EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF:	CASE NO.
Employee	RP237/2005, MN354/2005
Employee	RP239/2005, MN356/2005
Employee	RP240/2005, MN358/2005
Employee	RP244/2005, MN362/2005
Employee	RP246/2005, MN364/2005

against

Employer

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J. Sheedy

Members: Mr. M. Forde
Mr J. McDonnell

heard this appeal at Cork on 15th June, 17th, 18th and 19th October 2006 and 8 January 2009

Representation:

Appellants : Mr Michael Howard S C (9th Jan 2009 only) and Ms. Lucy Walsh B L instructed by McCann Fitzgerald, Solicitors, 2 Harbourmaster Place, I.F.S.C., Dublin 1

Respondent : Mr Anthony Collins S C (9th Jan 2009) and Ms. Cathy Smith B L instructed by Ms Christina Loughlin, Chief State Solicitor's Office, Osmond House, Little Ship Street, Dublin 8

Preliminary Point: (pages 2 to 38 refer to the EAT proceedings prior to the High Court case)

Whether the temporary veterinary inspectors were employed under a contract of service or a contract for service by the XXXX.

Appellants' Case:

Giving evidence, an appellant (hereafter referred to as JB) said that he had qualified as a veterinary surgeon in 1970 and, after being "on holidays for a while" started permanent employment on 1 January 1971 in Mitchelstown where he joined a group private practice. He worked as an assistant for a year and became a partner the following year.

Asked when he had first applied to be a temporary veterinary inspector (hereafter referred to as TVI) and if he had undergone any training, JB replied that he had a vague recollection of having done shifts in Cahir but had no recollection of doing any training there. When he applied to do shifts in XXXX the first thing he had to do was two weeks' training.

Asked about this training, JB said that he had had to attend XXXX where he had had to report first to the veterinary inspector (hereafter referred to as VI) and go in to do a shift each day for two weeks without pay.

JB told the Tribunal that he had regarded the VI as his boss. Although JB had come in as an individual vet, the VI had been in total control over anything JB had done. If JB made a mistake or was not doing his job properly the VI came around every so often to oversee his work.

Asked if the VI would be present on the premises at all times during a kill, JB replied that the VI, though perhaps not present all the time, would come along at some point during each shift to inspect the work or would come the following day saying that there was a problem with something that had been done the previous day and ensuring that it was corrected.

JB stated to the Tribunal that he had worked at XXXX in Mitchelstown from the 1970s to when it closed in October 2004. He had not applied to be on other panels because he had wanted to work in Mitchelstown. If he had started to go from one panel to another (e.g. Watergrasshill or Midleton) he would never be permanent. He aimed for XXXX and stayed on it. His only hope was seniority. There was a few people ahead of him. They were getting old and he thought that he would get in when they got out. That was the way to do it and he just worked away at his practice.

JB worked at XXXX five days per week. He worked shifts of two hours, three hours or three-and-a-half hours. Asked how the number of hours in a shift was determined, JB replied: "Oh, we had a rota system in XXXX. You come in at 8.00 in the morning, you worked through the first system, which was determined by the VI, finish that and another shift comes in, you might be on that shift next week, you are rotated sometimes, most of the time, the third shift (two o'clock), until the factory closed depending on how many pigs there were."

JB was now asked who would determine the start and end times of the process for the slaughter of a number of pigs that might come in. JB replied: "I wouldn't be totally sure of it but I always understood that the factory had to report to the VI and he would set the overall time for the factory, what they could kill. Certainly all the pigs would be killed. Okay, they could be moved on to another day. We had a lot of trouble towards the end with money restraints by the Department. We were on a budget and we were often told <<Money is going to run out in October. There will be no more kills. You are using up all your budget.>> It was difficult to know what was going on as regards how long a shift or how many pigs would be killed in a day but if the pigs came in you killed away and you just do your shift. It was just routine every day."

It was put to JB that the respondent would contend that there had been a lot of flexibility so that the

TVIs could choose their shifts and that there had been no control over them. JB replied: "I suppose it depends. We certainly did rotate on three daily shifts. If I was on the 8.00 shift in the morning until 10.30 or 11.00 or whatever there was certainly no flexibility there. I either turned up for work or I didn't get paid. Now, swapping was another issue. It was certainly frowned on. You could do it. It wasn't done that often but the flexibility you are talking about is you basically turned up on time, you signed in and you signed out. Now, it did impinge on my practice certainly. Okay, that was my business. I always looked at it that way. It was my problem. If I get a cow calving just before going in I certainly couldn't do it. I would have to give it to some other vet to do and I would lose out that way. I just took it for granted and carried on. I could easily go out and do the cow calving and arrive in a half an hour late. It was not the way. It was just in on time or else I would lose my job inside."

JB was now referred to his phrase "not the way" and was asked what would be the ramifications of being a half-hour late. He replied: "Again my boss is the veterinary inspector. He would be on to me why I am not in on time. He certainly would be on the line. Okay, if he gets wind that I am late he would be down the following day checking and seeing if everybody is in on time."

JB was now asked if he could not have started a half-hour late and finished a half-hour late. He replied: "No. When the shift finishes everybody…you work until the workers in the factory finish. Some of it was kind of determined like that. We basically finished at lunch-hour. So everybody goes home at that time. The shift was over."

JB was asked what had been the day-to-day procedure when he arrived. He replied: "You would arrive in. You have a quarter of an hour's signing-on time, washing-on, togging-off. So you arrive in and you sign the book and then you basically go to the locker- room."

Asked what had been in the locker-room, JB said: "All your protective gear, Wellingtons, aprons, white coats, a new white coat every day or laundered white coat every day, apron, hard hat, protective gloves - all Department-supplied."

JB admitted that he was not sure who had done the practical things like the laundry or the cleaning of the equipment. He just arrived every day and there were always new white coats hanging up. Asked what sort of protective equipment he had had, he said: "You put on a white coat, put on an apron and for health and safety you have to wear gloves (steel gloves or non-cut gloves), helmet, hairnets, steel-toecap Wellingtons."

Asked who had provided his tools i.e. his scabbard, knives and sharpener, JB said: "Everything was supplied by the Department." Asked what had happened to all of the equipment when XXXX closed down on 29 October 2004, JB said that he did not know, that it was left in the locker and that he had just handed up the key. He had not taken it with him because it was not his.

JB was asked who determined who would work on which animal part and for how long. He replied: "It was a thing we had ourselves. We rotated it. Now, we thought a full shift on the one thing was too demanding, especially with pigs. Pig examinations are different. The volume of pigs coming at you is 250 up to 280 an hour. You just wouldn't do it. You just wouldn't retain the concentration. So we just decided it would be a better idea just to rotate. That way we would do better work. Cattle pass you, I don't know, it is something ridiculously slow compared to the pigs. You wouldn't even get time to do the pigs they were going so quick at times."

Asked if he had earned more money on one end of the rotating line rather than on another, JB said:

"No. It was just inside the shift. You get your shift pay and that was it. It was just to facilitate better work practices, I thought."

Asked what sort of requirements the Department had put on him in terms of taking out professional indemnity insurance while he was there as a vet, JB said that he could not recall anything and that he had not had to do anything apart from his two-week course. He had not been required to take out any special insurance such as public liability insurance.

Regarding payment, JB said: "Well, at the end of every month we made out a claim sheet and handed it up to the VI. What we basically did was we copied out our hours that we worked for the month, handed it up to the VI and we got our cheque maybe a month later in the post. We got paid our money minus the deductions, PRSI and PAYE, and there was another deduction for the veterinary union fund. We never got paid VAT on it."

JB said that he had signed a form with the Department to allow them to deduct the veterinary union sub. The TVIs had probably signed it for the union and they forwarded it on. He was not sure if the TVIs had forwarded it on themselves. He did not know for how many years the Department had deducted the veterinary union sub but he said that it had done so for "years" and "a long time".

It was put to JB that, in late 2003, there had been something of a change in the conditions of engagement, the specific hours, the specific periods of pay. He was asked how much he was being paid per shift. He replied: "To be honest, I would be vague but I just know we were paid a certain amount per shift. Then that was changed and we went on this hourly rate. I think that was some €60.00 an hour or something. You had to work a minimum of so many hours. If you went into the second or third…to be honest, I am not sure of the exact amounts… but for years we were paid a set amount per shift irrespective if you got a long shift or a short shift or whatever. If you got a breakdown in the factory the shift could go along and you would just get the same amount – it wouldn't matter."

JB was now asked how he had gone about organising to take annual holidays or a day off (e.g. for a personal commitment). He replied: "There was no real organising. You just tell the VI <<Look, I won't be around for the next week.>> That was it. You don't do any more about it. It's up to him to replace you and that is it." Asked if had received any benefits if he were out sick, JB said that he had not.

It was put to JB that the hourly rate had been negotiated at €58.35 and that this was in accordance with the national wage agreements. He replied that he thought it had been around €60.00, as he had said, and that it had probably gone up as there was "a new one out".

JB stated that he now had a practice in his own right and that he was a sole practitioner. He was asked what percentage of his annual income would have been made up of XXXX meat plant/XXXX TVI work. He replied: "XXXXwould make up about a third of it, a third/two thirds."

JB was asked if there had been someone else that he could have sent if he had not been able to go e.g. because he had a cow calving. He replied: "I had a good arrangement with most of the vets around. I would help them out and they would help me out. Like I said a while ago, if there was a cow calving as I was going in one of the lads would do it for me and I would do the same for them. You would lose out."

JB was asked, if he had had another vet working in his practice, what was the position in terms of substituting a spare vet for himself so that the spare vet could go in and work JB's TVI shift. JB replied: "No. You just don't substitute. You just cancel out and you give twenty-four hours' notice to the VI and he organises it."

JB was asked if, since 29 October 2004, he had sought any work or been offered any work as a TVI by the XXXX. He replied: "No. I kind of resigned myself. Again, I am based in Mitchelstown and I would have too far to travel. The nearest practical ones would be Watergrasshill or Cahir. They are all about twenty kilometres plus away and I would spend most of my day travelling then and missing out on calls."

JB was now asked what would be "the charging position" if he were carrying out some type of artificial insemination or some type of animal testing for the Department. He replied: "I don't know. I never did anything like that. I would imagine there is set fees for it."

Regarding JB's relationship with the VI, JB was asked who had provided the claim form sheets. JB replied that it was all there in the Department office in the XXXX food building. As well as the equipment, the Department had provided the claim forms, which JB then filled out and submitted.

Asked if the Department had provided ongoing training, JB said: "You would occasionally get literature provided by the VI." He added: "It would be left out for us in the office, certain things underlined to be more specific about this or when you get something like a foot-and-mouth outbreak, how to be more specific in your examination on ante mortem etc."

Asked who would draw updated memos from the Department to his attention, JB said: "The Veterinary Inspector." Asked if there had been provision of continuing training or professional development as a TVI, JB said that there had not. Asked if training had ever been provided in terms of the ongoing work he did on a day-to-day basis, he said: "Not really, no."

JB was asked how he had charged for TB testing that he had done for the Department in the context of his own one-man veterinary practice. He replied: "I sent out a bill. It was my own private work." Asked if there would have been a tax implication to that bill, JB said: "There was VAT." He added: "I am registered for VAT. So you have to put VAT on everything you do."

JB told the Tribunal that if he did a Department test it was paid for by the Department and that the Department paid the VAT, which JB then returned in the normal course of his practice.

JB was now asked what had been the VAT situation for a TVI. He replied: "We never paid VAT. It was just the standard payment cheque and PRSI." Asked if he had not charged VAT, JB replied: "No, we had nothing to do with VAT in the Department in the TVI work."

Under cross-examination, JB said that there had been no interview process involved in becoming a TVI and that he had not had to perform better than anybody else to be approved. He did not dispute that his two weeks' training was at his own expense.

It was put to JB that he was a competent, experienced professional and that he had not really needed anybody showing him how to do his TVI work. He said that in any job one had to have a boss and that the TVIs had to do their work a special way when "American inspection came in". The VI would let the TVIs know of any "updated stuff, any new rules or regulations".

JB was asked if the VI had had a responsibility to make sure that the actual post-mortem and ante-mortem were actually being done within the factory. JB replied: "It was his job to oversee that we did it. It was our job to actually carry out the post-mortem and ante-mortem. It was his job to oversee us and make sure we were doing it correctly."

JB was asked how he had decided what panel he wanted to join. He replied that he was based in Mitchelstown and that XXXX was in Mitchelstown. It would be much more convenient if he did not have to travel. Also, he thought that he would put his name in for Mitchelstown as there had been talk that Mitchelstown was "going to expand". This would mean more shifts for TVIs.

JB went on to say: "It was always a dodgy issue in Mitchelstown. We were always hoping that it would increase and increase. We heard rumours that Mitchelstown was closing I don't know how many times and we were all wondering what are we going to do now but we had no control over that. It was just the Department. We were employed by the Department but XXXX was supplying the pigs for us to examine and if that closed down we knew we were gone…." JB added that factory work had been a "sideline" but that "the process switched as soon as XXXX expanded in 1984…."

Asked if he would have considered another panel, JB said: "No. This thing about the panels is a small bit confusing. Once you are permanent on one panel you automatically go way down the line on the others. You are basically ruling yourself out so you take a gamble and you stick with one that you think is going to expand and that's the whole secret. You are talking about four panels but you must make a decision and stick with one. Or else you are in trouble and you go way down the line."

In the context of working his way up a panel of seniority JB was asked if it took long until he got a regular shift on the panel. JB said that "some retired for different circumstances and everybody moves up a step".

JB accepted that there was a system of rotation of shifts by agreement between all of the different TVIs. It was put to him that the Department respected this and that, from the Department's point of view, it was for flexibility for the TVIs. JB replied: "I am not too sure did the Department respect it. It was something we did in Mitchelstown which was unique to Mitchelstown and we thought it was a more friendly practice. I don't think it happened in any other factory.

It was put to JB that if he gave twenty-four hours' notice they would have to organise somebody else. JB accepted this and said that he would give adequate notice if he wanted holidays.

It was put to JB that there was never any difficulty about taking leave once he gave appropriate notice. He replied that he "could only take so much time off in a year" and quantified it as "sixteen days in three months or something like that". He continued: "I could get very busy in the spring – calving cows and that – and if I kept missing shifts, while you would be penalised --what's the other word?--you could technically be moved down to the end of the panel even though it mightn't have happened that often. The deterrent was there so you just didn't take the days off."

JB was asked the following question: "Let's say if there was somebody lower down the panel and the person higher up just wasn't doing their shifts they wouldn't be very happy with that, would they, as the panel worked on seniority and so on?" JB replied: "I suppose that's true. The punishment was always there so you don't go missing. That's the type of job it was." He went on to say that the Department "were only worried about doing meat inspections and as long as people

turned up for work" and that he thought "the VI's aim always was to get the meat inspection done on the day by the set panel".

JB was asked if it was open to him to swap a shift with another TVI. JB replied: "It generally was at short notice again. If you hadn't given in enough notice yourself you would but again it certainly was frowned on." He subsequently said: "It wasn't that regular. As a matter of fact I think the practice actually stopped a few years ago. I don't think it was XXXX or the vets that stopped it. I think it came from the VI but, like that, I wouldn't be dogmatic on that."

Elaborating, JB said: "One of the problems about swapping and I think what happened was there was a mix-up and maybe somebody mightn't have turned up and somebody in authority then said <<Right, we won't have that any more. You go down the panel.>>"

JB did accept that the system had been something that had been worked out between the TVIs rather than implemented by the Department. It was put to JB that he had not been paid annual leave. He replied: "Yes. If you don't work you don't get paid." He also accepted that he had not got sick leave and that there had been no pension provisions for him from the Department.

JB said that claim sheets were filled out monthly for a while but that he did not know if this had been done every two weeks in the end. Shifts would rotate and would vary in length. In "the last few years" one was paid by the hour whereas in "the old days" one was paid by shifts.

JB told the Tribunal that he might get an extra shift on a particular day if the VI "was really stuck and there was nobody available for a short shift" but that this would not be for the whole of that week. He added: "You could call in. If they were badly stuck or if something goes wrong in the factory you might get one. You are not going to double-shift regularly. Definitely not."

JB accepted that the Department had never restricted him by telling him that he could not do any other work he wanted outside of TVI work.

At this point, the chairman of the Tribunal division asked where this was leading. The respondent's representative replied that the permanent-employed VIs had such restrictions put on them and that she was making that comparison.

Subsequently, JB was asked about deductions for tax and PRSI from his income as a TVI. It was put to him that the Department would say that this was done due to a direction from the Revenue Commissioners. He replied: "That would be outside of my….I wouldn't have a clue of that."

An appellant (hereafter referred to as MOC) told the Tribunal she qualified as a vet in 1981. Her work as a TVI with the XXXX began in 1989 in a factory in Cahir. There were a lot of cattle being killed in the approach to Christmas and the appellant worked four to five shifts a week. After Christmas and for the following year she received the odd shift here and there.

MOC applied to the XXXX panel in Mitchelstown in April 1990. She received a few shifts at first. This changed in 1993 as the XXXX factory had expanded and more pigs were being killed. This gave more work to TVIs at the lower end of the panel. From 1994 onwards her average week consisted of twelve to fifteen hours. From 1993 onwards she did not work elsewhere as she had regular work in XXXX and was getting four or five shifts a week. MOC was precluded from doing other TVI work at that stage. MOC said this was due to an agreement between the XXXX XXXX and XXXX whereby if TVIs were getting regular TVI work in one particular factory they did not

do TVI work anyplace else. It was just one shift a day for a TVI. Initially from 1990 to 1993 MOC worked in two private practices but from 1993 she was not in a position to stay in private practice and she just did TVI work at that stage.

The daily duties of her work as a TVI consisted of going into the office, signing the attendance book, changing her clothes for working clothes. This consisted of a white coat, apron, helmet, hairnet, steel capped Wellingtons, a scabbard and knife, a hook and a sharpener. She would then proceed to the line to carry out inspection duties. The equipment was provided by the XXXX. Each TVI had their own locker and the equipment was stored in these lockers.

MOC inspected carcasses and intestines. At times she would be inspecting carcasses that were detained for trimming. At other times she would be in the layerage doing ante mortem inspections. Three TVIs would be present on the line during a shift and one would be in the layerage. They reported to the VI. When MOC was in XXXX the VI was Mr. C. Mr. C was their boss and the TVIs did not report to anyone else or to the management at Galtee. Issues discussed with the VI included the running of the line. If problems or changes in procedures arose the VI would inform the TVIs and discuss with them. Procedure changed as more emphasis and attention was put on the detained carcasses that needed extra trimming. The VI would tell them verbally of changes and he would also leave photocopies with information for them.

MOC's shifts varied from two and a quarter hours to three hours. The TVIs were at first paid a set fee per shift but this changed to an hourly rate. The VI determined the length of the shifts in consultation with factory management. When the late morning shift ended it was lunchtime. The TVIs would check and see if there were any pigs left on the line and if there was not they went away at that stage. The same happened on the evening shift. Once they checked there were no more pigs on the line they were allowed to go home. If they had not checked the line for pigs before leaving the VI would reprimand them the next day. This never happened though. The TVIs did not leave early. There was a sanction that if a TVI missed 16% of shifts in a three-month period they would be demoted on the panel.

Sometimes an unforeseen event would happen in the factory that would delay things. Occasionally, the VI would make a verbal request for the TVI to work beyond the end of their shift. The TVI would stay late but if this was something that occurred on a regular basis there would be discussions with the VI and another group of vets would be requested to come in and take over. MOC stated that regardless of how many panels a TVI was on they could only work one shift a day.

The TVIs filled out claim forms available from the office and left them for the VI to submit to the XXXX. Tax and PRSI were deducted at source from her pay.

During MOC's time as a TVI in XXXX she went on maternity leave twice. She took fourteen weeks maternity leave in 1995 and 1997 with an additional four weeks unpaid leave in 1997. She claimed maternity benefit from the Department of Social Welfare both times. Each time she notified the VI and the Personnel section of the Department. When she was returning to work she informed both of them again. Her maternity leave had no effect on her position on the panel. She returned to the same shift as before.

If MOC intended to take holidays she would inform the VI usually a week beforehand. She would meet the VI around the office or factory and would say she was taking holidays and would not be in. The VI would write it in his book. She could not take holidays without notifying the VI.

Each TVI had a personal contract with the XXXX to provide TVI service. A TVI could not substitute himself or herself with another vet on a shift. MOC had to meet certain requirements to be a TVI. She had to be a qualified vet, she had to be registered with the XXXX and had to undergo two weeks training in a meat plant. MOC completed her training in the meat plant in Cahir.

When MOC was working in private practice she carried out TB testing for the XXXX. This was during the early 1990's. The charge for the testing was subject to retention tax and VAT was paid on it.

During cross-examination MOC confirmed when she first applied for work as a TVI she was not given any particular expectation from the Department as to the amount of work she might receive. MOC accepted the choice of panel and choice of factory was her choice. She agreed the rotation of shifts between the TVIs was organised by them with the cooperation of the VI.

By the end of 1993 the appellant was getting regular work in the Galtee factory and therefore she was not available to do TVI shifts in any other factories. She agreed that a TVI could be on more than one factory panel. The panels operated on a seniority basis. The TVIs were allowed to rotate on the different shifts. Occasionally the TVIs were allowed to swap shifts. MOC stated occasionally someone would miss a shift. No action was taken, as it did not happen frequently. MOC decided how much leave she was going to take each year.

MOC worked as a TVI for approximately fifteen years. The physical skills required for the job would have remained the same but the knowledge required would have changed as new things came into force, which the VI would tell them about. She agreed legislation dictates what happens in meat inspections and sets down the requirements.

MOC did not receive any benefits from the Department such as pension or holiday entitlements nor did she seek them. She undertook the initial training at her own expense. It was put to MOC that the provision of equipment was provided by the Department for health and safety reasons. All MOC knew was the Department provided the equipment to the TVIs.

It was put to MOC the evidence of the Department would be that a TVI could do more than one shift in a day if there was no other TVI available to cover the shift. MOC accepted that was the case but it had not happened to her.
Answering questions from the Tribunal MOC stated the VI held a supervisory role in the factory. He was the TVIs' direct boss.

Giving evidence, an appellant (hereafter referred to as CD) told the Tribunal that he qualified as a vet in 1969. He first began work as a TVI in a factory in Cahir in 1970. He had regular shifts that varied between three to five days per week. He also worked as an assistant in a private practice. He applied for a position on the panel in XXXX and in March 1976 he worked his first shift in XXXX.

In approximately 1985 XXXX built a new slaughter line and due to increased production more TVIs were needed. CD was offered a full time shift of three and a half hours, five days a week. He was also a partner in a private practice in Mitchelstown. His work as a TVI and his private practice

work interacted quite well. His partner in the practice handled any emergencies. His partner was also a TVI but they could not swap shifts or substitute for each other in the factory. This became an issue when the VI at that time (Mr. S) misinterpreted a ruling in relation to the employment of TVIs. This came to CD's attention when he found out he was not being offered a shift as a substitute. CD approached the VI and was told it was because two vets from the same practice could not be in the factory as a TVI. CD was also accused of substituting for someone else and CD disputed this. CD requested a meeting with the Superintendent Veterinary Inspector and they examined the records. The records showed CD had not substituted for another TVI. As a result of the outcome of the meeting it was found that the VI's interpretation of the ruling was incorrect and CD had his full position on the panel restored. CD believed he lost work due to the VI's interpretation of the ruling.

The latter VI (Mr. C) would discuss with the TVIs any difficulties they had in relation to the interpretation of the regulations. If CD had a difficulty with any interpretation he would immediately seek the VI's opinion and approval. The VI had the ultimate say in what CD would do in the inspection procedure. The VI would say where on the line the inspection was to take place. There were three inspection points on the line and CD could be on any one of the three. The inspection points were decided by the VI and by the XXXX. The VI instructed CD on any changes in procedures or requirements. The factory had American inspections. As part of the inspection CD's work was inspected. The VI and some personnel from the XXXX would guide the American inspectors through the factory.

CD's equipment was Wellingtons, white coat and apron. The Wellingtons were renewed on an annual basis. New aprons were provided when requested. The equipment was provided by the XXXX. The Agricultural Officer in the factory would request the equipment needed. The equipment always remained in the factory. On the last day he worked there CD left the equipment in his locker.

CD still has his own private practice. He has carried out TB testing and brucellosis testing for the Department. Until recently he was paid entirely by the XXXX for this work but the scheme is now privatised. Agreed fees are paid for testing. When CD first started testing in the 1970's there was no tax deducted. Retention tax was then introduced which was a controversial issue. Retention tax was then changed to income tax after a High Court ruling found it to be unconstitutional. VAT is now charged on the testing. VAT was never charged or paid on CD's TVI income. PAYE and PRSI had been deducted from his pay for TVI work.

Initially when he started work as a TVI there were three shifts in the day, 08.00am to 10.30am, 10.30am to lunch and 02.00pm to finish. Prior to CD starting work in XXXX it was organised that these shifts were rotated between the TVIs so everyone got a long shift and a short shift as they were all being paid the same money. If a breakdown occurred CD had no problem inspecting past his finishing time. There was an arrangement made whereby if it happened more frequently CD would not stay beyond the time for which he was being paid.

CD was offered shifts verbally on the phone. If he were unavailable he would have to give a minimum of twenty-four hours notice to the VI. The VI would then find someone else to do the shift. The Irish Veterinary Union had an agreement with the XXXX that if 16% of shifts in a three-month period were refused by a TVI they would be disciplined and demoted to the end of the panel. CD had an engagement with the Department and he fulfilled it.

CD took holiday leave every year. He was not paid when he was on leave. He would inform the VI in advance with usually one week's notice. This gave the VI an opportunity to make arrangements and this facilitated the smooth running of the factory.

CD was not requested to take out insurance when working as a TVI. His personal understanding was that the XXXX would be responsible if anything happened to him while he was working. CD received an injury when he was working in the factory and he took an action against the Board of Management of the factory and the XXXX. The determination in his case was found against the management of the factory and the XXXX. The two were co-joined as defendants. CD was paid compensation for his injuries but the Department did not contribute to the compensation.

The VI is responsible for the health and movement certificates for the animals inspected by the TVIs. CD answered to the VI and the VI is responsible for the certificates on the carcasses that leave the factory. Legislative requirements put on the Department were enforced through the VI who supervised and was responsible for CD.

In cross-examination CD accepted there was not a competitive process or interview involved in becoming a TVI but he did have to apply to become a TVI. CD completed his two-week training period at his own expense. CD believed he did not receive a contract from the XXXX. When CD became a TVI he understood that the work available to him was based on the meat factory in terms of what their level of business was. When he was offered a regular shift in XXXX by Mr. S, the VI at the time, CD disputed his position on the panel with him. He also reserved the right to dispute his position on the panel at a later date.

At all times when a TVI was on the line the VI had control. There was an understanding that once the kill was finished CD's duties were finished but if the VI requested him to stay on he would.

The TVIs were conscious the proper thing to do was to give adequate notice of leave. The minimum requirement was twenty-four hours notice. CD's annual leave varied through the years and the amount of leave was at his discretion. If somebody needed to swap a shift they applied to the VI for a swap. The VI would organise the swap.

CD could not remember whether the High Court ruling in relation to his injury actually found against the XXXX.

It was put to CD that due to legislation the VI had to tell the TVIs what inspection points they were to be placed at. CD accepted that a VI would have to enforce European legislation. There would be an interpretation of legislation by the VI and CD would have to follow that legislation. The VI would become aware of changes in legislation and would inform CD.

The equipment provided included a belt, scabbard, two or three knives and a steel glove. It was put to CD that if TVIs could not bring in any outside equipment to the factory because it might cause contamination then the Department provided the equipment for health and safety reasons. CD disagreed with this, as the tools were needed to carry out the job of a TVI. Whether the tools were provided for health and safety reasons or to do the job he was not qualified to say.

CD was not aware of anyone ever being demoted.

Answering questions from the Tribunal CD stated if there was a disagreement with the VI about

how the job should be carried out CD and the VI would have a discussion on the line or in the VI's office.

CD told the Tribunal that on several occasions over the years the XXXX attempted to get the TVIs sick pay and holiday pay but the Department refused. CD believed part-time TVIs were appointed, as they were more cost effective than a VI.

Giving evidence, an appellant (hereafter referred to as COB) told the Tribunal he qualified as a vet in 1975. He started his own practice in April 1977. He completed the mandatory two-week TVI training, at his own expense, during the summer of 1977 in Galtee. During October 1977 the VI (Mr.S), offered him a shift at the factory. At that time there were two TVIs in the factory as the factory had only one kill in the afternoon from 02.30pm until 04.30pm. From 1977 to 2004 XXXXwas the only plant COB worked in.

Initially in 1977, the shifts were invariably evening shifts and very little notice was given. The factory had a small regular kill but then the factory started to expand and very short notice would be given for shifts. COB might only have got notice at lunchtime to be in for 04.30pm and he might not have known when the shift was going to end. It was not as regular as it became in subsequent years. At that time he was paid on a monthly basis for the shifts he had worked. By the time his employment ended in 2004 he was working five shifts a week, totalling approximately fifteen hours. PAYE and PRSI were deducted at source and he received a payslip. He received a P60 at each year-end. It was sent to him in a XXXX envelope.

The VI (Mr.S) was in the factory all day. He was either in his office or on the line. At the beginning of the shift he was on the line and he would stop the line until the TVI was in position. If a TVI were late the VI would speak to them about their time keeping and on occasion he had to give verbal warnings. The VI often stood beside COB and would watch him cut the animal's glands in order to oversee what COB was doing. If an abscess was missed, as occasionally happened, the VI would stop the line until the TVI came up and trimmed it off or did whatever was required. In the early days the TVIs did other work such as trimming or removing abscesses that the factory employees did in later years. This work was done under the direction of the VI. At that time the industry was not as regulated as it became in later years. The TVIs did not do any inspections of live pigs at that time. The VI inspected the live pigs and the TVIs were involved in the dead carcass inspection. There was no ante mortem inspection at that time so the TVIs did not have to be there before the kill. It was rare for a TVI to be asked to work a double shift.

When he first started work as a TVI he was given very little equipment. He could bring in his own Wellingtons but he had to wear a white coat and hardhat that were supplied to him. He was supplied with all the cutting equipment such as hooks, knives, and scabbards. When things became more regulated he was no longer allowed to bring his own Wellingtons into the factory, they were provided. The Agricultural Officer supplied them to the TVIs. He physically examined carcasses by using a knife for incisions and he used a steel protective glove. He used the hook and the knife to remove the glands.

COB told the Tribunal if a TVI wanted to work in the factory a TVI did not refuse a shift. A TVI might get away with refusing one shift if they were sick but if they refused on a regular basis they would not be called in. His understanding of the impact of refusing shifts was that a TVI could lose their job. COB could not substitute one of the vets in his practice for himself in the factory. COB recalled one incident where he was about to perform a caesarean. He got to shave the animal but

had to ask his colleague to finish as COB was due at the factory and he could not cancel the factory. If he received an urgent call when he was in the factory that was just tough. Either it went undone or someone else did it. COB often felt that he was losing a lot of work.

COB found the latter VI (Mr. C) to be very fair. He allowed a certain amount of latitude but COB knew the parameters were there. Mr. C issued edicts from the Department, for example extra duties during the foot and mouth scare. Mr. C would get updates from his superior who was the head Department vet and would send down small additions to the regulations every now and then. The VI and the Department ultimately decided for the TVIs in what manner animals were to be inspected.

The original veterinary union negotiated the TVI rate of pay. COB had no negotiations with the VI about pay as the VI had no say about payment. COB worked the hours he was told to work.

In his private practice COB did TB testing for the Department. Occasionally his work was inspected by the Department to ensure he was carrying out the testing correctly. Originally the Department used to pay a set fee but then the testing became privatised. VAT was charged on the testing. TB testing was done in the vets own time and they could finish the testing of the herds they were given as quickly as possible.

COB has professional indemnity insurance. The Department did not request him to have insurance nor did the Department seek proof that he was insured. COB thought the Department insured him. It never arose, as he never had an accident.

In cross-examination COB confirmed he did not partake in an interview or a competitive process for the position of TVI. He completed the necessary training and was then asked by the VI to work a shift. COB did not apply as such for the TVI position. COB does not recall receiving a contract or anything in writing from the Department work nor did he request it. He accepted that the volume of work was within the control of the factory rather than in the control of the Department.

It was his belief that in the early days if you refused shifts you would lose the job. At that point in time there was only COB and another colleague working on the line in the factory. When the factory expanded the number of shifts they could refuse became regulated, i.e. 16% of shifts in three months. COB did not receive any holiday or sick pay nor did he seek such payments.

It was put to COB that the equipment he used was provided for health and safety reasons. COB stated the equipment used for meat inspection had nothing to do with health and safety; it was what he used to inspect carcasses.

Answering questions from the Tribunal COB confirmed the panels were within the factory that a TVI worked in and did not spread over to other factories. For example COB was number three on the XXXX panel as he was on it since 1977. If he applied to another factory panel he would have been further down that panel. It was COB's belief when he started work in XXXX that if he wanted to become established and have regularity on the panel he needed to be available for shifts.

Giving evidence, an appellant (hereafter referred to as MS) told the Tribunal that he qualified as a vet in 1967. To the best of his knowledge MS believed he commenced work as a TVI in 1972. He applied to a factory in Cahir and completed the necessary two-week training without pay at this

factory. He worked in the factory in Cahir for approximately ten years. MS applied to XXXX in 1981 or 1982. He worked in XXXX from 1982 onwards.

Mr. S was the VI when MS started work in XXXX. He later retired and Mr. C became the VI. As far as MS was concerned he was given a shift, the VI was the boss and MS did exactly as the VI said. The XXXX factory was slightly different than the factory in Cahir so Mr. S showed MS how he wanted the TVI work done.

If any changes in procedure occurred the VI informed MS. The latter VI (Mr. C) would come down the line and show what way something should be done. He provided photocopies with information on changes in regulation. If MS had a query or wanted a second opinion he could ask the VI. The VI had the final say on the matter.

If a TVI condemned a carcass or part of a carcass they had to sign a document for each carcass they condemned during their three-hour shift. The documents were kept and recorded. The Agricultural Officers stamped the carcasses, the TVIs inspected the carcasses and the VI would sign the final documentation. If a problem were found the VI would trace back and would outline to the TVI involved in the error how things should be done. MS stated it often happened that abscesses were missed at inspection and then spotted later further up the line. The repercussion came back down the line to the TVIs.

The roster was completed a week in advance by the VI. Payment for TVI work changed from a per shift basis to an hourly rate. MS was absent for a number of months due to health reasons. He informed the VI. He was unable to carry out private practice work or factory work during this time. When he returned to work in the factory, he was returned to the same position on the panel. During his absence he did not receive sick pay nor did he apply for it as he was advised he would not get it.

If a TVI could not work a shift they notified the VI as soon as possible. The VI would organise a substitute. If a TVI missed more than 16% of shifts they could be demoted. MS knew of one TVI who was not doing their shifts and that TVI was demoted. If the problem persisted the person could lose their job. If there was an emergency in his practice MS could not leave the factory as he was an employee not a contractor.

MS had one assistant at first in his private practice but he now has three assistants. He could not substitute any of his assistants for himself in the factory. The VI would have to organise a replacement if MS could not do the shift. The VI would usually pick the next person on the panel.

MS has done TB and brucellosis testing for the Department for which he received remuneration. VAT was charged on the testing. MS had personal insurance and public indemnity insurance. He was never asked by the Department to prove he had insurance when he was a TVI. MS thought because PAYE and PRSI were deducted from his payslip that he was an ordinary employee and that his PRSI covered him.

All the equipment he used was supplied to him. In recent years the equipment was replaced about every six months. MS would have requested replacement equipment from the Agricultural Officer. A steriliser was used on the equipment and the Department provided this. The TVIs were instructed by the VI to sterilise the equipment.

In cross-examination MS confirmed he had not applied to any other panel as he had opted for the factory in the closest proximity and he was receiving regular shifts there. MS accepted there was not a disciplinary issue if a TVI was unavailable to do a shift. He accepted the rotation of the factory shifts was developed by the TVIs in cooperation with the VI and that XXXX was the only factory that operated the rotation of shifts.

MS had a problem with his payslip every month showing PRSI. He queried it with Mr. C at one point. He asked Mr. C why he was paying PRSI if he never got the benefit of it.

MS said the equipment provided was provided for reasons of hygiene and proper procedure and for carrying out meat inspection. He accepted that regulations and directives dictated to the VI how the TVIs should inspect carcasses.

MS could not recollect if a TVI had ever been suspended from the factory in XXXX but he thought it had happened in other factories.

Giving evidence, the Chief Executive of XXXX (hereafter referred to as CE) told the Tribunal that XXXX came into being in 2001 after the amalgamation of a number of veterinary associations and unions.

XXXX was requested to make a submission to the Competition Authority in approximately 2003. XXXX main conclusion in this submission was that they were a trade union acting on behalf of a group of employees, negotiating with their employer and reaching agreement on terms and conditions. The Competition Authority acknowledged receipt of the submission but XXXX has not yet received a response from them to date concerning the submission.

XXXX addressed in their submission to the Competition Authority the issue of the employment status of the TVIs. A Code of Practice document produced under the Programme for Prosperity and Fairness National Agreement was used as a template to explore the employment status of the TVIs. Under every heading the TVIs came out as employees.

If a TVI has a problem they can approach their local VI and sort matters out locally. If it cannot be resolved the TVI can then contact the shop steward. Each panel in each factory has a shop steward. MS was the shop steward in XXXX. The shop steward negotiates with the local VI to try and resolve issues. If the issue cannot be resolved it is brought to the attention of XXXX Head Office. XXXX would see if the issue could be resolved locally. Failing this the Personnel section of the XXXX would be contacted and they would try and reach a resolution. XXXX tries to play down confrontation as much as possible.

CE joined XXXX in 1999 and part of his brief was to try and arrange the amalgamation of the veterinary bodies. Prior to CE joining XXXX a major agreement was reached in 1995 concerning the rules of engagement for TVIs. A TVI must send in a written application, complete two weeks training and then notify the Department that they have completed their training. A TVI must then be approved onto a factory panel.

CE's understanding is that the VI is in charge at the plant, he is the TVIs' supervisor and boss and he assigns the work to the TVIs. He assigns the TVIs their workstation and the type of work they are to do. If the work is not done the VI will discipline them.

CE was involved in renegotiating an aspect of this agreement regarding the operation of the TVI panels. The first item on the agreement was that if a TVI was given less than 24 hours notice of a shift this was deemed unreasonable therefore it would be unreasonable for disciplinary action to be taken against the TVI if they refused the shift. Annual leave was permitted to the amount of five shift weeks. The TVIs were not paid for sick leave but XXXX believed they should have been. XXXX attempted to raise this issue with the Department but they were shunned. CE's view of this was that it was a cost saving exercise on behalf of the Department who were using the TVIs as a flexible work force.

The agreement stated that if a TVI was genuinely sick they should not be penalised for this by losing their place on the panel. A TVI could definitely turn down the occasional shift but if they turned down shifts on a regular basis they could lose their seniority on the panel and be demoted. There were instances where this had occurred. CE told the Tribunal a TVI could only be a regular on one panel and this was very strictly enforced.

The document also dealt with the issue of the negotiation for flexible working arrangements for TVIs similar to the flexible working conditions of other employees of the Department. CE stated it was not easy to get changes made.

It was agreed that TVIs should not be placed, demoted or removed from panels by a VI unless written approval was obtained in advance from the Personnel division of the Department. This was to try and tighten up procedures.

It was incorrect to say the TVIs did not have contracts with the Department. CE said anyone applying to become a TVI had to make a written application. When they were appointed they were appointed in accordance with the written conditions of engagement.

XXXX had received a letter from the Personnel section of the Department dated 03 December 1996 regarding the issue of sick and holiday pay for TVIs. The letter stated that this would "…alter the status of temporary veterinary inspectors" and that " the present method of engaging TVIs on an all inclusive fee basis is the Department's preferred option."

CE stated at all times the Department attempts to minimise the cost of the meat inspection service. In 2003 when the Department was looking at cost saving measures the Department wanted to review the TVI element of the meat inspection service.

CE told the Tribunal that disciplinary action does happen. In the XXXX office they deal with disciplinary matters on a regular basis such as TVIs being disciplined by their VI or by the Department centrally and XXXX negotiate on behalf of TVIs to ensure that due process is followed. However, XXXX has an absolute guideline that it will not stand over people who abuse the system. It will support its members to ensure due process is followed. CE told the Tribunal

Since 1973 the XXXX had been given sanction to link the TVI rates to the minimum of the VI scale. In 1991 a determination was issued at the behest of the Department of Revenue that PAYE and PRSI should be deducted at source from the pay of TVIs as Revenue viewed them as employees under a contract of service. National Wage Agreements are being automatically applied to the TVI rate of pay. New rates of pay including benchmarking increases are now being paid and back money is currently being calculated.

XXXX believes the Department should provide training for the TVIs. XXXX addressed this with the Department in 2000. The Department agreed that, with the help of XXXX, a series of training sessions would be held around the country for TVIs. The VIs attended as well. A Superintendent Veterinary Inspector provided the training. The training was free of charge to TVIs. TVIs also receive ongoing briefing from the Department through the VI who provides them with circulars.

There was no formal notification to XXXX that the factory would be closing down and there was no direct communication to XXXX from the Department regarding the closure of the factory.

In cross-examination it was put to CE that XXXX had engaged a consultant who wrote a report that referred to TVIs as being employed by the Department on a contractual basis. CE stated that the report was found to be valuable by XXXX.

It was put to CE that instances of disciplinary action did not relate to the factory in XXXX. CE said the evidence he gave was reinforced by what he heard from the TVIs in XXXX.

There were negotiations between XXXX and the Department. They approached the talks with different points of view. XXXX approached with the view that TVIs were employees and the Department with the view that TVIs were contractors. It was put to CE that XXXX had not broached the issue of TVIs having employee status during negotiations. CE stated he had proved XXXX had been raising the issue since 1996.

It was put to CE that it is unusual for an employee to be able to pick where they want to work. CE said they do not pick, the VI determines what is needed and the VI does the roster. The most senior person on the panel gets to pick first what shift they want.

It was put to CE that during negotiations in a meeting on 27 May 2003 a spokesperson for XXXX suggested that, "…big savings were possible if TVIs could be treated as contractors." CE stated this person was a branch representative who was later removed from this position, as he did not follow official lines.

Answering questions from the Tribunal CE stated that during discussions with the Department in 2003 the main issue was cost reduction but the issue of whether TVIs were employees or contractors did arise.

XXXX made a submission to the Department in relation to bench marking in 2004 and this was later agreed to. At the present time the Accounts section of the Department is calculating back money due since 2004.

Respondent's Case:

Giving evidence Ms. S told the Tribunal that she has been in her role in the Salaries section of the Department in Cavan since 1998. She pays the TVIs on receipt of information from the central fees division. When Ms. S receives this information the fees are implemented in the Salaries division and are paid the following week. Payments are not made on a set date in the month.

The amount paid varies depending on the hours or the number of shifts worked by each individual TVI. Prior to an agreement in 2003 the TVIs were paid on a per shift basis. Basically, the

information was received from the central fees division and keyed in manually. Since the new hourly rate was introduced the system is more computerised and manual input of the fees or PRSI is no longer required.

The Department does not pay any maternity benefit. The Salaries section may receive Social Welfare forms for signing. The forms are submitted to the Salaries section by either the Personnel division or the individual involved. The form is then returned to the individual.

The Salaries section has dealings with Revenue and Social Welfare as the Salaries section pays the tax and PRSI. That is why the TVIs are paid through the Salaries section. In previous years TVIs may not have been paid through the Salaries section because they might not have been paying tax or PRSI.

In cross-examination Ms. S stated that the central fees division receive their information from the factories. As far as Ms. S knew the VI sends the information to the central fees division. The VI receives his information from the TVIs.

Ms. S is not involved in the payments for TB testing. Payments for TB testing are paid by the Accounts division in Cavan and not by the Salaries section. The Salaries section deals with PAYE and PRSI, which Ms. S believes, is not charged on TB testing. She agreed the Salaries section deals with all full-time employees in the Department. All the TVIs in the country are paid through the Salaries section. The Salaries section does not deal with any services charged out, it only pays meat inspection duties.

The majority of individuals are paid by cheque but some are paid into a bank account on request. A payslip is attached to their cheque. The payslip is the same for VIs and TVIs. There is a standard payslip for the Department, for all people paying PRSI and PAYE.

Giving evidence Mr. M told the Tribunal that he works as an Assistant Principal in the Personnel division of the xxxx. Since 2001 part of his responsibilities is to deal with issues arising in relation to the approval and engagement of temporary veterinary inspectors engaged in the meat inspection service. Prior to 2001 he worked in a number of line divisions that had involvement in disease eradication, animal health and welfare and general issues that may impact on meat factories in general.

One of the Department's main objectives is to maintain a high animal health status in the country. The Department provides a veterinary presence in each of the export-approved meat plants. The main role is to ensure that meat is processed in accordance with best international practice and in accordance with legislation. The VI is required by regulations to carry out certain functions. There is a process involved for factories applying for export approval status. The involvement of the VI and his presence in the plant on a regular basis is part of that. At each plant there is a VI in charge. Department staff in the position of Agricultural Officer, assist the VI. Agricultural Officers carry out duties of a technical nature. The VI must ensure that proper hygiene standards are reached in export approved meat plants in accordance with the relevant legislation. They must ensure meat is inspected in accordance with the relevant legislation.

TVIs have been engaged over the years to assist the VI in charge at the plant. The factory generates the work. The factory would determine in consultation with other stakeholders, but particularly

farmers, the level coming through the factory at any particular period of time. The Department has no control over the amount of work. The amount of work varies from plant to plant and it can be seasonal. Full time or part-time veterinary inspectors are not employed because there is such a wide degree of fluctuation in throughput at plants. The Department took the view a number of years ago as to how they would organise the veterinary presence at export approved meat plants.

Mr. M explained the process of engagement for a TVI. Any private veterinary practitioner can apply to be approved as a TVI carrying out meat inspection duties at export-approved plants. There are a number of conditions in relation to eligibility. A person must be registered in the register of veterinary surgeons of Ireland and he or she cannot be in employment, the conditions of which preclude them from participating as a TVI. The application has to be approved. If approved they must undergo two weeks training at their own expense. They then make a written application to the Department selecting a plant or plants of their choice up to a maximum of four plants. The Department does not advertise these positions. When a vet makes an enquiry for such work the Personnel division sends out an application form and a note attached outlining the conditions in relation to the engagement of part-time TVIs. There is no competitive element involved. There is no limit on the number of people the Department will accept. Generally, in the public sector the recruitment process is a competitive process and could involve a written exam and interview. The actual recruitment process for new entrants to the Department is quite rigid. They would have to serve a probationary period for two years and if that was completed in a satisfactory manner they would be established in that post by the public appointments service. They would have to sign quite a number of documents including some pertaining to confidentiality. A starter pack is usually given to new entrants. It is not given to TVIs.

The training seminars held in hotels around the country were requested by XXXX but the Department facilitated the request. A VI attended and distributed leaflets.

The Department's point of view on the operation of the panels is that they work very well. The panels are based on the seniority principal. The higher up a TVI is on the panel the more they are in a position to get regular shifts. The Department works in close consultation with CE of XXXX. The panels are working well for all concerned. A TVI can apply for up to four panels. Depending on the roster arrangements and on the factory, a regular shift could be offered. In some factories a regular shift could be three days a week because the factory just kills three days a week. If a TVI was in a position where they were offered regular shifts in two factories they may have to opt for one or the other. The Department does not place people on panels. The TVI can select what panel or panels they wish to be placed on. A newly recruited VI to the Department is assigned a location. The TVIs select the panel they wish to be placed on.

The budgetary allocation for meat inspection duties was reduced in 2003. The Department was concerned with improving efficiencies. There were a number of discussions held with XXXX. The Department took minutes of meetings in the process leading up to the agreement that was reached in November 2003 between the Department and XXXX. Mr. M said the minutes were the Department's view of the meetings.

Mr. M accepted one of the appellants might have had some loss of income as a result of the change from a shift rate to an hourly rate. The Department could not give any commitment or undertaking in relation to the guarantee of work. The Department had no control over the place of work. The TVI selected the place of work. The factory owners owned the actual premises.

In general terms a TVI can turn down a shift but in reality it does not happen. A number of shifts

(16%) can be turned down in a three-month period. Even if a TVI exceeded the 16% the condition states that it "may result" in consequences.

When a regular shift is available a TVI is offered the shift in the context of the roster arrangement as prepared by the VI. The senior people on the panel get first choice and can opt for a morning shift or an afternoon shift. The Department did not have a view on the TVIs in XXXX not exercising that option. It is only if a problem came to the attention of the Department that they would enter into dialogue with XXXX or sometimes XXXX would contact the Department if a problem arose. In relation to the issue of a TVI refusing 16% of shifts, Mr. M said that no issues regarding this ever came to his attention.

If a TVI was leaving the factory they would communicate this to their VI or sometimes they would ring Personnel to have their name removed from the panel. There was no hard and fast rule in relation to it. There is no notice requirement.

The Department heard about the closing of the killing operations in XXXX through the media. The Personnel division had no advance notification from the factory.

In 1991 the Department received an instruction from the Revenue Commissioners that the Department was to deduct PAYE and PRSI at source from TVIs' pay. Mr. M was not working inPersonnel at that time. The Department implemented this request. Prior to this it was retention tax. The Department's view has always been that TVIs are contractors, engaged on a contract for services. Mr. M was referred to the Department's notes from a meeting with XXXX in relation tothe agreement that was concluded in November 2003. The Department's minutes noted that XXXX raised the issue: would the Department be willing to consider and explore the possibility inconsultation with the Department of Social Welfare that TVIs could be treated as contractors in relation to PRSI. There is a PRSI rate for contractors and the important aspect of that would be theDepartment would not have to make a contribution in the context of PRSI. The Department's contribution is significant as it runs in the excess of €1 million annually. If this suggestion by XXXX was explored to a successful outcome it would mean more money that could be put into thebudgetary allocation for the benefit of the meat inspection service. Mr. M stated that there was noindication at the meeting with XXXX that the remark was made without the approval or agreementof XXXX. There was no request at the meeting that the request was to be withdrawn. It was animportant issue and he would have examined it to facilitate XXXX. There was no retraction at alater stage. Mr. M did explore the issue with an official at the Department of Social Welfare.

Mr. M confirmed his name was on letter dated 24 November 2003, which was opened to the Tribunal. The Competition Authority had indicated they were investigating various aspects of the meat inspection service and they wanted the Department's view in relation to the engagement of TVIs. The Department's view, that TVIs are contractors, is set out in this letter. Mr. M's own view is that there has been no outcome from the Competition Authority.

In the context of discussions with XXXX leading up the conclusion of the agreement in November 2003 there was no reference to Mr. M's knowledge in relation to the status of TVIs. The main thrust of all the negotiations was the budgetary reductions. XXXX may have made references to Labour Court cases and a case in the Labour Relations Commission but this was when they were both dealing with an individual TVI in that respect. Mr. M is not aware of any negotiations between the Department and XXXX on the employee/contractor issue.

There is no insurance provided by the Department to TVIs. Mr. M did not enquire if any of the TVIs had insurance cover. He assumed they were carrying their own insurance.

The Department takes the view in Mr. M's interpretation that the protective equipment is being given to the TVIs to treat them in the same manner as Department staff so as not to treat TVIs less favourably. Also, the equipment is provided in the context of Health & Safety and some pieces are provided for hygiene purposes.

There is no retirement age for TVIs. To Mr. M's knowledge no one has ever been removed from a panel. He was aware of a case where a TVI was suspended.

Mr. M stated that if the Department were to approach vets on a local basis rather than through XXXX it would be a change in practice. It would not be efficient for the Department to negotiate with vets around the country on a one to one basis, as there would be a huge increase in workload for all concerned. Mr. M thought it would probably be unworkable.

The Department feels that considering an undertaking they have given to the High Court they could be held in contempt if they were to attempt a change in work practices at this time.

If a TVI takes annual leave it has no effect on the Department, as they do not pay TVIs for annual leave. It pays employees for annual leave.

The Department was assured that if a TVI was on a panel they met the necessary requirements. The Department would not have knowledge of people that are not on the TVI panels.

In cross-examination Mr. M was asked if he accepted that the VI directs the TVI in the manner in which they do their work as stated in the conditions of engagement in 1999. Mr. M agreed it was set out in this document. Mr. M was asked why the Department does not negotiate on a local basis with vets. Mr. M responded that the Department has negotiated with XXXX over the years. It would be a change in practice to negotiate on a local basis. It was put to Mr. M the Department enters into negotiations with the union because the people they are representing are employees. Mr. M's own view is that XXXX represents private veterinary practitioners who can have engagement as TVIs with the Department. If XXXX represents TVIs then the Department does business with XXXX.

Mr. M confirmed that four panels can be applied to but that only one regular shift can be held. He agreed it was exceptional circumstances for a TVI to work a regular shift and another shift in one day. It is correct that since 1991 PAYE & PRSI have been deducted TVIs' pay. Mr. M was asked why was the instruction from Revenue not appealed in 1991. Mr. M could only speak from the time he arrived in the Personnel division, which was in 2001. Mr. M was asked why he did not pursue the issue of the PRSI rate for contractors. Mr. M stated that he had explained what he had done in relation to it. In the context of the request from XXXX before the conclusion of the meat inspection agreement in November 2003, Mr. M spoke to the official in the Department of Social Welfare. This was a telephone conversation. Mr. M set out his position in relation to TVIs but as a result of that conversation he took no further action as there are legal proceedings initiated in the High Court and the Department had to give an undertaking to the High Court in relation to this case.

Mr. M confirmed that the Department had facilitated the request of XXXX to deduct veterinary

union subscriptions deducted from TVIs' pay. It was put to Mr. M that it was incredible that the Department would deduct union subscriptions from the TVIs' pay if they were contractors. Mr. M said the request came from XXXX and the Department facilitated it.

Prior to the November 2003 agreement the shift of a TVI was three hours plus a half a hour for wash up/wash down time. Mr. M stated that if 16% of shifts are turned down in a three-month period it may result in a loss of seniority. The opportunity to demote a person on a panel is there. He accepted demotion could be construed as discipline. TVIs are very wary of that situation. If a TVI was unhappy with something he could go to his shop steward, involve the VI in charge of the factory and if it could not be resolved then the Personnel division in the Department and Veterinary XXXX would get involved and would generally solve most issues to the benefit of all concerned.

TB testers are contractors for the Department and are paid from the Accounts section rather than the Salaries section. The actual budget for TVIs engaged on the meat inspection service is paid from a budget on the programme side in the Department, not the administrative budget that deals with salaries. The TVIs are not paid from the administrative budget float. They are paid from the actual programme unit that deals with that sector. The actual TVI fees are paid from the programme side of the Department which organises its own budget with the Department of Finance in the context of the estimates. VIs are paid from the administrative budget. Mr. M is responsible for the administrative budget.

Mr. M confirmed he was present for COB's evidence of completing TB testing in eight weeks but that it was more profitable to complete the TB testing as quickly as possible, send in the bill and return to private practice work. From his general knowledge Mr. M accepts that TVI work is different from the work of TB testers in that TVI work has fixed times, fixed hours and fixed places.

Mr. M was asked if he accepted that the payment rate to TVIs has always been linked to the payment rate for VIs since 1973. Mr. M stated there is a link to the minimum point on the veterinary inspector scale. The Department assumed that the TVIs had their own insurance. If there was an incident in a factory and someone suffered an injury that would be looked at on an individual basis. Mr. M had never looked for a contract or certificate of insurance. Mr. M took the view that the level the TVI fee was pitched at took into account various issues. It would have been accepted that was the view within the Department.

A different division deals with the provision of the equipment. Mr. M does not have knowledge of what the equipment costs. TVIs did not have to provide their own equipment as the Department took the view on health, safety and hygiene grounds that the Department was going to supply equipment to the TVIs and the VIs in the factory. It was put to Mr. M that the equipment was not solely provided for these reasons but because the equipment was necessary to them carrying out their job. Mr. M stated TVIs need equipment to carry out their job effectively.

It was put to Mr. M that it was unusual for contractors to be provided with flexible working conditions as they are usually told when they are required. Mr. M stated that this was done to benefit TVIs. If a TVI wanted to have flexible working conditions and it was in accordance with the agreement then the Department had no problem with it. It was done in the context of the operation of TVI panels, which was to the benefit of TVIs. It also benefited TVIs lower down the panel as well.

Mr. M was questioned concerning the provisions included in the agreement, which was updated in

June 2004, for annual leave, sick leave and maternity leave. Mr. M stated that any agreement drawn up in consultation with XXXX would involve discussions and the Department in that context would want to be as flexible as possible.

Mr. M confirmed a P-60 was provided to all of the TVIs. The Salaries section is responsible for issuing the P-60s'.

Mr. M accepted there was a provision for tea breaks in the agreement concluded in November 2003. He did not think there was a provision made for lunch breaks for the TVIs. The thinking behind the tea breaks was in the context of rostering arrangements. If a factory had a tea break at a certain time there might be a break in the shift and the TVI would obviously get paid for that as well because the TVI would have to resume his work after the tea break was finished. The Department felt this was inefficiency. Mr. M could not answer about the situation in XXXX.

Mr. M accepted that a TVI could not substitute another vet from his practice on his TVI shift. This was to facilitate the TVIs. He accepted there is no provision for substitution whatsoever. It was put to Mr. M that one of the TVIs when giving evidence had said that he had got as far as shaving an animal for a caesarean when he had to leave to commence his shift as a TVI in the factory. It was put to Mr. M that the question of substitution is one of control. Mr. M said the reason a TVI could not have someone substitute for them was to operate fairness to everyone on the TVI panels. It would have been unfair if someone high up the panel could have their assistant do their shift. It would be unfair to TVIs further down the panel. The union over the years would have said they wanted the panels to be more fair and transparent and that is how this emanated. Mr. M said the Department did not drive this, as it had no benefit to drive it.

The TVIs had control of the panel. When a panel is set up the seniority principle is crucial in the context of any panel and in the operation of a panel. The Department itself would not have a fixed view in relation to a TVI substituting his partner in a practice for himself on a TVI shift. If, for instance, TVIs in the context of their union wanted a panel operated in a certain way the Department would not have any fixed view in relation to that. The actual operations of TVI panels provide for the situation that there is no substitution. The VI draws up the roster arrangements and will roster TVIs based on the seniority principle and availability of the TVIs and the VI will simply go down the panel to the next person to see if they are available. This was drawn up in the context of the operation of TVI panels.

Mr. M accepted that when MOC returned from maternity leave she returned to the same place on the panel that she had held prior to her maternity leave. She did not suffer any loss of seniority.

Mr. M accepted that suspension is a form of discipline. It was put to Mr. M that in general terms suspension with pay is rare for a contractor. Mr. M stated that he could not answer that one way or the other.

Answering questions from the Tribunal Mr. M stated he had never received a formal written claim from XXXX to resolve the issue of TVIs being viewed as contractors. It has not been raised at meetings for discussion.

There are a number of TVIs who worked at XXXX who are still engaged by the Department at other factories.

The majority of recruitment for the Department is organised by the Public Appointments Service.

The only other recruitment is when people are recruited on a fixed term contract to replace staff on family friendly schemes during the year. They are employees on fixed term contracts with very definite contracts of employment.

In the context of all the Department's negotiations with XXXX leading up to the agreement, which was concluded in November 2003, Mr. M's view of these discussions was that the question of whether TVIs were employees or contractors was not raised. He acknowledged XXXX had set out clearly their position in their submission to the Competition Authority. The Department's point of view has always been that TVIs are contractors.

Giving evidence Mr. C told the Tribunal he has worked with the Department since 1990 and was the VI in XXXX from November 1992. Prior to his employment with the Department he was in private practice. He has also done TVI work and TB testing. When he was a TVI he felt it was a temporary position. When he joined the Department, as a VI, he felt he was joining to get a full-time position. His responsibility was to ensure that the EU law that transposed into national law was implemented. He had to inspect the plant and ensure that everything was being carried out according to regulations. Inspecting the work of the TVIs was part of his duties.

The factory opened at 6.00am until 10.00pm. The slaughtering took place from about 7.15am to 5.00pm. Mr. C's hours varied. He generally worked a forty-hour week. His times in the factory varied. Some of his time would be spent in other plants. It was a regular occurrence that he was often not present in the factory in XXXX when the slaughtering was happening. The factory decided what the hours of slaughter were.

Mr. C did not do the duties that TVIs did unless in an emergency if a TVI was unavailable. A VI had other functions and there were so many duties that the TVIs were brought in to assist VIs.

Mr. C completed the roster for TVIs. The panel was based on seniority. This system was already in place when Mr. C arrived as the VI in XXXX. As it was working well and everyone was happy, he was happy to leave it as it was. Mr. C had no problem if a TVI was unavailable for a shift as long as he was given advance warning. Mr. C would then select the next person from the panel to work the shift. If a TVI wished to take annual or maternity leave they informed the VI a week or two in advance. The VI would then select the next person on the panel for the time the TVI was away.

The TVIs were independent and professional in their work and Mr. C trusted them. Mr. C could leave the factory knowing that the TVIs were providing a professional service. Mr. C discussed with the TVIs how meat inspection was to be carried out in a particular way. This was to ensure there was uniformity between everyone.

A TVI was responsible for condemning an animal if there was an incidence of disease. The TVIs were responsible for signing off on this. The VI was responsible for the export certificates based on the ante mortem and post mortem, stating that the product was fit and wholesome for human consumption. The TVI was an integral part of the meat inspection service. The VI satisfied himself in relation to the export certificates by observing that the TVIs were carrying out the functions as per the legislation. The VI discussed any changes in legislation with the TVIs. The physical skills required for the meat inspection service did not change much over the years. Mr. C as the VI set the inspection points on the line. If a TVI was late or did not turn up the supervisor was told to stop the line. This was to ensure that the meat inspection was carried out per statute. It

was very rare that a TVI might be late or not show for a shift.

The TVIs received their equipment from the Department. Mr. C did not look for a reason why the Department provided them with the equipment. As far as Mr. C was aware the plant and not the Department provided the steriliser that was used to sterilise the equipment.

When the TVIs were paid per shift it regularly happened that Mr. C might have to ask them would they be willing to stay on to work another shift. Often the TVIs would not work beyond two hours but they would get paid for the shift, which was three hours in duration.

In cross-examination Mr. C stated that he was now working in another factory. When the slaughter line in XXXX closed it was no longer a requirement that the factory have a full-time VI present.

Mr. C never disciplined or demoted a TVI. He disputed that a TVI had lost seniority on the panel during Mr. C's time as a VI in XXXX. The factory in XXXX had regular audits. If there was aproblem it came back on Mr. C as the VI. He checked the TVIs' work on a regular basis. Herandomly checked carcasses in the chills. If he found something wrong during his inspections hewould be onto the TVI in advance of the load going out. He would inspect the carcass number andwould be able to trace it to a particular shift of TVIs. He would have to speak to the three TVIs onthe shift, as he would not be able to establish which TVI had made the error or omission. Mr. C didnot think this had ever occurred but this was the procedure if it did happen. If something was notdone properly Mr. C as the VI would have to tell the TVI to "pull their socks up".

When Mr. C was in XXXX he also worked elsewhere for a few hours during the week. He spent 60% of his working hours in XXXX. He was required to do spot checks in XXXX every day and he always got these done. At times he may have had discussions with the TVIs about how things should be done. These discussions would take place on the line, in the office or the canteen. What prevailed at the end of the day was the statutory requirement.

MOC informed Mr. C with ample notice that she was going on maternity leave. Mr. C had no difficulty with MS' sick leave. Nobody lost out because of maternity or sick leave as that was the system and that was the way it worked. For good management it suited Mr. C that the TVIs gave him ample notice. It suited them too as someone else could be brought in to do their shift.

Mr. C photocopied and distributed any new circulars from the Department in relation to changes in the legislation. Mr. C held one meeting in a hotel with the TVIs in order to bring about uniformity in the meat inspection. The Superintendent Veterinary Inspector also attended this meeting.

Mr. C could not start the line in the factory until the TVIs were in position. Mr. C was not present at the start of every shift. The factory supervisor was responsible for starting the line. The factory supervisor had it written into the safety system that if the TVIs were not in position he would not start the line. As the VI in charge he needed to know the TVIs were in their appropriate locations.

Mr. C agreed that a TVI needed equipment to carry out the inspection of the carcasses on the line. The VI applied for the equipment from the Department when a requisition order was received. The Senior Agricultural Officer had a stock of knives, gowns and scabbards etcetera if a TVI needed a replacement. As far as Mr. C was concerned the Department approved the equipment. Mr. C presumed it was authorised for use from a sanitary point of view and from a health and safety point

of view.

In relation to payment, Mr. C left out a stack of claim forms for the TVIs. The TVIs submitted their completed forms to him. Under Mr. C's direction the Senior Agricultural Officer usually posted the claim forms to the central fees unit. The TVIs were paid on a monthly basis.

Mr. C had an attendance book in the office and the TVIs were required to sign in and out. If Mr. C was not physically there at the time he trusted that they had done their shift.

VIs are benchmarked and linked to the National Wage Agreement. When he was a TVI Mr. C did not know that the income he received was linked to the VI income.

The five appellants all had regular shifts and there was never a problem such as them refusing shifts, everything ran smoothly.

Closing Statement of Ms. Walsh B.L.

Providing her closing statement Ms. Walsh stated that **Henry Denny & Sons (Ireland) Ltd –V- Minister for Social Welfare** (1998) 1 IR 34 is a major case in considering whether the appellants are employees or contractors. The person in this case was a shop demonstrator. The question was raised as to whether she was an employee or a contractor. When the case came before the Supreme Court it made a statement that "each case turns on its own facts" and that control is not decisive.

A broader number of tests need to be examined. The Labour Court and other various forums have looked at other questions, questions of integration into the business and that is referred to **In The Matter of the Sunday Tribune Ltd (in liquidation)** (1984) IR 505. The appellants were integrated and were getting directions from the Department. The VI was giving them photocopies of regulations and holding meetings. He spoke to them about how they were to do their work. The appellants were acutely aware of the regulations in the manner in which they did their work.

An issue was raised during the hearing as to whether the TVIs through Veterinary Ireland previously sought confirmation of their status. There had been a push for the last ten years to clarify this position. The evidence of CE was that Veterinary Ireland felt the Department would never succumb voluntarily to accepting TVIs as employees. There was a previous case by a TVI in the Labour Court in 2002 **Department of Agriculture, Food & Rural Development –V- Mr. Maurice O'Reilly** WTC/02/5 No. 0232. There was also the case of **Department of Agriculture, Food & Rural Development –V- Mr. Thomas Maher** WTC/02/6 No. 0222. Mr. Maher was a whole-time Veterinary Inspector. The Labour Court on appeal looked at the case and in particular pointed to the fact that Mr. Maher was subject to PAYE and PRSI. Ms. Walsh accepted the Courts have set out that the issue of PAYE and PRSI is not conclusive. If it were a conclusive test than all TVIs would be employees since 1991. There was a direction from Revenue in 1991 that PAYE and PRSI was to be deducted from TVIs' pay. The Department never appealed this. Ms. Walsh stated that even if the Department's submission in relation to a High Court case is to be taken on board by the Tribunal, that did not happen until 1998, seven years elapsed after the Revenue direction determining that PAYE and PRSI was to be paid. This should be taken into account in relation to the previous case law in the case of Mr. Thomas Maher. The Labour Court specifically looked at the fact that Mr. Maher was precluded and prevented from doing any other type of work except his work as a whole-time TVI. The Labour Court ultimately

determined that Mr. Maher was an employee. The appellants in this case do carry out other work. There is nothing in the legislationand nothing in previous case law to say that a person cannot be an employee of one party and beself-employed in their own practice all within the course of one week. CD and COB gave evidencethat they had to leave animals they were about to operate on, as there was no question of abandoning their shift in the factory. They had an obligation to perform the work and they didperform the work.

Four of the five appellants had private practices. MOC worked solely for Galtee. In light of looking at each case on its own facts, there are factors that are relevant to the appellants, which allow them to fall into the category of employee. In the case of Mr. O'Reilly the circumstances were different from how they are now as he was paid on a per shift basis, there was no exclusivity clause and the Labour Court did look at the fact that he was continuing to do TB testing. TB testing is a very different type of work and evidence was given in relation to the profit that can be made from TB testing. Once the testing is completed the vet can return to the work in his private practice. The same does not apply to the facts of a TVI. A TVI must work fixed times, fixed shifts and they must turn up for work or otherwise the VI will certainly take them up on that issue.

In terms of a general overview of the law Ms. Walsh drew the Tribunal's attention to the case of **Western People Newspaper –V- A Worker** ADE/03/21 No. 047. Mr. Kevin Duffy of the Labour Court sets out in the end of this case that there is now a single composite test for determining if a person is engaged on a contract of service or on a contract for service. The contract is to be looked at as a whole and the question to be asked is- is the person in business on his or her own account? None of the TVIs in their work as a TVI were in business on their own account. They could not increase their profit. They had a fixed rate, fixed hours, fixed times, fixed shift and in fact if anything they had the potential to lose out on private practice work while they went in to do their work as a TVI.

Ms. Walsh also drew the Tribunal's attention to the case of **Roche –V- Kelly (1969).** This case sets out that it is the right to control the work rather than the actual exercise of that right that matters. In other words Mr. C had the right to control the work and the right to control the TVIs. Whether he exercised that right is not the important thing to consider. Mr. C did exercise that right because he pulled the TVIs up on questions of the manner in which they did their work. He ensured they did their work in accordance with the requirements the Department were putting on him and to ensure the meat which was coming out of the plants was in a correct state.

Ms. Walsh drew the attention of the Tribunal to the case of **Tierney –V- An Post** (2000) 1 IR 536. In this case the Supreme Court referred to the fact that it was of note that the Applicant was entitled to employ an assistant but only with the permission of the Respondent. None of the TVIs in this case could employ an assistant. They could not substitute anyone for themselves or send in a vet from their practice. It was the determination of the VI to select the person next on the panel to replace them.

In the case of **Castleisland Cattle Breeding Society Limited –V- The Minister for Social, Community and Family Affairs** (2004) IESC 40. This case came before the Supreme Court in2004. The artificial inseminators (hereafter referred to as AI men) took redundancy in 1989 andthere were two categories of AI men thereafter. There were the people who took a lower statutoryredundancy and were then essentially re-employed on a contract of service basis. There werepeople who took a higher redundancy and became contractors who contracted their services asartificial inseminators. The latter group subsequently sought to be deemed employees despite beingoffered the alternative. This is not the case with the TVIs. They have worked for

many years,(some with 35 years service) as TVIs. They have pushed through their union (their negotiators)over the last 15 years to be employees. There is correspondence going back to 1995 and 1996, asread into evidence by the Chief Executive of XXXX. In this correspondence clarification is soughtin relation to annual leave, holiday entitlements, pension entitlements and sick leave. Their statuswas an issue on the agenda.

The question of payment is hugely relevant. PAYE and PRSI were deducted. TB payments were made in an entirely different fashion. No VAT was charged on the TVIs' pay. The Department deducted the veterinary union subscriptions. From a factual point of view that is highly unusual if the TVIs are in fact contractors, as the Department maintains.

The VIs and the TVIs were paid on a linked scale. Determining a contractor's rate linked into a permanent employee's rate is abnormal. TVIs are employees and that is why the Department linked the temporary employees to the full-time employee's rate as would be normal in any other form of employment. They were issued with P-60's every year. The Department permitted a union to negotiate on their behalf. There was no local bargaining despite the fact that the Department could have negotiated with four or five large contractors who would have brought in their own TVIs around the country.

In relation to the equipment, it was provided with a dual purpose, which were not just health and safety and hygiene requirements but also because the equipment was necessary to do the TVI work.

The issues of sick leave, maternity leave and flexible working hours were addressed and were agreed by the Department and were put in the agreements which were the conditions of engagement in the operation of TVI panels. This would be unusual in the circumstances of contractors.

The issue of control is not decisive but the issue of control is here in the case of the TVIs. There was one regular shift and the TVIs were controlled in terms of the hours they worked. Mr. C and his predecessor Mr. S told them when they were needed. The TVIs could not subcontract out the work, which would be normal in the case of a contractor. The VI's opinion prevailed as he was the boss, he was the man in charge and he ultimately ruled in terms of how the work was done.

In relation to discipline and grievance procedures there was a suspension from a panel in 2001 in to another plant. Mr. M accepted that suspension is a form of discipline. The union in the case negotiated in 2001 that the person would be suspended with pay. A contractor is never suspended with pay. No purchaser of services will continue paying for a contractor to do nothing. The TVIs always left their own practices to go and do their shift, as they had no option but to go and do their shift.

In terms of the issue of control, the issue of integration, the issue of enterprise and of all the tests put forward before the Tribunal, the logical and reasonable conclusion is that the appellants were employees. The Salaries section of the Department in Cavan paid them. The appellants were not in a position to be enterprising in relation to their TVI employment. They could not complete their shifts faster or in a shorter period of time like TB testers. The appellants came in, worked their shift and then returned to their own businesses. The fact that four of the five appellants had their own business does not preclude them in law from being an employee of the Department.

Closing Statement of Ms. Smith B.L.

Providing her closing statement Ms. Smith stated that the control test was something that initially carried huge weight but the extent of it had lessened over time. It is a matter of looking at all the different tests, all the different facts and arriving at what was the actual situation. There has been a lot of emphasis put on this case in terms of what the level of control may or may not have been on TVIs in doing their work. The original test in respect of control was whether a person was under another person's control sufficiently to make them his employer. Case law has evolved in the respect of the control test itself.

In terms of applying the facts of this case, these were professional individuals with between 15 and 35 years experience within the function as a TVI. As to the necessity of control- there has been case law stating that people like that do not necessarily need the same amount of control. They are professional people with extensive experience. Ms. Smith asked the Tribunal to consider an important point. If the Tribunal is to find that there was control exercised by the Department over the TVIs, it is control that evolved from the legislation and the statute that was applicable to the meat inspection service. This was the responsibility of the Department and of the veterinary inspectors.

In particular the case of **Castleisland Cattle Breeding Society –V- The Minister for Social & Family Affairs** (2004) IESC 40 considers the control issue. The facts are quite different in terms of the redundancy aspect but there is a very important point in that case in respect of control and that was the Supreme Court agreed with the view of Judge O'Donovan in the High Court that statutory controls imposed on the individual by the legislature should not be equated with control over them by the person who has engaged them. That is very important in this case. The meat inspection service had to be implemented exactly. The VI had to ensure that everything was done appropriately. Everything, including what the TVIs were doing came from various pieces of legislation. It was control that flowed from the legislation.

In the case of **Tierney –V- An Post** (2000) 1 IR 536 it was held by the Supreme Court that despite extensive control in certain cases an engaged person can nonetheless be an independent contractor. There are a lot of parallels in the case of the TVIs. The Supreme Court recognised that in the particular nature of the business and the legislation, that the element of control was something that did not stop the relationship of a self-employed independent contractor being in existence.

The integration test has been referred to and was relied on **In the Matter of the Sunday Tribune Ltd (In Liquidation)** (1984) IR 505. There are different aspects as to whether somebody is integrated into the business or not. The Court had regard to particular things such as the individual's entitlements to things like pension, holiday pay and expenses and allowances and where those aspects were not actually allowable to the persons engaged they were held not to be employees. They were not integrated by virtue of not being able to avail of all those entitlements, which were available to actual employees. By virtue of that it was held under the integration test that they were not employees. If somebody was absent due to annual or maternity leave and no disciplinary action was taken for this absence this was different to actually availing of the entitlement benefits that would be available to an employee. Essentially, this position was accepted by the appellants.

In the entrepreneurial test as referred to in **Henry Denny & Sons (Ireland) Ltd. –V- Minister for Social Welfare** (1998) 1 IR 34 there are a number of elements in the evidence that can be tested. The main question in the above case was whether the person was engaged in business on his or her own account. Essentially there were three tests set out in that case to try and arrive at a decision.

One of the tests was whether the person engaging provided the necessary premises or equipment or some other investment or whether the person engaged did this. In the case of the TVIs the factory is clearly the premises and neither of the parties provided the premises. The training was an investment on the part of the TVIs. They also gave clear evidence that they had no particular expectation as to the amount of work they would get at the initial stage of their work as a TVI. They undertook this investment without any guarantee of what return they would get from it.

The equipment can be divided into two areas, protective clothing and protective equipment. Mr. M gave evidence that the Department provided the equipment due to health and safety obligations. They did not distinguish between employees or contractors, they were treated the same. That is an appropriate and responsible interpretation of Section 7 of the 1989 Health and Welfare at Work Act which refers to the responsibility of the employer to extend this to people in the workplace, not just employees. It was a responsible approach on the behalf of the Department and was not something that should be used to penalise them. Also, there is the second aspect involved that the VI must be satisfied with the meat inspection before he signs the documentation. The provision of the equipment by the Department was an essential element in guaranteeing the hygiene of the meat inspection service. The TVIs invested and in the **Tierney –V- An Post** case it was considered, that an investment no matter what it was, should be considered as an investment by the person engaged.

In terms of the second element of the test the case of **Henry Denny & Sons (Ireland) Ltd –V_Minister for Social Welfare** explores whether someone is in business on his or her own account. There is obvious reference to the ability to employ somebody else to assist the person. While thatcould not be done by the TVIs it was not something the Department decided on a whim. First of allit had to be able to guarantee that the persons doing the work had the proper qualifications andsatisfied the criteria. They also had to be approved to do TVI work. The controls were necessarydue to the nature of the work rather than something that was dictated by the Department. However,it is clear that if the TVIs gave adequate notice they did not actually have to come in and do theirshift. Another person from the panel could be selected to fill their place on the shift. There mayhave been a threshold but up to that point they could do refuse so it was something that could bedone. There was evidence that it did not happen often but whether it happened or not, theopportunity was there for them.

The third element under the test in the **Henry Denny & Sons (Ireland) –V- Minister for Social Welfare** is the point about profit. Evidence was heard from the TVIs that there were long and short shifts. The appellants as senior members on the panel had the choice of shift. The TVIs chose not to exercise that right. They could have chosen the short shift which would have given them the same amount of money, would have left them more time off to go and increase their profit.

Ms. Smith asked the Tribunal to consider in respect of case law (apart from the control, integration and the entrepreneurial tests) the question of mutual obligation. This is something that has been considered in UK case law. One of the cases is **O'Kelly –V- Trusthouse Forte Plc** (1983) and the second decision of the House of Lords, **Carmichael –V- National Power Plc.** (2000). Essentially, what both of these cases recognised was that for a contract of employment to exist there must be a mutuality of obligation. The employer must be obliged to provide work to an employee and the employee must be obliged to perform it. This is a very important consideration in relation to the TVIs.

All the appellants accepted there was no guarantee provided to them regarding the volume of work they would get. They all acknowledged that the level of work was something that was dictated by the factory, not by the Department. The Department also confirmed that there was never any

guarantee or any obligation on the Department to provide work to the TVIs.

There was no obligation on the individuals to perform it and that would need to be there for a contract of service to be in existence. The appellants were people who came in and did their work; they did work in line with the rosters and as Mr. C said the system worked for them. The fact of the matter is that they could have refused shifts if they wanted to and the 1999 agreement that has been referred to clearly recognises the fact that a certain amount of shifts could be refused. The very fact that the possibility was there to refuse a shift meant there was no obligation on the individuals to perform. There is a clear lack of mutual obligation in this case. A mutual obligation must exist for a contract of service to exist.

Ms. Smith referred to the cases of **Department of Agriculture, Food & Rural Development –V-Mr. Thomas Maher** and **Department of Agriculture, Food & Rural Development-V-Mr. Maurice O'Reilly.** In the case of Mr. Thomas Maher there were very different circumstances thanthose of the TVIs. Mr. Maher was a whole-time veterinary inspector and there was a very specificcondition in a written contract with him that he was specifically prevented from doing any otherwork. The other thing is that he did work whole-time; it was a full-time every day of the week,every day of the year. This was very different to the appellants' situation.

The decision of the Labour Court in the **Department of Agriculture, Food & Rural Development –V-Mr. Maurice O'Reilly** on appeal came out with a finding that that particular TVI was not an employee. The Labour Court was influenced in their decision by two things. One was the right to refuse work. The other was the degree of control exercised by the appellant over the performance of those duties. The appellant in the above case did place reliance on the Code of Practice that was referred to in the submission to the Competition Authority. The Labour Court found this should not be relied upon in consideration of that particular case. They found the proposition in the code of practice, which referred to the overriding factor was that if a person was in business on their own account it was erroneous because there should not be an overriding factor. It should be a consideration of all the factors. Ms. Smith stated this was a correct interpretation by the Labour Court in respect of the application of the code of practice.

These aspects of evidence point towards the fact that the appellants were independent contractors employed under a contract for service. TVIs have the ability to choose their own panel. TVIs paid for their own training. There was no competitive process for the position of TVI. They could choose to be on up to four panels. These are all aspects that would be completely contrary to the contract of employment.

In an exceptional case suspension of a TVI occurred for a brief period. Disciplinary action was something that was considered in **Tierney –V- An Post.** There was disciplinary action that was capable of being enforced by An Post in respect of a sub-post officer but yet the Supreme Court found that that person was a contractor.

The importance of MS' evidence, as agreed with by Mr. M, was that the Department agreed that as a result of the negotiations in 2003 the change from a shift rate to an hourly rate did result in a slight loss of earnings. This is something that would be very unlikely to happen if the appellants were employees. Reducing the wages of an employee would be extremely rare and would have to be done with the full agreement of all employees.

While Veterinary Ireland were involved in negotiations, we do not know that all TVIs were

members of XXXX. Custom and practice meant non-members might have benefited from the negotiation and agreements that XXXX negotiated on behalf of their members. It is difficult to suggest that that could happen if they were employees. That could only happen if they were contractors.

The issues of control in the workplace, the provision of equipment, the lack of substitution and turning up for work on time; while they could point towards someone being an employee because of the level of professionalism of the appellants, by the nature of the work which was being taken on and by the regulations that were in place, these are all explainable factors and does not mean that they point to a contract of employment.

In terms of the flexibility of hours the TVIs if they were senior enough had the right to choose the slot that suited them best. Whether they chose to do that or not was up to them.

The issue of PAYE and PRSI is not necessarily a decisive issue. The TVIs were paid from the Salaries section but evidence was given that this is where calculations for PAYE and PRSI were carried out. Prior to PAYE there was a long period where withholding tax was paid. The decision by Revenue or the Department of Social Welfare regarding PAYE and PRSI may be based on criteria outside of the criteria being considered for this hearing. A parallel should not necessarily be drawn.

The question of insurance was raised. The Department did not pay it. The Department did not ask the TVIs as to whether they had insurance or not but that is reasonable if they are contractors. It was up to them to look after their own interests. It adds to the Department's position that these people were contractors that this was never brought up.

The fact that the Department and the VI had a good relationship with the TVIs does not mean it was because they were employees; it was because it did not impact the efficiency of the Department in engaging these people on contract and the fact that the Department was willing to be reasonable about it is not something that should essentially work against the Department.

The TVIs could walk off the line and that is consistent with the TVIs being contractors. The VI could not do that, as he was an employee.

In all the different tests it is possible to tick the boxes on both sides as to whether the appellants are employees or employed on a contract for service basis. Some of the tests that might seem to be satisfied in the pursuance of the employee direction are actually all explainable under different criteria. There are very distinguishing features that point to the appellants being contractors for service.

Determination on Preliminary Point:

The Tribunal determines by majority decision (with Mr. M. Forde dissenting), that the five appellants were employed by the respondent, under a contract of service, and therefore they were employees.

Four of the five TVIs (Temporary Veterinary Inspectors) were self-employed in their own private practices as veterinary surgeons. The one exception is MOC who worked solely as a TVI. All five TVIs did two weeks training in TVI work at a factory, which killed either cattle or pigs. All five

then applied to the XXXX and were then put on a panel of TVIs. Eventually, they could be on a panel of up to four factories getting occasional work at any one or more factories.

In the case of the five appellants herein they would work odd days on shift work. Eventually all five claimants opted to work on one panel in a particular factory which in this case herein was XXXX factory at Cahir Hill, Mitchelstown, Co. Cork.

Initially all five appellants were paid on a rate per shift basis. The duration of this shift was of either two hours, two and a half hours or three hours duration. However, TVIs remained at their positions until inspection was completed.

In the year 1999 XXXX was formed from three separate unions and thereafter this veterinary union (namely XXXX), represented the majority of veterinary surgeons in the country.

In October 2003 XXXX reached a formal agreement with the XXXX concerning the employment of TVIs. This agreement was implemented by the XXXX in November 2003. Thereafter, all TVIs were paid on a rate per hour basis as per the agreement between XXXX with the XXXX. This was a significant change because in the new agreement the Department paid a rate per hour to TVIs instead of the rate per shift, which was paid up to, and until this time.

This agreement between TVIs and the XXXX was implemented and operated by the XXXX regarding the TVIs and continued until the closure of the slaughter line in XXXX in the autumn of 2004.

The evidence adduced by both parties at the hearing together with final submissions from Counsel by both parties was considered very carefully. The issue to be determined was whether the TVIs were employees on a contract of service or contractors on a contract for service.

The majority found that the agreement between the XXXX and the TVIs union, XXXX, in November 2003 where a rate per shift was changed to a rate per hour was very significant in indicating that the TVIs were employees rather than on a contract for service.

The majority found it also to be a fact from the evidence that all five appellants had deductions made for PAYE and PRSI from their payment cheques and received a P60 after the end of each financial year. All five appellants were paid a salary per month by the XXXX, through the Salaries section, in Cavan.

The majority found that the Department had sanctioned, since 1973, that TVIs' scale of pay was linked to the minimum of the VI salary scale. A letter dated 20 April 2006, was referred to in evidence where a rate per hour of €60.04 for TVIs was agreed by the Department and XXXX. Thisbenchmarking agreement was retrospective to January 2004 when TVIs were still working atXXXX

The majority accepts that the payment by TVIs of PAYE and PRSI is not conclusive but however it is a very relevant factor to be taken into account. The majority further notes that there was a direction by Revenue to the XXXX in 1991 that PAYE and PRSI was to be deducted from TVIs' salaries. There was no record of the Department appealing this direction from Revenue. The majority found that no VAT was charged in the case of TVIs. The evidence also clearly showed that the Department deducted veterinary union subscriptions.

The majority considers the case of **Department of Agriculture & Food & Rural Development–V- Mr. Thomas Maher**. Mr. Maher was a whole-time Temporary Veterinary Inspector, a slightlydifferent position, engaged in TB testing by the Department. The case was an appeal by theDepartment of Agriculture & Food from the recommendation of the Rights Commissioner. Theappeal was to the Labour Court and the hearing took place on 27th March 2002. The case looked atthe fact that no VAT was charged by Mr. Maher. The same situation persists in relation to the fiveTVI appellants herein. The Labour Court specifically looked at the fact that Mr. Maher wasprecluded and prevented from doing any other type of work except his work as a whole-time TVI. The appellants herein were part-time TVIs but were independent contractors in their own veterinarypractices. The majority finds that there is nothing in the legislation or in previous case law to saythat a person cannot be an employee of one party and self-employed in their own practice, all in thecourse of one week, particularly in circumstances where these people are vets in their ownpractices. Clear evidence was given at the hearing by CD and COB that they had to leave animalsthat they were going to operate on to go to work on their shift as TVIs. There was no question ofabandoning their shift as TVIs because they were employees, they had an obligation to perform thework and they did perform the work. The Labour Court determination was that Mr. Maher was anemployee.

The majority considers the case of **Department of Agriculture, Food & Rural Development –V- Mr. Maurice O'Reilly** which was an appeal by the Department of Agriculture & Food and Rural Development against the decision of the Rights Commissioner that Mr. O'Reilly was an employee. Mr. O'Reilly was a part-time Temporary Veterinary Inspector since 1966. The Labour Court found that Mr. O'Reilly was not an employee in its determination and its decision was that he was a contractor. This hearing took place on 14 January 2002. In this case herein the majority found thatthe facts were different then to what they are now.

Mr. O'Reilly was paid on a per shift basis, there was no exclusivity clause and the Labour Court examined that. Mr. O'Reilly continued to do TB testing but TB testing is a very different type of work as per the evidence given to the Tribunal. VAT is charged on TB testing and it is paid by a separate section of the Department of Agriculture. Further evidence was given at this hearing that a profit can be made from TB testing. TVIs could not increase their profit at Galtee. A veterinary surgeon when doing TB testing has eight weeks within which to examine herds. During that period of time it depends on how fast the vet can get the TB testing done and he/she can move on to more lucrative work in their own private practices.

The same position does not apply to the facts of TVIs' employment. The TVI works fixed times, fixed shifts where a rate per hour is now paid and a TVI has to turn up for his/her shift otherwise the Veterinary Inspector will take them up on that issue.

In the case of Mr. O'Reilly he took his case without the assistance of a veterinary union or XXXX and the circumstances are different from this case herein. In this case the evidence from the five appellants, all of whom had slightly different situations, four of whom had private practices and one of whom (MOC) did not have a private practice but all five were paid at an hourly rate since 2003. The TVIs in this case did not pay VAT on their earnings as are in the facts of the case of Mr. Maher. The TVIs paid PRSI and PAYE only on their earnings at XXXX.

In the light of looking at each case on its own facts there are factors in regard to the five appellants, which are relevant to these particular appellants, which allow them to fall within the category of employee.

The majority considers the case of **Western People –V- A Worker** (2004) a Labour Court case. In that case Mr. Kevin Duffy in the Labour Court gave a very fulsome review of the law and the tests in relation to the determination of being an employee or alternatively of being a contractor. Mr. Duffy went through all of the background, all of the various cases and he ultimately sets out in the end of that case how he determined the person who was a reporter with the Western People was an employee.

Mr. Duffy set out in that case that there is now a single composite test for determining if a person is engaged on a contract of service or on a contract for service. The position is that the contract as a whole is examined and the question asked, is the person in business on his or her own account?

The majority finds that none of the TVIs in their work as a TVI were in business on their own account. They could not increase their profit per shift. They had a fixed rate of pay per hour, fixed hours, fixed times and fixed shift. In fact they could lose out on their private practice work while they went in to do their work as a TVI.

The majority considers the case of **Roche-v- Patrick Kelly & Co. Ltd.**(1969). This case sets out that it is the right to control the work rather than the actual exercise of that right which matters. In fact Mr. C the Veterinary Inspector had the right to control the work of the five TVIs. In this case herein Mr. C did exercise that right because he corrected them in the manner in which they did their work and he made sure that they did their work in accordance with the requirements the Department of Agriculture & Food were putting on him. This requirement was to ensure the meat which was coming out of the plant was in a correct state and was capable of being consumed or was not going to damage the meat industry.

The issue of control is not decisive but it is a major factor to be considered in deciding the case herein. The issue of control was here. There was one regular shift and they were controlled in the terms of the number of hours they worked. Mr. C and his predecessor, Mr. S, told the TVIs when they were needed. TVIs could not subcontract out the work. They could not bring in their substitutes, which would normally prevail if they were contractors. Guidelines were given by the Department of Agriculture & Food and they were passed down to the Veterinary Inspectors who then enforced them with all of the TVIs. Mr. C gave clear evidence at the hearing that if there was a dispute as to professional opinion, the opinion that ultimately prevailed was Mr. C's, who was the boss and who ultimately ruled in terms of how the work was done.

The majority considers the case of the Supreme Court in 2004- **Castleisland Cattle Breeding Society Ltd. -v- The Minister for Social and Family Affairs.** This case was known as the Artificial Inseminators' case. The majority found that this case was capable of being distinguished from the current circumstances of the TVIs case. In the Castleisland case artificial inseminators accepted redundancy but one group accepted a lower rate and were employed thereafter as employees. The other group of artificial inseminators accepted redundancy at a higher rate and were employed thereafter as contractors for services as artificial inseminators.

This is not the case in regard to TVIs employed by the XXXX at XXXX. These TVIs had worked for many years including some with up to thirty-five years service as TVIs. Their union negotiators had pushed the Department over the last fifteen years to be employees. Evidence was given at the hearing by CE of XXXX of correspondence with the Department dating back to 1995 and 1996 and read into the record. XXXX were seeking issues of clarification in relation to annual leave, holiday entitlements, pension entitlements and sick leave. It was an issue on the agenda even though little progress was made.

On the evidence given to the Tribunal the question of the manner of payment to TVIs is hugely relevant though it may not be decisive. PAYE and PRSI were deducted. No VAT was charged. The Department deducted veterinary union subscriptions. From 2003 the TVIs were paid an hourly rate instead of a shift rate previously. The majority reiterates the fact that the Department had sanctioned, since 1973, that the TVI scale of pay be linked to the minimum of the VI salary scale.

It appears to the majority that the above-mentioned evidential facts would not occur in the case of contractors. The Department issued the TVIs with P60's after the end of each year. The Department permitted the XXXX union to negotiate on behalf of the TVIs. There was no local bargaining because the Department did it nationally.

The issues of sick leave, maternity leave and flexible working were agreed by the Department with the XXXX union on behalf of TVIs and were conditions of engagement in the operation of TVI panels.

It would be highly unusual for these circumstances to exist in the case of a contractor. Evidence was given at the hearing that there was a suspension from a TVI panel in 2001 at another plant. The TVI was suspended from that panel and was not rostered. The XXXX negotiated that the TVI was suspended with pay. The fact that a TVI was suspended with pay indicates he was an employee. A contractor would never be suspended with pay.

Evidence was given to the Tribunal at the hearing in the case by all five appellants, that the Department provided equipment to the five TVIs and that this equipment was necessary to do the work not just for Health & Safety requirements or for hygiene requirements. It may have a dual purpose but the equipment was necessary to do the work. This equipment was provided to the five TVIs by the Department at considerable expense.

When considering a contract of service versus a contract for service the first stage of the test is was there a mutuality of obligation between the parties? It must be decided if the alleged employer is contractually obliged to provide the person claiming to be an employee with work which that person is then required to perform. Conversely, in the case herein the five TVIs have an implied agreement reached with the XXXX and the TVIs to carry out inspection of meat and certification of same on the behalf of the XXXX on an ongoing basis, hence the majority finds there is mutuality of obligation.

The second stage of the test in the process requires a determination as to whether the contract binding the parties is one of service or one for service. The fundamental test for determining this question was set down in the English decision of **Market Investigations-v-Minister for Social Security** (1969) 2QB 173. Here it was held that the Court should consider if the person was performing the service as a person in business on his own account. If the answer to that question is yes then the contract is one for service. If the answer is no then the contract is one of service.

This approach was adopted in this jurisdiction by the Supreme Court in the case of **Henry Denny & Sons (Ireland) Ltd-v-Minister for Social Welfare** (1998) IR34. Here Keane J. (as he then was) quoted with approval the following passage from judgement of Cook J. in the Market Investigations case.

" The observations of Lord Wright, of Denning L.J. and of the judges of the Supreme Court 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 test 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 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 service provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether or how far he has an opportunity of profiting from sound management in the performance of his task."

From that passage Keane J. concluded as follows: "It is, accordingly, clear that, while each case must be determined in the light of its particular facts and circumstances, in general a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account is not decisive. The inference that the person is engaged in business on his or her own business account can be more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her."

In the Denny case the demonstrators were paid a fee in respect of each demonstration provided. As appears from the Judgement of the Supreme Court each demonstrator provided an invoice and payment was made each fortnight without deduction of tax or PRSI. They were nonetheless held to be employees even though the contract stated otherwise.

In the case of **Tierney-v-An Post** (2000) I.R.536 Keane J. in a Judgement with which Hamilton C.J. and Lynch J. agreed, reiterated what he had said in the Denny case. This case involved a postmaster who had been dismissed for misconduct. An issue arose as to whether he was an employee of An Post or self-employed under a contract for service. The Applicant carried on the business of the sub-post office from premises, which he provided and from which he carries on an independent business selling newspapers etcetera. The applicant was entitled to employ an assistant but only with the permission of the Respondent.

In the High Court, McCracken J. held that the Applicant was an employee on the basis of the degree of control, which the Respondent was able to exercise over the work and the extent to which it was integrated into the business of An Post.

The Supreme Court held that the contract was one for service. Keane J. observed that it was not normal to find a clause in a contract of employment allowing an employee to hire assistance for the work he or she is employed to perform.

It was further held that whilst the Applicant worked under the control of the Respondent's Regional Manager and the running of the post office was part of the Respondent's business, an overriding consideration was the fact that he operated the post office from the same premises as his own business and that the post office was, in fact, part of the Applicant's own business. In the case herein the TVIs did not operate from their own veterinary premises nor did they provide their own equipment.

Following the decision in the Supreme Court in the case of **Henry Denny & Sons (Ireland) Ltd-v-Minister for Social Welfare** and **Tierney-v-An Post** there is now a single composite test for determining if a person is engaged on a contract of service or a contract for service. It involves looking at the contract as a whole and asking is the person in business on his or her own account? If the answer is yes then the contract is one for service. It the answer is no then the contract is one of service.

The question of control and integration should no longer be regarded as conclusive tests in themselves but as elements to be taken into account in applying the enterprise test.

The majority having regard to all the factors in this case herein found that there is little to support the proposition that the five TVI appellants were engaged in business on their own account. Rather, the preponderance of evidence suggests that they undertook a continuing arrangement to provide their own skill and labour in the service of the XXXX on a mutually convenient basis as to how and when they would work and that they did so for remuneration. They were not in a position to be enterprising in relation to their TVI employment. They were paid a salary. This salary was paid by the Salaries section of the XXXX in Cavan. The TVIs were not in a position to do their shifts faster or in a shorter period of time like TB testers were. The TVIs simply came in did their own work, finished
their shift and went back to their own business. The fact that four of the five appellants had their own businesses does not preclude them in law from being employees of the XXXX.

The Tribunal determines by majority decision (with Mr. M. Forde dissenting), that the five appellants were employed by the respondent, under a contract of service, and therefore they were employees.

Tribunal Hearing from 9 January 2009

This case initially came before the Tribunal on 15 June 2006 and concluded on 19 October 2006 following an adjournment and three subsequent days of evidence and submissions. Those hearings and submissions related to a preliminary point concerning the status and employment relationship between the appellants' i.e. former veterinary inspectors and the respondent. An Order that included the Tribunal's Determination was signed on 12 March 2007 by the chairman of the division who had sessin of that case and issued to all relevant parties some time later. The Tribunal determined by a two to one majority that all five appellants were employed by the respondent under a contract of service. In effect the Tribunal determined that it had justification to hear their appeals under the Redundancy Payments Acts and the Minimum Notice and Terms of Employment Acts.

The respondent being dissatisfied with that decision appealed the determination on a question of law to the High Court. That Appeal was heard in the middle of February 2008. The High Court delivered its judgement on 7 July. The judge was of the view that the Tribunal fell into error from the very outset of the case in not having regard to all the possibilities in determining the nature of the work relationship between the parties. The judge also commented that the Tribunal misdirected itself in law and that its finding of mutuality of obligation between the parties was based on a

flawed and untenable basis. Following submissions from the concerned parties the High Court issued its ruling on the case on 22 July 2008.

Among the High Court's eight declarations issued that day were that the Tribunal erred in law in several aspects of the case including that the initial appellants were employed under a contract of service. The judge also declared that the Tribunal's finding of such a contract was based on insufficient evidence placed before it. Those declarations concluded with an order that the case be returned to the Tribunal pursuant to the above Acts but without any apparent direction.

Following further submissions on behalf of the former veterinary inspectors and the respondent on 8 January 2009 the Tribunal noted there was no final objection that further evidence be heard.

The following Order should be read in conjunction with the above Order that was signed in March 2007

Appellants' (former employees) Case

Apart from working at the XXXX meat and processing plant at Mitchelstown county Cork as a veterinary surgeon the first named appellant, in common with three other appellants, was also involved in a private practice providing veterinary services. This witness's evidence on his employment status with the respondent also applied to all the other appellants.

This witness referred to the code of practice for determining the employment or self-employment status of individuals. That code was issued with the assistance of various bodies including the Departments of Enterprise, Trade and Employment; Finance; Social and Family Affairs, and the Revenue Commissioners together with NERA, ICTU, IBEC, CIF, and the Small Firms Association. The witness stated that he was under the control of another person who directed his work. An inspector who was responsible for at least another plant oversaw his work. The witness's only input into that work was his labour and time. In addition he received a fixed remuneration for that labour from the respondent and could not sub–contract that work to others. All his work at the XXXX plant was done exclusively under the aegis of the respondent.

The witness also said that he worked in excess of the hours stated on the respondent's records for the years 2001 up to October 2004 when the plant closed. Apart from being remunerated by the respondent for the actual work done the witness was, at times, paid for being rostered even when no work was made available for him. Statutory deductions were made by the respondent from that income.

A XXXX (trade union) official outlined the rationale that allowed the appellants to refuse up to sixteen percent of their shift work. This was done in part to facilitate the respondent and their work requirements. An agreement to this effect was enacted in late 1999 and has remained in place having regard to a change in work patterns and payment methods in 2003. The witness highlighted that the appellants were therefore required to work eighty-four percent of their rostered time and that the consequences of not complying with that requirement left the appellants exposed to possible sanctions from the respondent. All five appellants were regarded as regular veterinary practitioners as distinct from substitute vets, which meant they were in the top fifteen vets on a panel called upon by the respondent for their services in the plant. A sanction might result in the withdrawal in their regular status to the position of a substitute vet. Substitute vets had less access and opportunity to gain employment at that plant. The witness was not familiar with any "actual demotion" under that system at the Mitchelstown plant. The fifteen "seniority" vets on that panel

regularly rotated their shifts in that factory.

Respondent's Case

An official from the respondent who got involved in the operation and application of service requirements between the respondent and the temporary veterinary inspectors from April 2001 onwards acknowledged he had no involvement in arrangements between XXXX and his employer prior to that time. In referring to the panel system and sixteen percent rule the witness acknowledged this was in place to facilitate both the vets and the respondent. However, the primary purpose of the panel system was to assist all the members on it. He added that the respondent's main concern was to ensure there was sufficient numbers of temporary veterinary inspectors available when required. It was inaccurate to state that senior vets had to attend for work eighty four percent of the time. This witness accepted that the veterinary inspector who represented the respondent was in charge of the temporary vets and also rostered their shifts and kept records of their working hours. Those records were used to calculate payments to the relevant temporary vets.

If the respondent received a complaint from temporary veterinary inspectors about their colleagues on the seniority panel then the veterinary inspector would bring it to the attention of the Department. Likewise if a veterinary inspector from the Department was faced with persistent refusals from a senior and regular temporary veterinary inspector to operate rostered shifts then the respondent could investigate this situation. Many temporary veterinary inspector cases were viewed on their individual situations and on a plant-to-plant basis.

Determination

The question in this preliminary issue concerns the status and working relationship between the appellants and the respondent. In other words were the appellants engaged under a contract of or a contract for services? To put it another way were the appellants' employees or contractors of the respondent. The answer to this fundamental question determines whether the Tribunal has jurisdiction to hear a substantive case under the above Acts.

Those Acts state that an employee is a person who has entered into or works under a contract of employment, whether that contract is for manual labour, clerical work or otherwise, is express or implied, oral or in writing, and whether it is a contract of service or apprenticeship or otherwise. The Acts make no reference to the disputed imported phase of mutuality of obligation. However, the Tribunal is now mindful it must deal with that issue.

In addressing this phrase the Tribunal had to first define it and then apply it to this case. Mutuality of obligation can be defined that the work provider is obliged to provide employment and there is a corresponding obligation on the worker to accept and carry out the work provided. This amounts to a working relationship commonly referred to as master and servant. The Tribunal is also conscious of the assertion that for someone not to be an employee there has to be an absence of this mutuality. Lack of mutuality of obligation means not only must the provider not be under any obligation to provide employment, the worker must not be under any obligation to accept any work that is offered.

Following the renewed hearing in Cork in January 2009 and consideration of the written submissions the Tribunal still maintains on the balance of probability, by a majority decision that the appellants and respondent were engaged in a working relationship that carried sufficient

mutuality of obligation to allow them to be classified as possible employees. This allowed the Tribunal to consider the various other tests associated with determining whether they were employed under a contract of or for services. In that consideration their determination from March 2007 applies.

However, a ruling from the High Court on this case issued in July 2008. The judge on that case issued eight declarations concluding that the case be returned to the Tribunal. Two contrasting interpretations emerged from the totality of those declarations. One was that the judge was in effect instructing the Tribunal to change its original determination due to its many errors in law in reaching that determination. Another interpretation was that this ruling was silent on the Tribunal's original determination but critical of its reasoning and flawed approach in law as to how it reached that decision.

Following further consultations of this division of the Tribunal and notwithstanding the majority view expressed above and the relevant legislation, the Tribunal feels bound to accept the former interpretation.

Accordingly, the Tribunal reverses its determination of 12 March 2007 and now finds that all the appellants were engaged under a contract for services with the respondent. It therefore follows that the Tribunal finds it has no jurisdiction to proceed with substantive hearings on these cases under the Redundancy Payments Acts, 1967 to 2007 and Minimum Notice and Terms of Employment Acts, 1973 to 2005

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)