Neutral Citation No. [2006] NICA 20

Ref:	**KERH4683.T**

Judgment: approved by the Court for handing down

(subject to editorial corrections)

Delivered:	**21/03/2006**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

MARIE LOUISE McGURK

(Applicant) Respondent;

and

DEPARTMENT FOR SOCIAL DEVELOPMENT

(Respondent) Appellant.

Before Kerr LCJ, Campbell LJ and Sheil LJ

Ex tempore judgment

KERR LCJ

[1] This is an appeal by way of case stated from a decision of an industrial tribunal on a preliminary issue in proceedings before the tribunal between Mrs Louise McGurk and the Department for Social Development. The tribunal had been invited by the parties to make a finding in relation to the employment status of Mrs McGurk and it concluded that she was employed by the Department for Social Development.

[2] The requisition to state a case, which is dated 18 March 2005, is in the following terms:

> "Did the Industrial Tribunal err in law in deciding that in all the circumstances the appellant, Department for Social Development, employed the (applicant) respondent under an implied contract

> of service so that the (applicant) respondent was entitled to all the appellant's terms and conditions of employment?"

The requisition was framed in that way, we suspect, because of the statement made in the decision which is reflected in the terms of the requisition itself.

[3] Mr McKee, on behalf of Mrs McGurk has accepted (and in our view correctly accepted) that it was not open to the Industrial Tribunal to make a finding that all of the Department's terms and conditions of employment inured to the benefit of Mrs McGurk. We are satisfied that this is correct. On the assumption that the tribunal was correct to conclude that Mrs McGurk was employed by the Department, before any conclusion could be reached on the question of which of the Department's terms and conditions applied to her further evidence would be required and certainly further analysis of the evidence already been given would have to be undertaken.

[4] It was perhaps, therefore, not surprising that when the Tribunal came to state a case for the opinion of the Court of Appeal the question was refined so that it now appears in paragraph 8 of the case stated as follows:

> "The question posed for the opinion of the Court of Appeal is whether the Tribunal was correct in law in finding that the respondent was an employee of the first-named appellant?"

That is the issue which defines the context of this appeal and on which we must reach our decision. We are unanimously of the view that there was material on which the Tribunal could reach that decision.

[5] Before saying why we have arrived at that opinion it is important, I think, to emphasise that the conclusion of the tribunal that Mrs McGurk was an employee of the Department for Social Development does not equate to a finding that she was a Civil Servant. We wish to make it abundantly clear that in upholding the decision of the Industrial Tribunal we are not to be taken as having reached any conclusion as to whether she is entitled to the status of Civil Servant. It appears to us to be entirely feasible that a person can be an employee of the Civil Service Commissioners or a particular Government department without becoming a Civil Servant and we therefore make no finding whatever in relation to the terms and conditions of the employment of Mrs McGurk by the Department for Social Development. That is, as we have said, a matter for further evidence and further more detailed analysis of the evidence already given.

[6] In the case of *McDonnell v Henry* [2005] NICA 17 this court said that there is no single universally applicable test to resolve the often vexed

question of whether a worker is to be deemed an employee. The decision can only be taken on the basis of the particular facts of each specific case having regard to the nature of the relationship between the parties, the type of work to be carried on, the level of control exercised by the party engaging the worker and all other relevant factors of which there may be many.

[7] A common theme running through the authorities on this vexed area is that there must be a sufficient element of control. In *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471 Elias J returned to that theme in his discussion as to whether the test was satisfied in that particular case. He said at paragraph 10:

> "**10** For the purpose of analysing this decision it is not necessary to set out an exegesis of the law in this area. It is perhaps sufficient to start with an observation of Longmore LJ in *Montgomery v Johnson Underwood Ltd* [2001] ICR 819, 831, para 46:
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> > 'Whatever other developments this branch of the law may have seen over the years, mutuality of obligation and the requirement of control on the part of the potential employer are the irreducible minimum for the existence of a contract employment: see *Nethermere (St Neots) Ltd v Gardener* [1984] ICR 612, 623 per Stevenson LJ approved in *Carmichael v National Power plc [*1999] ICR 1226, 1230 per Lord Irvine of Lairg LC.'"

[8] But, as Elias J explained, undue literal emphasis on the requirement of mutuality of obligation is inappropriate in the circumstances where the person who claims to be an employee is supplying services and the person who is said to be the employer is supplying (whether directly or indirectly) payment for those services. Elias J pointed out:

> "The question of mutuality of obligation poses no difficulty during the period when the individual is actually working. For the period of such employment a contract must, in our view, clearly exist. For that duration the individual clearly undertakes to work and the employer in turn undertakes to pay for the work done. That is so even if the contract is terminable on either side at will."

[9] In this case the employee, Mrs McGurk, clearly was supplying her services or, to borrow the language of Elias J, undertaking to work. The Department for Social Development, we are satisfied, undertook to pay for the work that she rendered although it was a payment that was made through the medium of Worknet, the recruiting agency.

[10] In its decision the tribunal set out a number of factors which the majority considered were germane to the issue of whether the Department had exercised sufficient control. This is, in our view, the only area of any controversy between the parties. It is not necessary for us to set out each of those factors and to discuss the weight that was attached by the tribunal to them. We have listened, I hope carefully, to the painstaking analysis of them conducted by Mr O'Hara QC, on behalf of the Department. It is, of course, possible to criticise the weight that the tribunal has attached to some of those factors and, indeed, to suggest that there is a lack of coherent and complete consistency between the factors outlined by the majority and those outlined by the minority. Despite this, any analysis of the factors adumbrated by the Tribunal leads inexorably to the conclusion that there was material available on which it could rationally be concluded that the element of control in this case was sufficiently well-established.

[11] One need only refer to a sample of the factors that the tribunal outlined to make good that proposition. Many of these are uncontroversial between the parties. The first is the undisputed fact that the applicant supplied services for the Department since her initial placement in 1990. Secondly, she was chosen to act up in what was an acknowledged Civil Service post. Thirdly, she worked exclusively under the direction of the Department. Fourthly, her evaluation of her work was carried out by Department employees, albeit that it was not supplied to the Department. Fifthly, it is clear that Worknet (which was the only other possible employer) had no input into the way in which Mrs McGurk, carried out her work. All of these are, in our judgment, hallmarks of an employer/employee relationship established by the level of control that the putative employer has been able to exercise.

[12] The factors outlined by the minority are for the most part instances where a different view of various aspects of the relationship has been taken. The fact that such a different view is feasible does not, of course, rob the decision of the majority of its validity. We should observe, however, that we consider that the factor outlined in paragraph 10 of the minority's summary of relevant factors cannot survive analysis. It was stated that "the minority took account of the basic contractual argument that there was no intention on the part of the Department to enter into a contract with the applicant; an intention to enter into legal relations is a fundamental of any contract of employment". If that proposition were applied with full rigour it would mean, as Mr O'Hara candidly and sensibly accepted, that there could never be

an implied contract of employment. In our judgment that consideration should not have found any place in the factors taken into account by the minority.

[13] But in the final result our conclusion can be expressed succinctly and simply. There was in our judgment sufficient material before the tribunal on which it could conclude that the Department was in such control of the conditions of the applicant's employment as to make the relationship between them one of employer and employee and on that basis the question in the case stated must be answered "Yes" and the appeal must be dismissed.