

EMPLOYMENT

New landmark judgment: *The Supreme Court rules on pizza delivery drivers' employment status*

Issues involving whether a worker is engaged under a contract of service (as an employee) or a contract for services (as an independent contractor) occur in a wide range of different legal contexts and have been the subject of many decisions handed down by various bodies over the years. Now, for the first time in recent years, the Irish Supreme Court has delivered a judgment on this issue in the case of *Revenue Commissioners v Karshan (Midlands) Limited trading as Domino's Pizza*.¹

¹ [2023] IESC 24

9 MIN READ

What happened in this case?

Drivers were engaged to deliver pizzas for a Domino's pizza franchise² (**Karshan**). The drivers signed agreements (**umbrella contracts**) with Karshan, pursuant to which it engaged the drivers to deliver pizzas and to promote its brand logo. Among other terms, the umbrella contracts described the delivery drivers as independent contractors and required the drivers to acknowledge that Karshan had no responsibility or liability to deduct and/or pay employment taxes on behalf of the drivers.

The umbrella contracts provided that Karshan would pay the drivers an amount depending on the number of deliveries made and in respect of brand promotion – i.e., wearing Domino's branded clothing and/or affixing the logo to their vehicles. They also included a number of terms

relating to insurance, substitution of drivers, scheduling and limitations on the right of the drivers to provide delivery services to other companies.

The drivers were required to sign two other documents – a 'Promotional Clothing Agreement' regarding the use of branded clothing and a 'Social Welfare and Tax Considerations' document, pursuant to which the drivers were required to acknowledge that any work undertaken was strictly as an independent contractor and Karshan had no responsibility or liability to deduct and/or pay PRSI or tax on any monies received from work-related activities.

This particular case involved the question of whether the workers were employees or not under the Taxes Consolidation Act 1997 (**TCA**) as different tax rules apply depending on whether a worker is, or is not, an employee.

² (*Karshan (Midlands) Limited t/a Domino's Pizza*)

What did the Tax Appeals Commission decide?

The Revenue Commissioners (**Revenue**) contended that the delivery drivers were employees and, therefore, PAYE and PRSI should have been operated on payments made to the drivers. Karshan claimed that its delivery drivers were self-employed and responsible for their own tax deductions.

The Tax Appeals Commission (**TAC**) agreed with Revenue that the delivery drivers should be classified as employees during the relevant tax years (2010 and 2011).

In coming to this conclusion, the TAC had regard to factors such as:

- the mutuality of obligation between the parties
- the level of control by Karshan
- the level of integration of the drivers into the business
- whether the drivers were in business on their own account and had the opportunity to profit from their efficiency
- the level of bargaining power between the parties.

What did the High Court decide?

Karshan appealed the TAC's determination to the High Court.³ The High Court found that the pizza delivery drivers were employees. The High Court examined factors such as *mutuality of obligation*, the level of integration of the drivers into the business, their freedom to sub-contract their services and the reality of the relationship between the parties (as opposed to what was in the umbrella contract) to reach its conclusion.

What did the Court of Appeal decide?

Karshan appealed to the Court of Appeal who found, by a majority of 2:1, that the pizza delivery drivers were self-employed independent contractors. The Court of Appeal stated that the test to be relied upon in determining whether an individual is an employee or not was the mutuality of obligation test, i.e., is there a mutual obligation on the employer to provide work

for the employee and on the employee to perform work for the employer. The majority of the Court of Appeal were of the view that only once mutuality of obligation was made out should it look at other matters such as the right of substitution, the level of integration of the worker in the business and the terms of the contract.

The Court of Appeal found that no mutuality of obligation existed between the parties and therefore the delivery drivers were independent contractors responsible for their own taxes.

The decision of the Court of Appeal was then appealed to the Supreme Court.

What did the Supreme Court decide?

"*Mutuality of obligation*" dominated the legal arguments by the parties. However, the Supreme Court found the term "*mutuality of obligation*" has, through a combination of over-use and under-analysis, been transformed from what should have

been a straightforward description of the consideration underlying a contract of employment, to a wholly ambiguous label with no clear authority in precedent. Not only that, but the Supreme Court stated the term has generated unnecessary confusion, which it commented will be most effectively avoided in the future if the use of the phrase in this area is discontinued.

In its unanimous judgment, the Supreme Court conducted a detailed assessment "*of the warehouse of cases that have developed around this issue over the past half a century*" in order to retrieve a test that is "*clear, workable and yet sufficiently flexible*".

The Supreme Court relied, in particular, on the framework developed by the English High Court in the case of *Ready Mixed Concrete (South East) Ltd. v. Minister for Pensions and National Insurance*⁴ to determine that the question of whether, in any given case, a worker is an employee should be resolved by reference to the following factors:

³ [2019] IEHC 894

⁴ [1968] 2 QB 497

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

In this case, the Supreme Court held that there could be no doubt but that the umbrella contract was a contract, nor could there be any serious dispute that at some point, an agreement came into being between the drivers and Karshan whereby they would be paid in consideration for their services. The agreement was capable of being an employment contract, insofar as for at least the periods during which they worked there was an exchange of labour and wage.

2. Is the worker agreeing to provide their services personally?

It is necessary to decide if the agreement is

- i. one for personal services
- ii. one for personal services with a conditional capacity for delegation or
- iii. whether it is an agreement that enables such a level of unconditional delegation that it is not an employment contract at all.

The Supreme Court agreed with the TAC's finding that the right of substitution in this case was limited. The right of substitution could only be availed of by a driver who had agreed to be rostered and who was unavailable to work at short notice. The TAC was entitled to decide that the ability of a driver to delegate was sufficiently limited, maintaining the personal service required for it to be an employment contract.

3. Does the employer exercise sufficient control over the employee?

The Supreme Court commented that what is of concern is a *right* of control and that if a worker is unskilled, close direction as to the means and manner by which the work is to be done is to be expected, while if skilled, the employer would not be expected to be in a position to direct the worker as to how to achieve the prescribed objective. In both situations there is a right of control.

Agreeing with the dissenting judgment in the Court of Appeal, the Supreme Court in this case found that the combined effect of the operation of the rosters and weekly allocation of work, as well as the level of control over matters such as those outlined below, all pointed to a high level of control on the part of Karshan:

- the manner the drivers dressed
- the time the drivers were there
- the number and extent of deliveries the drivers were to undertake
- the preparation and filling out of invoices

4. Do the terms of the contract, interpreted in light of the factual matrix and working arrangements, point to the worker working for themselves, or for the 'employer'?

The first three questions are a filter in the form of preliminary questions which, if any of them is answered negatively means that there can be no contract of employment. If all are answered affirmatively, the next step is to interrogate the factual matrix to ascertain the true nature of the relationship. Central to this is the question: is the worker carrying on business on their own account?

In this case, the Supreme Court found the TAC had correctly focused on the extent to which the pizza delivery drivers were carrying on business on their own account. The Supreme Court noted the following factors considered by the TAC in correctly determining that the pizza delivery drivers were not independent contractors:

- they did not take calls from customers
- they did not employ, or have the right to employ, their own labour to undertake the tasks

- they took no credit or economic risk
- they worked exclusively from Karshan premises
- their ability to maximise their own profits was very limited and constrained by the control exercised by the on-site managers
- they did not advertise their services
- they did not scale their delivery business to any particular market

The Supreme Court noted some elements of the 'control' limb of the test were also relevant to this conclusion, namely the fact that the pizza delivery drivers were required to wear uniforms, to carry branding on their vehicles and that they could deliver only those pizzas directed to them by the managers.

In short, their economic activities were so restricted by the terms and conditions imposed on them, the Supreme Court found that they could not be said to have been engaged in their own business. Their work was in, every sense, work for Karshan and was directed towards advancing its business, not their own.

5. The legislative context

Depending on the particular legislation under which a worker's employment status is being considered, the different language, purpose and context of that legislation will need to be taken into account. In this case, the language of the TCA did not require any modification to the above approach.

Conclusion

The Supreme Court found the TAC was entitled to reach the conclusion it did. The drivers worked at and from Karshan's premises wearing uniforms directed by it, conducting a critical part of its business, delivering in accordance with the directions of the managers and advertising Karshan's business as they were required to do.

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

Next steps

The unanimous decision of the seven-judge Supreme Court provides welcome clarification on this complex area of law. It is vital that businesses now consider their current and future arrangements with those they engage to provide services, in light of the five sequential factors promulgated by the Supreme Court.

The implications are not confined to tax liabilities but could lead to significant exposure for the purposes of employment legislation. In conducting an analysis of the factors, it is important that all relevant features of the relationship are assessed to identify those that are, and those that are not, consistent with an employment contract, in order to determine the correct characterisation.

Since the judgment, Revenue has published an [update](#) on its website which encourages businesses to familiarise themselves with Supreme Court's findings. In particular, it states that any business which currently engages contractors, sub-contractors or other workers on a self-employed basis should review the nature of any such arrangement(s) in light of this judgment and consider the implications it may have for

them. Revenue specifically states that it is important to note this judgment is relevant to a broad range of work and is not limited to delivery drivers.

They remind businesses that they may engage with Revenue through the various disclosure regimes in their Audit Code in order to regularise the position where businesses are now discovering that they may have miscategorised workers.

For further information in relation to this topic please contact [Triona Sugrue](#), Knowledge Consultant, [Dearbhla O'Gorman](#), Senior Associate, [Colm Byrne](#), Solicitor, [Dharitri Datar](#), Solicitor or any member of the [ALG Employment](#) or [Tax](#) teams.

Key contacts



Triona Sugrue
Knowledge Consultant, Employment
+353 1 649 2413
tsugrue@algoodbody.com



Colm Byrne
Solicitor, Employment
+353 1 649 2997
cbyrne@algoodbody.com



Dearbhla O'Gorman
Senior Associate, Tax
+353 1 649 2968
dogorman@algoodbody.com



Dharitri Datar
Solicitor, Tax
+353 1 649 2756
ddatar@algoodbody.com

Resources



[Update following judgment delivered in The Revenue Commissioners v. Karshan \(Midlands\) Ltd. t/a Domino's Pizza](#)

[READ MORE](#)