The Domino's Case- Guidance on Employee Status

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The Supreme Court Decision in Revenue Commissioners v Karshan (Midlands) t/a Dominos [2023] IESC 24

Introduction

In perhaps the most eagerly anticipated decision of the year, the Supreme Court, through Murray J published what is being considered a landmark ruling in the case of *The Revenue Commissioners v Karshan (Midlands) Ltd t/a Domino's Pizza* (2023) IESC 24. The comprehensive judgment, which initially stemmed from issues relating to the treatment of 'gig workers' for tax purposes, will have far reaching implications outside of tax, likely reshaping how we classify an individual's employment status.

Background and Facts of the Case

The facts of the case relate to a 2018 decision of the Tax Appeals Commissioner where the Commissioner stated that Karshan had underpaid tax on the basis of the incorrect classification of delivery drivers as self-employed independent contractors, rather than as PAYE workers. This decision was appealed to the High Court, who upheld the finding of the Commissioner, noting the existence of a 'mutuality of obligation'.

The High Court finding was appealed to the Court of Appeal in May of 2022, who overturned the decision. Costello J for the majority, held that the High Court had erred in its interpretation of the theory of 'mutuality of obligation'. The Court of Appeal noted that there must be some ongoing nature to the mutuality of obligations between the parties in order to give rise to a discernible contract of employment.

Decision of the Supreme Court

The appeal to the Supreme Court centred upon what could be considered a relationship of mutuality of obligation, and whether in the present circumstances, such a relationship existed. Karshan reiterated the stance that in order to view delivery drivers as employees, there needed to be some future element or a continuity of service. They further argued that the obligation aspect of the principle meant that the employee was obliged to perform work. This was rejected by the Supreme Court.

Mr Justice Murray of the Supreme Court focused on the distinction between a contract *for* service, which arises in circumstances where there is a clearly defined employer-employee relationship and a contract *of* service, which generally involves a contractor completing a specified task for a client.

Murray J listed a five-pronged test to establish whether a contract is 'of' or 'for' services:

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

   In the present case, there was considerable clarity in this respect, with the delivery drivers receiving payment in exchange for wearing branded clothing, as well as when a pizza was delivered to a customer.

2. **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?**

   On review of the facts of the case and the contract between Karshan and the delivery drivers, it was the finding of the Court that the driver was providing their own services.

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

   The Court examined how much control Karshan exerted over the drivers. Evidence that the drivers helped prepare invoices, were directed what to wear, and were instructed on working hours and delivery numbers all served to satisfy the Court that sufficient control was held over the delivery drivers, such as to be more consistent with an employment relationship.

4. **If these three requirements are met, the decision maker must then determine whether the terms of the contract between the employer and worker interpreted in the light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, are consistent with a contract of employment, or with some other form of contract having regard, in particular, to whether the arrangements point to the putative employee working for themselves or for the putative employer.**

   In this regard, the Court analysed the relationship between the contracted workers and the customers, finding that the level of interaction between the parties was at all times controlled and restricted by the employer, so that the contract between employer and worker was clearly more similar to that of employment as opposed to independent contractor.

5. **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.**

   Considering the above questions set out by Murray J above, the Supreme Court held that the Tax Appeals Commissioner was entitled to conclude that the delivery drivers were employees for the purposes of the Taxes Consolidation Act 1997.

Impact of this Decision on the 'Gig' Economy

This judgment serves to strengthen the ever-increasing protections afforded to workers and employees under Irish employment law legislation. Employers, specifically those who rely on workers operating in the 'gig' economy, will have given this decision considerable analysis as the ramifications for their trade, in the realms of both employment and tax, are vast.

However, the UK Supreme Court's (the "UKSC") decision in the 'Deliveroo' case[1], delivered on 21 November 2023 will come as a welcome comfort to 'gig economy' reliant companies. The decision brings to close a 7-year saga of litigation, wherein the UKSC has ultimately ruled that the relationship between Deliveroo and the delivery drivers was fundamentally inconsistent with a recognisable employment relationship. It is interesting to note the differences in reasoning employed by the UKSC to that of the Irish Supreme Court, and the decision is one that will no doubt be influential to future interpretations of law in this jurisdiction.

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[1] IWGB v CAC & Anor [2023] UKSC 43

How we can help

If you have any queries or concerns, or would like to discuss the above in further detail, please feel free to contact Kate Walsh, solicitor, in the Employment & Benefits Department of BHSM LLP on 01 440 8300 / kwalsh@bhsm.ie.