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Domino's pizza delivery drivers are self-employed independent contractors not employees (IR)

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Summary

This case originated in an assessment by the Revenue Commissioners that pizza delivery drivers who had worked for the taxpayer company in 2010 and 2011 were 'employees' and, as such, were taxable under Schedule E to the Taxes Consolidation Act 1997. A Tax Appeals Commissioner (TAC) upheld this assessment, whose decision, in turn, was upheld by the High Court (HC). The HC distilled the questions raised by the TAC's decision to four core issues: mutuality of obligation, substitution, integration and the written terms of the contract (and the weight that it should be given). The HC found no error of law by the TAC and dismissed the appeal, which decision was then appealed to the Court of Appeal (CA). The CA, sitting in a panel of three with one judge dissenting, found that the drivers were in fact and in law engaged by the company on contracts for services and were thus independent contractors, not employees.

Legal background

Ireland has a strong line of legal precedent concerning the principles to be applied in determining whether a person is employed under a contract of service (an employee) or under a contract for services (independent contractor). Historically, these have aligned in large part with the applicable principles from the United Kingdom. In more recent times they have diverged, both resulting from statutory change which has created a category of 'worker' that sits between the definition of employee and independent contractor, and from judicial precedent regarding the application of the relevant principles. As is explained in the majority judgment of Costello J., the *sine qua non* of the question as to whether a person is an employee is the principle of 'mutuality of obligation'. If there is found to be no mutuality of obligation it cannot be an employer-employee relationship. If there is, then the further issues of substitution, integration and the terms of the written agreement must be considered. Each case must be decided on its individual facts.

Facts

The company trades as Domino's Pizza, a business that makes and provides home delivery of pizzas to customers who place orders. The company engages drivers by way of a written contract which states that they wish to sub-contract the delivery of pizzas and the promotion of its brand logo to drivers who shall be retained as independent contractors. The drivers must provide and insure their own vehicle and are paid both by delivery and in addition for brand promotion by wearing a branded uniform and affixing logos to their vehicles. Drivers are entitled to provide delivery services to other companies, provided they are not rival companies where a conflict of interest would be possible. The contract further provides that:

- drivers are entitled to engage a substitute delivery person if they are unavailable at short notice;
- the company does not warrant that it will use the drivers' services at all;
- if the company does use the drivers' services the drivers can invoice per delivery at an agreed rate;
- the company recognises the drivers' right to make themselves available only on certain days and certain times of their own choosing; and
- the drivers in turn agree to notify the company in advance of unavailability to undertake a previously agreed service.

The drivers also signed a document entitled 'Social Welfare and Tax Considerations' which confirmed they provided services strictly as independent contractors and a document entitled 'Promotional Clothing Agreement' which provided for a deposit to be paid in respect of their branded uniforms. The practice between the parties was that drivers who had signed the written contract would fill out an 'availability sheet' one week

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before a roster was drawn up by the company, based on those availability sheets.

Court of Appeal decision

Costello J. noted that the TAC had taken her starting point from the decision in *Minister for Agriculture – v – Barry* [2008] IEHC 216 in which the HC had held that it was necessary to determine if the relationship was subject to one or more contracts. The TAC had determined that the relationship in this case fell into a hybrid category. It was subject to an overarching 'umbrella contract' and thereunder multiple individual contracts between the parties in respect of each assignment of work (i.e. each rota). In this regard the TAC relied on a UK case, *Weight Watchers (UK) Ltd and others – v – Revenue & Customs Commissioners* [2011] All ER (D) 229 (Nov) (*Weight Watchers*). The TAC determined that mutuality of obligation was present for the duration of each individual contract, however, she did not analyse the overarching written contract for mutuality of obligation. She proceeded to analyse whether the individual contracts were contracts of service or contracts for services and found that they were contracts of service, and the drivers were employees.

When parsing the applicable precedents, Costello J. noted that although the written terms of a contract could not be determinative of the relationship if they did not align with the ongoing practice between the parties "the wording of a written contract still remains of great importance". She noted that the TAC had not addressed a number of relevant Irish authorities and instead placed great emphasis on the *Weight Watchers* case. As a result, it was necessary to consider that judgment in detail to determine whether the TAC had erred in law in her application of that case to the facts in these proceedings. The judge in *Weight Watchers* had determined that, in hybrid contract cases, it may be sufficient if either the overarching written contract or the discrete contracts below them were contracts of service (employment contracts), provided that, after being so identified, that contract, or contracts, "sufficiently resolve[d] the question in dispute". Costello J. further noted that the judge in *Weight Watchers* had both referred to the written contract in making determinations, and that the contract(s) in that case differed critically from the contracts between the company and the drivers in this case. Citing the requirement that each case be determined on its particular facts, she set out the essential differences between the two. In her view, the TAC had erred in her analysis and application of *Weight Watchers* to the facts and contractual arrangements of this case and the HC had erred in failing to identify this error.

Before moving on to consider the true terms of the written contract between the appellant and respondents, Costello J. noted that it was important to record that the TAC had found that the written agreement reflected the true agreement between the parties, except in three respects. One of those respects was irrelevant to the issue at hand, and the second two (the fact that the appellant prepared rosters for some drivers to sign, and the fact that some drivers were asked to fold boxes while they waited to collect orders) were deviations that only applied to some drivers and therefore were not incompatible with the written agreement and did not modify its terms. The central question was to determine how the contract worked out in practice. The written terms were of great importance, though if there was evidence that in practice the working arrangements were "consistent only with a different kind of contract or are inconsistent with the expressed categorisation of the contract, this will override" those written terms.

Costello J. stated that in her judgment the TAC had erred in her construction of the contract between the company and the drivers primarily because she had misapplied *Weight Watchers* to the case without giving due weight to the differences between the facts, and by misinterpreting the written agreement between the company and the drivers. She had improperly assessed the mutuality of obligation between the parties when she found it was present in the discrete individual contracts and failed to consider it at all in the overarching contract.

Costello J. held that as there was no mutuality of obligation between the company and the drivers this ought to have been dispositive of the issue before the TAC as it meant that it was not possible that they were engaged on a contract of service. Haughton J. gave a concurring judgment and Whelan J. dissented indicating that she would not have allowed the appeal. The appeal was allowed, the judgment of the High Court was set aside, and a declaration was made that the drivers who worked during the relevant period had worked as self-employed independent contractors.

Commentary

It will not be surprising if the Revenue Commissioners seek leave to appeal this decision to the Supreme Court as it is remarkable for multiple reasons, not least the importance of the issue. It is the first case in Ireland to consider the employment status of gig economy type workers. It arose from a Revenue decision, while most precedent cases arise from either an employment or social welfare dispute. Further, there was a strong dissenting judgment delivered by Whelan J., who is the senior judge on the Court and a former attorney general.

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Comment from other jurisdiction

Germany (Susanne Burkert-Vavilova, Luther Rechtsanwaltsgesellschafts mbH): In Germany, too, the very first prerequisite for the question of whether a person is an employee is the fact that mutual obligations exist. Further on, in the given case, a German court would also look at the entire contractual situation, i.e. the framework agreement as well as the individual agreements, and at the same time take into account the actual practice between the parties. The question, whether a person is an employee or self-employed – just like in Ireland – always requires an assessment of the case in its entirety before a conclusion can be drawn.

In fact, in its ruling of 1 December 2020 (9 AZR 102/20), the German Federal Labour Court had to decide a case that resembles the case at hand in many respects. Based on a framework agreement, a crowdworker, over time, had accepted a multitude of micro-orders from his principal via an internet platform and had personally completed the orders within the framework of defined implementation modalities (including time limits for completion) as provided for under each order from the platform. Under the framework agreement, the crowdworker had no right to be assigned with orders, and the principal did not commit to using the crowdworker's services at all. Once orders were taken on, they were to be performed in the prescribed time and manner. The framework contract claimed that no employment would be established with the crowdworker.

In a nutshell, the Federal Labour Court ruled that in aggregate the individual orders consolidated into a single (permanent) employment relationship between the parties. According to the Court, the parties – by conclusive behaviour – expressed the will to be bound by an employment contract, since their legal relationship was aimed at the continuous processing of bundles of orders. Furthermore, the Court held that it was characteristic of an employment relationship that the crowdworker provided services personally, that the activity owed was of a simple nature, that the order execution was specified in detail and that the awarding of the orders was controlled by the principal through the use of an online platform.

Against this background, a German court might have reached a different result than the Court of Appeal in the case at hand.

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