



**Appeal number: UT/2018/0082**

*INCOME TAX AND NATIONAL INSURANCE – intermediaries  
legislation- IR35- personal service company- whether sufficient control  
existed to mean that contract of employment would arise if services supplied  
direct to client- yes- appeal dismissed*

**UPPER TRIBUNAL  
TAX AND CHANCERY CHAMBER**

**CHRISTA ACKROYD MEDIA LIMITED**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S  
REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: MR JUSTICE MANN  
JUDGE THOMAS SCOTT**

**Sitting in public at The Rolls Building, Fetter Lane, London on 3 and 4 July 2019**

**Jolyon Maugham QC and Georgia Hicks, instructed by Grant Thornton, for the  
Appellant**

**Adam Tolley QC and Christopher Stone, instructed by the General Counsel and  
Solicitor to HM Revenue and Customs, for the Respondents**

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## DECISION

### Introduction

1. This is the decision on an appeal by Christa Ackroyd Media Limited (“CAM”) against the decision of the First-tier Tribunal (“FTT”) published at [2018] UKFTT 69 (TC) (“the Decision”). CAM is the personal service company of the television journalist Ms Christa Ackroyd.

2. In the Decision the FTT dismissed CAM’s appeal, determining that the intermediaries legislation applied to CAM for the periods under appeal on the basis that if Ms Ackroyd’s services had been supplied directly to the client (the BBC), there would have been a contract of employment.

3. CAM appeals against the Decision with the permission of the FTT on the sole ground that the FTT erred in law in its conclusion that the BBC had sufficient control over Ms Ackroyd to mean that an employment relationship would have arisen if the services had been directly supplied.

### Background

4. Ms Ackroyd is a television journalist and presenter who presented “Look North” on BBC 1 between 2001 and 2013. The appeal before the FTT related to a fixed term contract dated 4 May 2006 between the BBC and CAM, which was terminated by the BBC in June 2013 (“the Contract”). Between March 2013 and October 2014 HMRC issued to CAM determinations in respect of income tax and notices of decision in respect of national insurance contributions (“NICs”) under the “intermediaries legislation” which is set out below. The income tax determinations under appeal covered the tax years 2008-09 to 2012-13 and the national insurance notices the tax years 2006-07 to 2012-13. Together they totalled £419,151. At the invitation of the parties, the FTT dealt with the appeals in principle and did not deal with quantum.

### 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

...

(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.”

5 6. A materially similar but not identical test is applied by the NICs legislation, in Regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000. Before the FTT and before us, the parties agreed that in this case the effect of section 49 ITEPA 2003 and Regulation 6 of the 2000 Regulations was the same, and the analysis in the Decision and before us focussed on section 49.

10 7. The purpose of the intermediaries legislation was described in *Professional Contractors’ Group & others v Commissioners of Inland Revenue* [2001] EWCA Civ 1945 as follows (at paragraph 51):

15 “...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”.

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

25 “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):

30 "(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."

35 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.

40 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:

45 "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 ...” ”

### **Constructing a hypothetical contract**

9. For the period covered by the Contract, the legislation requires the tribunal to posit a direct contract between the BBC and Ms Ackroyd for the services under that contract (“the hypothetical contract”) and to determine whether “the circumstances”  
5 are such that it would be a contract of employment. The legislation states 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”. The reference to “contracts” is readily understandable given that in addition to the contract between the personal service company and the client there  
10 must also exist a contract between the individual and the personal service company enabling that company to provide his or her services to the client.

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

15 “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  
20 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.”

### **Determining employment status**

11. In determining employment status, the conventional starting point remains the  
25 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:

30 “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.”

12. The first of MacKenna J's conditions is commonly referred to as “mutuality of  
35 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:

40 “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.”

13. Decisions such as *Market Investigations Limited v Minister of Social Security* [1969] 2QB 173 and *Hall v Lorimer* [1994] I WLR 209 have emphasised that employment status should not be determined by rigid rules. Factors which carry weight in one situation may carry little weight in another, and, in particular, the position of a skilled or professional person may raise difficult issues. However, the *Ready Mixed Concrete* formulation remains applicable in assessing whether a contract would be a contract for services or a contract of service.

### **The issue in this appeal**

14. The first requirement of employment status identified by MacKenna J is mutuality of obligation. In *Carmichael v National Power plc* [1999] I WLR 2042 the House of Lords referred (at 2047) to “that irreducible minimum of mutuality of obligation necessary to create a contract of service”. In a phrase first adopted judicially in *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181, this 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. The case law establishes that mutuality of obligation in this context requires at least that the employee provides the services through his personal work or skills, and that the employer pays the employee for any work actually done.

15. In this case, the FTT determined that the necessary mutuality of obligation existed (see [157] of the Decision) and that conclusion is not the subject of any appeal.

16. In relation to MacKenna J’s “third condition”, the FTT found (at [168] to [178]) that overall the other provisions of the hypothetical contract were largely consistent with the employment status which, the FTT had found, would otherwise arise by virtue of the existence of the necessary mutuality of obligation and control. Again, those findings are not the subject of any appeal.

17. So, the only issue in this appeal is whether the FTT erred in law in concluding on the basis of the facts found that under the hypothetical contract the BBC would have had sufficient “control” of Ms Ackroyd to establish a relationship of employment. In our opinion, although that conclusion clearly necessitated both findings of primary fact and the drawing of inferences from the facts as found, the issue is capable of raising issues of law, and it does so in this appeal. We consider, therefore, that we do have the jurisdiction to determine the appeal, and neither party suggested that we did not.

### **The Contract**

18. The material provisions of the Contract are set out in the appendix to this decision.

## The Decision

### *The law on control*

19. The FTT set out its understanding of the relevant law as to control at paragraphs [134] to [141] as follows:

5                   “134. The right of control in respect of what is to be done, and where  
when and how it is to be done is an important indicator of an  
employment relationship, but is not by itself decisive. The key question  
in this regard is not whether in practice the worker has actual day to  
10                   day control over his own work, but whether there is, to a sufficient  
degree, a contractual right of control (see *White v Troutbeck* [2013]  
*IRLR* 286 at [40]-[43] per Richardson J, upheld in the Court of Appeal  
at [2013] *IRLR* 949, and *Morren v Swinton and Pendlebury BC* [1965]  
*1 WLR* 576). The question whether control is “sufficient” for this  
15                   purpose must take into account the practical realities of a particular  
industry, considering those aspects of the performance of work that  
could be controlled in that industry.

135. The significance of control was considered by the Court of  
Appeal in *Montgomery v Johnson Underwood Ltd* [2001] *EWCA Civ*  
*318*. That was a case of an agency worker seeking to establish that she  
20                   was an employee of the agency. Buckley J (with whom Brooke and  
Longmore LJ agreed) considered the position of employees with a  
high degree of autonomy. He stated as follow at [19]:

“19. MacKenna J made plain [in *Ready Mixed Concrete*] that provided (i) and  
25                   (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  
30                   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  
35                   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. MacKenna 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:

40                   ‘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.’”

136. The same point was made by Vinelott J in *Walls v Sinnott*  
*[1987] STC* 236 at p246c in relation to a professional singer who  
45                   lectured in music at a technical college:

“The other point that was very much stressed by the taxpayer is the  
modest degree of control which in practice was exercised by the  
governors and the principal of the college. In some contexts the degree  
of control exercised may be very important in deciding whether

5 someone is an employee or servant, but in the case of a senior lecturer at a college of further education, more particularly one who like the taxpayer came into teaching from active work as a singer, it is not surprising to find that he was given a very wide degree of latitude in the organisation of his work and time.”

137. In identifying whether there is a right of control, the starting point is the express terms of the contract. If the express terms do not answer the question, then it is necessary to consider the implied terms of the contract (see *Ready Mixed Concrete* at p516A).

10 138. Absence of control as to the detailed way in which work is performed is not inconsistent with the employment of a skilled person (see *Morren v Swinton and Pendlebury Borough Council* [1965] 1 WLR 576 per Lord Parker CJ at 582A-C; *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 per Lord Griffiths at 384A; and *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318 per Buckley J at [19]).  
15 The significance of control is that the employer can direct what the employee does, not necessarily how he does it (see *Various Claimants v Catholic Child Welfare Society & Ors* [2012] UKSC 56 per Lord Phillips at [36]).

20 139. If the genuine contractual right of control to a sufficient degree does exist, it does not matter whether that right is actually exercised (see *Autoclenz v Belcher* [2011] UKSC 41 per Lord Clarke at [19]).

25 140. In *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938 at [76] Ward LJ said that the question of control is not merely about the legal power to control, but that it should be viewed more in terms of accountability and supervision by a superior. That was said in the context of vicarious liability of the Church for sexual abuse by priests. In our view Ward LJ was not suggesting here that the legal power to control was less important.

30 141. Mr Summers [counsel for CAM] relied on the Court of Appeal decision in *Cowell v Quilter Goodison & Co Limited* (1989) IRLR 392. That was a case involving an equity partner in a firm of stockbrokers, and it was held that he was not an employee for the purposes of unfair dismissal rules. The Master of the Rolls said that as an equity partner  
35 “[he] was not the servant of anyone”. Mr Summers suggested we should look to see whether Ms Ackroyd was a servant and submitted that she was not. However, the Master of the Rolls also described the terms ‘master’ and ‘servant’ as old terms and emphasised that it was the nature of the relationship that was important and not the terminology. We agree with Mr Tolley [counsel for HMRC] that in the  
40 light of subsequent authorities (see for example *Various Claimants v Catholic Child Welfare Society* at [36]) the question of whether an individual “looks like a servant” is not a helpful test.”

### *Findings*

45 20. We set out below those passages of the Decision relevant to the control issue in this appeal.



21. At [21] to [27] the FTT made findings of primary fact as to the commercial background to the Contract which can be summarised as follows. The BBC was doing less well in the ratings with its early evening news and current affairs programme “Look North” than its ITV rival, and approached Ms Ackroyd twice to host Look North. Ms Ackroyd agreed to the second approach and began working on the programme in September 2001 (under a contract preceding the Contract). At [22] it is stated that “Ms Ackroyd’s evidence was that she was given control over Look North and that it was agreed she could make whatever changes she wanted to the programme”. This is a description of Ms Ackroyd’s evidence with no finding at this stage as to its accuracy. The FTT does, however, accept (at [24]) Ms Ackroyd’s evidence that it was the BBC who suggested that Ms Ackroyd should work using a personal service company, and that the BBC did not want her to be an employee, the FTT inferring that this was to avoid PAYE and NICs for the BBC. From 2001, the Look North viewing figures improved, and it came to have more viewers than its ITV rival. At [27] it is stated:

“27. Ms Ackroyd’s evidence is that when she came to work for the BBC she was given a guarantee of “independence” and “control”. We do not accept that was control of the programme itself and the BBC’s output. If anything, it would have been control over the way in which she provided her services to the BBC. We consider these aspects of control later in the decision.”

22. In a section headed “The Contractual Arrangements”, the FTT discussed and made findings not only on the contractual arrangements but, to a significant extent, how things worked in practice. The main findings relevant to the control issue were as follows:

(1) CAM had effective control over Ms Ackroyd’s working activities, as recorded in Clause 1 of the Contract.

(2) The FTT did not accept Ms Ackroyd’s evidence that she had “day to day editorial control” over her work, noting that that would have been inconsistent with Clause 5 of the Contract.

(3) In terms of who would have “the last say” on issues relating to Look North or her work on the programme, the FTT had difficulty accepting that this was Ms Ackroyd. In correspondence with HMRC, Ms Ackroyd’s accountant had accepted that “the BBC is the ultimate arbiter”, and elsewhere it was stated on her behalf that “of course she could be told who she was interviewing”. If a difference of opinion was unresolved, under Clause 14 of the Contract the BBC could tell Ms Ackroyd she would not be presenting Look North on a particular evening.

(4) On air during a live programme, Ms Ackroyd would have de facto control.

(5) Per [37], “the Contract is silent on the point but the context suggests to us that the BBC through the Editor would have control over content given the BBC’s editorial responsibility. That is also consistent with the BBC’s Editorial Guidelines...”

(6) The Editor on behalf of the BBC had the right to decide which stories were covered and in what order. There was room for professional disagreement, “but...ultimately these were decisions for the BBC”.

5 (7) It was unusual for someone in Ms Ackroyd’s role to have a 7 year fixed term contract.

(8) Clause 3 of the Contract gave the BBC “first call” on Ms Ackroyd’s services for up to 225 days per year. The BBC could require her not only to work on a particular day, but also it could direct what work she did. The BBC was contractually entitled to require her to report on a particular story without also presenting the Look North programme.

10 (9) The effect of Clause 8.1 of the Contract was that Ms Ackroyd could not provide services as a television presenter or broadcaster in the UK or the Republic of Ireland or services for other publications without the consent of the BBC.

15 (10) Ms Ackroyd “did not have a line manager as such” and was not subject to formal appraisals.

23. In a section headed “Working Practices”, at [59] to [74], the decision included the following conclusions and findings:

20 (1) Ms Ackroyd was expected to and did drive change in Look North and make editorial contributions, but the ultimate decision as to how the programme might be changed lay with the BBC.

(2) The FTT did not accept solely on the basis of Ms Ackroyd’s evidence that “she led the team in the sense of control and decision-making”.

25 (3) Ms Ackroyd controlled the research, production and filming of stories, but it was a matter for the BBC to decide whether and in what way to use the story. They also had the right to edit Ms Ackroyd’s material.

(4) Ms Ackroyd could be told by the BBC who she was interviewing, but she had control over how the interview was conducted.

30 24. In a section headed “Control Generally”, the FTT observed that “Ms Ackroyd had a high degree of autonomy in carrying out her work and in identifying the stories she wished to follow”. It accepted that Ms Ackroyd was “not simply a newsreader”.

#### *BBC Editorial Guidelines*

35 25. The Decision discusses (at [93] to [108]) a document described as the BBC’s “Editorial Guidelines” and what was said to be its predecessor “the Producers’ Guidelines”. These documents were lengthy and set out how the BBC expected creators and makers of BBC content to abide by and implement values relating to issues such as impartiality, fairness, taste, decency, stories concerning vulnerable individuals and political matters. HMRC maintained that Ms Ackroyd was contractually bound by the Editorial Guidelines. While the FTT did not accept that  
40 argument, it concluded as follows, at [108]:

5 “108. Mr Tolley submitted that even if compliance with the Editorial Guidelines was not a contractual obligation, Ms Ackroyd was still obliged to follow them. The source of that obligation was not explained but in practical terms we accept the submission. If Ms Ackroyd did not act in accordance with the Editorial Guidelines then her contract might not be renewed, albeit she had a 7 year contract. Alternatively, in any particular situation the BBC could decide not to call on Ms Ackroyd to present or work on Look North, although arguably they would remain liable to make payments under the contract. In our view the real significance of the Editorial Guidelines in the present case is that they provide part of the context in which the parties entered into the Contract...”

*The hypothetical contract*

15 26. The FFT’s conclusions as to the terms of the hypothetical contract were as follows:

20 “151. There was no issue between the parties that the hypothetical contract with which we are concerned in the present appeal is based on the terms of the Contract, with Ms Ackroyd herself agreeing to provide those services to the BBC on the terms set out in the Contract. We are satisfied that the hypothetical contract contained the following terms derived from the Contract:

- 25 (1) The contract was for a term of 7 years pursuant to clause 2, terminable only pursuant to clause 13.
- (2) Ms Ackroyd was contractually obliged to perform the services in clause 3 and the BBC was contractually obliged to pay the fees set out in the payment Schedule in monthly instalments. If Ms Ackroyd failed to perform the services including a minimum of 225 days for Look North then the fees would reduce proportionately.
- 30 (3) The BBC was not bound to call on the services of Ms Ackroyd but it remained liable to pay the fees pursuant to clause 6 where it did not.
- (4) The BBC was entitled to edit Ms Ackroyd’s contributions to Look North and other contributions pursuant to clause 5.
- 35 (5) Travel and subsistence expenses would be reimbursed as for freelance contributors, together with a clothing contribution of £3,000 per year.
- (6) There were no set hours or set working days, subject to Ms Ackroyd being available to present Look North at 6.30pm as required by the BBC. There was no set location where Ms Ackroyd would work, either in the studio or on an outside broadcast.
- 40 (7) Ms Ackroyd was subject to the restrictions in clause 8 and clause 9. Otherwise she was entitled to undertake other paid or unpaid activities outside the BBC.

(8) Ms Ackroyd was not contractually bound by the Editorial Guidelines. She did not have an identified line manager and was not subject to formal appraisal procedures.

5

(9) Ms Ackroyd had no right to provide a substitute to perform the services and was expressly prohibited from doing so by clause 18.

(10) There was no express provision for payment of holiday pay, sick pay or pension entitlement.

152. Mr Summers submitted that there were also terms of the hypothetical contract as follows:

10

(1) Ms Ackroyd would control stories covered, how they would be presented, who should be interviewed and whether there should be an outside broadcast.

(2) Ms Ackroyd could make such changes to the Look North format as she wanted.

15

(3) Ms Ackroyd could develop human interest stories of her own for future screening.

153. Based on our findings of fact we are not satisfied that these were terms of the hypothetical contract. These were matters in which she was subject to direction by the BBC.”

20 *Conclusions as to control*

27. The FTT’s conclusions as to the control issue are set out at [159] to [167], as follows:

25

“159. Mr Tolley submitted and we accept that it is a necessary premise of clause 1 of the Contract that Ms Ackroyd was subject to the control of CAM Ltd. It states in terms that “*The Company [CAM Ltd] controls the services of Christa Ackroyd*”. It is clearly possible therefore to control someone in the role Ms Ackroyd was performing at the BBC.

30

160. Clause 3 of the Contract gave the BBC first call on the services of Ms Ackroyd “as it may require”. We consider that the reference to what the BBC may require was a reference to such of Ms Ackroyd’s services that it may require whether as presenter, reporter or providing reasonable ancillary services, for example assisting with the editing of material. The BBC could direct which of those services it required Ms Ackroyd to perform. The BBC could also require Ms Ackroyd to attend and represent the BBC at public events pursuant to clause 3.3.

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161. Ms Ackroyd’s evidence was that she would never have entered into a contract with the BBC if it meant that the BBC would control the way in which she worked. However, we are concerned with the hypothetical contract. At most this has only marginal relevance in a finely balanced case as a statement of intention.

40

162. Ms Ackroyd maintained that the BBC was obliged to accept and act upon her suggestions. We do not accept that evidence. There is no express term to that effect in the Contract. Further it is inconsistent with the terminology used by Ms Ackroyd when describing her role in

5 her witness statement. We have found that the Editorial Guidelines were not incorporated as terms of the hypothetical contract, but they do form part of the context in which we must construe the hypothetical contract. In our view it would be inconsistent with the Editorial Guidelines if Ms Ackroyd were to have control over the content of Look North or her contribution to the programme as submitted by Mr Summers. It seems unlikely to us that the BBC would give Ms Ackroyd an entirely free role in Look North without at least an expectation that in carrying out her work she would abide by the Editorial Guidelines. It was not necessary for the BBC to bind Ms Ackroyd contractually to the Editorial Guidelines because it was entitled to direct what work she did and how she did it. Much would be left to her professional judgement but if the BBC considered that she was breaching the Editorial Guidelines in a material way then in our view it could direct her to work in a way consistent with the Editorial Guidelines.

10  
15  
20 163. We accept that the BBC did implement changes suggested by Ms Ackroyd, but there is no evidence that Ms Ackroyd would have the last word on the implementation of changes. There are no real examples of her having the last word, except in one instance where there was a difference of opinion as to how she should describe three murder victims. We do not consider that example carries much weight.

25 164. We are not satisfied that as a matter of contractual obligation the BBC was in any sense required to act on Ms Ackroyd's direction. If that was the intention of the parties at the time the Contract was negotiated then we have no doubt that express provision would have been made to that effect. In practice, the BBC did act on Ms Ackroyd's advice and suggestions. That is because she was an experienced, professional and successful television journalist and presenter. CAM Ltd was engaged and the contract renewed because Ms Ackroyd possessed such qualities.

30  
35 165. Mr Summers relied on the fact that Ms Ackroyd had no line manager and was not subject to the BBC appraisal procedure. Looked at in isolation this may suggest that the BBC did not control Ms Ackroyd's work. Looked at in context, however, for the reasons given we are satisfied that the BBC did have ultimate control over what work Ms Ackroyd did and how she did it. There was no evidence of examples where they exercised such control but we consider that as a matter of contract they were entitled to do so. It is consistent with the fact that the BBC were expressly entitled to edit Ms Ackroyd's contributions.

40  
45 166. Mr Summers submitted that HMRC viewed Ms Ackroyd's role pursuant to the hypothetical contract as simply a newsreader. He accepted that if that were a true reflection of her work then she would properly be treated as an employee pursuant to the hypothetical contract. We accept that her role was much more than simply presenting the news and reading a script. Indeed, Mr Tolley acknowledged as much.

5 167. Mr Summers rightly submitted that the contract had no express  
term dealing with control. Control of Ms Ackroyd’s work pursuant to  
the hypothetical contract must lie somewhere, either with Ms Ackroyd  
or with the BBC. We are not satisfied that it lay with Ms Ackroyd. We  
consider that the BBC did have ultimate control in how, where and  
when Ms Ackroyd carried out her work. We accept a submission by  
Mr Tolley that this was an implied term of the hypothetical contract in  
order to give that contract business efficacy. In the context of Ms  
Ackroyd’s role it was necessary for the BBC to at least have the power  
10 to direct Ms Ackroyd’s work, otherwise Look North as a programme  
ran the risk of not complying with the Editorial Guidelines. For  
example, if Ms Ackroyd consistently failed to comply with the  
Editorial Guidelines, it is inconceivable that the parties intended that  
the BBC should be obliged to continue to pay Ms Ackroyd for her  
15 work even if as a result she was not called on to present Look North.”

28. In delivering its overall assessment in relation to employment status under the  
hypothetical contract (at [179]), the FTT stated its view that “...the most significant  
factors in the present case include the fact that the BBC could control what work Ms  
Ackroyd did pursuant to the hypothetical contract. It was a 7 year contract for what  
20 was effectively a full time job”.

**The Appellant’s submissions**

29. The Appellant’s skeleton argument states as follows:  
“CAM advances five propositions:  
(1) First, control, as the Decision makes clear, was the key issue;  
25 (2) Second, the terms of the BBC Contract are the terms of the hypothetical  
contract;  
(3) Third, the BBC contract, as is common ground, contained no right of  
control;  
(4) Fourth, even if, contrary to the second proposition, the hypothetical  
30 contract was in principle capable of including other terms there was no basis to  
include within it a term giving a right of control over what Ms Ackroyd did  
and/or how she did it sufficient to establish Ms Ackroyd as an employee; and  
(5) Fifth, the Decision contains a number of other significant errors of law in  
its treatment of control.  
35 In addressing those propositions, CAM will identify the errors of law made by  
the FTT...”

30. It was not consistently clear from either the skeleton or Mr Maugham’s  
responses to our questions what all the errors of law were that the Appellant was  
suggesting had been made by the FTT. In particular, in oral argument, Mr Maugham  
40 sought to develop a proposition not identified in his skeleton argument, which turned  
on the difference between control over “output” and “input”.

31. However, we have identified and considered the following submissions put forward by Mr Maugham:

5 (1) The FTT was wrong to imply any term into either the Contract or the hypothetical contract regarding control. This was a case where the hypothetical contract was the same as the Contract.

(2) Even if it was appropriate to imply a term into the hypothetical contract, the FTT erred in law in its analysis of whether a term should be implied and what that term was.

10 (3) The BBC Editorial Guidelines should not have been relied on by the FTT in its reasoning as to an implied term relating to control.

(4) The FTT erred in not concluding that the necessary “framework of control” was absent.

(5) Control by the BBC which was exercised for regulatory purposes was not relevant to the control test for employment purposes.

15 (6) The BBC may have controlled Ms Ackroyd’s “output”, but they did not control her “input”, and it was the latter which mattered in determining employment control.

(7) The FTT erred in not giving weight to Ms Ackroyd’s intentions as regards control.

20 (8) The FTT erred in placing weight on Clauses 1 and 5 of the Contract in its reasoning.

32. It is convenient to consider propositions (1) to (3) together since they all relate to the same aspect of the Decision.

#### *Implied control*

25 33. While the FTT found that the Contract contained several terms relevant to the control issue, it was silent as to whether the BBC had ultimate control over Ms Ackroyd in the performance of her services. Did the FTT err in not concluding that the terms of the hypothetical contract were the same as those of the Contract, so that no other term, including as to control, could properly be implied?

30 34. Mr Maugham argued that if there was any case where the contract between the service company and the end user must also be the hypothetical contract, it was this one. The Contract was negotiated; it was detailed; it contained a “whole agreement” clause; there was no other contract with conflicting terms, as there was in *Dragonfly Consultancy Ltd v Revenue and Customs* [2008] EWHC 2113 (Ch) and *Usetech Ltd v*  
35 *Young* [2004] EWHC 2248 (Ch) (“*Usetech*”), and there was no evidence before the FTT to suggest that the Contract did not reflect the reality. Indeed, said Mr Maugham, the FTT initially accepted this, at [151], in recording that the hypothetical contract was “based on the terms of the Contract”. Since the Contract contained no express term dealing with ultimate control, the FTT should inevitably have concluded that the  
40 necessary control for an employment relationship did not exist.

35. Mr Maugham relied on the statement in *Usetech*, at paragraph 36 of that decision, that in a straightforward situation where there were two contracts (as here, between CAM and Ms Ackroyd and CAM and the BBC), then "...the contents of the notional contract will be based on the contents of the second contract between the service company and the end user, but with the worker himself agreeing that he will provide his services to the end user on, as near as may be, whatever terms are agreed between the service company and the end user". This appeal, he submitted, was just such a straightforward case, and the FTT should have concluded in line with the *Usetech* approach that the hypothetical contract simply mirrored the Contract.

36. We consider that in constructing the hypothetical contract, the FTT was right to begin with the Contract. However, it was also right not to confine its consideration to the Contract. The FTT clearly had *Usetech* in mind (the Decision refers to it at [13], [143] and [151]) in stating at [151] that the hypothetical contract was "based on" the terms of the Contract. However, *Usetech* cannot be taken as establishing a general proposition that in a situation where, as in this appeal, there are two contracts the hypothetical contract must simply track the actual contract with the service recipient. It should be borne in mind that the comment in *Usetech* was made in the context of distinguishing a situation where there were two contracts with the factual situation in *Usetech*, where there were three. Section 49 explicitly requires the tribunal not to restrict the exercise of constructing the hypothetical contract to the terms of the actual contract, but to assess whether "the circumstances" are such that an employment relationship would have existed if the relevant services had been provided by the individual directly and not via a service company, and section 49(4) provides 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..." (emphasis added). The FTT therefore proceeded correctly in considering whether the hypothetical contract would have included terms not set out in the Contract. Indeed, directly contrary to Mr Maugham's submission, before the FTT CAM itself argued (without success) that various such terms relevant to control should be so included: see [152].

37. It was for the FTT to determine whether the hypothetical contract would have included terms not contained in the Contract or excluded terms which were contained in the Contract. The fact that the Contract was detailed and negotiated does not of itself preclude such inclusion or exclusion. As to a "whole agreement" clause, in light of section 49(4) the effect of such a clause is limited to the actual contract.

38. Did the FTT err in relying on the BBC Editorial Guidelines in determining the issue of control? Before the FTT, the discussion of the Guidelines concentrated on three issues. These were the extent of Ms Ackroyd's knowledge of the Guidelines; whether Ms Ackroyd was contractually bound by the Guidelines, and whether the reference in Clause 9 of the Contract to "Programme Standards" was a reference to any version of the Guidelines.

39. The FTT concluded that Ms Ackroyd had some knowledge of the Guidelines, but that in light of the evidence it was not satisfied that the reference in Clause 9 was to the Editorial Guidelines. As to the significance of the Guidelines the FTT's conclusions, at [108], are set out at paragraph 25 above. In its conclusions as to the



terms of the hypothetical contract, the FTT determined that it would not contain a term that Ms Ackroyd was bound by the Editorial Guidelines: [151] paragraph (8). In its analysis of the control issue, as set out above at [162] the FTT determined that, although the Guidelines were not incorporated as terms of the hypothetical contract, they formed part of the context in which the hypothetical contract must be construed. In that context, it would be inconsistent with the Guidelines for the BBC to give Ms Ackroyd control over Look North or her contributions to the programme, or for her to have “an entirely free role in Look North”. A critical aspect of the FTT’s conclusions at [162] was this: the BBC did not need to bind her contractually to the Guidelines because it was entitled to direct what work she did and how she did it, including directing her to work consistently with the Guidelines.

40. It is apparent from the Decision that the FTT did not have before it comprehensive evidence relating to the reference to Programme Standards in Clause 9. In the hearing of this appeal, with the agreement of both parties we were provided with that evidence, from which we conclude that the position was as follows. When the Contract was entered into, there was an extant agreement between the BBC and the Secretary of State for National Heritage and the British Broadcasting Corporation. That was the “Agreement” referred to in Clause 9.1 of the Contract. Under that agreement, the BBC undertook to secure observance of various programme standards, and to draw up a code giving guidance as to those standards. The 2005 Editorial Guidelines, in force at the time of the Contract, included, but were not limited to, that code.

41. We do not consider that the additional evidence which was not available to the FTT would have resulted in any material difference to the FTT’s conclusions on these issues. The conclusions that the reference to Programme Standards in Clause 9.1 was not a reference to the Editorial Guidelines and that neither the Contract nor the hypothetical contract contained terms contractually binding Ms Ackroyd to the Editorial Guidelines are not inconsistent with that additional evidence. Indeed, the additional evidence further supports the FTT’s conclusion that it did not matter that Ms Ackroyd was not contractually bound by the Editorial Guidelines because both parties understood that the BBC could enforce those Guidelines if necessary. Mr Maugham submitted that the Editorial Guidelines should not have been relied on by the FTT to imply control by the BBC because in Clause 9 the parties had “explicitly traversed the territory” of the Guidelines, and set out in its entirety their negotiated agreement as to the extent to which those Guidelines affected the provision of Ms Ackroyd’s services by CAM. We do not consider that the force of that argument (which is a particularisation of the first submission set out above) is increased by the additional evidence available to us; again, the FTT’s conclusions would not logically have been affected by it.

42. We now consider whether the FTT erred in concluding, whether on the basis of a context which included the Editorial Guidelines or for other reasons, that by implication the BBC did have ultimate control over Ms Ackroyd’s services in the sense required by the authorities.

43. Mr Maugham argued that the FTT erred in finding that by implication a right of ultimate control was contained in the Contract and/or the hypothetical contract because they failed to consider and apply the requirements established by case law for the implication of a term into a contract. In particular, they failed to consider the specific terms of such a provision, why it was necessary in order for the contract to have business efficacy, and whether the implied term was otherwise consistent with the contract and the relationship of the parties.

44. The conventional approach to be taken to the implication of terms into a contract is summarised in Lord Neuberger’s judgment in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, at [18] to [21]. Broadly, a term may be implied into a contract subject to meeting the requirements of reasonableness, equity, capability of clear expression and compatibility with the express terms of the contract, but only if it is either necessary for the contract to have business efficacy (such that the contract lacks commercial or practical coherence without it) or sufficiently obvious to go without saying.

45. If the exercise required of and undertaken by the FTT was to determine whether a term giving the BBC control over Ms Ackroyd’s services was an implied term of either the Contract or the hypothetical contract in the sense discussed in *Marks & Spencer v BNP Paribas*, we agree that the tribunal’s analysis and reasoning were inadequate.

46. However, this does not mean that the appeal succeeds, because the exercise required of the FTT was broader than that. The full guidance from MacKenna J, which continues to represent the correct approach to the issue, is as follows:

“...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.”—*Zuijus v Wirth Brothers Pty Ltd* ((1955), 93 CLR 561 at p 571.

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.”

47. That guidance was considered and applied in *White v Troutbeck* [2013] IRLR 286, upheld by the Court of Appeal at [2013] EWCA Civ 1171. The approach taken in that case, with which we respectfully agree, was to interpret MacKenna J’s guidance as requiring not a formal analysis as to an implied term in the contract but an exercise of contractual construction. The court or tribunal must address “the cumulative effect of the totality of the provisions in the agreement and all the

circumstances of the relationship created by it” (per the Court of Appeal at paragraph [38]) and decide whether as matter of construction ultimate control by the recipient of the services exists, notwithstanding the absence of an express provision in the contract.

5 48. Paragraph [167] of the Decision states that the FTT “accept a submission by Mr  
Tolley that [a right of ultimate control] was an implied term of the hypothetical  
contract in order to give that contract business efficacy”. This language, and in  
particular the reference to “business efficacy”, points clearly towards a *Marks and  
Spencer* exercise of determining an implied term. The adoption of such an approach  
10 was an error of law by the FTT. However, the FTT’s conclusions in relation to  
control, which we summarise above, are all relevant to a broader process of  
construing the Contract and the context in order to make a series of determinations as  
to the extent of the BBC’s control over the “what, how, where and when” in relation  
to Ms Ackroyd’s services. One example of several is the conclusion, at [37], that,  
15 although the Contract was silent on the point, “the context suggests to us that the BBC  
through the Editor would have control over content given the BBC’s editorial  
responsibility. That is also consistent with the BBC’s Editorial Guidelines...”.

49. The FTT therefore took the wrong approach but, as will become apparent, it  
reached the same result as if it had taken the right approach.

20 50. Did the FTT nevertheless err in concluding in effect that the right of ultimate  
control lay by implication with the BBC? We consider that the FTT was justified in  
reaching this conclusion. It had rejected Ms Ackroyd’s evidence that she had “day to  
day control” over her work and “led the team in the sense of control and decision-  
making”; refused to accept her assertion that she had the last say on issues relating to  
25 Look North or her work on the programme; concluded that the editor of Look North  
on behalf of the BBC had the ultimate right to decide what stories were covered and  
in what order; interpreted Clause 3 of the Contract as giving the BBC the right not  
only to require her to work on a particular day but to direct what work she did;  
concluded that the BBC had the right to edit Ms Ackroyd’s material as it saw fit, and  
30 concluded that Ms Ackroyd could be told by the BBC who she was interviewing.  
These findings alone would point towards a conclusion that the BBC had the ultimate  
right of control over the provision by Ms Ackroyd of her services. When considered  
in the context of the BBC’s extensive obligations to the Secretary of State in relation  
to broadcast programmes and the fact that the Contract was in effect a fixed term 7  
35 year agreement, we consider that the FTT reached a reasonable conclusion as to the  
question of where, by implication, the ultimate right of control must lie. In reaching  
that conclusion, the FTT was not obliged to consider a specific implied term and then  
apply to that term the processes and principles described by Lord Neuberger. It was  
sufficient for the tribunal to ask itself the question “in so far as the Contract does not  
40 deal explicitly with all aspects of control, is it appropriate in view of the Contract and  
the wider context to conclude that ultimate control in relation to Ms Ackroyd’s  
services lay with the BBC?”

### *Framework of control*

51. Mr Maugham submitted that the FTT erred because, having correctly identified the need for a “framework of control” to exist in order for an employment relationship to arise, it failed to take into account that no such framework existed in Ms Ackroyd’s case. She had no line manager, was not subject to formal appraisals and such limited right of termination as existed under the Contract did not amount to control in the performance of her duties. In oral argument, he amplified this point to argue that the BBC lacked “effective sanctions” to control Ms Ackroyd.

52. The FTT’s summary of the relevant case law on control is set out at [134] to [141] of the Decision. The parties agreed that this summary was a fair reflection of the relevant principles. At [135] the FTT referred to the statement by the Court of Appeal in *Montgomery v Johnson Underwood* that “some sufficient framework of control must surely exist [in order for employment to exist]”. The FTT therefore had this observation in mind in reaching its decision.

53. The question is what the Court of Appeal meant when it referred to the need for “some sufficient framework of control”. Mr Maugham’s argument amounts to an assertion that Buckley J had in mind contractual mechanics conferring on the recipient of the services a method of enforcing control over the individual during the continuing performance of those services and throughout the continuance of the contractual relationship. It is not clear to us whether the assertion is that such mechanics must facilitate control during the real time performance of the services; we assume not, since by definition an appraisal process operates primarily after the event, making its absence largely irrelevant to day-to-day control.

54. In any event, we do not consider that Buckley J was addressing the granular mechanics of control in this context. In the first place, there is no discussion which would indicate that particular performance tools such as appraisals or line managers were material. If the passage is read as a whole, the point being made is simply that set out in *Humberstone v Northern Timber Mills* and cited in *Ready Mixed Concrete*, namely that what mattered in determining control was not the practical exercise of day-to-day control and whether “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”. That point is made clear in *White v Troutbeck*, where the Employment Appeal Tribunal (at paragraphs 40 to 42) expressed the question as whether the owner of an estate who left a servant in charge of a property “retained the right to step in and give instructions concerning what was, after all, their property”, pointing out that the delegation of day-to-day control did not mean that the owner had “divested himself of the contractual right to give instructions to them”.

55. As we summarise above, the FTT determined that under the Contract the BBC had explicit control over Ms Ackroyd in a number of important respects, and that it should be implied that it had “ultimate authority” in the sense referred to in *Ready Mixed Concrete* and *Montgomery v Underwood*. The FTT had correctly directed itself as to the issues in this respect at [134] to [136] of the Decision, and took into account that in the hypothetical contract Ms Ackroyd would not have an identified line

manager and was not subject to formal appraisal procedures ([151(8)]). The issue identified by the “framework of control” submission is dealt with explicitly at [165] of the Decision. We identify no error of law in the FTT’s reasoning or conclusions in this respect.

5 56. Mr Maugham also argued that a “framework of control” can exist only where  
the recipient of the services can impose control through “effective sanctions”. In this  
case, he argued, such sanctions did not exist. In particular, the mere right under  
Clause 13 of the Contract to terminate for material or irremediable breach was not a  
right of control over the services, but a right to bring them to an end: see *Professional*  
10 *Game Match Officials v Revenue and Customs* [2018] UKFTT 528 (TC).

57. We are aware that the decision in *Professional Game Match Officials* is listed  
for appeal. In view of our decision as to the meaning of “framework of control” we  
need express no view on this issue, and do not do so. The outcome of that appeal can  
have no effect on this decision.

15 *“Regulatory” control*

58. Citing various FTT decisions as support, Mr Maugham argued that since control  
which applies to employees and non-employees alike cannot be “a touchstone of  
employment”, control over Ms Ackroyd imposed in order to comply with the BBC  
Editorial Guidelines could not be relevant to control for employment purposes.

20 59. In this appeal, Mr Maugham’s argument on this issue probably amounts to an  
assertion either that the obligations imposed on Ms Ackroyd under Clause 9 of the  
Contract are not relevant to control because of the BBC’s reasons for imposing them,  
or that because the BBC’s obligations under the Guidelines applied in relation to  
content provided by all content providers, they were not properly part of the relevant  
25 context in considering ultimate control. We do not accept either argument. Mr  
Maugham argued (as part of his central submission that the FTT had erred in implying  
ultimate BBC control) that in Clause 9 the parties had “traversed the territory” of the  
Guidelines and reached agreement about the restrictions to be imposed on Ms  
Ackroyd under the Contract. He did not challenge the FTT’s conclusion (at [151(7)])  
30 that those restrictions would follow through into the hypothetical contract. We see no  
rational basis on which then to ignore those restrictions in considering the control  
issue. In relation to the context applying to the consideration of the implication  
question, we consider that the FTT would have been wrong to leave the Guidelines  
out of account because of their potential application to other service providers.

35 *Output versus input*

60. Although not articulated in his skeleton argument, Mr Maugham argued before  
us that the FTT had erred in law because the instances of control which they had  
identified as arising under the specific terms of the Contract were in fact control only  
over Ms Ackroyd’s output. What mattered for the purposes of control in the  
40 employment context was control over her input, and the BBC did not have that  
control. Another way of expressing this proposition is that control for the purposes of

the employment test requires control over the individual in the performance of the contracted services, and that is different from control over the eventual work product.

61. While we would accept that such a distinction might exist in principle, we reject this submission for a number of reasons.

5 62. First, it is not an approach which has been formulated or adopted in the myriad of decided cases which have considered control in the employment context. We regard the appropriate formulation as continuing to be McKenna J's statement, set out at paragraph 46 above, that control requires consideration of all of the following: the power of deciding the thing to be done, the way in which it shall be done, the means  
10 to be employed in doing it, the time when and the place where it shall be done. The weight to be attached to each aspect will, of course, vary with the facts.

63. Secondly, in the context of services such as those in this appeal, the distinction is highly artificial and not a helpful way of approaching the control question. In practice, neither party will have distinguished a direction as to what was to be done  
15 (input) from a decision in relation to the finished product of which that input formed part, usually an episode of Look North (output). On each side, the expectation would naturally have been that if Ms Ackroyd was tasked with doing something, it would normally be with a view to it being used.

64. Finally, in any event the FTT determined on the facts that the BBC had the right  
20 to control not only what they did with Ms Ackroyd's work product, but also what she did in the first place.

#### *Ms Ackroyd's intentions*

65. Paragraph [161] of the Decision states as follows:

25 "161. Ms Ackroyd's evidence was that she would never have entered into a contract with the BBC if it meant that the BBC would control the way in which she worked. However, we are concerned with the hypothetical contract. At most this has only marginal relevance in a finely balanced case as a statement of intention."

66. Mr Maugham submitted that this was a "highly material" error of law by the  
30 FTT. Under section 49 the intentions of the parties are central to the question of constructing the hypothetical contract. That is shown by *Usetech* at paragraphs 38 to 40, where the intentions of the parties were taken into account in reaching the conclusion that the hypothetical contract, like the actual contract, would not have contained a right of substitution. The FTT apparently accepted Ms Ackroyd's  
35 evidence, yet it erroneously relied on *Dragonfly*, the language of which is used in the final sentence, to give Ms Ackroyd's clear intention no material weight.

67. We agree that, in so far as the FTT was relying on *Dragonfly*, that reliance was misplaced. The relevant passage from *Dragonfly*, which in fact restates a principle set out in *Ready Mixed Concrete*, is concerned with the weight to be given to any explicit

statements contained in the actual contract between the parties as to the legal status of the relationship which they intend to create (or, more usually, avoid).

68. However, we consider that for other reasons the FTT was right to afford this statement little weight in constructing the hypothetical contract. First, the relevant  
5 factual situation in this appeal is quite different to that in *Usetech*. Second, and contrary to Mr Maugham’s submission, the wording of section 49 does not require a consideration of the subjective intentions of the parties prior to the services being provided, but rather an objective consideration of the terms on which the services  
10 “are” provided. Third, even assuming that the FTT was accepting Ms Ackroyd’s evidence as an accurate statement of her intent, that evidence records that she would not have entered into a contract under which the BBC “would” control her, but as we have described above the most important issue is not whether the BBC *would* in practice control Ms Ackroyd, but whether they *could* do so. Finally, it begs the question of what Ms Ackroyd meant by “control”; there was no evidence to suggest  
15 that she was referring to each relevant aspect and nuance of the control test for employment purposes.

#### *Clause 1 and Clause 5*

69. At [159] of the Decision, the FTT concluded that the reference in Clause 1 of the Contract to CAM controlling the services of Ms Ackroyd showed that it was  
20 clearly possible to control someone in the role which she was performing at the BBC. Mr Maugham submits that this was an error because it afforded a mere recital too much weight. At [151(4)] the FTT relied on Clause 5 of the Contract as justifying the inclusion in the hypothetical contract of an entitlement to edit Ms Ackroyd’s contributions. At [34] the FTT had concluded that Ms Ackroyd’s assertion that she  
25 had day-to-day editorial control over her work would have been inconsistent with Clause 5. These were errors because the control afforded by Clause 5 was over work product, not the provision of the services which preceded the work product.

70. The submission in relation to Clause 5 is on examination a particularisation of the “input/output” submission, which we have rejected above.

30 71. In relation to Clause 1, it does not appear from the Decision that the FTT afforded this point any great weight. CAM does not challenge the FTT’s finding that Ms Ackroyd was an employee of CAM, or Ms Ackroyd’s acceptance that CAM “effectively controlled her working activities” ([31]). We do not therefore consider that the reference by the FTT at [159] amounted to an error of law in relation to its  
35 decision on control.

#### **Decision**

72. The only issue in this appeal is whether the FTT erred in law in reaching the conclusion that under the hypothetical contract posited by section 49 the BBC had a  
40 sufficient degree of control over the provision of services by Ms Ackroyd to satisfy the control requirement necessary for an employment relationship. For the reasons

given, we conclude that the FTT made no such error. The appeal is therefore dismissed.

**MR JUSTICE MANN**

**JUDGE THOMAS SCOTT**

**RELEASE DATE: 25 October 2019**

**APPENDIX—Material terms of the Contract**

**1. THE COMPANY**

The Company controls the services of CHRISTA ACKROYD (‘the Broadcaster’) and agrees to provide the services of the Broadcaster to the BBC and further agrees with the BBC that it shall observe and perform and (where appropriate) shall ensure that the Broadcaster observes and performs the terms and conditions of this Agreement.

**2. TERM**

This Agreement shall (subject to any other terms providing for prior termination) be for a period of Seven Years from the First day of January Two Thousand and Seven to the Thirty First day of December Two Thousand and Thirteen (‘the Term’).

**3. SERVICES**

During the Term the BBC shall (subject to reasonable notice) have first call on the freelance services of the Broadcaster (including acting as presenter reporter and reasonable ancillary services normally associated with such a role) as it may require to the output of the BBC, to include in particular:-

3.1 up to Two Hundred and Twenty Five (225) days in each year of this Agreement for the output of BBC Yorkshire

3.2 such days as may be mutually agreed for BBC radio stations in the North region

3.3 attendance at/representation of the BBC at such public events as required by the BBC

3.4 such other contributions as shall be mutually agreed.



## 5. MORAL RIGHTS

The Company grants the BBC the unlimited right to edit copy alter add to take from adapt or translate all the Broadcaster's contributions made under this Agreement and warrants that the Broadcaster has waived irrevocably any 'moral rights' which he may have now or in the future ....

## 6. FEE

6.1 In respect of the services of the Broadcaster the rights granted under Clause 4 above and the waiver given in clause 5 above the BBC shall pay to the Company the sums set out in the Schedule hereto during the term which sums exclusive of VAT shall be payable by equal monthly instalments not later than 14 days after the end of the relevant month.

6.2 In the event of the Broadcaster failing for any reason to render the services under this Agreement the payment shall (unless the BBC otherwise decides) be reduced by an amount proportionate to the period during which the Broadcaster failed to render the services.

## EXPENSES

7.1 The Company shall be entitled to the appropriate BBC travel and subsistence payments for freelance contributors.

7.2 The BBC shall make a contribution of up to Three Thousand Pounds (£3,000) in each contract year to the Broadcaster in respect of the purchase of suitable clothing ... subject to the supply of suitable receipts. Beyond this contribution the Broadcaster will be required to provide appropriate contemporary clothing for carrying out the services ...

## 8. ENGAGEMENTS FOR THIRD PARTIES

8.1 During the Term the Broadcaster shall not without the prior written consent of the Head of Regional and Local Programmes, BBC Yorkshire (referred to hereafter as 'the BBC Representative' ....) provide services of any kind in respect of any form of television or radio intended for audiences in the United Kingdom of Great Britain and Northern Ireland and the Republic of Ireland or for on-line services for any party other than for the BBC.

8.2 The Broadcaster shall not provide her services for publications of any kind for any party other than the BBC without first obtaining the prior written consent of the Head of BBC Yorkshire.

## 9. CONFLICTS OF INTEREST

9.1 The Company acknowledges that the BBC under its Agreement with the Secretary of State for Culture Media and Sport has given certain undertakings in relation to Programme Standards including in particular impartiality and accordingly agrees in furtherance of the mutual interest of the BBC and the Broadcaster that the Broadcaster

5 will not engage in any conduct which compromises or calls into question the impartiality or integrity of the BBC or any of its programmes or the Broadcaster and in particular without limitation thereto the Broadcaster will not without the prior written consent of the BBC Representative

9.1.1 be involved or associated in any way with any person or organisation which has a trading relationship with the BBC its subsidiaries or associates or which is itself or in association with others in competition with the BBC its subsidiaries or associates or which is  
10 tendering for work from or which supplies goods or services to the BBC its subsidiaries or associates

9.1.2 provide training in how to be interviewed for radio or television

9.1.3 be publicly associated with the work of any charity or government initiative ...

## 15 11. WARRANTIES

The Company warrants that:-

11.1 there is no other contract or engagement or other reason (including prior conduct) which would inhibit or prevent the Broadcaster from entering into or fulfilling the terms of this Agreement

11.2 the Broadcaster's contributions under this Agreement are and will be the Broadcaster's original work and do not and shall not contain anything which is an infringement of copyright or related rights or which is defamatory or which may bring the BBC into disrepute ...

## 25 12. INDEMNITY

The Company shall at all times keep the BBC fully indemnified in respect of any consequences which may ensue upon breach of any of the warranties given by the Company pursuant to Clauses 11 and 5 hereof

30

## 13. TERMINATION

13.1 If the Company or the Broadcaster shall commit a material or irremediable breach of this Agreement ... then the BBC shall have the right to terminate this Agreement forthwith ...

35

## 14. ENHANCEMENT OF REPUTATION

The BBC shall not be obliged to call on the services of the Broadcaster hereunder or to use all or any of the Broadcaster's contributions and if it does not do so it shall not be liable to the Company or to the  
40 Broadcaster for any loss or damage suffered by the Company or the Broadcaster ...

## 18. ASSIGNMENT

The Company shall not assign transfer charge or deal in any other manner with this Agreement or sub-contract any or all of the Broadcaster's obligations under it.

...

5 THE PAYMENT SCHEDULE

(referred to in clause 6.1)

A 1<sup>st</sup> January 2007 to 31<sup>st</sup> December 2007

10 One Hundred and Sixty Three Thousand Two Hundred and Thirty Three Pounds (£163,233) which shall be payable via equal monthly instalments in arrears

[B-G contain provision for annual increases (if any) in the Retail Prices Index in the previous year up to 1<sup>st</sup> January 2013 to 31 December 2013]

15 H In addition the BBC agrees to make payment to the Company of Seven Thousand Five Hundred Pounds (£7,500) at the end of June and the end of December in each year of this Agreement SUBJECT TO the programming of the Broadcaster consistently and significantly exceeding the ratings of its commercial competition (in the opinion of the BBC) over the relevant preceding Six Month period.

20 which sums are all expressed as exclusive of VAT.