Mc DERMOTT

1981 No. 366 R

J. E. McDERMOTT,
INSPECTOR OF TAXES

Appellant

-and-

PATRICK LOY

Respondent

JUDGMENT
Delivered the 29th day of July 1982 by Mr. Justice Barron.

Counsel on behalf of the applicant accepted that in the earlier cases the test to determine the distinction between a contract of service and a contract for services depended upon a consideration of the degree of control exercised by the employer over the person employed in relation to the work to be carried out. He submitted however that while a question of such control was still of importance it was not the sole criterion. He relied for this submission upon principles enunciated in recent English cases and in particular in Market Investigations Limited .v. Minister of Social Security 1969 2 Q.B. 173 and Global Plant Limited .v. Secretary of State for Health and Social Security 1972 1 Q.B. 139. He submitted that the question to be asked in each case should be, is the employee concerned

business on his own account? He cited a passage in the judgment of Cooke J., in Market Investigations Limited .v. Minister of Social Security at page 184 in which he says:-

"The observations of Lord Wright, of Denning L. J., and of the Judges of the Supreme Court in the U.S.A. suggest that the fundamental test to be applied is this:-

'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'

If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no" then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters

as whether the man performing the services provides his own equipment, whether he has his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

It seems to me that the test really has not changed. When the question was asked, who decides what the work is to be and when and where it is to be done, it seems to me that the purpose was to determine whether the employee was working for someone else or for himself. This was the basis upon which Graham .v. Minister for Industry and Commerce, 1933 I.R., 156 was decided. The Court was satisfied on the evidence that the Plaintiff had been working for himself as a building contractor.

In the present case, the facts as found support the proposition that the Respondent is in business on his own account. He had to buy his collecting book. He has no fixed hours and may canvass business where and when he wishes. He uses his own stationery. He is entitled to employ someone else to make the collections. He may sell his collection book. Undoubtedly, there are aspects of

his employment which suggest that he is employed under a contract of service. He is a member of the Royal Liver Superannuation Fund. He joined a trade union to qualify for holiday pay. Even if the Respondent would not have been entitled to become a member of the Superannuation Fund or of the trade union, if he was not employed under a contract of service, no question of estoppel has been raised nor could it have been since the appellant was not a party to either situation, nor would the belief of the Respondent have affected the legal status of his contract of employment.

It is submitted that the appeal commissioner was wrong in his determination and that I must answer "no" to the question raised by the case stated. The question is put as to whether there was evidence upon which the appeal commissioner could properly arrive at the decision that the Respondent was not engaged by the Royal Liver under a contract of service. Counsel for the appellant submits, relying upon Mara .v. Hummingbird, an unreported decision of the Supreme Court delivered on the 6th December 1977 that the question is whether the decision was one which the appeal commissioner could reasonably maintain on the facts as found by him.

If I was entitled to express my own view on the facts as found, I would hold that the contract was a contract for services. On this view clearly I must uphold the decision of the appeal commissioner. However I feel that I should consider the basis upon which he arrived at that decision. In reaching his decision, he was greatly influenced by the decision of the High Court in the Minister for Industry and Commerce .v. Hayes and others 1967 I.R. 50. That case dealt with the question as to whether or not certain ministerial regulations were valid. However, the person to whom the regulations would have been applicable, if valid, was a person employed under the same terms and conditions as the Respondent in the present case. In that case, it was conceded by the Minister that the contract between the agent and the Royal Liver was a contract for services. The case would therefore only be an indication of the opinion of the Minister's Counsel but for the fact that a passage in the judgment of Henchy J., which is set out in full in the case stated deals with the point and expresses his view that the agent was engaged under a contract for services. While it would have been incorrect for the commissioner to accept unquestioningly an admission of Counsel as a statement of principle,

I do not see that he can be faulted for accepting a direct statement of principle, even though such statement may have been obiter. On the contrary, if he had not done so, I consider that he could have been faulted for not following such statement of principle.

Accordingly, I am of the opinion that the determination of the appeal commissioner was correct in law.

Finally, it seems to me that where the issue is dependent as it is upon a determination of the proper schedule of the Income Tax Acts under which the Respondent should pay income tax, that it is a relevant consideration that if I were to have answered the question differently that the Respondent would have been unable to claim as expenses against his income expenditure incurred for the purpose of earning that income.

Henry Darvas.

29th July 1982.