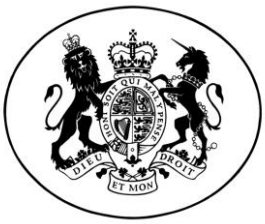
[2019] UKFTT 0415 (TC)



TC07230

Appeal number: TC/2017/02499

INCOME TAX AND NATIONAL INSURANCE – intermediaries legislation - IR35 - Regulation 6 NIC Regulations - personal service company -whether contract of employment would exist if services supplied directly to client - no – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

KICKABOUT PRODUCTIONS LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE THOMAS SCOTT
CHARLES BAKER

Sitting in public at Taylor House, Rosebery Avenue, London on 18 to 21 September 2018

Georgia Hicks, counsel, instructed by RadcliffesLeBrasseur, for the Appellant

Christopher Stone and Marianne Tutin, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is the decision on the appeal by Kickabout Productions Limited ("KPL") against a notice of determination for PAYE and a notice of decision for Class 1 National Insurance Contributions ("NICs") issued by HMRC for the period 2012 to 2015. The assessments relate to what is commonly known as the IR35 legislation and its equivalent for NIC purposes.

2. KPL was a personal service company ("PSC") established by Paul Hawksbee. KPL provided the services of Mr Hawksbee as a radio broadcaster to TalkSPORT Limited ("Talksport") for a period including but not limited to the periods under appeal. HMRC determined that for the periods under appeal the IR35 legislation applied to those services, on the basis that the hypothetical contract between Mr Hawksbee and Talksport would have been a contract of employment.

3. The relevant years of assessment and the approximate amounts due are as follows:

(1) 2012/13: PAYE £23,351, NIC £15,364

(2) 2013/14: PAYE £32,275, NIC £18,702

(3) 2014/15: PAYE £34,132, NIC £19,302

4. Although HMRC's amended statement of case refers to the availability of corporation tax relief for the amounts assessed as being a matter in dispute, we were told in the hearing by counsel for both parties that this was not an issue to be determined by us in the appeal. The only issue before us was whether the payments made by Talksport to KPL are liable to PAYE and NICs because they fall within the intermediaries legislation.

Relevant legislation

5. The intermediaries legislation is contained in sections 48 to 61 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003"). The key provision is section 49, which provides, so far as relevant, as follows:

> "(1) This Chapter applies where —
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),
>
> (b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and
>
> (c) the circumstances are such that —
>
> (i) if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office under the client, or
>
> ...
>
> (4) The circumstances referred to in subsection (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided."

6. A slightly amended version of section 49, referring specifically to office-holders, was in force for the year 2013/14 but neither party contended that that was relevant in this appeal.

7. A materially similar test is applied by the NICs legislation. For the relevant period, Regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000 ("the NICs Regulations") provided as follows:

> "(1) These Regulations apply where—
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),
>
> (b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and
>
> (c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the [Social Security Contributions and Benefits Act 1992] as employed in employed earner's employment by the client.
>
> (2) Paragraph (1)(b) has effect irrespective of whether or not—
>
> (a) there exists a contract between the client and the worker, or
>
> (b) the worker is the holder of an office with the client."

8. The PAYE and NICs tests are not identical. That is confirmed in *Dragonfly Consultancy Ltd v Revenue and Customs Commissioners* [2008] EWHC 2113 (Ch) at paragraphs 9 to 17 of the judgment. While Ms Hicks submitted in her skeleton argument that the NICs test was broader, because it did not refer to the written terms

of the contracts, at the hearing both counsel took the position that any difference in language between the two tests was not relevant in this appeal. We have proceeded on that basis, and in our decision we focus on the wording of section 49 save where stated otherwise.

9. The Appellant bears the burden of proving that the intermediaries legislation does not apply, the standard being the ordinary civil standard of the balance of probabilities.

Evidence

10. The written evidence before us included the two successive contracts between KPL and Talksport for the services of Mr Hawksbee for the period under appeal. There were no written contracts between Mr Hawksbee and KPL. We were also provided with contractual documentation for work carried out by Mr Hawksbee for other clients in other areas. Additionally, we saw copies of discussions between Mr Hawksbee and Talksport, relevant Talksport working policies and the broadcasting code of the Office of Communications ("OFCOM").

11. Prior to the hearing, the parties had disagreed regarding the relevance to the appeal of a document called "Radio Industry Guidelines". This is a document apparently produced by HMRC in 2008 which deals with the employment status of various categories of worker in the radio industry. At the hearing, the parties agreed that this document was not justiciable, and we did not take it into account in reaching our decision.

12. We received witness statements from Mr Hawksbee and two other individuals on behalf of Mr Hawksbee. The first was from James Buckland, the Director of Strategy for Wireless Group, which owns and operates various radio stations including Talksport. Mr Buckland had never worked with Mr Hawksbee or KPL. He was in overall charge of regulatory compliance issues, although not with day-to-day compliance. Mr Buckland's statement dealt with provisions of the OFCOM code applicable to Talksport, and briefly described the protections taken by Talksport against breaches of the code. Mr Buckland was not called as a witness, and we admitted his witness statement as his evidence.

13. We heard evidence from Liam Fisher and had the opportunity to question him. Mr Fisher has been employed by Wireless Group since 2015 as its National Controller for Speech Radio. As part of that senior role, he has responsibility for the overall direction and budget of the Talksport station. During the period relevant to the appeal, he was Deputy Programme Director and then Programme Director of Talksport. We found Mr Fisher generally to be an honest and reliable witness, although we gained the impression that his evidence as to the lack of control exercised by Talksport over Mr Hawksbee was somewhat rehearsed and signalled a reluctance to deviate from an agreed position. We did not consider that this called into question his reliability in other areas or generally.

14. We also heard evidence from Mr Hawksbee and had the opportunity to question him. We found him to be an honest and reliable witness, with the one reservation that his responses to questions regarding control over his services by Talksport in the event that he and Talksport did not agree were somewhat evasive. Again, we did not consider that this called into question Mr Hawksbee's reliability in other areas or generally.

Issues to be determined

15. It was agreed that for the relevant years Mr Hawksbee personally performed services for Talksport as a client under a contract between KPL and Talksport. There were therefore only two issues before us. First, having made the necessary findings of fact, what would be the terms of the hypothetical contract between Mr Hawksbee and Talksport if the services had been provided directly? Secondly, would that contract be a contract for employment or a contract for services?

The intermediaries legislation

16. We deal below with case law authority on the approach to construction of the hypothetical contract.

17. In relation to the intermediaries legislation, its genesis was described as follows by Robert Walker LJ as he then was in *Professional Contractors' Group & others v Commissioners of Inland Revenue* [2001] EWCA Civ 1945:

> "3. On 9 March 1999, which was Budget Day, the Inland Revenue published (among numerous other press releases) one designated IR 35, which has achieved unusual notoriety. The press release began with what the trial judge described as unduly colourful language:
>
> " The Chancellor announced today that changes are to be introduced to counter avoidance in the area of personal service provision. This move underlines the Government's commitment to achieving a tax system under which everyone pays their fair share.
>
> There has for some time been general concern about the hiring of individuals through their own service companies so that they can exploit the fiscal advantages offered by a corporate structure. It is possible for someone to leave work as an employee on a Friday, only to return the following Monday to do exactly the same job as an indirectly engaged 'consultant' paying substantially reduced tax and national insurance.
>
> The Government is going to bring forward legislation to tackle this sort of avoidance. The Inland Revenue will be discussing the practical application of new legislation with interested parties and will work with representative bodies on the production of guidance. The new rules will take effect from April 2000." "

18. In fact, the legislation is somewhat broader than the press release would suggest. At paragraph 51 of that decision, Robert Walker LJ went on to state:

> "…the aim of both the tax and the NIC provisions (an aim which they may be expected to achieve) is to ensure that individuals who ought to pay tax and NIC as employees cannot, by the assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom's system of personal taxation".

19. Henderson J as he then was amplified this description in *Dragonfly Consultancy Limited v Commissioners of Inland Revenue* [2008] EWHC 2113 (Ch) as follows:

> "9. The method adopted by the legislation to achieve this aim, broadly stated, is to tax an individual worker…whose services are provided to a client… through an intermediary (such as Dragonfly) on the same basis as would apply if the worker were performing those services as an employee, provided that (in terms of the income tax test set out in paragraph 1(1) of schedule 12 to the Finance Act 2000):
>
> "(c) the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client."
>
> In other words, the legislation enacts a statutory hypothesis and asks one to suppose that the services in question were provided under a contract made directly between the client …and the worker …. If that hypothetical contract would be regarded for income tax purposes as a contract of employment (or service), the legislation will apply. Conversely, if the hypothetical contract would not be so regarded, the legislation will not apply.
>
> 10. It is important to notice that the effect of the statutory hypothesis is not automatically to transform all workers whose services are supplied through a service company into deemed schedule E taxpayers. On the contrary, as Robert Walker LJ stressed in paragraph 12 of his judgment in R (Professional Contractors Group) v IRC:
>
> "The legislation does not strike at every self-employed individual who chooses to offer his services through a corporate vehicle. Indeed it does not apply to such an individual at all, unless his self-employed status is near the borderline and so open to question or debate. The whole of the IR35 regime is restricted to a situation in which the worker, if directly contracted by and to the client "would be regarded for income tax purposes as an employee of the client". That question has to be determined on the ordinary principles established by case law …" "

Employment status—the authorities

20. In its "Good Work Plan" published in December 2018 The Government stated its intention to "legislate to improve the clarity of the employment status tests reflecting the reality of modern working relationships". The reforms to the off-payroll working rules are also due to be implemented next year. In our view, increased clarity is badly needed. We were referred to and considered over 50 decisions relevant or said to be relevant to the issues before us, often decided some time ago when working practices may have been very different. In addition, two of

the leading authorities, *Ready Mixed Concrete* and *Market Investigations*, are some 50 years old, with the terminology of "master and servant" more redolent of another era. The resultant uncertainty in relation to employment status is highly unsatisfactory.

21. The following authorities are in our view of particular importance in this appeal.

Relevant criteria and approach to employment status

22. The starting point is the judgment of MacKenna J in *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2QB 497. He stated, at page 515:

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

23. The first of MacKenna J's conditions is commonly referred to as "mutuality of obligation" and the second as "control". The third is a negative condition, taking account of other relevant factors. It was explained by MacKenna J as follows, at pages 516 to 517:

> "An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control."

24. The difficulty in setting down rigid rules to determine employment status was emphasised by Cooke J in *Market Investigations Limited v Minister of Social Security* [1969] 2QB 173 as follows, at 184:

> "…the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes," then the contract is a contract for services. If the answer is "no," then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor;

> and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task. The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him."

25. However, in *Hall v Lorimer* [1994] 1 WLR 209 the Court of Appeal expressed caution in applying Cooke J's approach too rigidly in the case of a professional supplying services. Nolan LJ stated as follows, at 216:

> "Mr. Goldsmith invited us to adopt the same approach as that of Lord Griffiths in applying the test or indicia set out by Cooke J. to the facts of the present case. That is an invitation which I view with some reserve. In cases of this sort there is no single path to a correct decision. An approach which suits the facts and arguments of one case may be unhelpful in another. I agree with the views expressed by Mummery J. [in the High Court] in the present case [1992] 1 W.L.R. 939, 944:
>
> "In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The process involves painting a picture in each individual case. As Vinelott J. said in *Walls v. Sinnett* (1986) 60 T.C. 150, 164: 'It is, in my judgment, quite impossible in a field where a very large number of factors have to be weighed to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are common, what are different and what particular weight is given by another tribunal to the common facts. The facts as a whole must be looked at, and what may be compelling in one case in the light of all the facts may not be compelling in the context of another case.'" "

26. At 218 Nolan LJ reiterated that once size does not fit all:

> "Again the question, whether the individual is in business on his own account, though often helpful, may be of little assistance in the case of

> one carrying on a profession or vocation. A self-employed author working from home or an actor or a singer may earn his living without any of the normal trappings of a business. For my part I would suggest there is much to be said in these cases for bearing in mind the traditional contrast between a servant and an independent contractor. The extent to which the individual is dependent upon or independent of a particular paymaster for the financial exploitation of his talents may well be significant. It is, I think, in any event plain that Cooke J. in *Market Investigations Ltd. v. Minister of Social Security* [1969] 2 Q.B. 173 was not intending to lay down an all purpose definition of employment."

Mutuality of obligation

27. In *Carmichael v National Power plc* [1999] I WLR 2042 (which concerned tour guides working on a "casual, as required" basis) the House of Lords referred (at 2047) to "that irreducible minimum of mutuality of obligation necessary to create a contract of service".

28. What does mutuality of obligation mean in this context? In a phrase first adopted judicially in *Cotswold Developments Construction Ltd v Williams* [2005] UKEAT 0457 05 2012, it refers to the "wage/work bargain". In a broad sense, this means an agreement by the recipient of services to pay a wage for work which the employee carries out. As we discuss below, what this requires of each party in more detailed terms is less clear.

29. Of course, once a contract is found to exist, it will almost inevitably contain mutual obligations of some sort. What is necessary in the present context is that those obligations must be "sufficiently work-related" if the first *Ready Mixed Concrete* condition is to be met: *Weightwatchers (UK) Ltd v HMRC* [2011] UKUT 433 (TC) at paragraph 23.

30. The case law establishes that mutuality of obligation in this context requires that the employee provides the services through his personal work or skills, and that the employer pays the employee for any work actually done.

31. It is considerably less clear whether the mutuality of obligation necessary to establish a relationship of employment also requires the putative employer to offer work and/or the putative employee to accept work. We were referred to a number of apparently conflicting judicial pronouncements on this issue.

32. For KPL, Ms Hicks submitted that a contract pursuant to which there was no obligation on the company to provide work or pay for work not rendered would lack the necessary mutuality of obligation to be an employment contract. She relied in support on the following passage from Park J's judgment in *Usetech Ltd v Young* (2004) All ER (D) 106 at paragraph 64:

> "The cases indicate…that the mutuality requirement for a contract of employment to exist would be satisfied by a contract which provided for payment (in the nature of a retainer) for hours not actually worked.

> It is only where there is both no obligation to provide work and no obligation to pay the worker for time in which work is not provided that the want of mutuality precludes the existence of a continuing contract of employment. See especially the *Clark* and *Stevedoring & Haulage* cases…"

33. It also followed from this, said Ms Hicks, that where there was no obligation on the individual to perform work offered, the necessary mutuality could not exist.

34. HMRC's submission, which reflects the position they have taken consistently in the decided cases, was that mutuality of obligation does not require the employer to offer work or the employee to accept an offer of work. Mr Stone referred in support to decisions such as *HMRC v Larkstar Data* [2008] EWHC 3284 (Ch); the comments of Special Commissioner Hellier (whose findings on the mutuality issue were not challenged in the High Court) in *Dragonfly Consultancy Ltd v HMRC [2007]* UKSPC SPC00655, at paragraph 50, and *Pimlico Plumbers v Smith* [2018] IRLR 872, at paragraph 40. The position was, Mr Stone submitted, clearly stated in *Cotswold Developments* at paragraph 55:

> "We are concerned that tribunals generally, and this tribunal in particular, may, however, have misunderstood something further which characterises the application of "mutuality of obligation" in the sense of the wage/work bargain. That is that it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. The focus must be upon whether or not there is some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it. Stevenson LJ in *Nethermere* put it as ". . . an irreducible minimum of obligation . . ." "

35. Having considered the various authorities (of which those mentioned above are only a selection) we have concluded that many of them are of limited assistance in establishing whether as a general proposition the mutuality test requires the employer to offer work and/or the employee to accept it. That is because they are dealing with factual situations where there were successive or multiple engagements, and the question being primarily addressed was the need for such obligations *outside* the various contracts and engagements. Those cases were not addressing the question which is before us, namely the need for such obligations within the confines of a particular contract. The passage from *Usetech* quoted above must in our view be understood in this context: it is referring not to the mutuality requirement necessary for the existence of a contract of employment *per se* but of a "continuing" contract of employment.

36. However, the dilemma which arises from simply accepting HMRC's broad principle, that mutuality does not require either the obligation to offer work or the obligation to accept it, is that it renders mutuality of very little assistance in distinguishing between service and services. If I offer to pay you if you perform certain services for me, and you can decide whether to do so, on its face that appears consistent with either employment or a contract for services.

37. It seems to us that this was the dilemma being expressed by Park J in *Usetech* at paragraph 60:

> "I would accept that it is an over-simplification to say that the obligation of the putative employer to remunerate the worker for services actually performed in itself always provides the kind of mutuality which is a touchstone of an employment relationship. Mutuality of some kind exists in every situation where someone provides a personal service for payment, but that cannot by itself automatically mean that the relationship is a contract of employment: it could perfectly well be a contract for free lance services."

38. Our conclusion is this. Mutuality as expressed as a condition in *Ready Mixed Concrete* does not necessarily require that within the confines of a particular contract or single engagement the employer must offer work, or that the employee must accept work offered, but the presence of such obligations is a touchstone of employment status, while their absence renders the bare existence of mutuality of limited assistance in determining employment status.

Control

39. The second of the *Ready Mixed Concrete* indicia is that the servant "agrees, expressly or impliedly, that in the performance of [the] service he will be subject to the other's control in a sufficient degree to make that other master".

40. The meaning of control and how to establish whether it exists was described in *Ready Mixed Concrete* as follows, at 515:

> "As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.
>
> "What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters." - *Zuijs **v**. Wirth Brothers Proprietary, Ltd*….
>
> To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication."

41. The most important issue is not whether the necessary control is in fact exercised day-to-day, but whether a "sufficient" contractual framework exists under which it can be exercised: *White v Troutbeck SA* [2013] EWCA Civ 1171, and *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318. In the latter case, the Court stated, at paragraph 19:

> "McKenna J made plain that provided (i) and (ii) are present (iii) requires that all the terms of the agreement are to be considered before the question as to the existence of a contract of service can be answered. As to (ii) he had well in mind that the early legal concept of control as including control over how the work should be done was relevant but not essential. Society has provided many examples, from masters of vessels and surgeons to research scientists and technology experts, where such direct control is absent. In many cases the employer or controlling management may have no more than a very general idea of how the work is done and no inclination directly to interfere with it. However, some sufficient framework of control must surely exist. A contractual relationship concerning work to be carried out in which the one party has no control over the other could not sensibly be called a contract of employment. McKenna J cited a passage from the judgment of Dixon J in *Humberstone v Northern Timber Mills* [1949] 79 CLR 389 from which I take the first few lines only:
>
> 'The question is not whether in practice the work was in fact done subject to a direction and control exercised by any actual supervision or whether any actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions.' "

42. In *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC, Lord Philips stated as follows, at paragraph 36:

> "In days gone by, when the relationship of employer and employee was correctly portrayed by the phrase "master and servant", the employer was often entitled to direct not merely what the employee should do but the manner in which he should do it. Indeed, this right was taken as the test for differentiating between a contract of employment and a contract for the services of an independent contractor. Today it is not realistic to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee. Many employees apply a skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus the significance of control today is that the employer can direct what the employee does, not how he does it."

43. HMRC sought to draw from this statement of Lord Philips a general proposition that nowadays the second condition in *Ready Mixed Concrete* no longer requires a consideration of control over "what, how, when and where" but only over "what" the individual does. While Lord Philips certainly expresses his view in general terms, we do not consider that it supports such a sweeping proposition. The passage must be seen in the context of the highly unusual facts and issues involved in the case, and in our view it is properly understood as making the narrower point noted in the following paragraph below, namely the limited assistance to be derived from the control test in relation to skilled or expert individuals.

44. In the case of a skilled or professional person, an absence of control as to the detailed way in which work is performed is not necessarily inconsistent with employment status: *Montgomery v Johnson Underwood*; *Market Investigations*; *Morren v Swinton and Pendlebury Borough Council* [1965] 1 WLR 576; *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 (Privy Council).

45. The control test must be considered as a factor, but will not be decisive: *Matthews and anor v Revenue and Customs Commissioners* [2012] UKUT 229 (TC), at paragraph 16. This is particularly so where the individual is engaged for his skills or professional expertise and experience. As Lord Parker stated in *Morren*, at 581:

> "The cases have over and over again stressed the importance of the factor of superintendence and control, but that it is not the determining test is quite clear. In *Cassidy v. The Minister of Health* [1965] 1 WLR 576 at 582 Somervell L.J. referred to this matter, and instanced, as did Lord Denning in the later case of *Stevenson, Jordan & Harrison v. McDonald & Evans* that clearly superintendence and control cannot be the decisive test when one is dealing with a professional man, or a man of some particular skill and experience. Instances of that have been given in the form of the master of a ship, an engine driver, or a professional architect, or as in this case, a consulting engineer. In such cases there can be no question of the employer telling him how to do work, therefore the absence of control and direction in that sense can be of little, if any, use as a test."

46. In *Autoclenz Ltd v Belcher* [2011] UKSC 41, Lord Clarke stated as follows, at paragraph 19:

> "Three further propositions are not I think contentious:
>
> i) As Stephenson LJ put it in *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612, 623, "There must … be an irreducible minimum of obligation on each side to create a contract of service".
>
> ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: *Express & Echo Publications Ltd v Tanton* ("*Tanton")* [1999] ICR 693, per Peter Gibson LJ at p 699G.
>
> iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg *Tanton* at p 697G."

47. HMRC cite the third of Lord Clarke's propositions as authority that in determining whether control is present, if a contractual right of control exists it does not matter whether it is exercised. In fact, the passage referred to by Lord Clarke in *Tanton* makes it clear that a somewhat subtler point is being made. In *Tanton*, the judge was held to have erred in determining the rights of the parties by starting not with the written contract between then but with their conduct in practice. The third proposition is in our view doing no more than reinforcing the guidance in *Ready*

Mixed Concrete that in determining whether control exists one should begin with the contract between the parties, not with their conduct. As to the primacy or otherwise of the written contract, we respectfully agree with the comments of the Upper Tribunal in *Weightwatchers* (at paragraphs 20 and 21) as to the interpretation of *Autoclenz.*

The third condition

48. As explained at paragraph 23 above, MacKenna J's third condition requires consideration of all relevant features of the contract, having first considered mutuality and control. Its categorisation as a "negative" condition was explained as follows by the Upper Tribunal in *Weightwatchers*, at paragraph 42:

> "Putting it more broadly, where it is shown in relation to a particular contract that there exists both the requisite mutuality of work-related obligation and the requisite degree of control, then it will prima facie be a contract of employment unless, viewed as a whole, there is something about its terms which places it in some different category. The judge does not, after finding that the first two conditions are satisfied, approach the remaining condition from an evenly balanced starting point, looking to weigh the provisions of the contract to find which predominate, but rather for a review of the whole of the terms for the purpose of ensuring that there is nothing which points away from the prima facie affirmative conclusion reached as the result of satisfaction of the first two conditions."

49. MacKenna J also emphasised the importance of the third condition, relative to the mutuality and control tests, in determining the nature of the contract: see 516B, and the statement at 517A:

> "[i]f the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, as the person doing the work will not be servant".

50. In *Market Investigations* Cooke J identified various factors which might be relevant. These were whether the worker 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 the extent to which he has an opportunity to profit from sound management in the performance of his task.

51. In *Novasoft Ltd v Revenue & Customs* [2010] UKFTT 150 (TC) the FTT stated as follows, at paragraph 22:

> "Mr Hall in his skeleton argument proposed the following list of factors for consideration, and we agree these are the relevant factors:
>
> (1) Extent and degree of control exercised by the client over the worker.
>
> (2) The worker's right to engage helpers or substitutes.
>
> (3) Mutuality of obligations between the worker and the client.

(4) Financial risk of the worker.

(5) Provision of equipment.

(6) Basis of payment of the worker.

(7) Personal factors.

(8) The existence of employee rights.

(9) Termination of the contract.

(10) Whether the worker was part and parcel of the client's organisation.

(11) Exclusive services.

(12) Mutual intention.

We bear in mind the admonishment of Mummery J not to treat this as a checklist to run through mechanically. Instead they are the factors that go towards painting the picture whose overall effect must be evaluated."

Findings of fact

52. There was no statement of agreed facts between the parties. We make the following findings of fact, indicating where the finding is based on inference rather than being a finding of primary fact.

Mr Hawksbee's professional career

53. Mr Hawksbee has been a comedy script writer since 1985. He has written scripts and generated ideas for a range of successful televisions shows, from 1985 until the present. His clients have included the BBC, ITV, Dave and Avalon. We find as a fact that Mr Hawksbee has been and is a successful script-writer with a reputation to match, as well as being known for presenting the radio show which arises in this appeal.

54. After a variety of other roles in television and sport, in 2000 Mr Hawksbee and his colleague, Andy Jacobs, began to write and perform a light-hearted cricket show for Talksport. At the end of 2000 Mr Hawksbee and Mr Jacobs were asked by Talksport to present a three-hour sports-based show each day from Monday to Friday. This was the Hawksbee & Jacobs Show ("The Show"), which has now been running for 18 years.

55. Mr Hawksbee's evidence, which we accept, was that his move into radio presenting was "a happy accident", and he has always regarded himself as a comedy writer, and The Show as only one string to his bow. The extent of his paid work outside The Show has varied considerably over the years, but overall has been considerable. For example, he wrote for all 161 episodes of the award-winning "Harry Hill's TV Burp" between 2002 and 2012. As well as being engaged on numerous television projects, Mr Hawksbee also works on generating format ideas for television shows.

56. We were provided with detailed breakdowns of Mr Hawksbee's income from Talksport and non-Talksport sources. We find the following as facts. For the three years which are the subject of this appeal, the income from Talksport comprised on average approximately 90% of his total income. We also considered evidence which showed that prior to this period his non-Talksport income was a higher percentage of his total income. For instance, for the two tax years preceding the period under appeal the Talksport income comprised approximately 70% of his total income.

57. Mr Hawksbee has not worked as a radio presenter outside his work on The Show.

Work with Talksport

58. From 2001 onwards, Mr Hawksbee and Mr Jacobs performed The Show pursuant to a series of two-year contracts. On the advice of his accountant, Mr Hawksbee set up KPL in January 2001 to provide his services on a range of projects. The contracts for Mr Hawksbee's services on The Show were with KPL.

59. For the period 2001 onwards, including the periods under appeal, we accept the evidence of Mr Hawksbee that while he was successful in renegotiating successive renewals of the contract, there was never any guarantee or certainty of renewal. In practice, Talksport would have an incentive, other things being equal, to offer renewal so long as the listening figures for The Show remained strong. Those figures are typically measured by numbers produced by Radio Joint Audience Research or RAJAR. As a commercial station, Talksport would also take into account the strength of sponsorship and advertising contracts for The Show.

Format of the Show

60. The Show is a sports entertainment show, created and hosted by Mr Hawksbee and Mr Jacobs. As Mr Fisher explained it, "the show is a sports and news show with a twist: its humour and originality is brought by Paul and Andy". It is broadcast live on weekdays between 1 pm and 4 pm. The only pre-recorded show is on Christmas Day.

61. Mr Hawksbee and Mr Jacobs have freedom to decide on the format and content of each show, and, subject to availability, the guests for each show, subject to four constraints. First, The Show must comply with OFCOM guidelines. Secondly, The Show must run adverts at set intervals and promotions for sponsors. Thirdly, The Show must have some news content as a requirement of Talksport's OFCOM licence. Fourthly, The Show must run travel bulletins twice an hour, again as a condition of Talksport's licence.

Preparation for The Show: a typical day

62. We accept Mr Hawksbee's evidence as to his typical preparation for The Show, which was consistent with the evidence of Mr Fisher and the written evidence. We find the following as facts. Mr Hawksbee keeps abreast of major sporting events and

news and reads newspapers and social media every day. He creates a "crib sheet" (copies of which we saw in evidence) of information and stories which he might use in that day's show, including potential guests. Some guests are booked well in advance, but fresh, topical material is important. If an interviewee has already been scheduled, he will prepare for the interview. At around 10.00 am, he will speak with Mr Jacobs to discuss that day's show. One of them will then call the show producer to inform him of their main ideas and requests for guests. Mr Hawksbee will usually arrive at the Talksport studio between 11.30 am and 12.15 pm. He will have a preparatory discussion with the producer and assistant producer. The producer will type the final running order for the show with approximate timings for guest slots, advertising breaks, news and travel bulletins. Mr Hawksbee will prepare a brief written introduction, being the only scripted element apart from advertising content.

63. When The Show finishes at 4.00 pm, Mr Hawksbee and Mr Jacobs will record a short introduction to the daily podcast, which features highlights of that day's show. Mr Hawksbee will usually leave the studio by 4.15 pm.

The production team

64. In addition to Mr Hawksbee and Mr Jacobs, a team produces the Show. The responsibilities of the Producer were described by Mr Fisher as follows:

> "First, they have the say in terms of what is permitted in keeping within our regulatory requirements (including OFCOM), as well as our legal constraints.
>
> Second, Producers oversee programming. Once the running order for the show has been agreed, s/he will be responsible for executing it and ensuring the show runs on time, breaking for adverts at the appropriate time, and ensuring other sponsorship material is delivered, such as show reads for sponsors/overall station messaging e.g. taglines.
>
> Finally, the Producer is responsible for ensuring that sponsorship deals are accommodated within the programming and that all advertising agreements are honoured; managing the budget, and monitoring listening figures."

65. The Technical Operator controls the audio equipment and is responsible for playing advertising breaks and jingles. The Phone Operator is responsible for guests and members of the public telephoning or contacting the show through social media. The Assistant Producer sits outside the recording gallery and provides day-to-day practical support to the Producer.

On air

66. We find the following as facts. While The Show is being broadcast, subject to the commercial and regulatory constraints described in [61] above, control over what is said and when rests very much with Mr Hawksbee and Mr Jacobs. While the Producer might alert them when an advertising break is due or a guest is ready for interview, we accept Mr Fisher's evidence that "the gallery still has to take its cue

from Paul. If he doesn't want to end an interview or cut to an ad break, we won't just bring the faders down, we'll wait for him to finish." If the Producer identifies a breaking news story he will alert Mr Hawksbee, but if Mr Hawksbee does not judge the story to be relevant he will not announce it.

67. As with many "live" broadcasts, the broadcast of The Show is in fact delayed by 14 seconds. This permits the use when necessary of the "dump button". We were provided with Talksport's general guidance issued to staff on the use of the dump button. This states that "the dump facility is provided to delete words/opinions that may land us in trouble for regulatory or legal reasons". Examples would be statements which breached the station's OFCOM guidelines, foul language or defamatory comments. The Producer, Technical Operator and show presenters have access to the button. If it is pressed a red light will appear on the transmission screen and the broadcast will be delayed for 7 seconds. If it is pressed again immediately the light goes out, the broadcast will be delayed for a further 7 seconds. The instruction in the guidance is that once the broadcast is live, the show should immediately go to a break and an internal follow up report initiated.

Activities for Talksport outside The Show

68. We deal below with the contractual obligations of KPL/Mr Hawksbee. In relation to Mr Hawksbee's actual activities outside The Show, we find as follows. Talksport would occasionally host drinks receptions for potential clients, focussed around major sporting events. Usually, all Talksport presenters would be invited. Mr Hawksbee attended some such event but missed many others due to other commitments including work engagements. Mr Hawksbee's evidence, which was not challenged by HMRC and which we accept, was that apart from such events Talksport did not at any stage (in the 18 years before and during the periods under appeal) require him to do anything for Talksport other than The Show. Mr Hawksbee does not contribute to the Talksport Twitter account.

The Contracts

69. There were two contracts relevant to the periods under appeal. The first, for a period of two years, was signed on 1 January 2012 ("Contract One"). The second, also for a period of two years, was signed by the parties on 18 December 2013 to take effect on 1 January 2014 ("Contract Two").

70. We now summarise the terms of each contract which are material to the issues before us. We then consider and make findings on certain provisions where one or both of the parties argued that that contractual provision did not reflect the true agreement between the parties.

Contract One

71. Contract One consists of a Letter of Engagement to which are appended "Terms and Conditions for Presenters". Clause 7 of the Letter of Engagement provides that

in the event of any conflict between the two, the terms of the Letter of Engagement would prevail. The relevant terms of the Letter of Engagement are as follows.

Introduction

72. The introduction refers to "the terms upon which the Company [Talksport] would like to engage you on a freelance basis as a presenter". The other signatory to the contract is not KPL but Mr Hawksbee: we discuss this below.

Engagement

73. This states "we engage you and you agree to provide to us the services referred to in Clause 3 on an exclusive basis on the terms and conditions set out in this Agreement".

Term

74. The Term of the engagement is two years commencing on 1 January 2012 unless terminated by either party on at least 4 months written notice.

75. It is stated that:

> "You will be required to work for a minimum of 222 days per year of the Term, and days not worked must be agreed with the Programme Director, but would normally occur if and when the services of the Presenter were not required".

76. At least 6 months prior to the end of the Term, the parties shall enter into good faith negotiations regarding the extension of the Term of the Agreement.

Services

77. Clause 3 states in full as follows:

> "You will provide us with the following services:
>
> 3.1 You shall be available to present (or co-present) a three hour (or such other duration as we may require) radio programme for live or pre-recorded transmissions for analogue and/or digital means between the hours of 1:00pm and 4:pm on Mondays to Fridays inclusive (the "Programmes") or on such other days and times as we may require at our 18 Hatfield studios or at such other location and station as we may require from time to time;
>
> 3.2 Should any Programme be cancelled on the day of broadcast for any editorial reason and your Services are not required on that day, then the applicable Fee for that day will remain payable to you and such days (if any) will be counted towards the minimum number of days to be worked by you per year;

> 3.3 You will make yourself exclusively available for a schedule of preparation and rehearsal as we shall reasonably specify from time to time and for such promotional and publicity engagements as we may reasonably require from time to time;
>
> 3.4 We shall have first call on your services at all other times in connection with the Programmes and notwithstanding any and all other commitments which you may have.
>
> (Together the "Services").

Exclusivity

78. Clause 4 states:

> "Notwithstanding any other provision of this Agreement, you shall be free to provide your services to television broadcasters and other commercial entities, provided that:
>
> (i) the provision of such services does not interfere with the provision of the Services by you under this Agreement; and
>
> (ii) you agree that you shall not provide your Services to any other UK radio broadcaster."

Fee

79. Clause 5.1 provides that as consideration for "all the Services rendered" Talksport shall pay KPL "a fee at the rate of £525 per Programme". The fee is payable monthly against production of an invoice from KPL.

80. It is stated that "the minimum fee paid and payable by the end of the Term will be based on 222 Programmes per year (such number to be reduced pro-rata if the contract is terminated before the end of the Term)".

81. Clause 5.3 states:

> "We are not obliged to broadcast any of the Programmes and shall be entitled to edit, alter or delete or transmit any part or aspect of the Programmes at our sole discretion".

Relationship between the parties

82. Clause 6 states that "this Agreement shall be a contract for services and not a contract of employment".

Terms and Conditions

83. The appended Standard Terms and Conditions for Presenters include provisions stating that the Presenter agrees that he shall during the Term:

(1) present the Programmes and in connection with the Programmes render all such services as are usually rendered by a first class radio presenter.

(2) unless otherwise directed by the Programme Director broadcast the station name on air at least 15 times per hour during the Programme.

(3) not provide services of the same or similar description to the Services to any other radio or television broadcaster without the prior consent of Talksport.

(4) not appear or take part in any advertisement broadcast by Talksport or be concerned in any promotional or sponsorship activities or agreements without the prior consent of Talksport.

(5) perform the Services "in co-operation with the Programme Director to whom the Presenter will report and in accordance with any budget or production schedule which may be notified to the Presenter from time to time".

(6) "conduct himself at all times both when providing the Services or in his free time in such a way as not to bring or to make it likely that he will bring either his own or Talksport's name or reputation into disrepute or in such a way as may jeopardise the successful production of Talksport programmes".

(7) comply with all instructions of Talksport including but not limited to those involving editorial and production matters, artistic taste and judgment.

(8) if so requested make himself available to publicise and promote the Programmes and Talksport generally, without additional compensation.

84. The Presenter will be reimbursed all travel and other expenses properly and reasonably incurred by him in the provision of the Services except for travel to and from the studio at 18 Hatfields.

85. Talksport may suspend the Presenter's engagement for various reasons. During any suspension the Fee will cease to be payable and the Presenter must continue to comply with those obligations under the Agreement which are not affected by the suspension. If suspended for potential misconduct, Talksport has the right during suspension to investigate the presenter's behaviour.

86. Talksport may terminate the Agreement immediately for cause.

Contract Two

87. The clauses of Contract Two which are materially relevant to this appeal are as follows:

"1. The Company has offered and the Freelance company [KPL] has accepted engagement, on the terms set out in this Agreement, to provide independent presenting services to the Company and/or any of its Group Companies in relation to such projects relating to the Company's business as shall, from time to time, be assigned to the Freelance Company by the Company (the Services). The terms of this Agreement shall include all preparation, publicity, promotion and transmission time required to fulfil the responsibility under this Agreement.

2. In consideration of the Services provided by the Freelance Company, the Company shall, within 28 days of receipt of an invoice submitted in accordance with Clause 10, pay to the Freelance Company a freelance fee as agreed from time to time, such sum to be exclusive of expenses properly incurred by the Freelance Company in the performance of the Services.

…

7. The Freelance Company or its employee(s), worker(s) or sub-contractors retained by the Freelance Company never has been, is not and shall not be deemed to be an employee of the Company for any purpose whatsoever. It is agreed that the Freelance Company is engaged to provide the Services and that this Agreement is not a Contract of Employment and at all times during the term of this Agreement the Freelance Company and its employee(s), worker(s) or sub-contractors will be self employed for all purposes and invoices and payments will be treated as such for tax purposes.

8. It is agreed that the Company is not obliged to assign Services to the Freelance Company under this Agreement and neither is the Freelance Company obliged to accept the assignment of Services under this Agreement.

…

10. The Freelance Company shall, on the last working day of each month during the period of this Agreement, submit an invoice to the Company giving details of the hours worked, the Services which it has provided and the amount of the fee payable for such services during that month.

…

13. For the avoidance of doubt, no fee shall be payable in accordance with this Agreement in respect of any period during which the Services are not provided.

14. During the term of this Agreement, howsoever arising, the Freelance Company may accept and perform assignments from other companies (with the exception of any competing audio service), firms or persons which do not impinge upon its ability to provide the Services at such times and in such a manner as may be convenient to the Company provided that the Freelance Company shall not accept any employment or engagement by any person, firm or company which impinges on its ability to uphold the obligation of confidentiality under

this agreement or for any entity which is in any way commercially competitive with any of the businesses of the Company and its Group Companies in each case without the prior written consent of the Company, such consent not to be unreasonably withheld. For the avoidance of doubt, written consent will not be required when accepting employment or engagement from an entity that is not commercially competitive with any of the businesses of the Company and its Group Companies.

…

23. Talksport Limited has the right to feature Paul Hawksbee on talksport.com and on other digital and mobile platforms. At Talksport's request, Paul Hawksbee shall contribute a reasonable amount of tailored exclusive content. Paul Hawksbee shall have the right to contribute to other websites, internet based outlets and mobile based outlets, providing such outlets are not directly competitive with Talksport and are subject to Talksport's approval (that shall not be unreasonably withheld or delayed). The Freelance Company and its employee Paul Hawksbee agree that during the term of this Agreement, Paul Hawksbee will contribute to the Talksport brand across all platforms, including online, on mobile, in Sport Magazine and in social media as well as on air. This forms part of his duties as a Talksport presenter and could take the form of, but is not limited to, providing audio, video, written and pictorial content for use in the talksport.com website, Sport Magazine and social media. This does not necessarily include content created for a third party's commercial purposes.

…

27. This Agreement shall terminate on either party providing the other with not less than four months' notice in writing or automatically without any requirement for notice or payment in respect of any outstanding period of the agreement in accordance with Clauses 4 [removal for underperformance] and 28…"

88. Clauses 26 and 28 contain provisions relating to suspension and termination for cause which are materially the same as those described above for Contract One.

89. Contract Two contains a Schedule of Services, as follows:

"**Nature of Work**

Kickabout Productions will provide Paul Hawksbee to present the 13.00-16.00 show for live or pre-recorded transmissions for analogue and/or digital means for a minimum of 222 shows per year at the Talksport studios at 18 Hatfields, London and at any such other times, locations and stations as the Company may require from time to time. Paul Hawksbee agrees to arrive in reasonable time to prepare for the shows. The Company reserves the right to make changes to the show times as and when requested.

As reasonably requested, Paul Hawksbee shall assist Talksport to promote their brand and advertising/sponsorship opportunities to agencies, brands and media in general. Paul Hawksbee will also act in an ambassadorial capacity for Talksport, including attendance at occasional functions. At all times Talksport will act reasonably in requesting Paul Hawksbee's time and will look to schedule any activity at times convenient to Paul Hawksbee.

Paul Hawksbee shall in the provision of his services, fulfil the proper, efficient and adequate devotion of his time and professional skills to meet his obligations under this Agreement.

Paul Hawksbee will make himself exclusively available for a schedule of preparation, rehearsal, programming meetings, conferences, interviews and contributions to the SPORT magazine and any meetings as Talksport shall reasonable specify from time to time and for such planning, promotional and publicity engagements as Talksport may reasonably require from time to time (including studio webcam).

Paul Hawksbee will, during the term of the Agreement, contribute to the Talksport brand across all platforms, including online, on mobile, in Sport Magazine and in social media as well as on air.

The Company may have reasonable call on Paul Hawksbee's services at all other times in connection with the programmes which he will endeavour to attend where reasonably practicable.

Duration of Contract

This Agreement will commence on 1 January 2014 until 31 December 2015.

Fees

Subject to the provisions of this Agreement for Services and to the due performance by the Freelance Company of their obligations under it, the Company shall as inclusive remuneration and as full and complete consideration for all the services rendered and for all rights, consents and benefits assigned and granted by the Freelance Company to the Company pay to Kickabout Productions a fee of £575 + VAT per show. The Freelance Company will invoice the Company for all work at the end of each calendar month in which the assignment is undertaken and Talksport agrees to pay all invoices in a timely manner.

This fee is applicable across the two years of this agreement. In addition, both parties will enter into a contract review after 12 months.

Payment of the fees will be made following the production of an appropriate invoice delivered to the Company in accordance with Clause 2."

Disputed written terms

90. We heard submissions from both Counsel to the effect that certain terms in the Contracts did not accurately record the agreement between the parties. Counsel also differed sharply as to the proper interpretation of certain provisions. Our conclusions on those issues are as follows.

91. We make two initial observations. First, in some cases the submissions were, in our opinion, not addressing the question of the true agreement reached between the parties so much as the question of whether or not a particular written term should be included in the hypothetical contract which we are required to construct in relation to the intermediaries legislation. While the hypothetical contract must be constructed taking into account the arrangements between the parties, the questions are properly considered separately. Secondly, as a matter of law the fact that a provision is "boiler plate", or that a party was not familiar with it or that it has not been enforced in practice does not mean that it is not one of the terms of the contract (in the language of section 49(4) ITEPA 2003) reached between the parties.

Contract one

92. The signatory to Contract One was not KPL but Mr Hawksbee. The parties were agreed that this was an administrative error, and the evidence from Mr Hawksbee and Mr Fisher confirmed this. We find as a fact that the contract was made between Talksport and KPL.

93. The conclusion at [94] below, and at [180] and [183], records the decision of the Tribunal by casting vote of Judge Scott. Mr Baker views the issue differently, for the reasons set out in an appendix to this decision.

94. Clause 2.1 states that Mr Hawksbee "will be required to work for a minimum of 222 days per year of the Term". There is a reference in parentheses in this wording to "note 1", but the contract contains no notes and the parties were unable to shed any light on what note 1 might have said. Ms Hicks submitted that this wording obliged Mr Hawksbee to perform the required work, and not, or not merely, to make himself available for that work. We agree. Mr Stone submitted that this wording also gave rise to an obligation, implied if not express, on Talksport to provide 222 days of work a year. We accept that there are arguments in favour of Mr Stone's contention. We do not consider that the wording of the contract can be interpreted as imposing an express obligation to this effect. It is however arguable that such an obligation should be implied, given the repetitive nature of the services and the expectations of the parties, but on balance we conclude that this clause (and the contract as a whole) imposes an obligation on Mr Hawksbee but not on Talksport.

95. Clause 3.4 states that Talksport shall have first call on Mr Hawksbee's services at all times other than (broadly) those for which he is required to prepare for and present the Programmes "in connection with the Programmes and notwithstanding any and all other commitments which [he] may have". Ms Hicks argued that this provision did not reflect the understanding of the parties. While we heard evidence from Mr Hawksbee and Mr Fisher which supported Ms Hicks' submission, we find that this provision was a term of the contract between the parties, though we accept that neither party expected it to be enforced in practice. We also find that a right of first call of some sort was a fairly common feature of the contracts with other providers (usually for script writing) which Mr Hawksbee entered into and of which we were shown numerous examples.

96. Paragraph 1.7 of the Standard Terms and Conditions appended to Contract One states that the presenter agrees that he shall "promptly and faithfully comply with all instructions of Talksport including but not limited to those involving editorial and production matters, artistic taste and judgment". Ms Hicks submitted that this provision was not a term of the contract because it "did not reflect reality and was contrary to all the evidence". In our opinion, this confuses the terms of the contract with the operation of the arrangements in practice. We consider below the degree of control exercised and exercisable by Talksport over Mr Hawksbee, but we were not persuaded that Paragraph 1.7 should not be regarded as a term of the contract in line with the other "standard" terms and conditions in the appendix.

97. The final provision of Contract One which calls for comment is contained within Clause 5.1, which sets out the fee per show payable by Talksport. The relevant sentence states that "the minimum fee paid and payable by the end of the Term will be based on 222 Programmes per year (such number to be reduced pro-rata if the contract is terminated before the end of the Term)". Mr Stone's position was that "this means what it says"—namely that (absent early termination) Talksport would be obliged to pay Mr Hawksbee at least £116,550 per year, regardless of the number of shows which Talksport required him to perform. It was, said Mr Stone, a guaranteed minimum payment or retainer, and as such a powerful indication of an employment relationship.

98. We reject Mr Stone's interpretation. First, we accept the clear evidence of both Mr Hawksbee and Mr Fisher that this was definitely not their understanding of the agreement between the parties. Rather, the mutual understanding was that KPL would be paid for shows done, and if a show was not done then (unless it was cancelled on the day) no fee would be paid or payable. Given the quantum of the amount which would be payable on Mr Stone's interpretation, we think it extremely unlikely that the parties could each have misunderstood the basic bargain between them in such a fundamental respect. Secondly, the wording in question must be construed not in isolation but in the context of the contract as a whole. We consider that the wording should be read together with the requirement in Clause 2.1 (discussed above) that Mr Hawksbee would be required to work for a minimum of 222 days per year. The respective obligations on Mr Hawksbee and Talksport are both set out by reference to the "minimum of 222" shows or days. So, provided that Mr Hawksbee meets his minimum obligation under Clause 2.1, the minimum fee from Talksport will be "based on" the number of shows required to meet that obligation.

Contract Two

99. Clause 8 of Contract Two states as follows:

> "It is agreed that the Company is not obliged to assign Services to the Freelance Company under this Agreement and neither is the Freelance Company obliged to accept the assignment of Services under this Agreement"

100. Mr Stone for HMRC submitted that this clause was inconsistent with other provisions of the contract, and was "a sham in the *Autoclenz* sense". He argued that it rendered the notice provisions in the contract meaningless and could not be reconciled with the requirement in the Schedule of Services (set out at [89] above) that Mr Hawksbee's services would be provided by KPL for a minimum of 222 shows per year.

101. Ms Hicks argued that there was no evidence to establish that Clause 8 did not reflect the true agreement between the parties. It was not open to the FTT to conclude that the clause was a sham when that point had not been put to Mr Fisher in cross-examination. Further, an expectation by the parties that work would be offered and undertaken was not the same as a mutual obligation to do so.

102. We consider below whether this clause would be included in the hypothetical contract. As to whether it accurately recorded the contractual agreement between the parties, we take from *Autoclenz* two relevant propositions. First, in determining the terms actually agreed, we must consider not only the written agreement but also evidence as to how the parties conducted themselves in practice, and what their expectations were. Secondly, as we set out above, the fact that a right in the written agreement has not been exercised does not necessarily mean that the right does not exist. We do not read *Autoclenz* as laying down that a written term in a contract can be disregarded only if it is a sham.

103. In giving their evidence, both Mr Hawksbee and Mr Fisher indicated that, firstly, they did not understand the fundamental bargain between the parties to differ as between Contract One (which did not contain an equivalent of Clause 8) and Contract Two, and, secondly, the clear expectation was that Mr Hawksbee would perform at least 222 shows a year. When directed to Clause 8 in questioning, Mr Hawksbee stated "it does seem a strange provision".

104. However, we have concluded that we would need to have seen clearer and more persuasive evidence than we did to justify a conclusion that Clause 8 was not a term agreed between the parties. We have therefore concluded that, subject to the important qualification in the following paragraph, it was part of that agreement. We are not persuaded that such an interpretation would render the notice clause in the contract meaningless. The contract could still operate in a meaningful way, including as to notice, without the more extensive mutuality of obligation which would arise in its absence.

105. That said, Clause 8 must still be interpreted if possible so as not to be inconsistent with the obligations contained in the Schedule of Services. We consider that this can be achieved by the following construction. By virtue of Clause 8 neither party is obliged to assign Services or accept an assignment of Services. However, if a "project" is in fact assigned under Clause 1, then by virtue of the Schedule of Services KPL must provide the services of Mr Hawksbee for a minimum of 222 shows per year. There is no corresponding obligation on Talksport to offer any minimum number of shows.

106. Unlike Contract One, Contract Two is silent as to any right of Talksport to edit, alter, delete or transmit any part of Mr Hawksbee's product. Mr Stone argued that "a similar right of editorial control must be implied by necessity" into Contract Two. While we agree with Mr Stone that the evidence from Mr Hawksbee and Mr Fisher was that the parties' methods of working did not materially change as between the two contracts, his submission elides the contractual position with the working practice. We are not persuaded that such a broad term should necessarily be implied by necessity. However, we do conclude below in our discussion of control that if under the second hypothetical contract the parties were to have failed to agree on a material aspect of the content of The Show, the ultimate right of control on that issue would rest with Talksport.

HMRC's submissions

107. HMRC's chief submissions were that the facts should be viewed realistically, as follows.

108. The intermediaries legislation applied to both Contracts. In each tax year under appeal, KPL agreed to provide the services of Mr Hawksbee to present the programme for a minimum of certain identified days (most Mondays to Fridays) and certain times (1 pm to 4 pm). The provision of services by Mr Hawksbee was consistent, regular and predictable.

109. The hypothetical contracts would have contained mutuality of obligation and the requirement for personal service by Mr Hawksbee. There would also have been the sufficient right of control by Talksport of Mr Hawksbee. The other terms of the hypothetical contracts would have been positively consistent with contracts of employment and there would have been no features inconsistent with contracts of employment.

110. In relation to mutuality of obligation, the fact that there was a series of contracts and no obligation to offer further work at the end of each contract was irrelevant. All that mattered was whether there was mutuality under each Contract. Mutuality does not require an obligation on the employer to offer work or on the employee to accept work. The question is whether there is *some* obligation on the individual to work and *some* obligation on the other party to provide or pay for it. This plainly existed under both Contracts. In any event, contrary to the Appellant's submissions, Talksport was in fact obliged to provide Mr Hawksbee with at least 222 days of work a year. Such a term should either be implied by necessity or derived from the expectations of the parties based on practice over several years.

111. In relation to control, a right of control is an important indicator of an employment relationship, but is not of itself decisive. The key question is not whether the employer has practical day-to-day control, but whether there is, to a sufficient degree, a contractual right of control. Per *Autoclenz*, if such a right exists it does not matter whether it is exercised. Whether there is the necessary framework of control must be considered taking into account the practical realities of the relevant industry. For a skilled person, such as Mr Hawksbee, an absence of control

as to the detailed way in which work is performed is not inconsistent with employment. Mr Hawksbee's contentions as to his degree of practical autonomy were very similar to those advanced by the taxpayer in *Christa Ackroyd Media Limited v HMRC* [2018] UKFTT 69 (TC), in which the FTT found that the BBC retained the contractual right of control consistent with an employment relationship. The limits of Talksport's practical control of Mr Hawksbee at the point of delivery are the same as they would be for an employed presenter.

112. In Contract One, Clauses 1.7 and 1.2 gave Talksport effective editorial control over The Show. A similar right of editorial control must be implied into Contract Two. While it is accepted that The Show is produced in a spirit of collaboration, the final editorial say always rested with Talksport.

113. Mr Hawksbee was only one member of the team producing The Show, so he was not himself producing a "thing" or a "product" as he suggested.

114. Under the hypothetical contracts, Mr Hawksbee would not have been in business on his own account. While he had other sources of income for the relevant tax years, that was not inconsistent with the engagement with Talksport which formed the vast majority of KPL's income for those years being a contract for employment under the hypothetical contracts. In any event, Mr Hawksbee's ability to carry out other presenting work was always subject to the restrictions in the Contracts relating to competing engagements.

115. Mr Hawksbee's work under the Contracts lacked any of the normal indicia of self-employment. There was no means for KPL to increase its profits from the engagement; no possibility of making a loss; no right to provide a substitute for Mr Hawksbee; no requirement to invest in equipment or staff, and no significant variability in the amount of work to be provided and paid for.

116. Stepping back from the detail of the hypothetical contracts, the picture which emerged was one of regular, predictable and substantial employment by Talksport.

KPL's submissions

117. For KPL, Ms Hicks' submissions were as follows.

118. The hypothetical contracts would have been for the services of Mr Hawksbee and not contracts of service. In particular:

(1) The requisite mutuality of obligation was absent.

(2) Talksport lacked sufficient control.

(3) Mr Hawksbee was in business on his own account as a comedy writer and broadcaster.

(4) Mr Hawksbee was not part and parcel of the Talksport organisation.

(5) The hypothetical contracts secured the services of Mr Hawksbee for the creation of The Show. He was only engaged to create The Show, and created a product for a set price.

119. In relation to mutuality, contracts pursuant to which there is neither an obligation on the company to provide work nor an obligation on it to pay for work not rendered will not be contracts of employment: *Usetech.* An expectation that work will be provided is not the same as an obligation to provide it. Where someone is only paid for work done, this may indicate that services are being provided on a freelance basis. Similarly, where there is no obligation on the individual to perform work offered, there will be insufficient mutuality of obligation.

120. It is accepted that the hypothetical contracts would not contain any right of substitution. However, in the circumstances this should carry little weight.

121. Control must exist "in a sufficient degree to make one party the master and the other his servant": *Ready Mixed Concrete*. Four points should be borne in mind in considering this formulation:

(1) The nature of the job may dictate certain requirements, including time and location, so that control over those factors would not be indicative of employment: *Hall v Lorimer.*

(2) Whilst it is the existence of a contractual right of control which is important, a "sufficient framework of control" must nevertheless exist for employment to arise. Control outside the performance of the stipulated services will not be relevant.

(3) What appears at first blush to be employer/employee control may in fact simply reflect the practicalities of a particular industry or environment: see, for example, *Matthews.*

(4) Where the same control is exercised over both employees and independent contractors alike, it cannot be the touchstone of employment: see *Marlen Ltd v Revenue & Customs Commissioners* [2011] UKFTT 411 (TC).

122. The third condition is to be given particular weight in this case. In *Ready Mixed Concrete*, MacKenna J examined the difference between a contract of service and a contract for services with a series of examples, at the end of the first of which he explained the difference as follows (at 516D):

> "It is not a contract to serve another for a wage, but a contract to produce a thing (or a result) for a price".

123. In *Market Investigations*, Cooke J emphasised that no exhaustive list can be compiled of whether services are being performed by a person in business on his own account, "nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases". Importantly, Cooke J's indicia of employment will not assist the analysis of a professional, as vocational

professions do not bear the same hallmarks of self-employment as tradesmen: see the Court of Appeal in *Hall v Lorimer*.

124. The requisite mutuality of obligation would be absent from the hypothetical contracts. There was no obligation on Talksport to provide Mr Hawksbee with any shows at all; both Mr Hawksbee and Talksport could, and did, cancel shows at the last minute, and Mr Hawksbee was only ever paid for the shows he did.

125. Under the hypothetical contracts, Talksport would not have a sufficient right of control in the performance by Mr Hawksbee of his services. Terms relating to compliance with Talksport policies and to OFCOM requirements applied to employees and contractors alike. Control as to the time and location of shows was simply a feature of live radio broadcasts. Any right of Talksport to edit, alter or delete Mr Hawksbee's work was only exercised over the show's content and not over Mr Hawksbee in the performance of his duties, and in any event was used only to ensure OFCOM compliance or to edit the running time of the show. The facility to use the "dump button" was not indicative of employment.

126. In practice, Talksport did not exercise sufficient control over Mr Hawksbee to make it his employer. He was not controlled in the preparation and research of The Show; he decided the content and shape of The Show; he could arrive at the studios whenever he chose before The Show was due to go on air; the pre-show meeting was minimal and confirmed choices made by Mr Hawksbee; he did not attend any post-show meeting, and he was not subject to appraisals. When The Show was on air, any control by Talksport was limited and was not indicative of employer/employee control.

127. Mr Hawksbee was in business on his own account. In the periods under appeal, that business was a broadcaster and comedy writer. Even when he was not earning income from other projects, he was investing time and resources into them, some of which came to fruition and some of which did not.

128. Mr Hawksbee was not "part and parcel" of Talksport. He was not invited to and did not attend staff meetings; he had no line manager; he was not subject to appraisals; he did not attend staff events and he did not integrate into Talksport.

129. Stepping back from the detail, Mr Hawksbee was not employed as a broadcaster. He was specifically engaged to create and present The Show. Those were the only material obligations on him. He produced a show and was paid a fee for each show he produced.

Constructing a hypothetical contract

130. For each of the two periods covered by Contract One and Contract Two, the legislation requires us to posit a direct contract between Talksport and Mr Hawksbee for the services under that contract and to determine whether "the circumstances" are such that it would be a contract of employment. We are told that the circumstances "include the terms on which the services are provided, having regard

to the terms of the contracts forming part of the arrangements under which the services are provided".

131. As stated in *Tilbury Consulting Ltd v Gittins* [2004] STD (SCD) 72, at paragraph 6:

> "The legislation calls for a two stage exercise. The first is to find the facts as they existed during the period covered by the decision. The facts to be found are those that serve to identify the 'arrangements' involving the intermediary and the circumstances in which those arrangements existed and the nature of the services performed by the 'worker'. The second is to assume that the worker…was contracted to perform services to the client…and to determine whether in the light of the facts as found [the worker] would be regarded as [the client's] employee."

132. While the terms of the contracts, which will usually but not always be found in the written terms, will be particularly important, regard must be paid in constructing the hypothetical contract to the wider circumstances, including the conduct of the parties. We have summarised at [102] above our understanding of the essential guidance given by the Supreme Court in *Autoclenz* as to when and to what extent it is necessary or justified in determining the arrangements between the parties to go beyond the terms of the written contracts.

133. As we state at [91] above, the fact that a provision has not been enforced or exercised does not necessarily mean that it is not part of the bargain between the parties. We have found assistance in the analysis of Smith LJ in the Court of Appeal in *Autoclenz,* which states (at paragraph 5):

> "In my judgment the true position…is that where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that that right was never exercised in practice does not mean that it was not a genuine right."

134. Where a contract contains an explicit statement of intention by the parties as to the nature of their relationship, the weight to be attached to such a statement in the hypothetical contract depends on whether the status of the relationship is otherwise relatively clear. As MacKenna J stated in *Ready Mixed Concrete,* at 513A:

> "It may be stated here that whether the relation between the parties to the contract is that of master and servant or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract. If these are such that the relation is that of master and servant, it is irrelevant that the parties have declared it to be something else. I do not say that a declaration of this kind is always necessarily ineffective. If it were doubtful what rights and duties the parties wished to provide for, a declaration of this kind might help in resolving the doubt and fixing them in the sense required to give effect to that intention."

135. In *Dragonfly Consultancy*, Henderson J referred to this passage in dealing with the issue in more detail, at paragraphs 53 and 55 of the decision:

> "53. …statements by the parties disavowing any intention to create a relationship of employment cannot prevail over the true legal effect of the agreement between them. It is true that in a borderline case a statement of the parties' intention may be taken into account and may help to tip the balance one way or the other: see *Ready Mixed Concrete* at 513B and *Massey v Crown Life Insurance Co* [1978] 2 All ER 576, [1978] 1 WLR 676, [1978] IRLR 31 (CA). In the majority of cases, however, such statements will be of little, if any, assistance in characterising the relationship between the parties.
>
> 55. I would not, however, go so far as counsel for HMRC who submitted that, as a matter of law, the hypothetical contract required by the IR35 legislation must be constructed without any reference to the stated intentions of the parties. If the actual contractual arrangements between the parties do include statements of intention, they should in my view be taken into account, and in a suitable case there may be material which would justify the inclusion of such a statement in the hypothetical contract. Even then, however, the weight to be attached to such a hypothetical statement would in my view normally be minimal, although I do not rule out the possibility that there may be borderline cases where it could be of real assistance."

The hypothetical contracts in this case

136. Two points were common ground between the parties. The first was that there would be two hypothetical contracts for the periods under appeal, to be constructed by reference to the periods covered by Contract One and Contract Two respectively. The second was that, although there was no written contract during the periods under appeal between KPL and Mr Hawksbee, there must by necessary implication have been a contractual relationship entitling KPL to control Mr Hawksbee in order for KPL to be able to satisfy its obligations under Contract One and Contract Two.

137. In constructing the hypothetical contracts, we have taken into account our conclusions, set out at [90] to [106] above, as to disputed terms of the agreements between the parties, and we have been guided by the principles set out at [130] to [135] above.

138. We have determined that the material terms of the two hypothetical contracts, in so far as relevant to the issues in this appeal, would be as follows.

Hypothetical Contract One

(a) Term

139. The contract begins on 1 January 2012 and lasts for 2 years unless terminated early.

140. Either party can terminate early with 4 months' notice. Talksport may terminate at any time for cause.

141. At least 6 months before the end of the term the parties will negotiate in good faith regarding a renewal of the agreement.

(b) Services

142. Mr Hawksbee ("PH") will present or co-present The Show for live transmission between 1 pm and 4 pm Mondays to Fridays at 18 Hatfields. Talksport can change the time and place of The Show.

143. PH must work for at least 222 days per year during the agreement.

144. PH will make himself available for preparation for, rehearsal and promotion of The Show as reasonably required by Talksport.

145. Talksport has first call on PH's services in connection with The Show.

146.There is no right to substitute any other person for PH.

(c) Fees

147. PH will be paid £525 per Show, payable monthly against an invoice.

148. PH will be paid only for Shows done, except that if Talksport cancels a show on the date of transmission PH will be paid for that show.

(d) Exclusivity

149. PH cannot provide the same or materially similar services to those set out in this agreement to another UK radio broadcaster. PH cannot take part in any promotional or sponsorship activities without Talksport's prior consent. PH is otherwise free to provide his services to any other person as long as it does not interfere with his provision of services under this agreement. [*Note*: While the restriction in the Terms and Conditions of Contract One is slightly different to the restriction in the Letter of Engagement, in view of the statement that the latter prevails in the event of any conflict with the former, we conclude that the form of

restriction in the Letter of Engagement would be included in the hypothetical contract].

(e) Control

150. It is expected that PH will decide the format and content of The Show, subject to regulatory and advertising constraints, but Talksport reserves the right to edit, control or delete any part of The Show, and PH must comply with Talksport's instructions in relation to The Show.

(f) Relationship between the parties

151. PH is engaged under this agreement on a freelance basis and is not an employee of Talksport.

152. PH has no rights by virtue of this agreement (other than statutory rights) to any holiday, sick pay, pension or paternity leave.

153. PH is not subject to or entitled to any of the processes for appraisals, grievances or disciplinary matters applicable to Talksport employees. He can be investigated for misconduct.

(g) Other

154. While on Talksport's premises, PH will comply with all rules and regulations, including OFCOM regulations, which are generally applicable to persons on the premises.

155. PH will not bring himself or Talksport into disrepute.

156. PH is not obliged to undertake any training.

157. PH is entitled to reimbursement of reasonable expenses, other than the expenses of travelling to and from 18 Hatfields, against production of proof of expenditure.

Hypothetical Contract Two

(a) Term

158. The contract begins on 1 January 2014 and lasts for 2 years unless terminated early.

159. Either party can terminate early with 4 months' notice. Talksport may terminate at any time for cause.

160. 12 months before the end of the terms the parties will negotiate in good faith regarding a renewal of the agreement.

(b) Services

161. PH will present The Show for live transmission between 1 pm and 4 pm Mondays to Fridays at 18 Hatfields. Talksport can change the time and place of The Show.

162. Talksport is not obliged to assign Services to PH and PH is not obliged to accept an assignment of Services, but if the project described in the preceding paragraph is assigned, then PH must work for at least 222 days per your during the agreement.

163. PH will arrive at the studio in reasonable time to prepare for The Show and will make himself available for preparation for, rehearsal and promotion of The Show as reasonably required by Talksport.

164. Talksport has reasonable call on PH's services in connection with The Show.

165. PH shall contribute to the Talksport brand [see Clause 23 of Contract Two at [87] above and second paragraph of Schedule of Services at [89]].

166. There is no right to substitute any other person for PH.

(c) Fees

167. PH will be paid a fee of £575 per Show, payable monthly against an invoice.

168. PH will be paid only for shows done.

(d) Exclusivity

169. PH cannot accept work for any competing audio service or commercially competitive entity without the prior consent of Talksport, such consent not to be unreasonably withheld. PH is otherwise free to provide his services to any other person so long as it does not impinge on his duty of confidentiality or interfere with his provision of services under this agreement.

(e) Relationship between the parties

170. PH is engaged under this agreement on a freelance basis and is not an employee of Talksport.

171. PH has no rights by virtue of this agreement (other than statutory rights) to any holiday, sick pay, pension or paternity leave.

172. PH is not subject to or entitled to any of the processes for appraisals, grievances or disciplinary matters applicable to Talksport employees.

(f) Other

173. While on Talksport's premises, PH will comply with all rules and regulations, including OFCOM regulations, applicable to persons on the premises. He can be suspended pending an investigation into suspended misconduct.

174. PH will not bring himself or Talksport into disrepute.

175. PH is not obliged to undertake any training.

176. PH is entitled to reimbursement of reasonable expenses, other than expenses of travelling to and from 18 Hatfields, against production of proof of expenditure.

Mutuality of obligation

177. Our conclusions in relation to the first of MacKenna J's indicia can be summarised as follows:

> (1) The "wage/work" bargain required for employment to exist requires as a bare minimum that the employee provides the required services through his personal work or skills, and that the employer agrees to pay for work actually done.
>
> (2) The authorities are not consistent as to whether mutuality also requires the employer to be obliged to offer work.
>
> (3) In our view, mutuality of obligation does not necessarily require that within the confines of a particular contract or single engagement the employer must offer work, or that the employee must accept work offered, but the presence of such obligations is a touchstone of employment status, while their absence renders the bare existence of mutuality of limited assistance in determining employment status.

178. We turn to the extent and nature of the mutuality of obligation under the two hypothetical contracts.

179. Under Hypothetical Contract One, the bare minimum of mutuality of obligation does exist, because Mr Hawksbee must provide the services personally, and Talksport must pay for them.

180. In terms of the obligations on the parties, Mr Hawksbee is obliged to work for at least 222 days a year. However, Talksport is *not* obliged under the hypothetical contract to provide work to Mr Hawksbee, even though in practice both parties expected that he would perform the minimum number of shows each year barring unforeseen circumstances.

181. In view of the lack of obligation on Talksport to provide work, we consider that, although the mutuality required by MacKenna J's formulation does exist, it is not strongly indicative of an employment relationship. A full-blooded employment relationship would typically require an employer to provide work to the employee, not merely for the employee to be obliged to undertake it.

182. Turning to Hypothetical Contract Two, the only material difference to Hypothetical Contract One is that it contains a provision that Talksport is not obliged to assign services, and Mr Hawksbee is not obliged to accept an assignment of services. Whatever the intention of this provision in Contract Two itself may have been (as to which we received no evidence) we do not consider that its inclusion in the hypothetical contract prevents mutuality from arising. For the reasons set out at [99] to [105] above, we find the arrangement between the parties to be that, once a "project" is assigned, the characteristics necessary for mutuality will arise, and this is what occurred in practice. So, from an early stage in the life of Hypothetical Contract Two, the relevant mutual obligations of the parties (including the obligation on Mr Hawksbee to work 222 days a year) were in fact triggered.

183. Again, the absence of any obligation on Talksport to provide work to Mr Hawksbee under Hypothetical Contract Two means that the mutuality which arises is not strongly indicative of an employment relationship.

Control

184. Our consideration of the authorities relating to the second of MacKenna J's indicia leads us to conclude as follows:

(1) Control includes the power to decide what, how, when and where. As MacKenna J expresses it at 515:

> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant…"

(2) If the right of control is not expressly provided in the contract, where it lies must be answered by implication and by reference to all the circumstances: *Ready Mixed Concrete, Autoclenz.*

(3) The practical, day-to-day exercise of control is less significant than the existence in the contract of a sufficient framework of control: *White v Troutbeck, Montgomery, Autoclenz.*

(4) For a skilled or professional person, the absence of control as to *how* work is performed is not necessarily inconsistent with employment status: *Montgomery, Market Investigations, Morren, Lee Ting Sang.*

(5) For a skilled or professional person, control will not be the decisive test of employment status: *Matthews, Morren.*

185. We also consider that control which applies to employees and non-employees alike is of no material assistance as an indicator of whether control sufficient for an employment relationship exists. We place into this category three areas in which Talksport has control in a broad sense over Mr Hawksbee under both hypothetical contracts. First, compliance with OFCOM guidelines is a form of control which

Talksport confirmed in evidence would be imposed on employees and non-employees alike. The adverse consequences of an OFCOM breach fall in the first instance on Talksport itself, so it is not surprising that this is the position. We include under this head the obligations for The Show to include a certain minimum content of news and travel information imposed by OFCOM. Those obligations in substance reflect control of Talksport by OFCOM rather than control by Talksport of Mr Hawksbee. Secondly, we find that the obligations on Mr Hawksbee to comply with Talksport rules and regulations (such as those applicable to health and safety) again apply without discrimination to employees and non-employees alike. Finally, the fact that Talksport can pause broadcast of The Show for a limited time by using the "dump button" is simply a facet of The Show being a live broadcast. We accept the evidence from Talksport that it could and would be used in any live broadcast, and it is not in our view an indicator of employment or its absence.

186. With these principles in mind, we find that the position under the two hypothetical contracts would be as follows.

187. Under both hypothetical contracts, Talksport has control over the *where* and *when*: see [142] and [162] above. Ms Hicks submitted that such control was not strongly indicative of an employment relationship, because it would likely have applied to a contractor equally, and it primarily reflected the practicalities of producing a live studio-based radio show. We broadly agree with that submission. Certainly, control over the where and when is in this case considerably less significant than control over the how and what.

188. In relation to whether Talksport would have control under the hypothetical contracts of *how* Mr Hawksbee performed his services, we do not consider it helpful to see this as a binary question. A distinction can usefully be drawn in the context of this appeal between three aspects of such control, which we consider in turn, namely:

> (1) Practical control over The Show while it is being broadcast.
>
> (2) Practical editorial control over the content and format of The Show before each broadcast.
>
> (3) Ultimate control in the event of an unresolved dispute relating to the content or format of The Show.

189. While The Show is being broadcast, with the limited exception of the "dump button", Talksport cannot control how Mr Hawksbee performs his services. Some FTT decisions on the intermediaries legislation have placed weight on the absence of such control in similar contexts in considering the *Ready Mixed Concrete* control test. In our view, it should be afforded little weight. In relation to less modern roles than that of live broadcaster (such as a surgeon or the master of a ship) the authorities indicate that the absence of such control should be regarded as primarily a consequence of the practicalities of engaging a skilled expert to perform a "real time" task. We consider that those authorities have force in the context of this appeal. Expressed another way, we do not accept that the absence of minute-by-

minute control which is inherent in a live broadcast is of itself a strong indicator one way or the other.

190. We turn to practical and editorial control over the content and format of The Show in advance of each broadcast. We find as a fact that Mr Hawksbee was afforded an extremely high degree of autonomy by Talksport in this respect. Save for the regulatory and advertising constraints referred to at [61] above, Mr Hawksbee was free to decide on all material aspects of the show. He was not required to read from a script; he chose the preferred interviewees, and he chose the stories or events to include. In short, he chose what to say and how to say it, and his creative freedom was very considerable. We accept Mr Fisher's evidence that what Talksport were paying for was the show as devised and presented by Mr Hawksbee and his co-presenter.

191. That is not to say that the ultimate right of control over how the services were provided lay with Mr Hawksbee. We find that in practice disagreements between Mr Hawksbee and Talksport in relation to the content of a forthcoming show were amicably resolved, with Talksport generally acceding to Mr Hawksbee's position. However, we have found that under Hypothetical Contract One Talksport reserved the right to edit, control or delete The Show: see [150] above. Under Hypothetical Contract Two, while we were not persuaded that a term of such breadth must be implied by necessity given its absence from the second written contract ([106]), we do find that, if there were to have been a disagreement between the parties as to a material aspect of a forthcoming show, the ultimate right to decide that issue must by implication have rested with Talksport. Mr Hawksbee and Mr Fisher grudgingly conceded as much in cross-examination, and we do not see how it could sensibly have been otherwise given Talksport's commercial and regulatory obligations. Talksport also had the means (via the Producer) to enforce control.

192. The final limb of control as formulated by MacKenna J is control over *what* services may be required. In our view, a right to direct that a broad category of services be performed under a hypothetical contract is more indicative of a master/servant relationship, while the narrower the services which may be required the more likely it is that the contract is for services. As older authorities might have expressed it, can an individual who is engaged as a gardener be required under the contract to paint the owner's house?

193. Under both hypothetical contracts, Talksport's control over the "what" is relatively narrow. It extends only to the preparation and presentation of The Show, with some ancillary obligations relating to promotion of the Talksport brand.

194. The control in this case can be contrasted with the BBC's control over Ms Ackroyd in *Christa Ackroyd*. In that case, the FTT found that, although both parties expected that Ms Ackroyd would be required to present the Look North show, the BBC's rights under the hypothetical contract to control what Ms Ackroyd could be required to do were much broader: see in particular paragraphs 41 and 160 of the decision.

195. It is appropriate at this juncture to comment on other recent FTT decisions relating to the intermediaries legislation and (television rather than radio) presenters. Since the hearing of the appeal in this case, the decisions have been published in *Albatel Limited v Revenue & Customs Commissioners* [2019] UKFTT 195 (TC) and *Atholl House Productions Ltd v Revenue & Customs Commissioners* [2019] UKFTT 242 (TC). We have not requested or received submissions from either party on the relevance of those decisions in this appeal. We do not consider that such submissions would be of material assistance for three reasons. First, we are not bound by other FTT decisions. Second, the application of IR35 turns critically on the facts of any particular hypothetical contract. Third, as a reading of the three decisions in *Ackroyd*, *Albatel* and *Atholl House* shows, the approach and weighting of individual factors adopted by the FTT in each case varies considerably, making it even more difficult to identify generally applicable principles in an appeal such as this. We will, however, comment on certain issues which arose in *Ackroyd* (which we are aware is being appealed) where we consider them helpful in explaining our reasoning in this case.

196. Our conclusions in relation to the relevant aspects of control may be summarised as follows. Under both hypothetical contracts, Talksport controlled the where and when, but that is of relatively little significance compared to control of the how and what. In relation to how Mr Hawksbee performed his services, Talksport had no effective control of a live broadcast, but we place little weight on this. In advance of each broadcast, editorial and artistic control of the content and format lay almost entirely with Mr Hawksbee. However, the ultimate right of control in advance of a broadcast if the parties had been unable to agree on a material issue would have rested with Talksport, with that right being somewhat broader under the first hypothetical contract than the implied right under the second. In relation to control over what services Mr Hawksbee could be required to provide, under both hypothetical contracts this was limited to The Show and some ancillary obligations to promote the brand. Talksport could not, for instance, require Mr Hawksbee to act as a researcher or script writer, to read the sports results, or to perform any role in relation to any other Talksport show.

The third condition: other terms

197. We consider now the other relevant terms present in or absent from the hypothetical contracts, and the extent to which they point towards or away from an employment relationship.

Exclusivity/right of call

198. Under Hypothetical Contract One, provided it does not interfere with his obligations under that contract, Mr Hawksbee is free to provide any services to any other person, with the proviso that he cannot provide services similar to those he must provide to Talksport under the contract to any other UK radio broadcaster. Additionally, Talksport has first call on Mr Hawksbee's services, but only in relation to The Show.

199. Under Hypothetical Contract Two, provided it does not interfere with his obligations under that contract or his duty of confidentiality, Mr Hawksbee is free to provide any services to any other person, with the proviso that he cannot work for a competing audio service or commercially competitive entity without the prior consent of Talksport, such consent not to be unreasonably withheld. Additionally, Talksport has "reasonable call" on Mr Hawksbee's services, but only in relation to The Show.

200. The case law is somewhat inconsistent in relation to the weight to be attached to rights of exclusivity or call in relation to the third *Ready Mixed Concrete* criterion. In *MDCM Ltd v Revenue & Customs Commissioners* [2018] UKFTT 201 (TC) the FTT noted as follows:

> "**Exclusive services**
>
> 69. HMRC did not rely on this point as exclusivity can be a feature of employed and self employed contracts".

201. We consider that this statement over-simplifies the potential significance of rights of exclusivity. While such rights arguably apply to a situation outside the contract, they can nevertheless in our view be a material indicator of a master/servant relationship. Whether they are in any particular case turns on all the facts, including in particular the breadth of the rights reserved to the company. We observe that in *Ackroyd*, for instance, the rights were considerably broader than in this appeal: see paragraphs 40, 47 and 177 of the decision.

202. In this case, the rights of exclusivity and first/reasonable call are in principle indicative of an employment relationship more than a contract for services. However, the weight we afford to that is mitigated by a number of factors. We accept the evidence of Mr Fisher that the purpose of the exclusivity provisions from Talksport's perspective was the protection of the commercial brand attached to The Show, including the avoidance of the audience confusion which might arise if Mr Hawksbee presented a similar show on another station, and that those interests would have been protected contractually whether Mr Hawksbee was an employee or a contractor. We also accept the evidence that in practice there was probably only one other radio station which might present a similar show, meaning that the restriction was narrow in effect. Finally, it is relevant that, while Mr Hawksbee would certainly have been restricted in his freedom to act as a radio presenter, there was no restriction applying to the ways in which he habitually earned income outside The Show, being primarily as a television script writer.

Duration of contracts

203. Each hypothetical contract was for a duration of two years unless terminated early. Termination other than for cause required four months' notice from either party. In each contract there was an obligation to enter into good faith discussions regarding renewal.

204. Ms Hicks argued that the two-year terms pointed to services, while Mr Stone argued that the notice periods pointed to employment. We were not persuaded by either submission, and we find that these terms were broadly neutral.

205. We discuss below the relevance of contracts for The Show being renewed over a period of many years.

Substitution

206. Neither hypothetical contract contained any right for another person to be substituted for Mr Hawksbee. Given our finding that Talksport were contracting for the unique expertise and work product of Mr Hawksbee, this is scarcely surprising. The very show featured Mr Hawksbee's name, and we regard the position as even more clear cut than in *Ackroyd*, in which the FTT concluded (at paragraph 168):

> "We agree that it points towards employment, but it is not a significant factor. In the context of the anchor of a current affairs programme, whether or not that person is self-employed it is unlikely that they would be entitled or expected to provide a substitute…"

Holiday, sick pay, pension, paternity leave

207. Neither hypothetical contract contained any rights in respect of holiday, sick pay, pensions or paternity leave.

208. Mr Stone argued that this was immaterial, for two reasons. The absence of such provisions from the actual contracts was simply a consequence of those contracts being between companies. Further, if, as HMRC contended, Mr Hawksbee was an employee, then he would as a result have various statutory entitlements to rights in those areas under the hypothetical contracts.

209. We have no hesitation in rejecting the second argument as entirely circular. The former argument was apparently accepted in *Ackroyd* (at paragraph 171 of the decision), but we also reject that argument. Under both actual contracts, there was nothing to have prevented the parties from negotiating and incorporating provisions for monetary amounts corresponding to such payments and/or for KPL to remain entitled to payments if Mr Hawksbee was unable to fulfil an engagement because he was sick or on paternity leave. In fact, the contracts, and the corresponding hypothetical contracts, are scrupulous in making clear that the only financial liability on Talksport is to pay a fixed fee per show actually performed (unless, under Contract One, it is cancelled on the day of broadcast).

210. We regard the absence of any provisions in these areas from the hypothetical contracts as a pointer away from employment. Mr Baker does not regard this as material, for the reasons set out in an appendix to this decision.

Other rights and obligations potentially indicative of employment

211. Neither hypothetical contract contained provisions relating to any of the following areas:

(1) Medicals

(2) Training

(3) Appraisals

(4) Formal disciplinary procedures

(5) Grievance procedures

212. We consider the absence of any such provisions, which are typically though not invariably found in employment relationships, to be a pointer away from employment.

Payment obligations

213. We consider that the fact that payment is due on a monthly basis under both hypothetical contracts is neutral.

214. However, other aspects of Talksport's financial obligations are in our view indicative of a contract for services rather than a contract of service. Under both hypothetical contracts, the payment obligation is not a salary but a fee per show. While the contracts do refer to a broadcast show lasting for three hours, the financial obligations are in no way dependent on the number of hours in fact worked by Mr Hawksbee for Talksport, or the number of hours for which he is "at work". Additionally, and significantly, no retainer or minimum payment is due under either hypothetical contract, and Mr Hawksbee could not earn any performance related success fee, both being factors present in Ms Ackroyd's case.

Financial risk

215. Mr Stone submitted that an indicator of the fact that Mr Hawksbee was not "in business on his own account" was that he bore no financial risk, because there was no means by which he could increase his profits from the engagement, and no realistic possibility of making a loss.

216. Looking solely at each hypothetical contract in isolation, Mr Stone's description of financial risk is accurate. However, we do not consider that this indicates that Mr Hawksbee is not in business on his own account. In the first place, for a skilled professional such as a presenter, the "opportunity to profit" comes not directly from the management of labour costs and other expenses, but from performing the job well, so that work continues to flow and the individual's professional reputation is enhanced. Additionally, in this appeal there is a link between financial risk and Talksport's payment obligations. Talksport paid a fee per show, regardless of how long it took Mr Hawksbee to research and prepare for each show. The effect of this was that his financial risk turned on opportunity cost; his

ability to continue to do other work and to generate and progress opportunities depended on how effectively he managed his time outside the three hours per weekday when The Show was on air. For example, we find as a fact that during the periods in this appeal Mr Hawksbee was offered the opportunity to work as a writer on a new show called "Taskmaster", which is now in its sixth series, and he turned it down largely because it would clash with The Show. In our view, the engagements in this appeal did give rise to clear financial risk in this way.

Market Investigations criteria

217. In *Market Investigations*, Cooke J identified various factors which might be relevant to the third condition. These included whether the worker provides his own equipment; whether he hires his own helpers, and what degree of responsibility for investment and management he has.

218. We find as a fact that Mr Hawksbee used his own equipment (such as laptop, mobile phone and home office) in the research for and preparation of The Show, and used Talksport equipment during the broadcast of The Show. He did not have his own office or desk at Talksport premises. While he did not hire his own helpers, he had the right to do so. He had no responsibility for investment in The Show. His responsibility in relation to "management" of The Show is as set out above in our discussion of Control. We observe that many employees have no responsibility for investment and management, and it is difficult to see its relevance in this appeal.

219. We consider that taken together these factors are broadly neutral.

Intentions of the parties

220. Both hypothetical contracts included unequivocal statements that the parties intended the relationship to be a contract for services and not a contract of service.

221. We have set out at [134] and [135] the guidance in the authorities as to the weight to be given to such statements. As MacKenna J expressed it, this turns on whether the status of the relationship is otherwise clear, or whether the position is doubtful. In Henderson J's words in *Dragonfly*, there may be borderline cases where such statements could be of real assistance.

Part and parcel

222. To what extent was Mr Hawksbee "part and parcel" of the Talksport organisation, being a status normally more associated with employment?

223. Ms Hicks pointed out a number of factors indicating that Mr Hawksbee was not part and parcel of the organisation. He had no line manager, himself had no line management responsibilities, and was subject to no appraisal process; he was not subject to formal disciplinary or grievance procedures; he did not undertake any training and could not be obliged to do so; he received no employee benefits; he did

not attend Talksport staff events; his security card gave him physical access only to the production studio floor, and he had no Talksport business card.

224. Mr Stone submitted that all of these factors were irrelevant. Mr Hawksbee was "an integral part of Talksport's schedule", with the longest running show on the station. He carried out Talksport's core function of connecting with listeners and was by any measure considered by listeners to be part of Talksport.

225. We find as facts that Ms Hicks' statements as to the factual position were correct. The cumulative impression created by those facts is far from irrelevant when considering a concept so inherently based on impression as whether someone is "part and parcel" of an organisation. It would follow from Mr Stone's approach that any presenter or performer who became a recognised part of a show should be seen as part and parcel of the organisation which produced that show. It seems to us that that approach begs the question. We consider that although Mr Hawksbee was undoubtedly strongly associated by listeners with The Show, the factors identified above do not support the view that he was part and parcel of the Talksport organisation.

The wider context

226. In considering the contracts in this appeal, is it legitimate to take account of events outside those contracts? If so, is it also legitimate to take account of other periods, in particular the fact that Mr Hawksbee has co-presented The Show for 18 years? We consider that the answer to both questions is yes, but with certain caveats as to the latter.

227. It must be relevant for the periods under appeal to take account of the proportion of Mr Hawksbee's total income represented by the income earned from the contracts. Other things being equal, a high degree of economic dependency is more indicative of employment. In this case, the income from the Talksport contracts comprised on average approximately 90% of Mr Hawksbee's total income for the periods under appeal. That indicates a high degree of economic dependency for those periods.

228. In relation to periods outside this appeal, HMRC placed considerable emphasis on the fact that Mr Hawksbee had "presented the show for 18 years". We agree that this is a relevant fact, but we do not consider that it bears the weight suggested by HMRC, for three reasons. First, the successive renewals of the two-year contracts over that period were in no way guaranteed, and we have found that renewal depended critically on the continued success of The Show, measured primarily by listening figures and sponsorship revenue. We do not accept the "stability" which HMRC suggested must be inferred from the total period. Secondly, if that longer period is taken into account, it must be relevant that the degree of economic dependency on the Talksport contracts varied considerably over that period, with a markedly higher percentage of Mr Hawksbee's total income being from other activities. Thirdly, to state the obvious, it is only the periods under appeal which fall to be determined.

229. With those important caveats, we agree with HMRC that the degree of economic dependency and the length of time over which the contracts have been renewed are material indicators of an employment relationship.

Taking stock

230. Having considered MacKenna J's criteria as developed by the other authorities, our conclusions at [177] to [229] can be summarised as follows, noting any material differences between the two hypothetical contracts:

> (1) Mutuality of obligation exists, including under Hypothetical Contract Two notwithstanding the provision stipulating "no obligation to assign", but it is not strongly indicative of employment because of the absence of obligation on Talksport to provide work.
>
> (2) In relation to control, certain facets of control are not indicative as they apply to employees and non-employees alike. Talksport controls where and when services are performed. In relation to how services are performed, Talksport lacks effective control over a live broadcast, but that is not significant as an indicator. Mr Hawksbee has a very high degree of control over the format and content of The Show, but the ultimate right of control in this respect, which the authorities indicate is more important, lies with Talksport, by necessary implication under Hypothetical Contract Two. Talksport's control over what services are performed is limited, because the substantive obligations relate only to delivery of The Show.
>
> (3) The rights of exclusivity and call, which vary under each hypothetical contract, are indicators of employment, but the weight to be afforded to that is reduced by various factors (set out at [202]).
>
> (4) The duration of the contracts, termination provisions and obligation to discuss renewal are broadly neutral.
>
> (5) The absence of any right of substitution points towards employment, but in the circumstances not significantly.
>
> (6) The absence of economically equivalent rights relating to holiday, sick pay, pensions or paternity leave points away from employment.
>
> (7) The absence of any rights relating to medicals, training, appraisals, grievance procedures or disciplinary procedures points away from employment.
>
> (8) The payment obligations point away from employment.
>
> (9) In context, Mr Hawksbee does bear financial risk, which is more consistent with a contract for services.
>
> (10) Taken together, the other *Market Investigations* criteria are broadly neutral.

(11) The intention of the parties was to create a contract for services and not an employment relationship. This carries weight only if the employment status is otherwise unclear.

(12) Mr Hawksbee was not "part and parcel" of the Talksport organisation.

(13) The degree of economic dependency, and, with caveats, the aggregate length of time over which successive contracts were renewed, were material indicators of employment.

Conclusions

231. We remind ourselves of the guidance given by the Court of Appeal in *Hall v Lorimer* set out at [25] above. In a case such as this of a professional supplying services the task before us "is not a mechanical exercise of running through items on a check list". It is a matter of standing back from the detailed picture and evaluating the overall effect of the individual details to appreciate the whole picture. The exercise is what we are told nowadays is a multi-factorial assessment.

232. We also remind ourselves that the taxpayer bears the burden of proof, to the ordinary civil standard, of establishing that the intermediaries legislation does not apply.

233. We begin with mutuality and control. On the basis of the authorities, the minimum conditions for mutuality exist. However, the lack of obligation on Talksport to provide Mr Hawksbee with work points away from a relationship of employment. Although Mr Hawksbee had a very high degree of control over the content and format of each show, Talksport had the ultimate right of control over *how* Mr Hawksbee performed his services, but its control over *what* services he could be obliged to provide was narrow; the substantive obligations were to prepare and deliver The Show.

234. Looking solely at mutuality and control, we consider that the absence of obligation on Talksport to provide work and the narrowness of the contracted services point on balance towards a contract for services rather than employment, but not decisively so. It is necessary in addition to take into account all of the factors considered in relation to "the third condition" to obtain a complete picture.

235. In our view the strongest indicators of an employment relationship are, as Mr Stone submitted, the degree of economic dependency on Talksport for the periods under appeal and the aggregate length of time over which successive contracts for The Show have been renewed. Even taking into account the caveats we express above in relation to those factors, if they were taken alone, then, coupled with the rights of exclusivity, they would strongly suggest a relationship of employment. To the extent that being "in business on one's own account" is a helpful gloss, as to which we are doubtful in the facts of this appeal, these factors also strongly suggest that, while Mr Hawksbee's professional career as a whole may have been fairly so described, he was not in business on his own account as a radio presenter.

236. However, these factors are not to be taken alone. In stepping back and looking at the complete picture, we see a relationship with the following characteristics:

(1) No obligation on Talksport to provide work.

(2) Controlled services largely restricted to delivering The Show.

(3) No equivalent rights to holiday, sick pay, pensions or paternity leave.

(4) No provisions regarding medicals, training etc.

(5) A payment obligation restricted to a fee for each show delivered, with no retainer or bonus.

(6) An individual who, while clearly synonymous with The Show, is not part and parcel of the Talksport organisation.

237. Looking at the picture as a whole, we conclude that the relationship in this case was not one of employment but rather was a contract for services.

238. We acknowledge that others might not reach this view, as illustrated by the fact that our decision is by casting vote of the judge, but we are clear that the taxpayer has discharged its burden of proof in this appeal.

239. If, contrary to our conclusions, the analysis of the relationship under the hypothetical contracts is properly described as "doubtful" (per MacKenna J) or "borderline" (per *Dragonfly*) then the clear statements in the hypothetical contracts by the parties as to their intentions, namely to create a contractor relationship and not one of employment, support our conclusion that the relationship was not one of employment.

240. The above conclusion records the decision of the Tribunal by casting vote of Judge Scott. Mr Baker's reasons for reaching a different conclusion are set out in an appendix to this decision.

Disposition

241. For the reasons given, the appeal is allowed.

242. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JUDGE THOMAS SCOTT
RELEASE DATE: 25 June 2019

Reasons for dissent by Tribunal member Charles Baker

1. In reaching the decision of the Tribunal, Judge Scott exercised his casting vote on three matters. The purpose of this note is to record my reservations on those matters.

SICK PAY, PENSIONS AND SIMILAR EMPLOYMENT RIGHTS

2. The First Agreement dated 1 January 2012 takes the form of letter from Talksport to Paul Hawksbee. All parties agree (and the Tribunal accepts) that this is an administrative error. The parties agree (and the Tribunal accepts) that for all purposes this should be treated as a letter from Talksport to Kickabout. The letter begins:

> "I am pleased to confirm the terms upon which the Company would like to engage you on a freelance basis as a presenter".

3. The cover of the Second Agreement begins with the heading

> "DATED 18 DECEMBER 2013
>
> FREELANCE COMPANY AGREEMENT …"

4. Neither agreement mentions sick pay, paternity leave or pension provision.

5. My colleague considers that those omissions are significant. In doing so, he is consistent with the decision in *Atholl House Productions Ltd v Revenue & Customs Commissioners* [2019] UKFTT 242 (TC). Respectfully, I disagree.

6. This case is an example of a three party personal service company chain. An individual is employed by a personal service company. The personal service company supplies that individual's services to an end-user. The employment relationship is between the individual and the personal service company. It is that employment relationship that attracts statutory employment rights such as sick pay and which may attract optional employment benefits such as a pension scheme. The end-user is not a party to the employer relationship between the personal service company and the individual. The end-user has no right to interfere with the employer-employee relationship. It is therefore entirely natural for the agreement between the end-user and the personal service company to be silent on matters that concern the relationship between the personal service company and the individual.

7. Turning now to the hypothetical contract, we have to imagine what would be the position on employment rights and benefits if Talksport direct engaged Mr Hawksbee. Mr Stone argued that this was immaterial, for two reasons. First, the absence of such provisions from the actual contracts was simply a consequence of those contracts being between companies. Second if, as HMRC contended, Mr Hawksbee was an employee, then he would as a result have various statutory entitlements to rights in those areas under the hypothetical contracts.

8. As will be appreciated, I accept his first argument for the reason I have explained. Mr Stone's second argument is entirely circular, but stating it is not without value. It demonstrates that whether the hypothetical contract would or would not contain employment rights is unascertainable.

9. My conclusion on this point is that we cannot know whether the hypothetical contract would or would not contain employment rights or benefits and so we must

leave those rights out of consideration. This appears also to have been the conclusion of the Tribunal in *Christa Ackroyd* at paragraph 171 of the decision.

OBLIGATION TO PROVIDE WORK

10. In an ordinary employment, there are two main ways in which the employer provides work. He can provide a repetitive task that the employee will perform until further notice. An example would be a receptionist. The number of visitors may vary from day to day but there is one task of being available during the employee's working hours to greet those who do arrive. There is no risk of work being unavailable. The other type of work is a succession of separate tasks. An example would be an assistant in an accountant's office who prepares the tax returns of clients. Whether the employee has that type of work to do on a particular day depends upon the employer being both able and willing to allocate sufficient tasks.

11. The contracts between Talksport and Kickabout were contracts of the first type for the performance of a single repetitive task. That is the creation and broadcast of The Show each weekday. When Talksport entered into each contract it provided that work for the duration of the contract. Talksport did not need to make any further decision to provide work to Mr Hawksbee or about the nature of that work.

12. The contracts and both witnesses were clear that Talksport would broadcast The Show each weekday. Mr Hawksbee would be one of the hosts whenever he was available and, in any event, not less than 222 times per year. The obligation on Mr Hawksbee to present The Show carried with it an implicit obligation on Talksport to provide him with the opportunity to do so.

13. In his witness statement, Mr Fisher referred to occasions when Talksport chose not to broadcast the show. The examples he gave were after the 9/11 Twin Towers attack and after the 7/7 London bombings. Neither event was in the periods under appeal. By any measure, both events were highly exceptional. If anything, the highly exceptional nature of those events only emphasises the commitment of Talksport to broadcast The Show every possible weekday.

14. My colleague considers that Mr Hawksbee had an obligation to work on at least 222 shows each year but Talksport had no obligation to provide him with shows to work on. Reading the agreements in context and in conjunction with the witness evidence, I see the bargain as the other way around. I see the fundamentals of the agreements as:

> Talksport will provide The Show for Mr Hawksbee to work on every weekday.
>
> Sickness or other events beyond his control may prevent Mr Hawksbee from presenting The Show.
>
> Mr Hawksbee may decline to present a particular edition of The Show to take a holiday or for another reason.
>
> Notwithstanding his right to decline a particular edition, Mr Hawksbee must nevertheless ensure that he presents at least 222 editions of The Show in a year.

15. In my view, the question of whether Talksport had an obligation to provide work is not applicable because, by entering into each agreement Talksport had already provided the work and no further decision was needed from Talksport.

THE CONCLUSION

16. It is not because I take a different view from my colleague on the matters of sick pay and the obligation to provide work that I have reached a different conclusion. They are only factors that weigh in the balance alongside more important factors.

17. I remind myself of the guidance given by the Court of Appeal in *Hall v Lorimer*. In a case such as this of a professional supplying services the task before us "is not a mechanical exercise of running through items on a check list". It is a matter of standing back from the detailed picture and evaluating the overall effect of the individual details to appreciate the whole picture.

18. I also remind myself that the taxpayer bears the burden of proof to the ordinary civil standard.

19. Looking at the picture as a whole, my conclusion is that if Mr Hawksbee had presented The Show for the periods under appeal under a contract direct with Talksport, he would be regarded for income tax purposes as an employee of Talksport. I acknowledge that my colleague has the right to exercise his casting vote and so the decision of this Tribunal is the other way.

20. It would not be helpful to set out a point-by-point comparison between this case and the recent cases of *Christa Ackroyd* and *Atholl House*. The factual backgrounds of those cases are quite different from this case and from each other. All I will say is that I am satisfied that on a broad-brush review of personal service company cases, including those two, a decision to dismiss in this case would not appear anomalous.