[2021] UKUT **(TCC)**

INCOME TAX AND NATIONAL INSURANCE CONTRIBUTIONS – IR35 – intermediaries legislation – terms of the hypothetical contract – whether FTT entitled on the evidence to make certain findings as to those terms

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

Appeal number: UT/2019/0122

BETWEEN

GEORGE MANTIDES LIMITED **Appellant**

-and-

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

TRIBUNAL: MRS JUSTICE BACON
JUDGE JONATHAN CANNAN

Sitting in public at the Rolls Building, London on 15 July 2021

Michael Paulin instructed by way of direct access for the Appellant

Sadiya Choudhury instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against a decision of the First-tier Tribunal ("the FTT") released on 13 June 2019 ("the Decision"). The FTT allowed in part the appellant's appeal against a determination for income tax purposes and a decision for national insurance purposes made on the basis of the "intermediaries legislation" in *sections 48–61 Income Tax (Earnings and Pensions) Act 2003* ("ITEPA 2003") and equivalent provisions in the *Social Security Contributions (Intermediaries) Regulations 2000*. These legislative provisions are commonly known as IR35.

2. For income tax purposes, the question whether the intermediary's legislation applies to any particular set of circumstances is determined by reference to section 49 ITEPA 2003. It is common ground that the effect of section 49 and the equivalent provision for national insurance purposes are identical for present purposes. Section 49 provides as follows:

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

3. Section 49 applies where there is no contract between the client and the worker for provision of the worker's services. Section 49(1)(c) requires consideration of the terms of what is often described as a "hypothetical contract" between the client and the worker.

4. Mr George Mantides is a doctor specialising in urology. He is the sole director and shareholder of the appellant, which is his personal services company. The FTT was concerned with income received by the appellant in connection with locum services provided by Mr Mantides in 2013 to Royal Berkshire Hospital ("RBH") and Medway Maritime Hospital ("MMH"). Mr Mantides worked as a urologist at RBH in the period March to August 2013 and at MMH in September and October 2013.

5. In terms of s 49 ITEPA 2003, Mr Mantides is "the worker", the appellant is "the intermediary" and RBH or MMH is "the client".

6. The FTT found that the circumstances were such that if the services of Mr Mantides had been provided under a contract directly between MMH and Mr Mantides, then Mr Mantides would not be regarded for income tax purposes as an employee of MMH. The FTT therefore allowed the appeal in relation to services provided to MMH. HMRC sought permission to appeal against that decision, but it's application for permission was submitted late and the FTT declined to grant an extension of time in which to make the application. A further application by HMRC to this Tribunal was refused both on the papers and subsequently following an oral hearing.

7. As regards Mr Mantides' work at RBH, the FTT found that the circumstances were such that if the services of Mr Mantides had been provided under a contract directly between RBH and Mr Mantides, then Mr Mantides would be regarded for income tax purposes as an employee of RBH. The appeal was therefore dismissed in relation to services provided to RBH. The appellant appeals that decision pursuant to permission granted by the FTT.

8. The FTT gave permission to appeal on the following grounds:

> (1) The FTT made an error of law in that it found that the hypothetical contract between RBH and Mr Mantides would have contained a provision that RBH would have to give at least a week's notice to terminate it early. That was an error of law because it was not a conclusion available to the tribunal on the evidence before it;
>
> (2) The FTT found that in the hypothetical contract RBH would have been under an obligation to use reasonable endeavours to provide 10 half day sessions in a week. That was a conclusion which was not available to the tribunal on the evidence;
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> (3) As a result of these errors the FTT erroneously concluded that the notional contract would be one of employment. That was an error of law.
>
> (4) The FTT failed to have proper regard to *Muschett v HM Prison Service* [2010] EWCA Civ 25 and as a result erred in law in its characterisation of the hypothetical contract between RBH and Mr Mantides.

9. The appellant made an application to amend the grounds of appeal shortly before the hearing. We dealt with that application at the oral hearing giving brief reasons as to why we partly granted permission and partly refused permission. We set out below our reasons for doing so more fully.

10. For reasons which appear later in this decision, we have confined ourselves at this stage to determining Ground 1, Ground 2 and Ground 4 of the grounds of appeal. Ground 3 will require further consideration at a subsequent hearing.

THE FTT'S FINDINGS OF FACT

11. The FTT had certain documentary evidence available to it, together with witness evidence from Mr Mantides. It also had written responses to enquiries made by HMRC with Mr Adam Jones, a consultant urologist at RBH. There was no witness statement as such from Mr Jones and he did not give oral evidence. However, the FTT took Mr Jones' responses into account, although it did so on the basis that it would accord less weight to Mr Jones' statements than if he had appeared as a witness.

12. The FTT made various findings as to the terms of the contracts which formed part of the arrangements under which the services of Mr Mantides were provided to RBH. It also made findings as to the nature of Mr Mantides' work at RBH.

13. Mr Mantides' services as a locum at RBH were supplied through a company called DRC Locums Limited ("DRC"). The contractual documentation of the arrangements was, however, remarkably thin, as the FTT recorded:

> 47. No formal contract was shown to me between RBH and GML. I conclude there was none. The written evidence of the terms of GML's engagement with RBH was limited to the two Locum Booking Confirmations comprised in letters from DRC Locums (the agency) to Mr Mantides at GML. These letters confirmed two consecutive booking bookings running (together) from 14 March 2013 to 6 August 2013 at RBH. I note the following items:
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> (1) Grade: SpR

(2) standard hours: “as per rota”
(3) on-call hours: “as per rota”
(4) Trust client (I take this to be RBH) to pay one return journey
(5) Accommodation: details e-mailed to you
(6) Upon arrival report to: “carry on as usual”
(7) Trust break policy: breaks will not be deducted
(8) Senior colleague: [blank]
(9) Covering : [blank]
(10) Vacancy: [blank]

…

50. This locum booking confirmation appears to me to record an agreement between DRC Locums (rather than RBH) and GML. That is because: it starts “Thank you for choosing to work through DRC Locums”, it refers to the holiday pay benefit given “to our locums” and says that “our standard Terms and Conditions ... apply to this booking” (I was not shown these terms and conditions).

51. Mr Mantides told me that DRC Locums acted as agent for GML but Mr Best’s evidence in relation to MMH that hospitals relied on the agency’s confirmation of the qualification of locums, indicated that some extent the agency also acted for the hospital. It seems to me to be likely that either DRC Locums was acting as agent for RBH in making a contract with GML or that DRC were contracting with GML and had a back-to-back contract with RBH mirroring the contract with GML.

14. The FTT then went on to make various findings as to whether the appellant had a right to provide a person other than Mr Mantides to undertake the services, the hours of work, holiday entitlement, provisions for termination and other matters.

15. The FTT’s conclusions as to what the terms of the hypothetical contract between Mr Mantides and RBH would have been appear at [103] of the Decision as follows:

103. [I] find that the contract between RBH and Mr Mantides would have contained the following terms:

(1) it would have been for a fixed term

(2) it would be terminable early on at least one week’s notice on either side. I come to this conclusion because there is no provision for early termination in the Locum Booking Confirmation, and because the suggestion from Mr Jones that 6 to 8 weeks notice was required for taking time off indicates that some reasonable notice of termination would have been expected by the hospital and it is likely that a corresponding period for notice to Mr Mantides would have formed part of the agreement between DRC/RBH and GML.

I reach this conclusion despite Mr Jones’ statement that the contract could be ended at any time by the urology department and that if the hospital’s priorities changed Mr Mantides’ “employment” would be stopped. I do so because since I did not hear from Mr Jones, it was not clear to me from those answers that no notice would have been given;

(3) it would be for the personal services of Mr Mantides to work as a urologist grade SpR. Mr Mantides would have had no right to provide another person to step into his shoes.

(4) it would require Mr Mantides to conduct the services notified to him by the weekly rota in the facilities provided by the hospital;

This reflects my conclusions in relation to the arrangements with RBH at [55] above;

> (5) it would require Mr Mantides to be available for 10 half day sessions in each week. I reach this conclusion because the Locum Booking Confirmation says that standard hours would be 'as per rota', and a standard rota, on Mr Jones' evidence was 10 half day sessions.
>
> But with the consent of RBH he could take holidays and miss occasional sessions.
>
> This reflects Mr Mantides' evidence that he frequently asked for, and took, Friday afternoons off, and that he had an 11 days of holiday while at RBH. It also reflects in part Mr Jones' statement that on a period of notice Mr Mantides could take time off. It would, in my view, have been part of the arrangements with GML.
>
> (6) RBH would agree to use reasonable endeavours to provide 10 half hour sessions in each week.
>
> Although there is no provision to this extent to this effect in the Locum Booking Confirmation, I so find because I concluded that there was a mutual understanding either between DRC as agent for RBH and GML or between GML and DRC and DRC and RBH that Mr Mantides' services would result in between 30 and 40 hours per week, and it would be a breach of such an understanding not to use some endeavours to make up a normal rota.
>
> (7) RBH would pay Mr Mantides the agreed rates per hour worked.
>
> (8) Mr Mantides would attend the morbidity and mortality meetings.
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> Although there is no express requirement in the Locum Booking Confirmation for Mr Mantides to attend such meetings, I think it highly likely that the hospital would schedule attendance at these meetings as part of the sessions on the rota. Thus the arrangement under which Mr Mantides' services were provided would encompass attendance at these meetings and as a result the same obligation would arise to attend them under both the income tax rest and the NI test.
>
> (9) There would be no entitlement to holiday pay, sickness pay or pension benefits.

16. It can be seen that Ground 1 of this appeal focuses on the finding at (2) above that the hypothetical contract would be terminable early on at least one week's notice on either side. Ground 2 focuses on the finding at (6) above that RBH would agree to use reasonable endeavours to provide 10 half-day sessions in each week resulting in between 30 and 40 hours work per week.

THE FTT'S DECISION

17. The FTT considered s 49 ITEPA 2003 and associated authorities at [68]–[101] of the Decision. In particular, the FTT had regard to the necessary conditions for a contract of service outlined by MacKenna J in *Ready Mixed Concrete v Minister of Pensions and National Insurance* [1967] 2 QB 497 which it described as follows at [79]:

> (i) [the mutuality test] The servant agrees that in consideration of a wage or other remuneration, he will provide his own work in the performance of some service for his master;
>
> (ii) [the control test] 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 inconsistency test] the other provisions of the contract are consistent with its being a contract of service.

18. The FTT went on to refer to subsequent authorities which consider the application of those three conditions. Having done so, it considered the terms of the hypothetical contract between Mr Mantides and RBH and whether in the circumstances that hypothetical contract would have been a contract of employment. By way of summary it found that:

(1) it was a contract for personal service without any right to substitute another service provider and this was a pointer towards employment (at [104]);

(2) RBH would be entitled to exercise sufficient control over Mr Mantides, but this was not a factor which pointed strongly towards employment ([105] to [109]);

(3) there would be sufficient mutuality of obligation to satisfy the *Ready Mixed Concrete* condition. While there would be no absolute obligation on the part of the hospital to provide 10 half-day sessions per week, which cast some doubt on whether this would have been an employment contract, the hospital would have been under a duty to use reasonable endeavours to provide those sessions during the period of the contract. That taken with the obligations to work and to pay was sufficient to satisfy the requirement of mutuality and pointed towards employment ([110]);

(4) the fact that Mr Mantides worked at three successive hospitals during 2013/14 did not point to self-employment, given the length of those engagements ([112];

(5) Mr Mantides' use of the hospital's equipment and helpers pointed only weakly towards employment, given the fact that what the hospital required was his skill and expertise applied to patients who came to the hospital ([113]);

(6) the fact that Mr Mantides bore the risk of early termination of the contract and of being required to work less than 37 ½ hours a week, was required to negotiate his rates of pay and bore the costs of training, complying with GMC registration requirements and travel and accommodation away from home pointed only weakly towards self-employment ([114]);

(7) some integration of Mr Mantides in the hospital organisation pointed weakly to employment ([116]);

(8) the fact that the contract was terminable on at least a week's notice was not an indication of self-employment ([118]); and

(9) the lack of any employee benefits pointed away from employment ([119]).

19. Taking all the factors together, the FTT found that if Mr Mantides had provided his services under a contract between himself and RBH then he would have been an employee ([120]).

THE APPLICATION TO AMEND

20. Ground 1 and Ground 2 in the present appeal are challenges to the FTT's findings of fact. The appellant says that there was no evidential basis on which the FTT could have found that the hypothetical contract would have contained a one-week notice period or a term that RBH would use reasonable endeavours to provide Mr Mantides with 10 half-day sessions a week.

21. Following the exchange of skeleton arguments and two days before the hearing before us, the appellant made an application to amend the grounds of appeal in two respects.

22. First, the appellant sought permission to add a further ground of appeal which it described as follows:

> [The Appellant be permitted to] argue its case on appeal before the UTT that the FTT erred with respect to the third limb of the *Ready-Mix Concrete* tests, namely that it was not the case that the other provisions of the contract were consistent with its being a contract of service and that the FTT erred in law by so finding.

23. Secondly, the appellant sought to amend and/or clarify Ground 2 so as to encompass not only the objection that the FTT's conclusion was not available to it on the evidence, but also

the argument that the FTT's conclusion was indicative of an error of law as to the question of mutuality of obligation.

24. HMRC objected to both aspects of the application. Having considered the parties' written submissions and further oral submissions on the application we decided to refuse permission to add the further ground of appeal but to grant permission in so far as necessary for the appellant to amend and/or clarify Ground 2. We now provide our reasons for doing so.

25. The first amendment concerns issues addressed by the FTT under the third limb of the *Ready Mixed Concrete* test, but which were not the subject of the appellant's application to the FTT for permission to appeal, and which therefore fell outside the four grounds on which the FTT granted permission.

26. The relevant principles in relation to late applications to amend were set out by Carr J in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) at [38] as follows:

> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> g) a much stricter view is taken nowadays of non-compliance with the CPR and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.

27. Applying those principles and in all the circumstances we decided that the appellant's application to amend its grounds of appeal should be refused. The application to amend was made very late, and there is a heavy burden on the appellant to show why it ought to be allowed. The appellant relied on the fact that Mr Mantides was acting as a litigant in person before the FTT and when he initially filed his application for permission to appeal. However, as HMRC pointed out he was represented by counsel by at least June 2020 when a reply drafted by Mr Paulin was submitted in relation to HMRC's response to the appellant's notice of appeal.

28. The appellant has therefore been legally represented for over a year, and could and should have made its application much earlier. There has been no adequate explanation as to why the application was made so late in the day; indeed Mr Paulin frankly accepted that it ought to have been made earlier. If the application were allowed, HMRC would have to deal with a much wider argument than the grounds on which permission was given. We did not accept Mr Paulin's argument that issues in relation to the new ground of appeal had already been "fully ventilated" in the parties' written arguments. The grant of permission would therefore inevitably mean the appeal being postponed in order to avoid injustice to HMRC. While we have decided to postpone consideration of Ground 3 to a later date, for the reasons which follow, the other grounds of appeal can properly be heard now, and we do not consider that they should be adjourned solely to allow a new argument to be raised at the last minute.

29. The position on Ground 2 is different. We considered that the issue to which the amendment or clarification of that ground of appeal was directed was already covered by Ground 2 and Ground 3: inevitably, in order to address whether the point identified in Ground 2 gives rise to an error of law as argued in Ground 3 it will be necessary to consider the legal test for mutuality of obligation. That being the case, we did not consider that the appellant required permission to amend Ground 2. Alternatively, for the same reasons, in so far as an amendment was necessary as a matter of form, we would have given permission.

30. There will, moreover, be no prejudice to HMRC given the way in which we have decided to deal with Ground 3, which we explain below.

GROUND 3

31. We were made aware by the parties that an appeal against the decision of the Upper Tribunal in *HM Revenue & Customs v Professional Game Match Officials Limited* [2020] UKUT 147 (TCC) ("*PGMOL*") was due to be heard by the Court of Appeal in the week commencing 19 July 2021. Both parties accepted that the decision of the Court of Appeal would have a significant bearing on their submissions on Ground 3 in the event that we allowed the appeal on Ground 1 or Ground 2.

32. In particular, it was held in *PGMOL* that to establish mutuality of obligation it is necessary for there to be an obligation on the employer to provide work (or at least a retainer or some form of consideration in the absence of work). HMRC disputes that test on appeal and points out that at the very least it is to be expected that the Court of Appeal will provide guidance on the application of the mutuality of obligation test in this context.

33. In those circumstances, we informed the parties at the hearing that we would consider Grounds 1, 2 and 4 at this hearing. What follows is our decision on those grounds. Ground 3 will be considered at a subsequent hearing where we will hear submissions from the parties in light of the judgment of the Court of Appeal in *PGMOL.*

GROUNDS 1 AND 2

34. Grounds 1 and 2 challenge the FTT's findings as to the terms of the hypothetical contract. The appellant submits that there was no proper basis on which the FTT could find that the hypothetical contract would be terminable early on at least one week's notice on either side, or that RBH would use reasonable endeavours to provide 10 half-day sessions a week resulting in between 30 and 40 hours work per week for Mr Mantides.

35. These grounds of appeal fall squarely within the principle outlined in *Edwards v Bairstow* [1956] AC 14 to the effect that we should not interfere with the FTT's findings of fact unless there is no evidence to support those findings or they were made on a view of the evidence that could not reasonably be entertained. It is well established that this is a very high hurdle (see

the discussion of the Upper Tribunal in *Reed Employment v HM Revenue & Customs* [2014] UKUT 160 (TCC) at [120]–[129] to which we were referred).

36. The position in relation to appeals against findings of fact was authoritatively described by Evans LJ in *Georgiou (trading as Marios Chippery) v Customs & Excise Commissioners* [1996] STC 463, p. 476:

> It is right, in my judgment, to strike two cautionary notes at this stage. There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law. That is well seen in arbitration cases and in many others. It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure to the High Court to be misused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but, was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.
>
> It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and, fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong. A failure to appreciate what is the correct approach accounts for much of the time and expense that was occasioned by this appeal to the High Court.

37. The FTT's findings as to the notice period and the obligation of RBH to use reasonable endeavours to provide Mr Mantides with work were based on the arrangements which it found were in place for Mr Mantides to work at RBH. However the evidence before the FTT left it unclear as to the nature of the contractual arrangements between Mr Mantides, DRC and RBH. The only contractual documents available were the two Locum Booking Confirmations provided by DRC to Mr Mantides. These referred to DRC's standard terms and conditions which were not in evidence. There was no reference in the Locum Booking Confirmations either to a notice period or to any obligation on DRC or RBH to provide Mr Mantides with work.

38. The FTT admitted into evidence Mr Jones' written answers to HMRC's questions, although it accorded that evidence less weight than if Mr Jones had given oral evidence in the same terms because he was not available for cross-examination. The evidence included Mr Jones' answers to an initial set of questions from HRMC as follows:

> Q15 If the hospital's priorities changed, could GM be moved from job to job? (either with or without his consent)
>
> A We would just stop his employment.
>
> Q22 Could his contract be ended at any time, and by whom?
>
> A Yes Urology Management
>
> Q29 Could RBH refuse GM's requests for time off?
>
> A Not if he gave 6 – 8 week's notice

39. There was then a supplementary set of questions and answers, which included the following:

> Q Your answer to question 15 suggests that Royal Berkshire Hospital (RBH) would not move GM from one task to another; they would simply terminate the engagement. Would RBH really terminate the engagement rather than move GM on to another task that they needed him to undertake. If work priorities changed would they really do that rather than get him to do another job that was in his skillset? Can you clarify this matter please?
>
> A If we no longer needed him in urology then job would be terminated. Within urology if we needed alternative things done eg more out patient clinics then we would just change his timetable but keep him on.

40. Mr Mantides also gave evidence to the FTT as to the termination of his arrangements with RBH, saying that he "did not have to report to anyone on day to day basis and could terminate the engagement without notice, as could RBH should they no longer require someone to conduct these particular sessions". There was, however, no reference to any document or any oral agreement to this effect.

41. The FTT's findings of fact in relation to the notice period and the obligation on RBH to use reasonable endeavours to provide work to Mr Mantides (on which the conclusions at [103] were based) appear at [60], [61] and [64] of the Decision:

> 60. Mr Jones told HMRC that Mr Mantides could take time off if he gave 6 to 8 weeks notice. Mr Mantides said that this was generic evidence in relation to locums as a class which was not relevant to him: he told me, and I accept, that he took 11 days leave from his duties during the course of his engagement with RBH. He also told me that he frequently asked for, and took, Friday afternoons off (to travel back to London). Mr Mantides argued that he could insist on not working particular session although as a matter of professional etiquette and custom he would not do so. Given Mr Jones' confession of his lack of memory of the detail and the fact that he did not give evidence, I consider that Mr Mantides would not have been required by the contract to give 6 to 8 weeks notice but that some shorter period applied.
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> 61. I find that the contract with RBH required Mr Mantides to be available during the period of the contract to conduct 10 half day sessions per week, but that with the consent of RBH he could take holidays and miss occasional sessions. He was paid by the hour only for the time it took to complete the sessions. I think it likely however that there was a mutual understanding that the sessions would result in between 30 and 40 hours work per week.
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> …
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> 64. The locum confirmations contained no provision for termination before the end of the relevant periods. Mr Jones told HMRC that the contract could be terminated at any time by urology management and that if Mr Mantides was no longer needed in urology the contract would be terminated. I conclude that the contract could be terminated early by RBH, but on the evidence of Mr Jones' replies to HMRC in relation to time off, and in view of the likelihood of some reciprocity, I think it likely that at least a week's notice would be required.

42. When a tribunal is considering the evidence and making a finding of fact, it must consider all the evidence relevant to the finding, assess the weight to be attached to each piece of evidence and reach a balanced conclusion based on that evidence. Starting with the FTT's finding that at least a week's notice of termination would be required, Mr Paulin submitted that Mr Mantides' case was that there was no notice period. That was supported by the evidence of Mr Jones set out above, who repeatedly confirmed that RBH could terminate Mr Mantides'

contract at any time if he was no longer needed. There was simply no evidence to support any other conclusion.

43. It was telling that when we asked Ms Choudhury what evidence there was to support a conclusion that there was a one-week notice period, her response was that it was more what evidence was absent than what evidence there was. She submitted, in that regard, that Mr Jones was not necessarily saying that there was no notice period. Further, the FTT recorded at [7] of the Decision that Mr Jones "could not remember the details of Mr Mantides' engagement".

44. We acknowledge that the evidence before the FTT, in particular contemporary documentation, was distinctly lacking and incomplete. While neither party suggested that the contractual arrangements involving Mr Mantides, DRC and RBH were in the form of oral contracts, the standard terms and conditions on which Mr Mantides apparently contracted with DRC were not in evidence, nor was there any other form of documentary evidence that might shed light on the terms of that contract. Nor was there, apart from Mr Jones' account, any evidence as to the terms of the agreement between DRC and RBH. The FTT was thus presented with a difficult task and strived to make findings of fact. However, the finding as to a notice period of one week appear to us to have been based more on assumptions and what might have been agreed rather than on evidence as to what actually was agreed between the parties.

45. In that regard it is clear from the Decision that Mr Jones' comment that Mr Mantides would be required to give 6–8 weeks' notice of a request to take time off was the sole basis of the FTT's conclusion that each party would be required to give one week's notice of termination of the contract. In our view, it was not open to the FTT to infer from that evidence that the parties would be required to give one week's notice of termination, when there was no other evidence whatsoever before the FTT that suggested a notice period of any length at all for termination, and when Mr Jones' evidence was that Mr Mantides' contract could be ended "at any time", and that if he was no longer needed then RBH would "just stop his employment".

46. We are therefore satisfied that the FTT was not entitled to find that the arrangements under which Mr Mantides worked for RBH required him or RBH to give one week's notice of termination.

47. As to the obligation on RBH to use reasonable endeavours to provide Mr Mantides with 10 half-day sessions or approximately 30–40 hours work per week, the FTT based this finding on what it found to be a "mutual understanding" to that effect. The basis of that mutual understanding is not clear to us. The Locum Booking Confirmation stated that Mr Mantides' standard hours were "as per rota", and the rota did indeed cover 10 half-day sessions a week. But we cannot see any evidence to support a finding that RBH would use reasonable endeavours to provide Mr Mantides with 10 half-day sessions a week. There is nothing to that effect in the evidence of Mr Jones or in the Locum Booking Confirmations.

48. It is one thing to find that Mr Mantides was contracting to make himself available for 10 half-day sessions per week – which appears to be the case, although it would in our view be subject to whatever right he had to terminate his contract. But it is quite another thing to find that there was a mutual understanding that RBH was contracting to use reasonable endeavours to provide Mr Mantides with 10 half-day sessions per week. Indeed it seems to us that Mr Jones' evidence that the contract could be terminated "at any time" is inconsistent with such a finding. If the contract was terminable without notice, any obligation to use reasonable endeavours to provide 10 half-day sessions a week would be meaningless. RBH could simply terminate the contract in the event that they did not want to or were unable to provide those sessions.

49. We are therefore satisfied that the FTT was not entitled to find that the actual arrangements under which Mr Mantides worked for RBH required RBH to use reasonable endeavours to provide Mr Mantides with 10 half-day sessions a week.

50. The appellant has identified in Grounds 1 and 2 the findings of fact which it challenges and we have been directed to the evidence relevant to those findings. We are satisfied that the findings were not available to the FTT on the basis of the evidence. It is also necessary for the appellant to satisfy us that those findings were significant in terms of the FTT's overall conclusion as to the nature of the hypothetical contract.

51. We are satisfied that the finding of a notice period of one week did form part of the FTT's consideration as to the nature of the hypothetical contract. It referred to the notice period at [118] as a factor which did not indicate self-employment; implicitly, therefore, the FTT considered that this factor was consistent with employment. It was therefore significant in relation to the FTT's overall conclusion as to the nature of the hypothetical contract.

52. The same is true of the finding that RBH was under an obligation to use reasonable endeavours to provide 10 half-day sessions a week to Mr Mantides. It was that obligation which supported the FTT's findings at [110] that there was sufficient mutuality of obligation pointing towards employment.

53. In those circumstances, the appellant has established the errors of law set out in Grounds 1 and 2.

GROUND 4

54. Ground 4 is that the FTT failed to have proper regard to *Muschett v HM Prison Service* [2010] EWCA Civ 25 when it came to consider whether the hypothetical contract was a contract of employment or a contract for services. This authority was cited to the FTT but was not referred to in the Decision. In that case, Mr Muschett was an agency worker who was placed by the agency to work for HM Prison Service ("HMPS"). The issue was whether there came a time in his working relationship with HMPS when his status developed into being an employee of HMPS. The issue arose because Mr Muschett wanted to make claims against HMPS in the employment tribunal including claims for unfair dismissal, wrongful dismissal and discrimination. The employment tribunal had found as a fact that the basis on which he worked for HMPS was in accordance with a contract for services for temporary workers entered into between him and the agency.

55. In the Employment Appeal Tribunal, it was submitted by Mr Muschett that a contract of employment was to be implied between Mr Muschett and HMPS. The submission was rejected on the basis that the facts as to the nature of Mr Muschett's working relationship with HMPS were not incompatible with the agency arrangements which were in place.

56. In the Court of Appeal, Mr Muschett submitted that the findings of the employment tribunal had been manifestly deficient and that it ought to have found facts sufficient to establish a contract of employment between Mr Muschett and HMPS. In the alternative, it was submitted that there was an implied agreement amounting to a contract for services between Mr Muschett and HMPS which fell within the extended definition of employment for the purposes of the race discrimination claim. Those submissions were rejected by Rimer LJ in strong terms at [34] and [38] respectively.

57. It became apparent during Mr Paulin's oral submissions that he was relying on *Muschett* in support of his argument on Grounds 1 and 2 that there was nothing in the evidence to support the FTT's conclusion as to the notice period and the obligation on RBH to provide work to Mr Mantides.

58. We have already found that the FTT was wrong in law when it found the existence of those terms in the arrangements involving Mr Mantides, DRC and RBH. *Muschett* does not add anything to that analysis, nor in our view does it amount to a separate ground of appeal. In the circumstances we are not satisfied that the FTT was wrong in law in not referring to *Muschett* in its reasoning.

CONCLUSION

59. For the reasons given above, we are satisfied that the FTT made the errors of law identified by the appellant in Ground 1 and Ground 2. The effect of those errors must be worked out in consideration of Ground 3. As we indicated at the hearing, we will consider that ground of appeal in light of further submissions from the parties following the decision of the Court of Appeal in *PGMOL*. Both parties should seek to agree directions for those submissions and the further conduct of this appeal and should inform the Tribunal what directions if any have been agreed within 21 days of the release of the decision of the Court of Appeal.

Signed on Original

MRS JUSTICE BACON

UPPER TRIBUNAL JUDGE CANNAN

Release date: 11 August 2021