

Determining Employment Status – The Impact of the Recent Supreme Court Decision

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There has been much activity regarding the employment status of individuals in recent years. The area continues to be a target for Revenue scrutiny and there have been cases before Tax Appeal Commission (TAC) and the Irish courts in recent years.

The classification holds significant consequences for every business, as it is the responsibility of the business to accurately classify the agreements with an individual as either an employee or a self-employed individual. In the event of an incorrect classification as self-employed, the Revenue can hold the business accountable for settling the unpaid income tax, employers PRSI, and may impose interest and penalties for non-compliance.

When comparing employed versus self-employed status, there are several distinctions to consider, which include differences in rights, responsibilities, and tax implications.

The following checklist provides some of the considerations in determining whether an engagement is an employment or self-employed arrangement. The below list is not exhaustive, and every case should be considered on its own merits.

The Revenue Commissioners v Karshan (Midlands) Ltd t/a Domino's Pizza [2023] IESC 24

On 20 October 2023 the Supreme Court delivered its highly anticipated judgment in *The Revenue Commissioners v Karshan (Midlands) Ltd t/a Domino's Pizza [2023] IESC 24*, which concerned a dispute over the employment status of delivery drivers working for the respondent company (Karshan).

Overtaking the Court of Appeal, the Supreme Court has determined that the delivery drivers of Domino's Pizza were employees and not independent contractors.

| Considerations | Employment | Self-Employment |
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| Nature of contract | Involves a contract of service. | Involves a contract for services. |
| Control Over Work | The employer controls how the work is to be done. | The individual controls how the work is done. |
| Links to Organisation | An employee is part of the organisation, typically with a designated workspace. | A self-employed person is not integrated into the organisation in the same way and does not have a fixed place of work within it. |
| Premises | An employee works at the employer's premises. | A self-employed person provides their own premises. |
| Equipment and Tools | An employee uses the employer's equipment and tools. | A self-employed person provides their own equipment and tools. |
| Substitution | An employee cannot provide a substitute for themselves. | A self-employed person can hire their own helpers and provide substitutes. |
| Social Welfare Benefits | Employees are entitled to a broader range of social welfare supports. | Self-employed individuals have access to a somewhat smaller range of social welfare supports. |
| Rights and Entitlements | Employees have rights regarding working time, holidays, maternity/parental leave, protection from unfair dismissal, etc. | Self-employed individuals do not have these rights and protections, although they can avail of protections under the Employment Equality Acts with a personal contract for work or service. |
| Public Liability | Employees are generally covered by their employer's public liability insurance. | Self-employed persons are expected to hold their own insurance. |
| Financial Risk and Profit Opportunity | Employees do not normally have the opportunity to make a profit beyond their agreed remuneration and do not bear the risk of loss. | Self-employed individuals can profit from their management and creativity, and they bear the financial risk, including the cost of making good faulty work. |
| Integration | An employee is an integral part of the organisation. | A self-employed person is not generally integrated within the business and is considered an accessory. |

This case has received a lot of attention over the last few years and its decision is very significant to employers. In its judgment the Supreme Court has clarified the position with regards to workers who fall within the legislative interpretation of the "employee" definition by setting out a five-step test to determine whether a contract is one of service or for services, although the underlying historical tests remain valid.

Background

This case involved drivers who provided delivery services for Domino's Pizza. The Respondent, Karshan, contended

that these drivers were engaged as independent contractors under contracts for services. Some background facts of the case include the following:

- Karshan produced and delivered pizzas and ancillary food items to customers, who placed orders by telephone, the internet and attending its stores.
- Karshan engaged drivers to deliver the pizzas to its customers.
- Each driver entered into a written agreement with Karshan, which outlined the company's need to sub-



contract the delivery of pizzas, as well as the promotion of its brand logo, and that the driver (referred to in the agreement as the "contractor") would be willing to provide those services.

- The agreement stated that the driver would be retained as an "independent contractor" and that the company had "no responsibility or liability whatsoever for deducting and/or paying PRSI or tax on any monies [he/she] may receive under this agreement".
- Each driver was required to provide his/her own delivery vehicle in a roadworthy and safe condition and to insure same for business use. Alternatively, the driver could rent such a vehicle from Karshan, with the agreement stating that the company was also prepared to offer third-party insurance at a predetermined rate. (TAC found no evidence that company vehicles were available for the drivers to rent).
- Drivers were also required to wear a fully branded uniform (subject to checks by store managers), with a deposit requested by the employer from the drivers for same.
- The driver could engage a substitute provided the substitute could undertake all of the driver's contractual obligations, with the substitute being paid by Karshan.
- On a shift, drivers clocked in and out using a computerised system located on Karshan's business premises and were given a cash float by the company, which was returned at the end of the shift.
- Drivers were required to use their own phones when contacting customers. The company also limited the number of pizzas that could be delivered to two per time, and some drivers folded boxes while waiting for deliveries, often at the request of the store manager.
- The contract envisaged that invoices would be prepared and submitted to Karshan by the drivers, but it was found that not all drivers prepared such invoices. Karshan would prepare invoices for many (but not all) of the drivers that would then be signed by the relevant driver.

The Appellant, the Revenue Commissioners, argued at all times that they were employees retained under

contracts of service.

The dispute has a long history commencing with a TAC decision which held that the drivers were employees. This was upheld by the High Court but overturned by the Court of Appeal. The Court of Appeal was of the view that there was no mutuality of obligation between the drivers and Karshan and as such, they were independent contractors.

Mutuality of Obligation

Central to the Supreme Court judgment was the concept of mutuality of obligation. In its arguments, Karshan presented mutuality of obligation as having the following four features:

1. The mutual commitments had to present some type of continuity ("continuity")
2. They had to have a forward-looking element ("extending into the future")
3. There had to be an obligation on the part of the employer to "provide" work
4. There had to be an obligation on the part of the employee to "perform" work

Karshan argued that without mutuality of obligation, a contract of service could not exist.

The Supreme Court maintained that the mere fact that an individual does not owe any contractual obligation to an employer when they are not working, does not preclude a finding that the individual is an employee, at the times when he/she is working.

In the end, the Supreme Court dismissed the argument that an agreement cannot be classified as a contract of employment unless there is the mutuality of obligation outlined by Karshan. It stated that this reasoning relied on adding a new, arbitrary requirement to the employer-employee relationship that has no basis in principle and is not backed by authority.

In this decision, the Supreme Court primarily considered whether mutuality of duty is a necessary need for the establishment of an employment contract. The Supreme Court

disagreed, confirming that mutuality of responsibility is a significant consideration for determining employment status rather than a necessary condition for the existence of an employment contract.

Contract of service or for services

Considering the body of existing case law in the area, the Court said that the question of whether a contract is one of service or for services should be resolved by reference to the following five questions:

1. Does the contract involve the exchange of wage or other remuneration for work?
2. If so, is the agreement one where the worker agrees to provide their own services, and not those of a third party, to the employer?
3. If so, does the employer exercise sufficient control over the supposed employee to render the agreement one that is capable of being an employment agreement?
4. If requirements 1-3 are met, the decision maker must then determine whether the terms of the contract between employer and worker and the reality of the working arrangements are consistent with a contract of employment, or whether they point to some other form of contract.
5. Finally, it should be determined whether there is anything in the

particular legislative regime under consideration that requires the court to adjust or supplement any of the foregoing.

Employers who engage contractors should urgently review how the arrangement operates in practice and review the relevant contracts in place. The new 5 step test will also be relevant.

The Supreme Court ruled that the evidence showed specifics of Karshan's previously stated "close control" over the drivers while they were at work. Noting that there were some features of the activities carried out by the drivers that were consistent with their being independent contractors engaged in business on their own account.

The Supreme Court noted that the TAC was entitled to conclude that the evidence pointed to the drivers carrying on Karshan's business rather than their own, and they were employees of the company for the purposes of the relevant provisions of TCA 1997, having regard to the satisfaction of the established tests.

This could be largely attributed to:

- the requirement for the drivers to provide notice of availability;
- the inability to freely provide a substitute in the event of an inability to work;
- the requirement for the drivers to wear the branded clothing of Karshan (furthering the promotion of its brand); and

- the lack of negotiating power held by the drivers in respect of their contracts.

Code of Practice on Determining Employment Status

Following the above Supreme Court judgement, Revenue are currently working with the Department of Social Protection and the Workplace Relations Commission to update the content in the Code to reflect the judgement.

Separate to updating of the Code, Revenue will shortly issue guidelines on the judgement and its impact on the employment status of individuals for tax purposes.

The Supreme Court's revision and restatement of law on this topic provides clarity for businesses 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.

It is important that businesses which engage contractors review how each such arrangement operates in practice and ensure the relevant contracts reflect this reality.



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