms. Clause 5 requires the contractor to insure the vehicle with a

reputable insurance company within the State for business use. It states that if a driver does not have the appropriate business insurance, the company *'is prepared to offer same (third party only) at a pre-determined rate.'* Clause 9 makes reference to a driver operating *'his/her own accounting system'*, states that the financial risks or rewards associated with providing the services outlined in the contract are strictly under the control of the driver, that Karshan bears no responsibility for same, and that it does not *'warrant a minimum number of deliveries.'*

14. Clause 11 addresses limitations on the right of the drivers to provide services to others: it states that the driver is entitled to engage in a similar contract delivery service for other companies at the same time as the contract is in force, but that this right does not extend to delivering similar type products into the same market area from a rival company at the same time where a conflict of interest would be possible.

15. Clause 12 concerns substitution of drivers. It assumed significance in the course of the argument in this appeal, and is to the effect that Karshan accepts the driver's right to engage a substitute delivery person should the driver *'be unavailable at short notice'*. A person so substituted must be capable of performing the driver's *'contractual obligations'* in all respects.

16. Clause 14 was also important to the respective analyses of the parties. It addresses scheduling and unavailability, stipulating that Karshan *'does not*

warrant or represent that it will utilise the Contractor's services at all'. It states that Karshan *'recognises the Contractor's right to make himself available on only certain days and certain times of his own choosing'.* It records the agreement of the driver *'to notify the company in advance of his unavailability to undertake a previously agreed delivery service.'*

17. Clause 15 provides that the agreement may be terminated without notice by Karshan but states that in that event, such of the provisions of the agreement as are expressed to operate or have effect thereafter, shall so operate, and have effect, and shall be without prejudice to any right of action already accrued to either party in respect of, any breach of the overarching contract by the other party.

18. The delivery drivers were required to sign two other documents. One was entitled *'Promotional Clothing Agreement'* and provided for a deposit to be paid in respect of a branded crew shirt, baseball cap, name tag and driver jacket. The other was entitled *'Social Welfare and Tax Considerations'*. It includes the following:

> *'This is to confirm that I am aware that any delivery work I undertake for Karshan (Midlands) Limited is strictly as an independent contractor. I understand that, as such, Karshan (Midlands) Limited has no responsibility or liability whatsoever for deducting and/or paying PRSI or tax on any monies I may receive from this or any of my other work-related activities.'*

The facts

19. Karshan's appeal to the TAC contested assessments raised by Revenue pursuant to section 990 of the TCA. The assessments were in respect of PAYE and PRSI and totalled €215,718.00 for the tax years 2010 and 2011. Its appeal was grounded entirely on its contention that its delivery drivers were independent contractors working under contracts for services.

20. In the course of their submissions to the Commissioner, one of the points made by Karshan focussed on what it contended to be a requirement of *'mutuality of obligation'*. This mutuality, it said, was a *sine qua non* of an employment contract. It said that this requirement was not met because (a) the 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 by Karshan upon them, and (b) because under the overarching contract Karshan was not required to provide work to the drivers or to any of them. In response, Revenue did not dispute that some version of *'mutuality of obligation'* was a requirement of an employment relationship, but it said that this condition was fulfilled because the drivers entered into specific contracts of employment at the point at which they agreed to be rostered for particular shifts, those contracts requiring them to attend as agreed, and entailing an obligation on Karshan to pay the drivers when they so attended. In this way, Revenue said, the legal requirements for a contract of employment were present: the drivers were operating under the

control of Karshan and in accordance with its directions, they were not carrying on business on their own account and were fully integrated into what was an important part of Karshan's business. Both parties appear to have agreed that while the driver was working, there was a contract in existence in which '*mutuality of obligation*' is present, but it seems also to have been accepted by Revenue before the Commissioner that this was not sufficient *'mutuality'* to give rise to a contract of employment. That *'mutuality'* had to extend in some way beyond the specific period during which the work was actually being done.

21. While I will look at the detail of her legal analysis later, in broad terms, the Commissioner (who heard evidence from nine witnesses, including a number of drivers) accepted Revenue's characterisation of the arrangements between the parties. Her description of how the contracts were operated was central to those findings. Thus, she found as a fact that it was the routine for Karshan's drivers to fill out an *'availability sheet'* indicating their availability for work. These were completed approximately one week prior to a roster being drawn up. The roster was formulated by a store manager based on those availability sheets. The Commissioner found that the contractual arrangements between Karshan and the drivers comprised the overarching contract (*'an overarching umbrella contract'*) supplemented by multiple individual contracts in respect of the individual assignments of work effected when the drivers were thus rostered.

22. The umbrella contract, she found, cast obligations on a driver across the continuum of their multiple assignments of work by *'mak*[ing] *himself available on only certain days and certain times of his own choosing'*. Once Karshan

rostered a driver for work (each roster comprising one or more shifts), the Commissioner said, there was a contract in place, in respect of which the parties undertook mutual obligations. As soon as a driver arrived for work, she found they were obliged to clock in, to arrange their cash float, to be uniformed, to have their vehicle insured, to deliver pizzas, and at the conclusion of their work, to clock out. She found that the drivers clocked-in and clocked-out on the computerised system in use in Karshan's business using their driver numbers. On commencement of a shift, drivers would be provided with a cash float by Karshan, which the driver would return at the end of their shift. The drivers were required to be generally presentable in their appearance and were subject to checks in this regard by managers. During their shift, Karshan limited the number of pizzas that drivers could deliver to two per time. Managers would intervene to preclude a driver taking two deliveries if other drivers were waiting to take a delivery. Moreover, she found, some drivers were, while waiting for a delivery, asked to perform work which was not stipulated in the contract (in particular the assembly of boxes in store).

23. For this, she noted, the drivers were paid a brand promotion/advertising rate of €5.65 per hour. Where pizzas were delivered by them an additional sum was payable to the drivers of €1.20 per drop with an additional 20c payable for insurance. This was stipulated by Karshan and was not negotiable. According to Karshan, the *'drop rate'* was paid at the end of each shift, while the fee due for brand promotional activity was paid weekly on foot of invoices. While the contract envisaged that invoices would be prepared and submitted to Karshan by the drivers, the Commissioner found that not all drivers prepared invoices

for submission to Karshan as required by the contract. The evidence from several drivers was to the effect that Karshan prepared invoices, which the drivers signed.

24. The Commissioner noted that drivers were required to provide their own vehicles for deliveries. They were required to use their own phones in contacting customers, when necessary. They had to provide certification of business use insurance and, where they did not have such insurance, Karshan would provide insurance on Karshan's policy for a charge. Karshan also required the drivers to ensure that their NCT certificates were up to date. The Commissioner said that although the contract provided that company vehicles could be rented by drivers for the purposes of carrying out their duties in fact, she found, there were no company vehicles available for rent.

25. In the course of her Determination, the Commissioner expressed the view that *'certain matters did not take place in accordance with the terms of the written contract'*. This was a reference to three features of the evidence which I have just noticed – the fact that some drivers were required to make up pizza delivery boxes while waiting to be allocated deliveries, the fact that some had invoices prepared for them by Karshan, and the fact that vehicles were not available for rent by the drivers.

II THE CASE LAW

The legal context

26. Although *'mutuality of obligation'* presented the legal issue which dominated the arguments of the parties before this court, it is necessary to place the concept in context. In that regard, the decisions of the Commissioner and of the four judges in the courts below all engaged extensively with the various legal tests developed for the purpose of distinguishing a contract of service from one for services, and each contains comprehensive examination of a wide range of authority addressing the relevant criteria. Given that I have concluded that not only the majority of the Court of Appeal, but also the Commissioner, fell into error in their understanding of the effect – in particular – of some case law from the United Kingdom, it will be helpful to what follows if the relevant decisions are described in some detail before turning to the Commissioner's legal analysis and that of the judges in the High Court and the Court of Appeal.

27. The *'control'* test that was applied from at least the middle of the nineteenth century to distinguish those providing their labour on foot of contracts *of* service, from those doing so pursuant to contracts *for* services had a crude but seemingly effective simplicity: *'a servant is a person subject to the command of his master as to the manner in which he shall do his work'* (*Yewens v. Noakes* (1880) 6 QBD 530 at p. 532 per Bramwell LJ). The test did not impose any requirement that the relationship between employer and worker involve ongoing

obligations of the kind contended for in this case. This is evident from its application to a range of claims under workmen's compensation legislation so as to cover day to day work by those providing their own equipment (*Moroney v. Sheehan* (1903) 37 ILTR 166), labourers whose services were retained for the purposes of a particular job of work and who were free to work for others (*O'Donnell v. Clare County Council* (1913) 47 ILTR 41) and those who were paid by reference to loads transported rather than by fixed salary (*Clarke v. The Bailieborough Co-operative Agricultural and Dairy Society Ltd.* (1913) 47 ILTR 113). What was central to all of these cases was neither the duration nor continuity of the contractual relationships between worker and employer, but the degree of control exercised by the latter: *'the power of control retained by the employer was the point on which would mainly turn the question whether the person employed was a servant or an independent contractor'* (*Ryan v. Tipperary County Council* (1912) 46 ILTR 69 per Barry LC).[3] As originally conceived, the concept of *'control'* envisaged by these cases was one based squarely on a high degree of subordination; the essential question, Ronan LJ said in *Hughes v. Quinn* [1917] 2 IR 442 at p. 444 was whether the workman was employed on terms that he should within the scope of his employment obey his master's orders, or whether he was employed to exercise his skill and

[3] Similar stress on the extent of the power of control can be seen in *Bray v. Kirkpatrick* (1919) 53 ILTR 81; the judgment of Moloney LJ in *Hughes v. Quinn* [1919] 2 IR at 445 ('*the vital element of control'*); and *Ryan v. Limerick RDC* (1920) 54 ILTR 85.

achieve an indicated result in such manner as, in his judgment, was most likely to ensure success.[4]

28. Thus, in *Scanlon v. Hartlepool Seatonia Steamship Company (No. 2)* [1929] IR 99, a dock labourer hired as part of a gang of fifty-six men for the single job of unloading a vessel was found to be within the provisions of the Workmen's Compensation Act 1906 – the *'vital element of control'* was established by the fact that the ship's broker was on and off the vessel to see how the work was proceeding, the evidence that if work were not being done by the men he would complain to their foreman, and that he directed the cleaning up of the hold.[5] When the judgment of Johnson J. in that case was applied to similar facts by the House of Lords in *Short v. J&W Henderson Ltd.* [1946] SC HL 24, Lord Thankerton explained (at p. 34):

> *'the principal requirement of a contract of service is the right of the master in some reasonable sense to control the method of doing the work, and … this factor of superintendence and control has frequently been treated as critical and decisive of the legal quality of the relationship.'*

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[4] Quoting Buckley LJ in *Simmons v. Heath Laundry Company* [1910] 1 KB 543.

[5] The cases involving dock labour, of course, demonstrate not merely the importance of control, but also shown the categorisation of persons who were engaged without any right to be offered work or any obligation to do it when offered, as parties to contracts of service, see *McCready v. Dunlop* 2 F.1027, *Gorman v. Gibson & Co.* [1910] Sess. Cas. 317 and *Bobby v. Crosbie* 114 LTR 244. The approach reflected in these cases remains good law today, see *Stevedoring & Haulage Services Ltd. v. Fuller* [2001] EWCA Civ. 651, [2001] IRLR 627.

29. It has been observed that in the context in which that test of *'control'* originated, the term *'servant'* did not simply denote a wage dependant worker but was used to draw a distinction within that category between mainly manual workers and higher status employees. In this way, it is said, the concept of *'control'* was used to exclude from the scope of regulation those higher-status employees for whom the courts considered protective legislation to be inappropriate (see Deakin and Morris' *Labour Law* 7th Ed. 2021 at para. 2.13). By the mid-twentieth century, inevitably, that exclusion and the hierarchical theory that underpinned it had become outdated. In particular, the direction of the test had to change to accommodate within the concept of *'employment'* skilled workers, professionals, and managers over whose day-to-day work those retaining them had neither operational control, nor the skills to direct the worker in the execution of those tasks.

30. While the cases are not always easily reconcilable, three broad approaches can be discerned as the courts sought to accommodate these realities. First, some of the decisions responded by relaxing the level of superintendence required by the control test so that, at least in the case of skilled workers, the focus shifted from whether the employer controlled the way in which the work was done, to a more remote (and in some formulations, theoretical) power of direction and authority. Indeed, some of these cases went so far as to suggest that at least in the case of skilled workers, the question of whether the employer controlled the manner in which the work was done was close to irrelevant (*Whittaker v. Minister of Pensions and National Insurance* [1967] 1 QB 156 at p. 167 (per Mocatta J.)).

The end point of that approach was summarised by Ungoed-Thomas J. in *Beloff v. Pressdram Ltd.* [1973] 1 All ER 241 at p. 251 who observed that in cases involving higher skilled work, control seemed *'of no substantial significance.'*

31. Second, it was realised that in some situations it was necessary to (at the very least) supplement the *'control'* test with a consideration of which of the parties to a working relationship bore the economic risk of the commercial enterprise in question. The decision in *Graham v. Minister for Industry and Commerce* [1933] IR 156 (*'Graham'*) is an early example. There, the issue was whether LM, a builder and contractor hired by the applicant to undertake repair and reconstruction work on tenement properties owned by the latter was *'an employed person'* under a *'contract of service'*, for the purposes of the Unemployment Insurance Act 1920. A majority of the Supreme Court (Fitzgibbon and Murnaghan JJ.) found that he was not: although paid a fixed sum per week, LM hired his own staff, he held himself out as an independent contractor and he purchased materials in his own name as and when they were required for the work. Murnaghan J. felt that *'when a person engages a skilled artisan or tradesperson, the presumption is that the person engaged is his own master over the work to be done and is not under the control of the other so as to be his servant.'*

32. Kennedy CJ dissented: he felt on the facts that LM was in truth a working foreman bound to give his working day to the applicant's service, being liable to dismissal at any time in the same way as any other weekly wage earner. His judgment is of significance in admitting a broad range of factors to be taken into

account in the process of identifying an employment relationship. The following passage expresses well the limitations of the control test, and focused on the characterisation of the enterprise and the location of the risk (at p. 159-160):

> *'A commonly accepted test is that of control .... This, the most usual test is, it appears to me, far from sufficient as a single test. In my opinion there are other and equally important tests, e.g., is the "engaged person" engaged to execute the whole of a given piece of work? Can the engagement be terminated before completion of the piece of work without cause assigned, or for misconduct, or only for malperformance of the work? Is the agreed remuneration on a wage basis or on a percentage or other commercial profit basis? Are the necessary materials to be procured by the engaged person on his own account and, if necessary, his own credit? Are such other workmen (if any) as have been taken into employment upon the work by the engaged person so employed by him as agent for the principal, or are they his own employees paid by and subject to him? Is the engaged person required to give all the time of his working day to the work until completed, or is he free to arrange his own time as he pleases? Is he a member of a trade union and are trade union rules and conditions applicable to the work?'*

33. This was mirrored in developments in other jurisdictions. In *Montreal v. Montreal Locomotive Works Ltd.* [1947] 1 DLR 161 (*'Montreal Locomotives'*) the Privy Council came to comment upon the test applied to distinguish

employees from independent contractors in the context of a dispute around the application of municipal taxes to certain contracts between the respondents and the Canadian government. That depended on whether the respondent was conducting business on its own account or on that of the government. Lord Wright identified *'more complicated tests'* for the identification of an employment relationship as resulting from *'the more complex conditions of modern industry',* focussing, in addition to *'control'*, on ownership of the tools, chance of profit and risk of loss. He observed:

> *'it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself, or on his own behalf and not merely for a superior.'*

34. In *United States v. Silk* (1947) 331 US 704 (*'Silk'*) a test of *'economic reality'* was similarly applied to determine whether unloaders and truck drivers at a railway undertaking were *'employees'* for the purposes of the Social Security Act 1935. All came to work as they wished, the unloaders providing their own tools and being paid by reference to the volume of coal they unloaded, the drivers using their own vehicles to deliver it. In deciding that the unloaders were employees, but that the truck drivers were not, the opportunity to make a profit or incur a loss were decisive. The unloaders *'had no opportunity to gain or lose except from the work of their hands and ... simple tools ... they did work*

in the course of the employer's trade or business', while the drivers were *'small businessmen'* with their own trucks and helpers. As Reed J. observed:

> *'There are cases, too, where driver owners of trucks or wagons have been held employees in accidental suits at tort or under workmen's compensation laws. But we agree with the decision below in Silk and Greyvan that, where the arrangements leave the driver owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance, they haul for a single business, in the other, for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver owners as independent contractors.'*

35. Third, at around the same time as the control test was thus adjusted, and the economic reality of the relationship between employer and worker the subject of greater analysis, some courts sought to reframe the inquiry slightly differently, looking at the degree of integration of the worker into the employer's undertaking. This proposition was first formulated by Lord Denning in *Stevenson, Jordan and Harrison v. MacDonald and Evans* [1952] 1 TLR 101. This *'integration'* test sought to identify a recurring feature of the

contract of service by reference to a distinction between those *'within'* and those *'without'* the employer's general undertaking:

> *'There are many contracts of service where the master cannot control the manner in which the work is to be done .... It is often quite easy to recognise a contract of service when you see it but very difficult to say wherein the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi man and a newspaper contributor are employed under a contract for services. One feature which seems to me to run through the instances is that, under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business; whereas under a contract for services his work, although done for the business, is not integrated into it but is only accessory to it'.*

36. In *Bank voor Handel en Scheepvaart v. v Slatford and Another* [1953] 1 QB 248 at p. 295, Lord Denning framed the same test thus: *'it depends on whether the person is part and parcel of the organisation'*. These statements (which, as with many in this arena, are somewhat question begging) have been approved and applied by the courts here (see in particular the decision of the High Court in *In re Sunday Tribune* [1984] IR 505).

Readymix and Market Investigations

37. An attempt was made in two decisions of the English High Court in the late 1960s to gather these various formulations into a composite test. Both have proved particularly influential both in the United Kingdom and in this jurisdiction. The first, *Ready Mixed Concrete (South East) Ltd. v. Minister for Pensions and National Insurance* [1968] 2 QB 497 (*'RMC'*) concerned an individual who used his own vehicle to make deliveries of concrete on behalf of the company. MacKenna J.'s formulation of the definition of a contract of service was as follows (at p. 515):

> *'A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.'*

38. *'Control'* for these purposes was defined broadly. What matters is lawful authority to command *'so far as there is scope for it'* (*Zuijs v. Wirth Brothers Proprietary Ltd.* (1955) 93 CLR 561 at p. 571). MacKenna J. continued (at p. 515):

> *'Control includes **the power** of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All of these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant.'*
>
> (Emphasis added)

39. However, within that he also acknowledged that *'the common law test is not to be restricted to the power of control "over the manner of performing service," but is wide enough to take account of investment and risk'* (at p. 522). Control, he said, *'is not everything'* (at p. 524). Moreover, MacKenna J. observed that *'[f]reedom to do a job either by one's own hands or by another's is inconsistent with the contract of service, though a limited or occasional power of delegation may not be.'*

40. And in that context, he found, the contract in issue before the court was one *'of carriage'*, not a contract of service. The reason was as follows, and it focussed very much upon the extent to which the driver was required to bear the cost of the enterprise (at p. 525-526):

> *'Latimer must make the vehicle available throughout the contract period. He must maintain it (and also the mixing unit) in working order, repairing and replacing worn parts when necessary. He must hire a competent driver to take his place if he should be for any reason unable*

> *to drive at any time when the company requires the services of the vehicle. He must do whatever is needed to make the vehicle (with a driver) available throughout the contract period. He must do all this, at his own expense, being paid a rate per mile for the quantity which he delivers. These are obligations more consistent, I think, with a contract of carriage than with one of service. The ownership of the assets, the chance of profit and the risk of loss in the business of carriage are his and not the company's.'*

41. Apart from its concision, the significance of the test suggested by the definition proposed in *RMC* was three-fold. First, it confirmed that *'control'* was, notwithstanding the then more recent suggestions to the contrary, not only in *all* cases *relevant*, but that it was in *all* cases a *mandatory* requirement of an employment relationship. Second, it made clear that, notwithstanding the formulation in the older cases, it was not necessary that this element of *'control'* extend to the actual operational direction by the employer of how the work was to be done. And third, it envisaged that within the inquiry as to whether a worker was an employee lay a wide range of other considerations – many of which could be squeezed into the more expansive concept of control posited by MacKenna J. – including economic risk and the overall relationship between, and place of, the worker in the employer's enterprise.

42. The second important decision delivered around this time – that of Cooke J. in *Market Investigations v. Minister of Social Security* [1969] 2 QB 173 (*'Market Investigations'*) – confirmed the importance of each of these considerations.

There, the issue was whether a part time interviewer retained by a market research company was an employed person for the purposes of the National Insurance Acts 1946 and 1965. The interviewers were assigned to conduct particular assignments from a panel, there being no obligation on them to accept offers of work (but if frequently refusing those offers, they were liable not to be offered further assignments). They were free to work for other firms, and each interviewing assignment was a distinct and separate arrangement. Interviewers could not send a substitute without prior permission from the company.

43. Cooke J. – referring to *inter alia Montreal Locomotives, Silk* and *RMC* – observed the shift in the authorities away from the thesis that *'control'* was a decisive factor in distinguishing between contracts of service and contracts for services, concluding that these cases suggested (at p. 184-185):

> *'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.....**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'.

(Emphasis added).

44. I have observed that Cooke J. referred to the decision in *RMC.* His consideration of whether the interviewer was an employee closely mirrored the methodology suggested by MacKenna J. in that case (at p. 185):

'I … proceed to ask myself two questions: First, whether the extent and degree of the control exercised by the company would, if no other factors were taken into account, be consistent with her being employed under a contract of service. Second, whether when the contract is looked at as a whole, its nature and provisions are consistent or inconsistent with its being a contract of service, bearing in mind the general test I have adumbrated.'

45. On the facts of that case, Cooke J. concluded that the requisite degree of control existed as between the interviewers and the market research company. As to the second question that arose – that is whether when the contract was looked at as a whole its nature and provisions were consistent or inconsistent with its being a contract of service – Cooke J. rejected a variety of contentions advanced by the company. These included the company's claim that the fact that the interviewers were appointed to do a specific task at a fixed fee suggested that

they were in business on their own account, that the fact that the company had a right of dismissal also implied this, and that the fact that the contract made no provision for time off sick pay or holidays, all indicated that the contract was a contract for services.

46. These aspects of Cooke J's decision, it should be said, were in no sense intended to operate independently of what had been said in *RMC*: it is clear from the judgment that Cooke J. was applying the *RMC* test, focussing his analysis in the light of the facts of that case upon the relevance of the issue of *'business on her own account'* in the context of the third limb of the test (and see in this particular regard the close examination of the judgment conducted by David Richards LJ in *HMRC v. Atholl House* [2022] EWCA Civ. 501, [2022] STC 837 (*'Atholl House'*) at para. 82).

47. Most importantly for present purposes, it was contended by the company that the relationship of employer and employee was normally conceived of as a continuous relationship and that the fact that there was a series of contracts was more consistent with those contracts being contracts for services rather than contracts of service. Notwithstanding this feature of the arrangements between the interviewer and the market research company, the court concluded that the interviewer was employed by the company under a series of contracts of service. Cooke J. doubted if the presence or absence of a continuous relationship could be usefully considered *'in isolation'*. He continued (at p. 187-188):

'It must I think be considered in connection with the more general question whether Mrs. Irving could be said to be in business on her own account as an interviewer. In considering this more general question I take into account the fact that Mrs. Irving was free to work as an interviewer for others, though I think it is right to say that in this case there is no finding that she did so. I also take into account the fact that in her work as an interviewer Mrs. Irving would, within the limits imposed by her instructions, deploy a skill and personality which would be entirely her own. I can only say that in the circumstances of this case these factors are not in my view sufficient to lead to the conclusion that Mrs. Irving was in business on her own account. The opportunity to deploy individual skill and personality is frequently present in what is undoubtedly a contract of service. I have already said that the right to work for others is not inconsistent with the existence of a contract of service. Mrs. Irving did not provide her own tools or risk her own capital, nor did her opportunity of profit depend in any significant degree on the way she managed her work.'

48. The decision in *Market Investigations* was applied by Barron J. in *McDermott v. Lo*y (Unreported High Court 29 July 1982) who considered that it did not change the test. In his view, when the question is asked as to who decides what the work is to be and where it is to be done, the purpose is to determine whether the employee was working for someone else or for himself (that was, in his view, the basis on which *Graham* was decided). That, as I have noted, was the

point made by MacKenna J. in *RMC.* Blayney J. in *Ó Coindealbhain (Inspector of Taxes) v. Mooney* [1990] 1 IR 422 at p. 429-430, on the other hand, applied the decision in conjunction with that in *RMC* to suggest a two-fold inquiry – was there control, and was the worker in business on his own account? *RMC* was followed and applied in *Lynch, Inspector of Taxes v. Neville Brothers Ltd.* Unreported High Court 7th December 2004 (Carroll J.), and by Gilligan J. in *Bridgewater Selection (Ireland) Ltd v. Minister for Social and Family Affairs* [2011] IEHC 510.

'Mutuality of obligation': some general observations

49. Much of the difficulty in this appeal arose from various different meanings applied by the case law, commentators, the parties, the Commissioner, the High Court and the Court of Appeal judges to the term *'mutuality of obligation'.* At first glance, one might think that this simply described the consideration underpinning the agreement in question. However, the phrase has acquired a particular meaning in employment law, signifying not simply an agreement involving consideration moving from each party to the contract, but instead demanding particular features before the agreement could be characterised as giving rise to the relationship of employer and employee. The concept has been related in some of the cases back to *RMC,*[6] where the relationship was described

[6] Karshan sought to relate the concept to the decision in *RMC* also noting in its submissions that in *Chadwick v. Pioneer Private Telephone Co. Ltd.* [1941] 1 All ER 522, Stable J. referred (at p. 523)

simply: a contract of employment involved an agreement by the worker that, in consideration of a wage or other remuneration, he would provide his own work and skill in the performance of some service for his employer.

50. The *'mutuality of obligation'* contended for by Karshan went significantly beyond this. It was expressed in written submissions as follows:

> *'an ongoing reciprocal commitment extending into the future to provide and perform work on the part of the employer and employee respectively.'*

51. This formulation presents four notable features. First, on this thesis it is not sufficient for there to be an obligation on the worker to perform work and on the employer to pay for it. The employer has to be under a specific obligation to provide work, in order for a contract of employment to exist. Second, the obligations have to be *'ongoing'*. This was described in Karshan's submissions as requiring an element of *'stability'*. Third, and certainly as the argument before this court progressed, distinctly, the obligations had to extend into the future. By definition every executory contract involves obligations into the future, but what seems to have been envisaged was a gap that was more than merely momentary between the assumption of the obligation to work, and the obligation to provide (and then when done, pay for) that work. It was thus

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to a contract of service implying *'an obligation to serve and it comprises some degree of control by the master'*. That statement similarly does little more than recite the consideration underlying the agreement.

Karshan's position that it was not sufficient for the driver and Karshan to enter into the agreement immediately before the work was undertaken: there had to be an obligation to provide work that predated that point. This gave rise to an obvious issue of definition. Fourth, if most obviously, the formulation involved an extension of what was said in *RMC*, which never expressly articulated any obligation on the part of the employer (ongoing or otherwise) to *provide* work.

52. Indeed, it is striking that although both *RMC* and *Market Investigations* involved workers who were under no legal obligation to accept work when offered to them, and employers who were under no contractual duty to offer such work, in neither of these decisions is any reference made to *'mutuality of obligation'* in the sense of an ongoing obligation of the kind contended for in this case. In *Market Investigations* in particular, I have noted that Cooke J. felt that the absence of a continuous obligation – whether to provide or perform work, or otherwise – could not be viewed in isolation, suggesting that while relevant it could not be dispositive, and that it fell to be considered as an aspect of the inquiry into whether the worker was carrying on their own business, or that of their employer. What Karshan argued was, in effect, that these mandatory features of the employment relationship arose from subsequent decisions of the English courts which were then adopted in Ireland and which, as thus applied here, impose a requirement of the kind thus formulated by Karshan. The manner in which this term entered the lexicon of employment law is therefore important.

'Mutuality of obligation': the early cases

53. Mr. Kerr SC for Revenue traced the idea that a contract of employment necessarily involved *'an exchange of mutual obligations for future performance'* (this being the phraseology of Freedland, *'The Contract of Employment'* (Oxford, Clarendon Press, 1976[7])) to a decision of the English Employment Appeal Tribunal ('*EAT*') in 1978, *Airfix Footwear Ltd. v. Cope* [1978] ICR 1210 (*'Airfix'*). That case involved a worker who assembled shoe parts from her home under contract with the appellant. She was paid according to the number of shoes she assembled, worked five days per week and had been doing so for seven years. The law report records as a fact that the company was under no obligation to give her work, but an Industrial Tribunal nonetheless decided that she was an employee within the meaning of English industrial relations legislation, and thus entitled to pursue a claim of unfair dismissal. The Employment Appeal Tribunal found that the Industrial Tribunal was entitled to reach that conclusion, Slynn J. rationalising the decision appealed against as one where the parties had, by their conduct, established a single and continuing contract of employment. Absent such a single contract, the worker would not

[7] It seems to be widely accepted in England that Freedland's formulation was influential in the emergence of *'mutuality of obligation'* as an indicia of an employment contract. 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).

have been able to maintain her claim as she required 26 weeks service so to do. Slynn J. did not, it is to be noted, at any point specifically state that this meant that in fact the employer was obliged to provide work or the worker to perform it when offered (nor, indeed, was the phrase *'mutuality of obligation'* used in his judgment). While the EAT thus decided that there was a single contract, Slynn J. addressed the relationship between obligations to offer and to do work in the context of separate jobs in terms that were both qualified, and tentative. He said (at p. 1214):

> *'We are of the view that, if the arrangements between a company and a person are such that work may be provided and may be done at the will of either side – in other words, that the company may provide or not, as it chooses and the other person may accept the work or not, as he pleases – it may well be that this is not properly to be categorised as a contract of employment. If in such a situation the company only delivers work sporadically from time to time, and from time to time the worker chooses to do it, so that there, e.g. is a pattern of an occasional work done a few times during a year, then it might well be that there comes into existence on each of those occasions a separate contract of service, or possibly a contract for services, but that the over-riding arrangement is not itself a contract of employment, either of service or for services. But these matters must depend on the facts of each particular case.'*

54. Two decisions of the English courts bedded down and, at least on one view, significantly developed the suggestion that the absence of an ongoing obligation

to do or to offer work militated against an employment relationship. The first in time was that of the Court of Appeal in *O'Kelly v. Trusthouse Forte Plc* [1983] ICR 728 (*'O'Kelly'*). There, three casual catering workers sought to bring unfair dismissal proceedings against the respondent. The workers were part of a group of *'regulars'* who were assured of some priority in the allocation of work. Under the relevant legislation, for most purposes a worker required 52 weeks continuous service before enjoying the right to mount an unfair dismissal case. There was an exception to this requirement where a dismissal was motivated by certain *'inadmissible reasons'*, including dismissal for taking part in certain trade union activities, and this was the ground on which the workers alleged they had been dismissed. The Industrial Tribunal found (a) that there was no single continuous contract of employment between the workers and Trusthouse Forte, and (b) that the workers provided their labour as independent contractors. The first of these conclusions took account – but was not based solely upon – the lack of mutuality of obligation and, specifically the Tribunal's finding that the workers had the right to decide whether or not to accept work, and that the company had no obligation to provide any work. The majority of the members of the Industrial Tribunal took the view that lack of mutuality of obligation was not in itself a decisive factor (they cited *Airfix* as authority for this proposition) but was nonetheless a matter on which they were entitled to place very considerable weight (see p. 106 D-E of the report). The Employment Appeal Tribunal agreed with that conclusion, but also decided that the workers were employed under a series of separate contracts of employment, these arising each time they turned up for a function.

55. A large part of the analysis in the English Court of Appeal[8] judgments is taken up with procedural issues around this latter finding (which had not been made by the Industrial Tribunal) and the jurisdiction of the Employment Appeal Tribunal to make it, the majority (Fox and Donaldson LJJ.) deciding that it was inconsistent with finding (b) of the Industrial Tribunal as outlined above. At no point is it said in any of the judgments that the Industrial Tribunal erred in its assessment of the *relevance* of the absence of an obligation to offer or to accept work, nor was it suggested that this was not merely a factor to be taken into account, but a *sine qua non* of an employment relationship. Ackner LJ clearly proceeded on the basis that notwithstanding the absence of these obligations, it was possible that there were individual contracts of employment arising from each assignment of work even though there was a finding that there was no obligation to offer or accept assignments. That is the only basis on which he could have decided to remit to the Tribunal the question of whether there were such individual contracts and, if so, whether the workers were discharged at the conclusion of the work involved and, thus, whether there had been a dismissal. Indeed, he noted (again without comment) the finding of the EAT that once a regular had turned up for the function, it was accepted that there was a contractual obligation to allow the work to be done (p. 117G). Clearly, that was viewed by him as sufficient '*mutuality'* to constitute the individual engagements as employment contracts. So, when he referenced the language of the industrial

[8] The shorthand I will use throughout to describe the Court of Appeal of England and Wales.

tribunal referring to the obligations to offer and to do work as *'the one important ingredient',* both the tribunal and Ackner LJ were underlining the significance of that mutuality in the identification of a single contract, but neither actually prescribed it as a *sine qua non* of any such agreement or series of agreements.

56. Fox LJ recorded without dissent the circumstances found by the Tribunal to be inconsistent with a contract of employment, viewing the various factors identified by it as a matter of degree (at p. 121 F-G) (although he did acknowledge that such obligations pointed to a contract of employment (*id.*)). Donaldson MR noted that the majority of the industrial tribunal had concluded that the absence of mutuality thus defined was a matter to which great importance should be attached, but never said that he viewed it as determinative (at p. 124 E-F). The significance of the case thus lies in both its acknowledgement that *'mutuality of obligations'* in the sense of an ongoing obligation to offer and perform work was relevant to the determination of whether there was a continuous contract of employment, and in the assumption made throughout both the argument of counsel (see p. 115 H) and the judgments that this was no more than a factor to be considered, rather than a *sine qua non* of *every* employment relationship. Indeed, it is a striking feature of the decision in *O'Kelly* is that had the law been as Karshan (relying in part on this decision) contends, the essential issue before the Court of Appeal could have been resolved very simply: the fact finder had decided that there was no ongoing obligation to provide or perform work and, had Karshan's case been well-founded, that would have been the end of the matter insofar as either a continuous contract, or individual contracts, were concerned.

57. *Nethermere (St. Neots) v. Gardiner* [1984] ICR 612 (*'Nethermere'*), was being heard in the lower tribunals at the same time as *O'Kelly* but was decided by the English Court of Appeal almost a year after it delivered judgment in the latter case. It was similar to *Airfix* in that it involved two homeworkers engaged by a clothing manufacturer. They sought to bring unfair dismissal proceedings following the termination of this arrangement, and the Industrial Tribunal determined by way of preliminary issue that the workers were not in business on their own account and were thus employees so that it had jurisdiction to hear the case. The EAT dismissed an appeal from that decision, holding that the Industrial Tribunal had applied the correct test in so determining.

58. While the company's appeal against that decision was dismissed for reasons explained by Stephenson and Dillon LJJ (Kerr LJ dissenting), all judges had difficulty with the EAT's analysis. The majority of the judges of the Court of Appeal concluded that in *Airfix*, Slynn J. had deduced an obligation to provide and to perform work from the course of dealing between the parties (see Stephenson LJ at p. 626; Dillon LJ at p. 634-635). Kerr LJ, on the other hand, doubted if such an agreement could be inferred (at p. 630). All members of the court also concluded that there was a requirement for what Stephenson LJ described as *'an irreducible minimum of obligation on each side to create a contract of service'* (at p. 623; Kerr LJ at p. 629; Dillon LJ at p. 634). Stephenson LJ was of the view that it had been decided in *O'Kelly* that *'if there was no contractual obligation, either on the company to offer work or on the applicants to do work, there was no contract of service'* (at p. 624 C-D) (it will

be noted that in the view of Stephenson LJ *either* an obligation to offer work or an obligation to do it would suffice). Dillon LJ indicated that he would accept that an arrangement under which there was never any obligation on the outworkers to do work or the company to provide work could not be a contract of service. The majority, however, concluded that the Industrial Tribunal had in fact followed *Airfix* in finding that there was an *'overall'* or *'umbrella'* contract obliging the company to continue to provide and pay for work and for the applicants to continue to accept and perform the work (at p. 624). It was not argued in *Nethermere* that the applicants were employed under a series of separate contracts (although Dillon LJ said that he found that suggestion *'wholly unrealistic'*). Thus, while the case is authority for the proposition that a finding of a continuous obligation to offer and/or perform work was required for there to be a single contract of employment extending over a period of time, it was never suggested that before separate agreements to do specific work could constitute employment contracts, they had to be unified by an ongoing obligation to offer and accept work.

59. That issue was addressed in *McMeechan v. Employment Secretary* [1997] ICR 549 (*'McMeechan'*). There, the question was whether the applicant was an employee of an employment agency for whom he had worked on a series of temporary contracts, thereby entitling him to apply to a statutory redundancy fund following the winding up of the agency. Waite LJ (with whose judgment Potter and McCowan LJJ agreed) drew a distinction between what he described as a *'general'* engagement under which sporadic tasks as performed by one party at the behest of another, and the specific engagement (the terms of which

may derive from those stipulated in the general engagement) which begins and ends with the performance of any one task. The Court of Appeal determined that the applicant was entitled to be treated as an employee of the contractor for the purposes of a single contract – a conclusion which counsel for Karshan submitted could not represent the law in this jurisdiction. Waite LJ said (at p. 563):

> *'In a case like the present where the money claimed is related to a single stint served for one individual client, it is logical to relate the claim to employment status to the particular job of work in respect of which payment is being sought. I note that the editors of Harvey on Industrial Relations and Employment Law appear to take a similar view, where they suggest …*
>
> > *"the better view is not whether the causal worker is obliged to turn up for, or do, the work but rather if he turns up for, and does the work, whether he does so under a contract of service or for services."'*

60. Later, he observed (at p. 565):

> *'[w]hen it comes to considering the terms of an individual, self-contained engagement, the fact that the parties are not obliged in future to offer, or to accept, another engagement with the same, or a different, client must be neither here nor there.'*

61. The question in *Carmichael and anor. v. National Power plc* [1999] AC 2042 (*'Carmichael'*) was whether a contract of employment was in place at points when the claimants were not actually working for the respondent. To an extent that turned on the construction of correspondence sent by the respondent to the claimants when offering them positions as tour guides of power stations owned by the respondent. That correspondence referred to the position as being *'on a casual and as required'* basis. Notwithstanding the fact that the correspondence referred to *'employment'*, when the claimants sought written particulars of their employment pursuant to legislation applicable only to employees, the Industrial Tribunal found that they did not enjoy that status because, owing to the absence of mutuality, the guides were in no contractual relationship of any kind with the respondent. While the English Court of Appeal reached a different conclusion based on its construction of the correspondence, Lord Irvine (with whom Lords Goff, Jauncey, Browne-Wilkinson and Hoffmann agreed), found that the documentation provided no more than a framework for *ad hoc* contracts of service or for services which the claimants might make with the respondent in the future. Referring to the decision in *Nethermere,* he found that as a matter of construction no obligation on the respondent to provide casual work, nor on the claimants to undertake it, was imposed. Therefore, he found, there was *'an absence of that irreducible minimum of mutual obligation necessary to create a contract of service'* (at p. 2047). Notably, the case was not made that the claimants were entitled to the particulars on the basis that when they actually worked as guides, they did so under successive *ad hoc* contracts of employment (at p. 2044).

Henry Denny and Castleisland Cattle Breeding Society

62. Were it the case that the law required as a precondition to a contract of employment or series of such contracts an ongoing obligation on the part of the employer to provide work or on the employee to do it when offered, one might have expected some consideration of the question of *'mutuality of obligation'* in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1996] 1 ILRM 418 (High Court), [1998] 1 IR 34 (Supreme Court) (*'Henry Denny'*). There, the issue was whether SM, who had been retained in 1988 as a demonstrator of the appellant's products at supermarket outlets was an insured person under s. 5(1)(a) of the Social Welfare (Consolidation) Act 1981. That, in turn, depended on whether she was employed under a contract of service. She was engaged by the appellant on foot of a written agreement, which was re-executed annually. That contract stated that she was an independent contractor, and that nothing in the agreement would be construed as creating the relationship of master and servant or principal and agent. It provided that she was responsible for her own tax affairs. She worked 28 hours a week for 48-50 weeks of the year and was paid £28.32 per day she worked, along with a mileage allowance. She received no holiday or sickness pay and was not a member of the appellant's pension scheme. She could not engage others to stand in for her, save in exceptional circumstances. Work was to be offered to her by the appellant (something it was not obliged under the contract to do) not less than 24 hours before the demonstration in question. She was free to refuse work, and

indeed to work for others (provided they were not direct competitors of the appellant) and was supplied by the appellant with a coat (with the company logo) and demonstration stand. The products used in her demonstrations were supplied by the supermarkets in question, and she was obliged under her contract to comply with directions and regulations in the supermarket given by the owner of that premises. While there was no continuous and direct supervision of those engaged in the demonstrations, a circular letter sent by the appellant to all persons rostered to do this work gave detailed instructions as to how they should go about it. Claims for payment by the demonstrator on foot of the contract were made on foot of what were described as *'invoices'*.

63. Importantly, the circular letter made it clear that in the event of a demonstrator finding on arrival at a store that the particular demonstration had been cancelled, he or she was entitled to ask if they could demonstrate another product. If there was no work available for them, the employer paid the demonstrator no more than the mileage rate. A Social Welfare Deciding Officer, an Appeals Officer and the Chief Appeals Officer all decided that SM was retained on foot of a contract of service.

64. The Appeals Officer found that the demonstrator was subject to control, direction and dismissal by the appellant. He found that the work undertaken by the demonstrator was an integral part of the business, and that the work carried out by the demonstrator was not inconsistent with the approach suggested in *RMC*, also applying the test formulated by Cooke J. in *Market Investigations*.

The arrangement so found by the Appeal Officer was of one of yearly renewable contracts of service.

65. The matter came before the High Court (Carroll J.) on foot of an appeal on a question of law. She decided ([1996] 1 ILRM 418) that the fact that the contract described the relationship as a contract for services was not dispositive: *'the entire contract must be looked at in order to decide if it is truly a contract for services'*. That being so, she said, the decision reached depended on the importance which the Appeals Officer attached to the particular facts. This was, she concluded, *'a balancing operation which is essentially a matter of degree and his conclusions should not be disturbed unless they are such that no reasonable person could draw them'*.

66. Before this court, the appellant contended that the Appeals Officer had failed to have regard to the terms of the written contract between the appellant and the demonstrator. Keane J. (with whose judgment Hamilton CJ and Murphy J. agreed) recorded the following submission as having been made by counsel for the appellant (at p. 46):

> *'He relied particularly on those clauses of the contract which made it clear that the appellant was not obliged to retain the demonstrator's services and that the demonstrator was not obliged in turn to provide the services when requested, which imposed on the demonstrator the duty to discharge any taxes and which required the demonstrator to*

indemnify the appellant against any claims against them. He submitted that these clauses were not usually found in a contract of employment.'

67. Reliance was also placed upon the lack of supervision and the fact that the directions with which the demonstrators had to comply were those of the individual supermarkets.

68. The judgment of Keane J. explained the court's reasons for dismissing the appeal by reference to three considerations. First, he found that the Appeals Officer had been correct in holding that he should not confine his consideration to what was contained in the written contract but should have regard to all the circumstances of the demonstrator's employment. Second, he cited with approval the judgment of Cooke J. in *Market Investigations v. Minister of Social Security*, concluding that the correct approach was reflected in the passage from that judgment I have earlier quoted (see para. 43 above). Indeed, he also adopted the view that the effect of the decision in *Graham* was that *'the essential test was whether the person alleged to be a "servant" was in fact working for himself or for another person'* (at p. 49).

69. Third, in deciding whether having regard to that test the Appeals Officer was entitled to reach the view that he did, Keane J. noted that there was no continuous supervision of the demonstrator. However, as he explained, this was not decisive: *'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'. He said (at p. 48):

> *'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.'*

70. The factors that weighed in favour of SM being an employee, were this (at p. 48-49):

(i) She was provided with the clothing and equipment necessary for the demonstration;

(ii) She made no contribution financial or otherwise of her own;

(iii) The remuneration she earned was solely dependent on her providing the demonstrations at the times and in the places nominated by the appellant;

(iv) She was not in a position by better management and employment of resources to ensure for herself a higher profit from her activities;

(v) She did not as a matter of routine engage other people to assist her in the work, and where unable to do the work herself, could only arrange for it to be done by someone else, subject to that person being approved of by the appellant.

71. Keane J. made no reference in the course of his judgment to mutuality of obligation, nor to any requirement that the employer or employees be under any continuing obligation to offer or accept work. Having regard to the emphasis placed on the decision of Cooke J. in *Market Investigations,* this is unsurprising. Instead he emphasised that the Appeals Officer had, Keane J. said, taken into account *'all the circumstances of her employment*' (at p. 49). It is to be stressed that the argument that an obligation on the employer to offer work was necessary, or something very close to it, was clearly made by the appellant who had, as the passage from the judgment I have earlier cited made clear, sought to attach importance to those clauses in the contract which absolved the employer from any obligation to offer demonstrations, and the demonstrator from any obligation to accept those offers when made. It will also be recalled that the effect of the circular letter was that the demonstrator could find themselves attending at a supermarket but having to leave without work or payment. The decision can only be viewed as authority for the proposition that the absence of obligations to offer or to perform work were not *necessarily* inconsistent with the existence of a contract of employment of a continuing or ongoing character.

72. Murphy J. delivered a short concurring judgment, focussing in particular upon the contention of the appellant that the Appeals Officer had failed to have

sufficient regard to the terms of the written contract between the worker and the company. He viewed those provisions of that agreement that described the demonstrator as an independent contractor, those that said that nothing in the document should be construed as creating the relationship of master and servant, those stipulating that the provisions of the Unfair Dismissals Act did not apply to the relationship between the parties and the statement that the demonstrator was responsible for her own tax affairs, as being of marginal importance. These terms were included in the contract, he said, not for the purpose of imposing obligations on one party in favour of another, but instead purported to express a conclusion of law as to the consequences of the contract between the parties. He said (at p. 50):

> *'Whether Ms. Mahon was retained under a contract of service depends essentially on the totality of the contractual relationship express or implied between her and the appellants and not upon any statement as to the consequence of the bargain.'*

73. The decision in *Castleisland Cattle Breeding Society Limited v. The Minister for Social Welfare* [2004] IESC 40, [2004] 4 IR 150 (*'Castleisland'*) affords an instructive contrast with *Henry Denny*. There, the issue was whether an individual conducting artificial insemination for Castleisland Cattle Breeding Society (which is described throughout the judgment as the appellant but was the respondent in the appeal to this court) was an employee or independent contractor for the purposes of the Social Welfare (Consolidation) Act 1993. In upholding the reversal by the High Court of the decision of an appeals officer

that he was an employee, Geoghegan J. (with whom Denham, Murray, McGuinness and Hardiman JJ. agreed) – relying upon the decision in *Henry Denny* – stressed two fundamental features of the background. First, the contract itself had been entered into in a context in which the individual had been an employee of the respondent and accepted a reduced redundancy on the basis that he would be allocated an area in which he could provide the services. This was done for the purposes of cutting losses in the business. After entering into that agreement (and emphasising that the purpose was to put in place entirely new arrangements) Geoghegan J. said that the parties conducted themselves accordingly, the individual being required to take out his own insurance to cover the activities in question, losing his pension entitlements, and never intimating any claim under the Social Welfare Acts. The wording of the contract, Geoghegan J. said, *'remains of great importance'* (at para. 20, p. 161) but, perhaps, of equal note is the significance attached by the court in interpreting it to the overall factual matrix in which it was put in place.

74. Second, he felt that the Appeals Officer had erred in equating controls in the contract over the carrying out by the individual of his work, with control over him. Those controls, Geoghegan J. said, arose from the regulations imposed by the Department of Agriculture over the conduct of artificial insemination: for this reason, provisions in the contract precluding assignment or requiring the approval of the company to a substitution were not significant.

75. Other factors pointing the same way (which Geoghegan J. felt were less important) included the obligation of the artificial inseminators to provide their

own transport, protective clothing, equipment and communications system, to indemnify the company against claims arising from the use of that transport, to conduct the operations at their own risk, to obtain insurance accordingly, to indemnify the company against claims arising from their work, the fact that they could make their own timetable and influence their profits accordingly, the fact that their fees could be reduced in certain circumstances (*'a provision which would hardly be compatible with a contract of service'*) and the fact that they were under an obligation to repeat inseminations at their own cost and expense if earlier inseminations were not successful.

'Mutuality of obligation' in the Irish courts

76. The decision of Edwards J. in *The Minister for Agriculture and Food v. Barry and ors.* [2008] IEHC 216, [2009] 1 IR 215 (*'Barry'*) appears to have been the first in which a court in this jurisdiction used the term *'mutuality of obligation'* (although, as is clear from that judgment, it had been acknowledged in the case law of both the Employment Appeals Tribunal (*'EAT'*) and the Labour Court before then). In *Barry* the question of law before the court (whether the EAT had misdirected itself as to the correct test to be applied to differentiate a contract of service from a contract for services) arose on foot of an appeal in proceedings brought by temporary veterinary inspectors pursuant to the Redundancy Payments Acts 1967-2003, and the Minimum Notice and Terms of Employment Acts 1973-2001. As stressed by counsel for Revenue in the course of his submissions in this appeal, these statutes not merely applied only to those

working under contracts of service but were available only where the putative employee had been working continuously for certain minimum statutory periods. The report of the judgment of Edwards J. records the case advanced by the veterinary inspectors as being that they were employed on foot of a single contract of service (see paras. 1 and 9), although the judge noted in the course of his judgment the possibility that on each occasion that they worked they did so on foot of a new contract that might be classified as a contract of service, or for services (at para. 44).

77. The EAT had concluded first that there was the requisite *'mutuality of obligation'* between the temporary veterinary inspectors and the Minister, and second that the so-called *'enterprise test'* had been found in *Henry Denny* to be *'the fundamental test'* and that it was satisfied on the facts. Edwards J. found that the EAT had erred *inter alia* in making a finding of mutuality of obligation *'on a flawed and untenable basis'* and thereafter in concluding that the test applied by it was the sole relevant inquiry. He noted a lack of clarity around whether the EAT had found a single contract of service with a term committing the Minister to offer and the inspectors to accept work on an ongoing basis (at para. 51).

78. The court's conclusion as to the first of these issues was based on the decisions in *O'Kelly, Nethermere* and *Carmicheal* which Edwards J. interpreted as holding that it is an invariable requirement for a contract of employment that the employer be under a duty to provide work and upon the worker to do it when offered. It is to be noted (as Ní Raifeartaigh J. observed in *McKayed v.*

Forbidden City Ltd. [2016] IEHC 722, [2017] ELR 57 (*'McKayed'*) (at para. 19) that there was no dispute between the parties in *Barry* that the requirement of *'mutuality of obligation'* was a precondition to an employment relationship, and that it was thus effectively conceded. Edwards J. formulated this *sine qua non* of the employment contract, as follows (at para. 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.'*

79. There was, Edwards J. found, no evidence to support the finding of the EAT in that case that this requirement of *'mutuality of obligation'* was satisfied by an *'implied agreement'* between the veterinary inspectors and the Department that the former would carry out inspection of meat on an ongoing basis. In fact, the Minister argued (and Edwards J. considered this contention to be *'well made'*) that the Minister had no control over the level of work that was available for the inspectors, and thus could not have given a commitment as to the level of work that would be given to the inspectors. It is, again, to be noted that as Edwards J. was addressing a context in which the relevant statutory provisions required ongoing employment over a period of time, it is to be expected that he did not address the distinct question of whether the veterinarians were employees during the periods when they were actually working – with or without an

entitlement to be offered work on a continuous basis. The word *'ongoing'* appears in the judgment only once, and then in reference to the findings of the EAT (at para. 54):

> *'In all the circumstances I regard the EAT's finding that there was an implied agreement reached between the Department of Agriculture & Food and the TVI's to carry out inspection of meat and certification of same on an ongoing basis to be untenable. Their finding of mutuality of obligation was predicated on the existence of this implied agreement and, accordingly, must be regarded as flawed.'*

80. Edwards J. also conducted a detailed and thoughtful analysis of the relevant authorities to determine whether a contract was one *'of'* or *'for'* service(s), concluding that it was not (as the EAT had believed) the *ratio decidendi* of *Henry Denny* that that issue was governed by *'a single composite test'* directed to whether the person was in business on their own account. Instead, Edwards J. stressed, the court in *Henry Denny* had emphasised that each case must be examined on its own facts. He said (at para. 65):

> *'... loose labelling can often create more problems than it solves. In the context of trying to correctly characterise the nature of a work relationship between two parties, I think it can sometimes be unhelpful to speak of a "control test", or of an "integration test", or of an "enterprise test", or of a "mixed test", or of a "fundamental test", or of*

an "essential test", or of a "single composite test" because, in truth, none of the approaches so labelled constitutes a "test," in the generally understood sense of that term, namely, that it constitutes a measure or yardstick of universal application that can be relied upon to deliver a definitive result.'

81. The account of the *'mutuality of obligation'* requirement expressed by Edwards J. in this case was subsequently applied by Lavan J. in *Akhtar v. Minister for Justice, Equality and Law Reform* [2011] 1 IR 562 (where it was held that a doctor providing services connected to the taking of blood and urine samples at a Garda station was not an employee) and by Gilligan J. in *Brightwater Selection (Ireland) v. Minister for Social and Family Affairs* [2011] IEHC 510 (where it was held that a worker was not an employee of the employment agency which placed her with third parties). In those circumstances it is unsurprising that in *McKayed* (where it was found that a person providing translation services as directed by the respondent could not establish the requisite mutuality), Ní Raifeartaigh J. declined to accede to the invitation of the (self-represented) applicant not to follow this aspect of the decision in *Barry*. She observed that while the Supreme Court in *Henry Denny* did not refer to the *'mutuality of obligation'* test (presumably, she said, having regard to the facts of the case), there was, she said, nothing in that decision to indicate that the test may not be usefully used as a filtering mechanism to identify clear cases of a relationship other than an employment relationship. *McKayed* was an unfair dismissal case, and thus one in which the question was whether the claimant was continuously employed, not whether there was a precondition of the kind contended for by

Karshan here before a worker could be an employee for particular stints. That was the context in which Ní Raifeartaigh J. concluded at para. 41 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'.*

82. In its submissions, Karshan used as shorthand the phrase *'mutuality of obligation in the Barry sense'* to describe not merely an obligation at the point at which work is done that the worker do that work and that the employer pay them for it, but the obligation to offer and do work that extended into the future that was central to its legal argument. While, having regard to his analysis of the facts and decision of the EAT, it is not unreasonable to suggest that he had in mind that obligation, Edwards J. did not, in terms, posit such a condition, although neither did he say that the requirement of mutuality to which he referred could be established merely at the point at which the labour is provided. Nor did he advert to the fact that in *Nethermere* and *Carmichael* the issue was directed to the obligations required before there could be a contract of employment encompassing periods between individual engagements. It seems that is all a consequence of the manner in which the EAT had determined the case which, as it is evident from the judgment, Edwards J. found to be less than satisfactory.

The later English cases

83. It will be recalled that in *McMeechan* (to which Edwards J. does not appear to have been referred in *Barry*), Waite LJ had found that a single engagement was capable of constituting a contract of employment, irrespective of whether there was an ongoing obligation to offer and accept work. As the English courts continued to develop the *'mutuality of obligation'* test,[9] this view has been consistently restated.

84. Thus, counsel for Revenue laid considerable emphasis in the course of his submissions upon the decision in *Cornwall County Council v. Prater* [2006] EWCA Civ. 102, [2006] IRLR 362 (*'Prater'*). Like *Carmichael*, *Prater* involved an application by a worker for a declaration of particulars of employment, but unlike the former case the respondent also relied upon s. 212 of the Employment Rights Act 1996. That allowed an employee to count towards their total period of continuous employment a week during which or

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[9] As one might expect, a very substantial body of case law has developed in that jurisdiction over the past two decades around these issues; the cases considered here are, largely, those referred to by the Commissioner, the High Court and the Court of Appeal, as supplemented by some further decisions referred to in the course of legal argument before this court. Other important considerations of the principles appear in: *McLeod v. Hellyer Brothers* [1987] IRLR 232; *Hall v. Lorimor* [1992] STC 599, [1994] STC 23; *Montgomery v. Johnson Underwood Ltd.* [2001] EWCA Civ. 318, [2001] IRLR 269; *James v. Greenwich LBC* [2007] ICR 577; *Drake v. IPSOS MORI UK Ltd.* [2012] UKEAT/0604/11/ZT; *Secretary of State for Justice v. Windle* [2016] EWCA Civ. 459. As the judgments of the Court of Appeal were at pains to stress, some of these judgments have to be treated with a degree of caution where they address the question not of whether a person is an '*employee'* but the distinct issue of whether they are a *'worker'* within the meaning of s. 230(3)(b) of the Employment Rights Act 2003, in respect of which there is a specific and broader statutory definition. As of the date of this judgment, the United Kingdom Supreme Court has reserved its decision in a case (*PGMOL*, discussed later in the text) addressing the relevance of mutuality of obligation and control to contracts involving workers providing services on an intermittent basis.

during part of which they were absent from work on account of a temporary cessation of work. However, the worker had to be an *'employee'* to avail of this provision, and the question was whether the respondent (a teacher who had over a period of ten years accepted individual assignments from the appellant to teach children at their homes) came within that section. The appellant argued that the respondent was not an employee, but an independent contractor during these periods. Its theory was that those who undertook engagements without any guarantee of further work were not employees because of the absence of the requisite *'mutuality of obligation'*. That argument was advanced in a context in which the parties agreed that there was no single contract of service of a global, umbrella or overarching character over the ten-year period in question, but in which the respondent was required, once she agreed to accept a pupil (as she had always done), to continue to provide that work until the particular engagement ceased. The respondent's argument on those facts was recorded by Mummery LJ (with whose judgment Longmore and Lewison LJJ agreed), as follows (at para. 32):

> *'mutuality of obligation within each separate contract is insufficient to create a contract of service if, after the end of the contract, there is no continuing or further obligation on the council to offer more work or on Mrs. Prater to accept more work'*.

85. Noting that there could be no doubt but that, had she been engaged to teach pupils in a class collectively or individually at school under a single continuous contract, the respondent would have been employed under a contract of service,

and observing that it made no difference to the legal position that she was engaged to teach the pupils out of a school and on an individual basis, Mummery LJ rejected the core point made by the appellant council, as follows (at para. 40):

> *'Nor does it make any difference to the legal position that, after the end of each engagement, the council was under no obligation to offer her another teaching engagement or that she was under no obligation to accept one. The important point is that, once a contract was entered into and while that contract continued, she was under an obligation to teach the pupil and the council was under an obligation to pay her for teaching the pupil made available to her by the council under that contract. That was all that was legally necessary to support the finding that each individual teaching engagement was a contract of service. Section 212 took care of the gaps between the individual contracts and secured continuity of employment for the purposes of the 1996 Act'.*

86. Longmore LJ said that there was mutuality of obligation in each engagement in that the county council would pay the respondent for the work which she agreed to do. That, he said, was *'sufficient "mutuality of obligation" to render the contract a contract of employment if other appropriate indications of such an employment contract are present'*.

87. The significance of the decision of the United Kingdom Supreme Court in *Autoclenz Ltd v. Belcher* [2011] UKSC 41, [2011] 4 All ER 745 (*'Autoclenz'*)

lay in the proposition that a tribunal faced with a written contract between worker and employer should seek to identify the true agreement of the parties, and to that end must consider whether or not the words of a written contract represent their true intentions or expectations. That approach, as explained in the judgment of Lord Clarke (with whose judgment Lords Hope, Walker, Collins and Wilson agreed) was animated at least in part by the disparity of bargaining power between worker and employer. It was held to justify the approach of the Employment Tribunal in that case, which had found that a substitution clause in agreements between individuals providing car valeting services did not reflect what was actually agreed between the parties – that the claimants would show up for work each day and do work and that the respondent would offer work, provided it was there for them to do. The Tribunal had also found that a clause in the relevant agreements to the effect that there was no obligation on the employer to offer work or on the claimants to accept such work, was not consistent with the practices of the parties. These, it was held, were unrealistic possibilities that were not truly in the contemplation of the parties when they entered into their agreements. Lord Clarke described the following statement from the judgment of Elias J. in *Consistent Group Ltd v. Kalwak* [2007] IRLR 560 as carrying *'considerable force'* (at para. 58)

> *'if the reality of the situation is that no-one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur,*

the fact that the rights conferred have not in fact been exercised will not render the right meaningless.'

88. This analysis posits that in English law, there is a distinction drawn between employment contracts and other written agreements. While the parol evidence rule, the principle that a party is generally bound by the terms of a written agreement bearing their signature, and the constraints of the doctrine of mistake and sham – all of which significantly limit the power of a court to go behind the text of a written contract – all govern ordinary contracts, *Autoclenz* suggests that employment contracts are construed by a different set of principles. It holds that in the case of agreements of this kind, the court or tribunal should consider what was *'actually agreed'* between the parties to the end that a party contending that written terms do not accurately record what was agreed may provoke an examination of the practices adopted by the parties which, in themselves, may justify the court in disregarding the provisions of the written contract by which they have agreed to be bound.

89. This was important in *Autoclenz* because (as Lord Legatt underlined in the course of his judgment in *Uber BV v. Aslam* [2021] UKSC 5, [2021] ICR 657 at para. 68) had ordinary principles of contract law been applied, there would have been no basis on which the court could have disregarded the terms of the written agreement, as the court held it was entitled to do. On this basis a finding that the valets were employees, was upheld. Lord Clarke said (at para. 35):

> *'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem, If so, I am content with that description.'*

90. Lord Clarke's judgment in *Autoclenz* is, it should be observed, significant for one other reason: at para. 18 he confirmed the continued vitality in that jurisdiction of what he described as *'the classic description of a contract of employment'* provided by the three features identified by MacKenna J. in *RMC.*

91. The decision of the Upper Tribunal (Briggs J.) in *Weight Watchers (UK) Ltd and ors. v. The Commissioner for Her Majesty's Revenue and Customs* [2011] UKUT 433 (TCC) ('*Weight Watchers'*) assumed – perhaps an undue – prominence in the analysis of the Commissioner, the High Court and the Court of Appeal in the present case. That was partly because it, also, was a case in which the issue of whether employment was continuous was not relevant to the issue before the court, and partly because some of the provisions of the agreement in issue there bore a similarity to those appearing in the agreement between Karshan and the delivery drivers.

92. *Weight Watchers* was an appeal from the Decision of the First Tier Tribunal ('*the FTT*'), whereby it dismissed appeals against determinations made by

HMRC under UK tax legislation arising from the activities of persons, known as '*Leaders*', in arranging and conducting meetings for consumers of Weight Watchers UK ('*WWUK*') programmes. The issue of whether the Leaders were employees of WWUK or independent contractors depended on whether a contract of employment or series of event-specific contracts of employment subsisted during periods when casual work was being carried out.

93. WWUK conducted its business through regional and area sales managers, who maintained regular contact with the Leaders. That business included seeking and encouraging members to lose weight by regularly attending periodic meetings held by a Leader. All Leaders entered into a written agreement. These contained stipulations that the Leader was free to devote as much or as little time to WWUK as they wished, that the Leaders were independent contractors and not servants of WWUK and that they were required to discharge national insurance and income tax liabilities themselves. The Leaders were given discretion as to the fixing of the date and time of meetings, but they were required to obtain WWUK's specific approval for same. The agreement provided for payment of commission and the provision to the Leaders by WWUK of necessary materials.

94. Clause 10 of the relevant agreements provided:

> *'If the Leader does not propose to take any particular meetings on any particular occasion and is unable to find a suitably qualified replacement, Weight Watchers will if so requested by the Leader,*

attempt to find such replacement and for this purpose the Leader will give the Area Service Manager as much prior notice as possible.'

95. Briggs J. in the Upper Tribunal ('*UT*') upheld the decision of the FTT that each of the meetings arranged and attended by the Leaders was conducted pursuant to a specific contract which incorporated the terms of this overarching contract. He determined that the umbrella agreement, as he described it, was an agreement to agree, requiring a further and distinct contract-making process for the conduct of any particular meeting or series of meetings.

96. In analysing the general legal context, Briggs J. was clear that the fact that a worker works intermittently does not preclude an employment relationship from arising. He said that contractual arrangements for discontinuous work may, at least in theory, fall into at least three categories:

(i) A single overarching or umbrella contract containing all the necessary provisions, with no separate contracts for each period (or piece) of work.

(ii) A series of discrete contracts, one for each period of work, but no overarching or umbrella contract.

(iii) A '*hybrid*' contract consisting of an overarching contract in relation to certain matters, supplemented by discrete contracts for each period of work.

97. In cases where reliance is placed on discrete contracts for periods of work, he stressed, it is still necessary to show that the requisite irreducible minimum of mutual work-related obligation subsists throughout each relevant discrete contract, not just during the potentially shorter period when the contracted work is actually being done. He identified the issue arising in this regard as follows (at para. 31):

> *'In a case where the discrete contract is made on the day when (say) a month's work starts and ends when the work ends, this causes no difficulty. But in other cases, including the present, the discrete contract may itself be made for a series of separate events, such as a series of one hour monthly or weekly meetings. The discrete contract may itself last for the whole period of the series, which may be as long as a year. In such cases I consider that ...* [the] *... "relevant period" during which the mutuality of obligation must subsist is the whole of the period of the discrete contract.'*

98. As will be evident from my consideration later of the relevant judgments, these comments were the subject of some focus in the Court of Appeal decision in this case, and it is helpful to say something about them now. They were interpreted by the majority of the Court of Appeal as requiring that at some time anterior to the actual point at which the drivers showed up for a scheduled work engagement, a legal obligation had to exist on them to present themselves for work, and on Karshan to give them work when they arrived at its premises for that purpose. From this there ensued a contest between the parties as to whether

there was such a pre-existing obligation in this case and, in particular, whether upon agreeing to have their names put on the relevant roster, the drivers accepted any consequent contractual obligation to do the work once they had (at least) signified their readiness to undertake it.

99. Obviously, if there is an agreement to work and to be paid, one would expect that it will pre-date the commencement of the work, even if only momentarily; but the argument advanced by Karshan here involved something else. It sought to establish that there was a requirement that some appreciable period prior to the commencement of the work such an agreement had to be in place, the suggestion being that in that event, there would be the requisite obligation of future performance for which it contended. The proposition gives rise to obvious issues of definition – to which I return. But for present purposes, it suffices to note that this was *not* what Briggs J. was suggesting.

100. He was, instead, positing that *from the point at which it was alleged there was a contract of employment in place* there had to be some form of mutuality. Given that in the present case Revenue appeared (at least before the Commissioner) to have firmly pegged its case to the proposition that the individual contracts of employment started when the driver was placed on the roster, it is to be expected that Karshan directed much of its fire at the proposition that by agreeing to be rostered the drivers assumed such an obligation. However, it is important that this position of Revenue not be understood as depending upon a general principle. In cases in which the issue was whether there was a contract of employment extending over a lengthy

period of time and said to arise from a global contract (such as *Clark v. Oxfordshire Health Authority* [1998] IRLR 125, from which Briggs J. derived this proposition), Briggs J. was positing that the obligation had to subsist throughout the period of that global contract. In *Weight Watchers* itself, the issue was whether there was a discrete contract for a series of separate events such as a series of one hour or weekly meetings, so that it was not sufficient to say that the Leaders were employees when attending the individual meetings (see para. 31 of the judgment). The nature of the work in issue in that case – involving the notification and assembly of a number of customers of WWUK for a meeting – demanded some advance organisation and commitment, but there is no reason why (to take the instant case as an example) there could not have been loose rostering arrangements put in place with the drivers with the latter having the option not to honour those arrangements, and yet distinct employment agreements arising when the driver did turn up, and agree to do the work for a specified period of time. As I explain later, the question might well arise whether an arrangement of that kind was more consistent with the drivers being independent contractors than employees, but that is quite different from postulating that the arrangements could *never* constitute contracts of employment.

101. Regarding the inclusion of a substitution clause (clause 10), Briggs J. noted that the right to substitute might be so framed as to enable the worker promising to provide the work to fulfil the promise wholly or substantially by arranging for another person to do it on their behalf. If that was the case, it was (he said) *'fatal to the requirement that the worker's obligation is one of personal service'*. He

stated that, on the other hand, contracts for work frequently provide that if the worker is for some good reason unable to work, they may arrange for a person approved by the employer to do it, not as a delegate but under a replacement contract for that particular work assignment made directly between the employer and the substitute. In those instances, the contract at issue is *'not necessarily inconsistent with a contract of employment'*.

102. WWUK had argued that the relevant distinction between substitution clauses is between a contractor being unable to work against one who was unwilling to work. Briggs J., however, was not persuaded by this distinction and noted how it would be *'unrealistically rigid.'* He gave the example of a teacher, whose contract allows them to be absent and find a replacement to temporarily be engaged by the school: *'it would be absurd to treat that sensible provision as incompatible with a contract of employment.*'

103. Insofar as clause 10 was concerned, Briggs J. stated that WWUK had misinterpreted this clause, noting that it did not set out expressly the circumstances in which a Leader would be at liberty to not take a particular meeting. He stated that the clause rather assumed that there were or may be such circumstances so that, without breach of contract, the Leader may propose not to take a particular meeting. He noted that these circumstances were not confined to cases of inability to take the meeting, and that it may be reasonably inferred that a Leader may propose not to take the meeting for *'good reasons'* such as a family wedding or a funeral, in which the Leader is able, but unwilling to take that particular meeting.

104. Briggs J. moreover stated that it was plain from the language of clause 10 that where a series of meetings has been agreed to be undertaken, as was the usual course of business, a Leader opting out of a particular meeting still left her obligation to take the remainder of the series intact. He stated that the prospect of a Leader being allowed to take on a series of meetings and then not attend any of them, without any notice to WWUK, would be absurd. He, thus, held that the FTT did not err in its analysis of the question of whether the meeting-specific agreements between WWUK and its Leaders satisfied the mutuality of obligation condition.

105. The issue in *Quashie v. Stringfellow Restaurants Ltd.* [2012] EWCA Civ. 1735, [2013] IRLR 99 was whether the claimant – a lap dancer who had worked intermittently at premises operated by the respondents – was an employee for the purposes of provisions governing claims for unfair dismissal. An employment tribunal had decided that she was not an employee and, in any event, did not have the necessary qualifying period of one year's continuous employment required to being her claim. The Employment Appeal Tribunal decided that she *was* an employee and that she had the necessary continuity of employment.

106. *Quashie* was an unusual case insofar as the *claimant* paid the *respondent* for the opportunity to dance at its premises, collecting tokens directly from customers, and thereafter redeeming these from the respondent less certain fees and commissions. Nonetheless, the judgment includes some helpful observations in

relation to the requirement of mutuality. Elias LJ (with whom Pitchford and Ward LJJ agreed) explained that there was, in principle, no reason why a worker should not be employed under a contract of employment for separate engagements, even if of short duration. He said (at para. 10):

> *'Typically an employment contract will be for a fixed or indefinite duration, and one of the obligations will be to keep the relationship in place until it is lawfully severed, usually by termination on notice. But there are some circumstances where a worker works intermittently for the employer, perhaps as and when work is available. There is in principle no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration, as a number of authorities have confirmed.'*

107. Where, he explained, it was necessary for an employee in a particular case to establish continuity of service between these separate engagements, what had to be shown was *'"an irreducible minimum of obligation" either express or implied, which continues during the breaks in work engagements'*. Citing *Nethermere* and *Carmichael* as authority for that proposition, he continued (at para. 12):

> *'Where this occurs, these contracts are often referred to as "global" or "umbrella" contracts because they are overarching contracts punctuated by periods of work. However, whilst the fact that there is no umbrella contract does not preclude the worker being employed under*

a contract of employment when actually carrying out an engagement, the fact that a worker only works casually and intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather than as an employee.'

108. Elias LJ continued, quoting his own decision in *Stephenson v. Delphi Diesel Systems* [2003] ICR 471 (at paras. 13-14) (*'Stephenson'*):

'The question of mutuality of obligation, however, poses no difficulties during the period when the individual is actually working. For the period of such employment a contract must ... clearly exist. For that duration the individual clearly undertakes to work and the employer in turn undertakes to pay for the work done. This is so, even if the contract is terminable on either side at will. Unless and until the power to terminate is exercised, these mutual obligations (to work on the one hand and to be paid on the other) will continue to exist and will provide the fundamental mutual obligations.

The issue of whether the employed person is required to accept work if offered, or whether the employer is obliged to offer work if available is irrelevant to the question whether a contract exists at all during the period when the work is actually being performed ...'

109. In *Quashie*, on the facts, the court concluded that the Employment Appeal Tribunal was entitled to decide that the claimant was not an employee, in particular because the employer was under no obligation to pay the dancer anything: this finding was reached in a context in which she negotiated her own fees with the clients, took the risk that on any particular night she might have been out of pocket and received back from the employer only monies received from clients after deductions.

Some conclusions from the English cases

110. I have dwelt on the English cases as they stood at the time of the Court of Appeal decision in some detail. I have done so for several reasons. It is there that the concept of mutuality in the sense of ongoing obligations to provide and perform work as suggested in *Barry* originates. The cases to which I referred featured prominently in the judgments in the tribunal and courts below, and – rightly or wrongly – framed the debate between the parties as it unfolded before this court. Most importantly, and as I explain later, in my view, these cases can only be read as presenting a complete rejection in that jurisdiction of the theory of '*mutuality in the Barry sense'* which underpinned both Karshan's case, and the decision of the majority of the Court of Appeal. Instead, what the cases establish is the following.

111. First, that for as long as a worker is actually undertaking work for which the employer is liable to pay them, there is consideration characteristic of an

employment contract. It is proper to describe those duties to work and to pay as '*mutuality of obligation'*. However, the fact that there are mutual obligations merely ensures that there is a contract, while the fact that the obligations are of work and of payment merely ensures that the contract is capable of being an employment contract. Thus understood '*mutuality of obligation'* can carry two meanings and two consequences. Neither entail the necessity for an ongoing obligation of the kind suggested by Karshan.

112. Second, and following from this, it is clear from the decisions in *McMeechan* and *Prater* that where a worker works intermittently for an employer it is possible for the worker to be an employee for those periods when they are actually working. The fact that the employer has no obligation to offer further work, or that the worker is under no obligation to work if it is offered, does not prevent the agreement between them from being a contract of employment. However, it is also clear from *Quashie* that where there are no ongoing obligations of this kind, this will be a relevant factor in considering whether the relationship insofar as the individual stints are concerned is one of employer/employee or not.

113. Third, it follows from the decision in *Weight Watchers* as I have explained it, that there will be cases in which it is not sufficient for the worker to establish that they are an employee during those periods when they are actually working. Where it is necessary to establish that there is a contract of employment over a period which includes times at which the worker is not actually working or being paid, there must be a mutual obligation of some kind over the entirety of

the period in question. The law in England requires that this mutual obligation involve a requirement to work if asked and, perhaps, a corresponding obligation on the employer to offer work but certainly to pay for it if it is done. It is also possible that this requirement will be fulfilled if the employer has to pay a retainer of some kind to the worker in return for some other work related consideration during this period (*Clark v. Oxfordshire Health Authority* [1998] IRLR 125 at para. 41).

114. Fourth, however, this does not mean that in order for a person to be an employee while carrying out work it is necessary that at a point anterior to their actually attending to do the work there be an obligation to offer or to do work. Obviously, the agreement to work and to pay will predate the undertaking of the labour, but the requirement fixed upon by Karshan and identified by it as sufficient to fulfil the requirement of mutuality of obligation as it defined it (an obligation to offer and accept work that extends into the future and is '*stable'*) is not supported by authority. There is, it must be stressed, nothing in any of the cases in England, or in any other jurisdiction, that so suggests and, indeed, it is difficult to see how such a principle could be precisely and coherently formulated.

115. This summary from those cases is confirmed by the analysis in two recent decisions of the English Court of Appeal. The first, and most directly relevant, is *The Commissioners for Her Majesty's Revenue and Customs v. Professional Game Match Officials Limited* [2021] EWCA Civ. 1370, [2021] STC 1956 (*'PGMOL'*) (that appeal was still pending at the time the present case was

argued before Costello, Whelan and Haughton JJ.). In her judgment (with which Patten and Henderson LJJ agreed) Laing LJ observed as follows (at para. 118):

> *'(i) The question whether a single engagement gives rise to a contract of employment is not resolved by a decision that the overarching contract does not give rise to a contract of employment.*
>
> *(ii) In particular, the fact that there is no obligation under the overarching contract to offer, or to do, work (if offered) (or that there are clauses expressly negativing such obligations) does not decide that the single engagement cannot be a contract of employment. The nature of each contract is a distinct question.*
>
> *(iii) A single engagement can give rise to a contract of employment if work which has in fact been offered is in fact done for payment.'*

116. In *PGMOL* the issue was whether football referees and match officials who had entered into an overarching contract with the appellant pursuant to which they attended for specific engagements were employees for the purposes of UK tax and national insurance law. The FTT and the UT each addressed the separate questions of whether there was an overarching contract of employment which covered the entire football season, and if not, whether there was a separate

contract of employment each time the officials refereed a match (the arrangements for the refereeing of a particular match arising on foot of an offer of appointment and its acceptance by the referee). The FTT held that there was not sufficient mutuality of obligation in relation to either the overarching or the individual contracts, and there was not sufficient control in relation to the individual contracts. The UT found that the FTT was correct as to the issue of mutuality, but that it erred in relation to the question of control.

117. As regards the match specific contracts, both the FTT and UT had found that there was insufficient mutuality because either side could pull out of the engagement before a game without sanction and without breaching the contract in question, with the UT also deciding that there was insufficient mutuality because the individual contracts merely provided for a worker to be paid for the work he did: as summarised in the judgment of Laing LJ, the UT had found that '*an obligation to pay for work actually done is not enough'* (at para. 104).

118. She said that the authorities (at para. 119):

> *'do not support any suggestion that the criterion of mutuality of obligation is the sole, qualifying test for the existence of a contract of employment, so that if there is some mutuality, but it is not the right kind of mutuality, there can be no contract of employment. On the contrary, those authorities … suggest that the court has to look at all the circumstances in the round before deciding whether or not there is a contract of employment.'*

119. Laing LJ concluded that the FTT was entitled to conclude that the overarching contract was not a contract of employment, as it did not require the appellant to offer work or the officials to do it. Thus, there, it was found that the FTT had been wrong to consider that there was no mutuality of obligation in the discrete contracts because either party could pull out of an engagement before a match: the fact, she said, that the terms of a contract permitted either side to terminate it before it is performed without breaching it is immaterial. The contract, she explained subsists unless and until it is terminated by one side or the other.

120. The English Court of Appeal was also of the view that the UT had erred in concluding that the individual contracts could not be contracts of employment if they merely provided for the worker to be paid for the work he did. The UT had said, in this regard, the following:

> '*we do not accept that a contract which provides merely that a worker will be paid for such work as he or she performs contains the necessary mutuality of obligation to render it a contract of service: the worker is not under an obligation to do any work and the counterparty is not under an obligation to do any work and the counterparty is not under an obligation either to make any work available or to provide any form of valuable consideration in lieu of work being available.'*

121. In this way, Laing LJ said, the UT had wrongly elided the mutuality of obligation which is necessary to show that an overarching contract is a contract of employment, with the mutuality necessary to show that a single engagement is a contract of employment.

122. The matter was remitted to the FTT to reconsider whether there was sufficient mutuality of obligation and control in the individual contracts for them to constitute contracts of employment. That decision is presently under appeal to the United Kingdom Supreme Court.

123. The second relevant decision is that in *Atholl House*. There, the issue was whether a radio presenter who, through a *'personal service company'* presented a regular show on BBC, was within the provisions of the Income Tax (Earnings and Pensions) Act 2003. The statutory conditions under which she could be subject personally to the legislation in respect of services provided through a personal company are not material here, save that it was necessary to decide whether a *'hypothetical contract'* between her and BBC was a contract of employment. The Court of Appeal ultimately held that the UT had erred in determining that the hypothetical engagement of the presenter was inconsistent with a contract of employment.

124. David Richards LJ (with whose judgment Arnold and Peter Jackson LJJ agreed), emphasised some features of the test for determining whether a contract was one *'of'* service or *'for'* services, an analysis which was conducted by reference to the three limbs of *RMC*. He observed that as that test had evolved,

in some cases, the employer is not required to provide work where he pays the agreed remuneration. Referring, *inter alia*, to *Nethermere*, *Carmichael* and *PGMOL* he stressed that a single engagement could give rise to a contract of employment if work which has in fact been offered is in fact done for payment, but an overarching or umbrella contract *'lacks the mutuality of obligation required to be a contract of employment if the putative employer is under no obligation to offer work'* (at para. 74). Moreover, he said, it was wrong to assert (as HMRC had) that at the point of the third stage of the test, the issues of mutuality and control understood to have arisen from the first and second stages ceased to have any role to play in the assessment. Stressing the *'multi-factorial process'* involved at the third stage he explained (at para. 76):

> *'the court or tribunal is required to weigh any terms of the contract which are contrary to a conclusion of employment against those terms, including mutuality of obligation and control, which favour a conclusion of employment. What is said is that no account should be taken of the strength or weakness of the finding of control. I am unable to accept this. In some cases, the control may be so pervasive as to make it very difficult, if not impossible, to conclude that it is not a contract of employment. In others, the decision on whether the right of control is sufficient may be borderline. I can think of no good reason why account should not be taken of these differences …'.*

125. *Atholl House* confirms one final point which assumes relevance later in this judgment: the decision maker in applying the third part of the *RMC* test – it was

found – is not limited in its consideration to the terms of the contract in question, but may have regard to the factual matrix in which that agreement was entered into and may also take account of issues of control considered at the second stage of the inquiry (at para. 124). The first of these propositions, it will be recalled, reflect the approach adopted in the *Castleisland* case.

126. As will be seen, aspects of the decisions of the Commissioner, O'Connor J. and Whelan J. suggest that the approach adopted by the United Kingdom Supreme Court in *Autoclenz* reflected that of this court in *Henry Denny* and *Castleisland. Uber BV and ors. v. Aslam* [2021] UKSC 5, shows that in fact *Autoclenz* went considerably beyond what had been decided in the Irish cases. It was concerned with whether drivers using the well-known taxi app were *'workers'* for the purposes of particular statutory provisions. Lord Leggatt (with whose decision the other members of the court agreed) in concluding that they were, made some observations that are equally applicable to those working under contracts of service. Two aspects of his judgment are, as this appeal has developed, particularly important.

127. First, he explained the conclusion reached by the UKSC in *Autoclenz.* The creation of a special rule governing the relationship between a written contract of employment and the terms of an employment relationship identified in that case could not, he felt, be rationalised solely by reference to the disparity of bargaining power between worker and employer. The same, he said, was true of other contexts. Instead, what he felt critical to the outcome of that case was the fact that the claimants were asserting not contractual rights, but statutory

rights. Because the issue was therefore one of statutory interpretation not contractual interpretation, the adoption of a purposive approach was appropriate, and corresponded with the modern analysis of the meaning of statutes: the ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically (see para. 70 of the judgment).

128. In applying to the legislation in issue in that case (concerned with the minimum wage and working time) rules that precluded the court from examining the actual arrangements in place between the parties would reinstate the mischief which the legislation was intended to address: it is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The judgment, it is to be noted, suggests that the analysis applicable to a taxing statute might not be the same as that applicable in an employment rights context (see para. 107). That decision has been described as effecting '*a dramatic shift away from the narrow contract-based analysis of the parties' relationship towards a broad enquiry into the reality of the relationship, and requires the legal category of 'employment' ... be constructed in a manner that protects individuals performing work in positions of subordination and dependency'*.[10]

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[10] Atkinson and Dhorajiwala '*The future of employment: purposive interpretation and the role of contract after Uber'* (2022) 85(3) MLR 787 at p. 789.

129. Second, Uber had argued that because there was no ongoing mutuality when drivers were not logged on to the app, they could not be considered to be workers. Lord Leggatt observed (at para. 91):

> *'the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working, does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working ...'*

130. Reference was also made by the parties in the course of this appeal to the decision of the English Court of Appeal in *R(IWGB) v. CAC* [2021] EWCA Civ. 952, [2022] 2 All ER 1105. These were proceedings brought by way of judicial review of a decision of a statutory body charged under United Kingdom law with the recognition of trade unions for the purposes of collective bargaining, the power in question depending on whether the union seeking recognition was seeking to represent '*workers'*. While the statutory provision in question included within the definition of that term persons working under a contract of employment, it clearly required that the work or services be performed personally. The respondent to the proceedings refused the application for recognition because the '*Deliveroo'* cyclists whom the applicant union wished to represent provided their app based services on foot of a contract which conferred on the drivers the right, without the need to obtain the employer's prior approval, to arrange for another courier to provide the services. Where

this occurred, the services were provided on foot of a private arrangement between the couriers, and the worker who arranged for the substitute continued to bear full responsibility for the substitute's acts and omissions. They were also responsible for remunerating the substitute.

131. While the proceedings were focussed on the provisions of Article 11 of the European Convention on Human Rights ('*ECHR*'), the conclusion reached by the respondent, the Court of Appeal found, was a decision it was entitled to make, and it was entitled in consequence to refuse recognition. *Uber* was distinguished on the basis that, there, not only did no issue arise under Article 11 of the ECHR, but there was no issue around the effect of a substitution clause. This decision, also, is the subject of a pending appeal to the United Kingdom Supreme Court.

III THE DECISIONS OF THE COMMISSIONER, THE HIGH COURT AND THE COURT OF APPEAL

The Commissioner's analysis

132. The Commissioner's essential conclusions having regard to the facts as found by her can be reduced to eight propositions. First, and based upon the three categories of *'contractual arrangements for discontinuous work'* identified by Briggs J. in *Weight Watchers*, she found that the structure of the contractual arrangements in the appeal before her comprised one overarching umbrella contract supplemented by multiple individual contracts in respect of assignments of work.

133. Second, the Commissioner noted Edward J.'s analysis of the *'requirement of mutuality of obligation'* in *Barry*. She observed that Karshan had contended that the requisite mutuality was absent because there was no obligation on the driver to provide work and that if the driver did not show up for work no sanction would be imposed by Karshan. Moreover, Karshan submitted that it had no obligation to provide work to the drivers or to any of them.

134. The Commissioner dealt separately with the issue of mutuality as it applied to the individual contracts, and the umbrella contract (ultimately concluding that it was unnecessary for her to address the latter). She did so in a context where she observed that for a contract of employment to exist, there had to be an

obligation on the employer to provide work and on the employee to perform the work. As to the individual contract, she agreed with the contention of Revenue that the individual contracts commenced once Karshan accepted notification by the driver of his availability for work in respect of a specific shift (or series of shifts) and placed his name on the roster in respect thereof. There was, she found, mutuality present for the entire duration of these contracts. That conclusion, it should be said, was not based on any findings of fact, other than that the drivers indicated their availability for work by being rostered in this way. While Karshan had contended that the effect of clauses 12 and 14 of the contract was that a driver who indicated his availability for work and was rostered was nonetheless under no obligation to turn up for his shift, the Commissioner did not accept this.

135. Here, she said two things. She concluded that the reasoning in two English decisions to which she had been referred *Autoclenz* and *Pimlico Plumbers Ltd. v. Smith* [2018] UKSC 29) did not *'support the proposition that if there is ... a clause ... which provides that the provider of work has no obligation to offer work and the putative recipient has no obligation to accept work ... that mutuality of obligation is absent.'*

136. From there, she stressed two features of clauses 12 and 14: clause 12 (allowing the driver to engage a substitute delivery person) was operative where the driver was *'unavailable at short notice'*, while clause 14 provided that the driver would *'notify the Company in advance of his unavailability to undertake a previously agreed delivery service'*. She said:

'In this appeal, the right of a driver to cancel a shift was qualified by the requirement to engage a substitute, to provide advance notification to the Appellant and to work out the remainder of the shifts in the series which had been agreed.'

137. Referring to the judgment of Briggs J. in *Weight Watchers*, the Commissioner concluded that a contract which provides drivers with the right to cancel shifts at short notice does not relieve a driver of work-related obligations, as Karshan had contended. Therefore, she said:

'the requirement of mutuality of obligation was satisfied in the individual contracts entered into between the Appellant and the drivers, each contract representing an assignment of work (comprising one or more shifts), and that these obligations were not invalidated by clauses 12 and/or 14 of the written agreement, and were not invalidated on any other basis'.

138. Noting the *'criterion of control'*, and the consequent question as to whether, and to what extent, Karshan could direct the drivers in relation to the work to be done, how it was to be done and *'the time and place in relation to same'*, the Commissioner (thirdly) decided that Karshan exercised *'a significant degree of control'* over work done and the manner by which it was done and that *'control of this nature is indicative of the existence of a contract of service'*. She said that the evidence in the appeal was that the drivers had no input into the terms

upon which they performed their work. The contracts signed by the drivers were drawn up by Karshan and the services required of the drivers were specified by Karshan. Drivers were required to wear uniforms provided by Karshan which promoted the appellant's business. Evidence was that invoices were in many cases prepared by Karshan. Rates of pay were determined by Karshan and were non-negotiable. Karshan ensured that the drivers' NCT certificates were up to date and that the drivers were insured, something that was unlikely to have occurred in a situation which involved a truly independent contractor. She noted that some of the evidence indicated that Karshan limited drivers to two pizzas per delivery run but that the in store manager would depart from that practice if there were other drivers waiting for deliveries. This suggested that the drivers were being managed to some extent by the in store manager.

139. Fourth, the Commissioner then noted those authorities suggesting an *'integration test'.* In considering that aspect of the test, the Commissioner felt that it was necessary to identify *'the core aspects of the business'.* She concluded that delivery was *'undoubtedly a core function of the business and if Domino's did not deliver pizzas, it is arguable that it would be a different business, operating in a different market place.'* She queried whether it was possible for a business to outsource the very service it was established to provide.

140. In concluding that the drivers were integrated into Karshan's business for this purpose, the Commissioner reasoned that where it can be established that a

driver carries out a service which the business was established to provide, the work of the drivers is integral to the business and is not merely accessory to it. The integral nature of the work of the drivers to this business raised the implication that in ordinary course they would be employees. Karshan had purported to outsource its delivery function but at the same time, in requiring drivers to wear branded uniforms, to brand their vehicles and to carry bags imprinted with the company's logo, it sought to reassure customers that they were dealing with Domino's personnel. The branding also served as a form of promotion of Karshan's business. She said that if the delivery service was carried out by contractors who were truly independent of Karshan, the contractors would not be wearing Domino's branded clothing, would not be driving Domino's branded vehicles and would likely not be using Domino's imprinted bags for the pizzas. The Domino's logo would be predominantly, perhaps fully, absent from the process of delivering the pizza. The absence of brand promotion in the delivery of the pizzas would lead at least some customers to query the identity of the delivery driver upon arrival, thus disrupting cohesion of the process and reducing customer assurance. However, with the business operating in its current form, delivery of pizzas appeared to the customer as a coherent operation under the care and management of the well-established Domino's brand.

141. From there, the Commissioner considered the test formulated by Cooke J. in *Market Investigations.* Noting that this test had been adopted in *Henry Denny* the Commissioner, fifth, determined that the drivers were not in business on their own account, having regard to the following: the drivers did not scale their

delivery businesses to the delivery market, locally or nationally, they did not advertise their services, that they did not take calls directly from customers, and they did not employ agents or assistants of their own. They did not take credit risk, economic risk or other risk and did not have the right to employ persons to carry out the work themselves. She noted that the drivers worked from Karshan's premises, finding that these features of the arrangement were indicative of work being done under contracts of service.

142. Sixth, the Commissioner considered the closely related issue of whether the drivers had the opportunity to profit from their efficiency in the performance of the work. This, she observed, had been identified by Keane J. in *Henry Denny* as a relevant consideration in determining whether a contract is one of service or for services. There, as I have earlier noted, he said that the inference that a person is engaged in business on his or her own account can be more readily drawn *'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'*.

143. However, the Commissioner adopted the position that the opportunity for the drivers to profit from their efficiencies was heavily reliant upon their being rostered for a shift which involved proportionally more orders received than delivery drivers rostered, these being factors that were outside the control of the drivers. Because, she said, the opportunity to profit was thus curtailed by factors outside the drivers' control, she did not consider that Karshan's submission to the effect that the drivers could increase their earnings through efficiency lent

support to the contention that the drivers were independent contractors. Accordingly, she said, she attached minimal weight to this aspect of Karshan's argument.

144. The Commissioner then turned to the question of whether there was an inequality of bargaining power as between Karshan and the drivers. In that regard, she felt this relevant to the question of whether the written contract actually represented what was agreed or whether it was necessary to instead glean the true agreement of the parties from the circumstances of the case, of which the written agreement was only part (in which connection she quoted the judgment of Lord Clarke in *Autoclenz* at paras. 34 and 35).

145. On that basis, and seventh, the Commissioner found that the drivers had no input into the terms contained in the written contract, which was drafted by Karshan. She noted how the rates of pay were set by Karshan and that they were non-negotiable. She said that in order to receive work drivers were obliged to sign the contract. She concluded that these factors were not consistent with equal or commensurate bargaining power, and the dynamic under this sub-head of analysis leant in favour of the view that these contracts were contracts of service.

146. The weight to be given to the categorisation the parties themselves had afforded to their working relationship was closely related to this issue. In this regard, the Commissioner observed that while Karshan had contended that the drivers had

agreed and accepted their status as independent contractors, Revenue argued that the true operation and interpretation of the contract would determine the question of whether drivers worked under contracts of service or for services. The Commissioner's eighth point was directed to this issue. Noting, in particular, statements in the judgments of Keane J. and Murphy J. in *Henry Denny*, the Commissioner concluded that the legal analysis *'must take into account the terms of the written contract but must focus also on the operation of the contract, the correct legal interpretation of its terms and the indications which arise on foot of the relevant legal tests and their application.'*

147. It was based on her analysis of these eight factors that the Commissioner concluded that the drivers were employees and not independent contractors. She summarised her view as follows:

> *'I have determined that the framework in the within appeal is one of an overarching umbrella contract supplemented by individual contracts in respect of assignments of work. As regards the individual contracts, I have conducted an analysis based on the components of; substitution and personal service, control, integration, the enterprise test, opportunity to profit and bargaining power. The application of these tests leads to the conclusion that these contracts are contracts of service. The law is unambiguous as regards the minimal weight to be attached to the description of the drivers in the written contract as 'independent contractors'. I determine that the individual contracts entered into*

between the Appellant and its drivers in respect of assignments of work involving one or more shifts, comprise contracts of service.'

148. The Commissioner then made a final observation. She stressed that the matter before her was a tax case. She noted in this regard that it thus differed from some of the authorities cited to her where, in proceedings concerned with redundancy and unfair dismissal, claimants had to prove that they were in continuous employment over periods defined by statute. She explained the position as follows:

'Tax under section 112 is charged 'for each tax year of assessment' on 'all salaries, fees, wages, perquisites or profits' arising from employment 'for the year of assessment'. The imposition of tax under section 112 is not conditional on whether a continuous period of employment can be established but on whether an 'employment of profit' has been held or exercised at some point during a tax year of assessment. Within a tax year of assessment, a taxpayer may hold more than one employment. Such employments may be concurrent, successive, part-time, full-time, temporary, permanent or intermittent in nature. Section 112 subjects to income tax 'all salaries, fees, wages, perquisites or profits' arising from such employment(s).'

149. That being so, the Commissioner reasoned that the multiple contracts comprising contracts of service, are taxable in accordance with s. 112 of the TCA. Therefore, she concluded, it was not necessary to embark upon an

analysis of the nature of the umbrella contract and whether it was a contract of service or for services. Nor, therefore, was it necessary to consider whether the umbrella contract contained mutual obligations. Because she had concluded that the multiple contracts were contracts of service, the appellants had failed to discharge the burden of proving that the assessments/estimates raised by Revenue were incorrect.

The High Court Judgment

150. Karshan requested the Commissioner to state a case for the opinion of the High Court pursuant to s. 949AQ TCA. The case stated presented the following questions:

1. *'Whether, upon the facts provided or admitted, I was correct in law in my interpretation and application of the concept of mutuality of obligation, as set out at pages 20-28 (paragraphs 53-87) of my determination.*

2. *Whether upon the facts proved or admitted, I was correct in law to determine that it was not necessary to consider whether the umbrella contract contained mutuality of obligation, for the reasons set out at pages 49-52 (paragraphs 156-166) of my determination.*

3. *Whether upon the facts proved or admitted, I was correct in law in the interpretation and application of the concept of 'integration' contained at pages 36-39 (paragraphs 114-125) of the determination.*

4. *Whether upon the facts proved or admitted, I was correct in law in the interpretation and application of the concept of 'substitution' contained at pages 30-34 (paragraphs 90-105) of the determination.*

5. *Whether I erred in law and acted in breach of natural and constitutional justice in having regard to authorities which were decided after the appeal hearing was completed in July 2016 and in failing to invite the parties to address me in relation to those authorities which were handed down after the appeal hearing completed in July 2016.*

6. *Whether I erred in law in having regard to United Kingdom/English authorities which are based on a different statutory regime, namely, section 230 of the Employment Rights Act 1996 and in particular, the reference therein to an intermediate category of 'worker' as defined per that legislation.*

7. *Whether I erred in law in determining that I was not bound by a previous decision of the Social Welfare Appeal's [sic.] Office dated 19 August 2008 and when finding that the Social Welfare Appeals Office and the Tax Appeals Commission are different adjudication bodies subject to different statutory schemes, whether I erred in law in failing to give any or adequate weight to the said previous decision as set out at pages 5-8 (paragraphs 11-20) of my determination.*

8. *Whether upon the facts proved or admitted, I erred in law by failing to give proper weight to the actual terms and conditions of the express agreement as between the Appellant and the drivers.*

9. *Whether upon the facts proved or admitted, I erred in law in my findings in respect of; the manner in which rosters were set, requests to drivers to fold boxes, the nature of the ordering system, the nature of substitution, sanction for unreliability, payment of an hourly rate, clocking-in, nature of prohibition of work for others and opportunity to make profit.'*

151. O'Connor J. determined that the Commissioner was correct in the conclusions she had reached in relation to questions 1-4, and that she had not erred in relation to the matters identified at questions 5-9. His analysis broadly reflected that of the Commissioner, albeit conducted within the constraints of the standard of review on an appeal by way of case stated as expressed in the judgments in

Mara (Inspector of Taxes) v. Hummingbird Ltd [1982] ILRM 421 at p. 426 and *Ó Culacháin (Inspector of Taxes) v. McMullan Brothers Ltd.* [1995] 2 IR 217. He structured that by reference to the conclusions reached by the Commissioner as regards what he viewed as four core issues – the principle of mutuality of obligations, substitution, integration, and Karshan's contention that the Commissioner had failed to give proper weight to the actual terms of the contract.

152. As to the first of these, Karshan contended that the Commissioner had erred in failing to follow Irish case law (in particular *Barry*, *Mansoor*, *Brightwater* and *McKayed*). These cases, it was urged, had posited a strict requirement of mutuality going significantly beyond a *'work/wage exchange'* demanding instead a *'reciprocal commitment to provide and perform work on the part of the employer and employee respectively'*. Given that Karshan specifically did not warrant or represent that it would utilise the services of the driver, the necessary '*mutuality of obligations*' was (it was asserted) absent from the relationship.

153. O'Connor J., in rejecting this contention, reasoned as follows (at para. 50):

> *'The Court is not persuaded that mutuality of obligations always requires an obligation to provide work and to complete that work on an ongoing basis in the manner contended for by the appellant. "Ongoing" does not necessarily connote immediate continuation or a defined period of ongoing. There is no binding precedent to suggest that*

the ongoing basis between the appellant and the drivers does not meet the criteria required … The appellant agreed to provide work when the appellant needed the driver, who notified the appellant about his or her availability. The Commissioner considered the facts and applied her understanding of the law which the appellant has not established to have been incorrect …'

154. Insofar as the issue of substitution was concerned, Karshan had contended before the High Court that the Commissioner had erred when she concluded that the drivers were not entitled to subcontract the performance of their duties (a) because any replacement drivers were paid directly by the appellant and (b) because those drivers had to be approved by, and were required to enter into a separate contract with, Karshan. Karshan had, in that context, also stressed that there was no requirement imposed on the drivers to arrange for the work to be done by another person: while there was a right of substitution, there was no obligation to substitute. It argued that the right of an employer to approve substitutes did not indicate an employment relationship. These arguments were shortly dismissed by the trial judge. He said that the Commissioner had not erred in having regard to the fact that drivers did not hire assistants, but instead the contract provided for one driver to be replaced by another from Karshan's pool of drivers. The substitute, he said, was paid by Karshan, a substitute was not a sub-contractor of the driver, and the driver and the substitute left it to Karshan to prepare invoices for them respectively.

155. The Commissioner had also erred, Karshan submitted to the High Court, in her application of the *'integration'* test. That test was not directed to whether the work performed by the drivers was integral to Karshan's business. The true question, Karshan argued, was whether the drivers (as opposed to their work) were integral to that business.

156. The '*integration test*' was referenced by O'Connor J. to the decision in *In re Sunday Tribune*, where the High Court looked to whether a person was employed as part of the business and his or her work was done as an integral part of that business. With respect to that issue O'Connor J. referred to Denning LJ's judgment in *Stevenson, Jordan and Harrison* concluding that the Commissioner had not erred in her application of this test when she focussed on whether the kind of work done by the drivers was integral to the business of the appellant rather than whether the drivers formed part of the appellant's organisation. He said that she did have regard to the integration of the drivers into the business. He noted that she considered various factors, including the requirements for drivers to wear uniforms and place logos on their cars, to reassure customers that they were dealing with the personnel of Karshan, to maintain a coherent operation under the care of Karshan, and to take telephone orders from Karshan and not from its customers.

157. Finally, regarding the proper approach to the written terms, O'Connor J. referred to the decisions in *Henry Denny* and *Castleisland Cattle Breeding Society Ltd.* saying this (at para. 66):

'Written terms in an umbrella agreement, which can be used piecemeal or in ways which will suit the practicalities of those who engage and those who work, were interpreted by the Commissioner at first instance with an eye on the reality of the relationships between drivers and the appellant. The words of Keane J. in Henry Denny (p. 53) about the written terms having "marginal" value echo in this regard. Moreover, Geoghegan J. in Castleisland at p. 150 referred to the necessity to "...look at how the contract is worked out in practice as mere wording cannot determine its nature". In short, this Court sees no real merit in the submissions made on behalf of the appellant under this heading. The Commissioner found the facts, summarised her understanding of the law and applied same without an error which has been established to the satisfaction of this Court.'

The Court of Appeal: majority judgments

158. As noted earlier, the Court of Appeal (Whelan J. dissenting) reversed the decision of the High Court, holding that there was no mutuality of obligations between the drivers and Karshan, that the drivers were independent contractors, and that the drivers should accordingly be taxed under Schedule D of the 1997 Act.

159. The central point made by Costello J. in her comprehensive judgment related to the requirement of mutuality of obligation. She began her analysis by observing that the parties agreed that *'mutuality of obligation'* is a *sine qua non* of an employment relationship. Costello J. from there rooted the definition of that term in the decision in *Barry*, citing Edwards J.'s statement 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.'* In that connection she said that it was necessary to first determine whether the Commissioner erred in law in concluding that the threshold test of mutuality of obligation was satisfied by the multiple individual contracts and that it was not necessary to consider whether it was met in the *'over-arching agreement'*.

160. In that regard, Costello J. conducted a detailed analysis of the decisions in *Barry*, *Mansoor*, *Brightwater*, and *McKayed*. She noted that the Commissioner did not address the second, third and fourth of these cases in any detail, and that she had focussed instead upon the decision in *Weight Watchers.* The Irish cases, Costello J. felt, stated clearly that for mutuality of obligation to be present there must be an obligation to provide work on one party and an obligation to perform the work on another party.

161. Because of the attention paid to it by the Commissioner, Costello J. addressed the decision in *Weight Watchers* at length. Noting the statement of Briggs J. at para. 31 of his judgment to the effect that it was necessary that the requisite irreducible minimum of work-related obligation subsists throughout each relevant discrete contract, not merely during the potentially shorter period when

the contracted work is actually being done (which I have discussed at paras. 97-100 above), Costello J. felt that where *'the discrete contract is for a series of separate events the "relevant period" during which mutuality of obligation must subsist is the whole of the period of the discrete contract.'* Therefore, she said, even if there are a series of discrete contracts of the kind alleged by Revenue in this case, the irreducible minimum of mutual work-related obligations must subsist for each rostered period and mutuality of obligation must subsist throughout the whole of the rostered period, typically a week.

162. *Weight Watchers*, Costello J. reasoned, involved agreements that were quite different from that under consideration in this case because (a) the contract there placed the obligation on the Leader to conclude meeting specific contracts and required the approval of the company to the time, date and place of any meetings, there being no equivalent provisions in this case, (b) Briggs J. in *Weight Watchers* based his decision that there was the requisite *'mutuality'* on his construction of the substitution clause in the agreement in issue there, rather than on an express clause stating that the company was not obliged to offer any work such as clause 14 of the agreement between Karshan and the drivers, (c) that in contrast to the present case, a Leader did not have an unfettered right not to take a particular meeting so that there was an obligation on the Leader to work within the meaning of the mutuality test, (d) that Briggs J. found that there was a continuing obligation on a Leader to seek to find a suitably qualified replacement, there being no such obligation in the agreement under consideration here and (e) that the Leader's right to substitute was not an unfettered right and the right of substitution in relation to a particular meeting

did not absolve the Leader of the obligation to take the remainder of a series of meetings. Costello J. stressed that counsel for Revenue accepted that there was a want of mutuality of obligation in the overarching contracts (as opposed to the specific roster contracts) and that counsel for Revenue had accepted that even after a roster had been drawn up and an individual discrete contract arose between the driver and Karshan, the driver was not obliged to work at the time for which he was rostered.[11] Thus, Costello J. reasoned, the Commissioner had erred in her analysis and application of *Weight Watchers* to the contractual arrangements as found by her, and the High Court had erred in failing to identify this error.

163. Noting that there was no evidence before the Commissioner of any practice which was inconsistent with the terms of the written agreement, Costello J. said that the Commissioner had, save in respect of the three matters to which I have referred earlier in this judgment, accepted by implication that the individual contracts were governed by the terms of the written contract and made no findings that would have entitled her, or a court, to hold that the written agreement between the parties did not apply. That being so, she was of the view that the Commissioner had erred in her interpretation of clauses 12 and 14.

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[11] Counsel for Revenue in the course of his oral submissions before this court vigorously disputed that any such concession had been given, and each party referred to transcript extracts in support of their position. In circumstances where this issue falls to be determined by reference to the provisions of the agreement, I do not believe it necessary or appropriate for this court to embark upon an examination of whether such a concession was or was not given. Counsel for Karshan – properly and prudently – said in the course of his oral submissions that he was not holding Revenue to that position if they now wished to contend that it was wrong.

Costello J. specifically noted that, while clause 12 confers a right on a driver to engage a substitute driver should they become unavailable at short notice, they are not actually obliged to do so. She also stressed that clause 14 did not impose an obligation on the driver to work. She held that the Commissioner erred by interpreting this right as an obligation or requirement. In this way, Costello J. said, the Commissioner had failed to give full effect to the differences between the facts in this case and those in *Weight Watchers* and to have due regard to the actual agreement between the parties. A driver, Costello J. said, *'remained free at all times not to work, regardless of the rostering arrangements'* (at para. 81). She recorded counsel for Revenue as accepting that, notwithstanding the fact that an individual may be rostered to attend for a particular shift, the driver was under no obligation to *'turn up'*. If a driver was not obliged to work a rostered shift, the requirement that mutuality of obligation subsists for the duration of the individual discrete contracts cannot be satisfied. The implications, she said, of the absence of an obligation on a driver to work a particular rostered shift, or of any resulting sanction where the driver did not show up, were not correctly identified and/or considered by the Commissioner.

164. Specifically, Costello J. said that clause 14 required the driver to notify Karshan only if he were unavailable to undertake a previously agreed delivery: it did not, she said, require him to undertake the delivery absent good reason for not doing so. The notification requirement, she said, did not fetter the freedom of the driver not to work if he so chooses. Costello J. was also of the view that the Commissioner had misconstrued clause 12. Clause 12, she said, did not impose an obligation on a driver to engage a substitute driver should he become

unavailable at short notice, and did not restrict in any way his freedom not to make himself available for work.

165. Costello J. further said that insofar as the Commissioner had found that the reasoning in *Pimlico Plumbers* and *Autoclenz* to the effect that a clause which provides that the provider of work has no obligation to offer work and the putative recipient has no obligation to accept work does not mean that mutuality of obligation is absent, were of assistance to her analysis, she had reached a conclusion that was contrary to the Irish authorities – *Barry, Mansoor, McKayed* and *Brightwater*. In all of those cases, Costello J. said, it was stated that for mutuality of obligation to be present there must be an obligation to provide work on one party, and an obligation to perform the work on another party. Costello J. said that the failure of the Commissioner to consider these authorities in her analysis and her consequent misstatement of the law in Ireland as a result gave rise to an error by the Commissioner. The judge explained her position as follows, (at para. 84):

> *'In Barry, Edwards J. identified the relevant obligations as the obligation of the employer to provide work for the employee and the corresponding obligation on the employee to perform work for the employer. These are the obligations which are at issue in assessing mutuality of obligation.* ***They are not to be confused with the obligation to perform the work once undertaken and to pay for the work so undertaken****. Counsel for the appellant submitted that the test must be applied before the workers actually "do the work".* ***One must ascertain***

whether the employer has an obligation to provide work to the employee prior to actually reaching agreement to provide and to perform that work.'

(Emphasis added)

166. Before the Court of Appeal, counsel for Karshan had argued that the High Court erred in merely looking at the obligations between the parties as they arose at the moment when the driver turned up at the delivery depot and was assigned a particular delivery job, noting that at that point there was an obligation on the driver to do the work and upon Karshan to pay for that work. However, Costello J. agreed with counsel for Karshan when he said: '*these obligations were not the obligations that are necessary to satisfy the mutuality of obligation test in this context.'* If that were so, counsel had argued, every contract for services would be converted into an employment contract because even in a contract for services, each party assumed obligations to each other. Having expressed her agreement with the position as thus argued by counsel for Karshan she continued (at para. 85):

'The Commissioner did not address the question whether the appellant was obliged to provide work for the drivers under the individual contracts, nor make any findings in relation to this aspect of the working arrangements of the parties. This is an important omission as there must be an obligation on the putative employer to provide work, not merely

an obligation on the worker to perform the work (Mansoor; McKayed). There was no obligation on the appellant to utilise the services of a driver even if the driver offered to make himself available for work by completing the availability sheet for any particular week. The appellant was free to roster any driver it chose and to decline the offer of any individual driver to attend at any given time. The mutuality of obligation on the part of the appellant therefore depended upon the terms of the individual contracts created by the rostering of drivers for one or more shifts. It must apply for the duration of the individual contract and it was not sufficient if the obligations only applied during the shorter periods when the work offered was actually being performed…Despite these criticisms, I conclude, on the basis of Ó Culacháin, that there is evidence pointing towards one conclusion, and evidence pointing to the opposite; her implicit conclusion, that there was an obligation on the appellant to provide work under the individual contracts, is not one which no reasonable Commissioner could have arrived at and it is not possible to say that this point was based on a mistaken view of the law, and therefore her decision on this point ought not to be overturned.'

167. Costello J.'s conclusions in relation to the three other *'core'* issues can be dealt with more briefly. As regards the issue of substitution, she felt that the Commissioner had failed to recognise that the substitution clause in this case fell between the two categories identified in earlier authorities: the driver was permitted to engage a substitute, but the substitute was not a subcontractor of

the driver, instead performing a replacement contract directly with Karshan. As a result of the Commissioner's failure to properly construe clause 12, Costello J. said, her conclusion that the type of substitution clause in the contract in issue here was consistent with a contract of service, was flawed. That conclusion notwithstanding, Costello J. ultimately adopted the view that it had been open to the Commissioner to conclude, as she had, that the right of substitution as it operated in practice was more akin to a swapping of shifts between drivers.

168. Costello J. was also of the view that the Commissioner had *not* erred in her consideration of the integration test. Noting the decision in *In re Sunday Tribune*, and having regard to the decision of the Court of Appeal for England and Wales in *Independent Workers Union of Great Britain v. the Central Arbitration Committee and Roofoods Ltd. trading as Deliveroo* [2021] EWCA Civ. 952, Costello J. said that it was open to the Commissioner to have regard to the fact that the drivers did not simply deliver the pizzas on the equivalent of a commission basis and to the fact that they were provided with uniforms they were expected to wear, and that they were expected to place a temporary logo on their vehicles when making deliveries. In effect, she said, they had two roles – delivery of pizza and brand promotion. They entered into a separate agreement in relation to brand promotion and were paid separately for this service. It was, therefore, open to the Commissioner to conclude that the drivers were integrated into the business of the appellant even though it was possible to out-source a delivery business or to have genuinely independent contractors who wear branded uniforms.

169. In his forceful concurring judgment, Haughton J. identified the key issue as whether there was *'mutuality of obligation'* in the relationship between Karshan and the drivers, this being, he said, a *sine qua non* of the employment relationship. He, also, referred in this regard to the judgment of Edwards J. in *Barry*. Applying this requirement to the facts of the case, he said that *'at the heart of the issue is whether an individual contract with mutual obligations comes into being after a driver indicates availability for work and at the time Karshan places the driver on a roster of shifts, as contended for by* [Revenue]*.'*

170. He felt that the Commissioner and the High Court had erred in agreeing with Revenue's case on that issue. The error, he said, lay in giving inadequate weight to the plain meaning of contractually agreed written terms that were incorporated into each of the individual contracts of engagement and, Haughton J. concluded, the material findings of fact made by the Commissioner in relation to practice were not considered properly in context. Moreover, he said, both the Commissioner and the trial judge erred in their application of the reasoning of Briggs J. in *Weight Watchers* to the facts of this case.

171. In this regard, Haughton J. was of the view that, while the parties' characterisation of their relationship could not be determinative of the question, it would be wrong to ignore it entirely. Of greater importance, in his view, were other terms which demonstrated an intent to create an ongoing relationship which was not intended to involve mutuality of obligation. In this regard, Haughton J. attached particular significance to clauses 9, 11, 12 14 and 15 of the contract (at para. 24):

'Read together, and having regard to the Agreement as a whole, in my view these provisions mean that a Contractor 'signs up', but has no obligation to make himself or herself 'available' for work. They mean that Karshan may choose not to roster him/her for, or allocate, any delivery work at all – and the contractor has no remedy in law. In my view the plain and ordinary meaning of clause 14 goes further – even if a Contractor is rostered and turns up for work, Karshan is under no obligation to avail of his/her services – whether for delivery work or wearing company branded clothing. It means that the Contractor has the right to make himself available for work, and equally the right not to offer his/her name for any roster – this is a matter "of his own choosing", without obligation other than that of notification "in advance of his unavailability".'

172. Haughton J. observed that the question had arisen before the court was whether if a driver failed to turn up for a shift for no reason, or for no good reason, this would be a repudiatory breach of contract. He noted as follows (at para. 26):

'Counsel for the respondent accepted that a driver could fail to turn up for a shift for no reason, and that there would be no sanction, and a new contract would come into existence with the substitute driver. He also accepted that the umbrella Agreement could only be terminated in

accordance with clause 15, in which Karshan reserved to itself the right to terminate "forthwith".

173. From there, Haughton J. proceeded to identify the errors in the approach adopted by the Commissioner. He began with paragraphs 82 and 83 of the Commissioner's decision. There, she had found that the right of a driver to cancel a shift was qualified by the requirement to engage a substitute, to provide advance notification to Karshan and to work out the remainder of the shifts in the series which had been agreed. She then said that she agreed with the reasoning of Briggs J. in *Weight Watchers*, concluding that a contract which provides drivers with the right to cancel shifts at short notice does not relieve a driver of work-related obligations in the manner contended for by Karshan. Haughton J. expressed the view that this reasoning was *'unconvincing'*. First, the Commissioner made no finding that Karshan was obliged to provide work to drivers which, he said, was a key requirement of mutuality. Second, he said that it was not open to the Commissioner to conclude that rostering created a contractual obligation to turn up and render personal service. He explained this as follows (at para. 42):

'I do not consider that it necessarily follows that the moment a driver is rostered by the manager a discrete contract comes into being and the driver then has a legal obligation to work any shift, still less all of the shifts, for which they have been rostered, or that Karshan has the corresponding legal obligation to give them work on such shifts. Such

an inference in my view flies in in the face of the express wording in the Agreement, and the freedom that the contracting parties clearly intended to be conferred on drivers to work or not to work, and on Karshan to provide or not to provide work. In this respect I differ slightly from Costello J. and incline to the view that no reasonable Commissioner would have concluded on the basis of her finding on rostering that a contract with mutual obligation came into being at the moment the driver's name was placed on the roster.'

174. Moreover, Haughton J. reasoned, the Commissioner erred when she said that a driver cancelling a shift was subject to any *requirement* to engage a substitute. That, he said, was a misconstruction of clause 12. That clause, he said, imposed no such obligation, being merely permissive of substitution or swapping. He could not see, he said, how clause 12 or the Commissioner's findings in relation to its operation in practice could have the effect of creating discrete contracts with mutuality of obligation at the moment of rostering. The originally rostered driver remained free not to turn up for work.

175. Haughton J. also said that he found the drawing by the Commissioner of an analogy with *Weight Watchers 'unhelpful on a broader basis'.* Here, unlike in that case, the required *'mutuality of obligation'* applied only when the work was actually being undertaken. It did not apply during the extended period covered by the rosters. Haughton J. also said that the trial judge had erred when he stated that he was not persuaded that mutuality of obligation always required an

obligation to provide work and to complete that work on an ongoing basis as contended for by the applicant.

176. It should, finally, be noted that Haughton J. concluded his judgment by observing that the test of *'mutuality of obligation'* had undergone some refinement in the tribunals and courts of England and Wales, noting in particular the decision of Laing LJ in *PGMOL*. However, because Revenue had expressly agreed that *'mutuality of obligations'* was the *sine qua non* of an employment relationship, Haughton J. felt that it was not open to the court to decide the appeal on principles of mutuality of obligation as they had evolved in the United Kingdom and on the basis of arguments that were not pursued before the High Court or the Court of Appeal.

Whelan J.'s dissent

177. Whelan J.'s conclusions are helpfully summarised in the final part of her detailed judgment. She was of the view that:

(a) On a true construction of the facts in the light of the evidence before the Commissioner, the trial judge was entitled to find as regards the individual contracts that the Commissioner had been correct to conclude that there was an *'irreducible minimum'* of continuing mutual obligation which, when combined with control and integration and the operation of

substitution was sufficient to establish that the relationship between the parties constituted a contract of service.

(b) The Commissioner correctly analysed the inter-relationship arising in practice: to work as a driver it was necessary to sign the overarching contract. This offered the only gateway to an individual contract. Because the evidence was that all drivers signed the overarching agreement, it followed as a corollary that Karshan relied on the panel of drivers who had executed the overarching agreement as the sole source of supply of drivers for its pizza delivery business.

(c) The degree of control exercised by the company over the work done and the manner in which that work was undertaken by the drivers was significant and was indicative of integration of the drivers into the business enterprise in a manner consistent with the existence of a contract of service.

(d) The Commissioner had correctly analysed the inter-relationship in practice between the overarching contract and the individual contracts. To work as a driver, it was necessary to sign an overarching contract, and it followed that Karshan relied on the panel of drivers who had executed that contract as the sole source of supply of drivers for its pizza delivery business.

178. Some features of Whelan J.'s analysis are to be noted. In her view, the relative bargaining power of the parties in work related contracts pointed to the

conclusion that what had to be ascertained was, in its totality, 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'.* In a similar vein, she was of the view that the court had to look beyond the label imposed on the arrangement, particularly where one party has drafted the agreement, in order to evaluate whether, on its true construction that agreement accorded with the label so attached to it.

179. A significant part of Whelan J.'s judgment is occupied by a consideration of a series of errors alleged by Karshan to have been made by the trial judge in his approach to the issue of mutuality of obligation. Whelan J. was of the view that *'mutuality of obligation'* was never *'outcome-determinative as to status'*. The ongoing working or operational practice between the parties may, she said, demonstrate the necessary mutuality of obligation irrespective of the express terms of any written agreement between the parties. There was, she said, no authority that *'exact symmetry is essential to mutuality of work-related obligation.'* Referring to a number of decisions of the courts of England and Wales (*Secretary of State for Justice v. Windle* [2016] EWCA Civ. 459, *Quashie, McMeechan* and *Prater*) she said (at para. 56):

> *'That line of authority demonstrates that it is not necessary to find mutuality of obligation in the overarching contract provided it is located within the context of each single engagement entered into thereunder, and further: -*

(1) The question of whether a single engagement gives rise to a contract of employment is not resolved by a decision that the overarching contract does not give rise to a contract of employment.

(2) In particular, the fact that there is no obligation under the overarching contract to offer, or to do, work in the event that it is offered or indeed where there are to be found clauses expressly negating any such obligation is not in and of itself determinative that a single engagement cannot give rise to a contract of employment and the relationship of employer and employee.

(3) The nature of each contract is a distinct question to be examined and considered in light of the facts.

(4) A single engagement can give rise to a contract of employment if work which has in fact been offered is in fact carried out by the worker for payment.'

180. She concluded that the necessary mutuality of obligation had been clearly established. She stated that the roster, once agreed, obliged Karshan to engage the drivers for shifts and to pay them accordingly. She found that the freedom of a driver not to drive was not unfettered and only applied in exceptional circumstances where unavailability arose at short notice. She pointed out the unavailability for one shift would not terminate a driver's remaining shifts and

agreed with the High Court's and the Appeals Commissioner's conclusion that there was an obligation on the driver to trigger individual contracts.

181. Further, she specifically pointed to language from clause 14: *'The company does not warrant or represent that it will utilise the contractor's services at all'*, noting that there was no reciprocal provision that the drivers do not warrant or represent that they will work for the company at all. She stated (at para. 93):

> *'At Clause 14 the company "recognises the contractor's right to make himself available on only certain days and certain times of his own choosing". Hidden in plain sight within the delimiting language ("only certain days") of that clause is the implicit ongoing positive obligation of the driver to make himself available to drive on "certain days".'*

182. Thus, in her view, it could not be said that the driver had no obligation on foot of the reasonable construction of the overarching agreement to make himself available to drive. She noted the decision in *O'Kelly* where workers reserved the right not to work just as the company reserved the right not to engage them. She said that the present case contrasted with *O'Kelly*, and that if Karshan intended that drivers had no obligation to drive then clause 14 would have stated: *'[t]he driver does not warrant or represent that he will ever drive for the company at all'*, or such like.

183. Whelan J. also attached significance to the interpretation of the text of clause 14 in context. She stressed that there was no evidence that Karshan ever

operated clause 14 to withdraw work hours previously agreed under a roster created after a driver had indicated days of availability to drive. In practice, she said, the creation of individual contracts arose after the drivers submitted details of availability as required by clause 14, which enabled the creation and circulation of the rosters.

184. From there, Whelan J. proceeded to conduct a careful analysis of the authorities relating to the *'integration'* test, and the relationship between that test and the issue of control and *'enterprise'*. Referring to the decision in *In re Sunday Tribune* (upon which Karshan had relied in connection with this part of its case) Whelan J. held that that case *'contrasts starkly'* with the present case. She stated (at para. 146):

> *'In his judgment, the trial judge had regard to the material distinguishing element in the instant case from the facts in Sunday Tribune which Revenue had asserted, namely that in the Sunday Tribune case each of the reporters had different roles within the newspaper. By contrast, in this appeal the drivers were engaged under similar terms and conditions which fact, Revenue correctly contended, also supported the integration of the drivers.'*

185. Whelan J. referenced Denning LJ's decision in *Stevenson, Jordan and Harrison* and the *'integration'* test formulated there. While Whelan J. noted that this test was often considered vague and did not supplement the control test, as she felt was seemingly intended by Denning LJ, she held that it was met in the present

case: *'Drivers were integral to the company's day to day pizza delivery business. Delivery was its unique selling point. Without drivers its business model could not operate.'* (at para. 144).

186. Regarding control, Whelan J. explained the test in terms of whether *'there was a sufficient framework of control in light of the relationship between the parties'.* She identified a number of the features of the agreement when viewed in the light of the evidence: the operation of the rosters and weekly allocation of work which she described as *'a significant lever with which to influence the performance by drivers of their individual engagements'*; the fact that Karshan had control over the manner the drivers dressed, the time the drivers were there, the number and extent of deliveries the drivers were to undertake and particularities with regard to insurance in relation to vehicles; the fact that the terms of the agreement continued to operate for the duration of the entire week in question in circumstances where the driver had an obligation to prepare and create weekly invoices; the fact that the local branch was actively involved routinely in the preparation and filling out of such invoices; the fact that drivers when at the premises were, on the evidence, 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; and the limitations on the drivers arising under clause 11.

187. Finally, with regard to substitution, Whelan J. stressed that an entitlement or right of substitution confined to a circumstance where the driver was unable to carry out the work at short notice was consistent with personal performance.

The more limited a right of substitution, she said, the more consistent the contract is with the obligation for personal performance inherent in a contract of service. Moreover, the absence of the opportunity for profit by sub-contracting which is characteristic of being in business on one's own account supported, in her view, Revenue's case.

188. Thus, she was of the view that the tenor of clauses 12 and 14 implicitly spoke to the exceptionality of an exigency arising whereby a driver would become unavailable at short notice. Moreover, she concluded that a substitute could only be drawn from the company's panel or bank of drivers. In this context she reiterated her construction of the agreement viewed in the light of the evidence (at para. 175):

> *'once the drivers submitted their availability sheets and the rosters were furnished and circulated to them there was a binding individual contract between the parties and the ordinary rules of contract applied as between the drivers and the company. A gratuitous failure to turn up for work for a shift was a breach of contract. Whether or not a sanction would be imposed is wholly immaterial to the issue.'*

IV ANALYSIS

Karshan's theory of mutuality

189. I have observed earlier that the theory of '*mutuality of obligation'* urged by Karshan had four components:

(a) The mutual commitments in question had to present some type of continuity ('*ongoing'*);

(b) They had to have a forward looking element ('*extending into the future'*);

(c) There had to be an obligation on the part of the employer to '*provide'* work; and

(d) There had to be an obligation on the part of the employee to '*perform'* work.

190. These elements appear to have been originally intended as cumulative conditions (although on one view as the argument before this court developed, Karshan's case might have depended only on elements (b)-(d)). Obviously, there was some overlap. In particular, it was elements (a) and (b) that combined to generate what Karshan's written legal submissions envisaged as a key feature of its theory of mutuality – '*future stability'.* The obligation to provide work

((c)) was there because this was an important part of the forward looking and continuous feature of the relationship which, Karshan argued, was a legally mandated feature of an employment agreement. However, it is not possible to appraise Karshan's argument without addressing the correctness of its theory that '*mutuality of obligations'* required *all* of these elements. For this reason, the claim advanced by Karshan that the court cannot, by reason of the position adopted by Revenue before the Commissioner, go behind some of these component parts was misconceived.

191. Without a doubt, Revenue accepted that '*mutuality of obligation'* was a necessary feature of a contract of employment, and in arguing (at least before the Commissioner) that this requirement was met by the fact that the individual contracts arose when the driver agreed to be rostered, Revenue might well be said to have accepted that there was a requirement that the employer be under an obligation to offer work, that the worker agree to do it, and that there be some '*forward looking'* element to the agreement that extended beyond the immediate '*work/wage exchange'* that arose when the driver showed up to work their shift. However, while it appears from the judgments of Costello and Haughton JJ. in the Court of Appeal that Revenue accepted that the formulation of mutuality of obligation suggested by Edwards J. in *Barry* represented the law, it is not apparent that Revenue accepted that there had to be a requirement of '*future stability'* suggested by the word '*ongoing´* in Karshan's formulation of mutuality (these, in fact, not being directly referenced by Edwards J. at all: the term '*ongoing'* appeared in his judgment only in his description of the EAT decision). It is not possible for this court to analyse the theory of mutuality

advanced by Karshan without interrogating the composite proposition it presented in its entirety and by reference to *all* its suggested constituent elements. The theory cannot be unscrambled: Kashan's formulation of mutuality was either right or wrong, and it is not feasible to decide which it is on the untested assumption that some parts of it were well placed. That is, of course, aside from the consideration that the issue presented in this appeal is one of considerable importance to those involved in the provision of a range of services in our economy, and indeed to those who hire them. The court made it clear to the parties that they wished the issue argued in full and by reference to all relevant authority, which it was.

192. This has resulted in my parting company from the majority of the Court of Appeal on some matters that, had the legal issues in this case been argued differently by Revenue from the outset, might have not have been resolved as they were by that court. In particular, I note that it is said in the Court of Appeal judgments that before that court, Revenue did not make as the focus of its argument the approach adopted by the English courts in their more recent case law and that Revenue appears to have adopted as correct the legal analysis in the Irish cases identified in Karshan's legal submissions (being all decisions of the High Court).[12] Leaving aside, however, the systemic importance of this issue, the reality is that cases present themselves in which the failure of a party

[12] Obviously (if at first glance counter-intuitively) if the Commissioner applied High Court authority that was wrong, the Commissioner erred in law – even if she was bound to apply these cases (*The People (Director of Public Prosecutions) v. JC* [2015] IESC 31, [2017] 1 IR 417).

to raise an issue of law, or its decision to concede a legal argument, or for that matter its failure to argue an issue before a statutory tribunal or lower court, leave this court with the unattractive choice between deciding the case on a legal assumption it suspects may be false, or conducting a full and proper analysis of the legal question it must resolve without the benefit of earlier consideration by the High Court or Court of Appeal. Where proposition B depends on a conceded proposition, A, it may not be possible to properly scrutinise proposition B without first determining the correctness of proposition A, and in that situation the court must be entitled to require argument as to proposition A (see for an example *Ulster Bank v. McDonagh* [2022] IECA 87). This was such a case.

The requirement of continuity

193. The argument as to continuity 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. This was the centrepiece of Karshan's case, and if it were well-founded (and on the assumption that the overarching contract was found by the court to have in fact governed the legal relationship between the parties), there could be no contract of employment: clause 14 of the overarching contract made it clear that Karshan was under no obligation to provide the drivers with work. This proposition was based on a single paragraph in the judgment of

Edwards J. in *Barry*, as subsequently developed in the decisions of the High Court in *Mansoor* and *McKayed*. It was, however the first time the issue had arisen before the Court of Appeal.

194. That said, a close examination of the authorities shows that in *Barry*, Edwards J. never actually found that there had to be any ongoing obligation to offer work of a kind that would ensure '*future stability'*. If that assumption can be implied into his comments, then that was because he was concerned with a case in which the entitlement of the claimant to the relief he sought was dependent upon continuous employment of some form. Edwards J. was not purporting to describe the requisite elements of a series of distinct contracts of employment. As the cases show, when it comes to the different question of whether there is continuous employment for a period of time, the fact that there is an *'overarching'* or *'umbrella'* contract may indeed be important if that contract can itself be categorised as a contract of service. In that context the question of whether there is an obligation to offer and/or accept work may be relevant in ascertaining whether there is a period of time during which the worker is not actually working or being paid, but in which they are nonetheless *'employees'*. That, however, is not the question here. The only question here is whether during those periods for which they were rostered and/or paid remuneration by Karshan, the drivers were employees.

195. Moreover, the suggestion that a contract of employment demanded ongoing obligations of this kind was ahistorical. As evident from my earlier review the notion of *'mutuality of obligation'* in the sense thus contended by Karshan,

appears nowhere in over a century of case law. 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, but – until the 1980s – without any reference to *'mutuality of obligation'* in the sense in which Karshan uses that term. Even while acknowledging that many of these cases arose from specific statutory provisions and in particular legal contexts, the experience of over a century of applying tests of control and thereafter in also considering the assumption and distribution of commercial risk suggests that there is no particular reason why these elements should not, in their own terms, provide a structure within which cases such as the present can be resolved.

196. The decision in *Market Investigations* as followed and applied in *Henry Denny* made it clear that even in more modern conditions there was no such requirement. As I have earlier noted, in *Market Investigations* the argument was made that the fact that there was no ongoing obligation to provide or to accept work, was inconsistent with a contract of employment. However, the court found that the interviewers *were* employees working under a series of contracts of service : Cooke J. made it clear in his judgment that this factor could not be considered in isolation and was a matter to be addressed in the context of whether the interviewer was in business on her own account (at pp. 187-188). The point, as I have also noted earlier, was also made in *Henry Denny* where,

similarly, there was no such obligation and, as the outcome of the case shows, an employment relationship was found.

197. *Henry Denny* it must again be said is a particularly striking example of this, because there 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). While in the course of his submissions counsel for Karshan sought to contend that *Henry Denny* was decided as it was because the long-term nature of the relationship between the employer and SM was such as to give rise to an implied term arising from a course of dealing that there were obligations of this kind, not merely does that analysis not appear in the judgment but the court specifically proceeded on the basis that the demonstrator could present herself for work and receive in return neither work nor payment. This aspect of Karshan's case was not consistent with the decision of this court in *Henry Denny*.

198. Given that *'mutuality of obligation'* originated in English law, the decision that there was a novel requirement of the kind urged by Karshan in this case merited some consideration of the origins of that principle and an understanding of how it subsequently developed in that jurisdiction. As I have detailed earlier, the *Airfix* case 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 it did not decide that it was dispositive of whether a contract of employment existed. In fact, the judgment of Slynn J. was cautious about the requirement – he said of a case in which there was no obligation to

provide work that *'it may well be that this is not properly to be categorised as a contract of employment'* (at p. 1214 B-C). He also implied that persons in the position of the outworkers could be operating under a series of separate contracts of service without suggesting at all that the absence of an obligation to offer or do work precluded this (see p. 1214 D-E).

199. In *O'Kelly*, the judgment of Donaldson MR proceeds on the basis that there could have been individual contracts of employment arising in relation to each specific engagement of the *'regulars'* even though there was no mutuality in the umbrella contract (see [1983] ICR 728 at p. 764B). At no point in any of the judgments in that case is it stated that there is a requirement before a contract of employment could arise from a single engagement that the employer be under an ongoing obligation to provide work other than while the job was being done. If 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, and any observations that so imply are properly viewed as addressing themselves to the issue of whether there was an employment contract in the period(s) between individual engagements. 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 contract of employment, but the decisions in *McMeechan* and *Prater* show that this is emphatically not the case in that jurisdiction today. Irrespective of whether the later English cases had been relied upon before the Commissioner, the Court of Appeal was fully entitled to have regard to all legal

authorities it felt relevant to the viability of the theory of '*mutuality of obligation'* for which Karshan contended.

200. This was important, as it inevitably followed from Karshan's argument, were it correct, that it would not be possible for a single stint without a promise of further work to give rise to an employment contract and, indeed, as I have noted, counsel for Karshan in the course of oral argument asserted that this was, indeed, the position in Irish law. That conclusion can only be true if the decision of the High Court in *Barry* completely and fundamentally changed the law in this jurisdiction, and if *Market Investigations* was wrongly decided. Any such conclusion would require some explanation for the slew of older authorities to which I have referred earlier in this judgment. [13]

201. Putting the authorities to one side, I find it difficult to identify any reason in theory or practice *why* there should be a requirement of this kind before an agreement can be characterised as a contract of employment. To begin with, it seems to me that there are strong reasons of policy for not imposing as an invariable precondition to the existence of a contract of employment a requirement of ongoing obligations of the kind contended for. If applied as a

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[13] Most strikingly, the decision in *O'Donnell v. Clare County Council* to which I have referred earlier in the body of the judgment, where a labourer employed for a day was found by the former Court of Appeal to be a worker: '*if he went for a day and got work he was bound to work for that day. He was a casual labourer for that day'*. The case is considered by Mr. Conlon SC in his comprehensive and impressive examination of the status of '*mutuality of obligation'* in Irish law (*Mutuality of Obligation Before the Irish Courts* (2014) 11(2) IELJ 44: he says of *O'Donnell* '*[t]hat a casual worker may be working under an individual short-term contract is clear from a case which was decided long before the jargon of "mutuality" came into vogue'*.

hard rule, 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. The central point made by Karshan in response – that if the requirement of mutuality as it defines it was not present the distinction between contracts of service and contracts for services would dissolve – was not, I think, well placed. The test, Mr. Collins SC strongly argued, was necessary to exclude from the scope of employment the plumber or taxi driver. But I do not see how *'mutuality of obligation'* is needed to address such cases, and I cannot accept that not to impose such a requirement will elide the difference between contracts of service and contracts for services. Even if the plumber or taxi driver providing occasional services to one of a number of customers as part of their own trade is for some periods of time under the control of an individual employer, they are clearly persons doing business on their own account. That is the rubric within which the merits of any case involving such persons should be resolved. The law has long recognised and implemented that distinction without needing to resort to this additional, mandatory requirement.

The 'forward looking' element

202. There was also a certain tension in this aspect of Karshan's case. While arguing on the one hand that it was necessary that there be some ongoing obligation to provide work (and from there contending that the overarching contract prevented such an obligation from arising), Karshan at the same time accepted

in the course of oral argument that *if* there was a legally binding obligation on the part of the employer to provide work to the drivers when the drivers were put on the roster, that this would suffice. At first glance, that position suggests that a single roster (usually it seemed covering a week or so) could comprise an employment contract *provided* the agreement to provide the work and to do it (neither of which Karshan said arose where there was rostering) predated the engagement. It was put by Costello J. in terms of a requirement to '*ascertain whether the employer has an obligation to provide work to the employee prior to actually reaching agreement to provide and to perform that work.'*

203. Whether or not that position was consistent with the requirement of '*future stability'* (and for my part I do not see how it could have been) this argument presented an issue of definition that was never resolved in argument: obviously in any executory contract the agreement predates its execution, but Karshan's case demanded some distance between the two. How far into the '*future'* these '*future'* obligations had to extend was not clear: the way counsel for Karshan put it was that there had to be '*enough of a commitment on both sides to some future obligations to each other in terms of offering and accepting work',* what was '*enough'* depending on the facts.

204. As a practical matter, the situations in which a worker turns up at an employer's premises, agrees to do a job in return for payment and then starts it, but is nonetheless acting as an employee for this one-off engagement, will be rare (although the older cases show that this can in theory occur). When that is how the work/wage agreement is made, the *ad hoc* nature of the engagement would

strongly suggest that the worker was engaged as an independent contractor. However, where there was an overarching agreement of the kind in issue here, the employment would not be quite so transitory or impermanent, at least if preceded by even a non-binding indication that the worker would turn up at the appointed time. To that extent there was perhaps more emphasis placed in this case by Revenue on establishing that the rostering arrangements gave rise to a contract than was necessary, at least insofar as the concept of mutuality was concerned. It should be said that before this court Revenue also sought to argue that there was sufficient mutuality in the performance of the work and payment, irrespective of whether the roster gave rise to an agreement, but it is not clear that this was the case made to the Commissioner. Whether or not it was, it is hard to see how this court could itself decide whether this was sufficient to give rise to a contract of employment in the absence of relevant findings by the Commissioner.

205. I should also note that counsel for Karshan further suggested that not only was there no obligation on the drivers to present for work having agreed so to do, but that even if they did attend, they were under no contractual obligation to actually see out their shift: a driver, it was said, who was rostered for four hours could without breaking their contract leave after an hour, Karshan being obliged to pay the brand/promotion fee for whatever period the driver chose to spend at its premises. In point of fact, at some stages in the oral argument this proposition took counsel to the verge of suggesting that there was no contract in place at all – at least until a specific delivery job had been allocated, at which point the drivers had a right to be paid for that work. It is, similarly, not

necessary to decide this issue here having regard to the conclusions I have reached in relation to rostering.

The obligation to provide work

206. It cannot be disputed that a contract of employment can only arise where the putative employee agrees to provide their own work and skill to the employer. However, the contention that there could only be a contract of employment if the employer agrees to provide the employee with work is misplaced. This was proposed as part of the test urged by Karshan because it was necessary to the theory of ongoing and future obligations for which it contended. The argument led it to take issue with the apparent implications of an aspect of a suggestion by the majority of the Court of Appeal (on this point, Costello and Whelan JJ.) that when the worker did honour the rostering arrangement and attend at Karshan's premises, the Commissioner was entitled to conclude that Karshan was under a legal obligation to pay the drivers the brand/promotion fee. That obligation, Karshan said, could not give rise to a contract of employment because it was not an obligation to provide work to the drivers (in the form of deliveries), and this was what was required before there could be a contract of employment. At the same time, however, the distinction between an ongoing obligation on the employer to provide work and other forms of consideration moving from the employer was important to the conclusion of the majority in the Court of Appeal: it was because the employer had to have *previously* promised work that there was insufficient mutuality where he simply gave work,

or promised to do so for the duration of a shift, and was paid for it when it was done.

207. But this was not correct. This argument, also, depended on an atomisation of a statement appearing in the judgment of Edwards J. in *Barry* without regard to its context or the pre-existing (or for that matter, subsequent) case law. Whatever about the requirement that there be such a promise as part of an overarching contract, it is well established that the consideration for an employment contract moving from the employer may be a promise of work, or it may be payment for work done, or indeed payment for being available to do work if it had to be done. It has been clear since the decision in *Turner v. Sawdon* [1901] 2 KB 653 that the obligation of an employer may be to pay, not to provide work. *Turner v. Sawdon* was not referred to in *Carmichael* but the formulation there reflects what MacKenna J. said in *RMC* and, indeed, the judgment of Stephenson LJ in *Nethermere* (who did refer to the former decision) proceeds on the basis that it is the *RMC* formulation, not an invariable obligation to provide work, that defines the employer's obligation. The law is now clear that when it comes to the consideration subtending a contract of employment (as Slade LJ said of a global contract in *Clark v. Oxfordshire Health Authority* [1998] IRLR 125 at para. 27) '*an obligation by the one party to accept and do work if offered and obligation on the other party to pay a retainer during such periods as work was not offered would … be likely to suffice*'. It was put clearly in another one of the English cases: 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 (see *Cotswold*

Developments Construction Ltd. v. Williams [2006] IRLR 181 at para. 49). Indeed, in *Forstaff Pty Ltd v. Chief Commissioner of State Revenue* [2004] NSWSC 573 (at para. 90) McDougall J. (having made the points I have just observed) corrected the definition of '*mutuality of obligation'* posited in *Carmichael*, in the following terms:

> '*the "irreducible minimum of mutual obligation necessary to create a contract of service" to which Lord Irvine referred should be expressed, not as an obligation on the one side to provide and on the other to perform work, but as an obligation on the one side to perform work (or provide service) and on the other side to pay.'*

208. All that is required is that the consideration be such as to involve in some way the provision of or payment for work that must be personally done by the worker thereby locating the agreement in what was described by Elias J. in *James v. Greenwich LBC* [2007] ICR 577 at p. 581-582 as '*the employment field'*. Once in that field it is not necessarily a contract of employment – this depends on other factors to which I will return – but it is *capable* of being such a contract. It followed that – irrespective of whether Karshan was required to give the drivers delivery work – if it had agreed to pay them when they attended at its premises and were thus available to do work, the contract was *capable* of being an employment contract. There was no requirement for any additional '*mutuality'*.

'Mutuality of obligation': conclusions

209. For these reasons, I have concluded that O'Connor J. was correct when he said that it was not a *sine qua non* of an employment contract that it impose an obligation to provide work and to complete that work on an ongoing basis in the manner contended for by Karshan. The argument depended on layering a new pre-requisite onto the employer/employee relationship which is unsupported by authority and for which there is no principled justification.

210. 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 consequence has been to assume that the '*mutual obligations'* that subtend a contract of employment are in all cases necessarily and categorically different from those that underlie a relationship of employer and independent contractor. This is the fundamental error in Karshan's legal analysis.

211. There will, of course, be contracts of employment that, when viewed in the light of all relevant factors, involve consideration that is not consistent with a worker

being an independent contractor. But the confounding effect of the term '*mutuality of obligation'* has been to give rise to an assumption that this must always be so. That is not the case. There will be situations in which the consideration in a contract of service (work in return for pay) will be the same as it is for a contract for services. Indeed, there will be contracts for services in which the employer promises a continuous engagement over a period of time. The point at which one of these falls to be distinguished from the other is provided by the third limb of the *RMC* test, not the first. It is thus 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.

212. While I am conscious that the United Kingdom Supreme Court has yet to deliver judgment in *PGMOL*, insofar as the law in this jurisdiction is concerned, the terrain occupied by the term '*mutual obligations'* reflects that suggested in the decisions in, in particular, *McMeechan* and *Prater* and can be best summarised as follows:

(a) Where the term *'mutuality of obligation'* appears in earlier cases it should be viewed as a reasonable description of the *'wage/work'* bargain referenced in the first limb of the *RMC* test. The phrase should be viewed as doing no more than describing the consideration that has to be present before a working arrangement is capable of being categorised as an employment contract.

(b) That consideration need not always include a promise of work moving from the employer, it need not involve an ongoing or continuous obligation of the kind contended for Karshan and the forward looking element of such an agreement can, as with any executory contract, at least in theory be more or less contemporaneous with the commencement of the work.

(c) For as long as a worker is actually undertaking work for which the employer is liable to pay them, there is consideration that may be characteristic of an employment contract: a single engagement can give rise to a contract of employment if work which has in fact been offered is in fact done for payment, and a contract which provides merely that a worker will be paid for such work as they perform is capable of being a contract of service.

(d) 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 or an independent contractor. That right and obligation are a common feature of employer/employee relationships and afford the certainty and commitment that both parties to such an agreement might often expect. A worker who has no such right and obligation might well be said not to be under the control of the employer in the same way as one who has, and to be assuming a risk of non-employment that makes them appear

more like an independent contractor. It is not, however, a *sine qua non* of such a relationship.

(e) When it comes to the distinct question of whether there is continuous employment for a period of time, the fact that there is an *'overarching'* or *'umbrella'* contract may indeed be important if that contract can itself be categorised as a contract of service. In that regard, of course, the question of whether there is an obligation to offer and/or accept work may be relevant in ascertaining whether there is a period of time during which the worker is not actually working or being paid, but in which they are nonetheless *'employees'* over an extended time. The question of what that consideration *must* entail or of whether it is possible for an overarching contract to constitute an employment contract without mutual promises of this kind will have to await a case in which that issue properly arises. It should only be considered in the light of a specific case having regard to the actual agreement between the parties, and the terms of the legislative provisions pursuant to which the issue arises.

The 'test'

213. In the light of that conclusion, it is necessary in addressing the correctness of the Commissioner's ultimate decision to say something about the overall approach that should be adopted to the identification of an employment contract.

Apart from the issue of mutuality, there was little dispute between the parties around this: the method I examine here is well trodden.

214. While many '*tests*' have been formulated around the elements of an employment relationship, they all lead directly or indirectly to two closely related (and somewhat unremarkable) conclusions – first, that every case depends on the particular facts, and second that in distinguishing an arrangement that is a contract of employment from one that is not, it is necessary to assess all relevant features of that relationship, identifying those that are, and those that are not, consistent with an employment contract, and determining based upon the sum of those parts the correct characterisation. The role of the various tests is thus, ultimately, not as much to condition the content of that '*multi-factorial'* analysis (although of course as the law has developed various important and helpful indicia that are, and are not, consistent with an employment contract have been identified in the cases) as it is to formulate a workable structure within which that analysis can be conducted while, at the same time, enabling the early elimination of those arrangements that do not present the legally required minimum contents of such a contract.

215. It is, I think, partly for this reason that it is sometimes said that the law does not, as such, prescribe any '*test'*, instead identifying in a general way factors that will usually be relevant to the inquiry. While not much turns on it, throughout this judgment I refer to these approaches as *'tests'*, in the sense that they describe either specific criteria that are indicia of a contract of employment, or a set of ordered steps which, if followed, will afford a method for answering the

underlying question of whether a person is or is not an employee. While in many cases decision makers will always end up at the same point – looking at all relevant factors – I think the prescription of a method should at least assist in obtaining uniformity of approach, in both clearly identifying and removing from the inquiry at an early stage those situations which, in law, are incapable of amounting to a contract of employment and in describing the '*pointers'* that suggest one way or another whether an arrangement between worker and employer should be viewed as consistent, or inconsistent, with the status of employment.

216. In seeking to retrieve from the warehouse of cases that have developed around this issue over the past half a century a test in this sense that is clear, workable and yet sufficiently flexible, I see no reason not to work from the framework posited by MacKenna J. in *RMC* and developed by Cooke J. in *Market Investigations.* This was, essentially, what the Commissioner did here. It follows from my earlier analysis, and as I explain further below, that at this point in time these decisions reflect the law in this jurisdiction, they have been widely applied and are reasonably well understood: as Whelan J. said in the course of her judgment, the *RMC* test '*has demonstrated its resilience and has withstood the test of time because of its inherent flexibility and overall applicability to a significant variety of scenarios …'* .

217. However, neither decision should be construed as if a statute, and both fall to be adjusted to reflect experience since they were formulated. I outline below how they should now be understood. In particular, it appears to me that the manner

in which the phrase '*mutuality of obligation'* has become embedded in the case law in Ireland requires that the elements of the test be shortly explained to avoid any future ambiguity as to what is, and what is not, required before a contract of employment can, as a matter of law, arise.

218. The *RMC* test is quoted earlier, but it is convenient to repeat it here :

1. *'The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.*

2. *He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other his master*

3. *The other provisions of the contract are consistent with its being a contract of service.'*

219. These elements can be usefully adjusted in the manner that follows.

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

220. This is simply a restatement of the first limb of the *RMC* test, but noting some of the submissions made in this case, it is helpful to separate out the requirement of personal service so as to make clear that it is a *requirement* and not merely a factor to be put into the mix. Having regard to the fact that this limb seems to have been viewed at least by some as the origin of '*mutuality of obligation'* it is necessary to say something about what this does, and does not, entail.

221. It goes without saying that the first question a decision maker must broach when determining if the parties have entered into an employment contract, is whether they have entered into a contract at all. Arrangements lacking an intention to create legal relations (as may be the case in what are truly casual or domestic agreements) and/or which are unsupported by consideration (as may be the case with volunteers) will be immediately out-ruled. In the course of that process, it will be necessary to determine what, precisely, the terms of the alleged contract are, and whether they derive from written agreement, oral agreement, are express, implied, or fall to be inferred from a course of conduct. There will, in some circumstances, be an issue of characterisation that this case shows can be important: is the contract a regular wage for work bargain with ongoing obligations to pay and work, is it a series of employment agreements governing the discharge of particular tasks, is it an agreement to complete one identified task, is it an ongoing agreement defined by an *'umbrella'* contract, is it some combination of the foregoing and, indeed, is the agreement one for the exchange of labour for pay at all? In some cases involving a so-called triangular relationship, it may be necessary to very specifically identify which obligations are owed by which party to another.

222. Central to each such exercise will be the identification of the consideration. That consideration will determine if the agreement is capable in law of being an employment contract. That was the purpose of the first limb of the *RMC* test, as evident from the manner in which it was subsequently explained in the judgment (*'[t]here must be a wage or other remuneration … [o]therwise there will be no consideration and without consideration no contract of any kind'*). An agreement that is *capable* of being a contract of employment may eventually prove to be a contract for services when all relevant circumstances are taken into account. 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. That promise may be one to work at defined points into the future, it may be to work if called upon to do so, or it may be to work starting more or less contemporaneously with the agreement itself. It may be to work continuously, or over an undefined period as called upon, or for a defined period(s), or for the purposes of completing a specific task(s).

223. 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. These may, but need not necessarily, involve an ongoing or continuous obligation into the future to provide work. They can fairly be described as '*mutual obligations'* but, for the reasons to which I have referred, it seems better to simply describe the core requirement by reference to the exchange of wage or other remuneration for work.

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

224. The second precondition to the existence of an employment contract is that the worker have agreed to provide their services to the employer personally. This is more than just a matter to be '*taken into account',* as the decision maker has to make a judgement having regard to the terms of the agreement and the facts as to whether the agreement is, 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 (*RMC* at p. 515). It was expressed in *Weight Watchers* (at para. 37) in the terms that where a provision in an agreement between the employer and the worker is, when purposively construed in the context of the contract as a whole, so wide as to permit, without breach of contract, the worker to decide never personally to do work at all, there was no agreement for personal service and, thus, no contract of employment. Clearly, as the instant case shows, where the contract of employment is an individual assignment governed in part by an umbrella agreement, this means that the worker cannot *both* accept an offer of work in accordance with the umbrella contract, and then be permitted to unconditionally delegate it.

225. Substitution clauses which impose substantive restrictions on the circumstances in which a worker can delegate the obligations they have assumed will thus not be inconsistent with employment status. As I explain shortly, an issue presents itself in this regard as to whether the tribunal is entitled to look at how the parties actually operated such clauses as well as what the clauses in terms provide.

226. The decision maker must decide on which side of the dividing line the facts in a given case fall. In that regard, the decision of Etherton MR in *Pimlico Plumbers Ltd. v. Smith* [2017] EWCA Civ. 51 (at para. 84) provides useful guidance. An unfettered right to substitute is inconsistent with an undertaking to provide the worker's services personally. A conditional right to substitute may or may not be inconsistent with personal performance depending on the conditionality, and in particular on the nature and degree of any fetter: a limited and occasional right will point to personal service. A right of substitution available only where the worker is unable to carry out the work is consistent with personal performance. A right of substitution limited only by the need to show that the substitute is qualified to do the work is not consistent with personal service, while a right only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance. But, in every case it is necessary to decide if the agreement is just one for personal services, whether it is an agreement for personal services with a conditional capacity for delegation, or whether it is an agreement that enables such unconditional delegation that it is not a contract for personal services at all.

Control

227. Third, the next limb of the *RMC* test requires that the agreement present the requisite degree of control. While the meaning of '*control'* has, as I have explained earlier, evolved, this long established feature of the Irish cases has never been questioned, and indeed Walsh J. in *Roche v. Patrick Kelly and Co. Ltd.* [1969] IR 100 at p. 108 (with whose judgment Ó Dálaigh CJ and Haugh, Budd and FitzGerald JJ. agreed) authoritatively restated it:

> *'[w]hile many ingredients may be present in the relationship of master and servant, it is undoubtedly true that the principal one, and almost invariably the determining one, is the fact of the master's right to direct the servant not merely as to what is to be done but as to how it is to be done. The fact that the master does not exercise that right, as distinct from possessing it, is of no weight if he has the right.'*

228. The need for this element has not been diminished, nor has the *RMC* test been supplanted, by a *'business on his or her own account'* test as a result of the decision in *Henry Denny*. In that case, the court focussed on whether the demonstrator was conducting her own business or that of the respondent because it was clear that there *was* sufficient control, this being shown in particular by the fact and terms of the circular letter from the appellant referenced in the judgment which provided, as Keane J. records, *'detailed instructions'* as to how

the demonstrators should do their job. The focus there upon whether the demonstrator was in business on her own account obviously arose from the language used by Cooke J. in *Market Investigations*, but as I have earlier stressed the passage from the judgment of Cooke J. in that case quoted by Keane J. (at p. 49-50 of the report) included the statement *'control will no doubt always have to be considered'* and, more importantly, the actual analysis adopted in *Market Investigations* mirrored that in *RMC*.

229. Moreover, the decision in *Graham*, cited by Keane J. as supporting his view that the *'essential test'* was whether the person alleged to be a '*servant*' was in fact working for himself or for another person was one in which the requirement of control was plainly assumed by all judges: Fitzgibbon J. referred to the *'power of dismissal or control of the alleged servant'* as a suggested *criteria* of the existence of the relationship (at p. 162) (although he thought the power of *dismissal* was not a true test in that case), Murnaghan J. spoke of the presumption that a skilled worker *'is not under the control of the other so as to be his servant'* (at p. 165), while Kennedy CJ in his dissent observed that control, while not sufficient, was *'the most usual test'* (at p. 159). What all of these statements show is so obvious that it is rarely stated (although it was alluded to by both MacKenna J. in *RMC* and by Barron J. in *McDermott v. Loy*): the issue of whether a person is in business on their own account is relevant to the question of control, because the degree of control exercised by the employer over a person in business on their own account will, by definition, be less than that exercised over an employee.

230. That understanding is more recently reflected in the judgment of Clarke CJ in *Minister for Education and Skills v. The Labour Court and ors.* [2018] IESC 52 at paras. 9.12- 9.13, [2019] 2 IR 529 at paras. 101-102 who, referring to a '*contract of service'* observed:

> '*Its most important function, as a formal legal term, is to distinguish such arrangements from a so-called "contract for services" where an independent contractor agrees to provide services but not with the degree of control over the way in which they are to work which applies in the case of a contract of service.*
>
> *The ordinary meaning of the term "contract of service" implies an arrangement whereby one party agrees to work for the other and, subject to the terms of the contract, under the control of that person as to how they carry out their work.'*

231. Clarke CJ returned to this question in the context of the requirements to be imposed before an employer will be rendered liable for the torts of another, in *Morrissey v. HSE* [2020] IESC 6 at para. 12.13:

> *'Obviously, employers not only identify the work which employees are to do but also exercise a significant degree of control over how it is to be done. However, the extent to which actual control, as opposed to a theoretical entitlement to control, may be exercised in practice may vary greatly from employment to employment. This will particularly be the*

case where an employee possesses a particular skill or expertise which may not be shared by those who manage the affairs of the employer … The reality of the employer exercising any real degree of control over how the work is to be carried out in such a case may be highly theoretical. Thus, just like an overly-technical reliance on the legal basis for the relationship between the parties may present an unduly narrow focus, so also a complete emphasis on control may not provide a satisfactory answer either.'

232. The second limb of the *RMC* test (as, indeed, with the third limb of that test) has to it a certain question-begging circularity. It is properly understood as prescribing a gateway, requiring a legally minimum level of control before a relationship is found capable of constituting an employment contract, but the control arising at this point of the inquiry does not itself determine the issue of employment. What this '*legally minimum'* element of control is, will depend on the nature of the employment, and in some cases it may indeed prove to be a wide gateway. It is well and clearly expressed by MacKenna J. in *RMC*: the control involves a lawful authority to command '*so far as there is scope for it'* (at p. 515). The question is thus directed to 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 (see *Montgomery v. Johnson Underwood Ltd.* [2001] EWCA Civ. 318, [2001] IRLR 269 at para. 19). The same point was made by Walsh J. in *Roche v. Patrick Kelly and Co. Ltd*.

233. In other words, 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.

234. But, if the putative employer does not enjoy the power to direct the type of work the worker is required to do, the relationship will not be capable of constituting an employment relationship (*Minister for Education v. The Labour Court and ors.* at para. 9.13, and para. 102 of the reported judgment). Similarly if the service is provided to a person who has no entitlement to prescribe times by which the work is to be done, no power to determine where or in what conditions the work is to be done or, within an enterprise, the persons who were to do particular work, it is difficult to see how this requirement could be met. While in cases involving skilled work, it is to be expected that the employer will not have the right to direct *how* the work is to be done, the test requires that the employer retain some residual authority over it. An analysis of the cases suggests that experienced fact finders have had little difficulty in distinguishing those cases which present this minimum level of control, from those that do not.

All the circumstances of the employment

235. An examination of the authorities – in this jurisdiction and elsewhere – discloses various debates around the import of the third limb of the *RMC* case. It has been suggested that if the first and second limbs are established, there is an onus on the person disputing that the contract is one of employment, to establish this. It has been said that control is not a proper matter to be taken into account at this stage, that inquiry having been exhausted at the second. There has been a debate about whether the limb is concerned with identifying factors that are consistent with a contract of employment, or factors that are inconsistent with such a contract. As I have noted earlier, there are questions around how the '*enterprise'* test, or the '*integration'* test, fit into this and as to whether one or other of these now defines the '*essential test'*.

236. In this regard, 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.

237. To that end, the third stage of the *RMC* test should be reframed as follows:

> *'Are 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, 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'.*

238. This formulation seeks to make four matters clear, having regard to the case law in this jurisdiction since *RMC*. First, while *RMC* looked to '*the provisions of the contract',* the decision in *Castleisland* establishes that the contract itself must be interpreted (as, today, with all contracts) in the light of the factual matrix in which it was concluded. There is nothing new in that regard in Irish law, but insofar as the RMC test does not make this clear, it should be expressly stated.

239. Second, both *Henry Denny* and *Castleisland* demand that in conducting that inquiry, the court must take into account the actual dealings between the parties. Keane J. thus referred in the first of these cases to the relevance of '*the manner in which the work was done'*, Murphy J. to '*the facts or realities of the situation on the ground'* and (in *Castleisland*) Geoghegan J. stressed that the Appeals Officer whose decision was in issue in that case, was bound to examine '*what the real arrangement on a day to day basis between the parties was'*.

240. There can be no dispute around some consequences of these statements. They mean that where an agreement purports to characterise the relationship between or the status of the parties, that description does not fetter the function of the court in determining what, as a matter of law, the agreement actually is. There is nothing particularly unusual about this – there have many been instances (to take one example) of cases where the courts have held that what is described as a mere licence is in fact a tenancy: see, e.g., the decision of this court in *Irish Shell Ltd. v. Costello Ltd.* [1981] ILRM 66. These statements also require that, as a matter of the general law, an agreement which says one thing when both parties in fact intend another will not be given effect to under the doctrine of sham, or perhaps mistake. Again, as a matter of the general law of contract, a court is entitled to look at what the parties actually did when implementing the agreement with a view to determining whether they have, by a course of dealing, established an agreement between themselves (and if so its terms) and/or an agreement that supplements or fills the gaps in the terms of a written document. And in that connection it is clear that the court in ascertaining the true nature of a working relationship is not analysing an ossified arrangement: a person who begins to work on their own account – perhaps casually – may as time passes become, by reason of the frequency of their work or absorption into the employer's undertaking, an employee.

241. The issue of whether the court can 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. As I have noted earlier in this judgnment, the United Kingdom Supreme Court has decided in *Autoclenz* that it can and, in an appropriate case, should do this. This court has never adopted this position, and neither *Henry Denny* nor *Castleisland* should be understood as having so decided. In neither of those cases was it expressly decided that the substantive terms of the parties' written agreement (as distinct from the conclusions of law they sought to include in their contract) could be over-ridden simply because they were contradicted by the parties' conduct. While, even apart from the doctrine of sham, or application of well established rules regarding mistake, the law of contract allows, in certain very limited circumstances, the parties to an agreement to waive terms by conduct or, for that matter, while in some situations one party may be estopped by their conduct from relying upon provisions of a written agreement, the conditions under which this can occur are wholly exceptional. Generally, the variation of a written contract requires a fresh contract supported by consideration, and usually the court is not entitled to look at how the parties conducted themselves with a view to interpreting a written instrument. In this case, as I explain, the question of looking to the conduct of the parties so as to deem certain provisions of a written agreement to no longer form part of the contractual arrangements between the parties does not arise, as the points at which the parties' practices were found to be inconsistent with the written agreements were of limited significance.

242. The question of whether, either generally or because of the requirements to give a purposive application to particular statutory provisions (as was suggested in *Uber*), there is in Ireland a principle similar to that recognised by the United Kingdom Supreme Court in *Autoclenz* will have to await a case in which that issue properly arises. There are two ways of looking at this: the analysis of Lord Leggatt in *Uber* might well be thought of as persuasive, and of reflecting both the intent of parliament when enacting labour rights legislation, 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.

243. At the same time, 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. The High Court of Australia, it is to be noted, has adopted an approach that diverges from that reflected in *Autoclenz* when it said that provided (a) the parties have exhaustively and in detail committed their agreement to writing, (b) there is no challenge to the validity or enforceability of that agreement under the general law or statute (whether as a sham or otherwise), and (c) there is no proven waiver, variation, or estoppel on the basis on which the written terms can be said not to govern the relationship, it is not appropriate when determining whether a relationship is or is not one of employment to traverse the history of the parties' dealings with a view to adjusting their rights (see *CFMMEU v. Personnel Contracting Pty. Ltd.* [2022]

HCA 1 at paras. 43 and 58-61). Insofar as there are suggestions in some of the judgments in the present case that evidence of the practices of the parties could override the written agreement of the parties, these should not be understood as sanctioning the wholescale replacement of a detailed written agreement with deductions from the manner in which the parties operated the agreement. As I have alluded to, there may well be cases in which it is found that the parties elected to describe their relationship in a particular way in order to circumvent or even frustrate the operation of some statutory provision, which would engage both questions of statutory intent and the doctrine of sham. But outside that situation whether, and if so when, it is possible in Irish law to otherwise allow evidence of the conduct of the parties to override the consequences of detailed and written contract, have to await a case in which that question is properly in issue, and is argued in full.

244. Third, the last clause in the *RMC* test is reframed in this formulation to make clear that this part of the inquiry does not depend on any presumption arising from the other parts. It is free standing, the onus of proof being in the ordinary way on the party who asserts any proposition of fact, law or mixed fact and law having regard to the statutory process in which the decision is made.

245. Fourth, it is useful to remember that if the contract is not one of employment it is something else, and the question of whether it is within the former category cannot in reality be resolved without identifying what it actually is. In most cases, the debate is a familiar one – is the worker at a particular point an '*employee'* or are they an independent contractor, that is a person who, by

definition, is undertaking work on their own account and at their own risk. But as Edwards J. suggests in *Barry* that is not always so: the issue may, for example, be a choice between an employment relationship and one of co-partners (as in *DPP v. McLoughlin* [1986] IR 355) or joint venturers, or (as in *RMC*) a contract of carriage or (as in *Cheng Yuen v. Royal Hong Kong Golf Club* [1998] ICR 131) a licence agreement permitting the worker to provide a service to third parties. Nonetheless, the effect of the *Market Investigations* case was to elevate the issue of whether the facts were consistent or not with the worker carrying on business on their own account, or whether they pointed to the worker conducting the business of the employer. Having regard to the decisions of the former Supreme Court in *Graham* and to the decision of this court in *Henry Denny*, it is appropriate that the importance of this factor be reflected in any formulation of the relevant inquiry.

246. I have commented earlier on the circularity of the third limb of the *RMC* test: it is sometimes criticised because it neither indicates what the core features of the contract of service are nor which features are inconsistent with it. However, I think this criticism overlooks unavoidable difficulties in achieving both certainty *and* flexibility. A contract of employment, Deane J. said in *Dare v. Dietrich* (1979) 26 ALR 18 at p. 36, '*cannot be identified by reference to the presence of any one or more static characteristics*'. It is the function of the relevant tribunals and the courts to incrementally develop those categories of arrangement that are, and those that are not, inconsistent in nature with a contract of service. As the law stands, this has most clearly been done in the context of those features of the relationship that are suggestive that the worker

is conducting his own business, and not that of the employer: the law makes it clear that the capacity to profit in a material way from their own skill, the need for the employee to invest significantly in their ability to undertake the work, and the requirement to bring tools or equipment to the task all lean against the existence of a contract of employment. So, as the cases develop there is no difficulty in identifying *some* features of a contract or working arrangement that are and that are not consistent with an employment contract. What depends on the particular facts, however, is the place of those positives and negatives and the weight to be given to them, in the balancing exercise undertaken in a given case. That is a matter, when the relevant factors pointing one way or the other are identified, for the assessment of the decision maker.

247. Here, it must again be said that *all* circumstances of the employment are relevant and, in particular, that the consideration of the question of control is not exhausted at the second stage of the *RMC* test. It is appropriate to consider control again at this stage, as there will be cases in which it is so extensive as to point overwhelmingly in the direction of employment just as there will be cases in which it is so attenuated as to push the agreement towards another type of relationship. Indeed, as I explain in the course of this judgment, it is not possible to separate the question of control from the question of whether the evidence points to the worker carrying on business on their own account.

248. The issue of whether the worker provides their services on a regular basis, or only rarely, or of the length of time they have so worked may in some cases be relevant. The question of whether they are under a legally enforceable duty to

do the work on an ongoing basis, or at particular points in time, is also self evidently relevant to this question, because the absence of such an obligation suggests a degree of independence that might militate against employer control and is consistent with the worker being engaged in his own trade, not someone else's. But, as with all of these factors, this is not generally dispositive: the only invariably dispositive factors are the three I have identified.

249. And, finally, it is within this inquiry that factors previously considered within what has previously been described as the '*integration test'* may arise. While I note that the decision in *Stevenson, Jordan and Harrison* was cited to the court in *Roche v. Patrick Kelly and Co. Ltd.*, while I am conscious that the decision of Carroll J. in *In re Sunday Tribune* has been referred to in decisions of this court with approval, and noting that when dealing with the parameters of vicarious liability in *Morrissey v. HSE* Clarke CJ referred to the relevance of whether the contracted party is closely integrated into the employer's business, this court has never adopted a free standing *'integration'* test as such. As I have noted earlier, that test was conceived at a time when the courts were struggling with the adjustment of the control test to modern forms of employment and it should be viewed as doing no more than articulating a possible feature 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.

250. The elevation of *'integration'* to the status of a specific test to be interrogated in all cases creates unnecessary duplication, and indeed the debate that ensued

in this case around whether the '*test'* required an examination of whether the worker was integrated into the business or whether their work was integrated into the business (both of which were relevant) shows the danger in so doing: I note that in *RMC* MacKenna J. said that Denning LJ's formulation of this test *'raises more questions than I know how to answer'* (at p. 524), and the point that the notion of which work is '*integral'* to a business is not easily applied has been frequently observed (see for example Deakin and Morris at para. 2.14). So, a decision maker may be quite right in a particular case to examine the extent to which the worker and their work form a coherent part of the employer's organisation but treating this as a stand alone '*test'* (with the implication that it must be interrogated in all cases) is neither necessary nor helpful.

The legislative context

251. There is one final issue that will fall for consideration. 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. The arguments of the parties in the present case, and most of the cases opened by them to the court, have so assumed.

252. 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, and that while I would expect that the assumption to which I have

referred can be reliably made in many cases, there may well be legislative provisions in which it is intended to carry a different meaning. This may be evident from the language used in the statute as a whole, or indeed its overall purpose and context. This is not relevant in this case: I can see no basis on which it might be said that the language of the TCA requires any modification to the standard approach, and neither party suggested that there was. However, the prospect that particular legislative schemes – in particular those involving the protection of particular employee rights – might require a modification of either the test, or (as was decided by the United Kingdom Supreme Court in *Uber*) to the approach adopted to the relationship between a written contract of employment and the practices of the parties in implementing it in a particular case, must be factored into the analysis.

The correct approach

253. The method prescribed by MacKenna J. in *RMC* as developed in *Market Investigations* and as applied by this court in *Henry Denny* continues to provide a reliable structure for the identification of a contract of employment. The parties in this case did not suggest that the approach adopted in those cases should no longer govern the issue. Developments in the law since that case, as well as the desirability of avoiding confusion in the future as to the need for '*mutuality of obligation'*, suggest that it can be usefully clarified. Thus, the question of whether in any given case a worker is an employee should be resolved by reference to the following five questions:

(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.

V APPLICATION AND CONCLUSION

The consideration, personal service and control

254. Obviously, the Commissioner did not apply the test in the manner I have suggested, but the method I have proposed is no more than a reduction of the existing case law, and the approach the Commissioner did take can be readily accommodated within it. That approach, it will be recalled, depended on viewing the overarching contract as an '*umbrella'* agreement supplemented by multiple individual contracts in respect of assignments of work. Before the Court of Appeal, Revenue accepted that the overarching contract was not itself a contract of service, and it did not seek to resile from that position before this court. The structure of the contract between the parties thus identified by the Commissioner was, in my view, clearly correct and the focus was properly upon the characteristics of those individual assignments of work.

255. There could have been no doubt but that the written, overarching agreement between the drivers and Karshan was a contract, nor can there be any serious dispute that at some point a binding agreement came into being between the drivers and Karshan whereby the former would be paid by the latter in consideration for their services (a) the hourly rate for branding and (b) the fee due as and when pizzas were delivered by the drivers. The agreement was capable of being an employment contract, insofar as for at least the periods during which they worked there was an exchange of labour and wage. There

are disputes around the Commissioner's conclusion that the specific agreements arose upon rostering, and I will deal with those issues shortly. But, at a very general level, the findings that there were binding legal relations between the parties involving the exchange of the consideration characteristic of an employment agreement cannot, in the light of my analysis of the issue of '*mutuality of obligation'* be seriously questioned.

256. The Commissioner carefully examined the substitution clause. She concluded that this did not involve an unqualified power to delegate the work contracted for. She described it as follows (at para. 50), speaking of the driver who had agreed to be rostered:

> '*He did not have the option to sub-contract i.e. to engage another person to perform the services in circumstances where he would continue being paid for the services. He could arrange for another of the Appellant's drivers to work his shift in the event he was unable to however, the substituted driver would be paid in respect of the work, as opposed to the driver originally rostered. This arrangement was akin to the swapping of shifts between drivers.'*

257. In this case, the right of substitution was limited. As I explain later, it could be availed of only by a driver who had agreed to be rostered and who was unavailable to work at short notice. The Commissioner decided that it was only

a driver who had entered into an agreement in the form of the overarching contract who could be thus substituted, and she decided that such a driver was, upon substitution, remunerated by Karshan. Having regard to her conclusions as to how the substitution clause operated in practice (which involved a consideration of the implementation, not a contradiction, of the clause), I can see no basis on which it can be concluded that she was not entitled to decide that the delegation was sufficiently limited to maintain the element of personal service required.

258. The Commissioner also examined carefully the second limb of the *RMC* test, concluding that Karshan exercised the necessary control over the drivers. No basis has been suggested on which the court could interfere with that aspect of her factual findings. As Whelan J. recited in her judgment, the combined effect of the operation of the rosters and weekly allocation of work, the fact that Karshan had control over the manner the drivers dressed, the time the drivers were there, the number and extent of deliveries the drivers were to undertake and particularities with regard to insurance in relation to vehicles, the fact that some obligations continued to operate for the duration of the entire week in question in circumstances where the driver had an obligation to prepare and create weekly invoices, the involvement of the local branch in the preparation and filling out of such invoices, the fact that some drivers when at the premises were, on the evidence, 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, all strongly pointed to a high level of control on the part of Karshan. Having regard to the frequently repeated

description of the function of the High Court in an appeal by way of case stated as recited in *Mara (Inspector of Taxes) v. Hummingbird Ltd* (which neither party in this appeal sought to either dispute or refine), there is no basis on which these findings could be upset.

All the circumstances of the employment

259. That being so, the next question required the Commissioner to consider all the circumstances of the employment. In that regard, her focus was correctly on the extent to which the drivers were properly viewed as carrying on business on their own account. The factors taken into account in this regard by the Commissioner were correctly viewed by her as militating against their being independent contractors – they did not take calls from customers, did not employ (or have the right to employ) their own labour to undertake the tasks, they took no credit or economic risk, they worked exclusively from Karshan's premises, their ability to maximise their own profits was very limited and constrained by the control exercised by the on-site managers, they did not advertise their services and they did not scale their delivery business to any particular market. Some of the factors considered under the rubric of the control test were also relevant to that conclusion – the fact that the drivers were required to wear uniforms, to carry branding on their vehicles and that they could deliver only those pizzas directed to them by the managers. In short, their economic activities were so restricted by the terms and conditions imposed by Karshan that they could not be said to have been engaged in their own business: their

work was in every sense work for Karshan and was directed towards advancing its business, not their own. Without doubt, it was relevant that they had to use their own vehicles and telephones and that they had to carry and fund their own insurance, but the Commissioner was quite entitled to conclude that these features of the arrangements were, when it came to characterising the relationship, outweighed by the other factors identified by her. Indeed, her approach to that issue mirrors that adopted in the New Zealand *Uber* case (*E Tū Inc. v. Rasier Operations BV* [2022] NZEmpC 192), in which Inglis CJ adopted the position that the fact that drivers provided their own vehicle and smartphones was neutral: that was not the sort of investment that would otherwise indicate that they were carrying on their own business. It was also relevant that in some situations the drivers might through their own efficiency have been able to maximise their income, but the circumstances in which it was found that this was so, were marginal and the extent of the additional profit to the drivers *de minimis*.

260. While, as explained above, there was a debate throughout as to whether the '*integration test'* required consideration of the extent to which the worker, or their work, was absorbed into the employer's organisation, I see this debate as a false one. Both were relevant, both should have been (and were) considered as part of the overall analysis.

The extent of the contractual obligation assumed by the drivers

261. There can be no doubt but that the picture might have been different had it truly been the case that drivers were on the hazard when they agreed to go on the roster for a period of time, so that (as Karshan contended was the case) they could show up for work and receive no pay, or indeed could not show up for work without breaching their contracts. That is not to say that this in itself would have precluded them from being employees: were it the position, however, it would have been a different case.

262. While the evidence in this regard was, having regard to the centrality this issue assumed in the appeal, surprisingly thin, the Commissioner was, having regard to the terms of the overarching contract, fully entitled to conclude that from the point at which the driver agreed to go on the roster there was an obligation on Karshan to pay them for that period and to allow them the opportunity to work.

263. Here, it is necessary to revisit the overarching contract. The principles by reference to which this fell to be construed could not have been controversial, being properly directed to the words used by the parties when put in their proper context, each clause being interpreted in the light of the provisions of the agreement as a whole and taking into account the purpose of the agreement and over-riding importance of construing it so as to give it commercial efficacy (see *Law Society v. The Motor Insurers' Bureau of Ireland* [2017] IESC 31).

264. Clause 14 was as follows:

> *'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****.'*
>
> (Emphasis added)

265. Clause 14 assumes that at some point in the dealings between the drivers and Karshan there exists a *'previously agreed delivery service'*. The language is precise and falls to be contrasted with the terms in which a more casual proposal might have been made – '*arrangement*', or '*indication of availability*'. The fact that this was '*agreed'* suggests more than a loose arrangement and is (at the very least) consistent with a contract whereby the driver agreed to show up and be available to make deliveries. The clause makes it clear that if the driver is '*unavailable'* he is under a contractual obligation to advise Karshan of that fact. That language might well be broad enough to cover any reason for his failure to attend from the driver's sudden decision to watch a football match to a need to attend an urgent medical appointment, but in its ordinary sense '*unavailability'* implies an impediment to his attendance, rather than a change of mind. The fact that there is any obligation to notify Karshan suggests a more formal and structured arrangement than that contended for by it, and it is quite inconsistent with the argument that the driver could show up for a shift and simply leave after a short period of time. The purpose of the notification obligation must be

to allow Karshan to ensure that it has enough drivers on the shift in question, something it cannot be guaranteed if drivers are free to come and go as contended for (before and during shifts).

266. The clause suggests that the *'previously agreed delivery service'* is initiated by the driver *'mak[ing] himself available'*. The Commissioner decided that this was done by filling out an availability form. There had to be another step from the company to create the *'agreed delivery service'* and that, she found, was the drawing up of the roster. That is a legitimate inference from the facts: inevitably the parties had to put in place some mechanism for implementing the agreement, and the mechanism as found by the Commissioner was not merely reflected in the facts, but slotted into what was expressly envisaged ('*previously agreed … make himself available … in advance'*). On any conventional analysis, the offer by a person to attend to undertake work, and the acceptance of that offer (with a resulting commitment to pay at least the branding and promotion fee for the duration of the shift) would, objectively viewed, constitute a contract and, were Karshan to contend otherwise it was a matter for it to establish that fact. There is no finding by the Commissioner to that effect, nor has any basis been identified on which it can be said she ought to have so concluded.

267. Clause 12 supports the construction whereby there is an *'agreed delivery service'* and it elaborates on the circumstances in which the driver is free not to show up. It conferred a right (not, as suggested in parts of the Commissioner's Determination, an obligation) to substitute:

> *'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.'*
>
> (Emphasis added)

268. Some obvious features of this also bear comment. If the driver did not have to show up, there would be no need to allow him to nominate a substitute: he would just not show up. While it was suggested in argument that the purpose of this provision, having regard to Karshan's claim that there was no binding obligation to turn up for work once rostered, was to allow the driver to keep in good stead with Karshan and/or to enable him to extend a favour to another driver, this is in my view implausible. If this was the purpose of the substitution provision, there would have been no reason to impose *any* conditions on it ('*unavailable … short notice*'). The end point of this argument would be that the driver had the option to turn up for work, the option not to turn up for work if they did not feel like doing so, and the option to nominate a substitute if he or she was '*unavailable at short notice'*, but no right to substitute if he or she simply decided that they did not want to work or, for that matter, were unavailable long in advance. There is no evident sense to this. Haughton J. was quite correct when he said that clause 12 confers a right, and not an obligation, but if it is being said that it conferred a right of substitution where there was no antecedent obligation to attend in the first place, that required some explanation in logic or context. None was forthcoming.

269. While Karshan complains of the absence of any findings of fact by the Commissioner to support her conclusion, it appears to me that thus understood, the Commissioner's finding at para. 49 was in actuality a construction of the agreements, which was contextualised by the evidence, rather than a finding of fact:

> *'Thus in the within appeal, the umbrella contract required a driver, in accordance with clause 14 thereof, to initiate an agreement with the Appellant in relation to his availability for work by 'mak[ing] himself available on only certain days and certain times of his own choosing'. Once the Appellant rostered a driver for one or more shifts of work, there was a contract in place, in respect of which the parties retained mutual obligations.'*

270. This was repeated at two further points in the Determination – paras. 64 and 82 – where the Commissioner said the following:

> '*The Respondent submitted that each individual contract commenced once the Appellant accepted notification by the driver of his availability for work in respect of a specific shift (or a series of shifts) and placed his name on the roster in respect thereof. The Respondent submitted that this agreement was the basis of the resulting contract and I accept this submission …*

… In this appeal the right of the driver to cancel a shift was qualified by the requirement to engage a substitute, to provide advance notification to the Appellant and to work out the remainder of the shifts in the series which had been agreed.'

271. Notwithstanding some loose language on her behalf, I find it difficult to accept that the Commissioner intended to find that clause 14 meant that drivers were under some obligation to make any form of application to Karshan to be rostered: clearly, they were not. But if they wanted to communicate their availability, the evidence was that this was how they did it. And once they did this, they had an obligation to show up *unless* they were (a) unavailable, (b) at short notice, in which case they had the right – but not the obligation – to nominate a substitute. While Costello J. observed that the Commissioner never expressly found that there were such obligations, to my mind this must follow from her finding that there was '*a contract'* in place. Paragraph 49 of the Determination immediately follows, and was obviously based upon, a passage from the judgment of Briggs J. in *Weight Watchers* which posited precisely such an agreement: thus the contract was described in that paragraph as one that related to the driver's '*availability for work by making himself available …'*. Once there were '*contracts'* there were, by definition, mutual obligations of some kind. Those contracts, she said at para. 164 of her Determination, comprised contracts of service that were taxable in accordance with Schedule E, so it seems obvious that the obligations involved both work and payment:

indeed at para. 84 of her Determination she found that the requirement of mutuality was found '*in the individual contracts entered into between the Appellant and the drivers, each contract representing an assignment of work (comprising one or more shifts)*', while at para. 64 she confirmed that the agreement comprised the acceptance by Karshan of the driver's notification of his availability for work.

272. *Henry Denny* shows that it is *possible* that a contract of employment would arise even without such obligations (in particular in a case in which it was established that over a period of time a particular employee did in fact always attend for work as rostered, was in fact always given work when attending, and that the parties conducted themselves on the basis that they were required so to do), however in this case there was an obligation triggered once the drivers appeared on the roster.

273. Across the submissions of Karshan various other arguments were advanced as to why the Commissioner erred when she reached the conclusion that she did. It was said, in particular, that the imposition of an obligation to attend where rostered was inconsistent with the stipulation in clause 14 that Karshan did not warrant or represent that it would utilise the driver's services at all. I do not think that this follows. Clause 14 makes clear that Karshan, by entering into the overarching agreement with the driver, was not committing to respond affirmatively to a request for work. That does not mean that where it *does* respond to such a request and *does* agree to roster a driver, it may not assume any obligation to that driver (or, for that matter, obtain any right for itself). It is

not inconsistent with the clause for Karshan to agree to pay a driver who did attend in accordance with the agreed roster (as, indeed, Costello and Whelan JJ. both decided in the Court of Appeal).

274. I think it appropriate in this regard to make one final point. In my view, excessive attention was paid to the detail of the agreements considered by Briggs J. in the *Weight Watchers* case and, to that extent, I believe that Costello and Haughton JJ. were right when they questioned the emphasis placed upon that case. These proceedings are concerned with an agreement between Karshan and the drivers, which falls to be construed on its own terms. The construction placed by a judge in another jurisdiction, on another agreement between distinct parties governing an entirely different type of work could never be of more than incidental significance to the resolution of the issues of construction that presented themselves. Of course, the overall approach to the relationship between the various provisions of the agreement in issue before him and conducted by Briggs J. was worthy of note, as was his analysis of the issue of mutuality, but *Weight Watchers* did not, in my view, bear the significance attached to it, nor require the detailed analysis conducted at earlier stages of the proceedings.

275. In these circumstances, the Commissioner was entitled to reach the conclusion she did. The drivers worked at and from Karshan's premises wearing uniforms directed by it, conducting a critical part of its business, delivering in accordance with the directions of the managers, and advertising Karshan's business as they were required to do. Their remuneration was fixed by Karshan, as was the rate

at which they would be paid for each pizza delivery. They did this on foot of a contract which had the effect that they committed to do the work a week or so prior to their assignment and the employer was required if not to give them work then certainly to pay them for the rostered time. They brought little by way of personal investment to the activity and had but a very limited opportunity to increase the profitability of their work. They were controlled by Karshan, and they were not conducting business on their own account. The contract was one that envisaged personal service by them, with the facility for substitution on certain conditions, the substitutes being paid by Karshan and not by the driver originally rostered. The Commissioner was entitled to find that they were employees.

276. In these circumstances it is not necessary to speculate on the outcome if, in fact, the effect of the overarching contract was that the drivers could place themselves on the roster and then and for no reason whatsoever, decide not to turn up for work. It follows from my earlier comments in relation to mutuality of obligation that single stints of work are capable in law of comprising contracts of employment even if not accompanied by a commitment by the employer to actually give work in advance of the specific engagement. It also follows that the fact that the overarching contract did not itself provide for any ongoing right to work was not relevant.

Some observations

277. It must be stressed that the only finding in this judgment is that, in these proceedings between Karshan and Revenue, Karshan was the employer of its drivers for the purposes of the relevant provisions of the TCA. So stated, the finding is subject to inherent limitations. First, it does not and cannot bind any driver who may wish to contend that, in fact, they were not an employee for this, or for any other, purpose. Second, the relevant provisions of the TCA – as the Commissioner emphasised at the conclusion of her Determination – do not impose a requirement of continuity of service before the sections in question are engaged. The question of whether the drivers have continuous service for the purposes of other legislation, and in particular employment rights legislation, cannot be decided here. Third, the court has heard no submissions and received no evidence regarding the calculation of the quantum of the assessments. It must be assumed that Revenue envisages in some way the offsetting of any tax or social contributions paid by the drivers themselves..

278. While the question of whether a decision of the Social Welfare Deciding Officer of August 2008 that similarly positioned drivers were *not* employees generated any form of estoppel was not before this court, it strikes me at a very general level that Karshan would have a legitimate grievance if it were to be penalised by one arm of the State for conducting its business in accordance with the law as interpreted and applied by another department of government. Whether that can or cannot be said to be so will depend on the facts of the case before the Social Welfare Appeals Office, the specific agreements the subject of that decision and the exact composition of the assessments. That may also be

relevant when it comes to the costs of these proceedings, which have now extended over four separate tribunals. The relevance of the actions or omissions of one part of government to the costs of proceedings involving another has been confirmed by the decision of Clarke J. (as he then was) in *Cork County Council v. Shackleton* [2007] IEHC 334, and by that of the Court of Appeal in *Lee v. Revenue Commissioners* [2021] IECA 114.

Conclusion

279. The argument in this case disclosed a range of issues around the proper approach to the differentiation of a contract of employment from a working arrangement which does not involve the relationship of employer and employee. The most important issue that arose before this court was the question of whether it is (as Karshan contended) a *sine qua non* of such a relationship that there be an ongoing reciprocal commitment extending into the future to provide and perform work on the part of the employer and worker respectively. The question of whether there is such an ongoing commitment will be relevant to whether a given worker is an employee and may be of particular importance in deciding if there is *continuous* employment for the purposes of certain statutory regimes, but as I explain in the course of this judgment, this is not a *sine qua non* of an employment relationship.

280. In resolving that issue, it has been necessary to review generally the method applied to identify a contract of employment. That test is well established in law, and it was not suggested in argument that the fundamentals of that test need to be revisited in any particular respect. The authorities opened by the parties, however, disclosed some issues of application suggesting the desirability of refining, adjusting the language used in and, for the sake of clarity, re-stating the correct approach, not least of all to make clear that the version of '*mutuality of obligation'* for which Karshan contended is not a determinative part of it.

281. In the light of the foregoing, 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:

(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.

282. In this case, the Commissioner was entitled to conclude, as she did, that the drivers were employees of Karshan for the purposes of the relevant provisions of the TCA. 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 Commissioner 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 Commissioner was correct to conclude that the drivers were, subject to the provisions of clauses 12 and 14, obliged to attend for work when they agreed to be rostered.

283. In these circumstances this appeal should be allowed. Questions 2 and 4 in the case stated should be answered in the affirmative, while questions 6, 8 and 9 should be answered in the negative. Question 1 should be responded to on the basis that the Commissioner's interpretation of mutuality of obligation was incorrect insofar as she viewed it as a *sine qua non* of the employment relationship that there be an ongoing or continuous obligation on Karshan to provide and for the drivers to perform work, but that her findings as to whether there was an agreement between Karshan and the drivers when the former rostered the latter whereby Karshan had to pay the drivers the branding fee for the rostered period, and the drivers had to attend for that purpose, were correct. Question 3 should be answered in the affirmative insofar as the Commissioner concluded that the extent to which the activities of the drivers comprised an important part of Karshan's business were relevant to the issue before the Commissioner. Questions 5 and 7 were not the subject of any argument before this court and, subject to any further submissions of the parties, I would not propose that they be answered.

284. In the course of the judgment I make some comments about the potential injustice of Karshan being disproportionately penalised by one arm of the State for conducting its business in accordance with the law as it was found by another department of government. It would appear that Revenue must account for any income tax already paid by Karshan's drivers and, if necessary, abate the assessments to take account of such payments. If there is anything arising from those comments, or if there is any dispute between the parties as to the issue of costs having regard to what I say, the matter can be re-entered.

VI APPENDIX

AN AGREEMENT made the ___ day of _____ BETWEEN KARSHAN (MIDLANDS) LTD. …. (hereinafter called "the company" which expression shall where the context so admits or requires include the company it's [sic] successors and assigns) of the one part and (name)_____

of (address)_____

(hereinafter called "the contractor" which expression shall where the context so admits or requires include the Contractor, his heirs, executors, administrators and assigns) of the other part.

WHEREAS the Company wishes to subcontract the delivery of pizzas, the promotion of its brand logo and the Contractor is willing to provide these services to the company on the terms hereinafter appearing.

NOW IT IS HEREBY AGREED as follows:

1. **The Contractor shall be retained by the Company as an "independent contractor" within the meaning of and for all of the purposes of the said expression.**
2. **The Contractor shall provide his own delivery vehicle, which shall be in a completely roadworthy and safe condition, and the Contractor shall keep and maintain the said delivery vehicle in the same roadworthy and safe condition and standard of appearance as same is in at the date of execution hereof. In this regard, the Company shall be under no obligation**

whatsoever to test or examine the said vehicle, but shall be entitled to accept the Contractor's warranty, which the Contractor now hereby provides that the said vehicle is in a roadworthy and safe condition.

3. **The Company shall pay the Contractor according to the number of the deliveries successfully undertaken. In addition the Company shall pay for brand promotion through the wearing of fully branded company supplied clothing and/or the application of company logos affixed temporarily to the contractor's vehicle.**
4. **However, in the event that the Contractor shall not have available his own delivery vehicle the Contractor, if he so wishes, may apply to rent a Company delivery vehicle at an agreed rate.**
    a. **If renting a Company delivery vehicle the Contractor accepts that it is his obligation to fill out a complete Vehicle Maintenance Report noting any damage to the vehicle prior to using same. Any damage must be brought to the attention of the Store Manager when first noticed. Subsequent claims of prior damage will not be entertained under any circumstances.**
    b. **A Contractor renting a delivery vehicle shall agree to such rental at a pre-determined amount.**
5. **Prior to the execution of this agreement (and from time to time as demanded by the Company) the Contractor, if the delivery is his own, shall furnish comprehensive evidence that the vehicle and the Contractor's use thereof is insured with a reputable insurance company within the state, and without prejudice to the generality of the foregoing a certificate of insurance, and evidence of payment of the premium thereon.**

a. **If the Contractor does not have the appropriate Business Use Insurance the Company is prepared to offer same (Third Party Only) at a pre-determined rate.**

6. **In the event of the Contractor's insurance being withdrawn, or otherwise lapsing, or in the event of the Contractor being prosecuted pursuant to the Road Traffic Acts in any manner whatsoever, the Contractor shall immediately notify the Company of such matter: so that the company is aware that the Contractor might not be in a position to continue to provide services under this agreement.**
7. **The Contractor acknowledges that, at all times, when delivering the aforesaid products by means of motorbike or moped, it is necessary to use and wear protective clothing, helmets, and other items, as approved and mandated by the Department of the Environment or such regulatory authority as such Department may approve of.**
8. **The Contractor shall strictly abide and adhere to those regulations, procedures and directions necessitated by the Health & Safety Authority; The Food Hygiene Regulations 1950 – 1989 (together with all subsequent amendments); as well as those, pertaining to the proper handling of all cash transactions.**
9. **The Company points out to the Contractor that in keeping with all self-employed individuals the financial risks and or rewards associated with providing the services as outlined in this contract are strictly under the control of the Contractor, and the Company bears no responsibility whatsoever for same. In particular, the Company does not warrant a minimum number of deliveries.**

Consequently, the Contractor undertakes to operate his/her own accounting system. He furthermore agrees to provide a weekly invoice with the information necessary to agree the amount owned by the Company.

10. **The Contractor acknowledges that all of the property and confidential information including, but without prejudice to the generality of the foregoing, street maps and their source, recipes, new products, supplier lists, cost data, advertising and marketing plans, designs specifications and operational techniques and practices relating to Domino's Pizza International Stores and the franchising thereof, are and shall continue to be, trade secrets, and the exclusive proprietary property of the Company or its franchisees, and the Contractor shall not reveal to any person any of the said trade secrets, or any other confidential operations, processes, dealings or information whatsoever which come to the Contractor's knowledge, and shall keep with complete secrecy all confidential information entrusted to him, and shall not use or attempt to use any such trade secrets, operations, processes, dealing or information in any manner so that his restriction shall continue to apply as well after the termination of this Agreement as before, without limit in point of time, and shall cease only to apply when any such information or knowledge comes within the public domain.**

11. **The Company accepts the Contractors right to engage in a similar contract delivery-type service for other companies at the same time as this contract is in force. However, this right does not extend to delivering similar type products into the same market area from a rival company at the same time, where a conflict of interest would be possible.**

12. **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.**
13. **Any notice to be served hereunder may be given personally to the Contractor or may be sent by ordinary prepaid post to the Contractor at his address given above, or his last known address. Any such notice sent by post shall be deemed to be served 24 hours after it is posted, and in proving such service it shall be sufficient to prove that the notice was properly addressed and put it in the post.**
14. **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.**
15. **The Company reserves to itself the right to terminate this Agreement forthwith but in such event, such of the provisions hereof as are expressed to operate or have effect thereafter, shall so operate, and have effect, and shall be without prejudice to any right of action already accrued to either party in respect of any breach of this Agreement by the other party.**
16. **This Agreement shall be governed by and construed under Irish Law, and each of the parties hereto submits to the jurisdiction of the Courts of Ireland.**

17. This is to confirm that I am aware that any delivery work I undertake for Karshan (Midlands) Limited is strictly as an Independent Contractor. I understand that, as such, for Karshan (Midlands) limited has no responsibility or liability whatsoever for deducting and/or paying PRSI or tax on any monies I may receive under this agreement.

In witness whereof the Contractor has signed his name and the Company acting by its duly authorised representative has signed his name, the day and year first herein written.