PUTTING MUTUALITY OF OBLIGATION IN ITS PLACE: THE REVENUE COMMISSIONERS v KARSHAN (MIDLANDS) LTD T/A DOMINO'S PIZZA

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1. INTRODUCTION

The case of *Revenue Commissioners v Karshan (Midlands) Ltd t/a Domino's Pizza* (hereafter *Karshan*) concerned the employment status of pizza delivery drivers for tax purposes.[1] The Revenue Commissioners argued that they were 'employees' under contracts of service, whereas Karshan (Midlands) Ltd argued that they were 'independent contractors', supplying their labour under contracts for services. The Revenue Commissioners claimed that Karshan owed substantial sums in tax and social insurance, whereas Karshan contended that the workers[2] themselves – as self-employed people – were responsible for their own taxes. The Supreme Court held that the delivery drivers were employees.

In broad terms, the case turned on the correct interpretation and application of 'mutuality of obligation', a highly controversial and much-debated concept derived from the law of England and Wales.[3] The phrase is ambiguous, but is generally used as a shorthand in this context for the presence of a contractual promise on the part of the employer to provide (and pay for) work in the future, and a contractual promise on the part of the employee to perform that work.[4] It has been held in a number of

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[1] [2023] IESC 24. All paragraph numbers in this paper refer to this judgment unless otherwise indicated.

[2] I use 'worker' as a neutral term with no specific legal meaning, unless the context otherwise requires.

[3] I use 'English law' as a shorthand hereafter.

[4] The terminology is generally attributed to MR Freedland, *The Contract of Employment* (Clarendon Press 1976), though as Countouris explains, the original intention was to explain the developing relational nature of the contract of employment and not to formulate a test to identify such a contract: N Countouris, 'Uses and Misuses of 'Mutuality of Obligations' and the Autonomy of Labour Law' in A Bogg, C Costello, ACL

English cases, discussed in detail below, to be a crucial element in demonstrating that a contract is one of employment. But it presents an obvious obstacle to securing employee status for working people whose work is 'intermittent', since their 'employer' does not usually guarantee that any work will be available to them in the future.[5] Intermittent workers include both 'traditional' casual workers, who are called in to work on demand, and modern-day platform workers, who sign up via an app which allows them to log in when they choose and to accept any work that happens to be available. These workers enter into a 'wage/work bargain' every time they turn up for a shift or take a job on an app, but they cannot usually demonstrate the mutuality allegedly required to link these wage/work bargains into an overarching contract of employment.

The Supreme Court in *Karshan* held that mutuality of obligation was not relevant to the question of employment status *during* the wage/work bargain.[6] It set out a five-step procedure for determining employment status, by way of restating and clarifying the existing law.[7] The decision-maker should first consider whether there was an exchange of work for pay, an obligation on the putative employee to perform the work personally, and a sufficient degree of control exercised over the alleged employee by the alleged employer. If these three requirements were met, the decision-maker should then assess whether the arrangements taken as a whole pointed towards employee status or some other kind of relationship, such as self-employment, before considering whether anything in the legislation applicable to the case required a different approach to be used. On the facts, the Supreme Court held that the Tax Appeals Commissioner had been entitled to conclude that the pizza delivery drivers were employees for tax purposes.[8] When they attended

Davies and J Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015).
[5] ACL Davies, 'The Contract for Intermittent Employment' (2007) 36 Industrial Law Journal 102.
[6] [209]-[212].
[7] [280]-[281].
[8] [282].

for an assigned shift, there was an exchange of work for pay, an obligation on the drivers to perform personally and a high level of control exercised by the employer. The 'preponderance' of evidence pointed towards a relationship of employment rather than self-employment.[9] Mutuality of obligation had no bearing on the drivers' employment status during the wage/work bargain, and would only be relevant where there was a need to show continuity of employment for the purposes of the right being claimed.

Since the decision in *Karshan* rejects an idea drawn from English law, my discussion of the case is comparative in nature. I begin with an account of the facts, case history and decision, before offering some critical reflections on three issues. First, I examine how and why mutuality of obligation became prominent in the English courts' reasoning, and discuss the important recent decision in *Professional Game Match Officials Ltd* (hereafter *PGMOL*).[10] This decision in the UK Supreme Court was handed down after *Karshan* and adopts a similar approach to employment status during the wage/work bargain. I argue that both *PGMOL* and *Karshan* are to be welcomed and do not create any significant risk of over-including genuinely self-employed people in the employee category. Second, I consider what role remains for the mutuality of obligation test in both jurisdictions after the decisions in *Karshan* and *PGMOL*. The requirement will still be relevant where the right at issue requires a period of continuous employment, because it provides a way in which a claimant can link a series of wage/work bargains together into an 'overarching' or 'umbrella' contract of employment of longer duration. But there are encouraging signs in both jurisdictions of more employee-friendly approaches to this issue. Third, I offer some brief reflections on the correct approach to the construction of contracts in the employment sphere. The judgment in *Karshan* suggests that the Supreme Court would not be minded to follow the UK's highly

[9] Ibid.
[10] *Commissioners for His Majesty's Revenue and Customs v Professional Game Match Officials Ltd* [2024] UKSC 29, [2024] ICR 1480.

purposive approach as laid down in the *Uber* decision, but I suggest that this may need to be reconsidered if it arises for decision in an appropriate case.[11]

2. OVERVIEW

Murray J's 185-page judgment is a tour de force: it offers a masterly survey of the history of mutuality of obligation in English law, a detailed critical analysis of its reception into Irish law, and powerful reasoning to support the conclusion that mutuality of obligation is irrelevant to the determination of employment status during the wage/work bargain. I offer a brief summary here for anyone who is not familiar with the case, but it is difficult to do justice to the rich detail in the judgment itself.

Facts

The workers were engaged by Karshan to deliver Domino's pizzas ordered by customers online, by phone or in stores. They entered into what Murray J referred to as an 'overarching contract' with Karshan.[12] This was a contract of indefinite duration terminable without notice by Karshan. It specified (repeatedly) that the workers were independent contractors, and they were also required to sign another separate agreement to that effect, which specified that they were responsible for their own tax. The contract also contained the following terms of potential significance in determining the workers' status:

- Karshan did not 'warrant a minimum number of deliveries' or to use the worker's services at all
- Karshan acknowledged the right of the worker to choose which days and times to work (though there was a provision requiring notice if the worker decided not to undertake a 'previously agreed delivery service')

[11] *Uber BV v Aslam* [2021] UKSC 5, [2021] ICR 657.
[12] [10]-[18]. The contract appears in full as an appendix to the judgment.

- the workers were free to enter into other delivery contracts with other firms, provided that they did not deliver similar products in the same geographical area
- the workers could send a suitable substitute if they were ‘unavailable at short notice’
- the workers were paid for each delivery they made and were expected to keep their own accounts
- the workers were also paid a flat fee for ‘brand promotion’, which involved wearing a uniform or affixing logos to their vehicle. There was also a separate agreement under which they paid a deposit for the uniform.
- the workers had the option of renting a vehicle from Karshan but were responsible for insuring any vehicle they used (though Karshan would also provide business insurance for an additional charge). In practice, Karshan did not make vehicles available for rent and the workers were obliged to use their own vehicles.

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At first instance, the Tax Appeals Commissioner made a number of significant factual findings about how the arrangements operated in practice.[13] The workers filled in an ‘availability sheet’ indicating when they were willing to work, and a store manager drew up a rota. Once the worker had been assigned their shifts, the Commissioner found that a contract arose in respect of each shift. The workers were obliged to clock on and clock off, and their appearance was checked. Managers monitored the number of deliveries they undertook, apparently to ensure fairness between the various workers waiting at the store. Workers were sometimes asked to undertake work in the store between deliveries, such as assembling pizza boxes. Although the contract appeared to envisage that the workers would maintain their own accounts, in practice, Karshan often issued invoices to the workers for them to sign.

Case history

[13] Outlined by Murray J at [21]-[25].

At first instance, the Tax Appeals Commissioner found that the delivery drivers had contracts of employment during their shifts.[14] The question whether there was mutuality of obligation between the parties between shifts did not arise, in her view, since the presence of contracts of employment during the tax year was sufficient to make them employees for tax purposes and Karshan liable for the sums sought by the Revenue. The High Court upheld the Commissioner's decision,[15] but the Court of Appeal, by a majority, allowed Karshan's appeal.[16] The majority decision in the Court of Appeal turned on two points: mutuality of obligation and the correct interpretation of the written agreement. On mutuality of obligation, it was held that there had to be some mutuality of obligation for a contract of employment to be found, either in the overarching contract or, at the very least, during each week for which a rota existed. Since it was not present in either of these settings, the workers were independent contractors. On the correct interpretation of the written agreement, the majority placed weight on the specific terms inconsistent with a contract of employment – such as the express statement that there was no obligation to provide work – and noted that the Commissioner had given no reason for disregarding these written terms. Whelan J, dissenting, placed emphasis on the need to consider the status of each contract, holding that the absence of mutuality in the overarching contract did not entail that individual work assignments could not amount to contracts of employment in their own right.[17]

Decision

The Supreme Court upheld the Commissioner's original decision that the pizza delivery drivers were employees during their shifts, overturning the Court of Appeal.

[14] Outlined by Murray J at [132]-[149].
[15] [2019] IEHC 894, discussed by Murray J at [150]-[157].
[16] [2022] IECA 124, discussed by Murray J at [158]-[176].
[17] See Murray J's account at [177]-[188].

Murray J began with a discussion of *Ready Mixed Concrete* and *Market Investigations*: two of the leading English cases on employment status.[18] These cases laid down what are often referred to as the 'control' and 'risk' tests: a person is an employee when they work under the control of another and do not assume business risk for themselves. Mutuality of obligation is not the subject of discussion in either case. Murray J traced the emergence of mutuality of obligation to three further English cases involving casual employment: *Airfix*, *O'Kelly* and *Nethermere*.[19] In each of these cases, it was held that a promise on the part of the employer to provide work (and pay) in future and a promise on the part of the employee to perform that work was necessary to tie a series of wage/work bargains together into a 'global' or 'umbrella' contract of employment. He noted that none of these cases specifically addressed the question of status during a particular wage/work bargain. That is not strictly true of *O'Kelly*, though the treatment of the issue in that case is questionable, as I explain later.

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Murray J noted that mutuality of obligation was a relatively late arrival into Irish law. Some significant cases in the 1990s involving intermittent working arrangements had been decided without reference to the concept, despite its potential relevance.[20] The first case to invoke mutuality of obligation – at least at High Court level – appears to have been the decision in *Minister of Agriculture and Food v Barry*.[21] This case concerned the employment status of temporary veterinary inspectors for the purpose of notice of termination and redundancy claims. The High Court held that the inspectors' claims failed because of a lack of mutuality of obligation: the government had not guaranteed any work to

[18] Ibid [37]-[48], and see *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance* [1968] 2 QB 497; *Market Investigations v Minister of Social Security* [1969] 2 QB 173.
[19] Ibid [53]-[58], and see *Airfix Footwear Ltd v Cope* [1978] ICR 1210; *O'Kelly v Trusthouse Forte Plc* [1983] ICR 728; *Nethermere (St Neots) v Gardiner* [1984] ICR 612.
[20] Ibid [62]-[75], and see *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare* [1996] 1 ILRM 418 (High Court), [1998] 1 IR 34 (Supreme Court); *Castleisland Cattle Breeding Society Limited v Minister for Social Welfare* [2004] IESC 40, [2004] 4 IR 150.
[21] Ibid [76]-[80], and see *Minister for Agriculture and Food v Barry* [2008] IEHC 216, [2009] 1 IR 215.

the inspectors because the need for their services was highly variable. But the relevance of mutuality of obligation as a test for a contract of employment was conceded, rather than decided, in *Barry*, and in any event, the High Court did not distinguish clearly between the wage/work bargain and the ongoing contract. In *Barry* itself, the focus was on the presence or absence of an ongoing contract, because the inspectors' claims relating to notice and redundancy could only succeed if they had the periods of continuous employment set out in the statute. Employee status during the wage/work bargain would not have helped them.

The judge then highlighted a series of decisions in English law in which it was held that mutuality of obligation was not relevant to the determination of employment status during the wage/work bargain. Perhaps the most significant of these is *Prater*, in which the claimant teacher was engaged by an education authority to teach pupils with special needs on the basis of one contract per pupil.[22] The Court of Appeal held that there was no obligation on the education authority to offer further assignments, not least because the authority did not know when demand for this particular type of teaching would arise. But each assignment was found to be a contract of employment in its own right. This meant that the teacher could rely on the statutory continuity provisions in the Employment Rights Act 1996 to link together the various contracts into a period of continuous employment for the purpose of entitlement to statutory employment rights.[23] However, it is important to note that the English cases usually have a caveat: although the wage/work bargain can be a contract of employment, the absence of mutuality between engagements can be an 'indication' that the relationship is a different one, even during the wage/work bargain. At the

[22] *Cornwall County Council v Prater* [2006] EWCA Civ 102, [2006] IRLR 362, on which see ACL Davies, 'Casual Workers and Continuity of Employment' (2006) 35 Industrial Law Journal 196. This use of these provisions was suggested by H Collins, 'Employment Rights of Casual Workers', (2000) 29 Industrial Law Journal 73 at 77–8.
[23] Employment Rights Act 1996, ss. 201-219. The key provision is s. 212.

time of the decision in *Karshan*, this had been asserted most recently in *Windle* and approved by the Supreme Court in *Uber*.[24]

It was argued on behalf of Karshan that the delivery drivers could not be employees because there was no element of mutuality in the case: no future commitments on either side giving continuity to the relationship. Murray J rejected this proposition, both as a matter of authority in the English and Irish cases, and as a matter of logic: future-regarding promises were simply irrelevant to status during the wage/work bargain.[25] Instead, he upheld the Commissioner's original decision that, once a driver had been placed on the roster to work, mutual obligations arose which were sufficient to constitute a contract of employment.[26] This was so even though the driver could decide not to attend if they were unavailable at short notice, and had a right but no duty to send a substitute. The judgment also noted, obiter, that it might be sufficient for a contract of employment during the wage/work bargain for the employee simply to turn up and do work in exchange for pay without a prior agreement of any kind.[27]

Murray J concluded the judgment with a useful restatement and clarification of the test for employee status, derived from the *Ready Mixed Concrete* case.[28] This makes it crystal clear that mutuality is not part of the test in the way that Karshan had argued. Importantly, though, it also makes clear that the radically purposive approach to the construction of contracts in the employment sphere developed in the UK Supreme Court's decision in the *Uber* case does not form part of Irish

[24] *Secretary of State for Justice v Windle* [2016] EWCA Civ 459, [2016] ICR 721; *Uber*, above n 11. See also *PGMOL*, above n 10, decided after *Karshan*.
[25] Above n 1, [193]-[201].
[26] Ibid [262].
[27] Ibid [204], [212], [276].
[28] Ibid [253], and see *Ready Mixed Concrete*, above n 18. For an early example of application before the Workplace Relations Commission see *McGranaghan v MEPC Music Limited* ADJ-00037668. I am grateful to Anthony Kerr SC for supplying this reference.

law, and that a more traditional, but contextual, approach should be taken.[29] I return to this point below.

3. EMPLOYMENT STATUS DURING THE WAGE/WORK BARGAIN

Murray J's decision in *Karshan* is a breath of fresh air for the straightforward, commonsense approach it takes to the employment status of the working person during each individual wage/work bargain. I consider how the English courts have approached this issue and why it has been such a struggle for them. I then examine a couple of consequences of Murray J's approach – the risk of 'overincluding' the genuinely self-employed and the issue of determining the duration of the wage/work bargain – and his comments on them.

Intuitively, employment status during the wage/work bargain does not seem to be a particularly difficult issue. If we take a casual worker as our example and focus on their status during a particular shift they have been asked to work, the core of a contract of employment is present: the exchange of work for pay. The employer usually controls what is to be done and when, by assigning the shift, and there is very little risk involved (unless the employer also retains the right to send the worker home early if business is slow). It is not at all clear why it might be necessary to consider the future relationship between the parties in order to understand their relationship in the moment. And, as Murray J explained, there are strong policy reasons against adopting mutuality as a requirement in this setting:

> If applied as a hard rule, such a requirement is likely to both encourage the assertion of legal fiction over factual reality and undermine the overall objective of ensuring that all relevant circumstances of each case are faithfully assessed.[30]

[29] Above n 1, [242]-[243].
[30] Ibid [201].

This rather oblique statement identifies two linked problems with mutuality of obligation: the risk that it becomes determinative, leading tribunals and courts to ignore other features of the parties' relationship, and the risk that 'employers' can readily deny the existence of mutuality of obligation in order to deny employee status.

Murray J's survey of the English authorities reached two conclusions: that most cases concerned with mutuality of obligation were in fact concerned with long-term relationships rather than with status during the wage/work bargain, and that it was possible in English law to have employee status during the wage/work bargain in the absence of mutuality between wage/work bargains. I explore each point in turn.

There is some truth in the claim that most of the English cases do not concern employee status during the wage/work bargain, or do not focus with sufficient clarity on that issue. This is for two reasons. First, since 1997, English employment law (but not tax law) has made use of the 'worker' concept as the key to unlocking basic employment rights, such as the minimum wage and working time protection.[31] Although there have been some misguided attempts to import mutuality of obligation into the 'worker' test,[32] the statutory requirement is that the individual undertakes to perform work personally for someone who is not a customer or client of a business they are running.[33] As a result, many litigants do not need to show that they are an employee in order to obtain the statutory rights they are seeking. Second, and again in employment law rather than tax law, it is generally true that most rights afforded only to employees also require a period of continuous employment or an ongoing contract between wage/work bargains. The link between 'employee' rights and long-term employment does tend to draw focus away from employee status during the wage/work bargain. The right to 'emergency leave' is a quirky and unusual example of a right afforded to

[31] See e.g. National Minimum Wage Act 1998, ss. 1 and 54; Working Time Regulations 1998 (SI 1998/1833), reg 2.
[32] E.g. *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667, [25].
[33] Employment Rights Act 1996, s. 230(3)(b).

employees only, with no qualifying period, which could be invoked during a wage/work bargain.[34]

Many of the problems English law has had in this area seem to stem from the decision in *O'Kelly*.[35] This well-known case concerned a group of waiters who worked long hours every week for a hotel, but on a casual basis with no promise of future work. After asking their trade union to make representations to their employer, they were told that their services were no longer required. For present purposes, it is important to note that the right not to be dismissed on trade union grounds is a 'day one' right not requiring any period of continuous employment.[36] The Employment Appeal Tribunal had held that the waiters' claims could proceed because they were employees during the wage/work bargain.[37] However, the Court of Appeal rejected this conclusion, holding instead that the absence of mutuality between engagements meant that they were self-employed throughout, including during engagements. Central to the Court of Appeal's decision was a procedural point: its desire to

reduce the number of appeals from Employment Tribunals by reinstating the approach in *Edwards v Bairstow* to appeals on a point of law.[38] This meant that the Court of Appeal was determined to uphold what it presented as the Tribunal's original decision, even though the Tribunal had not squarely addressed the question of status during the wage/work bargain. The approach in *O'Kelly* was cited with approval in the subsequent case of *Nethermere* and became a leading authority on the point.[39] As I have argued elsewhere, *O'Kelly* was at its most pernicious when coupled with another phenomenon: the courts' tendency to focus

[34] Employment Rights Act 1996, s. 57A.
[35] Above n 19, and see ACL Davies, '*O'Kelly v Trusthouse Forte*: a Landmark of Legalism', in J Adams-Prassl, A Bogg and ACL Davies (eds), *Landmark Cases in Labour Law* (Hart 2024).
[36] Trade Union and Labour Relations (Consolidation) Act 1992, s. 154.
[37] *O'Kelly v Trusthouse Forte Plc* (EAT, 11 May 1983). Ackner LJ in the Court of Appeal cast doubt on whether this would have been sufficient for a dismissal claim since they were not sent home in the middle of a shift: above n 19, 118.
[38] *Edwards v Bairstow* [1956] AC 14 (HL).
[39] *Nethermere*, above n 19.

on written agreements (drafted by the employer) to the exclusion of other evidence about how the parties' relationship worked in practice.[40]

As Murray J pointed out, despite *O'Kelly*, it is perfectly possible to find examples of wage/work bargains being treated as contracts of employment in English law, even in the absence of mutuality between those wage/work bargains. In *McMeechan*, mutuality was ignored altogether,[41] and in *Prater*, the court focused on the presence of mutuality within each of the wage/work bargains (which were of quite long duration).[42] But the prevailing approach is to treat the wage/work bargain as capable of being a contract of employment, subject to the possibility that the absence of mutuality of obligation between wage/work bargains is a signal that the individual is self-employed. This approach was summarised by Elias LJ in *Quashie*:

> … whilst the fact that there is no umbrella contract does not preclude the worker being employed under a contract of employment when actually carrying out an engagement, the fact that a worker only works casually and intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather than as an employee.[43]

The same view was also adopted in the *Windle* case,[44] concerning court interpreters who sought to bring race discrimination claims under the Equality Act 2010.[45] Underhill LJ said:

> I accept of course that the ultimate question must be the nature of the relationship during the period that the work is being done. But it does not follow that the absence of mutuality of obligation outside that period may not influence, or shed light on, the character of the relationship within it. It seems to me a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack

[40] Davies, above n 35. See e.g. *Stevedoring & Haulage Services Ltd v Fuller* [2001] EWCA Civ 651, [2001] IRLR 627.
[41] *McMeechan v Employment Secretary* [1997] ICR 549.
[42] *Prater*, above n 22.
[43] *Quashie v Stringfellow Restaurants Ltd* [2012] EWCA Civ 1735, [2013] IRLR 99 [12] (Elias LJ).
[44] *Windle*, above n 24.
[45] Equality Act 2010, s 83(2)(a). Arguably, this definition is broad enough on its face to cover genuinely self-employed people who perform work personally, but it was significantly narrowed in *Jivraj v Hashwani* [2011] UKSC 40, [2011] ICR 1004.

of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense.[46]

It is important to acknowledge that Underhill LJ's statement is carefully worded: it preserves the possibility that someone might be an employee during the wage-work bargain without mutuality of obligation between assignments, and it does not treat the absence of mutuality as conclusive.

This approach was approved by the Supreme Court in *Uber* (with limited discussion)[47] and, more recently, in *PGMOL*.[48] This latter case was decided after *Karshan* but it is of particular interest for two reasons: it is a tax case, like *Karshan*, and (unlike *Quashie* and *Windle*) was much more open to the possibility that the working people in that case might in fact be employees during the wage/work bargain. The case concerned the employment status for tax purposes of part-time football referees. They were assigned particular matches to referee (which included submitting the match report afterwards) but could turn down assignments or pull out, for example, because of injury or other work commitments. PGMOL could also change the assignments. There was no overall obligation on PGMOL to offer matches to referee. For this reason, there was no season-long contract of employment between PGMOL and the referees, but the issue for decision was whether a contract of employment arose in respect of each match assignment. PGMOL argued that the lack of mutuality of obligation meant that it could not. However, this argument was rejected by the Supreme Court on similar grounds to those in *Karshan*.[49] A distinction was drawn between establishing the existence of an 'overarching' contract of employment and determining the working person's status during an assignment. A particular assignment could be a contract of employment and there was no need for there to be any prior agreement between the parties giving rise to mutual obligations: the exchange of work and pay could be sufficient. However, in the case itself, the contract for each match began when the

[46] *Windle* (n 24) [23].
[47] *Uber* (n 11) [91] (Lord Leggatt JSC).
[48] Above n 10.
[49] Ibid [55].

referee accepted the assignment early in the week, even though there was a possibility of termination on both sides. The parallels with *Karshan* are clear.

Now that common sense seems finally to have prevailed in both jurisdictions, it is worth pausing to consider why mutuality of obligation has caused such a problem in English law and threatened to do so in Irish law too. Perhaps surprisingly, the judges rarely articulated why they seemed reluctant to make a finding that a wage/work bargain was a contract of employment. But the most likely explanation seems to be that they were worried about classifying genuinely self-employed people as employees and thus being over-inclusive. For example, Sir John Donaldson MR in *O'Kelly* expressed the worry that the EAT's approach would have made *everyone* an employee during the wage/work bargain.[50] The example often used to illustrate the point is a genuinely self-employed plumber who runs a small business as a sole trader. If each wage/work bargain is a contract of employment, there is a risk that a householder who calls a plumber might find themselves saddled with unexpected and unrealistic employer obligations while the plumber is fixing something in their home.[51] Of course, one response to this might be to point out that it is better to be over-inclusive than under-inclusive, at least in employment law where worker protection is the main concern, and that the likelihood of claims being made in this type of situation is remote.

In English law, the solution suggested by *Quashie* and *Windle* is to use the absence of mutuality between wage/work bargains as a possible indicator of genuine self-employment.[52] Murray J in *Karshan* endorsed this approach but, in my view, offered a much more helpful analysis of

[50] *O'Kelly*, above n 19, 765.
[51] There is an argument that a more limited set of obligations might be appropriate in respect of genuinely self-employed persons who perform work personally, e.g. under equality law, though this appears to have been ruled out by the decision in *Jivraj v Hashwani* [2011] UKSC 40, [2011] ICR 1004.
[52] Above nn 43 and 24 respectively.

the issue because of his emphasis throughout the judgment on considering all the facts and circumstances in the round before reaching a decision. His position can, I think, be summarised as the very straightforward proposition that a wage/work bargain is generally (or even presumptively) a contract of employment unless the surrounding circumstances indicate that the person performing the work is genuinely an independent contractor:

> If these three requirements are met the decision maker must then determine whether the terms of the contract between 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.[53]

Crucially, employment and self-employment are not distinguished by identifying different types of wage/work bargain or by focusing solely on mutuality of obligation. Murray J in *Karshan* also considered the plumber example specifically, albeit briefly:

> Even if the plumber or taxi driver providing occasional services to one of a number of customers as part of their own trade is for some periods of time under the control of an individual employer, they are clearly persons doing business on their own account.[54]

This is a very important point. While it may be difficult to classify the plumber correctly if we just focus on the wage/work bargain, other factors – such as setting the price for the job and having multiple customers or clients – are usually clear indicators of the plumber's status as an independent contractor. Problems tend to arise whenever courts focus on one issue to the exclusion of all others.

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[53] Above n 1, [281].
[54] Ibid [201].

The other issue arising out of the renewed focus (in both jurisdictions) on employment status during the wage/work bargain is that of defining the outer boundaries of that contract of employment. In both *Karshan* and *PGMOL*, an attempt was made to argue that there had to be some kind of prior agreement on the part of the employer to offer work and on the part of the employee to accept work in order for there to be sufficient mutuality of obligation to give rise to a contract of employment within the wage/work bargain. In both cases, there was a rostering arrangement which meant that, in fact, the delivery drivers and the referees had been offered a shift or a match respectively, and had accepted the offer. It seems likely that counsel was hoping to advance the argument that the obligations within these rostering arrangements were insufficient because, in both situations, there was a degree of flexibility to change one's mind, but neither court was impressed by this suggestion.

Both Supreme Courts were clear (obiter) that an individual assignment could be a contract of employment even if it simply involved an exchange of work and pay with no previous agreement between the parties. In *PGMOL*, it was said that:

> In the light of these authorities, it is clearly established that there may be sufficient mutuality of obligation to satisfy one of the essential requisites of a contract of employment, even if the obligations subsist only during the period while the putative employee is working for the putative employer.[55]

The court cited examples of casual workers in hospitality, construction and agriculture (given in the decision in *James v Redcats*)[56] to illustrate common situations in which there might be a contract of employment with no prior agreement. Murray J thought that, in most cases, the idea that a worker would just turn up and work without any previous discussion was unlikely, but made it clear that he did not think that it was conceptually impossible to find mutuality in this situation.[57] On this

[55] Above n 10, [55].
[56] *James v Redcats (Brands) Ltd* [2007] ICR 1006, [84].
[57] Above n 27.

view, mutuality is (as Murray J effectively pointed out) little more than the consideration which forms the basis of the contract: the exchange of work for pay.[58] Although neither court commented on this, it is quite an important point from the perspective of platform workers, where there may not be a prior agreement about shifts. A key issue in the *Uber* case was that, while the workers were in a contractual relationship with *Uber* because they had agreed to the conditions for using the app, they were free to log on and off whenever they wanted, so there was no previous agreement with *Uber* about when they would work.[59]

The decisions in *Karshan* and *PGMOL* are both tax cases, and the outcomes are probably a mixed blessing from the perspective of the employees: reduced earnings in the short term, but with better access to contributory benefits in the long term. But they have much greater potential significance in employment law, for two reasons. First, employee status during the wage/work bargain gives the individual access to any employment rights which are applicable during that time period. This matters less in English law given that many rights are now available to anyone classified as a 'worker', with no need to show 'employee' status, but it is a particularly significant development in Irish law, where there is no equivalent 'worker' concept. Second, it may be possible to use statutory continuity provisions to group together a series of contracts of employment into a period of continuous employment for those statutory rights where this is required.[60] This has considerable potential in both systems, though it should be noted that *Prater* has not given rise to a rush of litigation in English law.[61]

4. MUTUALITY OF OBLIGATION

This leads me neatly to a second issue arising out of the judgment in *Karshan*: if there is only a limited role for mutuality of obligation in

[58] Above n 1, [222]-[223].
[59] Above n 11.
[60] Above n 23.
[61] Above n 22.

determining status during the wage/work bargain, what function (if any) does mutuality of obligation still have in employment law? The answer – in both jurisdictions – appears to be that it still has a place in determining whether a person has the required period of continuous employment to bring certain types of claim.[62] I consider this in greater depth here.

Many employment rights do not apply from 'day one' of the employment relationship. For example, in English law, the entitlement to a redundancy payment and the right not to be unfairly dismissed (with exceptions) arise after a period of two years' continuous employment with the same employer.[63] In Irish law, there is a twelve-month qualifying period for unfair dismissal (with exceptions) and two years for a redundancy payment. It is important to emphasise that, in most cases of stable, long-term employment, continuity is not difficult to establish. Problems tend to arise only where the person has been in an employment relationship with the same employer for a long time, but the underlying contractual arrangements are in some way intermittent. As Murray J explained:

> … the question of whether there is an obligation to offer and/or accept work may be relevant in ascertaining whether there is a period of time during which the worker is not actually working or being paid, but in which they are nonetheless 'employees'.[64]

While mutuality in this sense is not at issue in *Karshan*, there are some hints in the judgment to the effect that this version of mutuality should not present a major hurdle for a claimant in an appropriate case.

One reason for optimism is that Murray J appeared to be open to the idea that mutuality of obligation might be satisfied without the need for a

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[62] Though statutory continuity provisions may provide an alternative in both jurisdictions.
[63] The Employment Rights Bill makes the right not to be unfairly dismissed a 'day one' right, but subject to a probation period, details of which are (at the time of writing) yet to be revealed.
[64] Above n 1, [194].

promise to provide work and a promise to accept work. I have long argued that this particular version of mutuality, which seems to stem from *O'Kelly*, is unduly strict.[65] The waiters in *O'Kelly* did have an ongoing relationship with the employer between assignments. There was an informal system of 'punishment' if they turned down work when it was offered, and an understanding that waiters on the 'regular casuals' list would be offered work ahead of other casual workers. But the Court of Appeal did not regard these lesser promises as sufficient to fulfil the mutuality of obligation requirement. In *Karshan*, however, while Murray J left the issue for decision in an appropriate case,[66] his review of the authorities suggested openness to a much wider range of possibilities.[67] This is important because (as *O'Kelly* illustrates) a strict approach can produce a situation in which the alleged employer escapes its obligations by not promising any work, whilst at the same time benefiting from a regular and reliable workforce. Although the authorities cited in *Karshan* are English ones, the position in English law on the nature of the pair of promises required remains uncertain.

A second reason for optimism is that Murray J seemed to be supportive of the 'course of dealing' analysis from *Airfix* and *Nethermere*.[68] The idea that obligations can arise from a course of dealing between the parties is, of course, a well-established principle in contract law and was used in those cases to give employee status to homeworkers who were paid piece rates, but who had worked regularly for the employer over a number of years. Murray J identified a common scenario in which this approach might prove useful:

> … it is clear that the court in ascertaining the true nature of a working relationship is not analysing an ossified arrangement: a person who begins to work on their own account – perhaps casually – may as time passes become, by reason of the frequency of their work or absorption into the employer's undertaking, an employee.[69]

[65] Above n 5.
[66] Above n 1, [212].
[67] Ibid [207].
[68] Above n 19.
[69] Above n 1, [240].

Interestingly, although *Airfix* and *Nethermere* remain good law in England and Wales, they have not produced a great deal of subsequent litigation and now seem to be rather a forgotten backwater.[70]

Obviously, the most significant move in *Karshan* is to put mutuality of obligation in its place – as a continuity issue rather than a status issue – but even where it does still exist as a requirement, there are reasons for thinking that it need not be the significant hurdle it once was.

5. CONSTRUCTION OF CONTRACTS

A third issue arising from the *Karshan* decision concerns the correct approach to the construction of contracts in the employment sphere. It is well-known that, in English law, the decisions in *Autoclenz* and *Uber* adopted a strongly purposive approach,[71] but the recent decision of the Supreme Court in *PGMOL* (which post-dates *Karshan*) indicated that this was confined to employment cases and should not be used in tax cases.[72] In *Karshan*, Murray J held that it was not necessary to decide whether to adopt *Uber* in Irish law, because the written contractual terms which were argued to be inconsistent with the parties' dealings in practice were not determinative of the outcome.[73] However, the indications are that Murray J did not find the approach attractive and would take some persuading to adopt it in an appropriate case.

The Irish approach is set out in the *Henry Denny* and *Castleisland* cases,[74] and was incorporated into Murray J's reformulation of the *Ready*

[70] There are also cases in which the argument did not succeed, e.g. *Hellyer Brothers Ltd v McLeod* [1987] ICR 526 (CA).
[71] *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745; *Uber*, above n 11.
[72] Above n 10.
[73] Above n 1, [241]-[242]. For an interesting discussion of this aspect of the decision, see Michael Doherty, 'Domino Dancing: Mutuality of Obligation and Determining Employment Status in Ireland' (2024) 53 Industrial Law Journal 524, 535-540.
[74] Above n 20.

Mixed Concrete principles at the end of the judgment.[75] It is worth quoting this in full:

> Are the terms of the contract between 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*, 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.[76]

The Irish approach allows the courts to use evidence about what happened in practice in two main ways: to disregard incorrect labelling, and to use a 'course of dealing' analysis. The first of these means that if the parties' agreement is in fact a contract of employment, but they have labelled it a contract for services, the court must ignore the label.[77] It is for the court, not the parties, to decide the correct legal classification of the agreement the parties have reached. The second allows the court to consider whether, particularly in a long-term relationship, what started out as a casual arrangement has hardened into a contract of employment over time, as discussed in the previous section.[78] What the Irish approach does not permit is the disregarding of written terms where they do not reflect how the parties have conducted themselves, outside recognised exceptions such as sham or estoppel, which are difficult to establish in practice.[79] This is the point of departure from *Autoclenz* and *Uber*.

Although these cases are well-known, it is worth offering a brief recap of what they decided, since this is itself open to some interpretation. *Autoclenz* was a classic example of the situation in which the contract documents misrepresented the parties' real-world relationship with a view to avoiding the creation of a contract of employment or workers' contract.[80] The written agreement between the parties was labelled a

[75] Above n 18.
[76] Above n 1, [237] (emphasis added).
[77] Ibid [240].
[78] Ibid.
[79] Ibid [240]-[242].
[80] Above n 71.

contract for services, but also included a number of clauses designed to create an impression of self-employment: for example, statements that the 'employer' did not guarantee any work, that the claimants could turn up when they wanted, and that the claimants were responsible for providing their own equipment. In practice, the claimants worked regular shifts under close supervision and would have been penalised for not turning up. The case reached the Supreme Court against the background of the notorious decision of the Court of Appeal in *Consistent Group Ltd v Kalwak*, in which the signature rule and the parol evidence rule had been applied very strictly,[81] even though it was clear that (in the memorable words of Elias P, as he then was) 'armies of lawyers' acting for 'employers' were drafting contracts to avoid the application of employment law.[82] Lord Clarke, giving the court's judgment, adopted what he described as a 'purposive' approach to the contracts in question, recognising the inequality of bargaining power between the parties and the likelihood that the contract would have been drawn up by the employer's advisers and presented to the claimants on a 'take it or leave it' basis.[83] This led to a finding that the claimants in *Autoclenz* were employees.

The decision in *Autoclenz* was a breath of fresh air compared to what had gone before, but it did leave some unanswered questions.[84] One was that it continued to operate within a contractual framework: the task of the tribunal or court was to search for the parties' 'true agreement', with the written documentation being one part of the evidence but not necessarily conclusive. Concerns were expressed that the 'true agreement' might be elusive, particularly where the parties had different expectations. The other was that the Supreme Court did not articulate particularly clearly what the 'purpose' was in the purposive approach. In *Uber*, Lord Leggatt offered a 'reinterpretation' of the *Autoclenz* decision which addressed

[81] *Consistent Group Ltd v Kalwak* [2008] EWCA Civ 430, [2008] IRLR 505.
[82] *Consistent Group Ltd v Kalwak* [2007] IRLR 560 (EAT), [57].
[83] Above n 71, [35].
[84] AL Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41 ILJ 328.

these points.[85] He noted that the issue in these and other similar cases was to find the correct classification of the parties' relationship for the purposes of entitlement to *statutory* employment rights. The relevant statutes contain provisions barring the parties from contracting out of most of the rights they contain.[86] From that perspective, allowing the employer to determine how the employment relationship should be classified was, in effect, allowing the employer to decide which statutory rights the working person would receive. To the extent that *Autoclenz* is a 'purposive' decision, the purpose is to ensure that protective employment statutes are applied to working people who are in need of protection. On the facts in *Uber*, this meant that the elaborate contractual structure creating the impression that the drivers were self-employed could be disregarded and they could be classified instead as workers for the purposes of working time and minimum wage protections.

Bogg and Ford have described *Uber* as heralding the 'death of contract' in determining employment status for the purposes of statutory employment rights.[87] This seems to be a fair assessment of the position and bears out Murray J's assessment that *Uber* goes further than the leading Irish cases in permitting contractual terms to be disregarded. One unanswered question after *Uber* is whether the same approach should apply where the claim concerns 'employee' rather than 'worker' status, which was at issue in *Uber* itself.[88] There might be a suggestion that 'worker' is designed to ensure that the most vulnerable working people get access to a very basic set of employment rights, whereas 'employee' is about access to the full range of employment rights. But this does not seem to be a very helpful distinction. In both cases, the classification is about access to employment rights, and the central point

[85] Above n 11, [68]-[70].
[86] Employment Rights Act 1996, s. 203(1).
[87] A Bogg and M Ford, 'The Death of Contract in Determining Employment Status' (2021) 137 Law Quarterly Review 392.
[88] Ibid 395.

in *Uber* – that this is for tribunals and courts, not the employer, to decide – holds good for both concepts.

However, the Supreme Court's decision in *PGMOL* has answered another question which was unclear after *Uber*: whether the *Uber* approach applied to determinations of employment status for tax cases, or only for employment cases. Although the point is not considered in much depth, the answer is clearly no:

> [This] is not a case where a particular meaning is to be given by reference to the context and purpose of the legislation.[89]

This follows on from the earlier tax cases *Atholl House* and *Kickabout*,[90] in which a neutral approach to construction was also adopted against the background of the so-called IR35 statutory provisions, which allow tribunals and courts to disregard personal service companies when determining an individual's tax status.[91] This divergence of approaches has been criticised for introducing unnecessary complexity into the law,[92] though even if a purposive approach were to be adopted in tax cases, it is by no means clear that the purpose would be the same as it is in employment cases.[93] Although there may be a worker-protective element, for example, in relation to the benefits to the working person arising from employee National Insurance contributions, other considerations around revenue collection and administrative efficiency also come into play.

Of course, it is not for me to say whether *Uber* should be adopted in employment cases in another jurisdiction. Some of the advantages and

[89] Above n 10, [2].
[90] *Revenue and Customs Commissioners v Atholl House Productions Ltd* [2022] EWCA Civ 501, [2022] ICR 1059; *Kickabout Productions Ltd v Revenue and Customs Commissioners* [2022] EWCA Civ 502, [2022] 4 All ER 500.
[91] This is a colloquial term for the regime in Part 2, Chapter 8 of the Income Tax (Earnings and Pensions) Act 2003.
[92] H Dhorajiwala, 'PAYEr Beware: Analysing the Treatment of Employment Status in *Atholl House* and *Kickabout*' (2023) 52 Industrial Law Journal 751.
[93] See e.g. J Freedman, 'Employment Status, Tax and the Gig Economy - Improving the Fit or Making the Break?' (2020) 31 King's Law Journal 194.

disadvantages of the decision are canvassed in Murray J's judgment, in which he notes that the High Court of Australia has chosen to stick to contractual orthodoxy.[94] But I will offer one reflection. Irish law currently allows the courts to make one move that English law had long permitted: to disregard the parties' classification of the contract. If the parties labelled their relationship 'self-employment', this was not conclusive if other terms pointed towards 'employee' status. Although there is a conceptual difference between ignoring the parties' label and ignoring a term designed to achieve the same effect, it is not such a big distinction in practice. For example, it is not uncommon (as we have seen) to find contracts creating an unfettered right to send a substitute. In English law, the obligation of personal service is a key element of 'employee' status at common law[95] and features in the statutory definition of 'worker'.[96] While the courts have become more adept at spotting and disregarding limited substitution rights when classifying an employment relationship (for example, where the contract simply gives the working person the responsibility of arranging their own cover if they are ill)[97] it would be difficult to ignore an unfettered substitution clause, even if it was never used and never intended to be used, without the purposive approach from *Uber*.[98] The risk is that employers (aided by 'armies of lawyers') simply move on from false labelling to the false inclusion of other kinds of terms. In English law at least, standard doctrines from contract law, such as the sham doctrine, proved inadequate to tackle this problem.

6. CONCLUSION

From a comparative perspective, one of the most interesting and exciting things about the *Karshan* decision is the opportunity it offers employment

[94] Above n 1, [243], citing *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1.
[95] See e.g. *Express & Echo Publications Ltd v Tanton* [1999] ICR 693.
[96] Above n 33.
[97] *MacFarlane v Glasgow City Council* [2001] IRLR 7.
[98] A point arguably borne out by the 'Deliveroo' case: *R (Independent Workers Union of Great Britain) v Central Arbitration Committee* [2023] UKSC 43, [2024] ICR 189.

lawyers to compare and contrast two- and three-tier approaches to employment status.[99] Had the English courts been more willing to recognise ‘employee’ status during the wage/work bargain, the use of the ‘worker’ definition might not have been necessary. To take just one example, the National Minimum Wage Act 1998 could have used the ‘employee’ concept, because employee status while actually working would have been sufficient to ensure that casual workers were paid the appropriate rate. Intuitively, this seems to be a more attractive option. The three-tier system has more boundaries for unscrupulous employers to exploit (between employee and worker as well as worker and self-employed, rather than between employee and self-employed) and seems to resign itself to a world in which there are multiple layers of protection for different ‘types’ of working people, who have little or no say over which level of protection they receive.[100]

Functionally, however, the difference is perhaps less marked. Both the approach in *Karshan* and the use of the ‘worker’ definition seek to ensure that casual workers get some protection when they are actually working. The real distinction seems to be between protections applicable during the working day, and protections applicable in long-term working relationships. For example, someone who is an employee only when they are working may not build up enough continuity of employment for an unfair dismissal claim, and someone who is only classified as a worker in English law will not be able to bring an unfair dismissal claim because it is available only to employees.[101] Whether this is justified is a topic for another occasion.

[99] Though it should be noted that Irish law uses different definitions of ‘employee’ in different statutes.
[100] The government has announced that it will conduct a consultation exercise on the possibility of moving back to a two-tier system, but the details are unclear at present.
[101] Though a worker may be able to bring a detriment claim in some circumstances.