Irish Supreme Court issues landmark decision in Domino's Pizza case

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The Irish Supreme Court issued its landmark decision in *The Revenue Commissioners v Karshan Midlands t/a Domino's Pizza* on 20 October this year finding that Domino's Pizza delivery drivers in this case (which is a tax case) ought to be treated as employees and not as independent contractors. What does this mean for employers?

Background

The dispute began when Karshan (Midlands) Limited trading as 'Domino's Pizza' ("**Karshan**") claimed that their delivery drivers were working under contracts for services and should therefore be classified as self-employed and responsible for their own tax affairs. The drivers signed an "umbrella contract" in which they acknowledged that they were providing services as independent contractors. They also signed two separate documents, a "Promotional Clothing Agreement" and a "Social Welfare and Tax Considerations" document, in which they further acknowledged that Karshan had no responsibility to deduct/pay PAYE and the usual employment related taxes.

The Irish Revenue Commissioners ("**Revenue**") submitted at all times that these individuals ought to have been treated as employees under contracts of service instead and be subject to PAYE and the relevant employment taxes. The matter was referred to the Tax Appeals Commission (the "**TAC**") which agreed with Revenue's views that the drivers should be classified as employees.

Karshan appealed the TAC's decision to the High Court which continued to uphold the TAC's decision. However, this was later overturned by the Court of Appeal in June 2022, which found that the delivery drivers should be treated as independent contractors. Revenue appealed this decision to the Supreme Court.

Mutuality of obligation

As the case made its way through the courts, fundamental principles of what constitutes an employee over a contractor were examined at each stage. The concept of "mutuality of obligation" appeared to dominate the majority of the legal arguments at each stage of appeal. That is the extent to which the relationship is one where the employer is obliged to provide work, and the worker is obliged to perform it. However, the Supreme Court in this instance took the view that the term has generated unnecessary confusion and rejected Karshan's view that the concept is a prerequisite in determining that a contract of employment exists.

The Supreme Court reiterated the importance to consider all of the particular circumstances of any given case and, that it is necessary to assess all relevant features of the working relationship in order to identify features that are consistent with an employment contract or a self-employed/independent contractor.

Five steps in determining employment status

Crucially having disposed of the established principle that mutuality of obligation must exist before a finding can be made that an employment relationship exists, the Supreme Court considered the following five steps as being determinative instead:

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

In this case, there was no doubt that the umbrella contract was a contract and that the drivers would be paid (consideration) for their services. Therefore this agreement was capable of being classified as an employment contract, at least for the periods during which the drivers worked for Karshan and there was an exchange of labour and wages.

If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?

The Supreme Court also commented that personal service is essential for an employment contract to exist. However, this is of course not determinative on the issue in and of itself. The Supreme Court also acknowledged that in an employment relationship, some limited degree of substitution is permissible. An agreement may provide a right of substitution only where the worker is unable to carry out the work (e.g. if a driver was absent due to illness, another driver may be rostered in their place at the direction of the employer).

However, an unconditional or unfettered right to substitute is inconsistent with an undertaking to provide work / services personally. For example, an independent contractor may hire its own employees to carry out work for a third party with whom the contractor has entered into a commercial agreement with.

If so, does the employer exercise sufficient control over the employee to render the agreement one that is capable of being an employment agreement?

The Supreme Court also confirmed that the long-established feature of 'control' remains central to the existence of an employment relationship, but that it is not determinative in and of itself. The legally minimum element of control is a framework of control in the sense of "ultimate authority" rather than the concept of day-to-day control which has been a main focus of previous cases.

In that regard, the question to be asked is whether the service receiver has a right of control over what is to be done, at least generally the way in which it is to be done, the means to be deployed in doing it and, the time and place where it is to be done.

If these three requirements are met, the factual matrix and working arrangements must be considered.

The first three questions act as a filter of sorts in deciding whether questions four and five ought to even be considered. If any of the first three questions are answered negatively, that means that a contract of employment does not exist. If all are answered positively, the next step is to consider the factual matrix of the true nature of the relationship.

Central to this limb of the test is whether the drivers are carrying out business on their own account. The Supreme Court reverted to the TAC's interpretation of the matter and considered this approach to be correct. These factors included the following:

- The drivers did not take calls from customers;
- They did not employ or have the right to employ their own labour to undertake their tasks;
- They took no credit or economic risk;
- They worked exclusively from Karshan's premises;
- Their ability to maximise their own profits was limited and constrained by the control exercised by the on-site manager;
- They did not advertise their services; and
- They did not scale their delivery business to any particular market.

The Supreme Court noted that some elements of the control test were also relevant here in that the drivers were required to wear Domino's Pizza uniforms, to affix Domino's Pizza branding to their vehicles and, to deliver pizzas directed to them by the on-site managers. In light of the aforementioned, the Supreme Court considered that the work being carried out by the drivers was in every sense work for Karshan and not for themselves.

Is there anything in the particular legislative regime under consideration that requires the court to adjust or supplement any of the foregoing?

The Supreme Court noted that depending on which piece of legislation a worker's rights were being considered, different language, purpose and context of that legislation must be taken into account. In this case, the relevant legislation was the Taxes Consolidation Act 1997 (the "**TCA**").

The Supreme Court considered the TCA and stated that it does not require continuity of service when determining whether the drivers should be taxable under Schedule D of the TCA (as self-employed independent contractors) or under Schedule E (as employees). The question of whether continuity of services for the purposes of employment rights legislation such as unfair dismissal, or redundancy, was not answered by the decision of the Supreme Court.

The Supreme Court considered all five limbs of this test as it was satisfied that the first three questions were capable of being answered affirmatively. In light of the above considerations under each question, the Supreme Court found that the TAC was correct in its determination that the drivers were employees of Karshan for the purposes of the TCA and their tax assessments.

It is important to note that this judgment has determined Karshan as the employer of its drivers for the purposes of the relevant provisions of the TCA and therefore, the finding is subject to inherent limitations. The Supreme Court clarified that the question of whether the drivers have continuous service for the purposes of employment rights legislation could not be decided within the present case. The Supreme Court also stated in its findings that the decision does not bind any driver who may wish to contend that they were not an employee.

What does this mean for Irish employers?

The Supreme Court's reformulation and restatement of law on this topic provides clarity for organisations who wish to engage workers as independent contractors in the gig economy, reiterating the risk that these organisations may end up liable for payment of employment related taxes and social contributions, regardless of the wording included in a contract. Whilst the implications of this judgement are not confined to tax, it is likely that the five step approach will be used in future cases when determining employment status for the purposes of employment rights legislation, such a statutory leave, unfair dismissal, redundancy entitlement etc.

This is certainly an area to watch and in any working relationship that is intended to be entered into with an independent contractor, organisations should consider the five steps above. The same applies for any existing arrangements that might already be in place. Revenue have also published commentary about this decision, encouraging organisations to familiarise themselves with the judgement and to liaise with Revenue regarding the various disclosure regimes in their Code of Practice for Revenue Compliance Interventions in the event of any discovery of misclassified workers.

For further assistance on classifying workers as independent contractors or employees, or, for assistance with preparing contracts of employment and/or independent contractor's agreements,

please contact our Employment solicitors Mary Gavin or Marianne Norton via their contact details below.

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