Appeal number: UT/2020/000353

INCOME TAX AND NICS– IR35 –"intermediaries legislation" – whether project manager would be an employee under a hypothetical direct contract – appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

NORTHERN LIGHT SOLUTIONS LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
JUDGE GUY BRANNAN

Sitting in public by way of remote video Microsoft Teams hearing treated as taking place in, London, on 6 and 7 May 2021

Michael Collins, counsel, for the Appellant
Christopher Stone and Colm Kelly, counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

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DECISION

Introduction

1. The Appellant ("Northern Light") is the personal service company of Mr Robert Lee. This appeal concerns whether the "intermediaries legislation", commonly known as "IR 35", applied to the arrangements under which Northern Light supplied the services of Mr Lee to the Nationwide Building Society ("NBS").

2. Mr Lee had been engaged as a project manager by NBS for a number of periods since 2007. Northern Light was incorporated by Mr Lee in 2008 and Mr Lee worked continually for NBS for several years, save for one period in 2012/13. During the tax years under appeal, Mr Lee worked for NBS under a series of contracts covering the periods 1/2/2012 – 31/10/2012 and 22/4/2013 – 19/12/2014.

3. The First-tier Tribunal ("FTT") (Judge Hyde) held that under the terms of the hypothetical contract envisaged by section 49 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") and its equivalent for National Insurance Contributions ("NICs"), Mr Lee would have been an employee of NBS during the periods in question ("the Decision"). Therefore, the FTT upheld the determinations for income tax purposes and notices of determination in respect of NICs made against Northern Light.[1]

4. Permission to appeal was granted by the Upper Tribunal (Judge Thomas Scott) on 3 July 2020.

5. For the reasons given below, we dismiss this appeal.

The statutory provisions

6. The relevant provisions of the "intermediaries legislation" are contained in Chapter 8 of Part 2 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") and in the Social Security Contributions (Intermediaries) Regulations 2000, SI 2000/727 (the "Regulations").

7. The conditions for the income tax legislation to apply are set out in section 49 of ITEPA 2003 which provides, so far as material, as follows:

> "49 Engagements to which this Chapter applies
>
> (1) This Chapter applies where—

[1] In respect of the period from 6 April 2012 to 5 April 2013 the determination was in the amount of £6,078 of income tax and the notice was for £8,803 in respect of NICs. On 18 October 2017 HMRC issued further determinations and notices in respect of the periods from 6 April 2013 to 5 April 2015 in the amount of £19,613 in respect of income tax and £13,664 of NICs for the tax year 2013-14 and £14,637 of income tax and £11,728 of NICs for the tax year 2014-15.

> (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."

8. It was common ground before us that the provisions in relation to NICs were, for all material purposes, the same as the income tax provisions set out above.

9. It was also common ground that the first two conditions set out in section 49(1)(a) and section 49(1)(b) were met because Mr Lee, the "worker" for these purposes, personally performed services for the NBS and those services were provided, not directly, but under arrangements involving Northern Light.

10. The issue before the FTT and, on appeal, before us was whether the condition in section 49(1)(c) was met. It was common ground between the parties that, in approaching the application of section 49(1)(c) in the context of the current arrangements, the following three stage approach should be adopted:

> (1) **Stage 1**. Find the terms of the actual contractual arrangements (between Northern Light and NBS on one hand and between Mr Lee and Northern Light on the other) and relevant circumstances within which Mr Lee worked.
>
> (2) **Stage 2**. Ascertain the terms of the 'hypothetical contract' (between Mr Lee and NBS) postulated by s 49(1)(c)(i) of ITEPA 2003 and the counterpart legislation as applicable for the purposes of NICs.
>
> (3) **Stage 3**. Consider whether the hypothetical contract would be a contract of employment.

11. This was the approach adopted by this Tribunal in *HMRC v Kickabout Productions Ltd* [2020] UKUT 216 (TCC), [2020] STC 1787, at [6] (Zacaroli J and Judge Richards) ("*Kickabout*") and in *HMRC v Atholl House Productions Ltd* [2021] STC 588, at [6] (Marcus Smith J and Judge Richards) ("*Atholl House*") and, in this decision, we followed the same approach.

12. We also adopt the observations made by this Tribunal in *Atholl House* at [8] as to the correct approach to follow in constructing the hypothetical contract:

> "[8] …(1) It is clear that, for income tax purposes at least, this is not simply an exercise in pure 'transposition' of terms from the actual contract into the hypothetical contract. As the Upper Tribunal (Mann J and UTJ Thomas Scott) said in *Christa Ackroyd Media Ltd v Revenue and Customs Comrs* [2019] UKUT 326 (TCC), [2019] STC 2222, at [36]:
>
> '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 s 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 …." '

The Decision

13. Unless otherwise indicated, in the remainder of this decision, references to numbers in square brackets are to paragraphs of the Decision.

The facts

14. The FTT set out detailed findings of fact at [33] – [88]. We set out the facts in some detail because, as we shall explain, part of Northern Light's case in this appeal involved a challenge, under the well-known principles in *Edwards v Bairstow* [1956] AC 14 ("*Edwards v Bairstow*"), to some of the FTT's findings.

15. The FTT noted at [34] that Mr Lee gave written and evidence and found that he was a credible witness. It was also recorded at [35] that HMRC, however, did not give witness evidence but, instead, relied on upon documents produced, including two Notes ("the Notes") of meetings held on 21 October 2014 and 13 October 2016 with representatives of NBS and Advantage AxPO ("AxPO"), with Mr Lee and his accountant present at the 2014 meeting as observers (respectively, "the 2014 meeting" and "the 2016 meeting"). The Notes were signed by representatives of NBS. At these meetings HMRC discussed with NBS and AxPO the Northern Light engagement and the nature of the relationship between Mr Lee and NBS. The FTT also recorded at [35] that in giving evidence Mr Lee disagreed with aspects of the content of the note, although no details of the areas of disagreement were given.

16. The FTT made two observations at [36] about the Notes. First, it found that the fact that Mr Lee remained silent during the 2014 meeting did not amount to agreement with NBS's comments. Mr Lee understood that he was there as an observer and that he may not have felt it his place to intervene. Secondly, the FTT noted that it was unfortunate that no witnesses from NBS were willing to give evidence and that, therefore, Northern Light was unable to test the evidence in cross-examination. Representatives of NBS had been invited to attend the hearing but had refused to do so.

17. Where Mr Lee gave evidence, which was at odds with the Notes and was cross-examined on it, the FTT took into account in its weighing of the evidence the lack of equivalent testing applied to HMRC's evidence [37].

18. The FTT found at [41]-[43] that:

A) from 1 February 2012 to 31 October 2012 Northern Light contracted on three occasions with an agency, Clarity Resourcing (UK) LLP ("Clarity"), which contracted with another agency, AxPO which in turn contracted with NBS ("the Clarity Contracts"). The periods covered by these contracts were;

(1) 1 February 2012 to 12 February 2012

(2) 13 February 2012 to 30 April 2012

(3) 1 May 2012 to 31 October 2012, but terminated early on 14 September 2012;

B) from 1 November 2012 to 21 April 2013 Northern Light provided Mr Lee's services to Lloyds Bank Group; and

C) from 22 April 2013 to 19 December 2014 Northern Light contracted on four occasions directly with AxPO ("the AxPO Contracts") which in turn contracted with NBS. The periods covered by these contracts were:

(1) 22 April 2013 to 31 March 2014

(2) 14 May 2014 to 30 October 2014

(3) 1 November 2014 to 28 November 2014

(4) 1 December 2014 to 19 December 2014

19. The parties agreed that the Clarity Contracts for the relevant periods are materially the same, [44]. The FTT then recorded at [45] that the parties agreed that the AxPO Contracts for the relevant periods had slight differences but were materially the same. The FTT set out the material terms from both sets of contracts in an Appendix to the Decision.

20. At [46], the FTT accepted "[NBS]'s evidence"[2] that if it wished to recruit for a project it would first consider whether existing employees had the requisite skills. Otherwise, NBS would try to use an existing contractor but, if none suitable were available, it would seek a new external contractor through agencies. For existing or new potential contractors NBS would produce a detailed proposal called a Resource Request Form setting out the nature of the project. This was forwarded to the agencies who forwarded it on to potential candidates such as Northern Light. Northern Light then decided whether it wished to contract.

[2] NBS and its employees, as we have noted, did not give evidence and we assume that the FTT meant that, in this respect, it accepted the contents of the Notes.

21. Mr Lee's evidence was that, as he was on NBS's premises almost continuously, if NBS was considering offering him a new contract NBS would ask him first if he was interested. If he was interested then the formal process would be followed through. [47].

22. At [48]-[57], the FTT summarised evidence concerning a typical project management role which Mr Lee performed for NBS. A governance structure, involving a NBS project board, would be established. Day-to-day management and allocation of project tasks was Mr Lee's responsibility but it was also his responsibility to ensure this group was kept up to date on progress, any challenges and what Mr Lee was doing to resolve any issues. Mr Lee described it as his responsibility to determine the cost of delivering the project and when it could be delivered by. He would draw up a detailed plan of activity and then manage that plan until delivery. The plan would be reviewed by the project board and, if thought appropriate, amended, for example as to cost, scope or timing. Mr Lee would then establish the core members of the project team.

23. Mr Lee would initiate and chair weekly meetings of the core team to review tasks and forecasted tasks. A central risk register would be established to manage risks, issues, assumptions and decisions. Mr Lee was also responsible for planning and monitoring the project finances on a weekly basis.

24. All work was subject to governance standards. Specifically, the Nationwide Change Framework ("NCF"), to which Mr Lee was required to adhere, was a set of governance standards that applied to all projects directing how the project was to be managed, setting required levels of visibility and accountability.

25. In accordance with the NCF Mr Lee would complete a weekly report for the head of group programmes to give a view on project progress and meet with him or her to discuss the project. A report was also sent to the monthly project board.

26. The FTT found at [57] that NCF was specific to NBS but that similar project management standards would have applied in other similar organisations.

27. At [58]-[64], the FTT considered Mr Lee's working patterns.

28. When Mr Lee started a contract with NBS, there was no induction training other than in relation to health and safety and there was no ongoing training.

29. On joining, Mr Lee would be provided with a contractor pass. Laptops were also provided by NBS for security purposes but no other equipment. Mr Lee would use a desk at NBS's offices on a flexible basis. Northern Light did not provide any equipment beyond a home office and his own vehicle.

30. Northern Light/Mr Lee was contracted to work what was described as a professional day at a fixed day rate, five days a week subject to the usual statutory holidays. In the Clarity Contracts a day was defined as 7.5 hours a day. The term was undefined in the AxPO Contracts and the FTT found that it would have been of equivalent length. A schedule to the Clarity Contracts provided that any additional days or hours would need to be agreed in advance and charged on a pro rata basis.

31. The FTT accepted that Mr Lee would work extra hours beyond what was in the contract to keep on top of the project but would not be paid for them.

32. Mr Lee would work beyond the contracted hours during the week to enable him to finish at lunchtime on a Friday. He was officially based in Swindon, which is where the project team was based, Mr Lee would normally work there but he would occasionally work from another NBS office in Macclesfield on a Friday or Monday to accommodate his weekly travelling from his home nearby.

33. Whilst (under the terms of the contracts) Mr Lee was required to seek consent to any absences, in practice he did not do so and NBS did not insist on him doing so, but Mr Lee instead notified the head of group programmes out of courtesy. If there was a need for a meeting when he was not in the Swindon office, for example on a Friday afternoon, Mr Lee would dial in. If the project was failing he would not disappear on a Friday afternoon.

34. Mr Lee was not subject to any appraisal and no line management responsibilities for any staff beyond managing the relevant task.

35. At [65]-[67] the FTT considered the pay and benefits provided by NBS to Northern Light.

36. Northern Light was paid on a day rate and there was no entitlement to employee benefits such as holiday, sickness, pensions or any benefit in kind.

37. Each year the agency would be notified by NBS that as a contractor Mr Lee would be unable to provide services during a furlough period of between 2 and 3 weeks covering mid-December to early January. If Mr Lee did work during this period Northern Light would not be paid. The agreement of a director of NBS would be required for an exception to be made but Mr Lee never made such a request. No such furlough period applied to employees. This arrangement was not contained in either of the Clarity or AxPO Contracts but Mr Lee accepted that it applied. As regards the periods under appeal, this issue affected 2013 but was not relevant to 2012 because during that period Mr Lee was working at Lloyds and, in 2014, the contract terminated early and, therefore, it was not a relevant issue. The FTT found that this arrangement formed part of the terms of any contract which spanned this furlough period of mid-December to early January and so Mr Lee was put, in effect, on a mandatory unpaid holiday and would not be paid for any work he did during this period.

38. Northern Light was required under the Clarity Contract to take out employer's liability insurance, public liability insurance and other suitable policies such as professional indemnity insurance. Under the AxPO Contract Northern Light was required to take out employer's liability insurance of between £5m and £10m and professional indemnity insurance of £1m.

39. At [68]-[72], the FTT considered the contract terms.

40. The term of each contract was for a fixed period. Mr Lee worked at NBS continuously from 2007 to December 2014 with the exception of the following periods;

(1) 14 September 2012 to 31 October 2012 being the period from the early termination of the NBS contract on 14 September until commencement of the Lloyds contract;

(2) 1 November 2012 to 21 April 2013 being the period of the five month contract with Lloyds; and

(3) 1 April 2014 to 13 May 2014.

41. It was common ground that there was no over-arching single contract. The FTT found that in the Clarity and AxPO Contracts, outside of any subsisting contract, there was no obligation on NBS to engage Northern Light or for Northern Light to accept any proposal from NBS.

42. Whilst each contract was for a fixed term there were termination rights. Under the Clarity Contract, NBS could terminate the contract;

(1) with one week's notice in the first month and four weeks' notice thereafter.

(2) if the consultancy work had finished to the reasonable satisfaction of NBS, the agreement expired automatically. The Clarity Contract commencing 1 May 2012 was due to end on 31 October 2012, but NBS terminated Northern Light's contract early on 14 September 2012, because the project was cancelled following a change in the regulations that were the subject of the project.

(3) immediately if Northern Light failed to perform the consultancy services promptly, efficiently, with all due skill and in a professional manner

43. Under the schedule to the AxPO Contract NBS could terminate the contract:

(1) Immediately, until the criminality checks had been completed.

(2) Otherwise the notice period was one week for the first 4 weeks and thereafter 4 weeks.

44. Under the AxPO Contract, the contract could be terminated immediately upon NBS terminating its contract with AxPO.

45. No evidence was adduced as to the terms of the NBS/AxPO Contract and therefore the FTT specifically refrained from finding that it entitled NBS effectively to terminate Mr Lee's engagement without notice. Accordingly, the FTT found that there was no right in the AxPO Contract to terminate the contract on the consultancy work finishing.

46. At [73]-[79], the FTT considered the right of Northern Light to provide a substitute for Mr Lee.

47. The FTT noted at [81] the statements of Mr Pilkington of NBS, recorded in the Notes of the meetings with HMRC, that in practice it would be impractical for NBS to accept substitutes due to the necessary restrictions on access to NBS's systems and restricted site access. Any substitute would need to go through vetting checks and an interview and get up to speed on the project.

48. After considering the arguments of the parties as to the correct construction of the contractual provisions, the FTT concluded at [84] that in both the Clarity Contract and the AxPO Contract Northern Light could propose a substitute but NBS acting reasonably could, subject to the terms set out in each of the relevant hypothetical contracts, refuse.

49. At [85] the FTT concluded:

> "However, I accept HMRC's argument as to the practical limitations to the right of substitution. I find Mr Lee was a specialist project manager very familiar with [NBS]'s business and its process and indeed was recruited for these reasons. Accordingly, in practice providing a substitute that met the requirements for the right experience, security clearance and familiarity with the project meant that it was difficult for Mr Lee to offer a substitute that [NBS] acting reasonably would accept."

50. At [86]-[88] the FTT considered whether NBS had the right to move Mr Lee.

51. The FTT noted that Mr Pilkington of NBS claimed in one of the meetings with HMRC in 2016 that NBS had the right to move contractors such as Mr Lee to another project during the term of a contract if a project was cancelled or deferred. However, the FTT found that (with the exception of a contract dated contract dated 22 April 2013) NBS did not have the right to move Mr Lee to another project during the term of a contract. The FTT also found that Mr Lee agreed to the variation in the 22 April 2013 contract and was not required to do so by NBS.

Submissions before the FTT

52. At [89]-[142], the FTT considered the submissions of the parties covering, *inter alia*, issues relating to mutuality of obligations, the right of substitution, the degree of control exercised over Northern Light/Mr Lee, whether Northern Light/Mr Lee was in business on their own account and whether Northern Light/Mr Lee was part and parcel of the NBS organisation.

Terms of the hypothetical contracts

53. At [143]-[146] the FTT considered the terms of the hypothetical contracts between Mr Lee and NBS posited by section 49 ITEPA, noting that the terms of the contracts upon which Northern Light was engaged had to be taken into account (section 49(4)). The FTT made the following findings at [145]:

> "Having considered the above facts, I find the principal terms of the hypothetical contracts between Mr Lee and [NBS] to be as follows;
>
> (1) Mr Lee and [NBS] each have discretion as to whether to contract with each other and did so on seven occasions during the period subject to this appeal
>
> (2) There are three Clarity Contracts are for the following fixed periods;
>
> (a) 1 February 2012 to 12 February 2012

(b) 13 February 2012 to 30 April 2012

(c) 1 May 2012 to 31 October 2012 (terminated early on 14 September 2012)

(3) There are four AxPO Contracts for the following fixed periods;

(a) 22 April 2013 to 31 March 2014

(b) 14 May 2014 to 30 October 2014

(c) 1 November 2014 to 28 November 2014

(d) 1 December 2014 to 19 December 2014

(4) Mr Lee is paid a day rate applicable to the original contract being in the region of £450 during the term of the contract and required to work a professional week, which for the Clarity Contracts is specified to be 7.5 hours a day. He is entitled to additional pay for additional hours worked.

(5) Mr Lee is required to work at [NBS]'s Swindon offices and can be required to work in other [NBS] offices with travel expenses reimbursed by [NBS].

(6) The contract is terminable on one week's notice for the first 4 weeks and thereafter 4 weeks, subject to;

(a) In respect of the Clarity Contracts, the contract was also terminable immediately upon completion of the services, that is to say the project for which Mr Lee is hired, to [NBS]'s reasonable satisfaction

(b) In respect of the AxPO Contracts, the contract was also terminable on no notice until such time as criminality checks were carried out

(7) For a two or three week period over Christmas notified by [NBS] in advance Mr Lee cannot work for [NBS] and he is not paid for any work he does during that period

(8) Mr Lee would be required to comply with [NBS]'s processes and policies including the [NBS] Change Framework

(9) During the currency of any contract Mr Lee cannot be required by [NBS] to work on any project other than the one described in the current contract.

(10) Mr Lee can provide a substitute;

(a) In the Clarity Contracts, subject to [NBS]'s consent, such agreement not to be unreasonably withheld as set out in Clause 2.1 of the Clarity terms.

(b) In the AxPO Contracts, in accordance with clause 10.2 of the AxPO terms, a substitute could be offered but [NBS] could reject the substitute if in its reasonable opinion such replacement is not wholly suitable (whether by reason of skills, experience, training, qualifications, authorisations or otherwise)

(11) Mr Lee is not entitled to any holiday, sickness, pensions benefits or other benefits in kind

(12) There was no induction other than health and safety and no initial or ongoing training

(13) Mr Lee is not subject to appraisals

(14) Mr Lee had no line management responsibilities for staff

(15) Mr Lee is issued a contractor pass rather than an employee pass

(16) Mr Lee is required to take out suitable contractor insurance for a minimum cover of £1m."

Evaluation of the hypothetical contracts

54. At [147] to [160] the FTT evaluated the terms of the hypothetical contracts.

55. The FTT noted at [147] that its task in determining the nature of the hypothetical contract was, as Mummery J said in *Hall v Lorimer* [1992] STC 599 at 611, "a matter of the evaluation of the overall effect of the detail".

56. Following the three-stage test of McKenna J in *Ready Mixed Concrete (Southeast) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 ("*Ready Mixed Concrete*"), the FTT discussed the nature of the hypothetical contract under a number of subject matters.

57. First, at [148]-[150], the FTT considered the question of mutuality of obligation. Under this heading, the FTT noted that it had already found that the nature of each hypothetical contract was one of a series of limited fixed term contracts, each with notice provisions, being generally between 1 and 4 weeks. However, in the AxPO Contracts NBS could terminate without notice until the criminal checks have been carried out. In the Clarity Contracts, NBS was entitled to terminate the Clarity Contract early on completion of the project. Outside of these fixed term contracts the FTT found that NBS was not obliged to offer work and Mr Lee was not required to provide his services.

58. The FTT considered at [149] that the mutuality of obligation test was "a very low threshold". It found that there was a mutuality of obligation in the limited sense as set out in *Cornwall County Council v Prater* [2006] ICR 731("*Prater*") and *Quashie v Stringfellows Restaurant Ltd* [2012] EWCA Civ 1735 ("*Quashie*") of there being mutuality within the contract once entered into for Mr Lee to provide services and for NBS to pay Mr Lee, unless the relevant notice is given under the contract. That mutuality was not affected by the furlough period but the FTT found that, if there was still a continuing contract between the parties, the obligation to work and the obligation to pay were suspended for a fixed and period.

59. At [150], the FTT found that the mutuality did not extend to any expectation that further work would be provided by NBS or any commitment by Mr Lee that services would be provided after the expiry of the contract.

60. Secondly, at [151]-[152], the FTT considered the question of the right of substitution.

61. The FTT noted at [151] that it had found that there was a right to provide a substitute but that it was qualified. For the Clarity Contracts the principal limitation was under Clause 2.1 under which NBS had to agree, such approval not to be unreasonably withheld. For AxPO Contracts, NBS was under no obligation to accept such a replacement if in NBS's reasonable opinion such replacement was not wholly suitable.

62. The FTT observed at [152] that no substitute was ever proposed by Northern Light during the period under appeal. The FTT noted the comments of Lord Clarke in *Autoclenz v Belcher* [2011] ICR 1157 at page1163 that what matters was whether a right existed even if it was not exercised. The FTT found it was difficult for Mr Lee to offer a substitute that NBS, acting reasonably, would accept. The FTT agreed with HMRC that, whilst a right that was not enforced may well still exist, "in the current circumstances it is difficult to see this happening to the point where it might be seen as almost theoretical."

63. Thirdly, at [153]-[158], the FTT considered the issue of control i.e. whether NBS controlled or was entitled to control Mr Lee to such a degree that he should be treated as an employee – the second of MacKenna J's tests in *Ready Mixed Concrete*.

64. As to when Mr Lee worked, FTT found that the hypothetical contract required Mr Lee to work a professional day, being 7.5 hours but that he did not in practice keep each day to a standard professional day as required by the Clarity Contract (nor did NBS insist) but satisfied his obligation over the working week. He worked as long as required, did not claim overtime, and worked longer during most of the week to enable him to finish early on a Friday. The FTT concluded that the needs of the project on which Mr Lee was engaged dictated his working hours but subject to that he could decide his working patterns without in practice needing the consent of NBS.

65. As regards control over where Mr Lee worked, the FTT found that NBS was entitled under the hypothetical contract to require Mr Lee to work at the Swindon offices of NBS. In practice, Mr Lee tended to work in the Swindon office but, consistent with the needs of managing the relevant project, chose other NBS offices or working from home if it suited him and did not affect the project. NBS was entitled to require Mr Lee to work in specific locations other than NBS's Swindon sites but never did so.

66. The FTT found at [157], as regards control over where and when Mr Lee worked, that he was required under the hypothetical contracts to work a professional day at NBS's offices (or such other offices as NBS directed) but in practice he was able to vary that as to time and location without asking for permission, but not significantly differently from what might be expected of a similarly senior employee. In this respect the FTT accepted, relying on *White v Troutbeck* [2013] IRLR 286, that the right to control Mr Lee as to when and where he worked existed even if it was not exercised by NBS.

67. In relation to what Mr Lee did, the FTT found that he could not be moved from one project to another. The scope of his work was therefore necessarily pre-determined in general terms at the outset of the contract. NBS did not seek to tell Mr Lee what to do on a given day or how to organise his time. However, within the scope of the contract,

Mr Lee was required to work within the constraints of the NCF and other NBS policies which set out required processes, reporting obligations etc. He was also required to obtain approval for his project plan and performance was monitored.

68. At [158], the FTT found that Mr Lee had more freedom as to how he carried out his role. Mr Lee could not be moved to another project and had considerable scope to manage the contracted project. However, apart from not being able to move him to another project, the level of control exercised over Mr Lee in how he did his job was not inconsistent with him being a highly skilled professional employee. The FTT considered that Mr Lee was in a similar position to the master of a ship or professional architect described by in *Morren v Swinton and Pendlebury BC* [1965]2 All ER 349 at page 351G-I.

69. Finally, the FTT considered at [159]-[160] the other terms of the hypothetical contract.

70. The FTT considered that Mr Lee took very little financial risk and incurred little expense. He worked full time for NBS with a financial exposure very similar to a full-time employee on a fixed term contract. Each contract was separate and there was no obligation on NBS to offer further work and no commitment by Mr Lee that services would be provided after the expiry of any contract. The FTT noted the longstanding relationship between Mr Lee and NBS. With the exception of the contract with Lloyds and some short gaps Mr Lee worked continuously for NBS for some 7 years. Mr Lee knew NBS extremely well and they knew him. He did not have to be interviewed or trained and so could instantly start on any project.

The FTT's conclusion

71. The FTT's conclusion was stated at [162]-[166] as follows:

> "162. Looking at the nature if the relationship in the round, in my view Mr Lee's relationship with [NBS] is one of employment.
>
> 163. There was a mutuality of obligation between the parties but only within each contract. Mr Lee was engaged under separate contracts with no obligation on either party to extend or renew. However, with few gaps Mr Lee has worked for [NBS] for number of years full time in substantially the same project management role.
>
> 164. During the course of a contract [NBS] had the right, albeit not exercised, to direct where Mr Lee worked and to require him to work a professional day. Mr Lee had in practice a considerable degree of operational and personal autonomy but was subject to overarching controls primarily concerned with [NBS]'s need as a highly regulated business to monitor the progress of the relevant project consistent with Mr Lee being a highly skilled employee. However, Mr Lee could not be moved to a different project without his consent.
>
> 165. During the time of Mr Lee's series of contracts with [NBS], aside from the risk of not being engaged on a new contract (which happened rarely), he was not subject to any financial risk beyond that of an

> employee and in many respects, was part and parcel of [NBS]'s operations. Finally, I have found that there was no substantive prospect of Mr Lee asking for or [NBS], acting reasonably, agreeing to a substitute.
>
> 166. On balance, I find that the hypothetical contracts required by the Intermediaries Legislation between Mr Lee and [NBS] would be ones of employment. Accordingly, this appeal is dismissed

Grounds of appeal

72. As already noted, permission to appeal was granted by this Tribunal (Judge Thomas Scott) on 3 July 2020 on the following grounds:

> (1) **Control** – the FTT erred at [158] in appearing to exclude the fact that NBS was not able to move Mr Lee from one project to another. Northern Light argued that the fact that NBS was unable to move Mr Lee to another project is inconsistent with a contract of employment.
>
> (2) **Mutuality of obligation** – the FTT erred in:
>
> > (a) concluding that sufficient mutuality of obligation would have been present in the hypothetical contract to render it a contract of employment There was no obligation on NBS to provide work once the project described in the contract was completed even if the end date of the contract had not been reached. There was no obligation on Mr Lee to continue to provide his services once the project was completed even if the end date of the contract had not been reached.
> >
> > (b) inaptly referring to decision in *Quashie*, at [149].
>
> (3) **Substitution** – the FTT erred in concluding that, even though the hypothetical contracts would have contained a substitution clause, the right of substitution "might be seen as almost theoretical" as there was no (or no sufficient) evidence to support this finding at [152].
>
> (4) **Part and parcel** – the FTT failed to provide adequate reasons for its finding that in many respects, Mr Lee was part and parcel of the NBS's operations, at [165].

73. In his skeleton argument and at the hearing before us, Mr Stone, appearing with Mr Kelly for HMRC, objected to the fact that the grounds of appeal advanced by Mr Collins, appearing for Northern Light, in his skeleton argument were wider than the grounds of appeal for which Northern Light had permission to appeal. In particular, as set out in detail at [111] below, Mr Collins made submissions to the effect that the FTT made an error of law in its approach to the question of substitution.

74. We saw considerable force in Mr Stone's objection and we deprecate the tendency to "expand" grounds of appeal in an appellant's skeleton argument and in oral argument when the points concerned could clearly have been made at the time that the original application for permission to appeal was made Nonetheless, as regards Grounds (1) to (3) above, we have taken the view that the additional points raised by Mr Collins were

very closely bound up with the issues on which permission had been granted and therefore involved little variation in the case that HMRC has already had to meet. Mr Stone did not object with any vigour to the points being argued and he was clearly adequately prepared to deal with them. There would therefore be no prejudice to HMRC if we permitted the new points to be argued. We have therefore decided, exceptionally, to exercise our discretion to admit these additional grounds of appeal.

75. The same could not be said, however, in relation to Ground (4) above. In fact, Mr Collins appeared to have abandoned the argument that Mr Lee was not "part and parcel" of NBS's operations. No mention of this argument was made in his skeleton argument or in his oral submissions. Instead, he substituted a wide-ranging argument based on other provisions of the contractual arrangements being inconsistent with a contract of employment. This is, effectively, the third limb of the three tests in *Ready Mixed Concrete* – a decision which we shall discuss in greater detail below.

76. The need for the statutory requirements to be observed in obtaining permission to appeal from the FTT to this Tribunal has recently been emphasised by Rose LJ in *HMRC v SSE Generation Ltd* [2021] EWCA Civ 105 at [73]-[80]. It is clear that permission to appeal for Mr Collins' more wide-ranging arguments was not granted and Mr Collins made no application to amend Northern Light's grounds of appeal. The new grounds were not closely related to the grounds on which permission had been granted. Accordingly, we refuse to consider those arguments advanced in relation to the other contractual provisions.

77. We should add that that, in its Respondents Notice, HMRC raised an argument in relation to Ground (3) (Substitution) that the FTT should have concluded that the hypothetical contracts between Mr Lee and NBS would not have contained any right of substitution. This was procedurally correct because HMRC were seeking to uphold the FTT's decision on the substitution point but advancing another ground for it.

Discussion

78. Under s 11 of the Tribunals, Courts and Enforcement Act 2007, a right of appeal to this Tribunal only arises in respect of any error of law in the Decision. An appellate court, in an appeal against a decision of a First-tier tribunal on the question whether a person is 'employed' under a 'contract of employment', may interfere with that decision only if (1) it determines that the FTT has made an error of law in determining and applying the relevant legal test, or (2) it is satisfied that no reasonable tribunal, properly directing itself on the law, could have reached the conclusion it did, within the principles of *Edwards v Bairstow*.

79. Grounds (1)-(3) raise the question whether the hypothetical contracts as found by the FTT at [145] were contracts of employment or contracts under which Mr Lee was a self-employed independent contractor. In addition, Ground (3) raises an *Edwards v Bairstow* argument to the effect that there was no evidence or insufficient evidence before the FTT to support a finding that it was impossible or theoretical for Mr Lee to provide a reasonably suitable substitute.

80. Both parties structured their submissions around the threefold test put forward in the well-known decision of McKenna J in *Ready Mixed Concrete* which gives the classic analysis of whether a contract under which a person works for another is a contract of employment or a contract for services. McKenna J said 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."

81. McKenna J continued:

> "I need say little about (i) and (ii).
>
> As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be: see Atiyah's *Vicarious Liability in the Law of Torts* (1967) pp. 59 to 61 and the cases cited by him.
>
> As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.
>
> "What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters." — *Zuijs v. Wirth Brothers Proprietary, Ltd.*
>
> To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication."

82. The first of McKenna J's tests is generally known as the requirement for "mutuality of obligation". It will be seen that the concept of mutuality of obligation also comprises a separate requirement that a contract of employment requires the employee to provide his or her services personally i.e. without a right of substituting another person.

83. The second test is usually described as the "control" test.

84. We shall, in the following discussion, consider the question of mutuality of obligation, the right of substitution and the control test in that order – which was the order in which Mr Collins and Mr Stone presented their submissions.

85. We should observe, however, that in applying the *Ready Mixed Concrete* tests the FTT is called upon to reach a broad evaluative conclusion based on all the evidence before it. As the authorities have repeatedly indicated, this Tribunal should be reluctant to interfere with the evaluative judgment of the FTT unless it is clear that the FTT has misdirected itself as to the law, misapplied the law to the facts or has reached a conclusion which is not open to it on the facts found (in accordance with the principles set out in *Edwards v Bairstow*).

Mutuality of obligation – Ground (2)

86. The mutuality of obligation test requires, as a minimum, that there is a contractual relationship between the parties. That was not an issue in the present case where it was common ground that there were hypothetical contracts between Mr Lee and NBS.

87. In relation to Northern Light's specific ground of appeal – that there was no mutuality of obligation in circumstances where the contract could be terminated early upon completion of a project –in our view,that ground of appeal can only apply to the Clarity Contracts. The termination clause in the AxPo Contracts did not permit early termination in those circumstances.

88. In Northern Light's skeleton argument, Mr Collins additionally argued that there could be no mutuality of obligation in circumstances where Northern Light/Mr Lee was engaged to perform a specific task and could not be required to perform anything else. That specificity of task, according to Mr Collins, was incompatible with mutuality of obligation. Moreover, Mr Collins submitted that the FTT erred in considering mutuality of obligation only in the first sense i.e. that there was a contractual relationship between the parties, rather than in the second sense of whether the nature of the obligations assumed by Mr Lee/Northern Light and NBS were of the kind necessary to give rise to a contract of employment.

89. We reject those submissions.

90. It is true, as we have said, that the test of mutuality of obligations – the first of McKenna J's tests in *Ready Mixed Concrete* – requires as a minimum that there is a contractual relationship between the parties and it was common ground that this requirement was satisfied in the present case.

91. We accept, however, that mutuality of obligations can extend to the question whether the nature of the obligations assumed by the parties were of the kind necessary to give rise to a contract of employment.

92. The point was explored by the Employment Appeal Tribunal (Judge Richardson) in *Drake v Ipsos Mori UK Ltd* [2012] IRLR 973 where the second aspect of the mutuality of obligations test was considered in some detail:

> [33] **Mutuality – was it a contract of employment**?
>
> There is, however a secondary sense in which the concept of mutuality is sometimes used. In this secondary sense it is not relevant to the

> question whether there was a contract at all, but to the question whether the contract was a contract of employment. After a review of the authorities it was described by Langstaff J in *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181 at paragraph 40 as 'a requirement of mutuality specific to contracts of employment'. And in paragraph 48 he said:
>
> 'It cannot simply be control that determines whether a contract is a contract of employment or not. The contract must necessarily relate to mutual obligations to work, and to pay for (or provide) it: to what is known in labour economics as the "wage-work bargain".'
>
> [34] In this secondary sense the concept of mutuality is used with reference to the nature of the contract – particularly, it seems to me, with reference to the first test in the *Ready Mixed Concrete* case. The emphasis is not really on mutuality as such; but on the nature of the bargain between the parties. Speaking for myself I would prefer to use the concept of mutuality only in relation to the question whether a contract existed between the parties; but it is inescapable that the concept of mutuality sometimes creeps into the question whether the contract is a contract of employment.
>
> [35] It is difficult to see why the fact that a contract is terminable at will should be determinative of the question whether the contract is a contract of employment. Agreements to do work personally in exchange for remuneration are of many kinds; casual agreements may be less common now than they once were; but I do not think there is any doubt that casual labour, which may quite often be terminable at will, can be (and historically often has been) provided pursuant to a contract of employment. It would, moreover, be remarkable if a contract which otherwise satisfies the tests for a contract of employment could be taken out of that classification merely by providing that it is terminable at will."

93. We respectfully endorse Judge Richardson's comments and specifically agree with his expressed preference at [34] that mutuality of obligation should usually be confined to the question whether a contract for work in in return for payment existed.

94. More recently, this second aspect of mutuality of obligations was considered by this Tribunal (Zacaroli J and Judge Scott) in *Professional Game Match Officials Ltd v HMRC* [2020] STC 1077. After considering the authorities, the Tribunal concluded:

> "[67] On the basis of the above authorities, we derive the following propositions as to the required content of the mutual obligations.
>
> [68] First, so far as the obligations on the employee are concerned, the minimum requirement is an obligation to perform at least some work and an obligation to do so personally. It is consistent with such an obligation that the employee can in some circumstances refuse to work, without breaching the contract. It is inconsistent with that obligation, however, if the employee can, without breaching the contract, decide

> never to turn up for work: see, in particular, *Cotswold Developments*[3] and *Weight Watchers*.[4]
>
> [69] Second, the minimum requirement on an employer is an obligation to provide work or, in the alternative, a retainer or some form of consideration (which need not necessarily be pecuniary) in the absence of work. We think it is insufficient to constitute an employment contract if the only obligation on the employer is to pay for work if and when it is actually done. We consider this to be the better reading of the judgments of the Court of Appeal in *Clark* [5](including the passages cited in it from *Nethermere*[6]) and the judgment of Langstaff J in *Cotswold Developments*; see also *Usetech*[7] and *Weight Watchers*.
>
> [70] Third, in both cases (and as reiterated in a number of the authorities, for example *Clark* (at 128 (para 22)) and *Weight Watchers* (at [31])), the obligations must subsist throughout the whole period of the contract."

95. We find no support in these authorities (nor the authorities cited therein) for the proposition that there would be insufficient mutuality of obligation present in the hypothetical contracts because there would have been no obligation on NBS to offer (or on the part of Mr Lee to accept) work if a particular project ended before the term of the contract had expired. We see no reason why, when a contract terminates in accordance with its terms, the failure to supply further work by the engager (or by the worker to accept the offer of further work) compels the conclusion that the contract is a contract for services rather than a contract of employment. Until the contract is terminated there is clearly mutuality of obligation in the sense of an obligation to pay for work done and an obligation to do the work provided.

96. Moreover, the hypothetical contracts were clearly "wage-work bargains", as Langstaff J described in *Cotswold Developments.* We therefore reject Northern Light's original arguments under Ground (2).

97. At the hearing, Mr Collins' main argument was different from that stated in Ground (2) above. Instead, Mr Collins submitted that the hypothetical contracts lacked mutuality of obligation because Mr Lee had agreed to perform a specific task and could not be required to do anything else.

98. Again, we do not consider the fact that an engager contracts with a worker to perform a specific task is inconsistent with a contract of employment. If it transpires that performance of the specific task is no longer needed and the contract comes to an end we do not think that this indicates that the contract was a contract for services rather than a contract of employment. In our view, the fact that NBS could not require Mr Lee

[3] *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181

[4] *Weight Watchers (UK) Ltd v HMRC* [2012] STC 265

[5] *Clark v Oxfordshire Health Authority* [1998] IRLR 125

[6] *Nethermere (St Neots) Ltd v Taverna* [1984] IRLR 240

[7] *Usetech Ltd v Young (Inspector of Taxes)* [2004] EWHC 2248 (Ch)

to work on a different project is more relevant to the "control" test set out in *Ready Mixed Concrete* than to the requirement for mutuality of obligation.

99. It follows, therefore, that we see no error of law in the FTT's conclusion at [148]-[150] that the hypothetical contracts had the requisite mutuality of obligation.

Substitution – Ground (3)

100. As we have noted, the FTT concluded at [145] that the hypothetical contracts would include the following provisions in relation to substitution:

> "(10) Mr Lee can provide a substitute;
>
> (a) In the Clarity Contracts, subject to [NBS]'s consent, such agreement not to be unreasonably withheld as set out in Clause 2.1 of the Clarity terms.
>
> (b) In the AxPO Contracts, in accordance with clause 10.2 of the AxPO terms, a substitute could be offered but [NBS] could reject the substitute if in its reasonable opinion such replacement is not wholly suitable (whether by reason of skills, experience, training, qualifications, authorisations or otherwise)."

101.Mr Collins referred to the FTT's decision. First at [85] the FTT held:

> "However, I accept HMRC's argument as to the practical limitations to the right of substitution. I find Mr Lee was a specialist project manager very familiar with [NBS]'s business and its process and indeed was recruited for these reasons. Accordingly, in practice providing a substitute that met the requirements for the right experience, security clearance and familiarity with the project meant that it was difficult for Mr Lee to offer a substitute that [NBS] acting reasonably would accept."

102.Secondly at [152] the FTT concluded:

> "No substitute was ever proposed by the appellant during the period under appeal. I note in this context the comments of Lord Clarke in *Autoclenz v Belcher* that what matters is whether a right exists even if it is not exercised. However, I have found it was difficult for Mr Lee to offer a substitute that [NBS] acting reasonably would accept. I agree with HMRC that, whilst a right that is not enforced may well still exist, in the current circumstances it is difficult to see this happening to the point where it might be seen as almost theoretical."

103. Thirdly, at [165] the FTT considered:

> "Finally, I have found that there was no substantive prospect of Mr Lee asking for or [NBS], acting reasonably, agreeing to a substitute."

104. Mr Collins submitted that there was no evidence (or no sufficient evidence) before the FTT to support a finding of fact that it was impossible or theoretical for Mr Lee to provide a reasonably suitable substitute – in other words, Mr Collins advanced an *Edwards v Bairstow* challenge to the FTT's conclusion. HMRC had provided no

witness evidence on the question of how difficult it might have been for Mr Lee to provide a reasonably suitable substitute.

105. Mr Stone, however, argued that there was sufficient evidence before the FTT which was capable of supporting its findings. Mr Stone drew attention to the Notes. First, as regards the Notes of the meeting in October 2014:

> (1) NBS stated that the contracts with Northern Light did not contain an unfettered right of substitution; and
>
> (2) AxPo confirmed that it would be very unusual for a substitute to be sent, that such a substitute would be subject to "very strict checks," and that Mr Lee "could not just send a substitute". Both Clarity and Northern Light would have to agree a substitute and this had never happened.

106. As regards the Notes of the meeting in October 2016, it was stated that:

> (1) NBS were aware of Mr Lee because he had undertaken work at NBS in the past so they were aware of his skillset, experience and knowledge of NBS' processes and this meant that he did not require additional training;
>
> (2) Mr Lee understood NBS policies and therefore they recruited him and subsequent in engagements he was redeployed as he knew the NBS processes;
>
> (3) There was no need to keep explaining the recruitment processes to Mr Lee because of his repeated engagements by NBS. They would just give Mr Lee an overview of the project;
>
> (4) NBS needed Mr Lee to be a Project Manager. If NBS wrote a description of the work Mr Lee was required to do, it would go to many pages as there were too many things to list;
>
> (5) Mr Lee could not send someone else to do the work. They would not get through security, they would not have a laptop nor knowledge of the work. The reality was that it was not going to happen;

107. Mr Stone also noted that the FTT had found at [39]-[40] that Mr Lee had worked continuously for NBS since 2007 (with the exception of a period in 2012-13, when he worked for Lloyds).

108. In Mr Stone's submission there was, therefore, sufficient evidence to support the conclusions reached by the FTT.

109. In our view, the evidence referred to by Mr Stone demonstrates clearly that there was evidence before the FTT on which the FTT could base its conclusions (either directly or as a matter of inference from its findings of primary fact) referred to at [100] to [103]above. The conclusion which the FTT reached was open to it on the evidence. We, therefore, reject this ground of appeal.

110. Mr Collins, however, made further submissions in relation to the right of substitution which went further than this *Edwards v Bairstow* challenge.

111.Mr Collins submitted that under both versions of the hypothetical contracts Mr Lee was able to provide a suitable substitute and NBS could not reasonably object. This right of substitution meant that the hypothetical contracts could not be a contract of employment. Mr Collins relied on the decision of the Court of Appeal (Hirst, Peter Gibson and Auld LJJ) in *Express and Echo Publications Ltd v Tanton* [1999] ICR 693 ("*Tanton*"). In that case an individual was engaged as a delivery driver under an agreement which it was intended should be a contract for services. The individual was sent a document headed "an agreement for services" which provided that should the applicant be "unable or unwilling to perform the services personally he shall arrange at his own expense entirely for another suitable person to perform the services." Peter Gibson LJ (with whom Hirst and Auld LJJ agreed) held that this provision was incompatible with a contract of employment. Peter Gibson LJ said at pages 699 to 700:

> "In these circumstances, it is, in my judgment, established on the authorities that, where, as here, a person who works for another is not required to perform his services personally, then as a matter of law the relationship between the worker and the person for whom he works is not that of employee and employer. The applicant has submitted to us that, though the personal service to the company was a highly material consideration, it was not conclusive. I am afraid that that proposition cannot stand in the light of the authorities.
>
> … But, for the reasons which I have given, clause 3.3, entitling the applicant not to perform any services personally, is a provision wholly inconsistent with the contract of service which the chairman found the contract to be. In my judgment, therefore, both the chairman and the appeal tribunal erred in law. The only conclusion which they could properly have reached was that this was a contract for services."

112. Mr Stone, however, submitted that *Tanton* was no longer the leading authority in relation to the effect of a right of substitution in determining whether a contract was a contract of employment or a contract for services. Mr Stone referred us to the decision of the Supreme Court in *Pimlico Plumbers v Smith* [2018] ICR 1511. That case involved the question whether an individual was a "worker" within the meaning of section 230(3)(b) of the Employment Rights Act 1996 ("a limb (b) worker"). Mr Collins submitted that this definition was not relevant to the question whether the hypothetical contract in this case was one of employment or a contract for services. However, as Mr Stone pointed out, at [20] Lord Wilson (with whom the Supreme Court agreed) stated:

> "If he was to qualify as a limb (b) worker, it was necessary for Mr Smith to have undertaken to 'perform personally' his work or services for Pimlico. An obligation of personal performance is also a necessary constituent of a contract of service; so decisions in that field can legitimately be mined for guidance as to what, more precisely, personal performance means in the case of a limb (b) worker."

113. At [23], Lord Wilson posed the following question:

> "Where, then, lie the boundaries of a right to substitute consistent with personal performance?"

114. At [32] Lord Wilson answered his question in the following way:

> "[T]here are cases, of which the present case is one, in which it is helpful to assess the significance of Mr Smith's right to substitute another Pimlico operative by reference to *whether the dominant feature of the contract remained personal performance on his part*." (Emphasis added)

115. Lord Wilson concluded that the Employment Tribunal had been entitled to hold that the dominant feature of the contract in question was an obligation for personal performance. At [34], Lord Wilson contrasted the facts in that appeal with:

> "…a situation in which the other party is uninterested in the identity of the substitute, provided only that the work gets done."

116. We therefore consider that the correct way to approach the effect of a right of substitution is to apply the "dominant feature" test formulated by Lord Wilson. On this basis, we have come to the conclusion that the facts found by the FTT demonstrate that the dominant feature of the right of substitution in the hypothetical contracts was that of personal performance by Mr Lee. It is true that there was a limited right of substitution, but for the reasons given above in relation to the *Edwards v Bairstow* challenge, it was clear that NBS particularly valued Mr Lee for his specialist expertise and familiarity, gained over many years, with NBS and its processes. Those factors lead us to conclude that the dominant feature of the hypothetical contracts, in this regard, was an obligation for personal performance.

117. Accordingly, we reject Northern Light's submissions on this point.

118.Having reached this conclusion, it is unnecessary for us to address HMRC's alternative case, viz that the FTT should have concluded that the hypothetical contracts between Mr Lee and NBS would not have included any right of substitution.

Control – Ground 1

119.The second test advanced by McKenna J in *Ready Mixed Concrete* was as follows:

> "(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."

120.Mr Collins submitted that the fundamental aspect of control was control over *what* the employee did. Mr Collins noted that under the hypothetical contracts, NBS could not control what Mr Lee did because NBS could not require him to work on a project other than the one described in the contract (at [145 (9)]). This was unlike those project managers employed by NBS who could be reassigned to manage any project.

121.The FTT's conclusions on control were stated at [158]:

> "Mr Lee had more freedom as to how he carried out his role. Mr Lee could not be moved to another project and had considerable scope to manage the contracted project. However, apart from not being able to

> move him to another project, the level of control exercised over Mr Lee in how he did his job was not inconsistent with him being a highly skilled professional employee. Mr Lee was in a similar position to the master of a ship or professional architect described by Lord Parker CJ in *Morren v Swinton and Pendlebury BC*."

122. Mr Collins argued that the FTT appeared to recognise that NBS's inability to move Mr Lee to another project seemed to be inconsistent with a contract of employment. Secondly, the FTT's statement that the degree of control exercised by NBS was not inconsistent with him being a highly skilled professional employee did not amount to very much. The authorities demonstrated that an employer often has very little control over how a highly skilled employee carries out the duties of their employment.

123.We reject Mr Collins' submissions.

124.The terms of the hypothetical contract set out by the FTT at [145] contained findings relating to control over how Mr Lee worked. At [145(8)] the FTT found that:

> "Mr Lee would be required to comply with [NBS]'s processes and policies including the [NBS] Change Framework."

125.The FTT referred to the NCF at [55]-[57]:

> "55. All work was subject to governance standards. Specifically, the [NBS] Change Framework ("NCF"), to which Mr Lee was required to adhere, was a set of governance standards that applied to all projects directing how the project was to be managed, setting required levels of visibility and accountability.
>
> 56. In accordance with the NCF Mr Lee would complete a weekly report for the head of group programmes to give a view on project progress and meet with them to discuss. A report was also sent to the monthly project board.
>
> 57. There was a disagreement between the parties as to whether the NCF was specific to [NBS] or was an industry standard for project management in financial services. In my view nothing turns on the point in this appeal but I find that NCF was specific to [NBS]but that similar project management standards would have applied in other similar organisations."

126.NBS had control of "when" Mr Lee worked – he was contractually required to work a 7.5 hour professional day, at [154]. NBS also had control of "where" Mr Lee worked – Mr Lee could be required to work from the Swindon office, although there was some latitude in this respect, at [155]

127.Further, at [164] the FTT found:

> "164. During the course of a contract [NBS] had the right, albeit not exercised, to direct where Mr Lee worked and to require him to work a professional day. Mr Lee had in practice a considerable degree of operational and personal autonomy but was subject to overarching controls primarily concerned with [NBS]'s need as a highly regulated

> business to monitor the progress of the relevant project consistent with Mr Lee being a highly skilled employee. However, Mr Lee could not be moved to a different project without his consent."

128. In *HMRC v Kickabout Productions Ltd* [2020] STC 1787[8] – another case on the intermediaries legislation – this Tribunal (Zacaroli J and Judge Richards) posed the relevant question in the following terms:

> "[72] The essential question is whether there is a 'sufficient framework of control' (in the words of Buckley J, as he then was, in *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318, [2001] IRLR 269, [2001] ICR 819 (at [19])) for the hypothetical contracts to constitute contracts of employment."

129. That case involved the question whether a broadcasting company (Talksport) had control over a radio presenter (Mr Hawksbee). The Tribunal said:

> [77] "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 Concrete 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* (2018) 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 UT (Zacaroli J and Judge Thomas Scott) said at [135] in *Professional Game Match Officials Ltd v Revenue and Customs Comrs* [2020] STC 1077 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

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[8] See also *Atholl House* at [94]-[97].

> examples. Cooke J noted in *Market Investigations v Minister of Social Security* [1968] 3 All ER 732 at 739, [1969] 2 QB 173 at 187 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."

130.We consider that the FTT was entitled to, and was correct to, conclude that NBS had a sufficient "framework of control" in relation to Mr Lee to ensure that it controlled Mr Lee for the purposes of the second of McKenna J's tests in *Ready Mixed Concrete.*

131. In addition to the NCF and the elements of control referred to at [124] to [127] above, the October 2016 Notes indicated that Mr Lee was subject to NBS's overall control. Those Notes stated:

> "ST [a manager within NBS] reported to CP who was the managers' manager. ST was responsible for the delivery of the project work undertaken by [Mr Lee]. [Mr Lee] had to deliver the set targets, build the team to deliver the "what" and "when" required by NBS. [Mr Lee] managed his group of technicians on a daily basis. It was for ST to divide the team as she saw fit and then give the work to each group within the team. [Mr Lee] was given a set piece of work to do by ST.
>
> …
>
> .
>
> Response 9 – NH confirmed that NBS have the right of control over [Mr Lee]/NLS as to how the work is done, where, when and what. CP's response at answer 9 was CP N/A. CP was because the question asked about the right of control over NLS, rather than [Mr Lee]. CP confirmed NBS has the right of control over [Mr Lee] and can tell [Mr Lee] what to do, how, when and they have to the tools to use to do this.
>
> …
>
> Response 31 - NH confirmed that NBS could overrule, without exception, any worker, employee or contractor. NBS are heavily regulated and therefore they ensure they have to comply with the relevant standards but also NBS ensure any work is also regulated, hence checks carried out at all stages. It would depend on what the matter was. For example, if [Mr Lee] decided not do something, he could be told he had to do it, when, etc."

132. In our view, therefore, there was sufficient evidence before the FTT to justify its conclusion that NBS had control over Mr Lee. Consequently, we reject Ground 1.

Part and parcel – Ground 4

133.As we have said,this Ground was not advanced by Mr Collins at the hearing or in his skeleton argument.

134.Instead, Mr Collins attempted in his skeleton argument to introduce a wide-ranging ground of appeal in relation to a variety of factors (particularly as regards his exposure to financial risk) which, so it was argued, indicated that there were features of Mr Lee's engagement with NBS which were inconsistent with the hypothetical contracts being contracts of employment. As we have already indicated, no permission to appeal in respect of these arguments having been granted, we decline to consider them.

Conclusion

135.For the reasons given above, we dismiss this appeal.

Signed on original
JUDGE TIMOTHY HERRINGTON
JUDGE GUY BRANNAN

RELEASE DATE: 21 June 2021

Amended under Rule 42 of the Upper Tribunal Rules