Employment status: *Contractors v Employers*

By Killian O'Reilly (Partner)

Employers are increasingly looking at ways to achieve greater flexibility in their workforce to meet the changing demands of the commercial environment. An emerging trend is that of engaging self-employed contractors.

The recent Circuit Court decision of *McMahon v Securicor Omega Express Ireland Limited* provides important guidance to employers by highlighting factors which will be considered relevant in determining the actual status of a worker.

McMahon, a motorcycle courier, undertook a three-year legal battle to have himself considered by the Revenue Commissioners and Department of Social Community and Family Affairs to be an employee rather than a self-employed contractor. In reaching its decision the court examined the reality of the employment relationship "on the ground". The decision is considered by many commentators to be of significant relevance in the current economic climate and provides important insight on establishing whether workers are employees or employers.

Historically, workers could be categorised as employees (when working under a contract of service) or self-employed (when working under a contract for services). Whilst this distinction is often unclear, the ability of the employer to control and direct the worker where, when and how to do their job are key determinants to be considered. Taxi drivers, for example, are self-employed whilst chauffeurs are generally considered to be direct employees.

Background to the case

Martin McMahon joined Securicor Omega Express ("Securicor Omega") in August 1997. The contract he signed at the time clearly stated that he was a self-employed contractor although he disputed this had ever been brought specifically to his attention. McMahon's job specification largely consisted of collecting and delivering envelopes and small parcels within the Dublin 1 and Dublin 2 areas. Work was transmitted to him by a base-controller who contacted him on a two-way radio supplied by the company. McMahon supplied all other equipment himself, including his motorcycle, and he was responsible for all the associated maintenance and running costs, including insurance and taxation. Securicor Omega had a pool of approximately twenty such motorcycle couriers all of whom were paid per delivery at an agreed rate.

In August 2000 McMahon challenged the status of his employment. He sought a decision from the Scope Section of the Department of Social Community and Family Affairs (previously the Department of Social Welfare). The Deciding Officer found that, on the basis of information supplied by McMahon, he was insurable under Class A, ie as an employee. This decision was overturned on appeal to the Chief Appeals Officer of the Department of Social Welfare in June 2001. The Chief Appeals Officer, who adjudicates on such appeals independently of the Department, held that McMahon's employment status was "more in keeping with a contract for services rather than of an employer and employee one". This decision was based on the fact that the courier provided his own transport, was responsible for insurance, tax and maintenance, was free to accept or refuse work as he wished and was not bound by fixed hours.

McMahon appealed this decision to the Employment Appeals Tribunal where he broadened the scope of his arguments to claim that he had been unfairly or constructively dismissed by Securicor Omega. This was successfully rebutted by his previous employers.

The crux of McMahon's arguments at the EAT were that, as far as he was concerned, his previous employers had exercised a great deal of control over him and were in a position to direct him to undertake work as they desired. The courier argued that he worked hard at his job (and this was accepted by Securicor Omega) and that he was essentially employed on a full time basis. He further contended that he was subject to dismissal and termination like regular employees. He also denied that he was free to take his lunch or tea breaks whenever he wanted.

It was accepted that McMahon had been a very good worker and had progressed through the ranks to be one of the company's top earners. Rather than collecting a parcel and delivering it from A to B he quickly realised that the more jobs that he could pick up and deliver between those two points, the more profitable his time would be spent. Typically he could handle ten to twelve jobs at any one time.

McMahon claimed that he was not in business on his own account and had no ability to profit from his enterprise or initiative, one of the tests

continued inside

orourke reid
LAWFIRM

LITIGATION NEWS

ISSUE **No. 6**
AUGUST 2003

orourke reid bookmark ...

€500,000 fine for unsafe work systems

A Galway-based construction company has been fined €500,000 for unsafe systems of work following the fatal fall of one of its workers. Thomas Farragher fell almost nine metres to his death while working on a roof gutter in Charlestown, Co Mayo in September 2001. The Circuit Court in Castlebar found that even though Mr. Farragher had been wearing a harness that it had not been properly anchored and he had not been trained in the use of the harness. On 18 July 2003, the Minister for Labour Affairs announced that a new Safety, Health and Welfare at Work Bill will increase penalties and prison terms for employers who breach health and safety legislation. A range of on-the-spot fines for breaches of the code will also be introduced. The Minister will invite the views of the Health and Safety Authority and the Social Partners before publication of the Bill.

ISSUE **No. 6**
AUGUST 2003

orourke reid
LAWFIRM

Please tear along perforated line & keep

Employment status: *Contractors v Employers*

By Killian O'Reilly (Partner)

used to establish whether one is regarded as a contractor or employer. The EAT held that this was not the case and Securicor Omega were able to establish that the more jobs the courier did the more he got paid. The Tribunal found that the company exercised a significant degree of control over the courier and that he had little opportunity to operate on his own account whilst working for them. The fact that the rate per delivery was set by the company and that the claimant carried little or no risk in relation to the deliveries he made, and had no opportunity to profit from his enterprise, were all considered to be factors in favour of him being regarded as an employee under the direction and control of Securicor Omega.

The Tribunal also found that he was constructively dismissed and that the dismissal was unfair for the purposes of the Unfair Dismissals Act 1977 to 1993.

The appeal

The company appealed the matter to the Circuit Court where Hogan J. overturned the EAT decision. In a decision that will have wide reaching implications for employers nationwide, he found that the courier was self-employed, supplying a service to the company and that this had always been the case. Despite the fact that the courier had been given a delivery bag and a radio it would be unreasonable to conclude that the relationship of employer and employee existed in the ordinary legal meaning of that term.

Hogan J. noted the undisputed facts that the courier supplied his own motorcycle and paid for its associated maintenance, insurance and tax. He also placed particular emphasis on the fact that the courier had to contact the base controller first thing every morning to establish whether work was available for him. He also had the freedom to refuse work if he wanted to and had the ability to agree extra rates in certain circumstances.

Conclusion

The net effect of the decision is that motorcycle couriers, like taxi drivers, do not enjoy the benefits of an employer and employee relationship. On the other hand, they do have the flexibility and freedom associated with self-employed contractors.

This decision must be seen in the context of the considerable growth in the number of workers who are employed outside the traditional employer/employee relationship. This trend towards "atypical workers" reflects the demand by employers for a more flexible workforce. The McMahon case is of considerable importance in that it clarifies the status of one group of workers. It also elucidates the relevant factors that may be taken into account in future cases.

Reform of personal injury claims

The Minister for Justice, Equality and Law Reform has published the heads of a bill to radically reform the law on personal injury actions. Amongst the provisions in the general scheme is the dismissal of actions or defences where parties have knowingly tendered evidence which is materially false or exaggerated and a requirement that all court pleadings which contain statements of fact are to be supported by an affidavit verifying the information. The Bill creates new offences of swearing an affidavit falsely; tendering or adducing false evidence and falsely instructing a solicitor with a view to deceiving a party to a claim. In addition, the limitation period in which a personal injuries action can be taken will be reduced from three years to one year and the introduction of a power to convene a mediation conference for pre-trial settlements. Other provisions of the Bill radically alter the current law on personal injuries actions. The Bill will be published in autumn of this year.

Dublin office
Pepper Canister House Mount Street Crescent Dublin 2 Telephone 00 353 1 240 1200
Facsimile 00 353 1 240 1210 DX number 109025 Email lex@orourkereid.com

Leeds office
5 Lisbon Square, Leeds, LS1 4LY, England Telephone 00 44 113 2457811
Facsimile 00 44 113 2457879 DX number 26450 Leeds Park Sq Email lex@orourkereid.co.uk

Asbestosis: an update

By Gordon Murphy (Senior Associate)

In the last issue of Litigation News we alerted readers to the decision of the Supreme Court in the case of *Fletcher v The Commissioners of Public Works*. This case has significant implications for the hundreds of asbestos related claims currently in existence. It remains to be seen how strictly this decision will be interpreted in subsequent cases and, as seen in the case of *Swaine v The Commissioners of Public Works*, the Supreme Court has already significantly distinguished its earlier decision.

The Fletcher case was an appeal by the defendants from a judgment and order of O'Neill J. in the High Court of June 2001 when the plaintiff was awarded damages in the sum of £48,000. The case arose out of what was admitted to be the failure of the defendants as employers to take proper precautions for the safety of the plaintiff.

The facts

The plaintiff had been employed from 1985 onwards as a General Operative in Leinster House. The trial judge found as a fact that the plaintiff had inhaled very large quantities of asbestos dust over a number of years and was satisfied that the defendants were guilty of gross negligence. The medical evidence of Professor Luke Clancy was that, although the plaintiff was exposed to the risk of developing asbestosis and lung cancer, he had not contracted either disease and it was unlikely that he ever would.

Dr. John Griffin, Consultant Psychiatrist had diagnosed the plaintiff as suffering from a "reactive anxiety neurosis" which could not be assuaged by counselling. The trial judge was satisfied that the plaintiff's psychiatric illness was the result of his exposure to asbestos dust and not his exposure to the knowledge of it. The defendants appealed the matter on the basis that the trial judge's determination that the plaintiff was entitled to recover damages in respect of psychiatric illness, when unaccompanied by any physical injury, was wrong in law.

The appeal

In the Supreme Court the Chief Justice, Mr. Ronan Keane, felt that important policy issues needed to be considered in deciding whether the plaintiff was entitled to recover damages for the impairment of his mental condition which had resulted from his exposure to the risk of contracting mesothelioma. He stated that the courts had to adopt a more circumspect approach to cases of psychiatric illness because it is less susceptible to precise diagnosis. More importantly, the Chief Justice referred to "*the undesirability of awarding damages to plaintiffs who have suffered no physical injury and whose psychiatric condition is solely due to an unfounded fear of contracting a particular disease. A person who prefers to rely on the ill-informed comments of friends or acquaintances or inaccurate and sensational media reports rather than the considered view of the experienced physician should not be awarded damages by the law of tort*".

The Chief Justice was also mindful of the implications for the health care field of a more relaxed rule in respect of recovery for psychiatric illness.

He was accordingly satisfied that the law in this jurisdiction should not be extended by the courts to allow the recovery by plaintiffs of damages for psychiatric injury resulting from an irrational fear of contracting a disease because of their negligent exposure to health risks by their employers, where the risk is characterised by their medical advisors as very remote.

Conclusion

It is too early to say how broadly or how strictly this judgment will be interpreted and applied. On a strict interpretation of the judgment it would appear that if the plaintiff had exhibited even the most minor of physical symptoms such as slight throat or eye irritation then he would have recovered damages both for his physical symptoms and his much more significant psychiatric injury.

continued on back page

orourke reid bookmark ...

Stamp duty: a reminder

New stamp duty rates for residential and non-residential property apply to instruments executed on or after 4 December 2002:

Residential Property

Exceeding	*Not Exceeding*	*First Time Buyer*	*Full Rate*
€.01	€127,000	Exempt	Exempt
€127,000	€190,500	Exempt	3%
€190,500	€254,000	3%	4%
€254,000	€317,500	3.75%	5%
€317,500	€381,000	4.5%	6%
€381,000	€635,000	7.5%	7.5%
€635,000	-	9%	9%

Non Residential Property

Aggregate Consideration	*Rate of Duty*
Not exceeding €10,000	Exempt
€10,001 - €20,000	1%
€20,001 - €30,000	2%
€30,001 - €40,000	3%
€40,001 - €70,000	4%
€70,001 - €80,000	5%
€80,001 - €100,000	6%
€100,001 - €120,000	7%
€120,001 - €150,000	8%
Exceeding €150,000	9%

When is a bar not a bar

By Killian O'Reilly (Partner)

A recent Supreme Court decision has highlighted the hidden strength of the Planning and Development Act, 2000.

Under Section 160 of the Act, a concerned party may apply to the High Court for an injunction in anticipation of a breach of the planning code. Until this provision came into operation a breach was not actionable until the nuisance had actually occurred.

The case

The applicant in this case was Ampleforth Limited t/a The Fitzwilliam Hotel on St. Stephen's Green, Dublin 2. The respondent was Cherating Limited who held the lease for the Planet Hollywood premises adjoining the Fitzwilliam Hotel. Cherating Limited is part of the Capital Bars Group Plc, controlled by the O'Dwyer Brothers who held the lease of Planet Hollywood, which traded as a licensed restaurant for 18 months prior to its closure. Capital Bars planned to renovate the premises to add it to its stable of late night entertainment venues citywide. The Fitzwilliam Hotel had concerns in relation to both the level of noise and number of revellers which such a development would cause and felt that its' business as a luxury hotel would suffer greatly as a result.

The use of the Planet Hollywood premises was confined under the Master Lease to that of a licensed restaurant. Cherating Limited, unbeknownst to The Fitzwilliam Hotel, took an action against the the lessor in order to force a change of use. It was successful in doing so and immediately applied for and was granted a seven-day on publicans licence in respect of the premises. This was done to facilitate subsequent applications for dance licences to enable the revamped premises to apply for special exemptions to serve alcohol past normal pub closing hours.

However, the various planning permissions which governed the use of the Planet Hollywood premises confined that use to that of a restaurant and/or bar. There was no dispute that the premises had never previously traded with the benefit of a seven-day on publicans licence.

The Fitzwilliam Hotel, in the first case of its type under the new legislation, sought an injunction from the High Court under Section 160 seeking an Order restraining Cherating Limited from carrying out any works to the Planet Hollywood premises without obtaining a new planning permission which permitted the operation of a public bar on the premises.

The designation under the planning code of the premises as a "licensed restaurant" was held by Mr. Justice Finnegan in the High Court not to entitle the premises to be used as a public bar. He followed the reasoning of McWilliam J. in *Carrighall Holdings Limited v Dublin Corporation* and held that a public bar with live music and dancing, availing of extended trading hours, would bear greater similarity to a nightclub rather than a licensed restaurant.

He further held that the term "restaurant and/or bar" meant a bar operating with an ordinary seven-day publicans licence and included a hotel licence with or without public bar facilities. Therefore it was possible, under the planning permissions which existed in relation to the premises, that a public bar could have been operated in the basement of the premises. However, on the basis that a public bar had not been operated in the premises within the limitation period of five years from the date of the grant of the permission in question, it was not now possible to commerce to operate a public bar therein.

Finnegan J. was satisfied that a change of use from a licensed restaurant to a public bar represented an intensification of use of such scale as to be a material change of use. This change of use would, therefore, require planning permission.

The appeal

Finnegan J's judgment had significant commercial implications for Capital Bars and they appealed the matter to the Supreme Court where Mr. Justice Geoghegan delivered a unanimous judgement on behalf of himself, McCracken J. and Hardiman J. Affidavits submitted on behalf of Capital Bars attempted to give the impression that the Planet Hollywood premises had previously traded as a sports bar showing major sporting events to customers and diners and that, on that basis, it operated as a public bar. The court did not accept this evidence.

It was successfully submitted by The Fitzwilliam Hotel that the premises operated as a licensed restaurant as its core business and that at no stage did the premises operate as a public bar. Even had it done so, such an operation would have been illegal since it did not have the requisite licence. The only bars that were on the premises were dispense bars from which drinks could be provided to diners, which was clearly compatible with the operation of a licensed restaurant.

As far as the Supreme Court was concerned, the bottom line was that "an alteration from the kind of restaurant trading accompanied with the limited serving of drink (whether in fact authorised or unauthorised under the licensing code)…. was a quite different use than an ordinary seven-day publicans trade use". On that basis it was held that a new planning permission was needed and the appeal was dismissed with both the High Court and Supreme Court costs awarded against Cherating.

Conclusion

Both the High Court and Supreme Court judgments emphasise the strength of the new Planning and Development Act, which gives the planning code significant teeth. Gone are the days when lip service can be paid to the fine print of planning permissions. Capital Bars' attempts to subvert the planning code were ultimately unsuccessful and costly.

Asbestosis: an update

continued from page 3

The judgment in Fletcher has already been distinguished by the Supreme Court in *Swaine v Commissioners of Public Works*. Like Fletcher, the claimant in this case had suffered no immediate physical injury but was exposed to "a very remote" risk of contracting mesothelioma. Being aware of that risk, he was suffering from a chronic "reactive anxiety neurosis". Significantly, the Chief Justice, while upholding the rationale of Fletcher, distinguished this case on the basis that in the Fletcher case the State had fought the issue of liability, while in the instant case they had "either expressly or by implication withdrawn any plea in the defence denying liability to pay damages and the case was proceeded as an assessment of damages only".