[2020] UKUT 0216 (TCC)

Appeal number: UT/2019/0112

INCOME TAX, NATIONAL INSURANCE CONTRIBUTIONS – IR35 – whether radio presenter would be employee under hypothetical contracts – appeal allowed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Appellants**
-and-	
KICKABOUT PRODUCTIONS LIMITED	**Respondent**

TRIBUNAL **MR JUSTICE ZACAROLI**
JUDGE JONATHAN RICHARDS

Sitting in public by way of video hearing treated as taking place in London on 16 and 17 June 2020

Christopher Stone and Marianne Tutin, instructed by the General Counsel and Solicitor for HM Revenue & for the Appellants

Georgia Hicks and Harry Sheehan, instructed by Radcliffes LeBrasseur for the Respondent

DECISION

1. The respondent company, ("KPL") is a personal service company owned by Mr Paul Hawksbee, a radio presenter and script-writer. During the tax years 2012-13 to 2014-15, KPL entered into contracts with Talksport Limited ("Talksport") under which KPL agreed to provide the services of Mr Hawksbee as a presenter on Talksport Radio's "Hawksbee & Jacobs show" (the "Show"), a three-hour radio programme broadcast every weekday from 1pm to 4pm.

2. The arrangements between Talksport, Mr Hawksbee and KPL did not result in Mr Hawksbee actually becoming an employee of Talksport. However, HMRC formed the view that the "intermediaries legislation", commonly referred to as "IR35", applied so as to treat Mr Hawksbee as an employee for tax purposes and to impose on KPL an obligation to account for national insurance contributions and income tax under the PAYE system. Accordingly, HMRC made assessments for income tax purposes and issued notices of determination for national insurance purposes against which KPL appealed to the First-tier Tribunal (the "FTT").

3. On 25 June 2019, the FTT (Judge Thomas Scott and Mr Charles Baker) released a decision (the "Decision") allowing KPL's appeal on the exercise of Judge Scott's casting vote. HMRC now appeal, with the permission of Judge Scott, against the Decision. The hearing before us took the form of a "fully remote" video hearing and both parties were content with a hearing in that form.

The Decision

4. The Decision and the issues arising in this appeal against it are best understood in the context of the intermediaries legislation itself. The key provision of that legislation for income tax purposes, as in force for 2014-15, was contained in section 49 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") which provided, 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…

5. Materially similar provisions applied for income tax purposes in the other tax years under appeal and for national insurance purposes.

6. Against that statutory background it was common ground that, in order to determine whether the intermediaries legislation applied, the FTT had to determine the following matters:

(1) As Step 1, it had to find the terms of the actual contractual arrangements and relevant circumstances within which Mr Hawksbee worked.

(2) As Step 2, it had to ascertain the terms of the "hypothetical contract" postulated by s49(1)(c)(i) of ITEPA and the counterpart legislation as applicable for the purposes of national insurance.

(3) As Step 3, it had to consider whether the hypothetical contract would be a contract of employment.

7. If the answer at Step 3 was that the hypothetical contract was a contract for services (also referred to as a "contract of self-employment"), then it was common ground, both before us and the FTT, that HMRC's assessments and notices of determination should be set aside. If, by contrast, the answer at Step 3 was that the hypothetical contract was a contract of service (also referred to as a "contract of employment"), it was common ground that HMRC's assessments and notices of determination should stand as issued.

The FTT's findings of fact and interpretation of disputed aspects of the contracts

8. Unless we say otherwise, in the remainder of this decision notice, references to numbers in square brackets are to paragraphs of the Decision. At [53] to [68], the FTT made findings of fact which formed the bedrock of the "relevant circumstances" for the purposes of its analysis of Step 1. Neither party seeks to disturb these findings of fact in this appeal. We will summarise some of the FTT's findings of fact only insofar as relevant for the purposes of this appeal:

(1) By the time of the FTT hearing, Mr Hawksbee and Mr Jacobs had been presenting the show for a period of 18 years ([54]).

(2) For the three years 2012-13 to 2014-15 under appeal, the income that Mr Hawksbee, through KPL, obtained from Talksport was approximately 90% of his total income for those years ([56]).

(3) Mr Hawksbee did not work as a radio presenter, in those tax years, for anyone other than Talksport ([57]).

(4) Mr Hawksbee and Mr Jacobs have, within certain constraints, the freedom to decide on the format and content of each episode of the Show and, subject to availability, the guests who are to appear on the Show ([60]). The constraints derive largely from OFCOM regulatory requirements. For example, the Show must comply with OFCOM guidelines, must have a certain amount of news content, and must run travel bulletins twice an hour ([61]). The Show also needs to run commercials at set intervals.

(5) While the Show is created and hosted by Mr Hawksbee and Mr Jacobs, who also generate its content, a production team is needed to enable the Show to be broadcast ([64]). When the Show is being broadcast, subject to the constraints outlined in paragraph (4) above, control over what is said and

when rests very much with Mr Hawksbee and Mr Jacobs. Therefore, while the production team might tell the presenters during a broadcast that an advertising break is due, they will wait for the presenters' cue before cutting to that break.

(6) The Show is broadcast as "live" but, as with many live shows, a short delay of around 14 seconds is built in. The presenters of the Show and the production team have access to a "dump button" which prevents material recorded within that period of delay from being broadcast. This facility could be used if, for example, something was said during the Show that breached the station's OFCOM guidelines, if foul language was used, or if defamatory comments were made.

9. In the period under appeal, there were two contracts in place between KPL and Talksport which the FTT referred to as "Contract One" and "Contract Two" respectively[1]. Contract One was signed on 1 January 2012 ([69]). It was replaced by Contract Two with effect from 1 January 2014. The effect of some, though not many, of the provisions forming part of Contract One and Contract Two was in dispute.

10. When we come to consider HMRC's grounds of appeal, we will analyse the FTT's conclusions and reasoning as to the effect of these contracts. For present purposes it is sufficient to note that Judge Scott's decision was that neither Contract One nor Contract Two imposed any obligation on Talksport to provide Mr Hawksbee with work although both contracts did require KPL to provide the services of Mr Hawksbee for a minimum of 222 shows per year. Mr Baker, the Tribunal member on the panel, did not agree with this conclusion and an appendix to the Decision set out the reasons for his dissent. Judge Scott's conclusion on this issue however prevailed on an exercise of his casting vote.

The hypothetical contracts

11. The FTT concluded that there would have been two hypothetical contracts, mirroring the fact that there were two actual contracts between Talksport and KPL. At [136] to [176], the FTT set out the terms of the hypothetical contracts which we replicate in the Appendix to this decision. With two exceptions, relating to the extent or otherwise of Talksport's obligation to provide work and whether Mr Hawksbee would be required to undergo medical examinations, the FTT's conclusions as to the terms of those hypothetical contracts are not challenged.

[1] Contract One was expressed to be between Talksport and Mr Hawksbee. However, the FTT found at [92] that this was as a result of an administrative error and the true contracting parties were Talksport and KPL.

Whether the hypothetical contracts were employment contracts

12. At [22] to [38], the FTT directed itself on the law concerning the difference between a contract of service, or a contract of employment, on one hand and a contract for services, or a contract of self-employment, on the other.

13. The FTT's starting point was the familiar test set out by MacKenna J in *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB 497, 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.

14. The FTT ordered its analysis by reference to the three conditions that MacKenna J had identified. It also had in mind the question set out in *Market Investigations Limited v Minister of Social Security* [1969] 2 QB 173 and *Hall v Lorimer* [1994] 1 WLR 209 namely whether a person is in business "on their own account".

15. At [177] to [183], the FTT considered the issue of "mutuality of obligation". It concluded, at [179] that the "bare minimum of mutuality of obligation" necessary for the hypothetical contracts to be employment contracts was present. At [180] to [183], it analysed the nature of that mutuality in more detail. Judge Scott's conclusion was that, because Talksport had no obligation to provide Mr Hawksbee with any shows to present under the hypothetical contracts, the mutuality that was present was not "strongly indicative of an employment relationship". Mr Baker disagreed with Judge Scott's conclusion because he disagreed with its premise, the absence of an obligation on Talksport to provide work.

16. At [184] to [196], the FTT considered the question of "control", the second element in the test that MacKenna J had formulated in *Ready Mixed Concrete*. The parties were not agreed as to what conclusions the FTT reached on the question of "control" and we will return to this issue later in our decision. For the time being, we simply note the following aspects of the FTT's analysis of the control issue:

> (1) At [184(1)], the FTT directed itself that "control" for relevant purposes included the power to decide what work is done, how it is done and where and when it is undertaken.
>
> (2) At [185], it directed itself that aspects of "control" that applied to employees and non-employees alike are of no material assistance in deciding whether there is sufficient "control" for an employment relationship to exist.
>
> (3) It decided, at [187] that, under the hypothetical contracts, Talksport would have control over where and when Mr Hawksbee performed his services.

(4) At [188] to [191], it explained the senses in which Talksport could, and could not, control "how" Mr Hawksbee provided his services.

(5) At [193], it concluded that, under both hypothetical contracts, Talksport had "relatively narrow" rights to control "what" services Mr Hawksbee could be required to perform in part because of its conclusion, at [193], that under both hypothetical contracts, Mr Hawksbee could be obliged only to present the Show and perform some ancillary obligations relating to promotion of the Talksport brand.

17. At [196], the FTT set out some conclusions on its analysis of "control" as follows:

> 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.

18. At [197] to [230], the FTT considered the extent to which other relevant terms present in, or absent from, the hypothetical contracts pointed towards or away from an employment relationship. We will consider this part of the FTT's reasoning later on in this decision. For present purposes, it is sufficient to note that the FTT set out various factors and considered whether each pointed in favour of the proposition that the hypothetical contracts were employment contracts or contracts of self-employment or whether it was neutral.

19. At [230] onwards, the FTT reflected on the conclusions it had reached thus far. At [233] and [234] it said:

> 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.

20. At [235] and [236], the FTT noted that the strongest indicators of employment status were the degree of Mr Hawksbee's economic dependency on Talksport and the fact that Mr Hawksbee had been presenting the Show for 18 years without interruption. However, those indicators were outweighed by factors referred to at [236] as follows:

> (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.

21. The FTT's overall conclusion was that the hypothetical contracts would not give rise to an employment relationship.

The grounds of appeal against the Decision

22. HMRC appeal to this tribunal on eight grounds:

> (1) The FTT[2] erred in law and/or reached a perverse conclusion in finding that under the actual contracts between KPL and Talksport, Talksport had no obligation to provide any work to KPL. In addition, the FTT erred in law in finding, at the third stage of its analysis of the *Ready Mixed Concrete* criterion that an obligation on an employer to offer work during the term of a contract is a "touchstone of employment", the absence of which points away from employment and towards self-employment.
>
> (2) The FTT erred in law and/or took into account an irrelevant consideration in treating the absence from the actual written contracts of clauses granting worker rights (such as sick pay or pension entitlement) as a factor pointing away from employment status.

[2] This was expressed to be a challenge to the Judge's conclusions, since Mr Baker disagreed with Judge Scott in this respect. However, since the Decision was of the FTT, albeit delivered following an exercise of Judge Scott's casting vote, we will refer to the aspects of the Decision that are challenged under Ground 1 as being made by "the FTT".

(3) The FTT erred in law and/or took into account an irrelevant consideration in treating the absence from the actual written contracts of clauses found in employment contracts by virtue of statute (such as disciplinary and grievance procedures) or clauses alleged to be typical of employment contracts (medicals, training and appraisals), as a factor pointing away from employment status. In respect of medicals, it reached a perverse finding.

(4) The FTT failed to apply the second stage of the *Ready Mixed Concrete* test properly because it did not determine whether there was a sufficient framework of control; and it erred in law in treating Talksport's extensive contractual rights of control as a limited right of control that pointed away from employment status.

(5) The FTT erred in law and/or failed to take into account a relevant consideration by giving limited weight to the exclusivity provisions in the hypothetical contracts.

(6) The FTT erred in law and/or failed to take into account a relevant consideration by treating the two-year duration of each contract as a "neutral factor" in the assessment of employment status.

(7) The FTT erred in law and/or took into account an irrelevant consideration in finding that Mr Hawksbee would bear a relevant financial risk under the hypothetical contracts.

(8) The FTT erred in law and/or took into account an irrelevant consideration in finding that Mr Hawksbee would not have been "part and parcel" of Talksport under the hypothetical contracts.

The parties' arguments under Ground 1

23. HMRC's appeal under Ground 1 has two aspects:

(1) First, it is said that the FTT made errors of law when reaching the conclusion that the actual contracts between KPL and Talksport imposed no obligation on Talksport to provide shows for Mr Hawksbee to present. Those errors resulted in the FTT wrongly concluding that the hypothetical contracts would similarly impose no such obligation on Talksport. We refer to this as "Ground 1(a)".

(2) A separate argument, which we refer to as "Ground 1(b)", is that the FTT, having found (see [179] and [182]) that there was sufficient mutuality of obligation at the first stage of the *Ready Mixed Concrete* test for the hypothetical contracts to constitute contracts of employment, was wrong to revisit the question of mutuality of obligation at the third stage.

24. The parties adopted significantly different approaches to Ground 1(a). HMRC rooted their arguments firmly in the terms of Contract One and Contract Two, arguing that the FTT had misconstrued those contracts. KPL criticised this approach arguing that the FTT's conclusion that the true intention of the parties was that Talksport had no obligation to offer work to KPL under either Contract One or Contract Two was one

of fact and not law. Accordingly, in KPL's submission, in order to succeed on their Ground 1(a), HMRC needed to meet the familiar high hurdle for overturning factual conclusions of the FTT by demonstrating that the Decision either ignored relevant considerations, took into account irrelevant considerations or was perverse. KPL argued that HMRC had failed to get over that hurdle and that their case on Ground 1(a) involved simply "island hopping" among a sea of evidence (in the words of the Court of Appeal in *Fage UK Limited and another v Chobani UK Limited and another* [2014] EWCA Civ 5).

25. The question whether interpretation of a contract is a question of law or of fact was considered by Lord Hoffman in *Carmichael and another v National Power PLC* [1999] ICR 1226, at 1233A-C:

> (1) If parties intend all the terms of their contract (apart from any implied by law) to be contained in a document or documents, the meaning of those documents, and so the interpretation of the contract, is a pure question of law.
>
> (2) The question whether the parties intended a document or documents to be the exclusive record of the terms of their agreement is a question of fact.
>
> (3) If, however, the intention of the parties, objectively ascertained, has to be gathered partly from documents but also from oral exchanges and conduct, then the terms of the contract are a question of fact.

26. There was no dispute between the parties as to the correct approach to the construction of a written contract, albeit that they emphasised different aspects. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It requires a consideration of the contract as a whole and, depending on the nature, formality and quality of its drafting, more or less weight to be given to elements of the wider context: see *Wood v Capita Insurance Services Ltd* [2017] UKSC 24. In particular, a court or tribunal can test rival constructions, to determine which is more consistent with business common sense, and test the implications of rival constructions (per Lord Hodge, at [11]-[12]).

27. Ms Hicks reminded us that we are not seeking to judge the good sense or otherwise of a business model or to rewrite contractual terms on the basis that they appear imprudent. As Lord Neuberger put it in at [20] of *Arnold v Britton* [2015] UKSC 36:

> …when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

Ground 1(a) - Discussion

The terms of Contract One

28. There were some differences between Contract One and Contract Two which makes it appropriate to consider Ground 1(a) in relation to those two contracts separately. As the FTT noted ([71]), Contract One consisted of a Letter of Engagement to which were appended some general terms and conditions.

29. Clause 1 of the Letter of Engagement stated:

> We [Talksport] 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.

30. Clause 2.1 of the Letter of Engagement provided 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.

31. Clause 3 of the Letter of Engagement set out the services that Mr Hawksbee was to provide 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 4:00 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")

32. Pursuant to Clause 5 of the Letter of Engagement, KPL was to be paid £525 plus VAT for each episode of the Show that Mr Hawksbee co-presented. Clause 5.1 also provided that the minimum amount of fee that Talksport was obliged to pay was to be "based on" 222 programmes per year. At [98] of the Decision, the FTT concluded that

this clause did not entitle KPL, absent early termination, to receive a minimum of £116,550 (i.e. 222 x £525) plus VAT from Talksport per year and HMRC do not seek to disturb that conclusion in this appeal.

33. Other relevant terms of Contract One were as follows:

> (1) It had a fixed term of two years but both Talksport and KPL had a right to terminate early on giving four months' notice.
>
> (2) Talksport had "first call" on Mr Hawksbee's services in connection with the Show at all times notwithstanding any other commitments he may have.
>
> (3) Mr Hawksbee was prohibited during the term of Contract One from working for any other UK radio broadcaster. He was, however, permitted to undertake other work provided that it did not interfere with the duties he owed to Talksport under Contract One.
>
> (4) Pursuant to Condition 5 of the Terms and Conditions, Talksport had a right to suspend Contract One if, for example, production of the Show was prevented, interrupted or delayed by circumstances outside Talksport's control or while Talksport was conducting any investigation as to suspected misconduct of Mr Hawksbee. If Talksport exercised this right, KPL would cease to be entitled to accrue further fees under Contract One, though fees that had already accrued would be unaffected. The suspension of the engagement would last "as long as the event giving rise to it plus such further period as may reasonably be required by Talksport to prepare to resume using the Presenter's Services or until this Agreement is terminated".

34. Ms Hicks said relatively little in her written and oral submissions about the wording used in Contract One and focused much of her support for Judge Scott's interpretation of the contracts on Clause 8 of Contract Two (which we will consider in the next section) and the FTT's findings as to the expectations of the parties. However, it was clear from her submissions that KPL places emphasis on what it submits to be the absence of an express obligation on Talksport to offer shows for Mr Hawksbee to present.

35. In our judgment, however, that approach ignores the provisions that are set out in Contract One. By Clauses 1 to 3 of the Letter of Engagement, Talksport specifically engaged KPL to provide the Services which consisted of Mr Hawksbee presenting, or co-presenting, a three-hour radio show between 1pm and 4pm on Mondays to Fridays, or such other days and times as Talksport stipulated. KPL was engaged to do so for a period of two years (subject to earlier termination). We consider that, in the context of the contract as a whole, the express engagement of KPL for a fixed period to provide the Services was sufficient to constitute a binding commitment by Talksport to provide at least some work. This is not a case where the contract provided merely a framework within which Talksport would offer particular pieces of work (such as in *Clark v Oxfordshire Health Authority* [1999] IRLR 125, where nurses working as "bank staff" would be offered work as and when a temporary vacancy occurred). There was no need for a separate offer of particular pieces of work, given the engagement to carry out the

Services for a fixed term, in the same way as a company engaging a person as ship's captain is necessarily agreeing to provide the ship in question. No further express clause was needed to constitute an obligation on Talksport to provide Mr Hawksbee with some shows to present.

36. This conclusion is supported by reference to other aspects of Contract One. First, the right for either party to terminate the contract on four months' notice makes little sense if Talksport is entitled simply to stop providing shows for Mr Hawksbee to present.

37. Second, the provisions for suspension make sense only if Talksport was obliged to provide work to KPL. The evident purpose of the right of suspension was to protect Talksport from the risk of having to continue to offer KPL work in circumstances where, for example, it was not practicable for the Show to be aired or if it was investigating possible misconduct by Mr Hawksbee. Moreover, the fact that the right of suspension could only be invoked on the occurrence of certain conditions carries with it the necessary implication that in the absence of those conditions Talksport did not have the right to suspend provision of work to KPL. Equally, the fact that the suspension was expressed to last as long as the relevant event giving rise to it, "plus such further period as may reasonably be required by Talksport to prepare to resume using the Presenter's services", carries with it the necessary implication that once the event ceased and such further period had passed to enable Talksport to prepare to resume using Mr Hawksbee's services, Talksport was obliged to resume using those services. In contrast, on KPL's interpretation, Talksport would not need to invoke its right to suspend the contract, for example, if it was investigating Mr Hawksbee for misconduct; it could simply decide to offer KPL no work.

38. Third, by clause 2.1 Mr Hawksbee had to make himself available for work on the Show for at least 222 days per year and give Talksport "first call" on his services in connection with the Show at all other times. KPL was only paid per programme that Mr Hawksbee actually co-presented and Mr Hawksbee could not work for another UK radio broadcaster. On KPL's interpretation, despite KPL having accepted obligations that would make it extremely difficult for Mr Hawksbee to earn a living by working full-time for anyone else, Talksport was not obliged to offer KPL or Mr Hawksbee any work at all. We regard that outcome as so contrary to business common sense as to call into question whether it was the true effect of Contract One. Business common sense points, on the contrary, to a conclusion that Contract One set out a contractual regime under which, in normal circumstances, Mr Hawksbee was, during the term of that contract, to be provided with a show to co-present on every weekday between 1pm and 4pm. The fact that Talksport was (by reason of clause 3.1) not obliged to offer work on a particular day or time does not negate the obligation to provide work at all.

39. KPL submits that the FTT's conclusion, not challenged in this appeal, that Clause 5.1 did not provide KPL with a minimum fee of £116,550 per year plus VAT demonstrates that Talksport could not have had an obligation to offer a minimum of 222 shows per year. We do not agree. If (as we have concluded) there is an obligation to provide work, then KPL would be entitled to claim damages if that obligation was breached. The absence of an obligation to pay a specific sum in lieu of a day's work

means that the damages cannot be a simple product of the number of days on which no work was provided. Their calculation would instead take account (among other things) of the number of days worked already in a particular year and the ability to terminate in any event on four months' notice. The absence of an obligation to pay a specific sum for each day that work was not offered is nevertheless consistent with Talksport having an obligation to provide work.

40. For these reasons, we reject the contention that the wording of Contract One indicates that Talksport had no obligation to offer Mr Hawksbee any shows to present. On the contrary, in our judgment, Contract One required Talksport unless and until it exercised its right of termination or suspension to offer KPL at least 222 shows per year for Mr Hawksbee to co-present.

41. We therefore turn to KPL's central argument that the FTT made clear factual findings as to the true agreement with which we should not interfere.

The expectations and intentions of the parties; Clause 8 of Contract Two

42. KPL places great emphasis on Clause 8 of Contract Two and the FTT's conclusion (at [104]) that it reflected the true agreement between the parties. We do not think, however, that this assists KPL, because there is nothing in clause 8 which is inconsistent with an obligation on Talksport to provide work to KPL. It reads as follows:

> It is agreed that the Company [i.e. Talksport] is not obliged to assign Services to the Freelance Company [i.e. KPL] under this Agreement and neither is the Freelance Company obliged to accept the assignment of Services under this Agreement.

43. It is important to be clear about precisely what findings the FTT did, and did not, make in relation to Clause 8. As recorded at [100] of the Decision, HMRC's primary submission was that Clause 8 was "a sham in the *Autoclenz*[3] sense". In essence that was a submission that, because Clause 8 set out terms that were so unrealistic and so at odds with what was happening "on the ground", it could not have formed part of the common intention of the parties (objectively construed) and so formed no part of the contract between them.

44. In rejecting that submission, the FTT noted an important qualification, namely that Clause 8 must be interpreted so far as possible to be consistent with the rest of the agreement. It continued, at [105]:

> …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

[3] *Autoclenz v Belcher* [2011] UKSC 41

> year. There is no corresponding obligation on Talksport to offer any minimum number of shows.

45. The particular problem the FTT was addressing was the apparent inconsistency between Clause 8 (if construed as not obliging KPL to accept any work) and KPL's obligation in the Schedule to provide a minimum of 222 days' work. We consider that the FTT was correct in concluding that nothing in Clause 8 negated the obligation on KPL to provide a minimum of 222 days' work within the context of a project. It logically follows, however, that nothing in Clause 8 negated (if it otherwise existed) an obligation on Talksport to provide work within the context of a project. To understand this conclusion it is necessary to place Clause 8 in the context of other relevant provisions of Contract Two.

46. Clause 1 of Contract Two provided that:

> [Talksport] has offered and [KPL] has accepted engagement, on the terms set out in this Agreement, to provide independent presenting services to [Talksport] and/or any of its Group Companies in relation to such projects relating to [Talksport's] business as shall, from to time be assigned to [KPL] by [Talksport]… (the **Services**)

47. Contract Two is therefore structured from the outset differently to Contract One. It provides a framework within which projects may be assigned from time to time to KPL. There is nothing in the body of Contract Two, for example, which identifies any services to be provided by KPL. Nor is there any limitation on the term of the agreement. These are found exclusively in the Schedule of Services attached to Contract Two (which, we note, is not referred to at all in the body of Contract Two), where the requirement to provide a minimum of 222 shows per year is found, and where the duration of the agreement is defined as two years. It is clear, in our judgment, that the Schedule of Services contained a "project" assigned to KPL within the meaning of Clause 1 of Contract Two.

48. Returning to Clause 8, when it uses the defined term "Services", that is a reference back to "projects" assigned from time to time by Talksport. The sole relevance of Clause 8, therefore, is that it negates any obligation on Talksport to offer, or on KPL to accept, any project. For the time period relevant to this appeal, Clause 8 has no relevance at all, since there is no doubt that the project consisting of the services set out in the Schedule of Services was assigned to KPL for the period commencing 1 January 2014 and ending 31 December 2015.

49. We consider that this was, in essence, the conclusion reached by the FTT in the first four sentences of [105]. In any event, we consider it is clearly the correct construction of Contract Two. Before us, HMRC renewed their argument that Clause 8 of Contract Two was a "sham in the *Autoclenz* sense" and that it should therefore be disregarded altogether. We reject that argument as we agree with the FTT that Clause 8, when read in the light of the provisions of Contract Two as a whole, reflected the reality of the arrangement between KPL and Talksport. For the reasons we have explained, however, we consider that Clause 8 is not unhelpful to HMRC's case.

50. In light of our conclusion on the impact of Clause 8, the question whether Talksport was obliged to offer KPL particular episodes of the Show for Mr Hawksbee to co-present is to be answered by reference to the provisions of the Schedule, read together with the provisions found in the body of Contract Two.

51. The Schedule when read together with the other provisions of Contract Two broadly replicated many of the provisions we have already mentioned in our discussion of Contract One with some relatively unimportant differences[4]. Significantly for the purposes of our analysis the combined effect of the main contract and the Schedule of Services was:

(1) KPL was obliged to make Mr Hawksbee available for a minimum of 222 shows per year. KPL was paid a flat fee per show.

(2) The termination and suspension provisions of Contract Two were materially similar to those of Contract One.

(3) The non-compete provisions are materially similar.

52. The presence of these factors means that the conclusion we have reached above in relation to Contract One applies with equal force to Contract Two. That conclusion is reinforced by the language of Clause 1, as we have interpreted it above when read together with Clause 8 and the Schedule of Services. That is because the "assignment" of the project contained in the Schedule of Services to KPL, for a duration of two years, implies an undertaking to provide the minimum number of shows contained within the project in much the same way as was implicit in the "engagement" of KPL under Contract One.

53. Aside from Clause 8, KPL contended that the FTT's conclusion that neither Contract One nor Contract Two imposed an obligation on Talksport to provide a minimum number of shows was a conclusion of fact, not law, as it was based on the parties' conduct and expectations and that there was no proper basis for interfering with that conclusion of fact.

54. When pressed as to what evidence was relied upon, going to the conduct and expectation of the parties, to support the contention that there was no obligation on Talksport to provide work, Ms Hicks identified only evidence as to the understanding of the parties as to the meaning of the contract.

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[4] For example, KPL was to be entitled to a higher fee of £575 plus VAT per episode of the Show. Talksport only had "reasonable call" on Mr Hawksbee's services in connection with the Show (as opposed to the "first call" provided for by Contract One).

55. Ms Hicks referred us in this respect to various extracts from the written and oral evidence that was before the FTT[5]. To the extent that these consisted of Mr Hawksbee (for KPL) or Mr Fisher (for Talksport) confirming that it was their understanding of the contracts that Talksport had no obligation to provide work, this is of limited, if any, assistance in construing the contract. In *Autoclenz v Belcher*, Lord Clarke (at [32]) endorsed the statement of the law given by Aikens LJ at [91] of his judgment in the same case in the Court of Appeal:

> There is a danger that a court or tribunal might concentrate too much on what were the private intentions or expectations of the parties. What the parties privately intended or expected (either before or after the contract was agreed) *may* be evidence of what, objectively discerned, was actually agreed between the parties: see Lord Hoffmann's speech in the *Chartbrook* case [2009] AC 1101, paras 64 -65. But ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed.

56. Typically in an employment context, evidence of the manner in which the parties conducted themselves towards each other is admitted as being relevant to the true agreement between them. In *Autoclenz* itself, for example, evidence as to the practice adopted by the parties was relied on to conclude that a contractual term purporting to negate an obligation to undertake work did not reflect the true agreement between the parties. That is not the issue here. Indeed, insofar as the FTT referred to the expectation of the parties (as opposed to their subjective understanding of the terms of the contract), they expected that Mr Hawksbee would perform the minimum number of shows each year (see [180]).

57. In our judgment, therefore, this was not a case in which the contract was only partly set out in the written agreement with the remainder consisting of oral terms or terms to be implied by conduct. The FTT did not cite any conduct of the parties, or any expectation arising from such conduct, in support of its conclusion that there was no obligation on Talksport to provide any work to KPL. While HMRC had made the limited submission that Clause 8 of Contract Two was a "sham in the *Autoclenz*" sense, that submission was rejected.

58. The FTT's task, therefore, was to interpret contracts that were entirely in writing and we conclude that its decision that the contracts imposed no obligation on Talksport

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[5] We did not have available to us all the factual evidence that was before the FTT in part, KPL said, because HMRC refused to include witness statements in the hearing bundles that were before us. However, Ms Hicks clearly had full access to all of that factual evidence and her skeleton argument contained extensive extracts from it. We also had KPL's Note on Evidence that was before the FTT. We have concluded that KPL has had a fair opportunity to direct our attention to evidence that it considered to support its case.

to provide work was one of law. For the reasons we have given above, we disagree with that conclusion based on our reading of the contracts as a whole.

59. Moreover, on closer inspection, the evidence to which we were referred was in any event not inconsistent with a conclusion that, under both Contract One and Contract Two, Talksport had an obligation to offer a minimum of 222 shows each year for Mr Hawksbee to co-present unless Talksport exercised its right of suspension or termination. For example, KPL's note on evidence referred to paragraph 64 of Mr Hawksbee's witness statement in which he said that if there were a serious terror incident in the UK and eight weeks of the show were cancelled, there would be no obligation on Talksport to make good the number of shows or give compensation. We would regard that as merely reflecting Talksport's contractual right of suspension.

60. Similarly, Mr Hawksbee's evidence had referred to situations in which he had missed episodes of the Show because either he or his wife was unwell or because he was moving house and so unavailable. His evidence was that KPL had not been paid for those shows. That evidence is also entirely consistent with the interpretation of the contracts that HMRC advance. Talksport only had to pay KPL for shows that Mr Hawksbee co-presented and so, if Mr Hawksbee did not make himself available for a particular show, for whatever reason, KPL was not entitled to be paid.

61. In a similar vein, Mr Hawksbee and Mr Fisher both referred to situations in which the Show had not been broadcast on a particular day (for example because Talksport preferred to broadcast commentary on a live football game forming part of a European championship or a World Cup) stating that KPL would not be paid for the show that did not go ahead. However, again, that outcome is entirely consistent with the interpretation of the written contracts that HMRC favour. Talksport had no obligation to air an episode of the Show on any particular day provided that, in aggregate and subject to their right of suspension and termination, Talksport offered KPL at least 222 shows per year.

Ground 1(a) – Conclusion

62. When setting out the terms of the hypothetical contracts at [139] to [176] of the Decision, the FTT did not state expressly that Talksport would have no obligation to provide Mr Hawksbee with work under those contracts. However, reading the Decision as a whole, it is clear that this was the FTT's conclusion (see, for example, [236(1)]). This was manifestly based on its conclusion as to the terms of the actual Contracts One and Two. For the reasons we have given above, we consider that the FTT's conclusion that Contracts One and Two contained no obligation on Talksport to provide work was an error of law.

63. The FTT's conclusion that the hypothetical contracts contained no obligation on Talksport to provide work was highly material to its overall decision. At [233], the FTT concluded that "the lack of obligation on Talksport to provide work points away from a relationship of employment". Although, at [234], the FTT acknowledged that the perceived absence of an obligation to provide work was not decisive, it clearly weighed heavily in the balance, and was the first factor identified in [236] as pointing away from

a contract of employment. We therefore consider that our conclusion on Ground 1(a) of itself means that we should exercise our power under s11 of the Tribunals, Courts and Enforcement Act 2007 to set aside the Decision.

64. The more difficult question is whether we should ourselves seek to remake the Decision or whether we should remit the appeal back to the FTT for reconsideration.

65. Ms Hicks submitted that, if we were minded to set aside the Decision, we should not remake it ourselves and instead should remit it back to the same FTT for reconsideration. She argued that to decide whether the hypothetical contracts were for employment or self-employment, it is necessary to paint a picture from an accumulation of detail and then stand back to assess the overall result, a task which she submitted was best performed by the FTT who had all relevant factual evidence before them.

66. We acknowledge that, to a degree, the determination of whether the hypothetical contracts were of employment or self-employment involves a multi-factorial assessment. However, once Ground 1(a) is resolved, there is almost no dispute between the parties as to the terms of the hypothetical agreements, nor as to other findings of primary fact. Moreover, it is not suggested that the FTT ought to have made primary findings of fact on any other issues relevant to the determination of the issues before it. Therefore, we consider that we can ourselves perform the necessary evaluation by reference to the FTT's findings of primary fact and that it would be proportionate for us to do so.

67. Before doing so, however, we refer briefly to the remaining grounds of appeal. Our conclusion in respect of Ground 1(a) makes it unnecessary for us to consider any of the other Grounds of appeal aside from Grounds 1(b) and Ground 4, because those other Grounds challenge particular factors taken into account by the FTT in undertaking the third stage of the *Ready Mixed Concrete* test. Since it falls to us to undertake that exercise afresh, it is for us to determine what factors are relevant and what weight to place on them.

68. As to Grounds 1(b) and 4, these raise a question of principle whether it is permissible, having concluded that there is a sufficient mutuality of obligation and sufficient control to satisfy the first two stages of the *Ready Mixed Concrete* test, to revisit the nature of the mutuality of obligations or control at the third stage. For reasons we explain below, we have come to the conclusion that, irrespective of any *re*consideration of the mutuality of obligations or control, the contracts were in fact contracts of employment. In those circumstances, the point of principle does not arise. Since we consider that the point of principle would be better determined in the context of a case where it squarely arises on the facts, we do not propose to determine it on this appeal.

Remaking the Decision

69. In remaking the Decision, we will, like the FTT, consider the three aspects of the test in *Ready Mixed Contract* in order.

Stage 1 – mutuality of obligations

70. As to Stage 1, the question is whether there is the "irreducible minimum of mutual obligation necessary to create a contract of service" (in the words of Lord Irvine of Lairg in *Carmichael v National Power plc* [1999] ICR 1226). That "irreducible minimum" will be present if, under the hypothetical contracts, there are (at least) mutual obligations that relate in some way to the provision of, or payment for, work that Mr Hawksbee was to provide personally (see paragraph 16 of the decision of the Employment Appeal Tribunal in *James v Greenwich London Borough Council* [2007] ICR 577). This is clearly satisfied by our conclusion on Ground 1(a) that, in addition to KPL being required to undertake work (which was common ground), Talksport would (under the hypothetical contract) be under an obligation to provide Mr Hawksbee with work.

71. In light of this conclusion, it is unnecessary for us to consider whether HMRC is correct in its contention that an obligation on the employer to provide work is not necessary for the "irreducible minimum" of mutuality to be present, and that the recent decision of the Upper Tribunal to the contrary effect in *HMRC v Professional Game Match Officials Ltd* [2020] UKUT 147 (TCC) was wrong.

Stage 2 – "Control"

72. The essential question is whether there is a "sufficient framework of control" (in the words of Briggs J, as he then was, in *Montgomery v Johnson Underwood* [2001] ICR 819) for the hypothetical contracts to constitute contracts of employment. There was no real dispute as to the legal test to be applied. In *Ready Mixed Concrete*, MacKenna J said of the test of "control" at 515F:

> 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.

73. In their skeleton argument, HMRC submitted that the FTT had failed to express a concluded view in the Decision as to whether there was a sufficient framework of control for the second *Ready Mixed Contract* condition to be met[6]. In our judgment it did. Had it not concluded that there was a sufficient framework of control at Stage 2 of the Ready Mixed Concrete test, it would not have been necessary to move to a consideration of Stage 3 of that test having correctly directed itself, at [48], that this Stage 3 was a "negative" condition in the sense outlined at paragraph 42 of the Upper Tribunal's decision in *Weightwatchers* (see paragraph 82 below).

[6] KPL does not accept that this argument was within the scope of HMRC's grant of permission to appeal.

74. In any event, since we are now at the stage of remaking the Decision, it is academic whether the FTT did or did not do so. We will start with the FTT's findings of primary fact and perform our own analysis of whether there is a sufficient framework of control.

75. The following findings of primary fact are relevant:

> (1) Under both hypothetical contracts, Talksport would have control over "where" and "when" Mr Hawksbee did his work ([187]).
>
> (2) While the Show was being broadcast, with the limited exception of the "dump button", Talksport had little practical control over how Mr Hawksbee did his job ([188]).
>
> (3) In practice, Mr Hawksbee had a high degree of editorial control over the content and format of each episode of the Show. He was not required to read from a script, he chose the interviewees and he chose the stories or events to include ([190]). In practice, disagreements between Mr Hawksbee and Talksport in relation to the content of a forthcoming episode of the Show were resolved amicably, generally with Mr Hawksbee's view prevailing ([191]). However, under both hypothetical contracts, even though Talksport was in practice happy to give Mr Hawksbee considerable artistic freedom, ultimately Talksport enjoyed the right to decide on the format or content of a particular episode of the Show.
>
> (4) Under both hypothetical contracts, Talksport had relatively narrow rights of control over what tasks Mr Hawksbee performed. Talksport could only require him to prepare and present episodes of the Show and undertake ancillary obligations relating to the promotion of the Talksport brand.

76. Part of HMRC's Ground 4 involves a challenge to the FTT's finding of fact summarised at paragraph 75(4) above. HMRC point out that under both Contract One and Contract Two, Talksport had the right of "first call" or "reasonable call" respectively on Mr Hawksbee's services in connection with the Show which they said was a much broader requirement than to prepare and present episodes of the Show. They stressed the breadth of the obligations in Contract One and Contract Two for Mr Hawksbee to adhere to a schedule of preparation and rehearsal specified by Talksport and to attend functions, and, under Contract Two, to act as an "ambassador" for Talksport and to contribute content for Talksport's website and magazine.

77. We see little force to that challenge. We consider that the FTT was entitled to express the broad evaluative conclusion that Talksport had "relatively narrow" control over what tasks Mr Hawksbee performed. However, we do not consider that the point matters greatly since, whether or not these rights were "relatively narrow", there was clearly a "sufficient framework of control" to satisfy Stage 2 of the *Ready Mixed Contract* test.

78. On the FTT's findings of fact, Talksport could control "where" and "when" Mr Hawksbee performed his duties. It also had material rights of control over "what" tasks Mr Hawksbee performed because, given the FTT's finding at [191], it had the ultimate right to decide on the form and content of a particular episode of the Show. The fact

that, in practice, Talksport was content to give Mr Hawksbee a high degree of autonomy does not alter that conclusion since, as Langstaff J said in *Wright v Aegis Defence Services* (BVI) Ltd UKEAT/0173/17/DM the "control" test is focusing on the right of control and not how, or if, that right was exercised in practice.

79. Admittedly, Talksport had little practical or contractual control over "how" Mr Hawksbee performed his duties. However, as the Upper Tribunal (Zacaroli J and Judge Thomas Scott) said at [135] of *Professional Game Match Officials Limited v HMRC* [2020] UKUT 0147 (TCC) after considering relevant authorities on the issue:

> … a practical limitation on the ability to interfere in the real-time performance of a task by a specialist, whether that be as a surgeon, a chef, a footballer or a live broadcaster, does not of itself mean that there is not sufficient control to create an employment relationship.

80. Moreover, the FTT's finding that Talksport had "relatively narrow" control over what tasks Mr Hawksbee performed does not prevent the sufficient framework of control from being present. As HMRC submitted, skilled employees are frequently engaged to perform tasks with a very narrow compass. Footballers and ophthalmic surgeons are examples. Cooke J noted at 187A of *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 that appointment to do a specific task at a fixed fee is not inconsistent with a contract being a contract of service.

81. Putting all of that together, we consider that there was a sufficient framework of control for Mr Hawksbee to be regarded as an employee of Talksport under the hypothetical contracts. We are fortified in this conclusion by our perception that this was the conclusion that the FTT itself reached with the benefit of all of the evidence.

Stage 3 – Other factors

82. Stage 3 of the *Ready Mixed Concrete* analysis requires us to consider whether the terms of the hypothetical contracts, viewed as a whole, are inconsistent with them being contracts of employment. Stage 3, however, does not proceed from what might be termed a "standing start". As Briggs J said at [42] of *Weight Watchers (UK) Ltd and others v HMRC* [2011] UKUT 433 (TCC):

> 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.

83. In the Decision, the FTT approached this task by setting out those factors that it considered pointed in favour of employment status, those that pointed against and those that were neutral.

84. The factors that it considered to point in favour of employment status were:

> (1) The "exclusivity" provisions of the hypothetical contracts and Mr Hawksbee's obligation to provide "first call" or "reasonable call" on his services to KPL in connection with the Show, although the FTT regarded that indication as "mitigated" by certain factors (see [198] to [202]).
>
> (2) The fact that neither hypothetical contract entitled Mr Hawksbee to provide a substitute ([206]).
>
> (3) The length of time for which Mr Hawksbee had been presenting the Show and the degree of his economic dependency on Talksport (which the FTT described at [235] as the "strongest indicators" of an employment relationship).

85. KPL has not served any Respondent's notice suggesting that the FTT was wrong to regard those factors as pointing in favour of an employment relationship. Since we are remaking the Decision it would nevertheless be open to us to form a different view of these factors. However, we agree entirely with the FTT's conclusion that they point in favour of an employment relationship. We will therefore focus our attention on those factors which the FTT considered pointed against employment status and those that it regarded as neutral.

86. In agreement with the FTT we regard the following aspects of the hypothetical contracts as broadly neutral:

> (1) The extent to which Mr Hawksbee provided his own equipment ([217] and [218]); and
>
> (2) Statements in the hypothetical contracts to the effect that they were not intended to constitute a contract of employment ([220] and [221]).

87. We consider, however, that the hypothetical contracts' duration of two years, with four months' notice of termination required, was an indicator of employment status and was not (as the FTT considered) a neutral factor. Similarly, the fact that Mr Hawksbee had been presenting, or co-presenting, the Show for some 18 years pointed in favour of employment status. In *Hall v Lorimer*, [1992] STC 599, at 612f, Mummery J considered that the "continuity of a relationship" could be an indicator of employment status and this view was not doubted by the Court of Appeal.

88. The FTT regarded the following factors as pointing in favour of the hypothetical contracts being contracts of self-employment:

> (1) Its perception that Talksport had no obligation to provide Mr Hawksbee with work under the hypothetical contracts ([233]).
>
> (2) The narrowness of the services that Mr Hawksbee was obliged to perform ([234]).

(3) The absence of terms in the hypothetical contracts containing typical "worker" rights relating to holiday, sick pay, pensions or paternity leave ([207] to [210]). Mr Baker disagreed with this conclusion and set out his reasons in his dissent in the appendix to the Decision.

(4) The absence of provisions of the hypothetical contract dealing with matters such as medicals, training and appraisals, pointed against an employment relationship ([211]).

(5) The fact that, under the hypothetical contracts, Mr Hawksbee was paid a fixed fee per show that he presented and the FTT's perception that he was thereby taking "financial risk".

(6) Its conclusion (at [222] to [225]) that Mr Hawksbee was not "part and parcel" of Talksport's organisation, adapting a phrase that Lord Denning had used in *Bank Voor Handel en Scheepvaart NV v Slatford* [1953] 2 QB 248.

89. Our conclusion on Ground 1(a) means that, even putting to one side the question as to whether the FTT was entitled to consider questions of mutuality at the third *Ready Mixed Contract* stage, Talksport did have an obligation to provide Mr Hawksbee with work under the hypothetical contracts. Therefore, the factor referred to at paragraph 88(1) was not capable of pointing against employment status.

90. In addition, even if, contrary to HMRC's submissions, it were legitimate for the FTT to take into account the extent of Talksport's "control" under hypothetical contracts at the third *Ready Mixed Contract* stage we regard the perceived "narrowness" of Mr Hawksbee's services (the factor referred to in paragraph 88(2)) as being of little, if any, weight. As we have already observed, skilled employees are routinely engaged to provide a narrow and specialist set of services.

91. Once the factor mentioned in paragraph 88(1) is taken out of consideration and the factor mentioned in paragraph 88(2) is given little weight, the balance shifts decisively as the remaining factors identified as pointing against the "prima facie affirmative conclusion" (in the words of Briggs J in *Weight Watchers*) given by the first two stages are, in our judgment, relatively slender.

92. Neither Talksport nor KPL thought that the actual contracts were contracts of employment and both Contract One and Contract Two included express acknowledgements that they were not contracts of employment. In those circumstances, it was inevitable that "worker" rights referred to in paragraph 88(3) would not be included in them. Mr Stone rightly observed that the question whether a contract of employment has been created arises frequently in employment tribunals with employers not infrequently relying on carefully crafted contracts to deny workers rights to holiday pay, sick pay and paternity leave. The absence from such contracts of terms providing the very rights that that are sought to be denied should not, in that context, count greatly in the balance. Nor, in respectful disagreement with the FTT, do we consider they count greatly in this case.

93. We agree with the FTT that the fact that Mr Hawksbee was not required to undertake training, or be subject to appraisals (see paragraph 88(4)) was a slight pointer away from employment status. However, HMRC are correct to submit that the FTT was mistaken in finding that he could not be required to submit to medicals: Clause 1.13 of the standard terms and conditions forming part of Contract One imposed such a requirement. Overall, we regard the weight to be given to this factor as slight. Talksport had, through KPL, obtained Mr Hawksbee's services for a fixed period. If his performance was unsatisfactory, or if he did not develop the Show so that listeners continued to find it appealing, Talksport could always choose not to renew the contract.

94. We do not consider that Mr Hawksbee would be taking material "financial risk" under the hypothetical contracts or, to the extent he was, that this was anything other than a slender indication of self-employment status (see paragraph 88(5) above). Under the hypothetical contracts, Mr Hawksbee would have an engagement with Talksport that would take up much of his time and restrict his opportunity to earn money by working for someone else. He therefore certainly ran the risk that his obligations to Talksport might make it difficult to earn money from other sources and that he might have to turn down potentially profitable work. However, we would regard that as a risk run by both employees and independent contractors.

95. Nor do we think that, in the circumstances of this case, an impressionistic analysis of whether Mr Hawksbee was "part and parcel" of Talksport's organisation would weigh heavily in the balance. It seems clear to us that the FTT itself did not regard this issue of great weight. In *Ready Mixed Concrete* itself, MacKenna J said that the question whether someone is "part and parcel" of an organisation "raises more questions than I know how to answer". It may well be that, in other cases, analysis whether someone is "part and parcel" of an organisation will be illuminating. However, we consider that it adds little in this case.

96. Taking all of the relevant factors into account, therefore, we consider that viewed as a whole they are not inconsistent with the hypothetical contracts being contracts of employment.

Disposition

97. The appeal is allowed on Ground 1(a). Under both hypothetical contracts, Mr Hawksbee would have been an employee of Talksport. We therefore remake the Decision so as to result in KPL's appeals against the PAYE assessments and Notices of Determination issued for national insurance purposes being dismissed.

MR JUSTICE ZACAROLI

UPPER TRIBUNAL JUDGE JONATHAN RICHARDS

RELEASE DATE: 28 July 2020

APPENDIX – THE FTT'S FINDINGS AS TO THE TERMS OF THE HYPOTHETICAL CONTRACTS[7]

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

[7] The paragraph numbers in this Appendix correspond to paragraphs of the Decision.

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 year 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.