23TACD2017

BETWEEN/

X Ltd. t/a HOTFOOD

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against estimates raised by the Respondent in June 2014, in accordance with section 990 of the Taxes Consolidation Act 1997 as amended ('TCA 1997'), regarding PAYE and PRSI totalling €215,718, in respect of the tax years of assessment 2010 and 2011.

2. The Appellant, trading as *HotFood*, manufactures and delivers fast food and ancillary food items to customers who place orders by telephone, internet and by attending at the store. The Appellant has several outlet stores. A franchise fee of 9.5% is payable to HotFood Ireland.

3. The matter at issue in this appeal is whether food delivery drivers engaged by the Appellant are in receipt of emoluments from an employment within the meaning of section 112 TCA 1997, or whether delivery drivers are self-employed persons chargeable to tax under Case I Schedule D in respect of income of a trade. In short, the Appellant contended that the delivery drivers were independent contractors working under contracts for services while the Respondent contended that the drivers were employees working pursuant to contracts of service.

Legislation

Section 112 TCA 1997 – Basis of assessment, persons chargeable and extent of charge

(1) 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 mentioned in that Schedule, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatever therefrom, and shall be computed on the amount of all such salaries, fees, wages, perquisites or profits whatever therefrom for the year of assessment.

(2)(a) In this subsection, "emoluments" means anything assessable to income tax under Schedule E.

Section 990 - Estimation of tax due for year

(1) Where the inspector or such other officer as the Revenue Commissioners may nominate to exercise the powers conferred by this section (in this section referred to as 'other officer') has reason to believe that the total amount of tax which an employer was liable under the regulations to remit in respect of the respective income tax months comprised in any year of assessment was greater than the amount of tax (if any) paid by the employer in respect of those months, then, without prejudice to any other action which may be taken, the inspector or other officer -

(a) May take an estimate in one sum of the total amount of tax which in his or her opinion should have been paid in respect of the income tax months comprised in that year, and

(b) May serve notice on the employer specifying -

(i) The total amount of tax so estimated

(ii) The total amount of tax (if any) remitted by the employer in relation to the income tax months comprised in that year, and

(iii) The balance of tax remaining unpaid

(2) Where a notice is served on an employer under subsection (1)

(a) The employer may, if claiming that the total amount of tax or the balance of tax remaining unpaid is excessive, on giving notice in writing to the inspector or other officer within the period of 30 days from the service of the notice, appeal to the Appeal Commissioners

(b) On the expiration of that period, if no notice of appeal is received or, if notice of appeal is received, on determination of the appeal by agreement or otherwise, the balance of tax remaining unpaid as specified in the notice or the amended tax as determined in relation to the appeal shall become due and recoverable in the like manner and by the like proceedings as if the balance of tax or the amended tax had been charged on the employer under Schedule E

(3) A notice given by the inspector or other officer under subsection (1) may extend to 2 or more years of assessment

Submissions in brief

4. The matter at issue in this appeal was whether the Appellant's drivers, tasked with delivering food to the Appellant's customers, were working under contracts of service or whether they were working under contracts for services. The Appellant contended that the drivers were independent contractors working under contracts for services.

5. The submissions of the parties can be summarised as follows;

Issue Estoppel

6. The Appellant sought to rely on a decision of the Social Welfare Appeals Office, dated **[redacted]** 2008, which concluded that Mr. A., a delivery driver, was to be regarded as an independent contractor for social welfare purposes. Based on this decision the Appellant contended that issue estoppel arose in the within appeal and that the decision of the social welfare appeals officer applied.

7. The Respondent submitted that the plea of issue estoppel was entirely misconceived and that criteria necessary to establish issue estoppel, in particular, privity of interest, were absent in this appeal.

Mutuality of obligation

8. The Appellant submitted that *mutuality of obligation* was absent in the contracts between the Appellant and its drivers and that irrespective of the legal tests to be applied in ascertaining whether a contract is one *of service* or *for services*, the contracts in the within appeal could not be determined to be contracts of service and thus the estimates raised under section 990 TCA 1997 could not be permitted to stand.

9. The Respondent submitted that the contractual relationship between the Appellant and its drivers comprised a hybrid contract consisting of an overarching umbrella contract, supplemented by individual contracts in respect of assignments of work. The Respondent did not accept the Appellant's submission in relation to mutuality of obligation nor did the Respondent accept that the drivers were independent contractors.

Employment v Self-Employment

10. In relation to the question of whether the contracts constituted contracts *of service* or *for services*, the parties differed in their submissions regarding the application of the various legal tests. While the Respondent contended that the relevant factors indicated the contracts were *of service*, the Appellant submitted that the application of these tests supported their view that the contracts were *for services.*

Issue Estoppel

11. The Appellant sought to rely on a decision of the Social Welfare Appeals office dated **[redacted]** 2008 which concluded that Mr. A., a delivery driver for B Ltd. was to be regarded as an independent contractor for social welfare purposes. The decision provided as follows;

'I have been asked by the Chief Appeals Officer to refer to the Insurability appeal of **[B]** *Ltd. … and to inform you that the Appeals Officer's decision is as follows; The appeal is*

allowed. I decide that Mr. **[A]** *from* **[dated redacted]** *2006 is in employment which is insurable under the Social Welfare Acts at the self-employed Class S rate of contribution provided he has reckonable earnings of €3,174 or more per annum. A copy of this letter has been sent to the Social Welfare Services Office.'*

12. Based on this decision the Appellant contended that issue estoppel arose in the within appeal and that the decision of the Social Welfare Appeals Office applied.

13. The Respondent submitted that the plea of issue estoppel was entirely misconceived and that the criteria necessary to establish issue estoppel were absent in this appeal, in particular, the issue of privity of interest. In support of this submission, the Respondent opened Civil Procedure in the Superior Courts by Delaney and McGrath, third edition, at chapter 32, paragraph 32-27 which provides;

> *'Apart from persons actually joined in previous proceedings and named on the record, a person will be considered to have been a party to those proceedings if he has been served with notice or attended those proceedings.'*

14. At chapter 32, paragraph 32-32, Delaney and McGrath continue, citing Lowry J. in *Shaw v Sloan* ;

> *'A person is a privy of a party 'by blood, title or interest when he stands in his shoes and claims through or under him'.*

15. Neither of these situations pertain in this appeal.

16. The Respondent also opened, from that chapter, paragraphs 32-40 and 32-41 of Delaney and McGrath, which provide as follows;

> *'The issue of privity requires special consideration in relation to proceedings involving the State. In particular the question arises as to the extent to which privity can be said to exist between different organs of the State. The question was considered by O'Hanlon J. in Kelly v Ireland. The plaintiff, who had been convicted of the Sallins train robbery, sued the defendants, Ireland and the Attorney General for, inter alia, damages for assault allegedly committed upon him while he was in custody. The defendants argued that the plaintiff was*

> *estopped from making the allegations of assault on the basis that they had previously been made and rejected before the Special Criminal Court in a challenge to the voluntariness of his confession. However, the plaintiff sought to argue that no privity existed between the Director of Public Prosecution and the defendants in the instant case and that, therefore, res judicata did not arise.'*
>
> *However, it would appear from the decision in A. A. v Medical Council that a body which is established by statute will not be considered to have the necessary privity with an organ of the State such as the Director of Public Prosecutions. The applicant sought to prohibit the holding of an inquiry by the Fitness to Practice Committee of the respondent into certain allegations against him which had been the subject of … criminal charges in respect of which he had been acquitted. The contention advanced by the applicant that there was identity between the Respondent and the Director of Public Prosecutions because the respondent was established by an Act of* [the] *Orieachtas and was, in essence, representing the State was rejected by O Caoimh J. Similarly, it is unlikely that privity would be found to exist between an individual member of the gardai and the Director of Public Prosecutions. Though both are employed by the state, there is no direct relationship between them and it would be to stretch the concept beyond its natural meaning to contend that two employees are in privity of interest simply by virtue of their employment by a common employer.'*

17. The Respondent also cited *Shaw v Sloan* [1982] NI 393 where Gibson LJ stated;

> *'It would seem that before estoppel of an issue can arise there must have been a final determination of the same issue in previous proceedings by a court of competent jurisdiction and the parties bound by this earlier decision must have been either the same parties as are sought in the later proceedings to be estopped or their privies.'*

18. In addition, the Respondent relied on the dicta of Lord Guest in *Carl Zeiss Stiftung v Rayner & Keeler Ltd.* [1967] 1 AC 853 where he stated;

> *'The requirements of issue estoppel still remain (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were*

the same persons as the parties to the proceedings in which the estoppel is raised or their privies.'

19. Finally, the Respondent opened the recent case of *National Museum of Ireland v Minister for Social Protection* [2016] IEHC 135. In this case, Judge Murphy firmly rejected an issue estoppel plea. At paragraph 51, Murphy J. stated;

> *'The Court does not consider that issue estoppel arises in the instant case. The Organisation of Working Time Act 1997, the Protection of Employees (Fixed Term Work) Act 2003 and the Social Welfare Consolidation Act have all provided for different statutory mechanisms to resolve what are in essence, different issues arising from an employer-employee relationship. Each of those Acts provides for an ultimate appeal to the High Court on a point of law. None of the Acts provides that the decision of one decision making body is binding on the other. The legislature in its wisdom has seen fit to set up different statutory schemes to deal with different employment issues. Undoubtedly it would be far more efficient to have one body charged with the resolution of all issues relating to employment status. This however is a matter for the legislature and not the courts and as matters stand, employees enjoy rights to seek redress simultaneously from the Rights Commissioner and the Department of Social Welfare depending on the nature of their complaint.'*

20. Thus, there are different statutory schemes set up to decide different issues in different legal contexts, with separate appeals to the Courts in relation to each. Based on the legal authorities above, it is clear that there is no privity of interest between the parties to this appeal and the parties to the decision of the Social Welfare Appeals Office and therefore the plea of issue estoppel does not arise and cannot succeed.

Evidence

Witness evidence

21. Evidence was provided by; Mr. E.C., operations director of the Appellant company, Mr. A.I., area manager with sister company of the Appellant, Mr. A.A., former store manager and area manager with sister company of the Appellant, Mr. O.U., driver with sister

company of the Appellant, Mr. N.R., former driver with the Appellant, Mr. A.U., former driver with sister company of the Appellant, Mr. I.I., store manager with the Appellant, Mr. R.I., former driver of the Appellant company and Mr. A.O., former driver of the Appellant company.

22. While each witness gave evidence independently, there was significant overlap in terms of the facts and the evidence is summarised by topic as follows;

Rostering

23. Evidence was that drivers would fill out an availability sheet approximately one week prior to a roster being drawn up by the Appellant. The roster was drawn up by the store manager based on the availability sheets.

Substitution

24. Drivers were entitled to substitute another of the Appellant's drivers in the event they were unavailable to attend for a rostered work shift. Mr. A.A., store manager, gave evidence that there would be follow up if an employee did not attend for work, having been rostered. He stated that if a driver failed to turn up, it was the manager's obligation to find a replacement and that the replacement would be paid for the work done.

Uniforms

25. Drivers were required to wear a fully branded uniform of a crew shirt, baseball cap, name tag and driver jacket. They were required to wear black trousers and black shoes and to be presentable in their appearance generally. Mr. R.I. and Mr. O.U. gave evidence that managers checked uniforms to ensure that they were in order. A deposit of approximately €40 was payable in respect of a uniform however, Mr. A.O. refused to pay the deposit on the basis that it was not specified in the written contract. While drivers were provided with branded magnetic signs to affix to their cars, some of the drivers did not use these or did not do so on a regular basis.

Vehicle rental

26. Mr. E.C. gave evidence that despite what the contract provided, there were no company cars available for rent by the drivers and drivers were required to provide their own cars for the deliveries.

Phones

27. Drivers were required to use their own phones in contacting customers, when necessary.

Insurance of motor vehicles

28. Mr. E.C. gave evidence that drivers were required to provide certification of business use insurance and that where a driver did not possess same, the Appellant provided the insurance for a charge, on the Appellant's policy. The Appellant also required drivers to ensure that their NCT certificates were up to date.

Number of deliveries

29. The Appellant limited the number of food deliveries that drivers could deliver to two per time and managers would intervene to prevent a driver taking two deliveries if other drivers were waiting to take a delivery.

Boxes

30. Mr. E.C. gave evidence that drivers were not expected to perform any duties in store but that some drivers folded boxes in preparation for a delivery. Deliveries were allocated on a first come first served basis. Other drivers gave evidence that they were requested by managers to make up boxes. Mr. R.I. gave evidence that if the drivers refused to make boxes the managers would warn those drivers that they would be sent home.

Record Keeping

31. The contract provided that the driver would be responsible for his own accounting system and would furnish invoices to the Appellant. Two drivers gave evidence of

employing an accountant to look after their records. Others gave evidence that the Appellant would pre-prepare invoices that the drivers would sign.

Timekeeping

32. There was a computerised clock-in and clock-out system in use which recorded arrival and departure times, numbers of deliveries and orders and rates of pay. When a driver presented for work he would clock in using his driver number, and on completion of his shift, would clock out. The Appellant stated that this system was not for time recording purposes but was to allow the Appellant to maintain a record in relation to which drivers attended and on which days and to correlate this information with invoices.

Cash Float

33. On commencement of a shift, drivers would be provided with a cash float by the Appellant, which they would return to the Appellant at the end of the shift.

Hourly rate

34. The drop rate was €1.20 per drop with an additional 20c payable for insurance. The drop rate was stipulated by the Appellant and was not negotiable. The brand promotion or advertising rate was €5.65 per hour. Mr. R.I. gave evidence that drivers were paid for deliveries on the day of the work and were paid their total hourly rate on Sundays. He stated that the manager would calculate payment and prepare invoices for signing by the drivers.

Documentary evidence

35. Documentation furnished included sample and copy invoices, spreadsheets detailing payments to delivery drivers and exchanges of correspondence between the parties. I was also furnished with a copy of the written agreement between the Appellant and the delivery drivers which was in place for the relevant tax years of assessment. While the terms of the agreement were altered in April/May 2013, this appeal concerns assessments in respect of 2010 and 2011 and it is the agreement in place in those years

which is relevant to this appeal. The agreement referred to the contracting party (i.e. the driver) as 'the contractor'. The agreement provided, *inter alia*;

- That the contractor shall be retained by the Appellant '*as an "independent contractor" within the meaning of and for all the purposes of the said expression'* (clause 1)

- That the Appellant would pay the contractor according to the number of deliveries successfully undertaken and that the Appellant would pay for brand promotion through the wearing of branded company supplied clothing and/or the application of company logos affixed temporarily to the contractor's vehicle. (clause 3)

- That the contractor would provide his own delivery vehicle (clause 2), would insure same (clause 5) or alternatively, that the Appellant would offer appropriate business use insurance on a third party basis at a pre-determined rate (clause 5(a)). If the contractor did not have his own vehicle he could apply to rent a company vehicle from the Appellant (clause 4).

- That the contractor *'in keeping with all self-employed individuals the financial risks and or rewards associated with providing the series 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'*. (clause 9)

- That '*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 owed by the Company'*. (clause 9)

- That the contractor is bound not to share trade secrets and confidential information (clause 10)

- That the contractor may engage a substitute delivery person however such person must be capable of performing the Contractor's contractual obligations in all respects. (clause 12)

- That the Appellant '*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*.' (clause 14)

- The final clause of the contract (clause 17) provides; '*This is to confirm that I am aware that any delivery work I undertake for* **[X]** *Limited is strictly as an Independent Contractor. I understand that, as such, for* **[X]** *Limited has no responsibility or liability whatsoever for deducting and/or paying PRSI or tax on any monies I may receive under this agreement.'*

36. In addition, drivers were required to sign a document titled '*Social Welfare and Tax Considerations'* which provided *inter alia*; *'This is to confirm that I am aware that any delivery work I undertake for* **[X]** *Limited is strictly as an Independent Contractor. I understand that, as such,* **[X]** *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*.'

37. Drivers were also required to sign a document titled '*Promotional Clothing agreement'* which provided for a deposit to be paid in respect of a branded crew shirt, baseball cap, name tag and driver jacket.

Material findings of fact

38. Based on the witness evidence together with the documentary evidence, I find as follows;

    a. I find as a material fact that, practice was that drivers would fill out an 'availability sheet' approximately one week prior to a roster being drawn up indicating their availability for work and that the roster would be drawn up by a store manager based on the availability sheets.

b. I find as a material fact that the substitution clause permitted drivers to substitute another of the Appellant's drivers when they were unavailable and that the substituted driver would be paid by the Appellant in respect of this shift of work. The substitute could also be arranged by the Appellant, if required.

c. I find as a material fact that drivers were required to wear a fully branded uniform of a cap, shirt, jacket and name tag, that they were also required to wear black trousers and black shoes and to be presentable in their appearance generally, that this was subject to checks by managers and that a deposit was requested by the Appellant in respect thereof. In addition, I find that drivers were provided with branded magnetic signs to affix to their cars as brand promotion for the Appellant.

d. I find as a material fact that drivers were required to provide their own vehicles for deliveries and that there were no company cars available for rent by the drivers.

e. I find as a material fact that drivers were required to use their own phones in contacting customers, when necessary.

f. I find as a material fact that drivers were required to provide certification of business use insurance, that where a driver did not possess same, the Appellant would provide insurance for a charge on the Appellant's policy and that the Appellant required drivers to ensure that their NCT certificates were up to date.

g. I find as a material fact that the Appellant limited the number of deliveries that drivers could deliver, to two per time and that managers would intervene to preclude a driver taking two deliveries if other drivers were waiting to take a delivery.

h. I find as a material fact that some drivers folded boxes while waiting for deliveries and that some drivers were requested to do so by their managers.

i. I find as a material fact that in the case of many drivers the Appellant would pre-prepare invoices that the drivers would sign.

j. I find as a material fact that the drivers clocked-in and clocked-out on the computerised system in use in the Appellant's business using their driver numbers,

that this and other relevant information was collated and maintained by the Appellant.

k. I find as a material fact that on commencement of a shift, drivers would be provided with a cash float by the Appellant which the driver would return at the end of his shift.

l. I find as a material fact that the drop rate was €1.20 per drop with an additional 20c payable for insurance, that the drop rate was stipulated by the Appellant and was not negotiable and that the brand promotion / advertising rate was €5.65 per hour.

39. The Respondent submitted that the written agreement did not accurately reflect the true agreement of the parties as evidence indicated that certain matters did not take place in accordance with the terms of the written contract. The Respondent is correct that the contract did not, in its day to day operations, function verbatim its terms. In particular, I find that the following differences arose;

m. I find as a material fact that there were no company vehicles available for rent although the contract stipulated that company vehicles may be rented by drivers for the purposes of carrying out their duties.

n. I find as a material fact that not all drivers prepared invoices for submission to the Appellant as required by the contract. Evidence from several drivers was that the Appellant prepared invoices which the drivers signed.

o. I find as a material fact that some drivers were asked to perform work which was not stipulated in the contract i.e. the assembly of boxes in store, while waiting for a delivery.

ANALYSIS I – Contract

Number of contracts

40. In the High Court case of *Minister for Agriculture v Barry* [2011] IEHC 43, Mr. Justice Edwards clarified the sequence in which legal questions were to be considered in such cases, stating that the analysis must commence with a consideration of whether the relationship between the employer and the worker was subject to one or more contracts. At paragraph 43, Edwards J. stated;

> *'In each instance it was incumbent on the tribunal to ask three questions. The first question was whether the relationship between each respondent and the appellant was subject to just one contract, or more than one contract. The second question involved the scope of each contract. The third question involved the nature of each contract.'*

41. Individuals carrying out work may work under multiple individual contracts as opposed to one single contract and this possibility was contemplated by Judge Edwards in the *Minister for Agriculture v Barry* at paragraph 44, where he stated;

> *'As I have stated, there were various possibilities. It was, of course, possible that each of the respondents, respectively, was employed under a single contract which, upon a thorough examination of the circumstances, might fall to be classified as either a contract of service or a contract for services. However, another possibility was that on each occasion that the temporary veterinary inspectors worked they entered a new contract, and these contracts, depending on the circumstances, might fall to be classified as contracts of service or contracts for services. A third possibility is that on each occasion that the temporary veterinary inspectors worked they entered a separate contract governing that particular engagement, which might be either a contract of service or a contract for service, but by virtue of a course of dealing over a lengthy period of time that course of dealing became hardened or refined into an enforceable contract, a kind of overarching master or umbrella contract, if you like, to offer and accept employment, which master or umbrella contract might conceivably be either a contract of service or a contract for services or perhaps a different type of contract altogether.'*

42. The Respondent in the within appeal submitted that there was an overarching umbrella contract of the type referred to by Edwards J. above and described by Mr. Justice Briggs, as he then was, in the UK case of *Weight Watchers (UK) Ltd. and ors v Revenue and Customs Commissioners* [2011] UKUT 433 (TCC). Briggs J, at paragraph 30 described this type of contract as follows;

> *'30. Contractual arrangements for discontinuous work may, at least in theory, fall into at least three categories. The first consists of a single over-arching or umbrella contract containing all the necessary provisions, with no separate contracts for each period (or piece) of work. The second consists of a series of discrete contracts, one for each period of work, but no overarching or umbrella contract. The third, hybrid, class consists of an over-arching contract in relation to certain matters, supplemented by discrete contracts for each period of work. In this hybrid class, it may be (and is, in the present case) sufficient if either the overarching contract or the discrete contracts are contracts of employment, provided that any contract or contracts of employment thus identified sufficiently resolve the question in dispute. Where, as here, the question is whether the PAYE regime and the applicable national insurance regime apply to the work done by the Leaders, it is clearly sufficient if there is identified either a single over-arching contract of employment or a series of discrete contracts of employment which, together, cover all the periods during which the Leader's work is carried out.'*

43. The Respondent submitted that the umbrella contract, represented by the written agreement, was supplemented by multiple individual contracts in respect of each assignment of work, with each assignment involving one or more shifts of work depending on the particular agreement.

44. In *Weight Watchers (UK) Ltd*., the Tribunal agreed that although there was a continuous contractual relationship between Weight Watchers and each Leader in accordance with an overarching umbrella contract, each meeting or series of meetings was conducted pursuant to a specific contract which incorporated, to the extent applicable, the terms of the umbrella contract. Briggs J. in the Upper Tier Tribunal, at paragraph 79 of the Decision stated:

'*the FTT concluded that, in relation to any specific meeting or series of meetings, Leaders conducted them pursuant to specific contracts for the taking of those meetings, rather than pursuant to any general umbrella agreement. Further, I am equally satisfied that the FTT concluded that, in addition to meeting-specific contracts, there was indeed an overarching or umbrella contract between WWUK and each Leader, dealing in particular with obligations of Leaders affecting them otherwise than when taking meetings.'*

45. In answer to the question as to the number of contracts in the within appeal, I am satisfied that the contractual arrangements fall within the hybrid category described by Briggs J. at paragraph 30 of *Weight Watchers*. Thus I find that the structure of the contractual arrangements in this appeal comprises one overarching umbrella contract supplemented by multiple individual contracts in respect of assignments of work.

Scope and nature of the contracts

46. In accordance with the judgment of Edwards J. in *Minister for Agriculture v Barry,* the next step in the analysis is to consider the scope and nature of the contracts.

47. I have determined above that the contractual arrangements in the within appeal comprised an overarching umbrella contract framework. The umbrella contract casts obligations on the drivers across the continuum of their multiple assignments of work. As is evident from the written contract, these requirements included *inter alia*, the wearing of a uniform, the provision of a motor vehicle and car insurance, the safeguarding of confidential information, the arrangements governing unavailability of a driver and arrangements in relation to invoicing and record keeping.

48. The umbrella contract was supplemented by multiple individual contracts for assignments of work. The legal basis for individual contracts arising under umbrella contracts in these types of hybrid contractual arrangements, was set out by Briggs J. in Weight Watchers (UK) Ltd., at paragraph 81, as follows;

***'...** In my judgment the FTT were not merely entitled but correct to conclude that there were meeting-specific contracts between WWUK and its Leaders. I consider that the key to that conclusion lies in Condition 6, which requires the Leader to obtain WWUK's*

specific approval … in relation to the fixing of the time, date and place of any meetings or series of meetings. Furthermore, the first sentence of Condition 6 refers expressly to that process being one which requires the Leader to agree to take any such meetings. It follows in my judgment that in relation to any particular meetings or series of meetings, the umbrella agreement constituted by the Conditions, the MOA and the Policy Booklets is no more than an agreement to agree, requiring a further and distinct contract-making process for the conduct of any particular meeting or (more usually) series of meetings. Condition 6 plainly places the initiative for concluding such meeting-specific contracts upon the Leader, who must propose the relevant timing, dating and venue of any meeting or series of meetings for WWUK's agreement.'

49. 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.

50. As soon as a driver arrived for work he was obliged to clock in, to arrange his float, to be uniformed, to have his vehicle insured, to make deliveries and then to clock out. 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.

51. In the UK case of *Quashie v Stringfellows* [2013] I.R.L.R. 99, Lord Justice Elias was of the view that there was no impediment to separate engagements of work constituting contracts of service. At paragraph 10 of that judgment, Elias LJ. stated;

'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: see the decisions of the Court of Appeal in Meechan v Secretary of State for Employment [1997] IRLR 353, [1997] ICR 549 and Cornwall County Council v Prater *[2006] EWCA Civ 102, [2006] 2 All ER 1013, [2006] IRLR 362.'*

52. However, for a contract to constitute a contract of service, it must be established that mutuality of obligation is present and that aspect is addressed in the second part of the analysis, below.

ANALYSIS II - Mutuality of obligation

Mutuality of obligation

53. In *Ready Mixed Concrete* MacKenna J. set out tools for the identification of an employment relationship. In Weight Watchers (UK) Ltd., Mr. Justice Briggs, at paragraph 24 stated: '*MacKenna J.'s original formulation of the mutuality of obligation condition was that it was necessary to show that the worker agreed to 'provide his own work and skill in the performance of some service for his master.'*

54. In *Minister for Agriculture v Barry* [2011] IEHC 43, Mr. Justice Edwards, at paragraph 47 stated;

'*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. …. Accordingly, the mutuality of obligation test provides an important filter. Where one party to a work relationship contends that the relationship amounts to a contract of service, it is appropriate that the court or tribunal seized of that issue should in the first instance examine the relationship in question to determine if mutuality of obligation is a feature of it. If there is no mutuality of obligation, it is not necessary to go further; whatever the relationship is, it cannot amount to a contract of service.'*

55. The above passage was quoted and approved in *Mansoor v Minister for Justice* [2010] IEHC 389, where the Plaintiff sued for breach of duty of care under the principles of employer's liability but was found to have been working under a contract for services and thus did not succeed in his claim. The passage was also quoted in *McKayed v Forbidden City Ltd*. [2016] IEHC 722, an unfair dismissals case brought by Mr. McKayed, a translator with the defendant company. The High Court held that Mr. McKayed could not succeed in his claim on the basis that he was not working under a contract of service and that the requisite mutuality of obligation for an employment contract was absent. The passage was further quoted in *Brightwater Selection (Ireland) Ltd. v Minister for Social and Family Affairs* [2011] IEHC 510, where Mr. Justice Gilligan stated that: '*the mutuality consideration is by no means a determinative test, but is an irreductible minimum of a contract of service*.'

56. Thus for a contract of employment to exist, there must be mutuality of obligation, i.e. an obligation on the employer to provide work and an obligation on the employee to perform the work for his employer. However, if mutuality is established, it does not necessarily follow that a contract is one of service.

Was mutuality present?

57. The authorities are clear on the fact that while an individual is working, there is a contract in existence in which mutuality of obligation is present and both parties to the appeal agreed that this was the case.

58. *In Stephenson v Delphi Diesel Systems* [2003] 1 ICR 471 Elias J. said at paragraph 13;

> *'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, in our view, 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.'

59. For a contract to exist, the mutuality of obligation requirement must be satisfied in respect of the entirety of each contract. In other words, mutuality must be present for the period of the existence of the contract alleged to amount to a contract of employment and not just in respect of the period of time when the work is being carried out by the drivers.

60. In *Weight Watchers (UK) Ltd*. Briggs J. at paragraph 31 stated;

'In cases where reliance is placed on discrete contracts for periods of work it is in my judgment still necessary to show that the requisite irreductible minimum of mutual work-related obligation subsists throughout each relevant discrete contract, not merely during the potentially shorter period when the contracted work is actually being done.'

61. The Appellant submitted that the requisite mutuality was absent for the reason that there was no obligation on the driver to provide work and that if the driver didn't show up for work, no sanction would be imposed by the Appellant. In addition, the Appellant submitted that, in accordance with the terms of the written contract, the Appellant had no obligation to provide work to the drivers, or any of them.

62. Turning to the written contract between the Appellant and the drivers, clause 14 of the contract provides 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.'

63. Clause 12 of the contract between the Appellant and the drivers provides;

'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.'

64. 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 on behalf of the Respondent.

65. The Respondent submitted that the fact that a driver could exercise a choice in respect of the shifts for which he was available did not alter the fact that the relationship between the driver and the Appellant was and is governed by contract and contains mutual obligations to perform personal service. The Respondent submitted that mutuality was present for the entire duration of such contracts and I accept this submission on behalf of the Respondent.

66. The contract in *Weight Watchers (UK) Ltd.,* at condition 10, contained a clause in respect of the parties' obligations which was similar to clause 12 of the contract between the drivers and the Appellant as set out above. Condition 10 of the Weight Watchers contract 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 (UK) Ltd. 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.'

67. Counsel for Weight Watchers (UK) Ltd. submitted that condition 10 entitled a Leader not to turn up to a meeting he/she had already agreed to, if he/she did not wish to do so and that there was no contractual obligation on the Leader to work even after making an agreement to do so.

68. This submission was rejected by Briggs J, on the basis that;

' ….Condition 10 does not set out expressly the circumstances in which a Leader is at liberty not to take a particular meeting. Rather, it assumes that there are or may be such circumstances so that, without breach of contract, the Leader may propose not to take a particular meeting. Since those circumstances are not confined to cases of inability to take the meeting, it may reasonably be inferred that a Leader may propose not to take a particular meeting due to circumstances falling short of inability, such as a family wedding or funeral, in which the Leader is for good reason unwilling to take that particular meeting. But such a proposal by no means leaves the Leader free of any work-related obligation to WWUK, either in relation to that meeting or the series of meetings which she has agreed to take.' [emphasis added]

69. Mr. Justice Briggs stated that condition 10 did not render the replacement Leader the original Leader's delegate but created an entirely new contract in relation to that particular meeting, between Weight Watchers (UK) Ltd. and the replacement Leader. Further, Briggs J. found that the Leader's contractual obligations ceased only when a substitute had been found and accepted and that in any event, contractual obligations persisted in relation to other meetings where the Leader had agreed to work a series of meetings but had perhaps cancelled just one of those meetings.

70. In relation to the question of cessation of contractual obligations on foot of substitution, Briggs J. stated at paragraph 89;

'First, in relation to the particular meeting, the Leader is by implication obliged first to try and find a suitably qualified replacement and secondly, if that fails, to request Weight Watchers' assistance by giving her ASM as much prior notice as possible. It is only when the replacement Leader has been found (by the original Leader or Weight Watchers (UK) Ltd.) or in default, the particular meeting cancelled, that the original Leader's work-related obligations in relation to that meeting entirely cease.'

71. In relation to the continuing contractual obligations on foot of previously agreed but un-cancelled meetings, Briggs J. stated, at paragraph 90;

' ***…*** *it is plain from the language of Condition 10 that where, as usual, a series of meetings has been agreed, a proposal by a Leader not to take a particular meeting leaves her obligation to take the remainder of the series intact. It is in my judgment absurd to suppose that a Leader could, because of Condition 10, first agree to conduct*

a series of meetings and then, without notice to Weight Watchers (UK) Ltd., simply fail to attend to take any of them, without a breach of contract.'

72. Returning to clauses 12 and 14 of the contract between the Appellant and the drivers, I consider it appropriate to place emphasis as follows;

73. In relation to clause 14:

> *'The Company does not warrant or represent that it will utilise the Contractor's services at all; and <u>if it does,</u> 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. <u>The Contractor,</u> in turn, <u>agrees to notify the Company in advance of his unavailability</u> to undertake a previously agreed delivery service*.'

74. In relation to clause 12:

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

75. The import of the above clauses is that they do not set out expressly the circumstances in which a driver is at liberty not to turn up for a shift for which he is rostered. In accordance with the dicta of Briggs J. set out above, the contract assumes that there are or may be such circumstances so that, without breach of contract, the driver may propose not to take a particular shift.

76. The Appellant contended that the drivers had no obligations whatsoever as they could choose not to turn up for any shift, safe in the knowledge that no sanction would be imposed. However, the contract envisages cancellation '*should the Contractor be unavailable at short notice*' together with a requirement of advance notification in accordance with clause 14. Thus the contract aims to some extent, to regulate the circumstances of cancellation by a driver. In this regard I note that condition 10 in the Weight Watchers (UK) Ltd. case similarly provided for advance notification in relation to cancellations.

77. A similar clause (the import of which was; no obligation to offer and no obligation to accept work) was present in *Pimlico Plumbers Ltd. v Smith* [2018] UKSC 29. In *Pimlico*, the UK Supreme Court, upholding the Court of Appeal, found that mutuality of obligation was present on the basis that Mr. Smith was obliged to work a minimum number of hours per week in accordance with his contract. Mr. Smith's contractual obligation was without prejudice to his entitlement to decline a particular assignment. The fact that Mr. Smith was not under an obligation to accept every particular piece of work available did not mean that he was relieved of the obligation to work a minimum number of hours per week nor did it mean that mutuality of obligation was absent.

78. In *Autoclenz* [2011] UKSC 41, a judgment of the UK Supreme Court, the dispute between the parties related to, in part, the classification of the working contracts of a group of car valeters. The contract provided that the car valeters *'will not be obliged to provide* [their] *services on any particular occasion nor, in entering into such agreement, does autoclenz undertake any obligation to engage* [their] *services on any particular occasion.'*

79. In that case there was a practice of Autoclenz requiring the valeters to provide advance notification if they were unavailable for work which, the Court concluded, meant that there was an obligation to attend for work unless a prior arrangement had been made.

80. Leading the judgment of the Court, Lord Clarke, at paragraph 37, quoting paragraphs 35-38 of the judgment of Employment Judge Foxwell in the UK Employment Tribunal, stated;

> *'37. I am satisfied that the claimants are required to provide personal service under their agreements with the respondent notwithstanding the substitution clause that was introduced in 2007. I do not find that this clause reflects what was actually agreed between the parties, which was that the claimants would show up each day to do work and that the respondent would offer work provided that it was there for them to do. Mr Hassell confirmed in evidence that this was the true nature of the agreement between the parties and that his work could not have been done without an understanding that the valeters could be relied on to turn up and do the work put in front of them. I have of course noted that in 2007 the respondent introduced a clause saying that there was no obligation on it to offer work or on the claimants to accept work. I find that this clause was wholly inconsistent with the practice described in*

paragraph 18 of Mr Hassell's witness statement where he refers to a requirement for valeters to notify him in advance if they were unavailable for work. This indicates that there was an obligation to attend for work unless a prior arrangement had been made. In my judgment these factors place these new clauses within the proposition identified at paragraph 58 in the judgment [of Elias J] in [Consistent Group Ltd v Kalwak] and I find that the substitution clause and the right to refuse work were unrealistic possibilities that were not truly in the contemplation of the parties when they entered into their agreements.'

81. While there are differences in *Pimlico* and in *Autoclenz* (i.e. the contract in *Pimlico* specified a minimum number of hours to be worked while the contract in *Autoclenz* did not actually reflect what was agreed between the parties) the reasoning in these cases is of assistance insofar as it does not support the proposition that if there is such a clause (i.e. 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.

82. 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.

83. I agree with the reasoning of Briggs J. in *Weight Watchers (UK) Ltd*. and I conclude 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 the Appellant.

84. Thus I determine that 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.

Conclusion on mutuality

85. The case law confirms that mutuality is present when work is being done and indeed the parties to the within appeal did not dispute that this was the position at law. In the

within appeal, under the umbrella contract framework, the drivers entered into individual contracts in respect of separate assignments of work (each assignment comprising one or more shifts). I am satisfied that mutuality of obligation was present for the duration of these individual contracts. The question of whether mutuality was present in the overarching umbrella contract is addressed at paragraphs 156-166 below.

86. In *Minister for Agriculture v Barry*, Edwards J. at paragraph [47] stated;

> ' *… if mutuality of obligation is found to exist, the mere fact of its existence is not, of itself, determinative of the nature of the relationship and it is necessary to examine the relationship further*.'

87. Thus while mutuality of obligation has been established, it does not necessarily follow that the contract is a contract of employment. The requisite legal analysis must follow in order to ascertain whether the contract is one of employment or of self-employment.

ANALYSIS III – Employment v Self-Employment

88. It is well established in law that an employee works under a contract of service while a self-employed individual or independent contractor works under a contract for services. In conducting an analysis under this heading, it is necessary to consider the leading judicial statement of Keane J, in *Henry Denny & Sons Ireland Ltd. v Minister for Social Welfare*, at page 49, where he stated;

> *'The criteria which should be adopted in considering whether a particular employment, in the context of legislation such as the Act of 1981, is to be regarded as a contract "for service" or a contract "of services" have been the subject of a number of decisions in Ireland and England. In some of the cases, different terminology is used and the distinction is stated as being between a "servant" and "independent contractor". However, there is a consensus to be found in the authorities that each case must be considered in the light of its particular facts and of the general principles which the courts have developed: see the observations of Barr J, in McAuliffe v Minister for Social Welfare [1995] 2 IR 238.*

At one stage, the extent and degree of the control which was exercised by one party over the other in the performance of the work was regarded as decisive. However, as later authorities demonstrate, that test does not always provide satisfactory guidance. In Cassidy v Ministry of Health [1951] 2 KB 343, it was pointed out that, although the master of a ship is clearly employed under a contract of service, the owners are not entitled to tell him how he should navigate the vessel. Conversely, the fact that one party reserves the right to exercise full control over the method of doing the work may be consistent with the other party being an independent contractor: see Queensland Stations Property Ltd v Federal Commissioner of Taxation [1945] 70 CLR 539.

In the English decision of Market Investigations v Min of Soc. Security [1969] 2 QB 173, Cooke J, at p 184 having referred to these authorities said:-

"The observations of Lord Wright, of Denning LJ and of the judges of the Supreme Court suggest that the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'. If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

It should also be noted that the Supreme Court of the Irish Free State in Graham v Minister for Industry and Commerce [1933] IR 156, had also made it clear that the essential test was whether the person alleged to be a "servant" was in fact working for himself or for another person.

lt is, accordingly, clear that, while each case must be determined in the light of its particular facts and circumstances, in general a person will be regarded as providing

his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive. The inference that the person is engaged in business on his or her own account can be more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her.'

89. A number of tests have been developed by the Courts to establish whether an individual is working under a contract of service or a contract for services. The relevant analysis is set out below.

Substitution and Personal Service

90. In the within appeal, if a driver was rostered for a shift but was unable to turn up, he had an entitlement under clause 12 of the written agreement, to arrange for the work to be done by another of the Appellant's drivers. In such a situation, the driver who performed the work who was not originally rostered would be paid for the work. Alternatively, the Appellant could arrange for another one of its drivers to perform the work.

91. In the recent UK Supreme Court case of *Pimlico Plumbers Ltd v Smith* [2018] UKSC, the substitute clause permitted Mr. Smith to substitute another Pimlico operative. The Court held that the contract was one for personal service.

92. The facts in *Ready Mixed Concrete v Minister for Pensions* [1968] 2QB 497 related to a driver who carried out delivery services. The Court concluded that the driver was an independent contractor however, the substitution clause provided that in the event the driver was unavailable, he was entitled to engage others to work for him in driving the vehicle in circumstances where the person appointed by the driver would work for the driver as opposed to the driver's employer.

93. The case of *McAuliffe v Minister for Social Welfare* [1995] ILRM 189 involved the question of whether persons engaged by the Appellant, a wholesale distributor of

newspapers, were independent contractors or were employees, in circumstances where they were engaged to deliver newspapers on behalf of the Appellant. The substitution clause in that case permitted the individuals engaged by the Appellant to substitute a relief driver who would be paid by them. The Court concluded that the individuals involved were independent contractors and not employees.

94. In *Denny*, the position of the shop demonstrator was that in the event she was unable to do the work herself, she was required to arrange for the work to be done by someone else approved by Henry Denny & Sons (Ireland) Ltd. The shop demonstrator was found to be working under a contract of service. In *Denny*, Keane J. at page 50, made clear the relevance of this aspect as follows;

> '*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*.'

95. In *Tierney v An Post* [2000] 1 IR 536, there was a similar clause. Mr. Tierney, a sub-post office master, was required to obtain the permission of An Post for the employment of any person in the post office. Keane J. stated, at page 545;

> *'It is not surprising to find that the respondent has, as it were, a right of veto over the appointment of persons who for any reason it might not be appropriate to employ in a post office: the fact remains that it is not normal to find in a contract of service that the employee can hire assistants to perform the work which he or she is employed to do*.'

96. The substitution clause in *Weight Watchers (UK) Ltd. (UK) Ltd and Ors v HMRC*, required team leaders to find a '*suitably qualified replacement*' in the event that they were unavailable. In that case, Briggs J. stated;

> *'32. Substitution clauses may affect the question whether there is a contract of employment in two ways. First, the right to substitute may be so framed as to enable the person promising to provide the work to fulfil that promise wholly or substantially by arranging for another person to do it on his behalf. If so, that is fatal to the*

requirement that the worker's obligation is one of personal service; see for example Express & Echo Publications v Tanton [1999] IRLR 367, in which the contracting driver was, if unable or unwilling to drive himself, entitled on any occasion, if he wished, to provide another suitably qualified person to do the work at his expense. He was, plainly, delivering the promised work by another person, and being paid for it himself.

33. At the other end of the spectrum, contracts for work frequently provide that if the worker is for some good reason unable to work, he or she 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 substituted person. In MacFarlane v Glasgow City Council [2001] IRLR 7, a qualified gymnastic instructor was entitled, if unable to take a particular class, to arrange for a replacement from a register of coaches retained by the Council, upon the basis that the replacement would be paid for taking the class directly by the Council, rather than by the originally appointed instructor. The Employment Appeal Tribunal had no difficulty in concluding, distinguishing Tanton, that this provision was not necessarily inconsistent with a contract of employment between the Council and the instructor.

34. The true distinction between the two types of case is that in the former the contracting party is performing his obligation by providing another person to do the work whereas in the latter the contracting party is relying upon a qualified right not to do or provide the work in stated circumstances, one of the qualifications being that he finds a substitute to contract directly with the employer to do the work instead.'

97. In the within appeal, the substitution involved is the latter type *i.e.* the driver may find a substitute to contract directly with the employer to do the work in circumstances where the substitute receives payment for the work as opposed to the original driver. In other words, the driver is relying upon a qualified right not to do or provide the work in stated circumstances, one of the qualifications being that he finds a substitute to contract directly with the employer to do the work instead. Based on the authorities, this type of substitution clause is consistent with a contract of service.

98. Briggs J. concluded on this point, at paragraph 35 as follows;

'37. .... the real question is in my judgment whether the ambit of the substitution clause, purposively construed in the context of the contract as a whole, is so wide as to

permit, without breach of contract, the contractor to decide never personally to turn up for work at all. That was indeed held to be the true construction of the relevant clause in Tanton.' [emphasis added]

99. In *Tanton*, the contracting driver, Mr. Tanton, pursuant to his contract, was not obliged to perform any services personally if he was unwilling or unable to do so, provided that he could find a suitable substitute driver. He delivered the promised work by another person and was paid for it himself. The Court held that Mr. Tanton was working under a contract for services.

100. In *Weight Watchers (UK) Ltd.*, Briggs J. affirmed the finding of the First Tier Tribunal that the substitution clause in that case (which permitted either a leader or Weight Watchers (UK) Ltd. to find a suitably qualified replacement to do the work) did not make the replacement leader the original leader's delegate, but gave rise to an entirely new contract in relation to that particular meeting between Weight Watchers (UK) Ltd. and the replacement leader. A similar substitution clause pertains in the within appeal and the same legal consequences arise. The substitution of one of the Appellant's other drivers, by the original rostered driver or by the Appellant, gives rise to an entirely new contract between the Appellant and that other driver in relation to that particular work assignment.

101. The Appellant in the within appeal submitted that the substitution clause was wide enough to permit, without breach of contract, the drivers, never to turn up for work at all and that the substitution clause was therefore consistent with the drivers being independent contractors. This is plainly incorrect. Any drivers substituted in the context of the within appeal would have been remunerated directly by the Appellant for carrying out contractual obligations for the Appellant. They were not sub-contractors of the original driver.

102. Where an original driver was replaced by a substitute, the agreement between the substitute and the Appellant constituted a new contract and it replaced any contract between the original driver and the Appellant in respect of that particular shift. This arrangement was akin to the swapping of shifts between drivers. It does not suggest that the driver's contract with the Appellant was a contract for services unless, *inter alia*, the original rostered driver was being remunerated by the Appellant for the work being done by the substitute driver, but this was not the case.

103. Clause 12 of the Contract between the Appellant and the drivers provides;

> *'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.'*

104. Where an individual is required to perform services personally and is not permitted to engage the services of a sub-contractor these factors weigh in favour of the existence of a contract of service.

105. In this appeal, if a driver was rostered for a shift but was unable to attend, he was required to arrange for the work to be done by another person approved by the Appellant, *i.e.* another of the Appellant's drivers. Once the original rostered driver confirmed his unavailability, the substitute entered into a contract with the Appellant and was paid directly by the Appellant for performing the work. The absence of an ability to genuinely sub-contract is a factor which indicates that the drivers worked under contracts of service as opposed to contracts for services.

Control

106. One of the criteria traditionally applied by Courts in legal analysis regarding the question of whether a contract was one *of* or *for* service(s) is the criterion of control. In *Roche v Patrick Kelly and Co. Ltd.* [1969] IR 100, Walsh J. stated:

> *'[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 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.'*

107. In *Ready Mixed Concrete (South East Ltd.) v Minister of Pensions* [1968] 2QB 497, MacKenna J. identified control as one of the conditions of a contract of services as follows;

'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.'*

108. At page 515 of the report, McKenna J. described the element of control in the following terms;

'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.'

109. The significance of the control test is reduced where the labour being provided is highly skilled but the test remains relevant otherwise. The question which arises in the within analysis is whether and to what extent, the Appellant 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.

110. Evidence in this 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 the Appellant and the services required of the drivers were specified by the Appellant. Drivers were required to wear uniforms provided by the Appellant which promoted the Appellant's business. Evidence was that invoices were in many cases, prepared by the Appellant. Rates of pay were determined by the Appellant and were non-negotiable. The Appellant ensured that the drivers' NCT certificates were up to date and that the drivers were insured, something unlikely to have been done in a situation which involved a truly independent contractor.

111. Additional evidence indicated that the Appellant limited drivers to two deliveries per delivery run but that the in store manager would depart from this 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.

112. In *Denny & Sons (Ireland) Ltd. v Minister for Social Welfare* [1998] 1 IR 34, at page 50, Keane J. stated;

> *'It is, accordingly, clear that, while each case must be determined in the light of its particular facts and circumstances, in general a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive. Therefore, the question of control, though not determinative, is a factor to be taken into consideration in the analysis.*'

113. In conclusion, it is clear that the Appellant exercised a significant degree of control over work done and the manner by which work was to be done by the drivers and control of this nature is indicative of the existence of a contract of service.

Integration

114. In *Stevenson, Jordan and Harrison Ltd. v McDonald and Evans* [1952] 1 TLR 101, Lord Denning, at page 111 stated;

> *'One feature which seems to run through the instances is that, under a contract of service a man is employed as 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.'*

115. In *Re Sunday Tribune Limited* [1984] IR 505, at page 507, Carroll J. described the integration test as follows;

> *'The test which emerges from the authorities seems to me, as Denning LJ said, whether on the one hand the employee is employed as part of the business and his work is an*

integral part of the business, or whether his work is not integrated into the business but is only accessory to it.'

116. In *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181, the employer contended that the work done by the claimant, a carpenter who sought to progress a claim for wrongful dismissal, was done for a customer of a business undertaking of his. This contention was rejected by the EAT however, the dicta of Langstaff J, at para 53 is informative in the context of the integration test. He stated:

'... a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls.'

117. The above dicta arose in the context of considering whether the claimant was a '*worker'* for the purposes of s.230(3)(b) of the UK Employment Rights Act 1996. Many of the UK cases turn on the meaning of 'worker' in accordance with this provision and the provision is set out herein as follows;

> *'(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*
> *(a)a contract of employment, or*
> *(b)any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.'*

118. In *Autoclenz v Belcher* [2011] UKSC 41, which involved the question of whether car valeters were 'workers' for the purposes of the relevant UK legislation, the UK Supreme Court found that the integration test was satisfied on the basis that the valeters were fully integrated into the respondent's business and that they had no other real source of work.

119. In order to ascertain how integrated an individual is in respect of a business, one must identify and consider the core aspects of the business. The Respondent submitted that HotFood describe themselves on their website as '*the world's leading* [hot food] *delivery company'* and this was confirmed in evidence by Mr. E.C., operations director of the Appellant company. The component of delivery to the business is extremely important. Food is made on the premises and is available for collection in store but a substantial amount of customers request home delivery. Based on the evidence, the Appellant's business comprises two core aspects, namely; the production of hot food and the delivery of hot food.

120. Delivery is undoubtedly a core function of the business and if HotFood did not deliver the food, it is arguable that it would be a different business, operating in a different market place. The Appellant contended that they outsourced their delivery service to independent contractors, namely, the drivers, but is it possible for a business to outsource to contractors, the very service it was established to provide? I accept that HotFood was established also, to produce food but I do not consider that the delivery service can be considered accessory to the production of the food because, HotFood is not simply a food business, it is a food *delivery* business.

121. It seems to me 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 raises the implication that in ordinary course they would be employees. HotFood has purported to outsource their 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 logo, they seek to reassure customers that they are dealing with HotFood personnel. The branding also serves as a form of promotion of the business of the Appellant.

122. If the delivery service was carried out by contractors who were truly independent of the Appellant, the contractors would not be wearing HotFood's branded clothing, would not be driving HotFood's branded vehicles and would likely not be using HotFood's imprinted bags for the deliveries. The HotFood logo would be predominantly, perhaps fully absent in the process of delivering the food. The absence of brand promotion in the delivery of the food 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 food appears to the customer as a coherent operation under the care and management of the well-established HotFood brand.

123. In *Uber B.V. v Aslam* [2018] I.R.L.R. 97, a decision of the UK Employment Appeal Tribunal, the matter at issue was whether Uber drivers were '*workers'* for the purposes of s.230(3)(b) of the UK Employment Rights Act 1996. Judge Eady, upholding the decision of the Employment Tribunal, observed at paragraph 109 that the Employment Tribunal

> '*…. found the drivers were integrated into the Uber business of providing transportation services, marketed as such .., and because it found the arrangements inconsistent with the drivers acting as separate businesses on their own account, given that they were excluded from establishing a business relationship with passengers (drivers could neither obtain passengers' contact details nor provide their own), worked on the understanding that Uber would indemnify them for bad debts and were subjected to various controls by [Uber London Ltd.]*'

124. I note in the within appeal, the customer, when ordering for home delivery, does not contact the driver but contacts the Appellant.

125. Under the integration test, the question to be considered is whether the work of the drivers is integrated into the business of HotFood or whether this work is accessory to the business. There is no doubt that the delivery service is integral to the business of HotFood as evidenced by the description of the company on their website as '*the world's leading* [hot food] *delivery company'*. For the reasons set out above, I am satisfied that HotFood delivery service is integral and fundamental to their business. It follows that the work of the drivers in delivering the food is an integral part of the business and is not merely accessory to it.

The enterprise test

126. In *Market Investigations Ltd. v Minister of Social Security* [1969] 2 QB 173, Cooke J. stated, at page 184-185;

'….. the fundamental test to be applied is this; 'Is the person who has engaged himself to perform these services, performing them as a person in business on his own account?' if the answer to that question is 'yes' then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.'

127. This test has been endorsed in a number of Irish High Court and Supreme Court judgments including *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare, Minister for Agriculture v Barry* and *McKayed v Forbidden City Ltd*. [2016] IEHC 722

128. In particular, Keane J. in *Denny,* at page 50, stated;

'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.'

129. In this appeal, the drivers work from the Appellant's premises. In terms of equipment, the drivers provided their own vehicles and mobile phones. Insurance was arranged by the Appellant but discharged by the drivers and the drivers paid for their own petrol. In addition, HotFood provided vehicle branding, uniforms, and branded hot bags. The cash float was provided by the Appellant and not by the drivers themselves.

130. In terms of employing others, the drivers did not have an entitlement to subcontract in the true sense. If the driver became unavailable, either he or the Appellant would arrange another of the Appellant's drivers to work the shift for which he was unavailable however, the substituted driver would receive payment in respect of the work done.

131. In terms of the enterprise test and the question of whether the drivers were engaged in business on their own account, the drivers did not scale their delivery businesses to the delivery market, locally or nationally. They did not advertise their services, did not take calls directly from customers and did not employ assistants or agents of their own. While their role within the Appellant's company was designated as one of '*independent contractor'* their position in the marketplace at large fell short of that which could be described as an established or even a fledgling enterprise. Their businesses did not take on credit risk, economic risk or other business risk.

132. As a result, I find that the drivers were not truly in business on their own account.

Opportunity to profit

133. As established by the Supreme Court in *Denny*, the ability to profit from one's efficiency in the performance of the work is a relevant consideration in determining whether a contract is a contract of service or for services.

134. The evidence in this appeal was that some drivers averaged 1.5 drops per hour per shift while others averaged 3 drops per hour. The Appellant contended that drivers had the ability to profit from their own enterprise and efficiencies depending on the effort they were willing to invest in their work. The Appellant contended that the drivers were at risk and could encounter loss.

135. The Respondent submitted that drivers were not in a position to impact their own earnings unless, during a given shift, there was high customer demand with low staff cover in terms of drivers. The Respondent contended that as the drivers were paid per hour, there was no possibility of the drivers generating a loss but that they might, on a given night, make less money than they had hoped or expected.

136. The Respondent submitted that the '*slightest ability*' to increase earnings did not indicate that one was employed under a contract for services. The Respondent stated that the ability to increase earnings is present in certain contracts of service in the form of commissions and bonuses but that this does not render such employees, independent contractors. The Respondent submitted that the suggestion that *any* ability to increase one's earnings is an indicator that one is working under a contract for services, is false and incorrect.

137. In *Weight Watchers (UK) Ltd*., the employer contended that the leaders were exposed to the risk of financial loss in the conduct of their meetings in a manner inconsistent with employment, on the basis that although leaders were entitled to reimbursement for some of the expenses incident to the conduct of a meeting, they might expend time, effort and money in preparing for a particular meeting for which the commission payable out of membership fees at that meeting, if very poorly attended, would be insufficient to recoup their expenditure. The Court found that the risk of loss in such circumstances was never more than *de minimis*, and that Leaders were, in any event, under no contractual obligation to spend their own money in preparation for a meeting. Briggs J. at paragraph 114 of the decision stated:

> *'this point comes nowhere near being sufficient to disturb an 'on balance' conclusion that, taken as a whole, the Leaders were employees of WWUK rather than independent contractors.'*

138. The Respondent submitted that the important point is rostering, in particular, the proportion of drivers rostered as compared with the number of deliveries ordered. The Respondent submitted such decision making is a function of management and whether the drivers are employees or independent contractors is irrelevant to that consideration.

139. I accept the Respondent's submission that that the opportunity for the drivers to profit from their efficiencies was heavily reliant upon being rostered for a shift which involved proportionally more orders received than delivery drivers rostered. These factors were outside the control of the drivers.

140. As the opportunity to profit was much curtailed by factors outside the control of the drivers, I do not consider that the Appellant's submission under this head lends support to the view that the drivers were independent contractors and I attach minimal weight to the Appellant's submission under this sub-head of analysis.

Bargaining power

141. The equality or inequality of bargaining power between the parties to a contract, is another factor which may be taken into account in a contract *of* and *for* analysis.

142. In the UK Supreme Court case of *Autoclenz*, Lord Clarke at paragraph 34 stated;

'[34] The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para [92] as follows:

> *'I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so … '*

[35] So 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.'

143. The differences between the operation of the contract and the verbatim written contract are set out at paragraph 39 above. In my view, the circumstances of execution of this contract do not suggest that it was a commercial contract between parties of

equal bargaining power. The drivers had no input in relation to the terms contained in the written contract which was drafted by the Appellant. The rates of pay (i.e. the drop rate and the brand promotion rate) were set by the Appellant and were non-negotiable. In order to receive work from the Appellant, drivers were obliged to sign the contract. These aspects do not reflect equal or commensurate bargaining power, and the dynamic under this sub-head of analysis leans in favour of the view that these contracts were contracts of service.

Categorisation of employment status by the parties

144. It is well established that minimal weight will be attributed to the categorisation given by the parties to their working relationship. Although the Appellant contended that the drivers agreed and accepted their status as independent contractors, the Respondent 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.

145. In *Henry Denny & Sons (Ireland) Ltd. v Minister for Social Welfare* [1998] 1 IR 34, Murphy J. at page 53, stated; '[the provisions of the contract were] *not of decisive importance. In my view their value, if any, is marginal. These terms are included in the contract but they are not contractual terms in the sense of imposing obligations on one party in favour of the other. They purport to express a conclusion of law as to the consequences of the contract between the parties. 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 Appellant and not upon any statement as to the consequence of the bargain*.'

146. In *Castleisland Cattle Breeding Society Ltd v Minister for Social and Family affairs* [2004] 4 IR 150, Geoghegan J. at page 161, stated; *'There is nothing unlawful or necessarily ineffective about a company deciding to engage people on an independent contractor basis rather than on a 'servant' basis but as this court has pointed out in Henry Denny and other cases, in determining whether the new contract is one of service or for services the decider must look at how the contract is worked out in practice as mere wording cannot determine its nature. Nevertheless the wording of a written contract still remains of great importance. It can, however, emerge in evidence that in practice the working arrangements between the parties are consistent only with a different kind of contract or at least are inconsistent with the expressed categorisation of the contract. '*

147. In *Denny*, Keane J at page 48 stated;

> '*In the present case, both the appeals officer and the learned High Court judge were of the view that the fact that Ms Mahon was described in the written agreement as being employed as an 'independent contractor' was not conclusive. It is accepted that they were correct in so holding. It is correct to say that the appeals officer appears to have taken the view that the importance of the terms of the written contract was somewhat diminished by the fact that Ms Mahon wanted the job and accordingly had no option but to sign the contract. However, it is also clear from his report that he considered in some detail the actual terms of the written contract and also had regard to the manner in which the work was done by Ms Mahon.*
>
> *If the appeals officer had erred in law in his construction of the written contract, then, in accordance with the principles explained by Kenny J, his decision would be liable to be set aside by the High Court. In the present case, however, it has not been shown that the appeals officer in any way misconstrued the written contract: he was, on the contrary, entirely 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 Ms Mahon's employment. Equally, the High Court judge was correct in the view she took that she should not interfere with his findings in this regard unless they were incapable of being supported by the facts or were based on an erroneous view of the law.'*

148. On page 51 of the report, Keane J. continued as follows;

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

149. In *Denny*, Murphy J. on page 52 of the report stated;

'The document known as the 'Demonstrators' General Terms and Conditions', which was applicable to Ms Mahon and all other demonstrators whose names were from time to time included on the panel maintained by Kerry Foods as persons available to provide the services of a demonstrator, is reasonably lengthy but not very informative. It is clear that the panellists might have been called upon 'to demonstrate, promote, market and sell Kerry Foods' products at different locations but little guidance is forthcoming as to the manner in which those operations would be carried out or the skills which the panellists might possess or would be required to exercise in carrying out their functions. The document is silent as to the contract between the parties. 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. Certainly the imposition of income tax and the manner of its collection falls to be determined in accordance with the appropriate legislation and the regulations made thereunder as they impinge upon the actual relationship between parties and not their statement as to how liability should arise or be discharged.

The terms and conditions governing the engagement of Ms Mahon were not 'the unique source' of the relationship between her and the appellants. I am satisfied that the appeals officer was correct in his conclusion that he was required to consider 'the facts or realities of the situation on the ground' to enable him to reach a decision on the vexed question whether the respondent was an employee or an independent contractor. In seeking to ascertain the true bargain between the parties rather than rely on the labels ascribed by them to their relationship the appeals officer was expressly and correctly following the judgment of Carroll J in Re Sunday Tribune Ltd [1984] IR 505.'

150. In *Minister for Agriculture v Barry*, Edwards J. at paragraphs 63-64 stated;

'[63] In the course of his judgment Keane J. sought to elucidate some of the general principles that the courts have developed, of particular relevance to the case then before him. It was in the course of him doing so that the oft quoted passage (which for identification purposes bears reiteration) appears. He said:
"It is, accordingly, clear that, while each case must be determined in the light of its particular facts and circumstances, in general a person will be regarded as providing his or her services under a contract of service and not as an independent contractor

where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive. The inference that the person is engaged in business on his or her own account can be more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her."

[64] This particular passage was subsequently quoted, and relied upon, in the judgments in the Tierney, Castleisland, and ESB cases respectively. However, although it represents an important summary of some of general principles that the courts have developed, it cannot be said to fully encapsulate the ratio decidendi of the Henry Denny case. It doesn't do so it because it omits one very important general principle developed by the courts which assumed a significant importance in that case and also, coincidentally, in the Tierney, Castleisland, and ESB cases respectively. A very important "particular fact" common to the Henry Denny, Tierney, Castleisland, and ESB cases, respectively, was that in all of those cases there existed a contractual document which purported to contain the expression of an agreed intention of the parties that their relationship should be governed by a contract for services. The existence of that particular fact brought into play the "general principle" that a characterisation or description as to the status of a party contained in a contract intended to govern a work relationship is not to be regarded as decisive or conclusive of the matter. That principle was uncontroversial in the Henry Denny case, having been accepted by parties from the outset. Although it was referred to by Keane J. elsewhere in his judgment, it is not referred to in the passage under consideration. It is in fact dealt with in greater detail in the judgment of Murphy J. who points out that the principle in question was first enuciated in the judgment of Carroll J. in In re Sunday Tribune Ltd [1984] I.R. 505. Accordingly, the celebrated passage from the judgment of Keane J. contains only part of the ratio for the court's decision.'

151. In *Uber B.V. v Aslam* [2018] I.R.L.R. 97, a decision of the UK Employment Appeal Tribunal, the matter at issue was whether Uber drivers were '*workers'* for the purposes of s.230(3)(b) of the UK Employment Rights Act 1996. Judge Eady, considering the decision of the Employment Tribunal and confirming the position that the Court may depart from the labels utilised by parties in the contractual documentation, stated;

'The ET was not bound by the label used by the parties; in the same way as the first instance tribunals in the VAT context, the ET was concerned to discover the true nature of the relationships involved. Its findings led it to conclude that the reality of the relationship between ULL and Uber drivers was not one of agent and principal; specifically, it rejected the argument that the drivers were the principals in separate contracts with passengers as and when they agreed to take a trip .... Having found that Uber drivers did not operate businesses on their own account and, as such, enter into contracts with passengers, the ET was entitled to reject the label of agency and the characterisation of the relationship in the written documentation.'

152. There can be little doubt but that the law is clear in relation to the matter of categorisation by the parties of their employment status. 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.

Conclusion on Employment v Self Employment

153. The possibility of the existence of individual contracts of service for assignments of work arising under an umbrella contract was contemplated by Edwards J. in *Barry v Minister for Agriculture* when he stated at paragraph 53;

'.... if, as is possible, the Employment Appeals Tribunal's ruling was to be interpreted as supporting the implication of an overarching umbrella agreement in a situation where individual contracts, either of service or for services, also existed .....'

154. Lord Justice Elias in *Quashie v Stringfellows* [2013] I.R.L.R. 99, was equally of the view that there was no impediment to individual engagements of work constituting contracts of service. At paragraph 10 of that judgment, Elias LJ. stated;

'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: see the decisions of the Court of Appeal in Meechan v Secretary of State for Employment *[1997] IRLR 353, [1997] ICR 549 and* Cornwall County Council v Prater *[2006] EWCA Civ 102, [2006] 2 All ER 1013, [2006] IRLR 362.'*

155. 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.

Tax cases v Rights cases

156. In legal analysis for the characterisation of persons as employees or as self-employed, it is important to identify whether the dispute relates to employment law rights or to the characterisation of contracts for the purposes of taxation.

157. Redundancy and unfair dismissal claims relate to rights associated with time and time's continuity. Claims of this nature require individuals to prove continuous employment over defined statutory periods.

158. Where a claimant seeks to establish such rights, the claimant will need to prove that he/she was employed by the employer over the requisite statutory period, as was the case in *Minister for Agriculture v Barry* and in *McKayed.*

159. In *Quashie v Stringfellows Restaurant Ltd.* [2013] IRLR 99, Elias LJ, at paragraphs 11 and 12, stated;

'Where the employee working on discrete separate engagements needs to establish a particular period of continuous employment in order to be entitled to certain rights, it will usually be necessary to show that the contract of employment continues between engagements. …

In order for the contract to remain in force, it is necessary to show that there is at least what has been termed 'an irreducible minimum of obligation', either express or implied, which continues during the breaks in work engagements: see the judgment of Stephenson LJ in Nethermere (St Neots) v Gardiner [1984] IRLR 240, 245, approved by Lord Irvine of Lairg in Carmichael v National Power plc [2000] IRLR 43, 45. 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. This was the way in which the employment tribunal analysed the employment status of casual wine waiters in O'Kelly v Trusthouse Forte plc [1983] IRLR 369, and the Court of Appeal held that it was a cogent analysis, consistent with the evidence, which the Employment Appeal Tribunal had been wrong to reverse.'

160. This appeal does not relate to redundancy or unfair dismissal rights. In fact, the drivers are not parties to the appeal. The matter at issue is the characterisation of contracts between the Appellant and its drivers in the context of the imposition of tax by the Respondent.

161. 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).

162. In tax cases, where the question is whether persons carrying out work are to be subject to tax under Schedule E as employees, or subject to tax under Schedule D as independent contractors, one must consider whether there is a single contract, multiple individual contracts, or an overarching umbrella contract supplemented by individual contracts. I have determined in this appeal that there is an overarching umbrella contract supplemented by individual contracts for assignments of work. I have determined that mutuality of obligations is present in the individual contracts and the reasoning in this regard is set out at paragraphs 53-87 above.

163. The next step is to ascertain whether the contracts are contracts *of service* or *for services* and the requisite legal analysis involving the tests of; substitution, control, integration, enterprise, business opportunity etc. is set out above. This analysis leads to the unequivocal conclusion that the contracts are contracts of service.

164. The multiple individual contracts, comprising contracts of service, are taxable in accordance with section 112 TCA 1997. It is not necessary to embark upon an analysis of the nature of the umbrella contract and whether it is a contract *of* or *for.* It is not necessary to consider whether the umbrella contract contained mutuality of obligations.

165. Similarly, in *Weight Watchers*, Briggs J. chose not address the issue of whether the umbrella contract satisfied the mutuality of obligation requirement. Briggs J. found that once it had been established that the meeting-specific contracts constituted contracts of employment, it was inevitable that they would be taxed as contracts of employment in the normal way. As a result, in terms of taxation, nothing turned on the issue of whether the umbrella contract contained mutuality of obligation. I am satisfied that the same considerations apply in this appeal.

166. As the nature of the overarching, umbrella contract is incidental to the operation of section 112 TCA 1997 in the circumstances of the within appeal, the assessments raised under s.112 subject to income tax, emoluments generated on foot of individual contracts of service between the Appellant and its drivers, in respect of the relevant tax years of assessment. Section 112 TCA 1997 does not stipulate a requirement of

continuous employment. It simply taxes emoluments arising from contracts of employment within the tax year of assessment, whatever their number and whatever their duration.

CONCLUSION

The burden of proof

167. In appeals before the Tax Appeals Commission, the burden of proof rests on the Appellant who must prove on the balance of probabilities that the assessments/estimates raised by the Respondent are incorrect.

168. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another,* [2010] IEHC 49, at para. 22, Charleton J. stated: *'The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.'*

169. As the Appellant in this appeal has not succeeded in showing that the tax is not payable, the Appellant has not succeeded in discharging the burden of proof.

Determination

170. The matter at issue in this appeal is whether food delivery drivers engaged by the Appellant were in receipt of emoluments from contracts of service, within the meaning of section 112 TCA 1997, or whether they were self-employed individuals working under contracts for services and chargeable to tax under Case I of Schedule D.

171. For the reasons set out above, I determine that the drivers worked under multiple contracts of service and are taxable in relation to the emoluments arising therefrom in accordance with section 112 TCA 1997.

172. I determine that the estimates raised in June 2014 in relation to PAYE and PRSI, regarding the tax years of assessment 2010 and 2011, in the sum of €215,718 shall stand.

173. This appeal is determined in accordance with Part 40A of the Taxes Consolidation Act 1997, as amended.

COMMISSIONER LORNA GALLAGHER

October 2018

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997 as amended.