The "Gig Economy"

Delivered by Mr Justice Maurice Collins at a bilateral meeting between the Supreme Court of Ireland and the Supreme Court of the United Kingdom on 1 November 2024

1. There is a wide variety of contexts in which the question of the correct legal classification of individuals providing services to others presents itself, including employment rights, taxation, social insurance and vicarious liability. Historically, the choice has essentially been binary: the court or tribunal (and these decisions are, in practice, predominantly made by tribunals rather than by courts, at least at first instance) must decide whether the individual is an "*employee*" providing services to an "*employer*" pursuant to a "*contract of service*", on the one hand, or an "*independent contractor*" providing services to a client or customer pursuant to a "*contract for services*", on the other.

2. In principle, these categories are hermitically sealed. In reality, of course, the line between them is often contingent and contestable. In the United Kingdom, Parliament has intervened to create a form of "*third space*", the so-called "*limb (b) worker*".[1] No equivalent legislative intervention has

[1] Section 230(3) of the Employment Rights Act 1996, section 54 of the National Minimum Wage Act 1998 and Regulation 2(1) of the Working Time Regulations 1998, all considered in *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All ER 209 ("*Uber*"). Limb (b) is set out later. Personal performance is also a requirement of limb (b). That was the hurdle on which the delivery riders fell in *R (on the application of Independent Workers Union of Great Britain)*

occurred here, though in some scattered instances the Oireachtas has incorporated the substance of limb (b) into an extended definition of "*contract of employment* in specific employment protection statutes.[2] Our Industrial Relations Acts also enshrine a definition of "*worker*" that encompasses persons who have entered "*a contract personally to execute any work or labour*" with an employer.[3]

3. The legislature here has created some additional categories of worker - the "*false self-employed worker*" and the "*fully dependent self-employed worker*" – for the purpose of shielding such workers from competition law's prohibition on collective bargaining by "*undertakings*".[4] "*False self-employed workers*" are, of course, the progeny of the Court of Justice of the European Union,[5] whereas "*fully dependent self-employed workers*" trace their origins to the deliberations of the International Labour Organisation (ILO). But these are insubstantial wraiths: the relevant Minister has yet to prescribe any classes of workers in either category and the legislative "*carve-out*" from the competition rules currently extends only to actors engaged as voice-over actors, musicians engaged as "*session musicians*" and journalists engaged as freelance journalists.[6]

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v. Central Arbitration Committee (Roofoods Ltd t/a Deliveroo, interested party) [2023] UKSC 43 ("*Deliveroo*") because in the CAC's view, the fact that the riders were permitted to use substitutes meant that their contracts did not require personal performance.

[2] See section 1 of the Payment of Wages Act 1991 (which repealed and replaced the Truck Acts) and section 2 of the National Minimum Wage Act 2000. So far as I can tell, these provisions have not been the subject of any significant judicial consideration.

[3] Section 23 of the Industrial Relations Act 1990 (as amended).

[4] Part 2B of the Competition Act 2002 (inserted by the Competition (Amendment) Act 2017). See the discussion in Hurley 'Collective Bargaining Rights in the Gig Economy in Ireland: Appraising the Competition (Amendment) Act 2017' (2020) IX *King's Inns Law Review*

[5] Case C-413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden* (ECLI:EU:C:2014:2411).

[6] Schedule 4 of the 2002 Act.

4. Where the courts have had the freedom to do so, they also have recognised the existence of a "*third space*" between "*employees*" *stricto sensu* and "*true*" independent contractors. Thus, in this jurisdiction as in the UK, a relationship "*akin to employment*" will suffice to satisfy the first stage of the test for vicarious liability: see our Court's decision in *Morrissey v Health Service Executive* [2020] IESC 6, para 12.9 as well as the UK Supreme Court's decisions in *Various Claimants v Barclays Bank plc* [2020] UKSC 13, [2020] AC 973 and *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2023] UKSC 15, [2024] AC 567.

5. In most cases, however, the options are binary. The gateway to many significant employment protections – not least the protection against unfair dismissal – is a determination of "*employee*" status (and in many instances, there is also a requirement for a minimum period of continuous employment). Tax and social insurance legislation generally recognises a rigid binary distinction between employees and independent contractors and significantly different burdens and benefits follow from that distinction. In important areas of economic and social life, the distinction between employees (*stricto sensu*) and independent contractors continues to be crucial. There is much at stake in the determination of status.

6. Drawing that distinction is frequently difficult, often involving a fact-intensive inquiry that inevitably throws up factors pointing in different directions. At the margins, the boundary between the two is blurry and permeable. Determining the employment status of atypical, casual,

freelance and/or "*on-demand*" workers presents particular difficulty. This is by no means a novel phenomenon. As Murray J noted in *Revenue Commissioners v Karshan (Midlands) Limited t/a Domino's Pizza* [2023] IESC 24, [2023] 2 ILRM 309 ("*Karshan*") the question of how the employment status of those engaged in "*non-continuous, occasional, or intermittent work involving no ongoing obligation on the part of the employer to provide work, or on the worker to accept it when offered*" is far from being a new one.[7] In his vivid language, a century of case law reveals a "*parade of carters, dockers, cattle drovers, delivery drivers, railroad unloaders, market researchers and homeworkers*" with whose status the common law has had to grapple.[8] The gig economy existed as a reality long before that phrase was first coined by former *New Yorker* editor, Tina Brown, in 2009.

7. Even if the basic framework for analysis remains unchanged – requiring the ultimate classification of every working relationship as one *of service* or *for services* – the common law has nonetheless always sought to be responsive to social and technological change in this context and has shown a capacity to adapt to new working practices.

8. Thus, as Murray J explained in *Karshan*, the "*control*" test changed direction in the mid-20th century so as to accommodate within the concept of "*employment*", skilled workers, professionals and managers over whose day to day work their employer had neither operational control, nor the skills to

[7] Para 2.
[8] Para 195.

direct the execution of their work.[9] The same point was made by Lord Richards in *Commissioners for His Majesty's Revenue and Customs v Professional Game Match Officials Ltd* [2024] UKSC 29 ("*PGMOL*") when he observed that "*flexibility in approach to deciding whether a sufficient level of control exists is critically important, given the ways in which employment practices have evolved and continue to evolve*", adding that the days when the vast majority of the workforce attended at a specific workplace between set hours to work in highly prescriptive roles "*have long gone*".[10] *PGMOL* itself provides a concrete illustration of that flexibility of approach: the "*institutional independence*" of soccer referees while officiating at matches did not exclude the finding that PGMOL maintained a "*framework of control*" sufficient to meet the control test for employment purposes.[11]

9. Similarly, *Karshan* and *PGMOL* decisively reject the theory that it is a *sine qua non* of an employment relationship that it should involve some form of overarching and continuing "*mutuality of obligation*", in the sense of an ongoing obligation on the employer to provide work and on the employee to perform it. That, in the view of both courts, went much beyond what was required by the "*wage-work bargain.*" A single engagement, or a series of discontinuous engagements, may give rise to a contract(s) of employment.[12] Were it otherwise, of course, workers in the gig economy could hardly ever be regarded as employees.

[9] Para 29.
[10] Para 34.
[11] *PGMOL*, para 88.
[12] *Karshan*, para 212; *PGMOL*, para 55.

10. "*Control*" and "*mutuality of obligation*" are not the only considerations relevant to deciding the employment status of workers (though an "*irreducible minimum*" of control and mutuality are pre-requisites to the existence of an employment relationship). Factors such as enterprise risk and integration into the business may also be relevant (though *Karshan* makes clear that integration should not be regarded as a stand-alone test[13]). Ultimately, the determination of status involves an overall appreciation of the totality of the relationship. That inevitably gives the relevant court or tribunal a significant margin for judgment.

11. The same principles apply to the determination of the status of workers in the modern gig economy, aka the "*platform economy*". Intermediary platforms matching buyers and sellers are not, of course, new. The stock exchange is one such example. However, technological development – the internet, smart phones, algorithmic management and cloud computing – has enabled real-time and continuous interaction between service provider, digital platform and customer on a much greater scale than was possible previously. Such platforms function as intermediaries between providers and consumers of services across a diverse range of services. In many cases, the service providers function independently of the intermediary platform and the platform is just another way to market their services. The service provider – not the platform – determines the conditions on which it offers its services, including fundamental conditions such as price. Hotels offering rooms through a digital platform such as Booking.com exemplify this category of service provider, in relation to which no issue of

[13] *Karshan*, para 250.

employment arises. But other service providers "*do not pursue an independent activity that exists independently of the platform*"; rather "*the activity exists solely because of the platform, without which it would have no sense*".[14]

12. The ease with which on-demand work can be performed via digital platforms poses significant issues. As the Directive of the European Parliament and of the Council on improving working conditions in platform work ("*the Directive*")[15] – which has been finalised if not yet formally adopted – states in recital (6), platform work is rapidly evolving, resulting in new business models and forms of employment that may not be covered by existing systems of protection. Therefore (so the recital continues):

> "*… it is important to accompany that process with adequate safeguards for persons performing platform work, irrespective of the nature of the contractual relationship. In particular, platform work can result in the unpredictability of working hours and can blur the boundaries between an employment relationship and a self-employed activity and the responsibilities of employers and workers. The misclassification of the employment status has consequences for the persons affected, as it is likely to restrict access to existing labour and social rights. It also leads to an uneven playing field with respect to businesses that classify their workers correctly, and it has implications for Member States' industrial relations systems, their tax*

[14] Opinion of Advocate General Szpunar in Case C-435/15, *Asocicación Profesional Elite Taxis v Uber Systems Spain* [ECLI: EU C:2017:364] (speaking of Uber).
[15] 2 October 2024 (2021/414(COD)

base and the coverage and sustainability of their social protection systems. While such challenges are broader than platform work, they are particularly acute and pressing in the platform economy."

13. I will come back to consider briefly how the Directive seeks to address these "*acute and pressing*" challenges.

Karshan

14. The issue in *Karshan* was the employment status of drivers engaged by a company which operated a number of *Domino's Pizza* franchises for the purposes of income tax. Previously, a Social Welfare Deciding Officer had determined that similarly situated drivers were not employed but were independent contractors. The drivers were required to enter into a form of overarching or umbrella contact (reproduced in an appendix to the judgment of Murray J) which contained a number of clauses to the effect that the drivers were independent contractors. Drivers were required to wear "*fully branded company supplied clothing*" while at work, for which they were paid an hourly rate (described by the contract as "*brand promotion*").They were also paid per delivery. They generally provided their own vehicle. The contract permitted them to engage in other delivery-type services (though not the delivery of rival pizzas in the same market area at the same time). The contract also contained a substitution clause, the meaning and effect of which was significantly disputed. Finally, a clause in the contract stated that the company did not warrant or represent that it would utilise the contractor's services at all but, if it did, the contractor could

invoice the company at the "*agreed rates*". The same clause recognised the contractor's right to make himself available on only certain days and times of his own choosing while the contractor in turn agreed to notify the company "*in advance of his unavailability to undertake a previously agreed delivery service*." The evidence before the Tax Appeal Commissioner (the first instance decision-maker) established that the drivers generally filled out an "*availability sheet*" indicating their availability for work – this was, it seems, an algorithm-free zone – on the basis of which a roster was drawn up by the store manager. Each roster involved drivers being rostered for one or more shifts, at the start of which they clocked in and at the end of which they clocked out.

15. The Appeal Commissioner found that the drivers were employees, at least in respect of the individual shifts undertaken by them. She did not consider it necessary to decide whether the umbrella contract gave rise to an enforceable obligation to provide or perform work (given the context – tax – continuity of employment was not at issue). The High Court upheld the Commissioner's determination on appeal. However, on the company's further appeal to the Court of Appeal, a divided court reversed, largely on the basis that the necessary mutuality of obligation between the drivers and the company was absent. In the majority's view, an obligation to perform work once undertaken and an obligation to pay for the work so undertaken was insufficient. There had to be an ongoing obligation on the employer to provide work and on the employee to perform it and the threshold requirement of mutuality of obligation could not be satisfied by a series of individual contracts.

16. Our Court unanimously reversed the Court of Appeal and restored the Appeal Commissioner's determination (though differing from her reasoning in certain respects). Giving the sole judgment, Murray J undertook an exhaustive analysis of the authorities. Ultimately, he set out what he considered to be the correct approach to the determination of employment status in the following terms:

> *"The correct approach*
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> *253. The method prescribed by MacKenna J. in RMC as developed in Market Investigations and as applied by this court in Henry Denny continues to provide a reliable structure for the identification of a contract of employment. The parties in this case did not suggest that the approach adopted in those cases should no longer govern the issue. Developments in the law since that case, as well as the desirability of avoiding confusion in the future as to the need for 'mutuality of obligation', suggest that it can be usefully clarified. Thus, the question of whether in any given case a worker is an employee should be resolved by reference to the following five questions:*
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> > *(i) Does the contract involve the exchange of wage or other remuneration for work?*
> >
> > *(ii) 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?*
> >
> > *(iii) If so, does the employer exercise sufficient control over the putative employee to render the agreement one that is capable of being an employment agreement?*
> >
> > *(iv) 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.*
>
> *(v) 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."*

The first three questions operate as a filter. A negative answer to any excludes a finding of employment. If all are answered affirmatively, all the facts and circumstances should be interrogated in order to ascertain the true nature of the relationship.[16]

17. Point (v) above makes it clear that, while the *Karshan* test is one of general application, its application must nonetheless be sensitive to the relevant statutory context. Consistency of approach (and outcome) is obviously desirable in principle, though it may need to yield to the statute – most obviously where the statute embodies a different threshold test (as where the statutory gateway depends on being a "*worker*"). But where the test is the same, as for instance it is in determining employment status for the purposes of the tax and social welfare codes, the outcome ought to be the same and – as was in fact the position in *Karshan* – divergent determinations of status have the potential to give rise to significant anomalies. Divergent determinations of status for the purposes of employment protection and tax/social welfare do not give rise to the same concerns.

[16] *Karshan*, para 235.

18. I have already noted parallels between *Karshan* and *PGMOL.* Each involved the gig economy but neither could truly be said to be concerned with the Platform economy (*PGMOL* did at least involve the use of a piece of software for match appointments but that was not of the essence of the arrangements at issue). However, each provides a framework for approaching the classification of Platform work.

Purpose and the limits of inquiry: are contracts of employment different?

19. There is one other aspect of *Karshan* that serves to frame an issue that might usefully be discussed further this afternoon. It has its roots in the decision of the UK Supreme Court in *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745 ("*Autoclenz*") and the subsequent judgment of Lord Leggatt in *Uber.*

20. At issue in *Autoclenz* was the entitlement of the claimant car valeters to the national minimum wage and the protections of the Working Time Regulations. The statutory gateway to the enjoyment of those rights was to the status of "*worker*", defined as an individual who has entered into or works under (or worked under) "*a contract of employment*" – in other words, an employee as conventionally understood – **or** "*any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried out by the individual*" – the so-called "*limb (b) worker*".

21. In his judgment, Lord Clarke had suggested that the principles applicable to ordinary contracts, particularly commercial contracts, did not apply, or at least did not apply with the same force, to employment contracts and that tribunals and courts had greater freedom to look beyond the written terms of the employment contract to ascertain the reality of the relationship between employer and worker than would be the case in other contractual disputes. Such an approach was, in his view, justified by reference to the relative bargaining power of the parties, presumably because the employer would generally be in a position to dictate the terms of the written contract. In *Autoclenz*, the Employment Appeals Tribunal had looked beyond the parameters of the written contract and concluded that the claimants were limb (b) workers. That holding was reversed on appeal but restored by the Supreme Court.

22. In *Uber*, Lord Leggatt reframed the *Autoclenz* analysis. In his view, it was critical that the rights asserted by the claimants in *Autoclenz* were statutory rather than contractual. The task of the tribunal or court was to determine whether the claimants fell within the statutory definition of "*worker*", "*irrespective of what had been contractually agreed*." In that task, the tribunal or court should adopt a purposive approach – the relevant purpose being to protect vulnerable workers from being paid too little, being required to work excessive hours or otherwise being treated unfairly. Once that was recognised, it could be seen that it would be inconsistent with the purpose of the legislation to treat the terms of a written contract as the starting point in determining whether an individual fell within the definition

of "*worker*" as to do so "*would reinstate the mischief which the legislation was enacted to prevent.*" That approach was, in his view, confirmed by the statutory prohibition on contracting out.

23. In *Karshan*, Murray J noted that the position adopted in *Autoclenz* had never been adopted in this jurisdiction. The general law of contract normally precluded the court from looking at the post-contract conduct of the parties for the purpose of interpreting a contract or determining the rights of the parties to it. The question of whether, either generally or because of the requirement to give a purposive application to particular statutory provisions (as suggested in *Uber*), a principle similar to that recognised in *Autoclenz* ought to be recognised in this jurisdiction should await a case in which the question was a matter of live controversy (it was not a real issue in *Karshan* because the points at which the parties' practice was inconsistent with the terms of the written agreement were of no real materiality) and was the subject of full argument.[17] In the course of his discussion of the point, Murray J identified arguments *pro* and *contra* as well as noting that the High Court of Australia, in *Construction, Forestry, Maritime Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1, (2022) 398 ALR 404 – also an employment rights case – had adopted an approach that diverged from that indicated in *Autoclenz*.

24. Ultimately, Murray J considered that it was reasonable to assume that when the Oireachtas refers to a "*contract of employment*" or an "*employee"* without more it is referring to those concepts as understood by the common

[17] *Karshan*, para 243.

law. As a matter of principle, though, when such terms are used in a statute, the ascertainment of their meaning involved an exercise of statutory construction and there was always the possibility that a particular legislative scheme – particularly those involving the protection of employment rights – might require a modification of the general test or (as was decided in *Uber*) to the approach to be adopted to the relationship between a written contract of employment and the practice of the parties in implementing that contract in a particular case. That was not the position in *Karshan*: the language of the Taxes Consolidation Act 1997 (the enactment at issue) did not require any modification of the standard approach.[18]

25. Earlier, in *Revenue and Customs Commissioners v Atholl House Productions* [2022] EWCA 501, [2022] 4 All ER 461 – as its name suggests, a tax case – Sir David Richards (as he then was) considered whether it was permissible to apply the approach adopted in *Autoclenz* and *Uber*. He noted that it was common ground that whether the relevant individual was to be regarded as an employee for income tax purposes fell to be determined by the application of the common law tests of employment and that both sides agreed that the statutory context gave no special meaning to the term "*employee*". In those circumstances there was in his view no justification for the application of the approach adopted in *Autoclenz*.[19] The same view appears to have been taken by Lord Richards in *PGMOL*.[20]

[18] *Karshan*, para 252.
[19] At para 165.
[20] At para 2.

26. In the light of these decisions, it would, I suggest, be useful to discuss the precise reach of the approach adopted in *Autoclenz*, as explained and reframed in *Uber* and, in particular whether (i) it is limited to the area of employment rights or may have a broader reach and (ii) whether it applies only where the court or tribunal is determining whether a person is a "*limb (b) worker*" or also applies where the issue is whether a person is an "*employee*" providing services on foot of a "*contract of employment"* (at least where that issue arises in the context of statutory employment rights). The extent of the divergence between the approach taken in the two jurisdictions – which may appear greater than it actually is – can also be discussed.

27. Before turning to the Directive (which is relevant on this issue also), and broadly on the same point, I note that the New Zealand Court of Appeal recently held that Uber drivers in New Zealand are employees of Uber for the purposes of the (NZ) Employment Relations Act 2000: *Rasier Operations BV v E Tu Incorporation* [2024] NZCA 403. Section 6 of that Act defines employee as any person employed by an employer to do any work for hire or reward "*under a contract of service*", without any "*limb (b)*" extension. However, the section goes on to injunct the deciding body to "*determine the real nature of the relationship between them*" and for that purpose it must consider "*all relevant matters*" including any matters that indicate the intention of the persons and is not to treat as determinative any statement by the persons describing the nature of their relationship. Those provisions had previously been interpreted by the New Zealand Supreme Court as requiring the relevant court or tribunal to examine how

any agreement actually operated in practice. Citing *Autoclenz* and *Uber*, the NZ Court of Appeal observed that the rationale for not relying on express "*labels*" in a contract extended equally to provisions in an agreement "*that are window-dressing designed to convey the impression that the relationship differs from what it is as a matter of substance and reality*".[21] The Court of Appeal then went on to consider the terms of the agreements and the operation of the agreements in practice, observing at the end of that analysis that although the driver agreement had been crafted to avoid the appearance of an employment relationship, many of the provisions designed to point away from employee status were "*window-dressing*" and ultimately concluding that the section 6 test was met.

Legislating for the Platform Economy – The Directive

28. In 2017, the Taylor Review Report recommended legislation to clarify the line between "*worker*" status and self-employment which was, in its view, the area where there was greatest risk of vulnerability and exploitation.[22] Despite the irresistible sales pitch that such legislation would do "*more of the work and the courts less*", I understand that there are currently no plans to implement this recommendation.

29. So far as I am aware, there are no plans to reform the law here either. In due course, however, Ireland will be required to implement the Directive

[21] Para 105.
[22] *Good Work*, The Taylor Review of Modern Working Practices (July 2017), chapter 5.

which will involve amending employment law as it applies to the Platform economy.

30. In the time available, it is possible only to highlight very briefly the headline features of the Directive. Article 1 states its purpose as being to improve working conditions and the protection of personal data in platform work (as defined) by (a) introducing measures to facilitate the determination of the correct employment status of persons performing platform work; (b) promoting transparency, fairness, human oversight, safety and accountability in algorithmic management in platform work and (c) improving transparency with regard to platform work, including in cross-border situations.

31. Here I focus on (a). The most significant provisions are Articles 4 and 5. Article 4(1) requires Member States to have "*appropriate and effective procedures*" in place to verify and ensure the determination of the correct employment status of persons performing platform work. Notably, Article 4(2) directs that the ascertainment of the existence of an employment relationship "*shall be guided primarily by the facts relating to the actual performance of work … irrespective of how the relationship is designated in any contractual arrangement that may have been agreed between the parties involved*." On its face, that will require a change of approach here, at least as regards platform work.

32. Article 5 provides for a "*legal presumption*" that the contractual relationship between a digital labour platform and a person performing platform work

through that platform is an employment relationship where "*facts indicating direction and control, in accordance with national law, collective agreements or practice in force in the Member States and with consideration to the case-law of the Court of Justice*, *are found*". If the digital labour platform wishes to rebut the employment presumption, it must then prove "*that the contractual relationship in question is not an employment relationship*" (Article 5(1)). That presumption is characterised as "*a procedural facilitation*" benefitting those who perform platform work (Article 5(2)). The presumption applies in all judicial or administrative proceedings which concern the determination of the employment status of persons carrying out platform work but it does *not* apply where the proceedings concern social security, criminal or tax matters unless Member States choose to apply the presumption in such as a matter of national law (Article 5(3)). The introduction of the presumption will be, per Article 6, supported by a framework of measures geared towards ensuring that the presumption is effectively implemented and complied with (e.g., Member States will be required to develop practical recommendations so that platforms, platform workers and social partners can understand the presumption and implement it (Article 6(a))).

33. Beyond noting that Chapter III contains complex but important provisions relating to "*algorithmic management*" including limitations on data processing by means of automated monitoring systems and automated decision-making systems, I say no more about the Directive here.

So far as the issue of classification of status is concerned, the measures in the Directive are, on any view, modest and it can be said with confidence that disputes about classification will continue to trouble courts and tribunals here.